The Interdisciplinary Centre for Competition Law and Policy (ICC)

Global Antitrust Review

Queen Mary
University of London

Celebrating International Excellence in Competition Law Research and Teaching

ICC GLOBAL ANTITRUST REVIEW

A PUBLICATION OF THE INTERDISCIPLINARY CENTRE
FOR COMPETITION LAW AND POLICY (ICC

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Global Antitrust Review (GAR)
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This review may be cited as [2008] G.A.R.

ICC GLOBAL ANTITRUST REVIEW

Issue 1, 2008

Dedicated to the late Ms Marion Simmons QC, an affiliated member of the ICC
and an alumna of Queen Mary, University of London

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FOREWORD

I cannot remember exactly when I felt it would be useful to establish a 'Global Antitrust Review', a journal in the field that would simply be 'different'. It was definitely long time ago. The obvious thing would have been for me to make this journal a home for major scholars and luminaries. The decision not to do this however was a very easy one to make. After all, my interest itself was rather different and my desire was to create an opportunity for competition law students – the next generation of specialists in the field – to develop a variety of key and valuable skills, chief among these the ability to achieve excellence in research and writing. The decision to choose to establish the ICC *Global Antitrust Review* (GAR) as a student journal was therefore the right one to adopt.

Formulating this idea, however, was never going to be sufficient in itself to realise this goal. An enormous task lied ahead to turn GAR into reality. This is where the fantastic and huge efforts by many colleagues and students made all the difference and ensured that this first issue would see the light of the day on 1 July 2008. All of them deserve full credit for their hard work, dedication and support.

Warm congratulations and a big 'well done' must go to the editorial team. In Marsela Maci, Ioannis Kalozymis and Andreas Themelis (as Editors), and Vineet Budhraja, Felipe Garcia and Jutta List (as Assistant-editors), I found a group of superb first-class young scholars. It has been a pleasure and source of pride seeing them execute this enormous task in practice with such diligence. They worked incredibly hard to ensure GAR will be what it is: a global journal. Special recognition should also go to the advisory board, a group of world-class specialists. They committed very early in the process when the whole thing was nothing but a vague and over-ambitious idea. They did an enormous amount of work to ensure this issue would be of the highest quality. Three of my fantastic team of assistants – Amandeep Bhogal, Sara Jameel and Jennifer Watts – who became involved during the last few days before this issue was sent into production made such admirable contribution, which only confirmed the superb skills they enjoy and their outstanding knowledge of competition law. I am truly proud to have taught these three talents. Colleagues at the College were extremely generous and supportive; warm thanks in particular should go to Professor William Wilson for his kind support, to Mr Kaptan Miah for looking after the technical aspect of GAR and to the Queen Mary production team for their good work. I must also thank all of my undergraduate and LLM students (past and current) who – through demonstrating an incredible interest in competition law – keep reminding me that academia is worthwhile. I am extremely fortunate to be surrounded by the best calibre of competition law students. All of my students – individually and collectively – are united in hard to find qualities.

Beyond the GAR team and Queen Mary, University of London, I would like to thank the former President of the European Court of First Instance, Bo Vesterdorf for producing a most interesting article for this issue and for honouring us with his acceptance to deliver the ICC Annual Competition Law and Policy Lecture 2008. Special thanks must also go to the law firms Crowell & Moring and Simmons&Simmons for generous financial support. In particular I would like to thank Dr Werner Berg and Mr Charles Bankes; in both of them the ICC has two major friends and affiliated members.

Five of the articles featuring in this issue are based on presentations made by their authors at the ICC International PhD conference, which was held on 7 March 2008. This event proved to be a resounding success and a unique occasion for students to test their ideas in practice and interact with other students and specialists in the field. I am grateful to Judge Frederic Jenny, Professor David Gerber and Mr Paul Lasok QC for chairing three of the sessions on the day. The conference participants and especially the presenters appreciated such an opportunity enormously. The comments offered by the panel of chairs have clearly contributed towards enhancing the quality of the articles featuring in this issue.

Finally, special thanks should go to present and former colleagues at the UK Competition Appeal Tribunal. They have been extremely supportive of the ICC and its activities this year; in particular Mr Adam Scott who has kindly written an obituary for our late colleague and friend, Ms Marion Simmons QC. Marion was a most loyal friend of the ICC and a most proud alumna of our college. We are proud and honoured to dedicate this issue to her.

Maher M. Dabbah
June 2008

Editorial Board's message

It gives us particular pleasure to be able to publish this first issue of the ICC Global Antitrust Review (GAR).

GAR is intended to be a unique journal, a platform for students to engage in research and writing in the field of competition law. It comes to benefit both its authors (by giving them an opportunity to produce their research output) and its audience, young scholars especially students of competition law; though we also hope that other groups within the competition law community globally would find the content of the Review of use.

The present issue brings together excellent contributions produced by a number of outstanding young scholars; additionally it features an article by Judge Bo Vesterdorf who kindly agreed to enrich the issue with his valuable thoughts on the underlying themes of the *Microsoft* judgment. We would like to thank Judge Vesterdorf and our team of authors for their contributions.

All of the articles herein address the 'issues of the moment' in the field of competition law. They were carefully selected so GAR can hopefully fulfil its expected role as a publication seeking to promote competition law and policy debate around the world. The articles were all refereed to ensure that GAR would be a journal of the highest quality. We are grateful to all the referees who devoted considerable amount of their time to read through all the articles submitted for consideration.

The journey towards publishing this issue has certainly been long and on more than one occasion we faced such high 'waves', which only made our task more challenging. Through sticking together and supporting each other as a team however, we were able to overcome these waves and to sail safely into our destination. It has been a most enjoyable process for us from which we came to learn a great deal. We were also able to reap perhaps the most important of benefits: friendship among us for surely many years to come. We dedicate our special thank you to the one who made this initiative and experience possible for us: the director of the ICC, Maher Dabbah. He supported us in every possible way and has been both our leader and our friend.

We hope that our audience and young scholars of competition law globally in particular would find this issue useful and we look forward to hearing from anyone who would be interested in expressing a view on what we achieved here; and certainly we look forward to receiving potential contributions for the next issue of GAR.

GAR Editorial Team
Issue 1, 2008

MARION SIMMONS QC
1949-2008

On Wednesday, 12 March 2008, an audience of academics, practitioners and students gathered at Charterhouse Square for the Annual Competition Law and Policy Lecture 2008, organised by Maher Dabbah on behalf of the Interdisciplinary Centre for Competition Law and Policy (ICC), and delivered by Bo Vesterdorf until recently President of the European Court of First Instance (CFI). I came accompanying our senior chairman, Marion Simmons QC, who was an enthusiastic and committed supporter of the ICC, indeed one of its earliest affiliated members. For Marion, her support to the ICC, to Maher Dabbah and to students studying competition law was an important aspect, not just of her commitment to the subject area of competition law but of her great commitment to those who study the law and to Queen Mary, University of London as her alma mater. Marion had provided lead thinking especially on 'competition and arbitration' and pushed forward the research agenda in an area that fits extremely well with the interdisciplinary nature of the ICC.

Marion showed her commitment to individuals and to their development both publicly and privately. She worked assiduously through the structures of the Bar to promote the effective training of advocates and, behind the scenes, operated a remarkably open policy towards Queen Mary students. Whatever the query and whoever the person, she would always find time in her crowded diary to help students. She also took great time and trouble in developing the référendaires whose work is invaluable to the Tribunal.

Between 2003 and 2008, her contribution to the Tribunal and to competition and communications law went beyond the obvious and substantial case load that she carried. One lawyer encapsulated what many seemed to feel when writing of Marion's unerring courtesy, good humour, careful and thoughtful chairmanship and of her insightful analysis. Marion became an integral part of the team at Victoria House, relating to individuals throughout the Competition Service that supports us as well as providing particular leadership during the interregnum between Presidents. She was a particular support to Sir Gerald Barling as incoming President and she had been a great support to the first President, Sir Christopher Bellamy, after the untimely death of Professor Dan Goyder who was due to serve as a chairman alongside her.

Marion showed her courage and determination not just in working right through her battle with cancer and continuing to enjoy entertaining and evenings out but also in enjoying her great network of family and friends. The family and friends whose appreciation and attention she so valued in the closing period of her time with us have sustained a loss that is both deepened because of how she related to us and moderated by our having known a remarkable person who lived such a full and fruitful life.

Adam Scott
Member, Competition Appeal Tribunal

Article 82 EC: Where do we stand after the *Microsoft* judgement?

BO VESTERDORF*

Several months have now passed since the European Court of First Instance (CFI) handed down its much anticipiated judgment in the Microsoft case. The judgment proved to be the final say in this highly important case as there was no appeal to the European Court of Justice (ECJ).

This article offers some reflections on the judgment and considers the key question of where we stand in relation to Article 82 EC after the judgment. The article begins with a brief introduction and preliminary observations on the relationship between competition law and the field of intellectual property (Parts 1 and 2). It then considers in Part 3 some of the key pre-Microsoft decisions. In Part 4 the article examines the judgment closely. This is followed with some reflections in Part 5. Finally, Part 6 concludes.

1. INTRODUCTION

The acquisition and use of intellectual property rights (IPRs) have often given rise to competition concerns on the part of competition authorities around the globe. Such concerns appear to be on the increase, as illustrated by the sector enquiry recently launched by the European Commission into the practices concerning the use of IPRs within the pharmaceutical industry. At the same time however, the application of competition rules by the competition authorities appear to have engendered legitimate concerns on the part of holders of IPRs. The existence and importance of these two different parts of the legal systems of most industrialised countries make it necessary for the authorities to strike a balance between the *existence* and *exercise* of these rights; something that courts and legislators of several countries have in fact attempted to do.

It is important to bear in mind that even if the central element of an IPR is to give the holder an exclusive right and thus the possibility to restrain competition, the *existence* and *exercise* of that right nevertheless play a very important part in effective competition in the market place to the good of consumer welfare. Without the protection offered by IPRs, as created by legislation, an important part of innovation might be endangered because of the often considerable economic investments required to innovate. And precisely because of the protection offered to the inventor, others will in turn also need to innovate in order to try and compete on the same market. Hence it is worth reminding the public in particular that IPRs are of fundamental importance not only to the holder but also to society in general.[2] On the other hand, precisely because of the protection afforded by legislation to IPRs and the inherent right to exclusivity, it is important that the substantive criteria for acquiring the exclusive right do not become too easy to fulfil, especially as regards patents.[3]

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*Former President of the European Court of First Intance. This article is an adaptation of the speech delivered by the author at the ICC Annual Competition Law and Policy Lecture 2008 on 12 March 2008.

[1]Case T-201/04 *Microsoft v. Commission* (judgement delivered on 17 September 2007).

[2]See for a thorough analysis of the balance between copyright and competition the opinion of the Advocate General in *Magill*, Case C-241/91P and Case C-242/91P, *RTE and ITP v. Commission* [1995] ECR I-743.

[3]One may for example wonder how the compilation of television programme listings in *Magill* could represent creativity worthy of copyright protection. The same applies to the *IMS Health* case, cited in note 11 below.

I believe it is also imperative that the limits to the acquisition and exercise of IPRs, which the competition rules impose, are proportionate and kept to the minimum necessary to avoid abusive behaviour. Within the EU competition law system, Article 82 EC is of particular relevance in this respect, since the concept of 'abuse of a dominant position' contained in that Article may take the form of an abuse of IPR by a dominant undertaking, i.e. the holder of such right. Establishing such an abuse in practice can be extremely difficult. Over the years, the relevant case law has highlighted just how problematic this is. The most notable and the single most high profile case is of course the *Microsoft* case itself; though the case was not exclusively about the use or abuse of IPRs by Microsoft: another part of the *Microsoft* case concerned the question of illegal tying of the Microsoft Media Player to the Windows operating system. This latter part of the case will be discussed in the present article, albeit more briefly than the issue of abuse of IPRs.

2. Some preliminary remarks and observations

Before discussing the central question of this article of whether, and if yes, how the *Microsoft* judgment changed the situation in relation to the issue of abuse of IPRs under Article 82 EC, it would be helpful to make a number of preliminary remarks and observations; some of these points might perhaps be considered fairly simple and straightforward but they need to be made.

Firstly, it is the very purpose and the very subject-matter of an IPR, for example a patent, that the holder will enjoy an exclusive right and that it is therefore for the holder – and for him alone – to decide: if, how, when, and under which conditions he wants to exercise his right. Thus, it is for the holder of a patent to decide whether he himself will use the patent to exploit the invention for the purposes of production, or somehow use the invented method or molecule or whatever the patent covers; alternatively he can decide to license the IPR to another party In the latter situation, the holder of the patent enjoys the right to determine on which economic terms and for how long the licence will be granted.[4] In other words the patent is the property of the holder as is his house.

Secondly, an inventor is entitled to seek to have his invention patented and when this happens he must enjoy the protection of that patent. This right equally applies to dominant undertakings which in principle are just as entitled to exercise patent rights as any other (non-dominant) patent holder. Dominant undertakings are also entitled to invest heavily in obtaining patents through a policy of innovation whilst also, in principle, being entitled to decide not to use a patent and to refuse to license their patent to another party. As long as they stay within the limits of the patent legislation, dominant undertakings are technically on safe ground. The same, of course, applies to copyrights, trade marks and design rights.

However, competition law also applies to holders of IPRs. But competition law is not meant to be used to abolish the very subject-matter of the right(s) created, for example by a patent or a copyright; it should only be used to the extent necessary to avoid an abuse of the right(s) by the holder. The difficult question is, however, when is the use or exercise of IPRs abusive? This is a very delicate question, which during the last 20 years, has probably not become easier to answer, let alone answer in a clear manner; indeed some might even argue that this question is simply unanswerable.

*See Case 402/85, *Basset/SACEM* [1987] ECR 1747.

Under EU competition law, it is long established in case law that dominant undertakings have a special obligation to avoid behaviour which can restrain, distort or hinder competition.[5] However, as stated so eloquently by John Temple Lang,[6] this special obligation simply means that Article 82 EC applies to dominant undertakings. It means that conduct which is perfectly lawful for ordinary (non-dominant) undertakings may be unlawful if it is carried out by a dominant undertaking. If, as recognised by case law, a dominant undertaking is allowed to defend its economic and legal interests, this is not so if the purpose or effect in reality is to damage competition by a disproportionate and unnecessary action.[7]

The difficulty, however, still exists in determining what constitutes abuse of a dominant position by the exercise of IPRs. As mentioned before, the simple fact that an IPR holder refuses to grant a licence is not in itself enough to constitute abusive conduct.[8] There must be other circumstances present for such refusal to be labelled abusive. The same applies to dominant undertakings which have a 'firm' policy of always seeking intellectual property protection for their innovations, even if they do not necessarily desire to exploit the protected innovation whether immediately following the grant of the protection under law or at a later stage.

Based on the former case law of the Community Courts it seemed to be that the biggest difficulties have often concerned the question of whether or not the relevant holder of the IPR in the case at hand was entitled to refuse to grant a license to another party. The case law on this problematic question consists of only a handful of judgments, which were relied upon by the CFI in the *Microsoft* judgment.

3. Before the Microsoft judgment

At least until the judgment in *Microsoft*, it seemed to be the general understanding that relatively strict conditions had to be present in order to find an abuse in case of a refusal by the holder of an IPR to grant a licence of that right to another person. Three particular cases are worth noting here.

In *VOLVO*, which concerned a design right regarding car body parts, the ECJ found that even if the proprietor of such a right is entitled to prevent third parties from manufacturing and selling or importing, without his consent, products incorporating the design in question, such proprietor, if dominant, may commit an abuse, for example by arbitrarily refusing to supply spare parts to independent repairers or by deciding to stop the production of spare parts even though many cars are still in circulation.

In *Magill*,[9] the ECJ, in confirming the judgment of the CFI, stated that 'refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot itself constitute abuse of a dominant position'. The ECJ, however, went on to state that 'the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve

[5]See e.g Case 322/81, *Michelin v. Commission* [1983] ECR 3461.
[6]See Temple Lang, 'European competition law and compulsory licensing of intellectual property rights – a comprehensive principle' (2004) 4 *Europarättslig Tidskrift* 558-588.
[7]See Case T-219/99, *British Airways v. Commission* [2003] ECR II-243.
[8]Case 238/87, *Volvo v. Veng* [1988] ECR 6211.
[9]Cited in note 2 above.

abusive conduct'. The ECJ found that such exceptional circumstances were present if the refusal concerned:

- a product the supply of which was indispensable to the production of
- a new product, for which
- there was a potential consumer demand, provided that the refusal was not justified and
- the refusal would eliminate all competition on the secondary market.

In *IMS Health*,[10] the ECJ, referring to *Magill*, found that it followed from previous case law that, in order for the refusal by a dominant undertaking holding a copyright to be abusive, it was sufficient that three cumulative conditions be satisfied, namely, that the refusal prevents the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market.

4. The Microsoft judgment and its implications

(A) Refusal to supply

As already mentioned, the first part of the Commission's case against Microsoft concerned Microsoft's alleged policy of not being willing to supply interoperability information to its competitors on the market for work group servers costing less than $20.000. According to the Commission, this policy would eventually have the consequence that Microsoft would obtain a dominant position on the market for work group servers because Microsoft, with its Windows operating system for client PCs, has more than a 90% share of the world-wide market for PC operating systems and because the servers of Microsoft's competitors, without the interoperability information from Microsoft, are not 100% compatible with Windows and therefore cannot interoperate as effectively with Windows as Microsoft servers. According to the Commission, this would lead to a situation where all competition on the market for work group servers risked being eliminated, as Microsoft in 2004 already had more than a 70% share of that market. The refusal to grant licences to interoperability information therefore constituted an abuse of a dominant position. In its decision, the Commission accepted as a working assumption – on which the decision was founded – that Microsoft's interoperability information might be covered to some extent by IPRs.

In its judgment, the CFI proceeded to analyse the case law regarding refusal to supply[11] and concluded that the exercise of an exclusive right may be abusive only in exceptional circumstances and that such exceptional circumstances are present, in particular if:

(a) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
(b) the refusal is such as to exclude any effective competition on the neighbouring market;
(c) the refusal prevents the appearance of a new product for which there is a potential demand.

[10] Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039.
[11] See paragraphs 320 to 335 of the judgement.

If such circumstances are present, the CFI stated, only an objective justification prevents the refusal from being abusive under Article 82 EC.

The particular anlaysis produced by the CFI on the issue of refusal to supply – in the form of a refusal to grant an IPR licence – on the part of a dominant undertaking deserves particular attention. Before casting a closer look at that analysis and its implications, it may be worth offering a number of hypothetical scenarios in an effort to illustrate the possible consequences of the case law analysed by the CFI in the judgment.

In the first scenario, a large undertaking (A) producing medicines for humans has invested large amounts of money in the development of a new product against common colds. In this regard, A has invented a new and very effective combination of molecules for which it has been granted patent protection. The new product cures colds very effectively within 8 hours. Within a few months after the introduction of this product on the market, A becomes dominant in all EU Member States on the market for medicines against colds.

If undertaking B then contacts A and asks for a licence to produce the products and sell them within the EU market or on any other market, it clearly follows from the case law that A is perfectly entitled to refuse to grant B a licence.

In the second scenario, B asks for a licence to produce and informs A that, if granted the licence, B will be able to produce a product which will cure colds within 4 hours. Is a refusal to supply by A abusive in these circumstances? The licence is, from a technical point of view, clearly indispensable for B; however the question must be asked whether B's intended product can reasonably be called a new product or whether it is simply a better, more efficient product. B's intended product is certainly a product for which there would be a potential demand and, in addition, the refusal prevents effective competition on the market. It is, however, not a neighbouring market but the same market. Based on the case law – at least until *Microsoft* – it is submitted that the refusal on the part of A is not abusive since the demand simply concerns a more effective variant of A's product. If A's refusal were to be deemed abusive and a licence was therefore to be granted, this would affect the very subject-matter of the patent right.

In the third scenario, a change to the facts is introduced. B now contacts A seeking a licence in order to produce a combination of molecules to be used for a product which is not meant for colds but would be a very effective medicine against liver cancer. A is not active on the market for medicines against cancer; however A still refuses to grant such licence. The question is asked whether such refusal is abusive under Article 82 EC. Probably the answer should be in the positive for a number of reasons: first, the licence is objectively indispensable: A's combination of molecules being nececssary for the new combination by the addition of B's particular molecule; secondly, it is a new (another kind of) product compared to A's product; thirdly, there is a clear consumer demand for the new product; and fourthly, we are dealing with a neighbouring market on which A is not active. Had A been active on that market, the situation might be different, for example if A claims that he is himself in the process of trying to develop a product for treatment of various types of cancer. In such a situation, A may have a reasonable objective justification for refusing to grant B a licence.

Having set out these three scenarios, we turn to consider the findings of the CFI in *Microsoft* in regard of the criteria the Court had identified.

I. Indispensability

The Commission had concluded in its decision that access to the interoperability information was indispensable for the competitors in order for their servers to be able to interoperate seamlessly with the Windows operating system; as seamlessly as if they were Microsoft servers. Microsoft however disagreed and its response to this claim was that the interoperability information was not indispensable for several reasons:

(a) Since 90 % of the world's personal computers (PCs) work with Windows and Microsoft's servers only cover 70% of the world market, a large number of non-Microsoft servers have to interoperate with Windows on PCs. Microsoft supported this with market data demonstrating that several undertakings had a combination of servers from different producers, all of them working in a Windows environment.

(b) A number of software products available on the market allow establishing a sufficient degree of interoperability with Windows for non-Microsoft servers.

(c) Reverse engineering is possible and has been done successfully by some producers of software for servers.

Microsoft claimed that, as a consequence of these possibilities, access to the interoperability information could not be deemed to be indispensable since it is technically possible and 'economically viable' for its competitors to develop and market their products without such access.

In its answer to these arguments the Commission argued that:

(a) Microsoft's market share for work group servers had grown to more than 70% in very few years and would continue to do so because of the difficulties users of non-Microsoft servers encounter with the interoperability with Windows. In other words, Microsoft's market share would continue to grow because of the better interoperability it could offer with servers.

(b) None of the available software products permit the servers of the competitors to obtain the same degree of interoperability as Microsoft servers; as a consequence, Microsoft's competitors are left at a competitive disadvantage.

(c) Reverse engineering is possible but takes years to accomplish and is far too costly for Microsoft's competitors.

Put in a different way, the Commission's view was that without access to the interoperability information, it would not be economically viable for competitors to continue to try to compete with Microsoft.

The CFI rejected the arguments presented by Microsoft by relying, in substance, on two premises: first, that the indispensability criteria is not a technical, objective criteria but must be based on an appreciation of 'economic viability'; and secondly, an appreciation of economic viability presupposes an analysis of a complex economic character, which under the case law is subject only to limited review by the Court.

This approach seems to differ from the situations dealt with in earlier case law. In *VOLVO*, *Magill* and *IMS Health*, and indeed in the earlier case of *Commerical Solvents v. Commission*,[12] there was *no* actual or potential substitute to the product or service to which access was demanded by the third party and refused by the dominant undertaking. In other words, in those cases, access was technically and objectively indispensable. Without access, there was no way at all for other undertakings to stay on or enter the market in the first place. This is obviously different from the situation in *Oscar Bronner v. MediaPrint*,[13] where the ECJ found that access to the newspaper distribution network of MediaPrint, to which access was demanded, was not indispensable to the competitor Oscar Bronner since nothing prevented the latter from establishing their own alternative network, even though it could be costly. The ECJ therefore found no abuse of dominance in the case.

With the CFI's acceptance of the Commission's approach in *Microsoft*, the concept of indispensability has now been broadened to also cover 'economic indispensability', which in future cases leaves the Commission with the possibility of applying its traditional wide margin of appreciation to the question of whether or not access to a licence of an IPR is 'economically indispensable'. This probably makes it easier to find a refusal on the part of a dominant undertaking abusive and may leave such an undertaking – when it is the holder of an IPR – with less legal certainty as to and under which circumstances it will have to grant a licence in order to avoid being caught by the net of Article 82 EC. Furthermore, the control of the Commission's assessment of economic viability is limited in scope because of the margin of appreciation accorded to the Commission. From a criterion based on objective, almost physical indispensability – as we also know it from the concept of 'essential facilities' – it has been broadened to include an economic assessment.

II. Elimination of competition on a neighbouring market

It is beyond the scope of this article to spend much time on this part of the CFI's judgment, which mainly dealt with the right product market definition and the development of this market up until the Commission decision – that is, this part of the case mainly dealt with facts and evidence.

In brief, the CFI agreed with the Commission in all respects, mainly on the basis of the limited control it enjoys because of the margin of appreciation left to the Commission when assessing complex economic situations such as the competitive situation of a market. It is, however, worth mentioning that the Court, while repeating that its control was of a limited character in view of the complex economic assessment involved in defining the correct product market and assessing the future market developments, put in a clear caveat at paragraph 482 of the judgment. The Court stressed that '... this [however] does not

[12]Joined Cases 6/73 and 7/73, *Commercial Solvents v. Commission* [1974] ECR 233.
[13]Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791.

prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of sustaining the conclusions drawn from it'. The Court referred in that regard to the judgment of the ECJ in *Tetra Laval*.[14]

Nonetheless, the CFI's findings in this part of the judgment contain an important clarification regarding the criterion for elimination of competition. The Court declared that it is not necessary that *all* competition on the market would be eliminated; what is necessary is that the refusal is likely to eliminate all *effective competition*.[15] In IMS *Health* as well as in *Magill*, it was stressed that the conduct was abusive as it would lead to elimination of all competition on the secondary market. After *Microsoft*, it is elimination of all *effective competition*, namely competition which might present a real constraint or a real competitive challenge to the dominant undertaking. This shift from elimination of all to elimination of effective competition appears to have at the same time rendered the conditions for finding an infringement of Article 82 EC less strict by loosening the conditions for finding an abuse in these situations. To most people this shift is probably well-founded, as what is necessary is that there is room for some effective and not just some, however toothless, competition.

III. New product

On this point, the judgment of the CFI represents another development of the case law, which will be welcomed by competition authorities themselves but presumably less by the proponents of strong protection of IPRs. In illustrating this point, it would be helpful to briefly consider the arguments of the parties in the case.

The Commission claimed that the refusal to supply the interoperability information to Microsoft's competitors prevented new products from entering the market, thereby causing prejudice to the consumers or at least preventing technical development on the market. If competitors cannot access the interoperability information, they cannot produce servers which can effectively compete with the Microsoft servers. If, on the other hand, they were able to obtain the information, they would not just be able to duplicate Microsoft servers, which would in any event not make them a better choice than Microsoft servers, but they might introduce servers to the market with added-on extra capabilities that would make them potentially more attractive to consumers than Microsoft servers and thereby create competition and further development.

Against this, Microsoft argued that it followed from the Commission's case that, for the competitors' servers to be able to match Microsoft servers as regards interoperability, the former would necessarily have to be a complete duplicate of the Microsoft servers as regards work group services; otherwise the competing servers could not be put into a group of Microsoft work group servers and function seamlessly within such a group. Put differently, competing servers would have to be 'clones' as regards the core services offered by work group servers. Therefore they would not constitute a new product but just another parallel product bearing another name.

[14]Case C-12/03 P, *Commission v. Tetra Laval* [2005] ECR I-987.
[15]See paragraph 563 of the judgement.

Having examined the application of the new product criterion in the case law, the CFI dealt with this criterion – which in earlier case law had been seen as an important limitation on the finding of abuse – by stating at paragraph 647 of the judgement:

> 'The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*… cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.'

Simply put: in order to find an abusive refusal to grant a licence, it is no longer a *conditio sine qua non* that the refusal prevents the emergence of a new product in a strict sense: also the prevention of technical development may be abusive. This is, according to some views, a development which may have significant consequences for IPRs holders.[16] Going back to the scenarios mentioned above regarding the medicine against colds, it might mean, in the second scenario, that B would be entitled to obtain a licence from A, the patent holder simply because its product was claimed to be better and therefore could be claimed to be a technical development for which there is a potential demand. However the question arises whether this case law would also mean that, if dominant on the market, A would be obliged to grant a licence every time another person claims that, if given a licence, its product will be a technical development for which there is potential demand. It may be supposed that proponents of strong protection of IPRs hope that this is not the case. Since the conditions under which a refusal to license a product must remain *exceptional*, this definition or broadening of the, 'new product' criterion must, like any other exception, be interpreted restrictively.

IV. Objective justification

It follows from the earlier case law and as was confirmed by the CFI in its judgement, if the other criteria for finding abuse are fulfilled, a dominant undertaking may still avoid such a finding if it can present an objective, convincing justification for the conduct in question.

Microsoft argued before the CFI that it relied, as a justification for its conduct, solely on the fact that the technology concerned was valuable and covered by the concept of IPRs. In its judgment however, the CFI found that the simple fact that the information requested was covered by the concept of IPRs cannot constitute an objective justification for a refusal if the other conditions are fulfilled; otherwise the *raison d'être* of the exception would be rendered meaningless since the exception would then never apply.[17]

Finding that Microsoft had only presented 'vague, general and theoretical' arguments and had thus not lifted its burden of proof for this allegation, the CFI also rejected Microsoft's arguments to the effect that, if it were to be obliged to grant a licence, this would eliminate future incentives to invest in the creation of more IPRs. However, having already rejected

[16]See for a strict approach to this criteria, Temple Lang, note 6 above, at, p. 577.
[17]See paragraph 690 of the judgement.

Microsoft's arguments concerning incentives to invest, the Court nevertheless examined this aspect somewhat more closely at paragraphs 702 to 710, first by making the point that the disclosures made under the settlement in the USA had not had any negative impact on Microsoft's incentive to invest and secondly by accepting the conclusion of the Commission in its decision to the effect that the need to protect Microsoft's incentives to invest cannot outweigh the exceptionnal circumstances of the case and cannot therefore constitute an objective justification.

In other words, a balancing of the interests at stake must be made and the burden of proof as to the negative impact on incentives to invest rests on the dominant undertaking.

The Court further stated that the mere fact that the technology was secret and of great value to the licensees and contained important innovations could not constitute an objective justification, since it was Microsoft's own unilateral decision to keep the information secret and the information was valuable to the competitors precisely because it was indispensable. Furthermore, there is no reason why secret information should be more protected than technology that is necessarily made public by a patent registration.

The Court, however, because of the pleadings of the parties, did not have the opportunity to clarify what might constitute an objective justification for refusal to grant a licence of an IPR. As mentioned above, by referring to a few case scenarios, an objective justification might perhaps be that the dominant undertaking itself is just starting to rely on the IPR concerned to develop a new product of the type that the applicant for a licence is claiming he would introduce on the secondary market and for which there is potential demand. Another objective justification might be that the IPR concerned is the only and fundamental basis for its production and that, if a licence were to be given to create competition *vis-à-vis* the dominant undertaking – because it follows from the judgment that the product need not be a new one but just a technical development – that might deprive the undertaking of its very economic basis.

Reflecting on this particular part of the judgment, it would seem that it has expanded the case law on four important fronts: the first is regarding the indispensability criterion, which now in addition to objective indispensability also covers 'economic viability', thereby allowing the authorities – in this case the Commission – a wide margin of appreciation; secondly, that the new product criterion no longer covers only new products in strict terms but also a technical development of an existing product; thirdly, elimination of competition means elimination of all *effective* competition and not all competition; finally, the value of the IPR or the degree of innovation involved or the negative effect on incentives to invest does not – at least easily – count as objective justification for a refusal by the dominant undertaking to grant a licence of its IPR(s).

(B) Tying

As was noted above, the second part of the Commission's finding of abuse on the part of Microsoft concerned the alleged illegal tying of the Windows Media Player to the Windows

software packet. In other words, customers could not buy Windows without also getting the Media Player which was integrated into Windows and which could not be uninstalled by buyers. This practice was started at the end of 1998/beginning of 1999; prior to that, Microsoft sold Windows with media players produced by other producers or by itself as an option.

The Commission found that this new business model constituted abusive tying or bundling of two separate and different products which had as its effect to restrain considerably competition from producers of other media players, since practically any buyer of a new PC would automatically get Microsoft's media player with Windows: buyers would not need another media player or at least only few of them would go looking for other media players. In other words, the market for other media players had become much smaller and might completely disappear. This in turn would have another effect, namely that writers of content for media players would focus on writing programmes that are compatible with the Windows Media player because of the much greater market they could access. This would diminish the demand for other media players because of the more limited volume of content written for them.

Microsoft's main arguments against the finding of abuse by the Commission were that:

(a) there were not two separate products but just one which over time had been developed into one integrated product; Microsoft explained in that regard that there was no demand for Windows without a media player;

(b) Windows with the media player did not cost more than without the media player;

(c) furthermore, any buyer of a Windows PC can download free of charge as many other media players as they want and nobody is forced to use Windows Media Player; anybody can use any other media player on their Windows PC. There was thus no foreclosure of competition; and

(d) as it was an advantage to users and writers of content to have one broadly used stable and well defined platform becoming so to speak an industry standard there was an objective justification for the integration of the media player into Windows.

On its part, the CFI felt that all of these arguments should be dismissed by stating the following:

First, the Commission was right to claim that there were two different products. Indeed, Microsoft itself had earlier sold the products separately and still did so for a particular version of Windows. There were other producers out there selling the media players separately, which demonstrated the existence of a distinct demand for media players. Referring to the *Hilti* judgment,[18] the CFI further stated that the fact that there was no demand for Windows without media player did not prevent it from concluding that those two products belonged to separate markets. Added to this was the fact that it was not a case of logical technical development and of technical necessity to integrate the two products into one.

[18]Case C-53/92 P, *Hilti v. Commission* [1994] ECR I-667, upholding the CFI judgment in Case T-30/89, *Hilti v. Commission* [1991] ECR II-1439.

Secondly, even if Microsoft did not charge a separate price for its media player, it could not be inferred that the media player was provided free of charge, because it was evident from the facts of the file that the price was included in the total price for Windows. The Court added that, in any event, it does not follow from Article 82(d) EC or the case law on bundling that consumers must necessarily pay a certain price for the tied product for it to be illegal bundling.

Thirdly, whilst it is true that certain other media players can be downloaded free of charge, this is not as simple as it is said. The Commission had presented facts to demonstrate that a not unimportant part of attempts to download simply failed and that probably a considerable number of private users of PCs were either unaware of that option or simply would not even want to try other media players, as they already had one at their disposal. The Court further confirmed the point of view that, as Windows Media Player is found on almost all PCs, this would necessarily lead content writers to concentrate on writing for that format, which in turn would lead to less content for the format of other competitors and, as a consequence, less demand for their media players, thereby leading to foreclosure.

Finally, the fact that the tying enables software developers and Internet site creators to be sure that Windows Media player is present on virtually all client PCs in the world is precisely one of the main reasons why the Commission correctly took the view that the bundling led to the foreclosure of competing media players; that anticompetitive effect cannot be offset by the claimed advantages for software writers. Furthermore, the Court stated that, although standardisation may effectively present certain advantages, it could not be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

It seems that the main worry that was expressed, following the delivery of the judgement, about its tying section is linked to the consequence of the Court's finding of two separate products and its dismissal of the claim that the integration of Media Player into Windows represented a logical technical development of the 'Windows' product. These arguments have been based on the assumption that no buyer of a client PC would want a PC which was unable to receive streaming sound and pictures. That is because, today as well as even in 1999, a large majority of websites incorporate sound and moving pictures which, in order to be used without cumbersome downloading, presupposes a working streaming media player installed on the PC. Thus, instead of customers having to buy separately the media player of their choice and having it installed afterwards, it is being argued that it is more logical that the media player is integrated in the PC package that the customers buy.

As long as buying the 'package' does not prevent manufacturers of PCs from selling a PC package that contains one or more other media players and as long as buyers of client PCs are free to add further media players to their PC, it might be argued that there is some truth in this line of argument, depending however on the exact competitive conditions present on the market. As it appears from the judgment, the Court found the conditions of the market to be such that that type of arguments could not be followed.

However, as long as the dominant undertaking limits itself to improving the quality of its products – and therefore enhance their competitiveness – and as long as it does not use action – without any value to their own products or productivity – simply and only to interfere with the competitors' development opportunities on the market, a technical development or improvement of their products is to the advantage of competition and thus to the advantage of consumers.

5. Reflections

The judgment of the CFI in *Microsoft* offers an appropriate opportunity for one to reflect on the application of Article 82 EC in cases concerning refusal by dominant undertakings to license their IPRs. Given the difficulties in striking the right balance between IPRs and competition law and the importance of any change in this balance it is understandable why some observers have expressed surprise and some scepticism about the judgment. Striking a balance between IPRs and competition law is indeed an extremely difficult exercise that will rarely meet everybody's expectations. Some fear that, with this judgment, the scope of protection afforded to IPRs has been weakened considerably and that the already somewhat shaky legal certainty that IPRs holders had before *Microsoft* has been rendered even more shaky after *Microsoft*. But this is one side of the story only and one must admit that the views on this issue can vary significantly depending on the degree of competition enforcement that is deemed acceptable at a given moment within a given jurisdiction.

According to some views, with this judgment, the weaponry of competition authorities in general and the European Commission in particular has been reinforced. Indispensability is no longer objective; it is no longer physical indispensability only: it now covers 'indispensability to operate in an economically viable way', a criterion which leaves a rather wide margin of appreciation to the authorities, subject only to limited control by the judiciary. The new product criterion now also covers technical development, a criterion which is perhaps of a complex technical character and therefore also leaves the authorities a margin of appreciation subject to limited control by the judiciary. The secondary market criterion now also covers a secondary market where the dominant undertaking is active and it must accept to grant licences to competitors of an IPR on an upstream market to allow the competitors to compete more effectively using a product representing a technical development of the dominant undertaking's product on the downstream market.

As to the objective justification, this was dealt with by the CFI rejecting arguments concerning disincentives to invest as well as the value of the investments made (and therefore of the IPR concerned), and by indicating that, on balance, the anticompetitive effects of the conduct outweighed that type of considerations. This of course means that it was so in the case itself and not necessarily in all other cases of this type.

There can be relatively broad agreement that the judgment may have far reaching consequences. On the one hand, the European Commission and the national competition authorities of Member States will now have support for a more powerful intervention *vis-à-vis* dominant undertakings, which may be good for competition. On the other hand, the judgment may have what some might call negative consequences for holders of IPRs, which perhaps might deter investments that otherwise would be made and in turn have negative consequences for competition, in particular if innovation were to be discouraged to the detriment of consumers. As was pointed out at the beginning, even dominant undertakings should be allowed to invest in patents and other IPRs, because even when these investments may incidentally limit the possibilities open to competitors, it normally benefits the consumers in the long run.

Regarding the tying part in the judgment, it is probably the case that less people are worried about the consequences of the judgment, even though, also in this respect, it is necessary to bear in mind that the risks entailed in overstretching the concept of tying can become a serious constraint for what otherwise would be valuable development and innovation to the benefit of consumers. As Advocate General Francis Jacobs once put it, competition law is not there to protect competitors but competition and the consumers.

In applying Article 82 EC with the rather vague notion of abuse and in view of the fact that intervention under the Article normally has as a consequence the need for dominant undertakings to modify their future business practices, the competition authorities need to exercise particular caution and choose their cases with great care in order to avoid running the risk of adopting in reality anticompetitive decisions.

6. Conclusion

The *Microsoft* judgment presents a number of developments or evolutions of the case law. Some of them may be far reaching and some seem to have given rise to concern. Others seem to raise less concern, but, as regards the future, it should not be forgotten that this judgment rules upon a very special and particular set of factual circumstances regarding an undertaking with an immense worldwide market power. The judgment must always be read and understood in its context. From a purely academic point of view, it may be regretted that the judgment was not brought on appeal before the ECJ so Europe's highest Court could have its final say in the case. However, sooner or later, either through a direct action or through a reference for a preliminary ruling under Article 234 EC, the ECJ may find the occasion to examine and decide on the delicate balance that must be struck between IPRs and competition law.

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

CONSTANZE SEMMELMANN*

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*[1], 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.[2] 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.[3] The multi-level character of governance in the EU adds an institutional element to the complex substantive discussions.

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I would like to express my gratitude to the ICC and the participants in its International PhD Conference held on 7th March 2008 in London, in particular to *Professor Frédéric Jenny* as the chair of the panel 'Competition law in context', *Mr Adam Scott* (UK Competition Appeal Tribunal), and all those who commented on the presentation, including the anonymous referees. Many thanks to *Mr Keith Bustos* for the language revision of the article. All errors remain mine.
[1]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*.
[2]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).
[3]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[4] rank among the EC's explicit goals.[5] 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,[6] employment aspects,[7] cultural interests,[8] public health,[9] consumer protection,[10] or industrial policy.[11]

In the context of the fundamental freedoms, it is widely recognised that a number of non-market goals such as environmental protection,[12] public health,[13] or the protection of workers[14] 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[15], non-competition goals[16], public-interest[17], and non-market goals[18] 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.

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[4]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.
[5]Article 2 EC.
[6]Article 6 EC, Article 174 EC f.
[7]Article 127(2) EC.
[8]Article 151(4) EC.
[9]Article 152(1) EC.
[10]Article 153(2) EC.
[11]Article 157(3) EC.
[12]ECJ, C-302/86, 1988 ECR 4607 *Commission v Denmark*.
[13]ECJ, C-41/02, 2004 ECR I-11375 *Commission v Netherlands*.
[14]ECJ, joined cases C-369/96 and C-376/96, 1999 ECR I-8453 Arblade and Others.
[15]Monti, 'Article 81 EC and Public Policy', (2002) 39 Common Market Law Review, 1057-1099 (title).
[16]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).
[17]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.
[18]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.[19] 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.[20] 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,[21] 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.[22] 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

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

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

[21]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.

[22]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.[23] 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.[24]

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[25], 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.[26]

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,

[23]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-177and 178/82 1984 ECR 1797 *Van de Haar*, paragraph 11f.
[24]AG Van Gerven, C-145/88, 1989 ECR 3851 *Torfaen*, paragraphs 21f.
[25]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); O.J. 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.
[26]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).[27]

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 8[1](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.[28]

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…[29]

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.[30] Thus, especially against the background of the existing exception mechanism laid down in Article 81(3) EC (and also the exceptions

[27]Komninos, 'Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC', *above*.
[28]ECJ, C-26/76, 1977 ECR 1875 *Metro v Commission*, paragraph 21.
[29]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.
[30]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.[31] 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.[32]

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,[33] 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…[34]

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

[31]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.
[32]ECJ, C-41/90, 1991 ECR I-1979 *Höfner* and *Elser*.
[33]E.g. Article 137 (2), 141 (3) EC; Article 175 EC.
[34]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.
[35]ECJ, C-372/04, 2006 ECR I-04325 *Yvonne Watts*, paragraph 92.
[36]ECJ, C-192/05, 2006 ECR I-10451 *Tas-Hagen and others*, paragraph 21f.
[37]ECJ, C-403/03, 2005 ECR I-6421 *Egon Schempp v. Finanzamt München*, paragraph 19.
[38]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.[39]

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.[40] 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.[41] 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*.[42] 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.[43] This was expressly confirmed in relation to the right to strike.[44] The same has to analogously apply to the determination of the scope of EC competition law.[45] 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.[46] Contrary to the US legal order where the antitrust immunity of those agreements

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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.

[39]ECJ, C-241/94, France v Commission, paragraph 21.

[40]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 regading 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'.

[41]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.

[42]Article 6 TFEU.

[43]ECJ, C-438/05, nyr, ITF & FSU v. Viking Lines , paragraph 44.

[44]Ibid., paragraph 44.

[45]AG Jacobs, C-67/96, 1999 ECR I-5751 Albany, paragraphs 131, 163.

[46]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,[47] 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.[48] 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.[49]

The Court confirmed the *Albany* exception in *Van der Woude* regading 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.[50] 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.[51]

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.[52]

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[47]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.

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

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

[50]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.

[51]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.

[52]See e.g. Forrester/Norall, 'The Laizisation 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, German 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[53], 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.[54]

The possibility to reconsider the rule of reason was assumed relevant in the *Wouters* decision.[55] 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.[56] 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.[57]

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.[58]

The ECJ transferred the *Wouters* test to the area of sport in the judgment *Meca-Medina*.[59] 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.'[60] 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

[53]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 *Gottrup Klim*.
[54]AG Léger, C-309/99, 2002 ECR I-1577 *Wouters*, paragraph 104.
[55]ECJ, C-309/99, 2002 ECR I-1577 *Wouters*.
[56]Ibid., paragraph 86f.
[57]Ibid., paragraph 97f.
[58]Ibid., paragraph 109.
[59]ECJ, C-519/04 P, 2006 ECR *Meca-Medina*, paragraph 42.
[60]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 interets 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.[61] On appeal, the ECJ repeated the established jurisprudence based upon the decision in *Walrave*.[62] 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.'[63] The ECJ confirmed the Commission's appreciation that the goal of the rules in combating doping for the fair conduction 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.'[64] 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.[65] 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, Cisal*).[66] 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.[67] Undertakings operating in the field of environmental protection are

[61]For this reason criticising the judgment *Weatherill*, Anti-Doping Rules and EC Law, (2005) 26 European Competition Law Review, 7, 416-421.
[62]ECJ, C-519/04 P, 2006 ECR *Meca-Medina*, paragraph 25f.
[63]Ibid., paragraph 42.
[64]ECJ, C-41/90, 1991 ECR I-0135 *Höfner and Elser* , paragraph 21.
[65]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 Eurocontro*l, regarding an air traffic control organisation in charge of maintaining and improving air navigation safety.
[66]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.
[67]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.[68] 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.[69]

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.[70] 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'.[71] The Court went on to hold that

> Powers conferred upon the Commission under Article 8[1](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.[72]

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).

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

[69]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.

[70]Ibid., paragraph 20.

[71]Ibid., paragraph 20.

[72]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*,[74] 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.[75]

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.[76]

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

[73]Ibid., paragraph 43.
[74]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.
[75]Ibid, paragraph 20.
[76]Ibid., paragraph 27f.

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

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'.[79] 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.[80]

In the *CECED* decision,[81] 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.[82] 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.[83] Furthermore, a price decrease was expected for the future.[84] 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.[85] 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 CECED 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.[86]

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.'[87] The guidelines on Article 81 (3) EC 'codify' this extension of the consumer's term.[88] The guidelines on horizontal cooperation agreements contain a special section on environmental agreements and

[77]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.
[78]Ibid., paragraph 36f.
[79]European Commission, Decision 94/322, O.J. 1994, L 144/20, Exxon/Shell, paragraph 71.
[80]European Commission, Decision 2001/837, O.J. 2001, L 319/1, Duales System Deutschland, paragraph 148.
[81]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.CECED), 2000/475/EC, OJ 26.7.2000 L 187/47 CECED.
[82]Ibid., paragraph 48.
[83]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.
[84]Ibid., paragraph 53.
[85]Ibid., paragraph 55.
[86]Ibid., paragraph 56.
[87]Ibid., paragraph 57.
[88]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.[89]

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*[90] . 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[91] is highly questionable. A hierarchy among the non-competition goals[92] 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).[93] 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.[94]

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[89]Above., paragraph 179f. See also European Commission, Decision 2001/837/EC of 17 Sept. 2001, O.J. 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.

[90]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.

[91]In this direction Monti, G., *EC Competition Law, above*, 94.

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

[93]Describing the evolution of environmental protection in the Treaty in relation to other Treaty policies, Wasmeier, '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.

[94]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[95]. In both of the latter fields of law, state power (in one form or another) is involved. In addition, the Court has relieIn 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 . 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.[96] 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 a *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'.[97] 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

[95]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.

[96]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 no 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.

[97]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[98], 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[99] 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

[98]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.

[99]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.[100] 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.[101]

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.

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

[102]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.[102] 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,[103] certain (political) declarations,[104] the Treaty's policy chapters including their provisions,[105] international conventions and agreements and their interpretation,[106] fundamental rights provisions recognised at the EU level or not[107] and in addition to secondary legislation, implemented by an agreement.[108] Cross-sectional clauses have rarely been relied on.[109] 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.[110] 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.[111] In this view, competition and free movement remained (and still remain) 'at the heart of [the Community's] legal system'.[112]

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[102]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.

[103]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.

[104]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.

[105]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.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.

[106]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.

[107]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.

[108]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.

[109]Article 151(4) could come into play, but is rarely relied on by the Court.

[110]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.

[111]Baquero Cruz, *Between Competition and Free Movement*, 2002, Hart Publishing, p. 79.

[112]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'[113]/-garantie'[114])* of market economy with free competition. At the same time, this does not exclude a 'mixed constitution'.[115] 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.[116] 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.[117] This has led some authors to the characterisation of a 'socially and ecologically qualified' internal market[118] , 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.[119] 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[120]. 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.[121] 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.[122]

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

[114]Drexl, Wettbewerbsverfassung - Europäisches Wettbewerbsrecht als materielles Verfassungsrecht, in: V. Bogdandy, (ed.), *Europäisches Verfassungsrecht- Dogmatische und theoretische Grundzüge, above*, 747-802, p. 759.

[115]Hatje, Wirtschaftsverfassung, in: V. Bogdandy (ed.), *Europäisches Verfassungsrecht - Dogmatische und theoretische Grundzüge*, 683-745, 692.

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

[117]*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..

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

[119]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.

[120]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.

[121]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.

[122]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.[123] 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.[124] 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

[123]In favour of a constitutional balance of the competition goals and the non-competition concerns, 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).

[124]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', O.J. 1993, C 138/5, p. 16.

an increasing shift toward private governance and the form of self-regulation of certain sectors.[125] 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.[126] 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.[127]

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.[128] 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.[129]

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.[130] Professional self-regulation can restrict entry to the market, serve rather the professions than the consumer, or distort price competition concerning fees.[131]

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

[125]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.
[126]Schiek, 'Private rule-making and European governance – issues of legitimacy', (2007) 32 ELRev. 443-467, 443f.
[127]Gilmour and Jensen, 'Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of 'State Action'', (1998) 58 Public Administration Review, 3, 247-258, 249.
[128]See e.g. European Commission, 'The 6th Environment Action Programme. Environment 2010 – Our future, our choices', COM (2001) 31final.
[129]European Commission, Green Paper Promoting a framework for Coprorate Social Responsibility, COM (2991) 366final.
[130]Ogus, 'Self-Regulation, Encyclopedia of Law and Economics', No. 9400, 1999, 587f., 595.
[131]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][132]

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[133]

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.[134] It is argued that courts[135] 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.[136] There is no reason to defer the decision to private parties about the prevailing public policy.[137] 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.[138] *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.[139]

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.[140] 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.[141] Exactly this aspect underlines the lack of legitimacy of the agreements. The state action cases[142] 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.

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[132]US Supreme Court, 435 US 679, 692 *National Society of Professional Engineers v. United States*.
[133]US Supreme Court, 435 US 679, 695 *National Society of Professional Engineers v. United States*.
[134]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.
[135]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.
[136]Ibid., p. 147.
[137]Ibid., p. 150.
[138]Ibid., p. 152.
[139]Ibid., p. 153.
[140]Freeman, 'Private parties, public functions', (2000) 52 Admin. L. Rev., 842f, 844.
[141]Freeman, 'Private parties, public functions', (2000) 52 Admin. L. Rev. , 842f, 845.
[142]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[143] 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.[144]

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[145] 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).[146] 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.'[147] In the *Guidelines on Horizontal Agreements*, the benefits under the first condition of Article 81 (3) are referred to as 'economic benefits'.[148] 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).'[149] 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*[150], which referred to the first condition of Article 81 (3) EC as referring to several types of efficiencies.

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[143]European Commission, 'Guidelines on the application of Article 81(3)EC', *above*.
[144]Above, paragraph 5.
[145]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.
[146]See further Monti, G., EC *Competition law*, Cambridge, 2007, 54.
[147]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.
[148]Ibid., paragraph 32.
[149]European Commission, 'Guidelines on the application of Article 81(3)EC', para 42.
[150]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[151] 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.[152] 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.[153] 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.[154] 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.[155] Similarly, the market of regulated professions has been analysed from an economic perspective.[156] 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,[157] aiming at the protection of competition in the market,[158] bridging the tensions between the effective supervision, and simplifying administration in the absence of regular administrative decisions.[159] 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

[151]European Commission,'Guidelines on the application of Article 81(3) EC', paragraphs 87-88.
[152]Ibid., paragraph 43.
[153]Ibid., paragraph 13 the link to the goal of the efficient allocation of resources which is the classic goal of the internal market.
[154]In this direction in earlier works *Monti*, above; *Mayer*, above.
[155]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.
[156]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/Atanasiu, *European Competition Law Annual 2004: The Relationship between Competition Law and The (Liberal) Professions*, (2005) Hart Publishing, 270f.
[157]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.
[158]Ibid., recital 9 Reg. 1/2003 .
[159]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[160] with the result of a limited (but not entirely clear) scope of judicial review.[161] 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.[162] 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.[163]

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[164], 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.[165] 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.[166]

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[160]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.

[161]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.

[162]*Wesseling, The Modernisation of EC Antitrust Law*, Oxford, 2000, 110.

[163]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.

[164]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.

[165]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.

[166]ECJ, C- 53/03, 2005 ECR I-4609 *Syfait and Others v GlaxoSmithKline AEVE.*

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.'[167]

In addition to the possibility of the adoption of individual decisions[168], at any time with the respective binding force for the NCAs,[169] 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.[170] 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[171] 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.[172] 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.[173] 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

[167]European Commission, 'Notice on co-operation within the Network of Competition Authorities', O.J. C 101 of 27.04.2004, paragraph 43.
[168]Ibid., paragraph 50.
[169]Article 16 (2) Reg. 1/2003.
[170]Article 11 (6) Reg. 1/2003.
[171]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.
[172]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.
[173]See e.g. US Supreme Court, 435 US 679 *National Society of Professional Engineers v. United States*.

constitutional law are very controversial.[174] 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.[175] The judicial independence is invoked as a limit on the powers of the Commission in the context of the cooperation with the national courts.[176] The source of the cooperation instruments and mutual obligations of assistance is Article 10 EC.[177] 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[178] opinion on questions concerning the application of the EC competition rules,[179]

[174]Lurger, 'The Future of European Contract Law between Freedom of Contract', Social Justice and Market Rationality, (2005) European Review of Contract Law, 4, 442f.
[175]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.
[176]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.
[177]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.
[178]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.
[179]Article 15 (1) Reg. 1/2003.

which can relate to economic, factual, and legal matters.[180] 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.[181] 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,[182] but they were assigned a strong factual value[183] because they will be published in one form or another.[184] These instruments are without prejudice to the ECJ's function as the final arbiter[185] 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.[186] 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.[187]

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[180]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.
[181]Article 15 (3) Reg. 1/2003.
[182]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.
[183]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.
[184]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.
[185]Ibid., paragraph 8.
[186]Article 10 Reg. 1/2003.
[187]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.[188] 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)[189], include cases with huge financial implications[190], or the fear of it being interpreted broadly and 'misused' for industrial policy decisions.[191] The European Parliament did not succeed with its request to clarify the term 'public interest'.[192]

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.[193] 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.[194] It is designed to advise as an expert committee the Commission in matters related to an individual case being handled or general issues.[195] 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

[188]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.

[189]Bechtold, Brinker, Bosch, Hirsbrunner, EG Kartellrecht. Kommentar, 2005, München, Art. 10 VO 1/2003, paragraph 6. In favour of a restrictive intepretation 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.

[190]Habermeier, in: Hirsch/Montag/Säcker (eds.), Münchener Kommentar zum Europäischen und Deutschen Kartellrecht, 2007, Band I, München, Einleitung, Article 81, paragraph 689.

[191]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 I, München, Einleitung, VO 1/2003, Art. 10 paragraph 9.

[192]Habermeier, in: Hirsch/Montag/Säcker (eds.), Münchener Kommentar zum Europäischen und Deutschen Kartellrecht, 2007, Band I, München, Einleitung, Article 81, paragraph 689.

[193]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.

[194]Article 14 Regulation 1/2003. European Commission, 'Notice on co-operation within the Network of Competition Authorities', O.J. 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.'

[195]Article 14 (2) Regulation 1/2003 and recital 19, 20 Regulation 1/2003.

recognised executive function of the Commission.[196] The Commission has to inform the committee of the manner in which it has taken into account its opinion,[197] 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.[198] 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.[199] 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.[200] 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.

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[196]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.
[197]Article 14 (5) Reg. 1/2003.
[198]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.
[199]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.
[200]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 circumstancs 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.[202] 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.

[202]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.

The impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom

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The first part of this article deals with the applicability of Article 6 (the fair trial procedure) to competition law enforcement in ECHR law and in domestic laws. The proceedings before competition authorities are clearly within the scope of Article 6(1) ECHR in its criminal aspect. However the jurisprudence of the ECt HR leaves countries a certain amount of discretion in the implementation of the fair trial requirement: They can apply it at the first stage or they can cure any possible defect of the first instance proceedings by providing a correct appeal to a tribunal with full jurisdiction. This discretion is used differently in the two countries under study, England and France. French Courts try to strike a balance between the requirements that have to be complied with at the first stage and those that can be cured by a correct appeal. English Courts appear to offer more flexibility on the crucial point of impartiality. Indeed the main problem in both countries seems to be the combination in one body of the prosecution, judge, and jury functions. Lastly the factors that could have an impact in both countries for the strengthening of procedural safeguards are considered in some detail. It is argued that human rights issues should not be construed as a burden but rather as part of a compliance strategy.

1. INTRODUCTION

France and the United Kingdom have two distinct historical traditions. Consequently, the arrangements for the operation of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (ECHR) and the European Union[2] (EU) have some differences and also similarities. Both Treaties pursue different objectives: Whereas the ECHR aims at establishing a community of rights based on the rule of law, the European Union intends among other things to 'eliminate barriers between countries and enhance the creation of a single market'.[3]

National legislations and national institutions have been set up in both countries to implement these provisions. In particular, both France and the UK have created authorities to enforce competition law through the sanction of anticompetitive practices, namely the prohibition of agreements[4] and the abuse of a dominant position.[5] The competition authorities in both countries wield considerable sanctioning powers and can impose substantial fines: The French *Conseil de la concurrence*[6] issued a record 534 million fine to mobile phone operators (Orange, SFR, Bouygues Telecom),[7] and for its part the Office of

[1]This Treaty was drawn up within the Council of Europe and entered into force in September 1953.
[2]This Treaty was set up first in 1957 with the Treaty of Rome and in 1993 with the Maastricht' Treaty on European Union. The UK joined the EU on 1 January 1973 together with Denmark and Ireland. The EU comprises three pillars: The European Community, the Common Foreign and Security Policy and the Justice and Home Affairs. The EU therefore has many goals, one of which being, through the EC, the making of a single market. Two EC policies aim at establishing this single market: The four freedoms (free movement of goods, free movement of services, free movement of persons, and free movement of capital) and the competition policy. This article deals with one of the policies of the EC but perhaps one of the most influential on Member States' economies, the competition policy. Moreover we will not deal with merger control that raises different legal questions.
[3]Maher M. Dabbah, EC and UK Competition Law, Cambridge University Press, 2004, at page 9.
[4]See Article 81 EC.
[5]See Article 82 EC.
[6]Hereafter Competition Council, French equivalent of the Office of Fair Trading (OFT).
[7]*Amende record pour entente illicite entre les trois principaux opérateurs de téléphonie mobile (Record fine for an illicit collusion between three of the main mobile operators)*, Le Monde, 1 December 2005.

Fair Trading (OFT) made British Airways pay a $121.5m penalty in a price fixing investigation.[8] This is obviously much more than the fines issued by criminal courts which observe strict procedural rules.[9]

Given the substantial amount of the fines imposed by competition authorities in England and France, it seems legitimate to ask for respect by these authorities of some minimum standards of procedural rights. The ECHR has attracted considerable attention in both countries but in different ways. In England the main debate seems to be the definition of the concept of public authority whereas in France it is mainly the right to a fair trial that has had dramatic consequences for Courts[10] and competition authorities.

Therefore it is necessary to understand the differences of impact of the ECHR in England and France. But it is also interesting to understand the situation in England as to the effect of Article 6 for competition law enforcement. When contrasted, the situation is indeed ambiguous. Lastly we would like to study the different factors that could influence the future impact of Article 6 in the UK and France: The Lisbon Treaty, and possibly the taking into account of human rights as part of a strategy to secure compliance.[11]

2. The applicability of Article 6 ECHR to competition law enforcement

(A) The scope of Article 6

The right to a fair trial applies only to cases involving the determination of civil rights and obligations or to criminal charges. The European Court of Human Rights (ECt HR) has an autonomous[12] conception of these notions that are independent of national definitions. Moreover the ECt HR held that Article 6(1) requirements should be construed in a substantive manner: The right to a fair trial does not apply only where a judicial procedure is concerned before a Court, but whenever a case involves the determination of civil rights and obligations or a criminal charge. As the Strasbourg Court puts it: Article 6(1) covers 'all proceedings the result of which is decisive'[13] for private rights and obligations or criminal charges.

I. In the determination of civil rights and obligations

The proceedings before competition authorities do not fall under the notion of civil rights and obligations therefore we will not study this concept at length.[14] For Article 6(1)

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[8]See OFT website: http://www.oft.gov.uk/news/press/2007/113-07.

[9]As a comparison a report by the Home Office in 2002 states that 'In total, magistrates' courts of England and Wales imposed some 1,011,000 fines. The average fine was £143' (Home Office, Fine enforcement in magistrates' courts, at page 1).

[10]The ECHR has entailed a complete change in the structure of the *Conseil d'Etat*, the French Administrative Supreme Court in at least one respect. It forced a change of the role of the *Commissaire du gouvernement* (or Government Commissioner) because it was customary for the Government Commissioner to attend the deliberations of the judging committee. France was condemned for this by the ECt HR *(Kress v. France - 39594/98 [2001] ECHR 386 (7 June 2001)*).

[11]K. Yeung, Securing Compliance, A principled Approach, Hart Publishing, 2004.

[12]The European Convention of Human Rights (hereafter ECHR) is a treaty and therefore some terms are given special or autonomous meaning in accordance with Article 31 (4) of the Vienna Convention. The ECt HR has repeatedly contended that Article 6 concepts are to be given an autonomous meaning. The Court will 'look behind the appearances and investigate the realities of the procedure in question' *(Deweer v Belgium (1980) 2 EHRR 439 paragraph 44)*. Therefore the terms 'criminal charge' *(Engel and others v Netherlands (n°2) (1976) 1 EHRR 706 paragraph 81)*, 'civil rights and obligations' *(König v Germany (1978) 2 EHRR 170 §88, House of Lords in R (on the application of Alconbury Development Ltd) v Secretary of State for Environment, Transport and the Regions (2001) UKHL 23)*, 'tribunal' *(Belilos v Switzerland (1988) 10 EHRR 466 §64)* have been given an autonomous meanings. The ECt HR tries to go beyond appearances to grasp the reality of the situation (see *Ezeh and Connors v United Kingdom (2002) 35 EHRR 691*).

[13]*Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR l, ECt HR, at paragraph 44.*

[14]A prominent writer, Wouter P.J. Wils, argues that merger control could fall under the notion of civil rights (see Wouter P. J. Wils, La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des

ECHR to apply three conditions must be met: There needs to be a dispute and a determination on civil rights and obligations.

First there needs to be a dispute. This requirement is absent from the English version of the text and only present in the French one,[15] but there is no doubt that a dispute or a disagreement is needed over a right that can be, at least on reasonable grounds, recognised under domestic law.[16] The ECt HR defined some characters of the term dispute (or 'contestation'): 'This word should not be construed too technically and (…) should be given a substantive rather than a formal meaning'.[17] It must be genuine and serious,[18] and there must be a direct link between the dispute and the right in question, the dispute being not only on the actual existence of a right but also on its scope, the manner in which the right may be exercised, and the possibility of concern for matters of both facts and law.[19]

In addition, the proceedings must involve the determination 'of his civil rights and obligations'. This requirement means that the outcome of the proceedings must be directly decisive for the determination of the rights in question, a 'tenuous connection or remote consequences do not suffice'.[20]

Finally, the determination must involve civil rights and obligations. The Court has not made any systematic definition of the notion. It is nonetheless clear that it is the character of the right at stake that is relevant rather than 'the status of the parties, the nature of the legislation which governs the manner in which the dispute is to be determined and the character of the authority which has jurisdiction in the matter'.[21] Moreover, there are some clues that must be considered: The character of the right or obligation at issue,[22] any consensus that can be gleaned from national laws (taking into account any 'uniform European notion' as to the nature of the right)[23], and the classification of the right or obligation in domestic law.[24] Some writers contend that an important criterion is the pecuniary nature of the right infringed or more precisely the consequences of the proceedings for the right in question.[25] It encompasses private law as it is concerned with the rights and obligations of private persons in their relations. As far as disciplinary

droits de l`homme, Cahiers de droit européen, [1996] Vol. 32, n° 3-4, at pages 329-354). However we excluded the analysis of merger control from our study because it raises different questions. As to the applicability of Article 6 (1) ECHR to merger control procedures the problem has been raised neither in England nor in France before the Courts. As to the EU level the ECJ has not been willing to respond to this particular question. The case law shows that Article 6 (1) is applicable to merger control proceedings but the ECJ does not say under which aspect, criminal or civil (see CFI, Schneider Electric v Commission (Competition) [2007] EUECJ T-351/03 (11 July 2007), especially at paragraphs 181 to 189).

[15] The French text says: « *Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle* ».

[16] *H v Belgium (1987) 10 EHRR 339.* See Lord Lester of Herne Hill, David Pannick. ed(s)., Human Rights Law & Practice, Second Edition, London, LexisNexis UK, 2004, paragraph 4.6.3.

[17] *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1, paragraph 45.*

[18] « Genuine » might exclude hypothetical or moot cases and « serious » excludes cases of minimal interference with the civil right: *Helmers v Sweden (1991) 15 EHRR 285 and Oerlemans v Netherlands (1991) 15 EHRR 561.*

[19] Human Rights Law and Practice, paragraph 4.6.4, The Law of Human Rights, paragraph11.161.

[20] *Le Compte, Van Leuven and De Meyere v Belgium (1982) 5 EHRR 183 paragraph 47.*

[21] See *Stran Greek Refineries and Stratis Andreadis v Greece (1994) 19 EHRR 293 paragraph 39.*

[22] See for example: *Konig v Germany (1978) 2 EHRR 170 paragraph 90.*

[23] See *Feldbrugge v Netherlands (1986) 8 EHRR 425 and Deumeland v Germany (1986) 8 EHRR 448.*

[24] See *Konig v Germany, paragraph 89.*

[25] F. Sudre, Convention européenne des droits de l'homme, Droit à un procès équitable, J.-Cl Europe, n° 22 et J.-F. Renucci, Traité de droit européen des droits de l'homme, LGDJ, 2007, at page 356. See also Human Rights Law & Practice n° 4.6.10 and the relevant case law: see for example *Ortenberg v Austria (1994) 19 EHRR 524 paragraph 28.*

proceedings are concerned they do not necessarily involve the determination of civil rights and obligations.[26] The determination must infringe on an existing civil right in order for Article 6 to apply (the right to continue in professional practice[27] for example). Competition law is not concerned with civil rights and obligations.[28] It is rather agencies like the Financial Services Authority (FSA) that can be concerned provided the sanction is not so high as to lose its civil nature and fall within the criminal charge aspect of Article 6.[29]

II. In the determination of criminal charges

The most important aspect of Article 6(1) for our purpose is the determination of the criminal charge aspect as competition law penalties fall under this definition. Here the Strasbourg Court uses three criteria to identify this concept, namely: The classification of the proceedings in domestic law, the nature of the offence itself, and the severity of the penalty which may be imposed.[30]

The reasoning of the Court is as follows: If the offence is not classified as criminal under domestic law, then the ECt HR will use it only 'as a starting point'[31] to determine whether the offence is criminal in character in the light of the last two alternative criteria.[32] The indications the Court has used to assess the criminal character of an offence under the second criterion are: Whether the legal rule is addressed exclusively to a specific group or is of generally binding character;[33] whether there is a punitive or deterrent element to the process;[34] whether the imposition of any penalty is dependent upon a finding of culpability; [35] and how comparable procedures are classified in other Council of Europe Member States[36]. The last criterion, the severity of the penalty, is very often decisive in the classification of an offence as criminal: Imprisonment[37] will most of the time lead to defining the proceedings as criminal but will also lead to large financial penalties. [38]

Finally, Article 6 only applies to the proceedings by which a charge is finally determined,[39] which affects the situation of the suspect. The Court puts it in *Deweer v*

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[26]For a seminal analysis of the definition of the concept of discipline see A. Guinchard, Human Rights in Financial Services: the Boundaries between Discipline and Crime [2007] EJCCLCJ 177 and B. Harris, Law and Practice of Disciplinary and Regulatory Proceedings, Barry Rose Law Publishers Ltd, London, 2002, 3rd edition, at page 25.

[27]*Albert and Le Compte v Belgium (1983) 5 EHRR 533 paragraph 25 and Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1 paragraph 48.*

[28]However merger control could as Wouter P.J. Wils argues in an article (op. cit., footnote n°15).

[29]As we will show below the severity of the sanction is an important criterion. The relevant case law assessing the civil nature of the proceedings before the Financial Services Authority is for the ECt HR (*Didier v. France, dec.n°58188/00, ECHR 2002-VII*) and for the UK (*Fleurose v Securities & Futures Authority Ltd & Anor [2001] EWHC Admin 1085 (21st December, 2001)*). See also the conclusions of A. Guinchard's article, op. cit., at page 202.

[30]*Engel v Netherlands (1976) 1 EHRR 647, paragraph 82.* The second and third criteria are alternative and not cumulative (see *Lutz v Germany (1998) 10 EHRR 182, paragraph 55; Garyfallou Aebe v Greece (1999) 28 EHRR 344, paragraph 33*).

[31]*Engel v Netherlands (1976) 1 EHRR 647, paragraph 82.*

[32]If the Court cannot reach a clear conclusion it can use a cumulative approach (see *Lauko v. Slovakia - 26138/95 [1998] ECHR 82 (2 September 1998), paragraph 57*).

[33]*Weber v Switzerland (1990) 12 EHRR 508, paragraph 33; Demicoli v Malta (1991) 14 EHRR 47, paragraph 32; Benham v United Kingdom (1996) 22 EHRR 293, paragraph 56.*

[34]*Oztürk v Germany (1984) 6 EHRR 409, paragraph 53; Lutz v Germany (1987) 10 EHRR 182; Bendenoun v France (1994) 18 EHRR 54, paragraph 47; Maaouia v France (2001) 33 EHRR 42.*

[35]*Benham v United Kingdom (1996) 22 EHRR 293, paragraph 56; Aerts v Belguim (1998) 29 EHRR 50.*

[36]*Oztürk v Germany (1984) 6 EHRR 409, paragraph 53.*

[37]The Court held that 'In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental' (*Engel and others v the Netherlands (1976) 1 EHRR647, 679 paragraph 82*).

[38]See for example *Janosevic v. Sweden - 34619/97 [2002] ECHR 618 (23 July 2002), at paragraph 69.*

[39]Human Rights Law and practice, op. cit., n°4.6.15.

Belgium as 'The Commission has adopted a test (…), namely whether 'the situation of the [suspect] has been substantially affected''. [40]

Most of competition law penalties are therefore to be considered as criminal charges for the purpose of Article 6. This has been explicitly admitted by the European Court itself in cases involving competition law matters,[41] by UK,[42] French Courts[43] and the European Court of Justice (ECJ).[44]

(B) THE RECEPTION IN DOMESTIC LAWS

I. THE DIFFERENCE OF APPROACH: DUALISM/MONISM

The applicability of the Convention raises different questions in England and France because of a different legal background. Indeed these two countries have a different legal structure in relation to international law: England is among dualist countries (with Ireland)[45] whereas France is a monist country (together with the Netherlands,[46] Spain,[47] Portugal,[48] Greece[49] and Poland[50]). This distinction, which must not be construed too sharply,[51] means that in dualist countries such as the UK and Ireland international law is not directly applicable and is not superior to statutes. For example the Irish Constitution provides that 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.[52] It is the same situation in the UK where it is a general principle that 'a treaty is not part of [domestic] law unless and until it has been incorporated into the law by legislation'.[53] Therefore, it is a basic principle of the common law that an international convention cannot override the intentions of Parliament as expressed in legislation.[54] It is a consequence of the doctrine of the supremacy of Parliament or 'Parliamentary sovereignty' which means that Parliament is legislatively supreme.[55] One of the corollaries of such a doctrine is that the legislative powers of Parliament are unlimited.

[40]See for example *Neumeister v Austria (1968) 1 EHRR 91 at paragraph 19.*

[41]Several decisions of the ECt HR deem Article 6 (1) applicable to competition law proceedings. There is a case concerning the French Ministry for Economy about an anticompetitive agreement *(see Société Stenuit v. France [1992] ECHR 34)* and a case concerning the Finland Competition Office (*The Fortum Corporation v. Finland - 32559/96 [2003] ECHR 367 (15 July 2003), at paragraphs 36 and 37*), here the issue was not contested. There are also several cases concerning the Swedish Competition Authority which are of great interest because they entailed a review of the legislative provisions governing judicial review of certain administrative decisions (see paragraph 26 of Swedish Transport Workers Union v. Sweden [2006] ECHR 761).

[42]*Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications [2002] CAT 1 (15 January 2002), at paragraph 98.*

[43]*CA Paris, 15 juin 1999, SA Canal Plus*, JCP G 2000, II, 10254, note J.-C. Fourgoux; Cass. com., 5 oct. 1999, C*ampenon Bernard SGE, JCP G 2000, II,* 10255, note E. Cadou ; *Cass. com. 9 oct. 2001, SA Unibéton*, JCP G 2001, IV, 2870).

[44]*CFI, Enso Espanola SA v Commission of the European Communities. (Competition) [1998] EUECJ T-348/94 (14 May 1998), at paragraphs 37, 38 ; ECJ, Baustahlgewebe GmbH v Commission of the European Communities, 17 December 1998, Case C-185/95 P, (1998) ECR p. I-08417 ; ECJ, 8 July 1999, Montecatini SpA v Commission of the European Communities, Case C-235/92 P, (1999) ECR p. I-04539.*

[45]See Article 29, 6 of the 1 July 1937 Constitution.

[46]See Article 94 of the 17 February 1983 Constitution.

[47]See Article 96 of the 27 December 1978 Constitution.

[48]See Article 8 of the 2 April 1976 even if the Constitution does not say anything about the primacy of international law over statutes.

[49]Article 28 of the Constitution.

[50]Article 91 of the Constitution.

[51]Among dualist countries some deny direct applicability and primacy to international treaties (United Kingdom and Ireland) and some admit the direct applicability but deny primacy (Germany and Italy). In the last instance international treaties do not prevail over ordinary statutes because they are incorporated by an act of Parliament: They simply have the same status as ordinary statutes.

[52]Pursuant to Article 29 (6) of the Irish Constitution.

[53]*J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, HL at 500C per Lord Oliver of Aylmerton.*

[54]*R v Lyons [2002] UKHL 44* at paragraphs 27-28, and paragraphs 39-40.

[55]Or as Rt. Hon. Lord Woolf of Barnes puts it: 'The supremacy of the Parliament in its legislative capacity' (Droit Public – English Style [1995] Public Law 57). In *Mortensen v Peters ([1906] 14 SLT 227*) Lord Justice General said very clearly 'for us an Act of Parliament duly passed by Lords and Commons and assented by the King, is supreme, and we are bound to give effect to its terms'. In even clearer terms Ungoed-Thomas J stated: 'What the statute in itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law' (see *Cheney v Conn [1968] 1 All ER 779* and also *R v Secretary for the Home Department, ex parte Thakrar [1974] QB 684*).

As a consequence, international law is not superior to statutes, which contradicts one of the key principles of international law contained in the Vienna convention on the Law of treaties.[56] The Courts try however to interpret statutes in order to avoid any contradiction with international treaties but if there is a clear contradiction then the Courts cannot make a treaty prevail over a statute. This general rule is not applicable to European Community Law, which has a special legal status. The ECJ has repeatedly held that EC law forms a 'new legal order of international law'[57] which 'became an integral part of the legal systems of the Member States and which their courts are bound to apply'.[58] As a consequence, EC law prevails over municipal laws or a bill of rights of a Member State's Constitution. The ECJ ruled: 'A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing by its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means'.[59]

But because EC law was incorporated in the UK's domestic law by the European Community Act 1972, the House of Lords appears to have accepted that membership of the Communities and the EC Act 1972 have altered the rules on legislative supremacy where there is inconsistency between Community law and domestic law.[60]

The situation in the UK is completely different from that which prevails in France, which is a monist country. France recognises not only direct applicability of international treaties, but also these treaties prevail over statutes. Pursuant to Article 55 of the French Constitution treaties that are regularly ratified and published are superior to statutes[62] provided they are executed by the other party. This position was ratified by the Courts be they administrative or civil. *The Cour de cassation*[61] held in 1975 that international law was superior to statutes. The Administrative Supreme Court, however, took longer to acknowledge this. It first held that international law was superior to administrative acts.[63] The problem the Court had was with statutes. Although the Courts had no problem asserting the superiority of Treaties over anterior statutes (acts passed before the entry into

[56]This principle is summarized in the saying « pacta sunt servanda » and contained in Articles 26 and 27 of the Vienna Convention which provide: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith' (Article 26) and 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' (Article 27).

[57]*NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] EUECJ R-26/62.*

[58]*Costa v Enel [1964] ECR 585.*

[59]*Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629.*

[60]*See House of Lords, R v Secretary of State for Transport, ex parte Factortame Ltd and Others [1990] 2 AC 85.*

[61]It is the French Civil Supreme Court. In order to be easily understood we will use the term State's Council to refer to the *Conseil d'Etat*, the French Administrative Supreme Court. However the term *Cour de cassation* will be used because it does not have any translation in English, it is the French civil Supreme Court. It is sometimes referred to in some English cases. These two Courts have the highest authority in France and are in charge of interpreting the law.

[62]*Cour de cassation, Ch. Mixte, 24 May 1975, Société des cafés Jacques Vabre.*

[63]*Conseil d'Etat, Ass., 30 May 1952, Dame Kirkwood.*

force of the treaty) it was harder for them to assert the superiority of international law over posterior statutes. In 1968 the *Conseil d'Etat* held that statutes prevailed over international law.[64] Consequently an administrative act taken for the execution of a statute could not be struck down by an administrative judge.[65] It was not until 1989 that the Administrative Supreme Court decided to depart from its previous case law.[66] From this case on, international treaties are treated as superior to statutes be they anterior or posterior to the entry into force of the Treaty. The last restriction is that according to both Supreme Courts international conventions are not superior to the Constitution.[67]

II. The consequence of this legal background for the application of Article 6(1) ECHR

This legal background explains the different problems for the applicability of the ECHR in domestic laws.

The acceptance of the individual right of petition on 14 January 1966 led to the incorporation of the Convention for it led to a situation where the ECt HR became a de facto supreme constitutional court of the UK. With the right of petition the number of cases brought to the ECt HR grew rapidly in areas having 'a powerful impact (…) upon the UK's constitutional and legal system'.[68] The numerous judgments where the UK was found in breach of the convention made the situation very difficult. The Convention could not be invoked in a trial and therefore UK Courts could not interpret statutes in a way compatible with the Convention. However, domestic courts tried to interpret ambiguous statutory provisions compatibly with the Convention. Nevertheless, they were unable to do so in cases where statutes conferred broad discretion on administrative authorities when they interfered with their rights. 'This is because a statute conferring broad discretionary powers was regarded as unambiguous, and the Convention as irrelevant, in construing the purpose of the statute. For the courts to require ministers to comply with the Convention in performing their public functions would involve a violation of the constitutional separation of powers, by incorporating the Convention through the back door when Parliament had refused to do so through the front door'.[69]

The continuing and growing gap between the Convention and domestic law made it urgent to incorporate the Convention and explains the campaign to 'bring rights home'[70] leading to the Human Rights Act in 1998.[71] The HRA 1998 contains a general principle of interpretation to avoid direct contradiction between a statute and the Convention. These principles are in substance the obligation of the Court to read primary and subordinate legislation in a way that is compatible with the Convention,[72] and the prohibition on the Courts to strike down legislation where this legislation is clearly incompatible with the

[64]Conseil d'Etat, Section, 1 May 1968, Syndicat général des fabricants de semoules de France.
[65]This doctrine was known as the 'legislative screen', ie the statute was making a screen between the Treaty and the administrative act.
[66]Conseil d'Etat, 20 octobre 1989, Nicolo.
[67]Cour de cassation, Ass. Plén., 2 June 2000, Mademoiselle Fraisse; Conseil d'Etat, 30 October 2000, Sarran, Levacher et autres.
[68]Human Rights Law and Practice, paragraph 1.28. For an account of the cases brought to the ECt HR see paragraph 1.29.
[69]Human Rights Law and Practice, paragraph 1.32.
[70]For an account of this campaign see Human Rights Law and Practice, op. cit., 1.38 on. See also Human rights, constitutional law and the development of the English legal system, selected essays, Lord Irvine of Lairg, Oxford, Hart, 2003, especially part 1; The Law of Human Rights, op. cit., paragraph 1.61.
[71]The HRA was enacted on 9 November 1998, and the substance of the HRA 1998 was brought into force on 2 October 2000.
[72]HRA 1998, Section 3 (1).

convention. The Courts may however make a declaration of incompatibility[73] encouraging Government and Parliament to amend such legislation. Finally public authorities must act in a way which is compatible with the Convention.[74]

Competition authorities, being public authorities,[75] must act in a way which is compatible with the Convention. Moreover, competition authorities are considered tribunal for the purpose of Article 6(1) ECHR; the case-law takes this fact for granted and does not even discuss it.[76]

Once the HRA was passed there was no problem in the UK deciding the applicability of the Convention to the competition authority.

In France the situation is different, but it is interesting to note that the debate focuses on the same problem: How can a national Court leave primary legislation unapplied? In France, Courts have been long to recognize the applicability of Convention rights, but not for the same reasons as the UK. The applicability of the Convention in general did not raise many problems except in the field of the fair trial requirement. The conditions provided for by Article 6 were not easily deemed applicable to administrative procedure. Concerning Article 6, the State Council did not accept at first that administrative law could be concerned with 'civil rights' or with 'criminal charges'. Literally speaking, and since the Blanco[77] landmark case, French administrative law has been built in opposition to civil law which was 'established to regulate relations between individuals'.[78] In addition, administrative penalties were not considered criminal charges.[79] The departure from precedent was made in 1999 with the Didier case.[80] The Civil Supreme court held that Article 6 was applicable to the proceedings before the Financial Services Commission and the Competition Authority. [81]

At this stage we know that Article 6(1) ECHR is applicable to the proceedings before competition authorities. It is now important to assess the extent of this application to competition law enforcement.

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[73]HRA 1998 Section 4 (2). This declaration does not affect the validity of the provision nor will it be binding on the parties in the proceedings. In French Law the Courts cannot either strike down legislation, they just leave the statute unapplied and they apply the Convention directly. This is another consequence of the fact that France is a monist country. In the UK on the contrary the Courts could not do this because they cannot apply directly the Convention.

[74]HRA 1998 Section 6 (1).

[75]Cases take this fact for granted and do not reason on this point: See *Office of Fair Trading v The Officers Club Ltd & Anor [2005] EWHC 1080 (Ch) (26 May 2005), paragraph 89; Office of Fair Trading v not named [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 13.* There is also a case concerning OFCOM where it is clear in the reasoning that it is considered as a public authority: *Office of Communications & Anor v Floe Telecom Ltd [2006] EWCA Civ 768 (15 June 2006), paragraph 39.*

[76]*See Office of Fair Trading v not named [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 6.*

[77]*Tribunal des conflits, 8 February 1873, Blanco, Rec. 1er supplt 61.*

[78]*Tribunal des conflits, 8 février 1873, Blanco, Rec. 1er supplt 61*, concl. David.

[79]We can find the same difficulty of the judges to understand the autonomous meaning of these concept in the UK in some cases where the Court answers the question about the question of the standard of proof: See *Napp Pharmaceutical Holdings Ltd & Ors v Ofcom [2002] CAT 1 (15 January 2002), paragraph 92; Argos Ltd & Anor v Office of Fair Trading [2004] CAT 24 (14 December 2004), paragraph 158; JJB Sports Plc v OFT [2004] CAT 17 (1 October 2004), paragraph 165.*

[80]*Conseil d'Etat, Ass., 3 December 1999, Didier.*

[81]The first decision concerns the *Commission des opérations de bourse* (hereafter COB, the regulatory authority in charge of the regulation of financial operations equivalent of the English FSA) in *Cour de cassation, Ass. Plén., 5 February 1999, COB v Oury.* The second concerns the Competition Council in *Cour de cassation, ch. Comm., 5 October 1999, SNC Campenon Bernard SGE.* These decisions were following a few judgements by the Court of Appeal that held that Article 6 was applicable to the proceedings before regulatory authorities (12 January 1994, *Métrologie internationale n° 93/10408, Fraiberger n° 93/10407*, Haddad n° 93/10407). The Paris Court of Appeal then applied Article 6 to the Competition Commission (*1re ch., sect. Conc., 6 juillet 1994, B.O.C.C.R.F., B.O.S.P. n° 12, Friday 29 July 1994, at page 299*).

(C) THE APPLICATION OF ARTICLE 6 ECHR TO COMPETITION LAW ENFORCEMENT

Is it necessary to apply Article 6(1) ECHR entirely to the proceedings before competition authorities?

According to the ECt HR the proceedings before competition authorities do not have to comply entirely with Article 6(1). The landmark case in this respect is *Le Compte, Van Leuven and De Meyer v Belgium*. In this case the ECt HR recognizes that 'Demands of flexibility and efficiency (…) may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect'.[82] In other words recourse to administrative agencies which do not fully comply with Article 6 is possible.[83]

What the Article requires however is a right to challenge the decision before a judicial body with full jurisdiction providing the guarantees of Article 6(1).[84] If such an appeal is provided, there will be no violation of the Article because the ECt HR 'must consider the proceedings as a whole including the decision of the appellate court'.[85] The consequence is that if the procedure before the competition authority fully complies with Article 6 then no right of appeal is guaranteed by the convention.

What is important here is to understand what 'full jurisdiction' means. The reviewing body 'must have jurisdiction to examine all questions of fact and law relevant to the dispute before it'.[86] It also includes 'the power to quash in all respects, on questions of fact and law, the decision of the body below'.[87] As regards competition matters the creation of appeal tribunals like the CAT, which reviews the case entirely, can cure the defects of the first instance proceedings.[88]

In conclusion, the fair trial requirements are applicable to the procedure before competition authorities. Nevertheless any default may be 'cured' by a correct appeal. It is therefore up to the Parliament or the Judge to impose the respect of Article 6 at either stage of the procedure.

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[82] *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR l, ECt HR, paragraph 51.*

[83] The ECt HR also permits the non application of Article 6 in other circumstances: the justiciable can waive his right to a fair trial (this is especially the case in arbitration cases (see *Colozza and Rubinat v Italy (1985) 7 EHRR 516)*) or in settlement cases. Nevertheless the waiver must be unequivocal (*Poitrimol v France (1993) 18 EHRR 130, §31*) and must not be tainted by constraint (see *Colozza, paragraph 54*).

[84] *Albert and Le Compte v Belgium (1983) 5 EHRR 533, paragraph 29*; see also *Helle v Finland (1998) 26 EHRR 159.* The case law is constant.

[85] *Edwards v United Kingdom (1992) 15 EHRR 417, paragraph 34.*

[86] See *Le Compte, Van Leuven and De Meyere, cited above, paragraph 51(b); Fischer v Austria (1995) 20 EHRR 349, paragraph 29; and Terra Woningen v Netherlands (1996) 24 EHRR 456, at paragraph 52.*

[87] *Schmautzer v Austria (1995) 21 EHRR 511, paragraph 36.*

[88] The CAT has wide powers to determine most appeals under the Competition Act on their merits and may confirm or set aside all or part of the decision, remit the matter to the OFT (or the regulator), impose, revoke, or vary the amount of any penalty, give such directions or take such other steps as the OFT (or sectoral regulator) could have given or taken, or make any other decision which the OFT (or the sectoral regulator) could have made (see schedule 8 Sections 46 (5) and 48 (4), 3, (2) and CAT website : http://www.catribunal.org.uk/about/default.asp#function).

3. The consequences of the application of Article 6 on competition law enforcement

(A) The protections granted by Article 6

I. The provisions that do not raise much problem

Indeed many of the Article 6 provisions do not raise many issues for the purpose of competition law enforcement.

Rights of the parties as regards the proceedings

First, the right of access to a court[89] is a fundamental principle of the law and 'one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.[90] This right is also a Common law presumption.[91] The ECt HR provides that the access must be effective, which could require the provision of legal aid to an indigent person in a particular case.[92] Any limitation must be legally certain, pursue a legitimate aim, comply with the principle of proportionality, and should not impair the essence of the right. This provision should not make any problem given the fact that companies involved in competition law proceedings are seldom 'indigent'. Nevertheless, the HRA had an impact on the regulation of the financial markets: When Parliament created the Financial Services and Markets Tribunal[93] it provided for legal aid. However, no legal aid is provided for the Competition Appeal Tribunal and this could prove to be an infringement of Article 6 if it deprived someone of his rights to a fair trial. In France as the Competition Council's decisions are reviewed by an ordinary court, the Paris Court of Appeal, legal aid is provided.

The ECHR also provides for a right to a fair hearing, which includes a hearing in one's presence,[94] equality of arms,[95] rules of evidence (prohibiting evidence obtained unfairly for example)[96] , freedom from self-incrimination,[97] and a reasoned judgment.[98] This aspect does not raise any problem as the OFT provides for oral representations by the parties under

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[89]This right was first recognized by the ECt HR in *Golder v United Kingdom (1975) 1 EHRR 524.* The Court held that 'it would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court' (paragraph 35).

[90]*Golder v. United Kingdom - 4451/70 [1975] ECHR 1 (21 February 1975), at paragraph 34.*

[91]*Pyx Granite Company Ltd v Ministry of Housing and Local Government [1960] AC 260, 286.*

[92]Legal Aid is compulsory only if someone is charged with a criminal offence (see ECHR Article 6 paragraph 3). As far as civil proceedings are concerned legal aid is one of the means available to the State to achieve the effective right of access to a Court: 'The institution of a legal aid scheme (…) constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 (1)' (see *Airey v Ireland (1979) 2 EHRR 305, paragraph 26*).

[93]Financial Services and Markets Act 2000, Section 134 (1). The draft bill did not provide for legal aid. The First Report of the Joint Committee on Financial Services and Markets shows that the risk of incompatibility with the ECHR as regards costs before the tribunal (paragraphs 211, 212, 213) entailed a change in the bill and the provision for legal assistance before the Tribunal (such a solution was actively wished by Clifford Chance and Herbert Smith (Q 237)).

[94]See in a case where criminal proceedings are involved: *Ekbatani v Sweden (1988) 13 EHRR 504.* This right implies not the defendant's physical presence, the ability to hear and follow the proceedings, to understand the evidence and argument, to instruct lawyers, and to give evidence.

[95]See, for example, *Neumeister v Austria (1968) 1 EHRR 91, paragraph 22; Delcourt v Belgium (1970) 1 EHRR 355, paragraph 28; Dombo Beheer v Netherlands (1993) 18 EHRR 213, paragraph 33; De Haes and Gijsels v Belgium (1997) 25 EHRR 1, paragraph 53; Komaniacky v Slovakia 4 June 2002, paragraph 45.* In essence this right implies that the accused has not a substantial disadvantage to present his/her case.

[96]*Schenck v Switzerland (1988) 13EHRR 242, paragraphs 46-48.*

[97]*Funke v France (1993) 16 EHRR 297:* 'The special features of customs law (see paragraphs 30-31 above) cannot justify such an infringement of the right of anyone 'charged with a criminal offence', within the autonomous meaning of this expression in Article 6 (Article. 6), to remain silent and not to contribute to incriminating himself' (paragraph 44).

[98]*Helle v Finland (1998) 26 EHRR 159.*

investigation.[99] It is also the case before the CAT[100] and the Competition Council. As regards the freedom from self-incrimination, in *Office of Fair Trading v not named*,[101] Justice Morison argues that it is all about the way the question is put:

> If a question were improperly asked, for example 'do you admit that you have been guilty of price fixing?' and the answer 'yes' was given, then the defendants would be entitled to seek relief from the courts to prevent the OFT from relying on that answer in making their determination. Answering and not answering questions does not deprive the defendants of legal redress if the questions asked extend beyond 'purely factual' matters. Thus, the rights of the defendants are fully protected in the event of any abuse of the power to ask questions. The aim of the requirement is to facilitate the investigation; the rights against self-incrimination are not offended; and the defendants' position is fully protected by law.

Finally, the right to a reasoned judgment does not raise any problem as both the OFT and CAT judgments are fully reasoned.[102] For a long time in France it was not compulsory to give reasons for administrative decisions. Since the 11 July 1979 Act, the Administration has to give reasons when it takes an 'unfavourable' act like a sanction for example. Competition law decisions fall within this category.

In addition the ECHR provides a right to a public hearing, which also includes a right to an oral hearing. The right to an oral hearing is provided for by the OFT[103] and the CAT.[104] The right to a public hearing is also provided for before the CAT but the tribunal can restrict this right if it considers that some information is to remain confidential.[105] The hearings of the French Competition Council[106] are not public but the right to an oral hearing is provided both before the Competition council and also the Paris Court of Appeal that reviews its decisions.[107]

The public pronouncement of the judgment contributes to the right to a fair trial as it conveys the public's scrutiny of the affair. This requirement imposes the publicity of the judgment but not the oral pronouncement of the judgment in open court.[108] It can be

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[99]OFT, Under investigation?, at page 16.

[100]The CA 1998 even provides for a pre-hearing (Schedule 8, Section 8 and 9).

[101]*Office of Fair Trading v not named [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 12.*

[102]The CA 1998 only provides for the giving of reason for interim measures (Section 35 (4)) but the study of the decisions shows that they are fully reasoned. The decision of the CAT must contain the reasons (Schedule 8, Section 4, (2), (b), (i)).

[103]See OFT, Under Investigation, at page 15: Oral representations. We will also allow a business an opportunity to make oral representations at a meeting with us if the business has indicated in its written representations that it wishes to do so. Many judgments mention the date of the oral hearing before the OFT. It is even possible to make a PowerPoint presentation (*Argos Ltd & Anor v Office of Fair Trading [2004] CAT 24 (14 December 2004), paragraph 34*). See also an example of parties waiving their right to an oral hearing before the CAT (*Floe Telecom Ltd v Office of Communications [2006] CAT 18 (31 August 2006), paragraph 4*).

[104]Schedule 8, Section 9 of the CA 1998.

[105]See The Competition Appeal Tribunal Rules 2003, Section 50: 'The hearing of any appeal, review or claim for damages shall be in public except as to any part where the Tribunal is satisfied that it will be considering information which is, in its opinion, information of the kind referred to in paragraph 1 (2) of Schedule 4 to the 2002 Act'. This refers to 'commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates'. In ECHR law a party may waive its right to a public hearing provided that the waiver is unequivocal and there is no important public interest consideration that calls for the public to have the opportunity to be present (*Hilkeansson v Sweden (1990) 13 EHRR 1, paragraph 66, applied also in Pauger v Austria (1997) 25 EHRR 105, paragraph 58*).

[106]*See Cour de cassation, comm., 5 October 1999, Société Campenon Bernard, n° 97-15.617.*

[107]See Article L. 463-7 Code de commerce.

[108]*See Preto v Italy (1983) 6 EHRR 182, paragraph 26, Axen v Germany (1983) 6 EHRR 195, paragraphs 29-32; Werner v Austria (1997) 26 EHRR 310, paragraphs 56 to 59.* Although the ECt HR has not ruled specifically on the point as to whether publicity on a website meets the requirements of Article 6 to a public pronouncement of a judgment it appears that the Strasbourg Court very often uses this means to study domestic decisions (see for example *Meftah and others v. France, 26 July 2002, paragraph 26*).

complied with by all the means to make the judgment available to the public. The practice by the OFT and the CAT to publish decisions on a website seems correct.[109] Decisions of the French Competition Commission are also published on the Internet and in an official publication.[110]

Moreover the ECHR provides for the right to a hearing within a reasonable time. This condition protects parties against excessive delays. However this requirement does not raise many problems as competition authorities usually adjudicate within a short period of time.[111]

Finally the ECHR imposes that the accused be informed as to the accusation. This aspect raises no particular issue as OFT[112] and Competition Council[113] guidelines clearly show that people under investigations are informed.

The provisions concerning the tribunal

First the tribunal has to be independent. The ECt HR has consistently held that in order to establish whether a tribunal is independent, 'regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence'.[114] Independent means independent of the executive, of the parties, and of Parliament. This requirement is easily met by Competition authorities as well as reviewing bodies[115] in England and France. It is not the place here to enter into the debate on the degree and the reality of their independence. Suffice it to say that they enjoy a reasonable amount of independence, reasonable enough to explain that this aspect has never been used to challenge their decisions before a Court of law.

Furthermore, the ECHR provides for the right to a tribunal. For the purposes of Article 6(1) a tribunal is characterised by its judicial function. The tribunal must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. It must determine matters within its competence on the basis of rules of law; and its decisions must be legally binding rather than merely advisory. This requirement is interpreted by the ECt HR taking into account all the proceedings before the competition authority and the reviewing body. The Strasbourg Court will see if as a whole the accused had a right to a tribunal. This requirement is not overly problematic given the role of the CAT. However, if the accused can only have his decision reviewed by way of judicial review, it may raise a problem. It has been argued that the Wednesbury test could impair the right to a tribunal as it is such a high one to meet. [116]

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[109]The French Civil Supreme Court held that parties had no right to a public pronouncement of the judgment before the competition council (*Cour de cassation, comm., 5 October 1999, Société Campenon Bernard, n° 97-15.617*).

[110]The name of this official publication is: *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes*.

[111]The OFT guidance contains strict time limits as regards the different stages of the enforcement process but the overall investigation time may vary. In the last annual account of the CAT the duration of the cases were between 45 months and 2 months.

[112]OFT, Under Investigation? At page 16. The picture shows that undertakings are informed at stage 4.

[113]See website: http://www.conseil-concurrence.fr/user/standard.php?id_rub=42.

[114]*Langborger v. Sweden - 11179/84 [1989] ECHR 11 (22 June 1989), at paragraph 32.*

[115]For the latest developments relating to the independence of regulators in England see House of Lords, Select Committee on Constitution Sixth Report, Chapter 7: Relationships with Ministers - Independence and Accountability.

[116]See Stephen Richard, The impact of Article 6 of the ECHR on Judicial review [1999] JR 106. The very restrictive Wednesbury approach resulted in the Court of Human Rights deciding that the applicants had been denied an effective remedy in breach of Article 13 (see *Smith and Grady v United Kingdom [1999] IRLR 734*). In this case the Court of Appeal, applying the Wednesbury test, decided that it was lawful to dismiss servicemen because they were homosexual (see *R v Ministry of Defence, ex p Smith [1996] QB 517*). As Sam Hamilton argues the view of the Court on judicial review is not clear. The ECt HR has held that it is 'valid in some cases in invalid in others, depending on the circumstances of the case'

Finally the ECHR demands that the tribunal be established by law. This requirement is intended to ensure that the judicial organisation in a democratic society should not depend upon the discretion of the executive, but should be regulated by law emanating from Parliament setting out the basic framework concerning the courts' organisation. This provision does not raise any issues as both agencies in England and France are established by Acts of Parliament.[117]

The provisions listed above do not raise many problems. We are now going to analyse the provision that raises the main issue: the right to an impartial tribunal established by law.

II. The main problems: The right to an impartial tribunal and the presumption of innocence

The main problems come (and came from in France) with the right to an impartial tribunal. A last requirement is the presumption of innocence.

The requirements under ECHR law

Impartiality,[118] for the purpose of Article 6, denotes an absence of prejudice or bias. It comes from the English saying 'justice should not only be done but should manifestly and undoubtedly be seen to be done'.[119] Impartiality is to be examined on the basis of both a subjective test of the personal conviction of a particular judge in a given case, and an objective test of whether the judge offered guarantees sufficient to exclude legitimate doubt.[120] The ECt HR gives great importance to this principle because 'what is at stake is the confidence which the courts in a democratic society must inspire in the public'.[121]

In addition to impartiality a tribunal for the purpose of Article 6(1) ECHR should apply minimum standards of fairness namely the presumption of innocence. The presumption means that the burden of proof lies in the hands of the competition authority,[122] but this principle does not prevent it from using the presumptions of responsibility used in competition law. In numerous cases the CAT held that 'the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case and to overcome the presumption of innocence to which the undertaking is entitled'.[123] Therefore the test to be applied in cases where penalties are involved is the civil standard taking account of the gravity of what is alleged.[124] Presumption of innocence requires a certain amount of evidence to overcome this presumption. As CAT held in Napp, 'It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be'.[125]

(The HRA and the regulation of utilities (1999) 10(3) Utilities Law Review 115). It is also the view of Lord Lester of Herne Hill (The impact of the European Human Rights Law (1996) JR 21 at paragraph 15).

[117]In England the OFT is a non-ministerial government department established by statute in 1973. In France the Competition Council was established by statute in 1986 (Ordonnance n°86-1243 dated 1 December 1986 on the freedom of prices and competition).

[118]Impartiality is part of the principle of natural justice and is entrenched in English law. It is also recognised in French law but not in the meaning of the convention as we will show.

[119]See *R v Sussex Justices ex p McCarthy [1924] 1 KB 256, 259.*

[120]See *Fey v Austria [1993] 16 EHRR 387, paragraph 28.*

[121]See *Ferrantelli and Santangelo v Italy (1996) 23 EHRR 33, paragraph 58.*

[122]See *Napp v Director General of Fair Trading [2002] CAT 1 at paragraph 99, hereafter 'Napp'.*

[123]See *JJB and Allsports v. Office of Fair Trading [2004] CAT 17, at paragraph 204.*

[124]See *Office of Fair Trading v W. Austin & Sons & Ors [2005] CAT 25 (6 July 2005), paragraph 116.*

[125]'Napp' at paragraph 109.

Given the ECt HR case law[126] judges and governments have the choice to impose the respect of the fair trial requirement at the first stage before the competition authority or after. The comparative study of these two countries shows clearly two different situations: France has chosen to draw the line between the requirements that are applicable at the first stage, while the UK tends to privilege the respect of the fair trial by a correct appeal (this is at least the position of the judge). The position of the English Parliament is nevertheless ambiguous. As a whole we want to show that the situation in England is ambiguous and that judges seem embarrassed.

(B) The situation in England and France

I. The French choice: Drawing the line between the requirements that are applicable to the proceedings before competition authorities and those that can be cured by a correct appeal

The principle of impartiality of the status of the rapporteur

To understand the debate that has taken place in France it is necessary to remember that the principle of separation of powers is deeply entrenched in the legal culture of this country. This principle is stated in the 1789 Declaration on human and citizens' rights and goes back to the thoughts of the Enlightenment era, and especially the work of Montesquieu.[127] Article 16 of this Declaration provides that a society where the separation of power is not determined has no Constitution.[128] M. Troper has explained in his thesis[129] that in the French doctrine each power should be specialized in a particular function without participating in another function. Even if this principle is proclaimed it has never been implemented in a strict way. The principle is nevertheless strong in the French legal culture and when Parliament began to create regulatory authorities combining the powers to regulate, implement, and enforce the regulation many prominent authors criticized it. Especially, the sanctioning (or enforcement) power was heavily criticized because it was thought that only a court of law could have such a power. The Constitutional Council held that the sanctioning power was constitutional, while strictly limiting the use of this power in the respect of principles inspired by criminal law:[130] First administrative sanctions cannot contain a deprivation of liberty, and second the principles of legality, necessity, proportionality shall apply. The decisions of the Constitutional council entailed a 'criminalization' of the regime of administrative sanctions.

As regards the procedural principles contained in the ECHR French courts have tried to draw the line between the requirements of Article 6 that have to be complied with at the first stage and those that can be cured by a correct appeal.

The main problem in France has involved cases where one body combines the role of investigator, prosecutor, and judge.

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[126]See the developments above.

[127]It is interesting to quote him all the more as it is his study of the English system that helped him theorize this principle: 'There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals' The spirit of laws, transl. by T. Nugent, revised by J.V. Prichard, 1914 by G. Bell & Sons, Ltd., London).

[128]« *Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution* ».

[129]M. Troper, La séparation des pouvoirs et l'histoire constitutionnelle française, LGDJ, 1973.

[130]*Décision n° 89-260 du 28 juillet 1989, Loi relative à la sécurité et à la transparence du marché financier, paragraph 6* (Security and transparency of the financial market Act).

I will focus here on the problem of the combination of functions inside the regulators of prosecutor and jury. In this respect the main difficulty was the role of the '*rapporteur*' inside the Competition Council. What is the exact function of the '*rapporteur*'? S/He is designated by the President of the Competition Council to investigate the alleged anticompetitive practices. After the adversarial discussion of his/her report during the hearings of the undertakings he/she also sits during the deliberations of the Council even if he/she had no entitlement to vote.[131] This article introduced confusion between the functions of prosecutor and jury. The '*rapporteur*' who investigates is under an obligation to collect both incriminating and exonerating evidence, but there had been voices to argue that 'rapporteurs' behave in fact like prosecuting judges only trying to prove guilt.[132] Others have shown how sometimes they departed orally from their written statements of objection.[133]

Litigants have tried to challenge the role of the '*rapporteur*' on the basis of Article 6 but the Court of Appeal has for a long time considered that this fact alone could not justify the quashing of the decision because this decision was reviewed by a court with full jurisdiction.[134] The Civil Supreme Court was more embarrassed: In its annual report for 1992 it argued that the sitting of the '*rapporteur*' during the deliberations of the Council allowing him/her to speak 'does not appear in harmony with the adversarial principle or the equality of arms principle'.

In the early 90s there was a contradiction of the Courts between their case law in which they accepted the participation of the '*rapporteur*' in the deliberation and the speeches of the judges in their discourse. The first blow was struck by the *Cour de cassation* in a case concerning the COB[135] in the *Oury* case.[136] The Court held that the '*rapporteur*' could not participate in the deliberations.[137] It was very likely that the solution was to be extended to the Competition Council. It was done first by the Paris Court of Appeal[138] which held that the participation of the '*rapporteur*' in the deliberations is in contradiction with Article 6 ECHR. The Civil Supreme Court finally decided that this participation was unlawful.[139]

Other consequences of Article 6 ECHR

Article 6 ECHR also helps regulating the way competition and regulatory authorities begin their own-initiative investigations. When they begin their investigations competition authorities should not give the impression that the case has already been judged. The statement of objection must not appear as a prejudgment. As a consequence the internal organization of the Competition council has been changed: The persons who sit to decide own-initiative investigations are different from the ones who sit to judge the merits of the

[131]Article L. 463-7 Commerce Code

[132]Ch. Gavalda et C. Lucas de Leyssac, Commentary on the 1 December 1986 Ordonnance, Revue concurrence consommation, n° spéc. n° 144.

[133]G. Canivet, L'obligation du procès équitable et les règles du contradictoire dans les procédures de sanction en matière de concurrence, Rev. conc., consom., juill./août 1995, at page 37. See also E. Claudel, Présence du rapporteur au délibéré du conseil de la concurrence, note sous *Cour de cassation, Com., 5 October 1999, Campenon Bernard*, RTD Com. 2000 at page 249.

[134]*26 April 1994, Sté pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et interprètes, BOCC 18 May 1994, at page 182.*

[135]French equivalent of the FSA, which sanctions market abuses.

[136]*Ass. Plén., 5 February 1999.*

[137]For an English account of this decision by the *Court of Appeal Fleurose v Securities & Futures Authority Ltd. & Anor [2001] EWCA Civ 2015 (21 December 2001), paragraph 11.*

[138]*SA Canal Plus, 15 June 1999, BOCCRF, n°14, 25 August 1999, at page 439.*

[139]*5 October 1999, Société Campenon Bernard.*

case. The Court of Appeal held that the '*rapporteur*' could participate in the decision on own-initiative investigations.[140]

Similarly the Competition council has also changed its internal organization to further the respect of Article 6 ECHR with regard to interim measures. The Council decided that persons who had sat to adjudicate on interim measures could not sit to adjudicate on the merits of the case.[141] In doing so the Competition council anticipated a decision of the Civil Supreme Court holding that the Council had infringed the impartiality principle by adjudicating on the merits of the case with the same persons sitting in the division adjudicating on interim measures.[142]

This solution could not be applied to commitment procedures as it has recently been held that they do not involve a determination of a criminal charge.[143]

II. The situation in England: The law as it stands is clear but there are signs of ambiguity

The law as it stands up to now

The situation under the law as it stands is clear. Article 6 ECHR applies to the proceedings before competition and regulatory authorities, but not entirely. The CAT has held in Napp that 'the fact that these proceedings may be classified as 'criminal' for the purposes of the ECHR gives Napp the protection of Article 6, and in particular the right to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6 (3) including the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him' (Article 6(3)(d))'.[144] In addition, in the context of civil rights proceedings LJ Schiemann held that 'clearly the proceedings had to be fair' which means the 'SFA had to inform Mr Fleurose in good time of the nature of the charges, that he must have adequate time and facilities to prepare his defence, a proper opportunity to give and call evidence and question those witnesses called against him'. This applies a fortiori to criminal proceedings involved in competition law enforcement. In conclusion on this point minimum standards of fairness should apply in the proceedings before competition authorities.

Three other Article 6 requirements apply at this stage: The presumption of innocence, the right against self-incrimination,[145] and the right to a fair trial.[146]

A last consequence of the application of Article 6 is that the means used by competition authorities that infringe on an ECHR right have to be proportionate.[147] It has to be noted in this respect that with the HRA the proportionality principle became an independent

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[140] *Cour d'appel de Paris, 27 November 2001, SA Caisse nationale du crédit agricole et a., BOCCRF 31 January 2002.*
[141] Annual Report 2000, t. I, at page 4.
[142] *See Cour de cassation, Commercial Division, 9 October 2001, Sté Béton travaux et a., no Y 98-21.987, BOCCRF 31 December, Bull. civ. IV, no 160.*
[143] *See Paris Court of Appeal, 6 November 2007, Société Canal 9 SAS.*
[144] *See Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications [2002] CAT 1 (15 January 2002), paragraph 99.*
[145] *See Office of Fair Trading v not named [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 6.*
[146] *See Office of communications & Anor v Floe Telecom Ltd [2006] EWCA Civ 768 (15 June 2006), paragraph 43.*
[147] *Office of Fair Trading v not named [2003] EWHC 1042 (Comm) (14 May 2003).* However this is a general principle of EC law.

ground for judicial review.[148] This fact, according to Tony Prosser,[149] 'may encourage the Courts to take a more interventionist approach in reviewing regulatory decisions in the future'.

However, any defects in fairness of these proceedings will be cured by a correct appeal. This explains why the Courts have never quashed a decision of a competition authority on this ground. The CAT held: 'It follows, in our judgment, that the Tribunal has full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab *initio* by an impartial and independent tribunal able to take its own decision'. [150]

A POSSIBLE AMBIGUITY?

The law as it stands is therefore clear up to now. However it is possible to feel a certain ambiguity in some judgments. In the *Napp* judgment the CAT held that: 'We also accept that there is force in the argument that the administrative procedure before the Director does not in itself comply with Article 6(1), notably because the Director himself combines the roles of investigator, prosecutor and decision maker'.[151] The ambiguity is reinforced by a recent willingness of Parliament to ensure the fairness of the proceedings. First this can be shown with the reform of the FSA, and second by the current concerns of the Select Committee of the Constitution.

The reform of the FSA has shown a will to expand the protection granted by Article 6 to the first stage proceedings. This example is interesting to study as FSA's powers are very close to those of competition authorities.[152] According to the Joint Parliamentary Committee on Financial Services and Market, 'The main focus of comment on the draft Bill has been on the disciplinary process. There has been a perception that the FSA internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and also that the FSA will be able to act as 'prosecutor, judge and jury''.[153] As a consequence these functions were separated: A Regulatory Decisions Committee (RDC) responsible for reaching decisions on disciplinary matters was created, the members of the RDC being independent from the FSA. RDC's conclusions are intimated to the FSA's Enforcement Committee, which takes the final decision. This gives effect to the requirement of Section 395 FSMA 2000 that such decisions must be made by persons independent of those who investigated the matters.[154]

This system was set up because of a strong belief that the initial design of the process, which did not provide for this separation, lacked fairness because the FSA acted as both prosecutor and judge. This separation 'intends that the judicial function of deciding on breaches and penalties will be separated from its prosecution function'.[155] The Parliamentary

[148]See Lord Nolan in *Alconbury [2001] UKHL 23; [2001] 2 All ER 929 (9th May, 2001), paragraph 151.*
[149]Tony Prosser, Il sistema dei ricorsi contro le autorità di regolazione nel Regno Unito, Seminar of the Università degli studi di Milano - Bicocca Il ruolo del giudice di fronte alle decisioni amministrative per il funzionamento dei mercati.
[150]*Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications [2002] CAT 1 (15 January 2002), paragraph 499.* This position can also be found at common law (*Lloyd v McMahon [1987] 2 WLR 821, at pages 4 and 5*).
[151]At paragraph137 of the judgment.
[152]Apart from the disciplinary powers of the FSA.
[153]At paragraph 147.
[154]See I. MacNeil, An Introduction to the Law on Financial Investment, Oxford, Hart Publishing, at page 84.
[155]G. Staple, Financial Services and the Human Rights Act, in The Human Rights Act and the Criminal Justice and Regulatory Process.

concern is also expressed by the Select Committee on the Constitution.[156] Other writers express a feeling that Courts would be willing to impose a greater standard of fairness before competition authorities. In a recent article, Aidan Robertson, Maya Lester and Sarah Love concluded by saying, 'there are some indications that a more intrusive standard of judicial review of competition decisions may be developed. This is particularly likely in reviews for incompatibility with (…) the ECHR, are likely to result in a more intrusive review of a regulator's decision, on grounds of proportionality'.[157]

4. Future possible developments

(A) The possible consequences of the entry into force of the Lisbon Treaty

Is the Lisbon Treaty likely to change the current situation at English law and reinforce procedural safeguards before competition authorities? The Lisbon Treaty integrates to EU law two important human rights texts: The Charter of Fundamental Rights of the European Union (the Charter)[158] and the ECHR.

The Charter also provides fair trial rights and is binding on Member States when they are implementing EU law.[159] The Charter is thus applicable when a competition authority applies EU competition law. The UK and Poland have signed Protocol 7 that gives an interpretation of the Charter. Article 1(1) of the Protocol provides that the Charter does not extend the ability of the ECJ or any UK or Polish court to find the laws and practices of the UK or Poland inconsistent with the Charter, and Article 2 provides that the Charter does not create new rights. This protocol would not prevent the Courts from possibly expanding Article 6(1) ECHR rights as it is contained in domestic law.

In general, the Constitution Committee argues that the Charter 'would be less of a radical step than at first it may appear'.[160] At EU level it may be a powerful drive to 'Article-6-proof' antitrust proceedings.[161] Indeed UK and French concerns about the combination of prosecutor-judge and jury functions of competition authorities are echoed at EU level[162] as it had been in the US during the 1940s.[163]

The Lisbon Treaty also allows the EU to become a signatory of the ECHR. But the Constitution Committee concludes 'the European Union's accession to the European Convention on Human Rights should have no impact on national law'.[164]

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[156]See minutes of evidence, memorandum by Professor Tony Prosser: 'What is important is that there is a degree of internal separation of powers where issues are particularly sensitive'.
[157]Judicial Review of Competition and State Aid Decisions, ECLR (2007) 28 (10), 553-562.
[158]Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF
[159]Article 51 (1).
[160]ropean Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution, paragraph 67.
[161]See E. M. Ameye, The interplay between Human Rights and Competition Law in the EU, ECLR, 2004, 25 (6), 332-341 ; A. Andreangeli, Toward an EU Competition Court: "Article-6-proofing" antitrust proceedings before the Commission, World Competition, 2007, 30 (4), at pages 595-622.
[162]Ibid.; Wouter P.J. Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A legal and Economic Analysis, World Competition 27 (2) 201-224, 2004; Wouter P.J Wils, Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law, World Competition, March 2006, Vol. 29 Issue, Number 1 at pages 3-24.
[163]See Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, 1941, at page 43.
[164]At paragraph 78.

(B) THE FUTURE ATTITUDE OF ENGLISH COURTS WILL BE INFLUENCED BY THEIR DEFERENCE[165] TO LEGISLATIVE AND EXECUTIVE CHOICES

This deference would mean that it is not the Courts that will impose the respect of Article 6(1) ECHR to the first instance proceedings. This deference is a corollary to the concept of margin of appreciation developed by the ECt HR[166] and UK Courts 'have developed their own autonomous concept of deference'.[167] As Lord Cooke of Thorndon puts it, 'there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention'.[168]

(C) THE NECESSITY TO STRIKE A BALANCE BETWEEN PROCEDURAL SAFEGUARDS AND THE EFFICIENCY OF ENFORCEMENT PROCEDURES

One of the concerns of the Courts is that expanding HRA rights would undermine the efficiency of the enforcement process. But are there not more problems in not applying the impartiality principle? The UK Parliament clearly answered yes to this question in relation to the FSA. This concern was also shared in the United States. The 1941 report on Administrative Procedure stresses this point: 'Procedure at this stage must be framed (…) in such a way as to give convincing assurance (…) that the deciding body (…) is not motivated by any desire to deal with the parties or their interest otherwise than in a manner which is an objective appraisal of the facts and the furtherance of the public duty'.[169] Thus the report recommends the separation of the adjudicating function[170] from other functions. We will try to defend this idea using three sets of arguments based on constitutional values, the quality of the decision, and compliance.

I. ARGUMENTS BASED ON CONSTITUTIONAL VALUES

K. Yeung has tried to show the importance of constitutional values to secure compliance. She argues: 'In liberal democratic societies, punishment is legitimated not by persuasion (…) but by a finding of guilt determined in accordance with the requirements of procedural fairness'.[171] Procedural rights, 'by confirming that due consideration has been given to any representation made by interested parties, enhance public confidence in the decision-making process'.[172] This argument should be taken into account as regulators usually lack legitimacy being independent from Ministers which are accountable to Parliament. As C. Veljanovski puts it: 'The flaws in the present system arise from the wide discretion given to the regulators to make determinations and negotiate compliance with the utilities within a system which has little regard for due process and accountability'.[173]

[165]See P. Craig, The Courts, the Human Rights Act and Judicial Review, LQR 2001, 117 (oct), 589-603.
[166]See for example *Handyside v United Kingdom (1979) 1 EHRR 737, paragraph 48.*
[167]See P. Craig, op. cit..
[168]*Regina v. Director of Public Prosecutions, ex parte Kebilene and Others [2000] 2 A.C. 326.*
[169]At page 43.
[170]At page 55.
[171]K. Yeung, Securing Compliance - A Principled Approach, (2004) Hart Publishing, Oxford.
[172]K. Yeung, op. cit., at page 44.
[173]C. Veljanovski, 'The power of the regulator' in But Who will Regulate the Regulators?; (1993), London, Adam Smith Institute, at page 25.

II. Arguments concerning the quality of the decision

Bentham was the first to study the relationship between procedure and outcome. 'Procedures are there to produce accurate outcomes'[174] or rectitude as Bentham said. The purpose of the legal process is indeed to apply the law accurately. That is why unfairness in the design of procedures could lead to an unsatisfactory decision.

As Wouter Wils shows in an article, the combination of investigative, prosecutorial, and adjudicative functions may entail a risk of prosecutorial bias. This is a particularly voiced criticism at EC level.[175] Wouter Wils identifies three possible sources of prosecutorial bias: Confirmation bias, hindsight bias, and the desire to justify past efforts and the desire to show high level of enforcement activity. Establishing internal checks and balances can reduce this risk.

Moreover an impartial and public process permits reaching a better decision. As M. P. Schinkel argues in a recent article entitled Forensic Economics in Competition Law Enforcement procedural fairness enhances the quality of forensic economic analysis as it reduces the scope for factors other than substantive to influence decision-making.[176]

III. Procedural human rights as part of a compliance strategy

The decision reached after a fair process would be better complied with. As F. Montag shows, the defects of the procedure before the European Commission led to a 'lack of acceptance' and are illustrated by the fact that 'hardly any decisions imposing significant fines escape being challenged'.[177] This criticism is particularly acute in relation to merger control. The lack of fairness led to heavy criticisms from the House of Lords Select Committee on the European Union during the consultation of the European Commission on the Green Paper reviewing the Merger Regulation.[178] The conclusions of the report stress that 'efforts should focus (…) on improving the internal checks and balances in the ECMR regime. The concerns about due process are best addressed by enhancing the procedural safeguards in the current system. The Commission should divide responsibility for the consideration of cases in Phase I and Phase II'.[179]

Acceptance of the decision is essential to regulators and explains why according to us procedural human rights should be considered part of a compliance strategy. The problem of the French choice is that as the Courts imposed the respect of procedural rights there has been no reflection on the way these rights could enhance acceptability and compliance with decisions.

The literature on compliance does not pay much attention to human rights issues. Attention of writers has focused on the necessary conversation between the regulator and the community it regulated,[180] on the different styles of enforcement process from the

[174]D.J. Galligan, Due Process and Fair Procedures, A study of Administrative Procedure, Clarendon Press, Oxford, 1996, at page 10.
[175]See for example A. Winckler, Some Comments on Procedure and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control? (2003) 26 World Competition 219, at pages 231-232.
[176]Journal of Competition Law and Economics, (2007) 4 (1), at page 14.
[177]The Case for a Radical Reform of the Infringement Procedure under Regulation 17, E.C.L.R. 1996, 17 (8), at page 430.
[178]Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6, 11.12.2001.
[179]Paragraphs 248 and 255 of the report.
[180]See J. Black, Talking about Regulation, 1998, Public Law 97.

compliance approach to the sanctioning approach,[181] or the persuasive and insistent strategy,[182] or the difference between the American approach (adversarial, legalistic) and the English approach, more flexible and discretionary.[183] Similarly theories of enforcement like responsive regulation[184] prescribe the strategies regulator should adopt to secure compliance based on the model of the enforcement pyramid. The most recent theories like 'really responsive regulation' stress that regulators should be 'responsive not only to the attitude of the regulated firm but also to the operating and cognitive frameworks of firms; the institutional environment and performance of the regulatory regime; the different logics of regulatory tools and strategies; and to changes in each of these elements'.[185]

This is very important as it shows that the enforcement process should also be thought as a continuance of regulation. There is no reason why the dialogue, the conversation regulators have with the community they regulate, should stop at the enforcement stage.

Impartiality and fair procedure should therefore be the core of a compliance strategy in a regulatory environment because it allows this participation to the enforcement process that is part of the continuing dialogue the regulator has with the community it regulates.

To show the importance of human rights procedural safeguards in the compliance strategy it is necessary to use the social psychology studies that have emphasized the importance of procedural legitimacy. The conclusions of these studies show that the acceptance of an institution's decision is not only derived from the result of the decision, the sanction, but from one's conception of the institution. What is interesting in these studies is that an unfavourable decision can nevertheless be accepted as legitimate provided the procedure appears fair. Tom R. Tyler's studies on procedural justice show that people tend to accept a decision because they think it has been taken following a fair procedure. Tyler's conclusions show that 'the legitimacy of both local and national legal institutions, and the willingness to accept their decisions, are influenced by views about the fairness of their decision-making procedures'.[186] The use of fair procedure is a key element in building trust and willingness to comply with the decisions.[187]

5. Conclusion

This study has shown three things. Even though Article 6(1) ECHR is applicable to competition law enforcement, the two countries enjoy a certain amount of discretion as to the stage at which they want to apply it. In this respect France and the UK differ in the way they consider impartiality. The combination of functions is prohibited in France whereas UK Courts do not seem to be willing to intervene. Yet, taken as a whole the situation in England is not very clear and there are signs that an evolution could occur. Even if Courts tend not to intervene too much, Parliament seems to be very concerned about this problem.[188] Finally we tried to make a case for a way to think the integration of human rights issues into a compliance strategy.

[181] K. Hawkins, Environment and enforcement, 1984.
[182] B. Hutter, Compliance: Regulation and Environment, Oxford, Oxford University Press.
[183] D. Vogel, National styles of regulation: Environmental Policy in Great Britain and the United States, Ithaca, Cornell University Press.
[184] I. Ayres and J. Braithwaite, Responsive Regulation, 1992.
[185] Robert Baldwin and Julia Black, Really Responsive Regulation (2008) 71 (1) 59-94.
[186] Tom R Tyler and Kenneth Rasinski, Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson, Law & Society Review, Vol. 25, No. 3 (1991), at pages 621-630, at page 621.
[187] Tom R Tyler, Does the American Public Accept the Rule of Law - The Findings of Psychological Research on Deference to Authority, DePaul Law Review 661 (2006-2007), at page 665.
[188] See the reform of the FSA, the concerns of the House of Lords Select Committee on the Constitution (above) and of House of Lords Select Committee on the European Union (see above its concerns about merger control procedures).

Competition Law in the developing world: The why and how of adoption and its implications for international competition law

DINA I. WAKED*

Developing countries face unique adoption processes, local circumstances, and concerns that makes their competition laws and enforcement practices distinguishable from more developed countries. This article analyses whether these are sufficient to argue for different laws that address different goals distinguishable from economic efficiency and consumer welfare.

1. INTRODUCTION

Over the last decade most developing countries have adopted competition laws that aim at preventing anticompetitive and monopolistic practices and that facilitate efficient competitive environments.[1] The motives to adopt these laws have varied. In some instances, rules have been adopted over the course of many years in response to local pressures, in order to mend behaviours imposing social costs on societies. In other instances, rules have been recommended as tools to achieve development. In yet other circumstances, they were imposed through treaties and international pressure. Most developing countries either adopted competition rules in response to recommendations of international institutions or because of various obliging treaties they signed.

In an attempt to benefit from the experiences of countries preceding them in enacting competition rules, newly adopting countries passed rules modelled on the legislations of developed countries. This mode of adopting competition rules does not always address local needs, legal institutions or general conceptions of the rule of law. However, the common denominator is that competition rules are essential to abolish undesirable practices that hamper progress, innovation, growth and development.

This article provides an in depth analysis of the phenomena of adoption of competition laws across the developing world. The reasons behind this heightened interest in competition law codification are examined to assess *why* countries adopt competition laws. Then the issue of *how* do they draft their legislation is tackled. Followed by an inquiry into whether developing countries need *different* laws than those adopted in the West. The following will summarise the different parts of the article.

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I thank Einer Elhauge for supervising the work on which this article is based and for continuous discussion and support. I also thank Hani Sayed, David Gerber, an anonymous referee and the participants at the ICC Conference for valuable comments.
[1]The terms antitrust and competition law will be used interchangeably throughout the article.

The first part of the article explores the reasons why developing countries adopt competition laws. These reasons cover international pressures as well as promises of development associated with adopting these laws. The article investigates the correlation between competition law and development. A major justification for adopting these laws in the developing world is the extent to which such laws positively impact development. This is evident in the overwhelming literature and specifically the discourse at the World Trade Organisation (WTO) and Organisation for Economic Co-operation and Development (OECD) supporting a positive correlation between competition law adoption and development. Thus, the article examines the literature, empirical studies and WTO/OECD publications to analyse this correlation. However, despite this generally accepted positive correlation, the opposing literature demonstrates that this allegation is not uncontested.

The second part of the article assesses the distinctive nature of developing countries' encounter with adopting competition rules. The challenges they face and the unique nature of their legal culture are presented. This is followed with an inquiry into whether these unique circumstances suffice to argue that developing countries need *different* laws than those adopted in the West.

The argument is as follows: developing countries have not only unique circumstances that make the laws developed in the West impossible to enforce, but also, they need different laws that address different goals. These unique goals, that better address the needs and wants of developing countries, encompass various claims regarding redistribution, efficiency, promoting national champions, international competitiveness, import substitution, development, growth and innovation.

The third part of the article is dedicated to exploring an alternative way of utilizing competition law to address non-economic and/or social goals, particularly redistribution. The article presents the arguments for such an approach and illustrates how economic efficiency may actually be fortified with a Coasian deal[2] that not only takes both consumer and producer welfare into consideration but also introduces some elements of redistribution. Hence, this approach manages to combine many of the goals that are important for the developing world.

In the conclusion, the preceding analysis is linked to the debate surrounding international competition law and positions the role played by the developing world therein.

2. Developing countries adopt competition laws: Why?

The main factor that led to the widespread adoption process is the pressure of the WTO and other supranational bodies, particularly the European Union. However, developing countries were not only pressured to adopt these laws. They also believed the rhetoric of these supranational bodies and the writings of academics about the positive relationship between adopting and/or enforcing competition law and development. Competition law suddenly seemed like the missing element promising prosperity and growth. These two

[2]See Einer Elhauge and Damien Geradin; *Global Antitrust Law and Economics*; 1st ed.; Hart Publishing; 2007; 901. The article appropriates a new concept developed by Einer Elhauge termed "Consumer Trust" which deals with the following idea: "If the dollar gains to the merging parties exceed the dollar losses to consumers, the merging parties could devise some mechanisms to transfer enough of their gain to consumers to offset any losses to those consumers."

igniting forces are discussed below. Furthermore, the relationship between competition and development is analysed critically to present another side of the debate.

(A) Pressure by supranational bodies

Competition laws have been regarded as an essential component of economic reform. This has been the case ever since competition laws were on the agenda of the negotiations to establish an International Trade Organisation (ITO) after WWII. Later, the General Agreement on Tariffs and Trade (GATT) endorsed the earlier provisions of the ITO on restrictive business practices in a "best-endeavour" clause.[3] However, the GATT does not impose specific provisions on the treatment of private restrictive business practices (RBPs).[4] Thus, the members of the WTO can freely adopt national competition laws as long as they do not infringe the principle of non-discrimination.[5] Moreover, the WTO deals with the actions of governments only and not of private parties.[6] The United Nations and the OECD continue to deal with the issue of competition law adoption in developing countries and they have adopted non-legally enforceable 'codes of conduct' to prevent anticompetitive practices.[7]

The new wave of amplified interest in adopting competition legislation in developing countries originated in the wave of neo-liberal reforms, which resulted in privatisation and liberalisation. The goals of these reforms were to end government monopolies and intervention in the economy. However, with the wave of privatisation, government monopolies were replaced by private monopolies yielding the same anti-competitive effects. Thus, adopting competition rules became a priority on the agenda of economic growth in many less developed countries. This is especially true for those countries that chose a competition-friendly policy as an ingredient in their broader development agenda. Some countries, however, continued to prefer concentration to competition, and hence had less of a drive to adopt competition laws of their own initiatives. To add to this heightened interest in adopting competition laws is the increased cross-border influences of anti-competitive practices.[8]

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[3]Bernard Hoekman; 'Competition Policy and the Global Trading System: A Developing-Country Perspective'; (March 1997); 1735 The World Bank Policy Research Working Paper; 1.

[4]Bernard Hoekman and Petros C. Mavroidis, 'Economic Development; Competition Policy and the World Trade Organization'; (October 2002); 2917 The World Bank Policy Research Working Paper; 14.

[5]The General Agreement on Tariffs And Trade (GATT 1947) Article III *National Treatment on Internal Taxation and Regulation*, 5. (III. 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.). For a variety of readings of the nondiscrimination provision see Einer Elhauge and Damien Geradin; *Global Antitrust Law and Economics* (2007); Chapter 8.

[6]Hoekman and Mavroidis; above note 4; at 19.

[7]Hoekman; above note 3; at 1. See also Cassey Lee; 'Model Competition Laws: The World Bank-OECD And UNCTAD Approaches Compared'; 96 Centre on Regulation and Competition, Working Paper Series.

[8]Paul Cook; 'Competition Policy, Market Power and Collusion in Developing Countries'; (December 2002); 33 Center on Regulation and Competition Working Paper Series; 3.

The role played by the WTO cannot be undermined in assessing the importance associated with competition laws on the development agendas of many countries. The General Council of the WTO created a Working Group in April 1997 on the Interaction Between Trade and Competition Policy. This Working Group has emphasised the need of developing countries to adopt competition rules in regard to the global merger wave underway and to the structural changes taking place in the developing countries themselves.[9] The reason why the WTO focuses on competition law adoption is the widely believed interaction between these policies and the expansion of free trade. Free trade needs are next to removal and liberations of barriers, the abolition of obstacles originating from private restraints like abuse of dominance, monopolisation, import cartels, horizontal and vertical restraints.[10]

The involvement of the WTO in the process of developing countries' competition legislation adoption is far-reaching. In some instances the WTO encourages developing countries to adopt US or EC type competition policies with allowance for time lags to be able to efficiently implement these rules. The WTO's continuous attempt to influence, encourage and facilitate the adoption of competition legislation in developing countries may also be explained by its aspirations of instituting universal competition policies under its umbrella. Moreover, its insistence that developing countries adopt rules similar to those in more developed countries can be explained by looking at the effects of global anticompetitive conduct with relation to trade. If laws adopted in developing countries were fundamentally different from those in the advanced world, the ability of the West to intervene when their interests are at stake as a result of anti-competitive practices in developing countries would be limited. To overcome these negative consequences the WTO is repeatedly encouraging harmonisation of the competition legislation as a first step towards the achievement of this goal. Whether this is a good or bad approach, from the standpoint of a developing country, is debatable and will be addressed in the latter parts of the article.

It is, however, important to note that the role played by the WTO in encouraging competition law adoption in the developing world is only part of a bigger picture where many constituents are involved. It would be simplistic to assume that the WTO is the only driving force pressuring the adoption of these laws, especially looking at the EU treaty conditionality that initiated the adoption of these laws in many countries.

The European Union has played a more active role in the competition law adoption process of developing countries, where 'some argue that today the EC competition law is the dominant model of competition law in the world.'[11] Treaties, such as the Accession Agreements signed by Eastern European countries to join the EU or the Euro Mediterranean Partnership Treaties signed by various non-European Mediterranean countries and the EU, oblige the signatories to adopt competition laws modelled on

[9]Ajit Singh and Rahul Dhumale; 'Competition Policy, Development And Developing Countries'; (November 1999); 7 T.R.A.D.E. Working Papers; 3.
[10]Damien Geradin; *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries*; World Bank Papers; 2004; 21.
[11]Seppo Reimavuo and Markus Händelin; 'Establishing a Credible Competition Authority – The Egyptian Case'; (March 2005); Trade Enhancement Prgramme A (TEP-A) Component 2 Egypt-European Association Agreement, 40 (unpublished report, on file with the author).

Article 81 and 82 of the EC Rome Treaty.12 One of the most comprehensive studies assessing the presence of 'laws on the books' suggests that 'the impetus for adopting antitrust laws appears related to the imposed guidelines of supranational bodies, in particular the requirements of the European Union.'[13]

(B) COMPETITION LAW LEADS TO ECONOMIC DEVELOPMENT: REALLY?

The direct impact of adopting competition laws on prosperity, economic growth, and development is the reason furnished by international institutions for developing countries to enact these laws. This assumption is not uncontested and some literature supports the argument that competition law is not the cure to the malfunctions of these economies in need of reforms, but recommends instead removal of entry and exit barriers, rather than adoption of competition laws. These two stances will be addressed in turn.

I. COMPETITION LAWS LEAD TO ECONOMIC DEVELOPMENT

As discussed, many developing countries have adopted competition laws in the last decades. This 'high level of interest suggests competition law is widely seen as a desirable and worthwhile economic policy.'[14] Competition policy has often been regarded as a building block of economic development. A paper of the WTO Working Group described that:

> The specific benefits that have been attributed to such policy include promoting an efficient allocation of resources, preventing/addressing excessive concentration levels and resulting structural rigidities, addressing anti-competitive practices of enterprises [...] enhancing an economy's ability to attract foreign investment and to maximise the benefits of such investment, reinforcing the benefits of privatisation and regulatory reform initiating and establishing a focal point for the advocacy of pro-competitive reforms and a competition culture. [15]

The same stance has been presented in various OECD publications. One of those based on a survey of OECD members and non-members asserts that:

> There are strong links between competition policy and numerous basic pillars of economic development. […] There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards. [16]

[12]See e.g. Euro-Mediterranean Agreement, Establishing An Association, E.C. - Egypt, June 25, 2001. Art. 34 of the Joint Declaration states that "while drafting its law, Egypt will take into account the competition rules developed within the European Union."
[13]Michael W. Nicholson; 'Quantifying Antitrust Regimes'; (February 2004); 267 FTC Working Paper; 18.
[14]John Preston; 'Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences'; (November 2003); DIFID Case Study for WDR; 2.
[15]World Trade Organization; Paper of 18 September 1998; WT/WGTCP/W/80.
[16]See Preston; *above* note 14; at 2.

Some countries have attested to the positive impact of adopting competition laws on economic development including Australia, Japan, Korea, Mexico and Peru. [17]However, limited studies have been conducted quantifying the effects of national competition laws on developing countries that adopted them. [18]One of the few empirical studies undertaken by Mark Dutz and Maria Vagliasindi (1999) assessing the effectiveness of competition policy across transitional economies finds 'a robust positive relationship between more effective competition policy implementation and intensity of competition as captured by economy-wide enterprise mobility.'[19]

It is argued that competition rules help sustain two of the fundamental ingredients to economic growth, namely competitive markets and a sound legal system.[20] Another study stresses the fact that the adoption of competition policy is positively correlated with the intensity of competition.[21]

An empirical study using multi-country regressions to explore the correlation between competition and growth rates found a strong correlation between the effectiveness of competition policy and growth.[22] This study also illustrated that the effect of competition on growth is more than that of trade liberalisation, institutional quality, and a favourable policy environment.[23] This, however, was found to be predominantly true for Far Eastern countries and less so for other developing countries. This stresses that the countries' level of economic development prior to adopting and implementing competition policy plays a significant role in the extent to which competition policy will positively affect economic growth.

Other proponents of the theory that adopting and enforcing competition laws will lead to development argue that competition rules are a precondition to the implementation of successful privatisation, especially if the goal of privatisation is not the substitution of government monopolies by private ones.[24] Similarly, another study concluded that liberalisation alone does not lead to development since 'non-tariff barriers to trade will replace tariffs that trade liberalisation removes because of the political power of rent-seeking special interest groups.' [25]

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[17]*Above* at 6-9. For a detailed account of their confirmations of the positive correlation between adopting competition laws and development.

[18]*Above* at 6-9. For some examples of countries that provided papers stating how competition laws positively influenced their economic development; these countries include: Korea, Mexico and Peru.

[19]Mark A. Dutz and Maria Vagliasindi; 'Competition Policy Implementation in Transition Economies: An Empirical Assessment'; (2002); 13 OECD Global Forum on Competition; 9.

[20]Bruce M. Owen; 'Competition Policy in Emerging Economies'; (April 2005); 04-10 SIEPR Discussion Paper; 3.

[21]Maria Vagliasindi; 'Competition Across Transition Economies: An Enterprise-level Analysis of the Main Policy and Structural Determinants'; (December 2001); 68 European Bank Working Paper; 1.

[22]Aydin Hayri and Mark Dutz; 'Does More Intense Competition Lead to Higher Growth?'; (November1999); 2320 World Bank Policy Research Working Paper; 14.

[23]*Above* at 14.

[24]Jean-Jacques Laffont; 'Competition, Information, and Development'; (Boris Pleskovic and Joseph E. Stiglitz 'ed.'); in *Annual World Bank Conference on Development Economics*; 1998; 335. ("Privatisation and formal liberalisation are likely to lead to private monopolies, which will generate resources for interest groups apt to resist further development of authentic competition. Efforts to impose these reforms before a credible set of institutions—regulation, competition policy, financial regulation—has been designed will yield disappointing results.")

[25]A. E. Rodriguez and Mark D. Williams; 'The Effectiveness of Proposed Antitrust Programs for Developing Countries'; (1993-1994); 19 N.C. J. INT'L L. & COM. REG.; 212.

Some also suggest that having competition legislation will deter corruption in transition economies, where 'government bodies have tremendous power to affect the competitive process when they issue licenses, permits, franchises, and subsidies.' [26]When these economies adopt competition laws some of the powers of government officials will be curbed and their responsiveness to bribes in order to facilitate illicit economic privileges will be reduced.

Finally, the World Bank has developed a consensus that competitive markets are the most effective way of organising production and distributing goods and services.[27]

On the other hand, it is important to note that most of the above-mentioned studies test the correlation between *adopting* competition laws and development. This is drastically different from studying the relationship between *enforcing* the competition laws and development. The latter should be the measure used to ascertain whether competition laws lead to development or not. Studying enforcement instead of adoption will not necessarily lead to the same conclusions.[28]

II. Critique of competition policy as a means to development

The literature critiquing the adoption of competition laws as a means to development highlight several alternatives to competition policy as elements of reform. One of the common arguments is that trade liberalisation yields far greater prosperity than adopting laws to attack restraints of trade. The advocates of trade liberalisation argue that the mere removal of trade obstacles, such as tariffs and barriers to entry, will effectively discipline domestic producers in transition economies. They support the notion that '[f]ree trade is, consequently, the best antitrust policy.'[29] Also, the argument that '[f]ree trade stimulates wealth creation and development, and in a small country, it makes antitrust concerns largely irrelevant'[30] comes to the fore.

Hoekman and Mavroidis, supporters of this stance, argue that '[t]he implication of the empirical literature is that liberalisation […] is likely to have a much greater direct impact on competition than antitrust enforcement, especially in smaller economies. Importantly, trade and investment liberalisation and deregulation of entry barriers are not costly in administrative capacity and do not require the use of scarce technical expertise.'[31]

A study by Kee and Hoekman using cross-country, cross-industry time series panel data on the number of firms by industry (turnover), sales (market size), and import competition, as well as data on the adoption of competition law by countries, investigated the impact of competition law on estimated industry mark-up over cost. They found that competition legislation on its own has no mark-ups, while imports and lower entry barriers have a major

[26]William E. Kovacic; 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement'; (2001); 77 CHI.-KENT L. REV.; 296.
[27]Yuichiro Uchida and Paul Cook; 'The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination'; (June 2004); 72 Centre on Regulation and Competition Working Paper Series; 2.
[28]This measurement is not easily attainable. I am currently working on a way that this could be attained and used to study this relationship.
[29]Robert D. Cooter; 'Market Modernization of Law'; (1996); 16 INT'L REV. L. & ECON; 162.
[30]Paul E. Godek; 'One U.S Export Eastern Europe Does Not Need'; (1992); 15 REGULATION; 21.
[31]Hoekman and Mavroidis; *Above* note 4; at 8.

and statistically significant effect in reducing mark-ups. The effect of competition law was more statistically significant for larger economies.[32]

Another critique is that the limited public resources of transition economies would produce better outcomes if invested in initiatives improving the flow of goods, such as improvement of infrastructure that would give consumers more access to an increased amount of sellers.[33] Similarly, it is argued that economic policy and competition law enforcement divert the scarce resources away from more important priorities on the path to reform and development. The famous quotation by one of the fierce opponents to imposing competition laws in transition economies, Paul Godek, is worth noting: 'Exporting antitrust to Eastern Europe is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly he won't be able to eat what little there is available to him.'[34]

To further support the negative correlation between competition laws and development, it is argued that misapplying competition rules would hamper development of free markets.[35] This argument assumes that poorly enforced competition laws would discourage foreign direct investment (FDI), cross-border mergers and acquisitions, and trade in general.[36] It is argued that with respect to horizontal restraints, competition law enforcement decreases FDI in the case of cartel enforcement and increases FDI in the case of ending restricting practices by industry associations.[37] Similarly, this criticism amounts to the fear that competition policy will be a tool to provide disguised government control and hamper the growth of the fragile private sector.

On another level, it is argued that aggressive competition law enforcement in a transition or developing economy might lead to the reduction of acceptable contracting which in turn will reduce the total number of contracts that is detrimental to investment.[38] 'Taken as a whole, antitrust as practiced in the developed world may have adverse effects on a reform policy in the developing world, and may stunt growth.'[39]

Last but not least, the literature opposing the correlation between competition law adoption and economic development is not free from the traditional critique postulated by those who criticise the policy of competition laws in general. The supporters of this view claim that '[t]oo often the antitrust suits […] were brought by or on behalf of inefficient competitors against their deservedly more successful rivals.'[40] The followers of this school

[32]See Hiau Looi Kee and Bernard Hoekman; 'Competition Law and Market Discipline: A Cross-Country, Cross-Industry Analysis'; (2002); World Bank, mimeo.
[33]Laffont; *Above* note 24; at 256.
[34]Godek; *Above* note 30; at 21.
[35]Paul E. Godek; 'A Chicago-school Approach to Antitrust for Developing Economies'; (Spring 1998); 43 ANTITRUST BULL.; 274.
[36]Laffont; above note 24; at 264.
[37]Simon J. Evenett; 'Links Between Development and Competition Law in Developing Countries'; (October 2003); Case Studies for the Development Report 2005: Investment Climate, Growth and Poverty; 8.
[38]A.E. Rodriguez and Malcolm B. Coate; 'Limits to Antitrust Policy for Reforming Economies'; (1996); 18 HOUS. J. INT'L L.; 317.
[39]*Above* at 357.
[40]Richard Posner; '100 Years of Antitrust'; (June 29, 1990); WALL ST. J.; at A12

of thought argue that the competition laws reduce competitiveness, since the monopolies they oust are in effect increasing output and leading to the reduction of general prices.

According to some economists setting perfect competition as the ideal market structure is an impossible target, and leads to the elimination of competition and innovation undertaken by the entrepreneurs, which benefits consumers. 'Attempts to base antitrust judgments on [these models] necessarily leads to economically absurd cases with harmful social consequences'.[41]

'The entire antitrust system,' writes Armentano, '—allegedly created to protect competition and increase consumer welfare—has worked, instead, to lessen business competition and lessen the efficiency and productivity associated with the free-market process. Like many other governmental interventions, antitrust has produced results that are far different from those that were allegedly intended.'[42] However, the advocates of this line of thought have not proven their conclusions empirically nor have they achieved the abolition of competition laws anywhere.

Those advocating a lesser critique still do not support the adoption of a full-fledged comprehensive competition legislation in developing countries. They would endorse the prohibitions on naked trade restraints but not on complex issues such as abuse of dominance, mergers, vertical restraints and price discrimination.[43] Those are represented by the discourse of the Chicago School. The minimalist Chicago School view of competition law 'seems to favour little other than prosecuting plain vanilla cartels and mergers to monopoly.' [44]

From the above, one cannot ascertain the relationship between competition and development. Both sides of the spectrum have valid arguments. However, the reality is that most countries of the world have adopted these laws. Therefore, the next part of the article will focus on the developing countries and analyse the challenges they face to adopt these laws. It will also assess whether these challenges are sufficient to argue for specifically tailored laws for developing countries.

3. Developing countries' encounter with competition law

(A) Challenges faced by developing countries in adopting competition rules

Developing countries are generally reluctant to adopt competition rules. This stems from various challenges they face in adopting these rules. At the outset, enacting competition legislation is not considered a priority on their reform agendas. This is due to the high cost and low returns associated with adopting these rules compared to other reform-oriented policies, such as removing trade restrictions. The costs are related to the

[41]See Dominick T. Armentano; *Antitrust and Monopoly: Anatomy of a Policy Failure*; John Wiley & Sons Inc.; (1982).
[42]*Above*
[43]Laffont; *above* note 24; at 256.("Although even more desirable in developing countries, the U.S.-type competition policy with its armada of lawyers and economists is not affordable or even implementable. The design of a body of simple and transparent rules for developing countries, in particular for horizontal collusion and abuse of dominant position, remains, I believe, a worthy task.")
[44]Frank H. Easterbrook; 'Workable Antitrust Policy'; (1986); 84 MICH. L. REV.; 1701.

need to acquire, reform, or implement lacking administrative apparatuses, effective judiciary and appeal systems, independent investigating authorities, expertise, people with technical and legal skills, etc.

One of the critical challenges that face developing countries is the high level of government interference in the economy. This includes government-erected barriers to enter or exit the market,[45] government monopolies, the various forms of subsidies granted by governments to loss-making enterprises,[46] and government politicisation of the administrative authorities in force of applying and enforcing the competition rules. In most developing countries, governments play an active role in regulating and setting bureaucratic measures to be followed by firms to enter or exit the market, resulting in many instances in rigid barriers that cannot be surpassed.[47] This in turn leads to rent-seeking behaviour, cronyism, corruption and favouritism. The economy is enmeshed in a 'Kafkaesque maze of control'[48] where large family owners often use their influence to limit competition and obtain finances from the government to alter the game in their favour.

To add to these challenges is the lack of data collection, especially necessary to define market shares. This is furthered by the lack of effective Statistic Offices of the public administration that may provide these kinds of information.[49]

Also, most of these countries lack a reliable administrative enforcement system and a qualified independent judiciary, which can enforce the adopted models of competition rules.[50] Also, the process of adjudicating is slow and in some cases almost a decade can pass before a ruling is final.

Higher levels of concentration, arguably the most powerful challenge for countries wanting to adopt a competition law, persist in developing and small nations. Developing countries have higher levels of concentration than those in industrialised countries.[51] Few firms dominate many sectors and produce the majority of output. This reality necessarily stands in the way of adopting and enforcing a competition law, especially one that is not favourable towards high concentration levels. The reasons for these high levels of concentration are numerous. They include mainly high barriers to entry and exit. Also, low demand or purchasing power in these countries necessarily leads to lowering the number of firms than can efficiently operate in these markets.[52] In other words, for firms to operate efficiently, i.e. be able to exploit minimum efficient scale of production, they need high concentration levels to offset this low demand. This leads to firms operating at sub-optimal levels, where they are not capable of reaching economies of scale.[53]

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[45]Cook; *above* note 8; at 13.
[46]Vagliasindi; *above* note 21; at 2.
[48]Jagdish Bhagwati; *India in Transition: Freeing the Economy*; Oxford: Clarendon Press; (1993).
[49]Reimavuo and Händelin; *above* note 11; at 5.
[50]Owen; *above* note 20; at 1.
[51]Cook; *above* note 8; at 15.
[52]See Michal S. Gal; 'Size Does Matter: The Effect of Market Size on Optimal Competition Policy'; (2000-2001); 74 S. CAL. L. REV.; 1445. (She argues that because of the low demand and the need for firms to achieve minimum efficient scale of production (MES) to be able to operate efficiently (at lowest cost), the market will not be able to support more than a few number of firms).
[53]*Above*

Furthermore, concentration levels are also high because of technological backwardness in these countries. A firm specialised in a newly developed technology entering these markets will by default occupy a large market percentage.

Moreover, because many developing countries used to be state-run economies, many sectors are still occupied by government monopolies. The new wave of privatisation and liberalisation only meant that these state monopolies are being sold to private entities that still maintain the monopoly status of the former government-run enterprises. These and other factors, mainly concerned with the political economy[54] of these countries, result in higher concentration levels in developing countries. Not only are concentration levels high, but the lack of merger regulation in some developing countries also works toward increasing these concentration levels even further.[55] Also, elasticity of supply is lower in developing countries, given the prevalence of scale economies and entry barriers. This lowers the constraints that the potential entry places on a firm that tries to raise its prices above marginal cost. Hence, the making of lower market shares sufficient to infer dominance.[56]

These are but some of the challenges that developing countries face to effectively implement their newly adopted competition legislation. These are also often used to argue that developing countries need different laws than the West.[57] To what extent these local concerns and challenges require drafting fundamentally different competition laws is addressed in the following part of the article.

(B) Do developing countries need specifically tailored laws?

Competition policy 'assumes large number of participants in all markets, no public goods, no externalities, no informational asymmetries, complete markets, no natural monopolies or, more generally, convexity of technologies in addition to full rationality of economic agents, a benevolent court system to enforce contracts, and a benevolent government with lump sum transfers to achieve any desirable redistribution. Developing economies are of course very far from this ideal world, and the policy question 'Should competition be encouraged in developing countries?' must be raised in a more realistic framework.' [58] (Emphasis added).

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[54]What is meant here are forms of barriers to entry, especially bribes or licenses and permits, required to enter the market.

[55]Michal S. Gal, *Competition Policy for Small Market Economies*; Harvard University Press; (2003);196. ("Despite its admitted regulatory importance, until recently merger control has been absent from the competition laws of most small economies. […] many small economies instead opted for no merger control. This policy was based on the assumption that leaving merger control to the market would produce more efficient results than the absolute value of competition approach. […] This trend has changed profoundly since the mid-1980s as many small economies have added merger control to their competition policies.")

[56]*Above* at 64.

[57]For a similar analysis see Michal Gal's writing. She argues that the distinctive nature of "smallness", which is characterised by high industrial concentration, high entry barriers and sub-optimal levels of operation, justifies that these small nations adopt competition laws different from the advanced world.

[58]Laffont; *above* note 24; at 237.

Based on the above, one can argue that the unique conditions and challenges these countries face require their competition laws to address their local needs. It is well established that in order for obeying laws to become less costly, moral and social norms need to align with state law.[59] If this is the case, then abiding the law will not only be out of respect and fear, but also social condemnation.[60] This mode of the rule of law facilitates economic development. The role of law in a society can only be understood by looking at its cultural and political environment,[61] in order to prevent the failure of legal reforms.[62]

Mere transplantation of laws does not properly address the legal culture of each country. A demand for these transplanted laws must exist for them to be effective, and also to ensure that the legal institutions needed to enforce them would develop.[63] The existence of demand is based on two conditions, namely that the law is adapted to the local environment and that the population is familiar with its basic legal principles. If these conditions are present, then demand for the law will exist and institutions to enforce it will develop.[64] If, on the other hand, these conditions do not exist then the enforcement of the law will be inefficient. I argue that in addition, the general level of economic development plays a major role in a country's aptitude to enforce the diffused laws.[65]

One of the focal problems with this diffusion of law movement is put forward in the following quotation:

> Where law develops internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker.[66]

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[59]Robert D. Cooter; 'The Rule of State Law and Rule-of-Law State: Economic Analysis of the Legal Foundations of Development'; (1997); 105 Berkley Program in Law and Economics Working Paper Series; 192.
[60]*Above*
[61]*Above* at 193-201. This is empirically tested in a study the author conducts where he explores the relationship between state law, effective law, and economic development by using a model of social norms that explains how the internalisation of norms strengthens people's willingness to punish violators informally.
[62]Anthony Ogus; 'The Importance of Legal Infrastructure for Regulation (And Deregulation) in Developing Countries'; (June 2004); 65 Centre on Regulation and Competition Working Paper Series; 4.
[63]Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard; 'Economic Development, Legality, and the Transplant Effect'; (2003); 51 AM. J. COMP. L.; 168.
[64]*Above* at 169.
[65]This is especially relevant when talking about enforcement of competition laws.
[66]*Above* at 189. ("Our empirical analysis offers strong support for these propositions. Receptive transplants, i.e. those that adapted the imported law, or had a population that was familiar with it show legality ratings that are statistically no different from those of origin countries. Countries without similar predispositions, i.e. unreceptive transplants, perform much worst. These countries suffer from the transplant effect.")

The meaning of a transplanted rule does not survive the journey from one legal culture to the other since 'the deep structures of law, legal cultures, legal mentalities, legal epistemologies, and the unconsciousness of law as expressed in legal mythologies, remain historically unique and cannot be bridged.'[67]

Other arguments for developing countries to tailor their competition laws to their own need state that the competition policies of the advanced world are not appropriate for their current development stage.[68] It is often argued that if developing countries adopt competition policies followed by the advanced world they would not be able to implement them. Developing countries adopt the language of modern Western competition law models without an effective enforcement bureaucracy, and even if it exists it is understaffed and subject to political constraints.[69]

Advocating for different competition laws in the developing world is not only based on the different local circumstances but more importantly on the different goals these laws should address in these countries. This will be dealt with in detail in the following part of the article. However, despite the conclusion that developing countries require laws that address different issues and goals than those of the advanced West, one can easily conclude that the reality is different.

The reality is that most developing countries adopt laws that do not address their particular conditions. 'One size fit all' models of competition laws have developed that are adopted across the world.[70] Studies looking at competition laws on the books of many countries conclude that the laws enacted in the developing world are quite similar to those adopted in the developed countries.[71] This is ascertained from studies allocating scores to the presence of key features of competition in national laws. In other words, these studies measure the breadth of the overall competition law. Such scores, denoted 'Scope Index' in Hylton and Deng's study[72] or 'Antitrust Law Index' in Nicholson are strikingly similar between developed and developing countries. For example, in Nicholson[73] the highest score (21) is given to the US, followed by Ukraine (20), then Turkey (19), then Belgium, Latvia, Poland and Romania scoring 18. The 'Scope Index' shows similar results, where the highest score of 25 is allocated to Australia, Barbados, Belarus, Malawi, and the US. These are followed by a score of 24 allocated to each of Hungary, Korea, and Kyrgyzstan. A 'Scope Index' score of 23 is given to Indonesia, Mexico, Spain, Ukraine, UK, and Uzbekistan.

Based on these findings, one can conclude that the laws on the books are relatively similar in the developed and in the developing world. One can also conclude that the scope of the law does not differ depending on the developmental status of a country. If Malawi's

[67]Gunther Teubner; 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences'; (January 1998); 61 THE MODERN L. REV.; 14.
[68]Singh and Dhumale; *above* note 9; at 9.
[69]Owen; *above* note 20; at 1.
[70]Gal; *above* note 52; at 1441. ("The main factor that creates the need to tailor competition law to economic size is that competition law generally consists of "fit all" formulations that are designed to best achieve the goals of the law in each category of cases to which they apply […].")
[71]Keith N. Hylton and Fei Deng; 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects'; (2006); BU Univ. Working Paper Series L. & Econ. 06-47. And Michael W. Nicholson; 'Quantifying Antitrust Regimes'; (February 2004); 267 FTC Working Paper.
[72]Hylton and Deng; *above* note 71.
[73]Nicholson; *above* note 13.

law is, in terms of breadth, as developed as the US competition law, it is enough to show that advanced laws are simply transplanted without much change to fit local circumstances, questioning the assumption that laws are enacted to address unique concerns. These results fortify the holding that developing countries model their laws on those adopted in the West. This of course is leaving out enforcement of the law, which assumingly is where the real difference resides.[74]

(C) Different goals for developing countries

Similar to other studies dealing with developing countries and competition law, this article is arguing that the developing world needs different laws because of different goals that these laws should address in their respective nations.[75] However, this article is arguing that 'for efficiency' considerations that prevail in the West may not be the best alternative for the developing countries. The latter's competition laws might want to consider distributional issues. This is a rather new proposition alien to competition law concerns; however, it may be gaining momentum in writings about development and competition.[76]

Furthermore, few jurisdictions consider promotion of fairness and equality criteria as one of the objectives of their laws. One of the often-cited examples is South Africa, which states that its competition law considers a 'broader range of considerations including the promotion of a more equitable spread of ownership as well as the 'interests' of workers.'[77] Moreover, some jurisdictions consider that non-competition goals may be taken into account when it serves the public interest.[78]

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[74]This is an assumption that I am invested in studying by quantitatively and qualitatively measuring competition enforcement in the developing world. This is part of a bigger project underway to be able to really understand the role of competition law in third world countries.

[75]According to the members of the ICN who took part in the questionnaire for the ICN Unilateral Conduct Working Group for the 6th Annual Conference (2007) countries consider 10 different goals/objectives for their competition laws. These are: ensuring an effective competitive process, promoting consumer welfare, maximising efficiency, ensuring economic freedom, ensuring a level playing field for small and medium size enterprises, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatisation and market liberalisation, and promoting competitiveness in international markets. The first 3 listed goals are the most important goals for most jurisdictions, with the rest only mentioned by some jurisdictions and not others. See International Competition Network; 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies'; prepared by The Unilateral Conduct Working Group; Presented at the 6th Annual Conference of the ICN; (Moscow, May 2007); available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf (hereinafter ICN Report).

[76]This statement may be rebutted based on the claim that distributional issues are already part of the consumer welfare criterion adopted in most countries as the "for efficiency" consideration that competition law is aiming to achieve. Consumer welfare standards neglect the efficiencies realised to producers, e.g. cost savings, and in this regard may be considered to be a distributive decision to not consider the interest of the producers. At the same time when the consumer welfare standard is taken to mean both allocative and productive efficiency then this decision regarding distribution is neutralized. Nevertheless, the decision to weigh in producer gains (productive efficiency) in a consumer welfare standard is often neglected and appears only when a country has selected a total welfare approach. See *Commissioner of Competition v. Superior Propane Inc.;* 2000 Canada Comp Trib 16 (4 April 2002).

[77]ICN Report; *above* note 75; at 18.

[78]ICN, Report, sputa note 75; at 31. The following jurisdictions recognise some non-competition goals: Australia, France, Israel, Jamaica, Korea, Pakistan, South Africa, and Switzerland.

A recent article by Eleanor Fox is one of the first elaborate attempts to explore this idea.[79] Basically, the proposition is to expand the reach of competition laws to be part of a broader developmental agenda that aims at economic development. By doing that, competition law may be used as a tool, not to protect producers or local champions, but to facilitate development. This is not only essential because development is the more pressing issue for third world nations, but because a competition legislation that merely focuses on economic efficiency tends to entrench a political economy that favours the ruling elite and discriminates against the masses. A neo-liberal framework of competition law will do little to help these countries develop.[80] Its effect will be no different than those achieved with liberalisation, privatisation, and globalisation – namely, a widening gap and more disparity of wealth.[81]

It is often argued that competition law should not concern itself with developmental or redistributional goals – it is a law about fostering competition at the end of the day.[82] Redistribution issues and other development policies should be left to government action specifically tailored to address such issues. Nevertheless, developing countries often have benevolent governments that fail at introducing or implementing such policies. Taxes are evaded and subsidies are slowly being lifted under the rubric of privatisation and liberalisation, leaving the masses at a loss. Laws are transplanted from the West with promise of prosperity, competition law being no exception, and leading to nothing more than entrenchment of local structures of cronyism, statism, corruption, and income inequality. Therefore, a mere attempt at using such a law, even if only theoretically, to undo such maladies should not be discarded at once.

> Market tools are a very important part of the panoply of tools needed to address world poverty and should be used liberally. These market tools include market-freeing measures that reduce prices. They also include antitrust priority-setting that targets conspiracies that raise the prices of staples, such as milk, bread, transportation and utilities, helping the poor as well as those who are better off.[83]

Using competition law as a market tool to address social concerns, as outlined in the quotation above, can take one of two forms. Both are extremes not alien to competition law debates in general.

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[79]Eleanor M. Fox; 'Economic Development, Poverty, and Antitrust: The Other Path'; (July 2007); 13 SOUTHWESTERN J. OF L. & TRADE IN THE AMERICAS; 211.

[80]Above at 105. ("This does not imply that antitrust for developing countries would or should look dramatically different form a developed country's antitrust. There are reasons why it might look much the same,[…]; but there are also reasons why the perspective might differ form the neo-liberal one that currently informs many antitrust laws of developed countries – a perspective that has "relatively little resonance for the great majority of the population that is poor.")(Quotation from Francis Fukuyama; 'Keeping Up with the Chavezes'; (February 1, 2007); Wall St. J.; at 7).

[81]Above at 106.

[82]This has been the trend since the Chicago School influence on competition law. Robert Bork in his famous *The Antitrust Paradox* (2nd ed., 1993) argues that "[..] the goal [of antitrust law] is maximum economic efficiency to make us as wealthy as possible. The distribution of that wealth or the accomplishment of non-economic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases." (p.427). However, this does not negate the fact that prior Supreme Court decisions in the US have attempted to address the issue of redistribution in competition cases. An example critiqued by Bork for doing that is Brown Shoe (1962) where the Court admitted the value of small-business welfare into the adjudicative process.

[83]Fox; *above* note 79; at 109.

One side of the spectrum is arguing for more competition in order to allow younger and smaller firms access to the market. This would lead to lower prices and benefit the poorest of the population. In addition, increased entry into the market creates automatic redistribution away from big firms to smaller ones. This is the argument of the Darwinian competition advocates. These advocates are mainly concerned with allocative efficiency considerations that manifest lower prices.

At the other end of the spectrum are those who argue for higher levels of concentration, which allow firms to invest in R&D, provide more employment opportunities, and benefit society in the long run by fostering growth and innovation as supported by the Schumpeterian competition advocates. Here redistribution can either work through government policies specifically addressing distributive taxes or other deals between firms and consumers.[84] The efficiency that directs competition law is one based on productive dynamic efficiency and not only allocative efficiency.

Each of these sides of the argument will be addressed in turn.

I. Darwinian Competition Advocates[85]

For the followers of this camp competition is all about increased market players that will push prices down to perfect competition levels. In other words, they are more concerned with static allocative efficiency considerations. Their antitrust policy is a rather strict one; fiercely opposing cartels, monopolistic practices, and abuse of dominance that prevents dominant firms from using their power and leverage to fence out powerless firms.[86] This policy would also warrant a strict law against mergers that create or reinforce the power to exploit and to exclude.

The idea is to allow competition law 'to build a ladder of mobility form the lowest rung up to enable mobility, incentivize entrepreneurship, and stimulate invention.'[87] The mechanisms for this 'ladder' approach are as follows: First, the market should be freed. This means tearing down barriers to free market participation. These barriers arguably lead to favouritism that allows powerful insiders to protect their friends at the expense of the public and at the particular expense of the poor.[88] Second, competition law should be used to create a marketplace that gives firms, including smaller and younger firms, a fair chance to compete on the merits of their product, free from artificial and unnecessary foreclosing restraints by powerful firms.[89]

> The evils of monopoly have long been recognised. These include, inter alia, higher prices and lower output levels than under competitive conditions (allocative inefficiency), X-inefficiency, and the costs of rent seeking behaviour. Under an oligopolistic structure, the actions of rivals impinge directly on each other. […] Such behaviour has many adverse effects on productivity and resource allocation: prices are likely to be above costs.[90]

[84]One such "deal" is developed below under the title Consumer Trust.
[85]This term is used in Patrick Rey; 'Competition Policy and Economic Development'; (September 1997); 14; available at dei.fr/doc/by/rey/competition.pdf. (The Darwinian model recommends that the increase in competition will force competing firms to innovate in order to survive.)
[86]Fox; above note 79; at 119.
[87]Above at 111.
[88]Above at 113.
[89]Above at 114.
[90]Gal; *above* note 52; at 1449.

Empiricists also find themselves more easily located within this camp. Many empirical studies on whether competition or concentration provides better tools for growth conclude that competition has the greater effect.[91] One of the most cited empirical studies includes one of 640 UK companies that concluded that the more competition the higher the levels of total factor productivity growth. This is because competition exerts downward pressure on costs, encourages efficient production and innovation.[92]

What is important to proponents of this strand of analysis is the effect that competition has on marginal cost. Perfect competition, in economic terms, is a state of the market where prices are set to equal the marginal cost of firms. In other words, prices are set by the intersection of the demand and the marginal cost curves.

The social ramifications of this competition policy would be achieved through strictly prohibiting any increases in prices. Any attempts at concentration will be discouraged to guarantee that prices, especially for important subsistence goods, will stay competitive. Also, redistribution will be a by-product of opening up the markets to more competitors. Small firms entering the market will be allocated a part of the pie that used to be confined to benefit the entrenched elites. In a way, competition allows redistribution away from big firms to smaller and younger ones entering the market. This creates a form of redistributive justice by ensuring that no one firm alone can reap the benefits of serving the market and that all firms have an equal opportunity to compete.[93]

II. Schumpeterian Competition Advocates

Those in this camp believe that some sort of concentration is required to achieve growth and development. They argue for a competition policy that is more accepting of higher levels of concentration. They would also argue that mergers resulting in dominance

[91]Some of these studies include: Mark A. Dutz and Maria Vagliasindi; 'Competition Policy Implementation in Transition Economies: An Empirical Assessment'; (2002); 47 European Bank for Reconstruction and Development. John Preston; 'Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences'; (November 2003); DIFID Case Study for WDR. Aydin Hayri and Mark Dutz; 'Does More Intense Competition Lead to Higher Growth?'; (November 30, 1999); 2320 World Bank Policy Research Working Paper. Maria Vagliasindi; 'Competition Across Transition Economies: An Enterprise-level Analysis of the Main Policy and Structural Determinants'; (December 2001); 68 European Bank Working Paper. Frank B. Cross; 'Law and Economic Growth'; (2001-2002); 80 TEX. L. REV. 1737. Bruce M. Owen; 'Competition Policy in Emerging Economies'; (April 2005); 04-10 SIEPR Discussion Paper. Yuichiro Uchida and Paul Cook; 'The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination'; (June 2004); 72 Center on Regulation and Competition Working Paper Series.

[92]See Stephen J. Nickell; 'Competition and Corporate Performance'; (August 1996); 104 J. POL. ECON.; 724. He presents with empirical evidence that competition, measured either by increased number of competitors or by lower levels of rents, is associated with higher rates of total factor productivity growth.

[93]Gal; *above* note 52; at 1451.

should not be prohibited just because of the market percentage the merged firm will occupy. The ideological underpinnings of this camp are rooted in the writings of Joseph Schumpeter.[94] Schumpeterian competition policy rests on the argument that dynamic efficiency is more important than static allocative efficiency and hence is more tolerant towards higher levels of concentration. Monopoly powers are therefore not considered a threat, as the monopolist would be encouraged to invest in R&D and advance innovation.[95] In this framework, laws that stand in the way of monopoly creation are considered inefficient.

Seeing that growth and development are priority targets for third world nations, many writings about the latter and competition law choose this camp as the model more suitable for these countries. Thus, they would argue that dynamic efficiency is more important from a developmental perspective.[96] Monopoly rents are invested in lowering cost functions and might result in lower prices and higher output than what would result under perfect competition. [97]Price wars reduce profits and thus, decrease the amount of investment. A combination of cooperation and competition between firms, which is referred to as 'optimal degree of competition'[98], rather than maximum competition achieves this dynamic efficiency that should be regarded by developing countries as the purpose of competition policy.[99] Hence, the competition policies adopted by developed countries are not often suitable for the developing world due to the fact that 'the attention to allocative efficiency and lower prices that underlies competition policy in developed countries may be too narrow and static from a development perspective.'[100]

The advocates of higher concentration levels are hence mainly arguing that the efficiencies realised by firms might outweigh the damage suffered by consumers, especially when the concentrated firm is able to pass on its efficiencies. In this regard, as mentioned earlier, they focus more on dynamic productive efficiency rather than static efficiency.

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[94]Joseph A. Schumpeter; Capitalism, Socialism and Democracy; 3rd ed.; Harper Perennial Publication; (1984).

[95]Of course this assumption has been refuted by many, using the arguments put forward by the Darwinian advocates above, but predominantly by Kenneth J. Arrow. See Kenneth J. Arrow; 'Economic Welfare and the Allocation of Resources for Invention'; in Philip Mirowski, Esther-Mirjam Sent (eds); Science Bought and Sold: Essays in the Economics of Science; University of Chicago Press; 2002; 165. This has led many involved in this debate to contrast Schumpeter against Arrow. E.g. see Jonathan B. Baker; 'Schumpeter vs. Arrow: How Antitrust Fosters Innovation'; (June 2007); SSRN; available at http://ssrn.com/abstract=962261.

[96]J. S. Metcalfe et al.; 'Economic Development and the Competitive Process'; (December 2002); 36 Centre on Regulation and Competition Working Paper Series; 24.

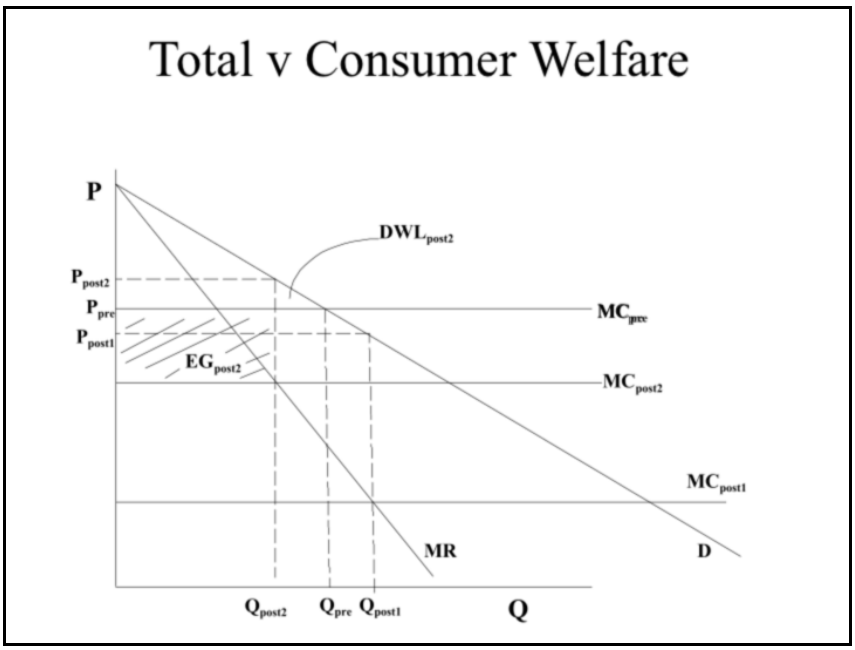
[97]This may be the case seeing that the monopolist sets prices at the intersection of the marginal revenue and the marginal cost curves. When monopoly rents are invested in lowering the cost functions (or innovation leads to cost reduction) the now downward shifted cost function's intersection with the marginal revenue curve may result in lower prices and higher output than under perfect competition. This, however, depends on the slopes of the demand curve and accordingly the marginal revenue curve. It also depends on the magnitude of the downward shift of the cost function. See graph 1 for an illustration.

[98]Metcalfe et al.; *above* note 96; at 14.

[99]A critique for this assumption is made by Elhauge and Geradin; *above* note 2; at 1109. ("[F]irms in developing nations can improve productive efficiency simply by copying techniques already used in developed nations, whereas firms in developed nations can improve productive efficiency only by innovating to create new techniques. One might thus think that competition to increase productive efficiency over time will, if anything, be more important in developed nations.")

[100]Metcalfe et al.; *above* note 96; at 24.

By doing so they favour a total welfare approachto competition policy, rather than a consumer welfare approach as understood to mainly focus on lower prices, i.e. marginal cost reductions and not fixed cost reductions. The benefits of the former approach are illustratively explained in the following graph.



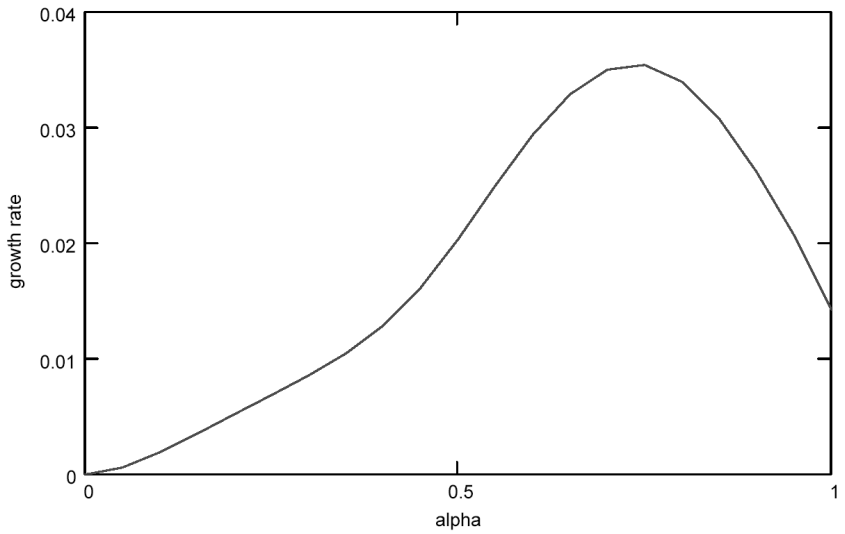
Graph 1
Source: Elhauge and Geradin

When the monopolist invests his monopoly rents in lowering the marginal cost curve to MC_{post1}, the price is reduced to P_{post1} (which is lower than under perfect competition at P_{pre}) and the quantity is increased to Q_{post1} (which is higher than under perfect competition at Q_{pre}). However, it is important to note that had the monopolist only reduced the cost to MCpost2 and not to MCpost1, price would have still been higher and quantity lower than under perfect competition ($P_{post2} > P_{pre}$; $Q_{post2} < Q_{pre}$).

This graph argues that a firm enjoying a monopolist position may be able to transform its cost reduction to lower prices and higher output, which is to the benefit of consumers. This position is, according to the graph, only reachable when the cost functions are lowered sufficiently, which is often only possible when monopoly rents are invested in R&D and innovation. This is the Schumpeterian assumption explained economically. However, what

the Schumpeterian advocates neglect is that when cost curves are not reduced 'sufficiently' (i.e. not reaching MCpost1) consumers are still worse off paying higher prices and market output is reduced. Here, the argument for distributive taxes and other means to generate redistribution come to the rescue. The next part of the article incorporates into this model a mechanism that allows for distribution without relying on government taxes to undo the harms suffered by consumers.

Similarly, arguing that higher levels of concentration is not necessarily bad for society is supported by the famous inverted U-shaped graph developed by Aghion et al.[101] This graph illustrates that at the two extremes of minimal competition and perfect competition growth rates are low. Growth rates increase to a certain degree of competition after which more competition is associated with lower levels of growth. With respect to competition law, this graph shows that perfect competition is not desirable and thus over-enforcement of competition law is not advisable. It presents the benefits of lax enforcement and acceptance of certain levels of concentration, which leads to less than perfect competition and hence higher levels of industry growth. However, it also delineates the difficulty in striking a balance between under-enforcement and over-enforcement, the potential increase in growth is forgone in the former and the growth rate is negative in the latter.



Graph 2
Source: Aghion et al

[101] Philippe Aghion, et al.; 'Competition and Innovation: An Inverted U Relationship'; (2002); 9269 NBER Working Paper; 57. In this graph α (alpha) is a parameter used to measure the degree of product market competition in each industry (it corresponds to a standard measure of competition). $\alpha = 0$ defines the minimal degree of competition and $\alpha = 1$ is the case of Bertrand competition between undifferentiated products, which results in perfect competition when the two firms have the same unit cost. On the other axis, the average rate for the productivity growth of the industry (growth rate)(g) equals the product of the frequency of "frontier innovations" and the (log) size of innovation. It is calculated as follows: $g = (2\_{0}n_{0} + \Sigma\ \_{k}n_{k}) \ln \gamma$.

Another reason why developing countries are thought to benefit from higher concentration levels is that the realities of their markets support only few firms. This is, as explained above, a widespread phenomenon in developing countries. It would be a futile attempt to try to undo this market structure. Openness to trade and other attempts at lowering entry and exit barriers may play a big role, however the lower demand and supply that prevail in these countries cannot be instantaneously changed with the adoption of a competition law. Hence, concentrated industries are tolerated (at least in the short run).

High levels of industrial concentration may be a necessary evil in order to achieve productive efficiency. Accordingly, a small economy should not pursue a policy that views high concentration level as undesirable per se. This is so because consolidation may eventually lead to the achievement of economies of large scale. The drawback is of course higher levels of concentration, which might lead to firms charging prices much above costs, which in turn decreases allocative efficiency. Competition policy should thus strive to strike the optimal balance between structural efficiency and competitive vigour so that firms may operate at efficient scales and pass at least some of the benefits of greater efficiency on to consumers. Competition policy in a small economy should, thus, aim to minimise the undesirable economic effects of concentrated market structures and support the dynamic, long run market forces that lead to more efficient market structures. […]

> Sometimes high concentration levels resulting from a merger will be sufficient reason for blocking it. Yet, concentration measures alone are not a good guide for competition policy for small economies. Rather, measures of levels of concentration should be balanced with productive efficiency considerations dictated by market size.[102]

> Concentrated market structures might need to become further concentrated to achieve minimum efficient scales. On the one hand, an aggressive stance toward mergers might prevent desirable efficiency-enhancing mergers from taking place while entrenching existing inefficient market structures.[103]

Finally, the advocates of higher concentration defend their position by arguing that this competition policy would allow developing countries to protect their 'national champions' and hence, be able to better compete on international markets.[104] Those arguing for encouraging national champions are by default arguing for laxer competition laws in developing countries – at least with respect to those national champions. The argument goes as follows: If the local producers are to compete in international markets, they should be given some slack in the local enforcement of competition laws. This often requires that the laws should either allow for export cartels or discriminatory enforcement against companies considered to be national champions.

The followers of this competition policy framework have a harder time defending their position in terms of social or redistributive justice. The common response these advocates of high concentration levels would give is that 'achieving and maintaining a balance

[102]Gal; above note 55; at 55 – 56.

[103]*Above* at 195. A critique of this theory is put forward in Elhague and Geradin; *above* note 2; at 1108. ("[It does not] make much sense to adopt any categorical presumption that economies of scale will require high concentrations in markets within small or developing nations and low concentration in larger developed nations or global market. A market maybe small, but have few economies given how the product is produced, or any economies of scale may not be relevant to the alleged anticompetitive activities. A nation may be large and developed, yet the relevant market within it may be quite small in any given case. Or a market may be large and even global. And yet have economies of scale that justify high concentration levels. […] In short, economies of scale and increased concentration levels do not really justify laxer antitrust policy in small nations rather than having similar antitrust rules in every nation whose criteria include the relevance of economies of scale, entry barriers, and market concentration levels to any particular market and alleged anticompetitive conduct.")

[104]Canada and South Africa recognise this argument as a valid objective of their competition law. See ICN Report; above note 75; at 20.

between permitting firms to be large and integrated enough to enjoy scale economies, as well as numerous enough to ensure effective rivalry, is challenging.'[105] Therefore, they prefer to leave the redistributive concerns to other government policies such as taxation and social insurance or welfare systems that are designed for that purpose, and through which redistribution is more directly observed or monitored by the voters to whom government is responsible. [106] The next part of the article attempts to devise such a mechanism under the rubric of competition law. It is a theoretical possibility that might be appealing to developing countries that prefer the Schumpeterian rhetoric to the Darwinian models.

4. Redistribution under competition law

The argument for concentration and mergers to dominance rests on the assumption that these have certain efficiencies. [107]However, the problem is that these efficiencies are seldom transferred to the consumers. [108]This is especially true when the merged entity's efficiencies are of the kind that reduces fixed costs and not marginal costs. Merger efficiency considerations have been solely focused on reductions in marginal cost rather than fixed cost. This is due to the economic theory supporting the claim that reductions in marginal cost are passed on to consumers in the form of lower prices. On the other hand, reductions in fixed cost are not obviously transferable to consumers in a way that would increase consumer welfare. However, this latter claim may be rebutted on the following grounds.[109]

First, if firms are setting their prices as a function of fixed cost, i.e. if firms set their prices using full cost pricing,[110] then the reductions in fixed cost may be passed on as lower prices to consumers in the long run. However, it may also be the case that a decrease in fixed cost will only mean that the firm will prefer to increase its rate of return instead of passing on these gains as lower prices to consumers. Second, fixed cost savings may be a result of improvements in innovation (dynamic efficiencies), which in turn may lead to improvement in quality by the merged firm, and it may also cause rival firms to react with lower prices and/or higher quality products. [111]Third, reductions in fixed costs may lead to a reduction in entry barriers and hence to expansion.[112]

Paying attention to fixed cost is not a novel proposition seeing the developments underway in merger law that are actively seeking to include fixed cost reductions in the efficiencies considered by the proposed mergers. This is still a proposition, however it may

[105]Gal; *above* note 52; at.1441.
[106]Gal; *above* note 55; at 204.
[107]See the graph 1 above.
[108]Except for the situation when the monopolist (or concentrated firm) lowers its cost function sufficiently to an extent that result in lower prices and higher output than under perfect competition (see graph 1 above).
[109]See Robert N. Rubinovitz; 'Acquisitions that create Efficiencies: Merger Analysis and the Treatment of Reductions in Fixed Costs'; (Spring 2008); NERA Economic Consulting: Antitrust Insights.
[110]*Above* Full cost pricing means that the prices are set so that the markup of price over marginal cost covers the fixed costs of the firm and provides the firm with a satisfactory rate of return.
[111]*Above* at 4.
[112]*Above* at 3.

be gaining momentum in writings calling for merger law amendments particularly in the US.[113] Recent DOJ and FTC decisions and statements attest to the importance of considering fixed cost reductions as part of the efficiencies realised by a merger.[114]

The pillar of this proposition rests on the fact that the outlook of competition law should not be one focusing on the short run, but one that is 'forward looking and dynamic.'[115]

> […] Fixed cost efficiencies become relevant once a longer time frame is considered because costs that are fixed in the short term are not fixed when considered over a longer time horizon. […] Thus, depending on the time frame and the amount of incremental output that is relevant, costs that appear to be fixed cost should properly be viewed as marginal cost, in which case a reduction in these 'fixed' costs should be given greater weight than is often the case.[116]

However, despite the above analysis it is still often very difficult to ascertain whether these reductions in fixed costs will be passed on to the consumers. The realisation of these efficiencies is delayed and more difficult to predict. Hence, the following is an attempt to install a mechanism that will commit the firms to transferring these realised dynamic efficiencies to the consumers. The following part of the article will address this mechanism, and its foreseeable critiques, in detail.

The idea is rooted in the proposition that competition law should aim at maximising the aggregate benefit to society, which in some cases may come at the expense of specific goals.[117]

(A) The Functioning of the Mechanism

First, let developing countries accept mergers to dominance and allow for higher levels of concentration to exist. This means that mergers are to be assessed under a total welfare standard and not a consumer welfare one. The reasons for that are as follows:

> (1) Given the concentrated nature of most markets in small economies, a policy that required high standard of proof of no negative effect on consumer welfare may well lead to market stagnation of oligopolistic structures that not only charge supra-competitive prices but do not achieve productive efficiency. The total welfare approach will thus reduce productive and even dynamic inefficiencies.

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[113]See Antitrust Modernization Committee; 'Report and Recommendations'; (April 2007); section I.B at 49; available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf. See also William J. Kolasky, Prepared Remarks; 'FTC/DOJ Joint Workshop on Merger Enforcement Panel on Efficiencies/Dynamic Analysis/Integrated Analysis'; (February 2004); available at http://www.usdoj.gov/atr/public/workshops/docs/202670.pdf.

[114]See US Department of Justice; 'Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirus Satellite Radio, Inc.'; (March 24, 2008); available at http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm. See also 'Statement of Chairman Timothy J. Muris in the Matter of Genzyme Copr./Novazyme Pharmaceuticals, Inc.'; available at http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf.

[115]Rubinovitz; *above* note 109; at 3. See also ICN Report; *above* note 75; at 9. (Mentioning the Netherlands response which states that "competition law should not solely concentrate on short term price/output issues but should also [maintain] a dynamic perspective taking due account of innovation.")

[116]Rubinovitz; *above* note 109; at 3.

[117]Gal; *above* note 55; at 48.

> (2) The consumer welfare approach may conflict with the goal of enhancing the international competitiveness of domestic firms.[118]

A disclaimer to start: This proposition does not argue for a permissible law that allows for abuse of dominance. On the contrary, it allows for a rule of reason assessment of the mere possession of a dominant position. All abusive conduct, especially horizontal agreements, should continue to be strictly banned. The only difference this article proposes is a more accepting law of dominance (especially because of the nature of developing countries) that factors in a process of redistribution.

> Given that many industries are already concentrated, mergers should be evaluated not against a benchmark of theoretically competitive conditions, but rather against the rational market structure options in the specific market setting. Presumption of anticompetitive effects based on high levels of concentration, which almost always produce strong predispositions toward the condemnation of mergers in concentrated markets, should be rejected and much more emphasis should be placed on efficiency considerations.[119]

The functioning of this redistributive process is arguably as follows. If a merger would increase total welfare, but not consumer welfare then a Coasian deal would be struck to guarantee an increase in consumer welfare.[120] In other words, if the gains to the merging parties exceed the losses to the consumers, then the merging parties could devise a mechanism that transfers enough of their gain to consumers to offset any losses they suffered.[121]

One possibility would be for the merging parties to commit not to raise the prices or lower the output post mergers. The problems this might lead to are deterioration of quality.[122] Also, the pre-merger prices may be high already, hence not a suitable benchmark for assessment. A remedy could be an assessment of the competitive price and a commitment by the firms not to increase prices above this benchmark. This is arguably hard to commit to seeing as demand might change necessitating a response in changing prices.

A second and more workable possibility, developed by Einer Elhauge, is to allow firms to create some sort of consumer trust.[123] This trust is funded out of the merging firms' gains that are not transferred to the consumers. For example, if the efficiencies lower the merging firms' fixed costs but not their marginal costs, in this case the consumer trust is funded out of the firms' reduction in fixed costs. This is then transferred to the consumers. By doing that, the reduction in fixed costs is converted into a reduction of marginal costs. [124]

The idea sounds appealing, however, its functionality depends on transaction costs of operating such a mechanism being lower than the net efficiency gains of the firms. Below are attempts at creating such a mechanism that might satisfy this condition.[125]

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[118]Above at 203.
[119]Above
[120]This idea is set forth in Einer Elhauge and Damien Geradin; Above note 2; at 901.
[121]Above
[122]Above
[123]Above
[124]Above
[125]Although I did not propose the "Consumer Trust", any shortfalls in the suggested logistics and mechanisms of its application are my responsibility.

(B) MECHANISM FOR MERGERS

Let us look at the following example dealing with a merger. Two companies agree to merge creating a dominant position after the merger. It is foreseeable that the merged entity will increase its prices. The merging firms, however, argue that the merger will have long-run benefits that will ultimately trickle down to consumers. The merger will allow the merging firms to invest in R&D and be able to compete on an international front. Also, the efficiencies include long-run cost reductions. Hence, in the long-term consumers will benefit. Ordinary competition policy would prohibit such a merger because of its adverse consequences on consumers today. The prohibition of the merger will assure that the firms will not obtain a dominant position, yet will also forgo the probable benefits that may accrue in the long-term. The mechanism introduced above would work as follows.

The merger will be allowed to go through. This will nevertheless allow the merged entity to increase prices. This will not be prohibited. However, the competition authority will decide what the competitive price should have been. This may be the price pre-merger or the price of other firms selling similar products in a competitive market. Then, the authority will allow the merged entity to raise the prices only if every purchaser of the product sold will be given a coupon with the difference between the current price and the but-for price (the latter will be decided by authority as explained). [126] The consumers can only cash in their coupons after a certain time. The competition authority, upon consulting with the merging firms, will set this time. The idea is that the merged firm may be allowed to harm consumers in the short-run, only to achieve their promised efficiencies in terms of lowering their cost-curves in a pre-set time frame, and then be required to give back to the consumers the realised efficiencies to offset their harms. So, this means that each product sold would come with a coupon to be cashed at a later time. Once this grace period elapses consumers will cash their coupons. At this moment their harm will be offset.

It is important to note that the merger is to dominance and not to monopoly. The mechanism devised above can only operate when the merger is to dominance, so that consumers, who cannot afford the product, even with the coupons repayable later, can buy the product elsewhere.

This mechanism can be understood to function as follows. Through the consumer trust, consumers become de facto shareholders who are owed dividends at a certain time. Or, they become creditors who are owed their loans back at a certain time. The mechanism can also be devised to allow for interest payable on every coupon received. If the firm fails to pay back its so-to-speak debts to the consumers, then the competition authority may liquidate the firm and use the sold assets to repay the consumers. This will be a driving force for the merged entity to achieve the promised efficiencies.

[126] Of course inflation needs to be factored into the assessment of the but-for price and should be considered when assessing the value of the coupon. The coupons could be devaluated by the increase in inflation.

The benefits of such are threefold. First, the firms will be able to undertake their merger and realise their efficiencies. This will allow the firms to achieve dynamic efficiencies when they invest in R&D and innovate. Second, the merger will allow the firms to compete in international markets, which is often a major concern in developing countries. Third, consumers will benefit in the long-term. Also, they will benefit as workers who may have more work options at the merged firm.

(C) Critique of the Mechanism

One of the obvious critiques is the problem associated with the administrability of this mechanism. However, a specialised entity such as the competition authority or even a specifically created institution would be able to monitor the firms' compliance. Consumers can resort to this institution to claim non-compliance. Hence, compliance need not be monitored by the institution upon its own initiative and may rely on consumer complaints as red flags.

Nevertheless, a further critique is that it is difficult to imagine this mechanism working effectively in developing countries, especially if one takes on a public choice critique of the latter's bureaucracies. In response to that critique one can relax the assumptions regarding corrupt officials, rent seeking employees, and inexperienced bureaucrats to distance the analysis from a public choice framework. Also, one can argue that subjecting the consumer trust to stricter court review, or allowing the private non-governmental sector to run the trust, or letting consumer unions manage its implementation might make the trust workable even in the developing world.

Another critique is that concentration increases barriers to entry that should be factored in when the authority is investigating the but-for price.[127] However, concentration is already high in these countries and a law that aims at ending all forms of concentration is a rather futile one. Lowering other barriers to entry should be a top priority and making use of the current concentration levels through this mechanism would amount to further benefits.

Moreover, other arguments challenging the idea of the trust are based on the assumptions that consumers want lower prices *now*, and that merger efficiencies are seldom realised. This might be a valid critique but would depend on the particular facts of every case. A case-by-case economic analysis of the probabilities of achieving the efficiencies and the cost-reductions that may affect long-run prices once these efficiencies come into effect compared to lowering prices now, must be undertaken to ascertain the validity of these assumptions.

One of the main concerns with this scheme would be the setting of the but-for price. However, any merger review necessarily undertakes such investigation when assessing the consumer welfare to be impacted by the merger.

[127]When assessing the impact of the increased barriers to entry, the competition authority in charge of the trust might want to consider the competitors that have suffered reductions in sales or market exit as a result of the merged entity. These firms might be eligible for some form of compensation or subsidiary payable from the trust.

(D) Mechanism for dominance

The second example deals with a dominant firm that is alleged to have abused its dominance by raising prices. Mere dominance is not a competition law concern. However, abuse of such conduct is what competition law is dealing with. The theory is not permissive, as outlined above, of abuse of dominance except in terms of price increases. Again, the competition authority may allow this increase to take place if the dominant firm subscribes to a repayment program as outlined above. The authority upon investigating the harm may allow the firm to persist in its consumer-harmful conduct if consumers are to benefit from the alleged efficiencies that the firm may achieve by maintaining its dominant position.

Basically, this repayment model transforms the outlook of competition law from being concerned with snap-shot of the short-run to take the long-run efficiencies into consideration. This gives firms a chance to invest and innovate and at the same time assures that consumers are not harmed. This long-term dynamic approach to competition law might be more suitable for developing countries under the premise that they prefer to follow a Schumpeterian model to competition law. Whether this suggested redistribution model could be put into practice is highly questionable. The extent to which it offers a realistic mechanism cannot be settled theoretically. It is, however, interesting to debate ideas regarding redistribution under the umbrella of antitrust laws, especially in developing countries.

5. Conclusion

This article has outlined some of the recurring themes that developing countries encounter with competition law. These countries face unique circumstances when confronted with adopting these laws. They are in many ways no longer free to choose whether to adhere to a competition law regime or not. They end up adopting laws that are not always tailored to address their local conditions. However, they still have ample space to enforce these laws in a way that 'fits' their unique environments and markets.

One of the pressing issues they face is whether to allow for dominance or not. In either case, this article has illustrated tools that can be incorporated into their enforcement schemes to achieve broader developmental goals. Whether these are concerned with dynamic efficiency, lower prices, or redistribution – developing countries have an arsenal of tools to choose form. The only important finding is that developing countries need to address such concerns. Following the path paved by the developed world may not allow them the opportunity to address these issues.

This conclusion needs to remain a top consideration especially amidst current debates about homogenisation and calls for a unified international competition regime. The move by developing countries to abort discussions on international competition law at Doha signals their strong objection to such a homogenisation attempt. [128] Whether this move is justifiable or not is debatable.

[128] At Doha, Qatar in November 2001 negotiations for an agenda on international competition law were once again commended. The Doha Declaration came to mandate clarifications of world competition rules on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels." The discussions were aborted and the Declaration fell through because the developing nations united to oppose it.

All that is important to note is that in a way it attests to the conclusions of this article. Namely, that the developing countries are not ready to adhere to a model of competition law that mirrors a Western path.

Their need to regulate international cartel activity is a pressing concern[129]; yet, their opposition signals a finding that their freedom to explore with competition law and to set their own policies and goals are more important.

[129]See Margaret Levenstein and Valerie Y. Suslow; 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy'; (2004); 71 ANTITRUST L. J.; 801. The authors' main argument is that in many cases international cartels sell to markets in developing countries, but prosecution and civil litigation in those countries have been rare. So, developing countries are harmed the most because of the lack of an international regime to prevent the anticompetitive effects of these cartels. These cartels are made up of producers in industrialised countries. Their members are large multinational corporations. There has been limited response from countries to these cartels. To assess the effects of these cartels on developing countries, the authors calculate the imports of "cartel-affected" goods, and find that the developing countries in 1997 imported $51.1 billion in goods from industries that saw international cartel activity at some point during the 1990s.

Multi-jurisdiction mergers and acquisitions in an era of globalisation: The Telecom Italia- Telefónica case

MARCO BOTTA*

The article offers a case study concerning the effects of the entrance of Telefónica among the shareholders of Telecom Italia in the Brazilian and Argentinean telecom markets. Through this case study, the article aims at showing that the competition authorities of the emerging economies have a limited range of remedies available when reviewing multi-jurisdictional transactions and that more international cooperation is, thus, needed in this area.

1. INTRODUCTION

During the last fifteen years new competition law regimes have 'bloomed' around the world. In several countries in transition the introduction of competition law has gone hand in hand with the privatization of former State-owned companies, liberalization of several economic sectors formerly reserved to the State economic activity, and the abolition of export and import barriers.[1] As a consequence nowadays, competition law can no longer be considered an exclusive business of Western Europe and of the USA.[2] To give an overview of this phenomenon, it is sufficient to mention that, according to the online database of the International Bar Association, 17 countries in Africa, 23 in Asia, 23 in Eastern Europe and 19 in Central and South America have already adopted competition legislations.[3]

The new competition legislations often include a merger control regime. The latter intervenes *ex-ante* on the market, by preventing or by imposing structural or behavioural remedies on the transactions which cause excessive market concentrations and which may lead in the long term to forms of abuse of dominance. The basic question discussed in this article is whether a system of merger control may be effectively enforced by the newly established competition authority of an emerging economy when the concentration is the result of a cross-border transaction. The competition authorities of the developing countries may, in fact, easily intervene in the concentrations involving local companies, while they face difficulties in enforcing their legislation when a cross-border transaction takes place. From the point of view of competition law, a cross-border merger and acquisition (M&A) is a multi-jurisdictional concentration. In fact, cross-border mergers are often reviewed by a number of competition authorities in different countries. The transaction, actually, has to be notified to all competition authorities of the countries where the concentration has an impact on the market. The problem is that during the process of multi-jurisdictional review, each competition authority analyses the transaction only from the point of view of its impact on the relevant market within its jurisdiction. One competition agency is often not

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[1] Lande R. 'Creating Competition Policy for Transition Economies' (1997-1998) Vol. 23 Brooklyn Journal of International Law 341.

[2] Roshanian A. 'Modelli di Tutela della Concorrenza nelle Economie Emergenti: il Caso dell'America Latina' (2002) Vol. 14 Boletín Latinoamericano de Competencia 163.

[3] http://www.globalcompetitionforum.org/ (24.04.2008).

aware either of the effect of the transaction in other countries or the remedies that foreign agencies have applied to the concentration. Moreover, the merging parties are often not required to provide information concerning the notification process in the different competition law jurisdictions involved.

It is important to point out that during the last years both the Organisation for the Economic Cooperation and Development (OECD) and the International Competition Network (ICN) have worked on the issue of the multi-jurisdictional mergers within the Committee on Competition Law and Policy[4] and the Merger Review Working Group.[5] For instance, one OECD's Recommendation of 1995 provides a framework for the bilateral agreements of cooperation between different competition authorities, in order to exchange information and to coordinate their action in cross-border cases.[6] Moreover, in 1999 the OECD Competition Law and Policy adopted a report on the notification of transnational mergers.[7] On the other hand, the ICN Working Group on Merger Review adopted a number of guidelines concerning the notification of mergers and their analysis, encouraging a harmonization of the national mechanisms of merger review, in order to increase the legal certainty for the merging parties and to improve the degree of understanding and cooperation between different competition authorities involved in cross-border transactions.[8] Finally, the companies involved in cross-border cases, even if not legally required, often have the interest to include in the notification form information concerning to which other competition law jurisdictions the cross-border transaction has also been notified. In fact, companies involved in multi-jurisdictional mergers are often better off if the different competition authorities cooperate.

However, as it will be shown in the following pages, the degree of cooperation between different competition authorities involved in the same merger review is sometimes quite

[4]The OECD Committee on Competition Law and Policy organizes every year meetings, seminars and roundtables among the national representatives of the OECD Member States, who are usually officers of the national competition authorities. The Committee issues recommendations and guidelines on different issues concerning competition law and periodically it undertakes peer reviews of the national competition laws and of their enforcement record. It also organizes once per year a Global Competition Forum and a Latin American Competition Forum, where non OECD members are invited to participate. Information concerning the work of the OECD Committee on Competition Law and Policy is available at http://www.oecd.org/topic/0,3373,en_2649_37463_1_1_1_1_37463,00.html (1.5.2008).

[5] The International Competition Network (ICN) is a network of competition authorities which gather since 2002 in order to discuss different topics related to competition law. The ICN organizes once per year a conference where the representatives of the competition authorities meet and where the work of the different working groups composed by a certain number of countries is presented. Since its establishment, merger control has been one of the key aspects of the work of the ICN. The ICN has, in fact, a Working Group on Merger Control, divided in two Subgroups on Notification and Procedures and Merger Investigation and Analysis. For further information see:
http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers (1.5.2008).

[6]OECD Council, 'Revised recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade'. Recommendation published in 1995. The text of the recommendation is available at http://www.oecd.org/dataoecd/60/42/21570317.pdf (24.4.2008).

[7]OECD Committee On Competition Law And Policy, 'Report on Notification of Transnational Mergers'. Adopted on 23rd February 1999. Document number DAFFE/CLP(99)2/FINAL. The text of the report is available at http://www.oecd.org/findDocument/0,3354,en_2649_34715_1_119666_1_1_1,00.html (1.5.2008).

[8]See for instance: ICN Subgroup Notification & Procedures, 'Recommended Practices on Remedies and Competition Agency Powers'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).
ICN Subgroup Investigative Techniques, 'Investigative Techniques Handbook for Merger Review'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).
ICN Subgroup Notification & Procedures, 'Implementation of the ICN Recommended Practices'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).
ICN Subgroup Notification & Procedures, 'Waivers of Confidentiality in Merger Investigations'. Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).
ICN Subgroup Notification & Procedures, 'Merger Notification Filing Fees'. Adopted during the Fourth Annual ICN Conference, Bonn, Germany (5-8 June, 2005).
ICN Investigative Techniques Subgroup, 'Planning a Merger Investigation'. Third Annual ICN Conference, Seoul, Korea (21-22 April, 2004).
ICN Notification and Procedures Subgroup, 'Recommended Practices for Merger Notification Procedures'. Adopted during the Second Annual ICN Conference, Mérida, Mexico (June 23-25, 2003).
ICN Working Group on Merger Control, 'Report on the Costs and Burdens of Multi-jurisdictional Merger Review'. Adopted during the First Annual ICN Conference, Naples, Italy (September 28-29, 2002).
All the reports and guidelines drawn by the ICN Working Group on Merger Control are available at
http://www.internationalcompetitionnetwork.org/index.php/en/library/working-group/17 (1.5.2008).

limited, and the competition authorities of the emerging markets are those which are mostly affected by this lack of international cooperation.

The problems described above may seem to the reader rather theoretical. It has already been claimed by a number of authors that the competition authorities of the developing countries suffer from a lack of international cooperation in the field of competition law.[9] However, so far there have been few attempts to follow the process of multiple notifications of a cross-border M&A, in order to study the effects of the transaction in the different competition jurisdictions where the transaction has been notified. The goal of this article is to undertake this kind of analysis for a recent cross-border transaction, the case Telecom Italia-Telefónica. This case study shows that a transaction which had its origins in Italy also had an indirect impact on the level of competition in the Brazilian and Argentinean telecommunications markets. The Telecom Italia-Telefónica case is interesting because it shows the difficulties faced by the competition authorities of the developing countries in enforcing their merger control legislations in cases of cross-border M&As and the low degree of cooperation between the competition authorities of the developed and the developing countries.

In relation to the methodology of the analysis, the case study will rely on the articles of the press to understand the different steps of the transaction. Moreover, the decision of the Brazilian telecom regulatory authority concerning the transaction will also be analysed. Finally, the Shareholders' Agreement which is the basis of the acquisition will also be a useful source of information. The case study takes into consideration both, the competition and the corporate law perspective of the transaction. The article discusses, in fact, the shareholding structure which connects Telecom Italia and Telefónica with their local subsidiaries in Brazil and Argentina; structure summarized in the Annex 1 and 2 attached to this article.

2. The investments of Telecom Italia and Telefónica in Latin America

The two actors of this case study are the Spanish telecommunications company, Telefónica, and the former Italian State-owned telephone monopoly, Telecom Italia. These two companies are active in the same product markets, due to the fact that both of them provide a full range of telecommunications services, including fixed and mobile phone connections and Internet access services. Another point that they have is common is that during the past years they have been investing outside of their country of origin. In particular, they have targeted through their investments Latin America, where they have acquired the control of a number of former State-owned companies, mostly privatized during the 1990s.[10] Overall, the Spanish telecom operator is present in all Latin American countries.[11] In this area of the world Telefónica counts 126 out of its 210 million clients.[12]

[9]See for instance: Bhattachrjea A. 'The Case for a Multilateral Agreement on Competition Policy: a Developing Country Perspective' (2006) Vol. 9(2) Journal of International Economic Law 293-323. Bhattachrjea A. 'Export Cartels – A Developing Country Perspective' (2004) Vol. 32(2) Journal of World Trade 331-359. Fox E.M. 'Desarrolo Económico, Pobreza y Antimonopolio: El Otro Sendero' (2007) Vol. 8 Revista Jurídica de la Universidad de Palermo, 167. Fox E.M. 'International Antitrust and the Doha-Dome' (2003) Vol. 43 Virginia Journal of International Law 911. Fox E.M. 'World Competition Law' 224-248 in (Dhall V. ed.) *Competition Law Today*, 2007.

[10]A description of the Telecom Italia's foreign direct investments in Latin America is available at http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=1&pageTypeId=-8661&LANG=EN&channelId=-9749&channelPage=/ep/channel/default.jsp (24.04.2008).

[11]Telefónica is present through its local subsidiaries in the following Latin American countries: Argentina, Brazil, Chile, Perù, Colombia, Mexico, Venezuela, Guatemala, Panamà, El Salvador, Nicaragua, Ecuador, Uruguay. http://www.telefonica.es/investors/ (24.04.2008).

[12]*Above*.

On the other hand, Telecom Italia has almost 90 million clients in the world, less than half of Telefónica.[13]

In Argentina, the former State-owned telecommunications monopoly, Entel, was privatized in 1990. Entel was split in two companies, Telecom Argentina[14] providing local land line services in the northern part of the country, and Telefónica de Argentina serving the south of the country.[15] A joint venture between Telecom and Telefónica Argentina was initially established to provide long distance services.[16] At the moment, Telecom Italia provides Internet and fixed phone services in the country through its subsidiary Telecom Argentina[17] and mobile phone services through one of the four mobile phone operators of the country, Personal Telecom S.A.[18] On the other hand, Telefónica provides fixed and Internet access services through its subsidiary Telefónica Argentina.[19] Furthermore, it also operates in the mobile phone sector through its subsidiary Telefónica Moviles Argentina S.A., known under the brand name Movistar.[20] Movistar has 35.5% market share in the Argentinean mobile phone market. [21]

In Brazil, Telecom Italia is present in the mobile phone market through Tim Brazil, the second mobile phone operator in the country with 25.4% market share.[22] Telefónica is also present in the same sector through Vivo Brazil, which is a joint venture established in 2002 with Portugal Telecom, and is now the main mobile phone operator in the country. [23]

During the last years, both Telefónica and Telecom Italia decided to invest in Latin America because, like in other emerging economies, the demand for mobile phone and Internet access services is rapidly increasing in this area of the world. For instance, in 2006 the Argentinean market for mobile phone services grew 30% for voice related services, and

[13]InfoBAE Professional, 'Telefónica Obtuvo los Mayores Beneficios del Mundo'. Article published on 1.8.2007. InfoBAE Professional is an Argentina online newspaper specialised in economy issues. The articles are available online at http://www.infobaeprofesional.com/interior/index?cookie (24.04.2008).

[14]Telecom Argentina was sold to Nortel Invessora, a holding company were the initial main shareholder was France Telephone, which later sold its shares to Telecom Italia.

[15]OECD Secretariat, 'Competition Law and Policy in Argentina, a Peer Review'. Report published in 2006. The text of the report is available at http://www.oecd.org/dataoecd/36/57/37970045.pdf (24.04.08) page 40.

[16]Above.

[17]http://www.telecom.com.ar/hogares/prodyserv.htm (18.4.07).
A description of the shareholding structure which connects Telecom Italia s.p.a. to Telecom Argentina s.a. is available at http://www.telecom.com.ar/institucionales/estructura/estructura.html (18.04.08).
Telecom Argentina has 4.2 million fixed telephone lines active and 783.000 ADSL clients in Argentina. Further information concerning Telecom Argentina's presence in the country is available at: Telecom Argentina S.A., 'Memoria y Estados Contables al 31 de Diciembre 2007'. The report is available at
http://www.telecom.com.ar/prensa/pdf/teco1207.pdf (18.04.08) page 7.

[18]http://www.personal.com.ar/ (23.04.08).

[19]The shareholding structure which links Telefónica S.A. to Telefónica Argentina S.A. is described in: Telfónica de Argentina S.A., 'Memoria, Estado Contables y Reseña Informativa al 31 diciembre 2007'. The text of the report is available at http://www.telefonica.com.ar/inversor/ (18.04.2008) page 9.
At 31st December 2007, Telefónica S.A. provided fixed phone connection to 4.9 million clients in Argentina and it provided ADSL connection to 816.000 clients in the country. See financial report 2007, page 110.

[20]http://www.movistar.com.ar/ (18.4.07).

[21]Telefónica Moviles Argentina S.A, 'Memoria, Estado Contales y Reseña Informativa al 31 diciembre 2007'. The text of the report is available at http://www.movistar.com.ar/empresa/inversores/documentos/07-12_moviles_esp.pdf (18.4.2008) page 92. 35.5% market share is equivalent to 13.6 million clients in Argentina.
Movistar was established in 2005, following the acquisition in 2004 by Telefónica of the Argentinean subsidiaries of Bellsouth , Compañía de Radiocomunicaciones Moviles S.A. (Movicom) and Compañía de Teléfonos de la Plata S.A.

[22]http://www.mzweb.com.br/tim/rao2006/interna.asp?i=1&pag=01&secao=1 (18.04.08).

[23]For further information concerning the shareholding structure of Vivo see
http://vivo.mediagroup.com.br/RAO/2006/en/corporateRestructuring.asp (18.04.08).

52% for transfer of data related services. The market of fast Internet access grew in the country with an increase of 32% in the number of ADSL users in comparison to the previous year.[24] According to 2006 Vivo's annual financial report, the Brazilian market for mobile phone services increased 15% and the same result is expected in the following year, due to the fact that there is '…still a growth potential, particularly in the lower income classes….'. [25]Due to this growing demand in the region, César Alierta, the chief executive officer (CEO) of Telefónica, in November 2007 stated that Telefónica will invest 16,000 million in Latin America by 2010; its goal being to increase its clients in the area to 170 million by that date. [26]In particular, the CEO added that Telefónica will focus its investments in the sector of mobile phones and Internet access services.[27]

3. The steps of the transaction in Europe

Through a press release on 28th April 2007, Telefónica S.A. announced to have achieved an agreement with Pirelli Co. S.p.A. for the purchase of its stakes in Olimpia S.p.A., the main shareholder of Telecom Italia S.p.A.[28]

Technically, the acquisition took place through the registration in Milan of a new company, Centotrenta 4/6 S.r.l., which was subsequently transformed and renamed into Telco S.p.A.. The latter was a joint stock company with five shareholders: Telefónica (the major shareholder, with 42.3% of the shares), Benetton (8.2%), two Italian banks Mediobanca (10.7%) and Intesa San Paolo (10.7%), and one Italian insurance company, Generali (28.1%). After its establishment, Telco had to acquire the entire capital of Olimpia from Pirelli.[29] Olimpia was previously the major shareholder of Telecom Italia having 18% of its shares. Moreover, Telco planned to acquire directly 5, 6% of the Telecom Italia's shares. As a result, Telco would acquire totally 23.6% of Telecom Italia's shares. Telecom Italia is a public company, where the shares are dispersed among several small shareholders.[30] Thus, Telefónica indirectly became one of the major shareholders in Telecom Italia, though its direct participation in the latter counted only for 6.9% of the shares, equivalent to 10% of the voting rights.[31]

Article 5 of the Shareholders' Agreement signed by Telco's shareholders stated that the parties of the agreement 'acknowledge, without prejudice of the independence and the autonomy of any of the Telecom Italia's management decisions, that the investment in

[24]InfoBae Professional, 'Mercado de Telecomunicaciones Crecerá un 23 por Ciento'. Article published on 11.11.2007.
[25]http://vivo.mediagroup.com.br/RAO/2006/en/phoneMarket.asp (18.04.08).
[26]Invertia, 'Telefónica Anuncia Inversiones en Latinoamerica Hasta 2010'. Article published on 21.11.2007. Invertia is an Argentina online newspaper providing information concerning financial markets. Invertia is part of Terra, Telefónica's subsidiary in Argentina. Invertia articles are available at http://ar.invertia.com/ (24.4.2008).
[27]InfoBAE Professional, 'Inversiones de Telefónica en Brasil superarán los 2.000 M. $'. Article published on 13.12.2007.
[28]Telefónica's press release, 'Telefónica, Mediobanca, Generali, Intesa San Paolo y Benetton se Unen para Entrar en Telecom Italia'. 28th April 2008. The text of the press release is available at
http://www.telefonica.es/accionistaseinversores/esp/pdf/hr/hr070429.pdf 24.4.2008).
[29]Further information concerning the financing of the transaction is available at http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=5&pageTypeId=-8662&LANG=EN&channelId=-12842&channelPage=/ep/channel/default.jsp (19.04.08).
[30]The shareholding structure of Telecom Italia updated to 31st March 2008 is the following one: Telco (24.5%), Telecom Italia (0.94%), Italian institutional investors (17.41%), foreign institutional investors (23.72%), Italian legal persons (8.32%), foreign legal persons (1.92%), Italian natural persons (23.12%), foreign natural persons (0.07%).
The shareholding structure of Telecom Italia is available at
http://www.telecomitalia.com/cgi-bin/tiportale/TIPortale/ep/browse.do?tabId=5&pageTypeId=-8662&LANG=EN&channelId=-12819&channelPage=/ep/TIinvestitori/TIazionisti.jsp (19.04.08).
[31]Telefónica S.A., 'Comunication to the Comisión Nacional del Mercado deValores', Madrid, 8th May 2007. The text of the communication is available at http://www.telefonica.es/accionistaseinversores/esp/pdf/hr/hr08052007.pdf (31.1.2008).

Newco (later renamed Telco) implies a strategic vision and perspective. Therefore, the parties will favourably regard any strategic initiative that the Telecom Italia's and Telefónica's respective managements may jointly carry out, in their autonomy and independence.'[32] This paragraph is a generic provision, which recognizes the potential benefits of the strategic partnership between Telecom Italia and Telefónica. According to the Shareholders' Agreement, each shareholder will appoint a number of Directors in Telco and Olimpia Boards of Directors proportional to their number of shares.[33] In particular, among the ten Directors of Telco Board, four of them would be appointed by Telefónica and the remaining six by the other shareholders.[34] Moreover, according to Article 5 of the Shareholders' Agreement, Telefónica had the right to appoint directly two of the Directors that Olimpia would present in the list of candidate Directors for the Telecom Italia's Board, which counts in total 17 Directors[35] and 1 secretary. Meanwhile, the other Telco's shareholders had the right jointly to present the names of three Directors. Finally, the Shareholders' Agreement granted to Telefónica the right to ask a de-merger of Telco in case another telecom operator purchases more than 10% of Telecom Italia's shares or if the latter sold its assets for a value of more than 4 billion.[36]

Following the conclusion of the agreement at the end of April 2007, the establishment of Telco and the acquisition of Olimpia's shares took place only at the end of October 2007.[37] In November 2007, Telco's Board was gathered and Telefónica appointed two Directors in the new Board of Telecom Italia. César Alierta, Telefónica's CEO, and Julio Linares were appointed as Directors in Telecom Italia's Board. The fact that Telefónica's CEO decided to sit personally in Telecom Italia's Board[38] is a clear sign of the interest of the Spanish telecom operator for the Italian partner.

The last step of the transaction took place at the end of November 2007, when Telco's Board of Directors decided to merge Telco and Olimpia into one company.[39] This last transaction shortened the ownership chain which connected Telefónica to Telecom Italia.

The six months period of implementation of the agreement (from the end of April until the end of October 2007) was necessary due to the need to ask authorization from the competition authorities of the countries where Telecom Italia and Telefónica operated directly or through their local subsidiaries. On 11th May 2007, the transaction was informally notified to the European Commission. The lawyers representing Telco asked the Directorate General (DG) for Competition if the transaction fulfilled the conditions to be considered a real concentration, and thus being formally notified under Article 4(1) of the Regulation 139/2004 EC.[40] Telco's lawyers argued that the number of shares of Telefónica

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[32] *Above*.

[33] Shareholders Agreement signed on 28th April 2007 between Telefónica S.A., Assicurazioni Generali S.p.A., Sintonia S.A., Intesa San Paolo S.p.A. and Mediobanca S.p.A. Article 1(1). The text of the agreement is available at http://www.telefonica.es/accionistaseinversores/ing/pdf/070507_shareholders_agreement.pdf (24.4.2008).
In relation to the conclusion of the agreement for the establishment of Telco, see also the By-Laws and the Co-Investment Agreements among Telco shareholders. The text of the agreements is available at http://www.telefonica.es/accionistaseinversores/ing/pdf/070507_by-laws.pdf (24.4.2008; By-Laws Agreement);
http://www.telefonica.es/accionistaseinversores/ing/pdf/070507_co-investment_agreement.pdf (24.4.2008; Co-Investment Agreement).

[34] *Above* Article 1 (1) (b).

[35] *Above* Article5.

[36] *Above* Article 6.

[37] Invertia, 'Telefónica Sienta Quatro Directivos en el Consejo que Controla Telecom Italia'. Article published on 25.10.2007.

[38] Invertia, 'Allerta Anuncia que Sentará en el Consejo de Telecom Italia'. Article published on 30.10.2007.

[39] InfoBAE Professional, 'Aprueban Fusión de Telefónica con Telecom Italia'. Published on 29.11.2007.

[40] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24, 29.1.2004, pages 1–22. Article 4 (1).

in Telecom Italia was limited and therefore, the transaction did not lead to change of control on a lasting basis under Article 3 (1) (b) Regulation 139/2004 EC.[41] The Commission analysed the case according to the Commission Notice on the Concept of Concentration.[42] In a letter sent to the parties on 12 June 2007, the Commission stated that in its opinion the acquisition by Telco of Olimpia did not trigger a notification under Regulation EC 139/2004.[43] The Commission concluded that the number of shares of Telefónica in Telecom Italia was too limited to create sole control of the Spanish telecom operator in the Italian company.[44] Furthermore, the Commission also excluded the hypothesis of the acquisition of joint control by Telco shareholders in Telecom Italia. Telco, in fact, did not enjoy particular veto rights on important decisions concerning the budget or the management of the shares of Telecom Italia[45] and it was argued that the 23.6% of Telco's shares in Telecom Italia was not sufficient to allow Telco to exercise a decisive influence on the management of Telecom Italia.

In Europe the transaction was almost unnoticed,[46] not only due to the informal decision of the European Commission, but also due to the low impact of this acquisition on the level of competition in the European telecom markets. Telefónica and Telecom Italia are in fact, direct competitors in Europe in only a few relevant markets. For instance, they both operate in Germany in the market for Internet access services, where Telefónica is present through the subsidiary O2,[47] while Telecom Italia provides ADSL services in some German cities through its subsidiary Hansenet, under the brand name of Alice.[48] However, due to the low market share of Telefónica and Telecom Italia in these few relevant markets where they are direct competitors, the transaction did not create particular horizontal overlaps between the two companies in Europe. As a consequence, even if the European Commission had required from the parties a formal notification under Regulation 139/2004 EC, it would have hardly applied any remedy to the transaction.

4. Brazil: Divestitures or behavioural remedies?

While in Europe the transaction passed almost unnoticed, the situation was different on the other side of the Atlantic where, as mentioned in the previous section, both companies invested heavily in the past years. In Brazil, Telecom Italia was the second mobile phone operator in the country through Tim Brazil. The latter, through its national network, had 25.8% market share in the market of services for mobile phones. On the other hand, Telefónica was active in the country through the joint venture Vivo, jointly controlled with Portugal Telecom. Vivo was the main mobile phone operator in the country with 28.4% market share. The acquisition of Olimpia by Telco created indirectly a shareholding link between Tim Brazil and Vivo, which jointly had 53% market share in

[41]Telephone discussion held on 10th April 2008 with the officer of the European Commission, DG Competition, Information, Communication and Media unit, who was in charge of the Telecom Italia-Telefónica case. The officer asked to remain anonymous.

[42]Commission Notice on the Concept of Concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ C 66, 2.3.1998, pages 5–13

[43]The letter is not publicly available. Access to the letter has been obtained by the author through the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. OJ L 145, 31.5.2001, pages 43–48.

[44]*Above* Commission Notice on the Concept of Concentration, paragraph 14.

[45]*Above* Commission Notice on the Concept of Concentration, paragraph 21.

[46]One of the few articles written on this topic in the European press is the following one: Olivieri A. 'Telco, il Riassetto Entro Luglio'. Article published on Il Sole 24 Ore on 14.06.2007. The articles of Il Sole 24 Ore are available at http://www.ilsole24ore.com/ (24.4.2007).

[47]http://www.o2online.de/ (24.4.2008).

[48]http://www.hansenet.de/index.html (24.4.2008).
ADSL Alice is available in Hamburg, Munich, Berlin, Stuttgart, Frankfurt, Lübeck. The company has only 684.000 subscribers in the country
.http://www.telecomitalia.com/cgibin/tiportale/TIPortale/ep/browse.do?tabId=1&pageTypeId=8661&LANG=EN&channelId=-9749&channelPage=/ep/channel/default.jsp (24.4.2008).

the Brazilian mobile phone market. Only the third mobile phone operator in Brazil, Claro, with 24% market share would have remained fully separated from Tim Brazil and Vivo.[49]

The Brazilian Competition Law of 8884/94 provides a regime of merger control.[50] According to Article. 54 (3), 'any form of economic concentration' has to be notified to the Secretariat for Economic Law (*Secretaria de Direito Econômico*, SDE), part of the Ministry of Justice, at least fifteen days after the completion of the transaction (a post-merger notification). The notification threshold provides that the total market share of the merging parties should account for at least 20% of the relevant market or the total annual turnover of the participants in the transaction being equivalent to 400 million of Reais.[51] The SDE sends afterwards the file to the Brazilian competition authority, the Administrative Council of Competition Protection (*Conselho Administrativo de Defesa Econômica*, CADE) and to the Secretariat of Economic Surveillance (Secretaria de Acompanhamento Econômico, SEAE), part of the Ministry of Finance. [52]SEAE and SDE give an opinion to CADE about the concentration from economic and legal perspective. Nevertheless, the final decision concerning the concentration has to be taken by CADE.

An exception from the system described above exists in the field of telecommunications, where according to Article 7 Lei 9472/97 it is the National Agency for Telecommunications (*Agéncia Nacional de Telecomunicaçóes*, ANATEL) to have jurisdiction over concentrations involving telecom operators[53]. However, ANATEL will have to notify later its decision to CADE.[54] In the past, this provision was considered ambiguous because it was unclear whether ANATEL's decision was simply an opinion for CADE, or it should be considered as the final decision concerning the concentration. This conflict of jurisdiction was solved in 2000, when the two institutions established a system of internal cooperation.[55] According to that system, ANATEL conducts an investigation of the concentration concerning telecom operators and it forwards an opinion to CADE, which takes the final decision. However, usually CADE follows ANATEL's opinion.

According to Article 7 *Lei* 9472/97, 'the general rules governing the protection of the economic order shall apply to the telecommunications industry when they do not conflict with the provisions of this act'.[56] This implies that ANATEL will have to analyse the concentration in accordance with the principles of the Competition Law 8884/94, part of the 'rules governing the protection of the economic order.' ANATEL will be able to impose all the required remedies on the concentration, in order to preserve the level of competition

[49]http://www.claro.com.br/portal/home.do?method=showHome&idlocal=50# (24.04.2008).

[50]Brazilian competition law, Law n.8884/94, adopted on 6th June 1994. A translation in English of the law is available at http://www.globalcompetitionforum.org/regions/s_america/Brazil/Legisla%E7%E3o%20Antitruste%20em%20ingl%EAs.PDF (18.04.2008). For a comment of the Law 8884/94 see Dallal S. 'Competition Law in Brazil', (1995) Vol. 16 European Competition Law Review 255-261.

[51]Originally, the turnover taken in consideration for the threshold of notification was the worldwide turnover. As a consequence, a huge number of M&A which did not have a direct impact on the Brazilian market had to be notified to the SDE. However, on 19th January 2005 CADE changed its understanding on the notification thresholds. It decided that the turnover could be calculated only in relation to the sales on the Brazilian market.

[52]Above Law 8884/94, Article 54 (4).

[53]Lei n. 9472, *de 16 de Julho de 1997, Dispõe Sobre a Organização dos Serviços de Telecomunicações, a Criação e Funcionamento de um Orgão Regulador e Outros Aspectos Institucionais, Nos Ternos da Emenda Constitucional nº 8, de 1995.* Article 7 (1). The text of the legislation is available at
http://www.planalto.gov.br/ccivil_03/Leis/L9472.htm (24.4.2008).

[54]*Above* Law 9472/97, Article 7 (3).

[55]OECD Secretariat, Brazil – Peer Review of Competition Law and Policy. Study published in 2005. The text of the report is available at http://www.oecd.org/dataoecd/12/45/35445196.pdf (18.04.08).

[56]"*As normas gerais de proteção à ordem econômica são aplicáveis ao setor de telecomunicações, quando não conflitarem com o disposto nesta Lei*".

in the telecom market, including the imposition of limits on the acquisition and transfer of transmission rights for the telecom operators.[57] One specificity of the system of merger control provided by *Lei* 9472/97 is that its scope of application is broader than that one included in the Brazilian competition Law of 1994. In fact, it does not contain specific turnover thresholds of notifications; every kind of economic concentration ('*qualquer forma de concentração econômica*') among telecom operators needs to be notified to ANATEL.[58] In particular, every kind of modification in the shareholding structure of the telecommunications companies operating in Brazil ('*qualquer forma de agrupamento societário*') has to be notified. The existence of this specific system of merger control in the field of telecommunications explains why the acquisition of Olimpia by Telco was notified to ANATEL. The argument that the transaction did not trigger a formal notification, because there was no change of control in Telecom Italia, was not valid in Brazil.

ANATEL authorized the acquisition of Olimpia by Telco on 23rd October 2007. It is important to point out this date, because the transaction was implemented through the transfer of Olimpia's shares from Pirelli to Telco few days after ANATEL's decision. ANATEL was, thus, the last competition authority to which the acquisition of Olimpia by Telco was notified. ANATEL imposed 28 restrictions to the transaction which aimed at keeping Tim Brazil and Vivo legally separated, and thus competitors on the market.[59] According to Antonio Domingos Teixeira Bedran, the *Conselheiro* in charge of elaborating the draft resolution for the ANATEL's *Conselho Diretor*, 'such as approved, the transaction preserves the level of competition in the Brazilian market ('*tal como aprovada, a anuência prévia preserva o Mercado concorrencial no Brazil*'). [60]However, the question is whether these 28 remedies are sufficient to prevent any potential anti-competitive effect caused by this indirect structural link established between Tim Brazil and Vivo. The 28 conditions imposed by ANATEL may be summarized as follows:[61]

- Prohibition for the Directors appointed by Telefónica in the Boards of Telco, Olimpia and Telecom Italia to take part in decisions concerning the Brazilian telephone market are taken.
- Prohibition for Telefónica to appoint any Director in the Boards of any of Telecom Italia's subsidiaries in Brazil.
- Prohibition for Tim Brazil and Vivo to start business relations in a manner different from the normal business relations between the two competitors. In particular, it was forbidden to finance, to provide loans, to transfer assets, technologies, human resources to each other. Moreover, it was forbidden to undertake common advertising campaigns.
- Prohibition for Telefónica to increase the number of its shares in Tim Brazil.
- Obligation to indicate in the agenda of the Boards of Directors of Telco, Olimpia and Telecom Italia the topics that were related to the Brazilian market (on which the Directors appointed by Telefónica could not vote).
- By 30 days after the decision, the companies were required to submit to ANATEL proof that the prohibitions and obligations mentioned above had been implemented in their corporate structure.

Finally, ANATEL's *Conselho Diretor* decided to review the case six months after the decision, monitoring how Telefónica and Telecom Italia had implemented the remedies imposed in the meantime.[62]

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[57]*Above* Lei 9472/1997, Article 7(1).
[58]*Above* Lei 9472/1997, Article 7 (1).
[59]Invertia, 'Brasil impone restricciones a Telefónica para entrar en Telecom Italia'. Article published on 23.10.2007.
[60]ANATEL's press release, 'ANATEL Concede Anuência Prévia a Acordo Societário entre Tim e Vivo'. Press release of 23.10.2007. The text of the press release is available at http://www.anatel.gov.br/Portal/exibirPortalInternet.do# (24.4.2008).
[61]*Above* ANATEL's press release.
[62]ANATEL, *Ata da 457° Reunião do Conselho Diretor, 23.10.2007. Paragraph 3.8, Anuência Prévia; Interessados: TIM e TELEFÔNICA; Processo n.° 53500.014598/2007.* The text of the document is available at http://www.anatel.gov.br/Portal/documentos/207496.pdf?numeroPublicacao=207496&assuntoPublicacao=Ata%20da%20457%AA%20reuni%E3o%20do%20Conselho%20Diretor&caminhoRel=Cidadao-Sobre%20a%20Anatel-Sobre%20o%20Conselho%20Diretor (24.4.2008).

The 28 conditions introduced a legal separation between Tim Brazil and Vivo. Their common goal was to ensure that the companies would be managed separately. On the other hand, no divestiture aiming at decreasing Tim Brazil/Vivo market power in the Brazilian mobile phones market was imposed. It should be noticed that the majority of the remedies imposed by ANATEL had a behavioural nature.

One of the most important behavioural remedies was the obligation for the Directors appointed by Telefónica in the Boards of Telco, Olimpia and Telecom Italia, not to vote when the topic of discussion was related to the Brazilian telecom market. That obligation was already included in Article 5 of the Telco Shareholders' Agreement.[63] According to that article, the Directors appointed by Telefónica in Telco, Olimpia and Telecom Italia were required neither to vote any resolution nor to participate in discussions related to 'the policies, management and operations of companies directly or indirectly controlled by Telecom Italia providing their services in countries where regulatory and legal restrictions or limitations for the exercise of voting rights by Telefónica (as indirect and ultimate shareholder of such companies) are in force'. Due to the focus of Telecom Italia and Telefónica's investments in Latin American countries it is obvious that this provision was inserted in the Shareholders' Agreement in order to face preventively the concerns which were expected to be raised by some competition authorities in South America, like ANATEL. The question is whether this obligation would be sufficient to keep the management of the two companies separate. It is a generic obligation and there is no form of control ensuring that this obligation will be enforced.[64] In fact, ANATEL will not have any power to control the fulfilment of this obligation, due to the fact that Telecom Italia's Board meetings take place in Italy, outside of ANATEL's jurisdiction.

Another risk is that the Directors appointed by Telefónica in the Board of Telecom Italia may transmit confidential business information to their mother company. The latter in fact, by sitting in the Board of Telecom Italia, will have access to the business strategy plans of the company. The fact that César Alierta, Telefónica's CEO, sits in Telecom Italia Board since November 2007 makes this not only a theoretical danger.

ANATEL's decision not to impose any divestiture can be explained in the light of the pressure to which ANATEL was probably subject to by Telefónica and Telecom Italia during the merger review. ANATEL was in fact, the last regulatory authority to which the acquisition was notified. The transaction was implemented on 30th October 2007, a few days after ANATEL's resolution. What would have happened if ANATEL had decided to impose tougher remedies on the transaction? In any case, ANATEL could not block the acquisition. In fact, the only real acquisition took place in the Milan stock exchange market, when Telco acquired Olimpia's shares from Pirelli on 30th October 2007. However, the acquisition in Italy could not be prevented, because it took place outside of ANATEL's jurisdiction. Perhaps, ANATEL could impose structural remedies at a local level, on Tim Brazil/Vivo. For instance, it could ask Tim Brazil/Vivo to sell some of their transmission licenses or part of their assets to third operators, in order to decrease their market power. However, in real terms, this could not be an option because it would not be acceptable for the merging parties. In fact, during the entire notification process Telefónica has clearly stated that it would never accept to divest any of its assets in Latin America in order to satisfy

[63] *Above* Telco Shareholders' Agreement, Article 5

[64] InfoBAE Professional, 'Telefónica toma recaudos para ingresar en Telecom'. Article published on 12.11.2007.

the concerns of the local competition authorities. [65] In case of divestiture, Telefónica would leave the country where such structural remedies were imposed.[66] From a business perspective this position is understandable, due to the fact that any divestiture imposed by a regulatory authority risks to undermine the business rationale of the transaction. Although this threat probably would never be implemented in practice, it shows the bargaining power that corporations have with the local competition authorities.

In conclusion, the Brazilian case shows the difficult situation in which the competition authorities of the emerging markets are often placed in when they have to review a cross-border merger. Due to the pressure from the merging parties and the lack of jurisdiction in the transaction's country of origin, the competition agencies of the developing countries are often unable to enforce effectively their merger control systems.

5. Argentina: Merger control or problem of minority shareholding?

As explained in the previous section, the acquisition of Olimpia by Telco was notified to ANATEL. If in Brazil the main issue was which remedies could be imposed on the transaction by ANATEL, in Argentina the issue was the lack of notification of the acquisition to the *Comisión Nacional de Defensa de la Competencia* (CNDC), the Argentina competition authority.

There are two criteria to trigger a merger notification according to the Argentinean Competition Law 25.156/99: the change of control in the acquired company[67] and the turnover of the merging parties in Argentina in the previous financial year has to be above 200 million pesos.[68] The time-limit of notification is unclear. According to the Decreto 89/2001, which contains some rules concerning the enforcement of the Law 25.156/99, the notification has to take place by one week after the signing the merger agreement or one week after the transfer of the share in case of an acquisition (one week after the acquisition is '*perfecionada*').[69] This creates a complex system, which requires an *ex-ante* notification for mergers, while an *ex-post* notification for acquisitions. Unlike Brazil, in Argentina the competition authority has clearly a full jurisdiction over all concentrations concerning companies operating in the network industries. The competition authority is required to ask for an opinion to the regulatory authority, but the opinion is not binding and the case is analysed according to the standard merger control procedure.[70]

The time frame of notification is not the only ambiguous point of this legislation. The Law 25.156/99 established a new and independent Competition Tribunal (*Tribunal de Defensa de la Competencia*).[71] The latter should be an independent body with its own budget,

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[65] InfoBAE Professional, 'Telefónica sigue a la espera de la decisión de Argentina y Brasil'. Article published on 8.10.2007.

[66] *Above* article of InfoBAE Professional on 8.10.2007.

[67] *Ley 25.156 de Defensa de la Competencia*, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm (18.04.2008), Article 6.

[68] *Above* Article 8. This Article was amended by Decreto N° 396/2001 of 5.4.2001, Article 1. The text of the decree is available at
http://infoleg.mecon.gov.ar/infolegInternet/buscarNormas.do?tipo=Decreto&nro=396%2F2001&INFOLEG_OLD_QUERY=true (24.4.2008).
Originally Article 8 contained a worldwide turnover threshold, but it triggered too many notifications which did not have an impact on the Argentinean market. The decree 396/2001 modified the turnover threshold from worldwide to a national one.

[69] *Decreto 89/2001, Apruébase la Reglamentación de la Ley N° 25.156*, Annex. The text of the decree is available at http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/65959/norma.htm (18.04.2008).

[70] *Above* Law 25.156/99, Article 16.

[71] *Above* Law 25.156/99, Article 17.

without political influence from the other ministries. However, up to now, nine years after the adoption of the Law, the Competition Tribunal has not been established. The Law 25.156/99 is enforced by the National Commission for the Protection of the Competition (*Comisión Nacional de Defensa de la Competencia*, CNDC) which was established by the previous competition Law 22.280/80.[72] The CNDC is part of the Ministry of Economy. It conducts the investigations concerning conduct cases and the merger review and it provides an opinion to the Secretary for Internal Market (*Secretario del Comercio Interior*), who takes the final decision.[73] This institutional structure leads easily to a politicization of the competition law cases. This aspect should be taken in consideration when analyzing the Telecom Italia-Telefónica case.

As mentioned in the previous section, Telecom Italia operates in Argentina through its subsidiaries Telecom Argentina and Personal Telecom, while Telefónica is present in the country through Movistar and Telefónica Argentina. From a substantive point of view, the indirect horizontal overlap between the local subsidiaries of Telecom Italia and Telefónica involved a number of different telecom markets, including one for mobile phone and ADSL services. The fact that two main telecom operators established a structural link in Europe was perceived by part of the public opinion and by the Argentinean Government as a threat to the level of competition in the telecom sector in the country. Since April 2007, there has been a broad debate in Argentina concerning the effect of the transaction on the telecom sector in the country. The two positions which emerged among the different stakeholders can be summarized in the words of Federico Pinedo, former Director of the National Commission for Communications (*Comisión Nacional de Comunicaciones*, CNC), and Joel Romero, consultant for Llrena y Asociados.[74] While according to the first one the acquisition strengthened a monopoly in Argentina ('*consolida un monopolio en Argentina*'), the second one argued that the holding of Telefónica in Telecom Argentina was indirect. In fact, Telecom Italia controls Telecom Argentina through two holding companies, Sofora and Nortel Invessora S.A. It owns 50% of the shares of Sofora, while the remaining 48% are controlled by the Werthein Group, an Argentinean family of investors. Sofora controls 67% of Nortel Invessora, while the latter controls 54.74% of the Telecom Argentina's shares.[75] Therefore, strictly speaking, Telecom Italia has the control both of Sofora and Nortel Invessora, but its percentage of shares is only slightly above 50%. According to Telefónica, its number of shares in Telecom Argentina, due to this long chain of ownership, would be limited to 1.5%.[76] Therefore, if the European Commission did not have a reason to consider that the acquisition of Olimpia by Telco could lead to change of control in Telecom Italia, the CNDC had even less reasons to argue that there was a change of control in Telecom Argentina, under the conditions provided by Article 6 Law 25.156/99. For that reason, the acquisition should not be notified to the CNDC.

At the end of August 2007, when it became clear that Telefónica would not notify the transaction to the CNDC, the latter opened an investigation to verify whether Telefónica had breached its duty to notify the acquisition under Article 8 Law 25.156/99.[77] During the month of September 2007, the CNDC organised a number of oral hearings, inviting the key stakeholders involved in the transaction to submit their opinion. According to Gerardo Werthein, vice-president of Telecom Argentina and representative of Werthein Group, who

[72]*Ley 22.262, Ley de Defensa de la Competencia*, adopted in 1980. The text of the law is available at http://www.poderdelconsumidor.com.ar/legislacion/ley22262.htm (18.04.2008).
[73]http://www.mecon.gov.ar/secdef/default1.htm (18.4.2008).
[74]Invertia, 'Divide Opiniones Entrada de Telefónica a Telecom'. Article published on 2.5.2007.
[75]InfoBAE Professional, 'Inminente definición por ingreso de Telefónica en Telecom'. Article published on 24.9.08.
[76]InfoBAE Professional,'Crece la Discusión por el Ingreso de Telefónica en Telecom'. Article published on 15.10.07.
[77]InfoBAE Professional, 'Defensa de la Competencia investiga a Telefónica'. Article published on 24.8.2007.

was against the acquisition due to his holding in Sofora together with Telecom Italia, the transaction would have brought a change of control in Telecom Argentina.[78] Third parties were also involved to participate in this debate. For instance, on 20th October 2007 five Argentinean consumers' associations submitted a petition to the CNDC, pointing out the risk that the indirect merger between Telecom Argentina and Telefónica Argentina/Movistar in the long term would cause an increase in the telecom tariffs in Argentina.[79] On 23rd October 2007, Claro, a competitor of Telecom Personal and Movistar in the market of mobile phone services,[80] submitted a petition to the CNDC against the acquisition.

Before imposing any fine on the merging parties under Article 46 (d) Law 25.156/99 for not having notified the concentration, the Argentinean Government decided to send two observers to Telecom Argentina with the task to study whether the acquisition of Olimpia by Telco had caused a change of control in Telecom Argentina. On 16th October 2007, the Minister for Economy, Miguel Peirano, and the Minister of State Planning (*de Planificación*), Julio de Vido, announced to the press the names of the two observers: Marcelo Goldberg, from the CNDC and Guillelmo Banegas, officer in the CNC. Their task was to study the long term industrial plans of the company and to analyse the contractual arrangements between Telecom Argentina and Telefónica Argentina/Movistar. Their mission was originally scheduled to last two months.[81] The Government's decision to send the two observers marked the beginning of the politicization of the Telecom Italia-Telefónica case. It became unclear whether the CNDC would have evaluated the case only in the light of the change of control in Telecom Argentina or if the issue of the change of control would be exploited to justify a political decision concerning the transaction. As mentioned above, the observers were supposed to complete their investigation by the end of December 2007.[82] However, in December the period of investigation has been prolonged for another two months.[83] In the meantime, there have been political elections in Argentina, in which the winner was Cristina Kirchner, the wife of the former President Néstor Kirchner.[84] One of the last acts of Néstor Kirchner as a President of Argentina was to meet César Alierta on 7th December 2007, to discuss the Telecom Italia-Telefónica case.[85] However, Kirchner preferred to leave his wife to take the political decision on the issue.

At the beginning of March 2008 the two observers submitted their report. The report is not public but, according to the Argentinean press, the report apparently concluded that there had been a change of control in Telecom Argentina and that the transaction should have been notified.[86] The main elements on which the observers based their evaluation were the public statements of César Alierta during the previous months concerning the strategic importance of the transaction and, the functioning of the Board of Directors of Telecom Argentina after the transaction. The report is not binding and at the moment it is unclear how the Argentinean Government will decide to act. The entire process has been non transparent. According to a number of commentators active as competition lawyers in Argentina,[87] it is obvious that the report was based more on political, rather than on competition law considerations. On the other hand, the market overlap caused by the transaction is also evident, like in the Brazilian case.

[79]InfoBAE Professional, 'Asociaciones, en alerta por monopolio Telefónica-Telecom'. Article published on 20.10.2007.
[80]http://www.telmex.com/ar/esto/index.html (04.02.2008).
[81]InfoBAE Professional, 'Gobierno interviene para evitar monopolio en Telefónicas'. Article published on 16.10.07. Invertia, Argentina Analiza 'Riesgo de Monopolio por Avance de Telefónica Sobre Telecom'. Article published on 16.10.2007.
[82]InfoBAE Professional, 'Atrasan Definición Sobre Ingreso de Telefónica en Telecom'. Article published on 21.12.2007.
[83]*Above* article of InfoBAE Professional published on 21.12.2007.
[84]InfoBAE Professional, 'Telcos: Cristina Hereda una Agenda de Temas Pendientes'. Article published on 10.12.2007.
[85]Invertia, 'Kirchner-Telefónica, el Presidente Está Reunido con Titular de Telefónica'. Article published on 7.12.2007.
[86]InfoBAE Professiona, 'Veedores avalan postura de Werthein por Telecom'. Article published on 8.3.2008.
[87]This is the result of two interviews held by the author with two competition lawyers practising in Buenos Aires, who prefer to remain anonymous.

According to Sebastian García Menéndez, a lawyer in the law firm García Menéndez Abogados in Buenos Aires, even if the transaction did not create a change of control in Telecom Argentina to trigger a merger notification, there is a danger of transferring business information from Telecom Italia to Teléfonica, due to the minority shareholding of the latter in the Italian telecom operator.[88] The minority shareholding may lead in the long term to anti-competitive practices (e.g. forms of tacit collusion between the tariffs applied by Telecom Argentina and Telefónica Argentina).[89] The Argentina Competition Law does not include any specific provision concerning minority shareholding. On the other side of the Atlantic, the European Court of Justice (ECJ) recognized in the *British-American Tobacco*[90] case, that the acquisition of a minority shareholding by a company in a competitor is not per se an infringement of Article 81 Treaty of the European Community (TEC).[91] However, the minority shareholding could have a negative impact on the level of competition between the two companies if it creates a structure which facilitates the form of cooperation between the two companies.[92] Furthermore, the minority shareholding may have an anti-competitive effect where the agreement gives the possibility to the acquiring company to reinforce its position in a later stage; when the acquisition of the minority shareholding is a first stage towards the full control of the company.[93] The ECJ recognized that there are no standard solutions in this area; every case should be analysed on an *ad hoc* basis. In its analysis, the European Commission should take into consideration especially the structure of the relevant market. In oligopolistic markets with high entry barriers, companies will be more likely to cooperate and exchange information exploiting the structural link created by the minority shareholding, rather than competing with each other.[94] According to Ezrachi and Gilo, a minority shareholding in a competitor may encourage forms of tacit collusion.[95] The latter is usually not sustainable for a long period of time; in fact, 'it is enough that for at least one firm the short-term profit during a price cut outweighs the long-term losses from a price war in order for tacit collusion to cease.' [96]However, when a firm invests in a rival in an oligopolistic market, '…the investing firm may become less eager to price-cut on a collusive price. This is because it would absorb a portion of the rival's losses from this price-cut.'[97]

In the past, the European Commission relied on this case law to sanction a number of minority shareholdings under Article 81(1) EC, by imposing either behavioural or structural remedies (e.g. asking the divestiture of the minority shareholding).[98] Though Argentina Competition Law does not contain an explicit provision concerning minority shareholding, this practice could fall under the general terms of Article 1 of the Law 25.156, which prohibits every agreement which has the effect or the intention to limit or restrict the level of competition in the relevant market, by creating a prejudice to the 'general economic interest' ('pueda resultar perjuicio para el interés económico general'). Article 2 of the Law lists a number of practices which are considered anti-competitive, but the list is not exhaustive. A practice not listed in Article 2 may still fall in the broader category

[88]InfoBAE Professional, 'Telefónica, Telecom y el Minority Shareholdings'. Article published on 7.11.2007.
[89]Interview held by the author with Sebastian Garcia Menendez on 23.04.2008 in Buenos Aires.
[90]Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities* [1987] ECR 04487.
[91]*Above* Joined Cases 142 and 156/84, paragraph 37.
[92]*Above* Joined Cases 142 and 156/84, paragraph 38.
[93]*Above* Joined Cases 142 and 156/84, paragraph 39.
[94]*Above* Joined Cases 142 and 156/84, paragraph 40.
[95]Ezrachi A. Gilo D., 'EC Competition Law and the Regulation of Passive Investments Among Competitors' (2006) Vol. 26(2) Oxford Journal of Legal Studies 327-349.
[96]*Above* page 332.
[97]*Above* page 333.
[98]Moavero Milanesi E., Winterstein A. 'Minority Shareholdings, Interlocking Directorships and the EC Competition Rules – Recent Commission Practice' (2002) Vol. 1 Competition Policy Newsletter 15-18. The Competition Policy Newsletter is published by the European Commission. It is available at http://ec.europa.eu/comm/competition/publications/cpn/ (24.4.2008).

of anti-competitive practices provided by Article 1. The fact that the relevant markets in the telecom sector in Argentina are oligopolistic and the fact that Telefónica has the right under Telco Shareholders' Agreement to appoint two Directors in Telecom Italia, could be good reasons for considering the minority shareholding of Telefónica in Telecom Italia prohibited under Article 1 Law 25.156/99. However, even if in the future the CNDC decided to follow this approach and to challenge the minority shareholding of Telefónica in Telecom Italia, the question would be which remedies the CNDC could advise the *Secretario del Commercio Interior* to adopt under the Law 25.156/99. In theory, every kind of remedy would be applicable under Article 35 of the Law 25.156/99, both behavioural and structural remedies. However in practice, like in the Brazilian case, the range of remedies would be very limited. As we saw in the preceding paragraphs, the transfer of Olimpia's shares from Pirelli to Telco took place at the end of October; after the acquisition has already been implemented. How could the Argentinean competition authorities ask Telefónica to divest its minority shareholding in Telco? Neither Telefónica nor Telecom Italia directly operates in Argentina. Their subsidiaries in the country are not directly linked by any cross-shareholding. Perhaps, behavioural remedies could be imposed as well, but they would be limited to the activities of Telecom Argentina and Telefónica/Movistar. Like in the case of Brazil, the enforcement of behavioural remedies imposed on Telco, Olimpia and Telecom Italia could not be effectively checked, due to the geographical limits of the competition authority's jurisdiction.

At the moment, the case is still open in Argentina. Probably, there will be a Government final decision on the case. However, every remedy imposed will have limited scope, because it will only concern the subsidiaries of Telecom Italia and Telefónica in Argentina, the last rings of the long chain.

6. Conclusions

In the previous pages the Telecom Italia-Telefónica case was analysed, with a particular focus on the effects of the transaction in the telecom markets of two emerging markets, Brazil and Argentina. A number of conclusions can be drawn from this case study. First of all, in multi-jurisdictional mergers the competition agencies of the developing countries are usually the last ones to which the transaction is notified by the merging parties (like the case of Brazil). The cross-border transactions are usually notified first in Europe or in the USA, and then in the other countries of the world.

The remedies imposed by ANATEL in Brazil show how limited the range of measures that the competition agencies of the emerging markets may adopt when cross-border mergers are involved. They do not have any territorial jurisdiction on the holding companies; thus, they cannot solve the competition concerns at the roots of the problem. They can just intervene at the local level, by imposing remedies on the local subsidiaries. However, as we saw in the case of Brazil, these competition authorities usually cannot impose divestitures or other structural remedies aiming at decreasing the market power of the subsidiaries. Such measures would not be tolerated by the merging parties and the latter

could threaten the local authorities to withdraw their investment from the country. Divestitures, if imposed, could discourage other foreign investors to enter in that market. In conclusion, the competition agencies of the emerging markets, even when they want to intervene, they often do not have any other choice, from a political rather than legal point of view, than imposing behavioural remedies on the merging parties. However, as explained above, behavioural remedies do not prevent the transfer of confidential business information between the merging parties at the level of the holding companies. Such transfer may lead in the long term to forms of tacit collusion between the merging parties.

One of the points on which there was more disagreement between the different competition authorities involved in this transaction concerned the change of control of Telecom Italia and, thereby, the need of notification of the acquisition. This transaction probably did not justify a notification under the Argentinean merger control system. However, as we saw in the analysis above, the transaction in this country could create a problem of minority shareholding; an issue to be analysed as an anti-competitive agreement, rather than under the merger control. As recognized by the ECJ judgement in the case *British-Tobacco*, the issue of minority shareholding is relevant when cross-border transactions take place. In fact, '…where the companies concerned are multinational corporations which carry out business on a world-wide scale, their relationships outside the Community cannot be ignored. It is necessary in particular to consider the possibility that the agreement in question may be part of a policy of global cooperation between the companies which are party to it'.[99] In this case, the acquisition of a limited number of shares by Telefónica in Telecom Italia did not cause any concern of minority shareholding within the European Union, but it could lead to forms of coordination and exchange of information between the subsidiaries in Argentina of Telecom Italia and Telefónica. As mentioned in the previous section, like in the case of Brazil, the remedies available to the anti-competitive effects caused by the minority shareholding have limited geographical scope.

It is also important to recognize that the case of Argentina shows how sensitive a case may be when it is analysed from a political rather than from a legal perspective, and when the competition authority is not sufficiently autonomous from the executive branch. A political intervention is not a solution to the anti-competitive concerns that the transaction may cause. In fact, despite the Government's intervention, in Argentina at the moment there is no solution to this case.

A second category of conclusions concerns the lack of cooperation among the different competition authorities involved in the review of this world-wide transaction. It is clear from the case study that cooperation among the different authorities involved in a multi-jurisdictional merger is necessary. In the merger review, such cooperation mainly involves the exchange of information concerning the data related to the case and the remedies imposed by each other. However, as mentioned in the introduction to the case study, the degree of cooperation among different competition authorities is sometimes limited, like in this case. For instance, the observers sent by the Argentinean Government to Telecom Argentina concluded that there was a change of control in the company, without taking in consideration that the European Commission had achieved ten months before an opposite

[99] *Above* Joined Cases 142 and 156/84, paragraph 40.

conclusion. Despite each competition authority may be free to interpret its own national legislation, it is important to point out that the conditions provided by Article 6 Law 25.156/99, in relation to the change of control, are very similar to those ones provided by Article 3 Regulation 139/2004 EC. As mentioned before, the two Argentinean observers probably carried out their evaluation more on the basis of political, rather than competition considerations. However, the officers of the European Commission who dealt with the case in May 2007 were also not aware that the transaction would be notified to ANATEL a few months later.[100] The European Commission has a number of agreements of bilateral cooperation with different competition authorities, but it does not have such kind of agreement neither with Brazil nor with Argentina. CADE, the Brazilian competition authority, has a cooperation agreement with the US Department of Justice/Federal Trade Commission.[101] However it does not have any agreement with any European competition authorities, neither with the European Commission nor with the national competition agencies of the single Member States.

The general problem is that at the moment there are few bilateral agreements between the competition authorities of the developed and developing countries. These bilateral agreements usually exist between the major competition jurisdictions of the world (e.g. USA, EC, Japan, Australia, and Canada).[102] On the other hand, these 'mature' competition agencies are reluctant to conclude similar agreements of cooperation with the newly established competition authorities of the developing countries, due to the uncertainty concerning the treatment of the information transferred to the latter. The European Commission signed cooperation agreements with the competition authorities of a number of developing countries. However, such agreements, unlike those ones mentioned above, do not contain provisions concerning the exchange of information and the application of positive and negative comity. They simply establish a framework for a dialogue between the two competition agencies. In a number of cases the agreement is used by the European Commission to provide technical assistance to the competition authorities of the partner country.

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[100]Telephone discussion held on 10th April 2008 with the officer of the European Commission, DG Competition, Information, Communication and Media unit, who was in charge of the Telecom Italia-Telefónica case. The officer asked to remain anonymous.

[101]Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of their Competition Laws. The agreement exists since October 1999. The text of the agreement is available at http://www.ftc.gov/os/1999/10/BrazilUStreaty.htm (24.4.2008).

[102]The EC cooperation agreements in the enforcement of competition law are the following ones:

- Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws. Published on the OJ L-95/47-52 of 27.04.1995. The text of the agreement is available at http://ec.europa.eu/comm/competition/international/bilateral/us_agreement_1995_en.pdf (24.4.2008).
- Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws. Published on the OJ L-173/28-31 of 18.06.1998. The text of the agreement is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21998A0618(01):EN:NOT (24.4.2008).
- Agreement between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws. Published on the OJ L-175/50 of 10.07.1999. The text of the agreement is available at http://ec.europa.eu/comm/competition/international/bilateral/ca2a_en.pdf (04.02.2008).
- Agreement between the European Communities and the Government of Japan Concerning Cooperation in Anti-Competitive Activities. Published on OJ L-183/12-17 of 22.07.2003. The text of the agreement is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22003A0722(01):EN:NOT (24.4.2008).

The US Federal Trade Commission and the US Department of Justice have cooperation agreements with the competition agencies of following countries: Australia, Brazil, Germany, European Communities, Germany, Japan, and Mexico. Further information is available at http://www.ftc.gov/oia/agreements.shtm (24.4.2008).

Finally, it does not seem that CNDC and the Brazilian competition authorities effectively cooperated in this case, despite their bilateral cooperation agreement of 2003.[103] According to Diego Povolo, CNDC Commissioner, the Argentinean competition authority exchanges information with CADE/SEAE/SDE when cross-border cases are at stake.[104] On the other hand, the CNDC does not cooperate with the other Brazilian regulatory bodies, like ANATEL, which are not parties of the agreement.[105] In this case, according to the Commissioner, the CNDC got to know the Brazilian decision from the press, but there was no exchange of views with the Brazilian authorities on the Telecom Italia-Telefónica case.

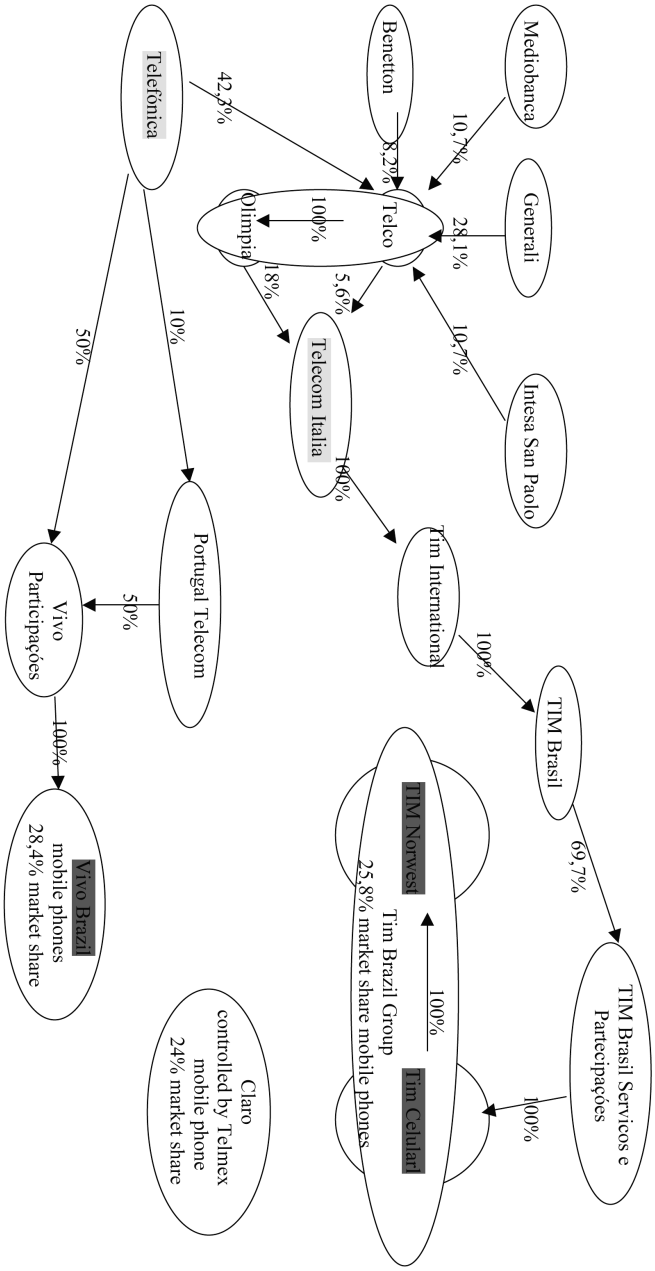
One statement from Ronaldo Mota Sardenberg, ANATEL's President, at the Congress of Regional Telecommunications (*Congreso de Telecomunicaciones Regional*) at the beginning of October 2007 concerning Telecom Italia-Telefónica case, perfectly summarizes the essence of this problem: 'we have the intention to work jointly with the Argentina regulatory authorities, but first of all we have to analyse the situation in the local Brazilian market' ('*tenemos toda la intención de trabajar en conjunto con los reguladores de la Argentina, pero primero necesitamos analizar bien la situación en el mercado local*'). The key problem of enforcement in multi-jurisdictional mergers is that each competition authority reviews the transaction at the national level, without taking into account the effect of the transaction in other jurisdictions or of the remedies imposed by other competition agencies. Only when there will be a full cooperation between the competition authorities of the developed and of the developing countries, the latter will be able to effectively enforce their national legislations in cross-border cases. In fact, in cross-border competition cases, such agreements would allow the competition authorities of the developing countries to be better informed about the case and to receive the opinion of their 'colleagues' who also review the case.

[103] *Acordo de Cooperação entre a República Federativa do Brasil e a República Argentina relativo à Cooperação entre Suas Autoridades de Defesa da Concorrência na Aplicação de Suas Leis de Concorrência*. Agreement signed in Buenos Aires on 16.10.2003. The text of the agreement is available at
http://www.cade.gov.br/internacional/Acordo_Cooperacao_Brasil_Argentina.pdf (24.4.2008).

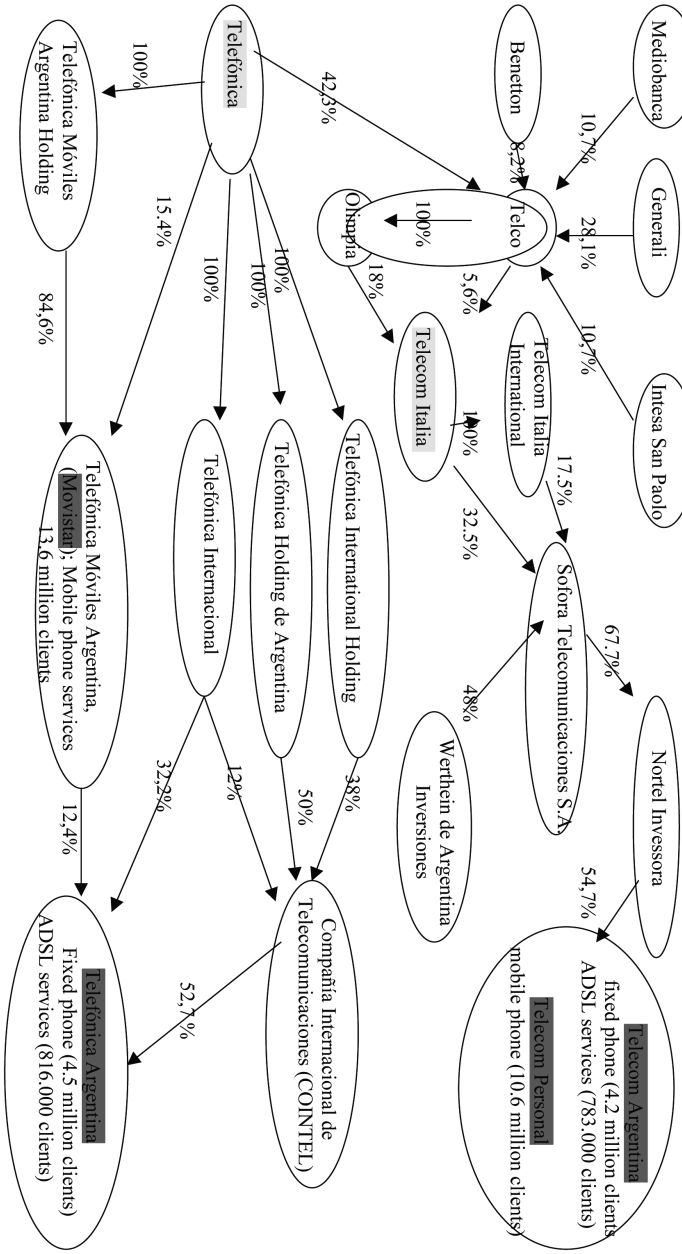
[104] Interview held by the author with Commissioner Povolo on 30.4.2008 at the CNDC in Buenos Aires.

[105] According to Article 1.b of the cooperation agreement, the parties of the agreement are: for Argentina the *Secretaría de Coordinación Técnica (today replaced by the Secretaría del Comercio Interior)* and the CNDC until the final establishment of the *Tribunal Nacional de Defensa de la Competencia*. For Brazil, CADE, SDE, SEAE.

Annex 1: Telecom Italia-Telefónica shareholding's structure in Brazil



Annex 2: Telecom Italia-Telefónica shareholding's structure in Argentina



Exploring the role of legal presumptions under the 'convincing evidence' standard in EC merger control

ALEXANDR SVETLICINII*

This article addresses the problem of increasing complexity and sophistication of the economic and legal assessment of concentrations under EC merger control regime. It evaluates the potential role that legal presumptions might play in facilitating the assessment of complex economic evidence and increasing legal certainty of the merger assessment process.

1. INTRODUCTION

(A) APPLICATION OF THE SUBSTANTIVE TEST IN THE MERGER ASSESSMENT

Prior to engaging in the detailed discussion regarding the potential significance of legal presumptions that could assist competition authorities and courts in assessing complex economic evidence brought up in the process of assessment of concentrations notified under the new EC Merger Regulation (ECMR)[1], we shall briefly discuss recent developments in EC merger control, which emphasize the need for further development of legal mechanisms so as to provide for a competent and efficient appreciation of economic theories and economic evidence.

Over the last five years a line of events occurred in EC merger control that for the purposes of the present discussion we shall label as increasing economic complexity and sophistication of the merger assessment.[2] Among the most notable developments was the adoption of the new ECMR in 2004, which has modified the wording of the substantive test that the European Commission and Community Courts apply in determining whether a particular concentration is compatible with the Common Market.

The reformulation of the substantive test did not change the course of the assessment process but has shifted the focus of attention.[3] Under the old test, dominance was the necessary indicator, without which the Commission could not block a merger. Thus, attention was concentrated on the structural analysis of the market, more specifically - on the identification of the market shares and market power of the merging undertakings, which would assist in the determination of the dominant position. Although being a

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[1]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24, 29.01.2004, 1-22, Article 2(2).

[2]This can be supported by the empirical evidence regarding increasing input of the economic experts in the competition cases. See Neven., A. 'Competition Economics and Antitrust in Europe' (2006), Economic Policy, 743-791. See also Schmidtchen, D., Albert, M. and Voigt, S. (eds) The More Economic Approach to European Competition Law, Mohr Siebeck: Tuebingen, 2007.

[3]See generally Riesenkampff, A. 'The New E.C. Merger Control Test under Article 2 of the Merger Control Regulation' (2003-2004) 24 Nw. J. Int'l L & Bus. 715-727.

necessary element, dominance alone could not suffice for the Commission to prohibit a merger. As a second step the Commission had to prove that, as a result of a creation or strengthening of a dominant position, the proposed merger would negatively affect competition on the relevant market. The 'significant impediment of effective competition' (SIEC) test[4] directs the focus of the Commission's analysis away from the determination of dominance, i.e. the acquisition by the merged entity of market power, to how this market power affects the relevant market, its effects on the existing level of competition and its effects on other market players – competitors (actual and potential) and consumers.

Nevertheless, post-reform merger control enforcement suggests that the SIEC test has not changed the Commission's assessment in a radical way: it continues to focus on finding dominance and the new wording of the substantive test and the Guidelines issued to clarify its application have made a difference only in a handful of cases.[5] One can also see the main role of the new wording in the clarification of the two-tier analysis that already existed under the old test and in closing the potential gap of under-enforcement in oligopolistic markets.[6]

It follows from the aforementioned considerations that the modifications to the substantive test introduced by Regulation 139/2004 should not be viewed as a radical legislative intervention, but rather as a reaction and reflection of tendencies already articulated and developed in the jurisprudence of the Community Courts. Even prior to the adoption of the new ECMR, Community Courts were actively scrutinizing the Commission's assessment in the second step of this process – namely, the potential effects on competition on the relevant market. The modification of the wording of the substantive test and certain institutional and procedural reforms introduced by the new ECMR were prompted by the annulment of the Commission's prohibition decisions, among others, in *Schneider*[7] and especially *Airtours*[8] , where the Commission failed to prove the existence or creation of collective dominance among the remaining market players post-merger.

In *Airtours* the CFI articulated the 'convincing evidence' standard when it stated that where the Commission seeks to prohibit a merger based on the collective dominance concerns 'it is incumbent upon [the Commission] to produce convincing evidence thereof'[9]. Some authors submitted that Airtours heralded an introduction of a new standard

[4]ECMR, Article 2(2): 'A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of creation or strengthening of a dominant position, shall be declared compatible with the common market'.

[5]Roeller, L.-H., 'The Impact of the Substantive Test in European Merger Control' in Current Competition Law V (Philip Marsden, Michael Hutchings, Peter Whelan (eds.), London: British Institute of International and Comparative Law, (2007), 24-44. This view can be supported by the official statistics of the European merger control (21 September 1990 to 31 October 2007), which indicates only 20 prohibitions out of more than 3500 notified concentrations. The number of mergers cleared with commitments is more significant – 83, but it is difficult to assess their importance, as these decisions were not scrutinized by the Community Courts. Statistics is available at <http://ec.europa.eu/comm/competition/mergers/statistics.pdf>.

[6]Roeller, L.-H. & de la Mano, M., 'The Impact of the New Substantive Test in the European Merger Control' European Commission, January 22, (2006), available at <http://ec.europa.eu/dgs/competition/economist/new_substantive_test.pdf>.

[7]Schneider Electric SA v Commission, T-310/-1, 2002 ECR II 4071, See also 'European Court Deals Successive Blows to European Commission's Merger Review Policy', Antitrust 6 (2002), Dechert, available at <http://www.dechert.com/library/Antitrust%2011-02.PDF>.

[8]Airtours plc v Commission, T-342/99, 2002 ECR II 2585 (hereinafter Airtours Judgment).

[9]Id., paragraph 63.

for the burden of proof, one which indicated 'a clear change in the standards for merger review in Europe'.[10] However, one can also look at the 'convincing evidence' standard as simply a clarification of the standard that should and has been applied before. This is the view reflected in the ECJ's judgment in *Tetra Laval*. [11]

The same standard worked against the Commission when applied in the subsequent landmark judgments of *Tetra Laval*[12] and *General Electric*[13]. These failures in the Commission's methodology and quality of the evidence warranted certain institutional and procedural reforms that further increased the complexity of merger assessment. The most notable institutional innovations consisted in the introduction of the office of Chief Economist and the appointment of peer review panels which would test the solidity of the team's position in Phase II cases.[14]

Modifications to the procedural rights of the Commission have also added to the complexity and length of merger investigations. The new ECMR granted the Commission the right to extend its Phase II proceedings in agreement with the parties for up to 20 days[15] ; this has furnished the Commission with more time to collect evidence and to discuss any necessary commitments with the parties. According to Berg, this is the price that must be paid for the improvement of scrutiny and avoidance of low-quality decisions which have been compromised by time constraints.[16]

(B) Increasing complexity of economic analysis in merger control

Certain modifications to the Commission's methodology of analysis were also warranted by the focal shift towards the competitive effects on the relevant market and away from the finding of dominance. The Commission's practice of merger assessment under the old ECMR was traditionally based on structuralist foundations[17] and it applied the substantive assessment test in a two-step process: first it determined the relevant market and secondly it calculated market shares of the merging parties and compared it with the market shares of the remaining competitors. Consequently, this simplified two-step assessment

[10]Guerrero, K., 'A New 'Convincing Evidence' Standard in European Merger Control' (2003-2004) 72 U. Cin. L. Rev. 249

[11]Commission v Tetra Laval, Case C-12/03P (2005) (hereinafter Tetra Laval ECJ Judgment), at paragraph 48: 'It follows from these examples that the Court of First Instance carried out its review in the manner required of it, as set out in paragraph 39 of this judgment. It explained and set out the reasons why the Commission's conclusions seemed to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence' (emphasis added).

[12]Tetra Laval v Commission, Case T-5/02 (2002) (hereinafter Tetra Laval CFI Judgment).

[13]General Electric v Commission, Case 210/01(2005) (hereinafter GE/Honeywell Judgment).

[14]The effectiveness of this mechanism could be disputed taking into account the fact that it was a peer review panel that brought about a reversal of the negative perception of the Sony/BMG merger (Sony/BMG, Case COMP/M.3333 (2004) (hereinafter Sony/BMG Decision), which resulted in the unconditional clearance subsequently annulled by the CFI in its landmark Impala judgment (Impala v Commission, T-464/04 (2006) (hereinafter Impala Judgment). See Kirch, P., 'A Practical Guide to the New EU Merger Control Rules (Effective May 1, 2004)', Stay Current, (July 2004), Paul Hastings Attorneys, available at <http://paulhastings.com/assets/publications/64.pdf?wt.mc_ID=64.pdf>.

[15]Regulation 139/2004, Article 10(3).

[16]Berg, W. 'New EC Merger Regulation: A First Assessment of Its Practical Impact' (2003-2004) Nw. J. Int'l L. & Bus. 24: 683-714, at page 702.

[17]See generally Bertolini A. & Parisi F., 'The Rise of Structuralism in European Merger Control' (1996), 32 Stanford J. Int'l L. 13.

allowed the Commission to make certain inferences as to whether the merger is problematic and it requires an in-depth assessment. [18]The structuralist approach warranted the application of structuralist presumptions and they were preserved under the new ECMR in the Commission's administrative Guidelines.[19]

However, the recent annulment of the Commission's decisions by the Community Courts indicates that the previously applied methodology might be insufficient for a proper analysis of proposed concentrations, particularly in the non-horizontal cases. There are at least two broad areas in merger assessment where traditional structuralist analysis and presumptions alone were found to be insufficient in satisfying the requirements of the established burden of proof standard. These areas include the assessment of the future conduct of the merging undertakings and forecasting the overall effect on the relevant market, including the effect on prices and reaction of the actual and potential competitors.

For example, in *Airtours* the CFI formulated a three-pronged test for assessing the likelihood of the undertaking adopting alleged anticompetitive conduct: this is the so called 'ability-incentive-impact' framework.[20] Since the Airtours decision this legal framework has been followed by the Commission[21] with a varying degree of success, until the recent *Impala* judgment raised doubts regarding the 'correct' legal test that should be applied to conduct a merger analysis.[22] The deficiency in the Commission's analysis was also revealed in the assessment of the incentives for the merging undertakings to engage in certain commercial practices. For example, in the case of *GE/Honeywell* the Commission based one of its theories of competitive harm on the submission that the merged entity will have the incentive to disrupt the supply of engine starters manufactured by Honeywell to other engine manufacturers competing with GE.[23] The CFI explained that the commercial interests of the undertaking, namely the profitability of engaging in certain behaviour, will constitute convincing evidence which the Commission had not adequately presented in the case before it, because the Commission did not conduct an analysis of the costs and profits borne by the merged entity in employing the alleged anticompetitive practices.[24]

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[18]See Van den Bergh, R. and Camesasca, P., European Competition Law and Economics: A Comparative Perspective, 2nd ed. London: Sweet & Maxwell (2006), 399.

[19]According to the Horizontal Guidelines, mergers resulting in concentration over 50% of market share in one undertaking may by themselves be evidence of the existing dominant position and mergers which do not bring the market share of the merged entity above 25% of the relevant market may be presumed to be compatible with the Common Market. See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (hereinafter Horizontal Guidelines) OJ C 31/5, 5.2.2004, paragraphs 17, 18. Similarly, in the Draft Non-Horizontal Guidelines the Commission provided for the 30% threshold, which is intended to separate potentially non-problematic mergers that do not raise concentration level above this threshold in each of the markets concerned. See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (hereinafter Non-Horizontal Guidelines), paragraph 25.

[20]Airtours Judgment, at paragraph 62: 1) members should possess information and ability to monitor 2) there should be incentives to sustain the collusive practices over time 3) proof that reaction of competitors and consumers would not jeopardize the results expected from the common policy.

[21]Telia/Sonera, Case COMP/M.2803 (2002), at paragraph 91: 'in assessing whether [vertical foreclosure issue] is significant, it is necessary to establish that the merged entity will have the incentive to foreclose, but also whether it has the ability to do so, and whether it will have any significant effect on competition on the market in question'.

[22]Impala Judgment, at paragraph 251: CFI stretched the limits of the Airtours test, stating that 'signs, manifestation and phenomena inherent in the presence of dominant position' might constitute 'indirect evidence' that will also satisfy the formal Airtours test.

[23]General Electric/Honeywell, Case No COMP/M.2220, at paragraph 420.

[24]GE/Honeywell Judgment, at paragraph 297.

Another factor that might constitute a departure from the traditional structuralist presumptions and adoption of new economic tools in identifying and quantifying competitive effects on the relevant market was the introduction of the efficiency defence in European merger control. As Ilzkovitz and Meiklejohn note in their work, 'the introduction of an efficiency defence, which will require quantification not only of efficiency gains but also of the competition effects, would therefore represent a major change in the whole process of EU merger analysis'.[25] In order to be able to make this quantification, the Commission will be forced to develop a methodology that would allow for the measurement of the alleged competitive harm and expected efficiencies in common denominators, and the subsequent balancing of these results against one another . However, due to the adherence to the consumer welfare standard and the subsequent formulation of high procedural requirements for invoking the efficiency defence, its role in the EC merger will presumably remain marginal.[26]

Taking into account all the above mentioned developments in EC merger control and using the scale for assessing the hierarchy of anti-trust rules based on their complexity developed by Brodley,[27] one would have to acknowledge that European merger control has already reached one of the highest levels of complexity and sophistication. Complex cases, especially in the area of non-horizontal concentrations, underscore a necessary preference for more sophisticated economic methods of analysis compared to the traditional structural analysis.[28] Unfortunately, economic theory that is supposed to provide exacting methodological tools for the purposes of merger assessment 'is of necessity subjective, value-laden and, ultimately, imprecise, offering no unique answers'.[29] As Van den Bergh notes in the discussion on the use of economic theories and economic evidence in merger assessment, even basic concepts such as market power and dominance leave substantial scope for subjective interpretation by the individuals and institutions involved in a merger control case ranging from judges and competition authorities to lawyers and experts.[30]

This conflict has reflected itself in the parallel assessment of economic evidence by the Commission and Community courts, which has led to diverging conclusions.[31] The ECJ

[25]Ilzkovitz, F. and Meiklejohn, R., 'European Merger Control: Do We Need an Efficiency Defence?' in European Merger Control: Do We Need and Efficiency Defence? (Fabienne Ilzkovitz and Roderick Meiklejohn, eds.) Edward Elgar, (2006), at page 72.

[26]See generally Svetlicinii, A., 'Assessment of the Non-Horizontal Mergers: is there a Chance for the Efficiency Defense in EC Merger Control' (2007) E.C.L.R. 28(10): 529-538.

[27]See Brodley, J., 'In Defense of Presumptive Rules: An Approach to Legal Rulemaking for Conglomerate Mergers' in The Conglomerate Corporation: An Antitrust Law and Economics Symposium (Roger D. Blair and Robert F. Lanzillotti, eds.), Cambridge, (1981), at page 252. The author creates a hierarchy of the antitrust rules, based on their complexity. As determinant criteria he offers following three factors: 1) the number of legal elements 2) difficulty in proving individual legal elements and 3) need to engage in balancing between legal elements.

[28]For critique on the structural merger analysis see Kaplow, L., 'The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative' (1982) 95 Harv. L. Rev., 1826-1832.

[29]Hildebrand, D., The Role of Economic Analysis in the EC Competition Rules, The Hague: Kluwer Law International, (2002), at page 106.

[30]Van den Bergh (2006), at page 400.

[31]On several instances the CFI conducted its own evaluation of the Commission's economic evidence which led the Court to different results. See generally Reeves, T. and Dodoo, N., 'Standards of Proof and Standards of Judicial Review in EC Merger Law' in 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry E. Hawk, ed.), Juris Publishing, 2006.

confirmed that '[the] Commission has a margin of discretion, but that does not mean that Community Courts should refrain from reviewing Commission's interpretation of information of an economic nature'.[32] Thus, with the Commission's limited margin of assessment as regards economic evidence, the high standards of the burden of proof and of judicial review, problems with legal certainty and stability in European merger control represent significant challenges both for the regulators and merging parties.

(C) Concept of legal presumption, its elements and functions

In an attempt to define the concept of legal presumption, it could be useful to refer to the US experience of antitrust enforcement where, unlike in the EU[33] , both federal courts and the antitrust authorities conduct a primary assessment of the facts produced by the opposing parties in the course of adversarial legal proceedings.[34] In order to facilitate the Courts' assessment of complex economic evidence, US antitrust jurisprudence developed a set of so called '*per se* rules'. The rationale of these rules was 'to avoid burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct'.[35] These *per se* rules in American antitrust practice have an empirical character and according to Hovenkamp 'are not based on the logical necessity but on accumulated observation subject to continual testing, falsification, and modification'.[36] Thus, *per se* rules allowed the US courts at certain points in the development of jurisprudence and economic thought to rule on the illegality of certain practices, which *prima facie* satisfy the conditions required by these rules without detailed examination of all relevant facts. At the other end of the spectrum of the American *per se* rules the so called 'rule of reason' approach appears; this requires the court to enter into a detailed examination of the case because *prima facie* evidence prevents it from being placed within the framework of an existing *per se* rule.[37] In the procedural context legal presumptions indicate the shift of the burden of proof from the party which has proved the existence of the *prima facie* conditions to the party that potentially could attempt to rebut the presumption with some kind of extraordinary evidence that would produce an exception from the general rule.

Using American antitrust terminology it should be noted that the legal presumptions in EC merger control which will be explored in this article probably fit neither in the category of *per se* rules nor in the rule of reason approach. There are several reasons for this qualification related to the state of development of EC merger control jurisprudence. While the movement towards more economics-based assessment of the competitive effects is a

[32]Tetra Laval ECJ Judgment, at paragraph 39.
[33]Formally, the Community Courts have to confine their judicial review on the Commission's decisions, assessing whether Commission based its conclusions on adequate evidence and provided sufficient reasons for its operative part. In its General Electric Judgment at paragraph 60 the CFI noted that 'Community judicature's power of review is limited to verifying whether the Commission has made 'manifest error in assessment'.
[34]See generally Merger standards under U.S. antitrust laws, American Bar Association, Section of Antitrust Law (1981).
[35]J. Stevens in Jefferson Parish Hospital District No. 2 v Hyde, 468 U.S. 2, 16 n. 25, 104 S.Ct. 1551, 1560 n. 25 (1984), on remand, 764 F.2d 1139 (5th Cir. 1985) cited in Hovenkamp, H., Federal Antitrust Policy: The Law of Competition and Its Practice, St. Paul: Thomson West, 2005, at page 254.
[36]Hovenkamp (2005), at page 256.
[37]See generally Posner, R., 'The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision' (1977) 45 U. Chi. L. Rev. 1, 14-15.

relatively recent phenomenon, Community courts have not yet developed a set of strong, hard core *per se* rules applicable in the merger assessment, especially in relation to non-horizontal concentrations. A brief review of the Community jurisprudence indicates that the Community courts are still looking for acceptable legal tests that would facilitate an economic assessment of the competitive effects. Throughout this process, legal tests were changed, their elements were modified and priorities were shifted. That is why it would be more correct to state that legal presumptions researched in the present work belong to a 'grey area', positioned somewhere in between hard core presumptions and 'rule of reason' analysis.

Therefore, a deeper analysis, an attempt to systematize these presumptions and evaluate their economic and legal background, as well as their possible implications for the merger assessment process, constitute the primary objectives of the present work. While presumptions could be discovered and developed in relation to various aspects of merger assessment, the narrow scope of the present discussion will confine the analysis to three specific topics. The first substantive section will focus on the role of legal presumptions in assessing theories of competitive harm based on leverage of market power in the context of conglomerate mergers using the examples of *General Electric* and *Tetra Laval* cases. The analysis will compare modern economic theories of leverage tests and legal tests applied by the Commission and the Community Courts in establishing the likelihood of leveraging practices such as bundling, tying, and price discrimination among others. The second substantive section deals with a more technical question: it attempts to assess the role of legal standards related to the quality and nature of economic evidence which can be considered 'convincing' under the current burden of proof standard. Finally, the third substantive section will address a particular aspect in the assessment of the future conduct of the merged entity – illegality of conduct under EC Competition Law and possibility of *ex post* prosecution as a deterrent factor.

2. Legal presumptions for the substantive assessment

(A) General presumption in favour of non-horizontal concentrations?

All the above mentioned elements and functions of the legal presumptions can be illustratively demonstrated using the example of the CFI's review of the Commission's prohibition decision in *Tetra Laval*. Summarily, in that case the Commission attempted to prove that Tetra would leverage its dominant position on the carton market into the growing PET market by capturing switching customers and offering them the package of PET products and services of Sidel. Traditionally, the Commission based its theory primarily on structural arguments, specifically in respect of Tetra's dominance and the rapid growth of the PET market which was caused by increasing substitution between the two kinds of packaging materials. On the 'incentive' part of the legal test the Commission was not very elucidating and it was penalized by the CFI, which dismissed the theory of competitive harm based on the leverage of market power.

Although under both the old and new ECMRs the substantive test for merger assessment was the same for all kinds of mergers, the Court ruled that, because vertical and conglomerate mergers are generally neutral and their effects are usually neutral or even beneficial for the consumers, there should be a higher level of proof of the opposite[38] and the mere strengthening effect does not in itself suffice to prohibit the transaction.[39] The CFI criticized the Commission's decision as lacking 'convincing evidence' that 'contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating conclusions drawn from it'.[40]

Applying the concept of legal presumptions to this ruling, one could observe that the general presumption in favour of non-horizontal concentrations increases the burden of proof on the Commission up to the 'convincing evidence' standard, where the Commission's arguments would serve as a rebuttal to that presumption. The existence of this general presumption can be traced to the Non-Horizontal Guidelines: 'Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers' because 'vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market'.[42] Similarly, the CFI's reference to the benefit to consumers was reflected in the Commission's acknowledgement that 'vertical and conglomerate mergers provide substantial scope for efficiencies'.[43]

When assessing the possibility of creating general presumptions in favour of non-horizontal mergers in light of consistency with economic theory, one would find enormous support coming primarily from the traditional Chicago School based on the premise that vertical mergers are largely concerned with efficiency and therefore should be allowed: 'Antitrust's concern with vertical mergers is mistaken. Vertical mergers are means of efficiency, not injuring competition…the law against vertical merger is merely a law against the creation of efficiency'.[44] This approach was also reflected in the US antitrust enforcement and non-horizontal mergers were almost never challenged.[45] Nevertheless, it is doubtful that the Commission or Community courts would adhere to such a resolute presumption. In his opinion, Advocate General Tizzano advised the Court that the substantive test laid down in the ECMR is of 'perfectly symmetrical nature' and therefore the CFI cannot establish different standards of proof for different kinds of mergers.[46] In its judgment, the CFI acknowledged the possibility for the Commission to challenge non-horizontal mergers if the 'incentive' part of the legal test could be proved to the requisite standard. The Non-Horizontal Guidelines also contain a diversified arsenal of the competitive harm theories that can materialize if it would be profitable for the merging undertakings.[47]

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[38]Tetra Laval CFI Judgment, paragraphs 153-155.
[39]Id., paragraphs 334-336.
[40]Tetra Laval ECJ Judgment, paragraph 39.
[41]Non-Horizontal Guidelines, at paragraph 11.
[42]Id., at paragraph 12.
[43]Id., at paragraph 13.
[44]Bork, R., The Antitrust Paradox: A Policy at War with Itself, 1978, at page 234.
[45]US antitrust enforcement was very receptive to these ideas and the last Non-Horizontal Guidelines released in 1984 contain only very limited theories of competitive harm.
[46]Opinion of Advocate General Tizzano in case C 12/03 P Commission v Tetra Laval, at paragraphs 73-75.
[47]These in a large degree reflect the views expressed in Church, J., Impact of Vertical and Conglomerate Mergers (2004), available at
<http://ec.europa.eu/comm/competition/mergers/others/merger_impact.pdf?bcsi_scan_129F6A3CDB83467E=0&bcsi_scan_filename=merger_impact.pdf>.

(B) Anticompetitive practices: incentive equals profits?

In assessing the potential effects of non-horizontal mergers the Commission faced the most problems in proving the likelihood of certain foreclosure practices being adopted by merging parties. In its *General Electric* judgment the CFI explained that 'incentive' implies that it is in the commercial interests of an undertaking to engage in the exclusionary practices and that these interests can be established by showing that the profits of the merging undertakings would outweigh potential costs of such practices.[48]

In that case the Commission assumed that GE's dominance on the aircraft jet engine market and Honeywell's dominance on the engine starters market were alone sufficient to infer that it would be in the commercial interests of the merged entity to disrupt the supply of engine starters to competitors in order to strengthen its existing dominance. The CFI considered 'persuasive' the fact that revenues potentially obtained from selling engine starters to competitors were significantly lower than the profits the merged entity would gain by expanding its basis on the markets for jet aircrafts.[49] However, the Commission's overall theory of bundling of avionics and non-avionics products was dismissed by the Court precisely due to the lack of a cost-benefit analysis.

Thus, by equalizing incentives with profits the CFI confirmed an underlying concept of the profit-maximizing undertakings which is deeply rooted in classical economic theory and previously marginalized under traditional structural assessment of the relevant market. Certainly, the behaviour of the undertakings is influenced by a variety of factors and this one is purely economic and the core function of the undertakings' operation. By clearly emphasizing the need to establish incentives in terms of profits the Court strengthened the foundations of the effects-based merger assessment, which was subsequently reflected in the Non-Horizontal Guidelines.[50]

Therefore, one could wonder whether by emphasizing the importance of commercial interests and profitability the CFI created a legal presumption which would shift the burden of proof on the undertakings once the profitability of the conduct would be established by the Commission. Even if the above question is answered in the positive, the significance of such a presumption can be undermined because profits are not the only factor relevant to incentives for future conduct. As it will be discussed in detail in the following sections, the CFI has requested that the Commission, in assessing incentives, should take into account other factors such as illegality of conduct and its deterrent effect on the undertaking.

3. Legal presumptions for economic evidence

(A) Source of evidence: merging undertakings and third parties

In the preceding section of this paper the analysis evolved around the interrelationship and consistency between legal presumptions and economic theories related to the substantive assessment of the proposed concentrations. In the present section we shall

[48]See General Electric CFI Judgment, paragraphs 338-339 and 444-462.
[49]Id., paragraphs 298-299.
[50]Every theory of competitive harm is tested through the ability-incentive-impact framework and incentives are expressed in terms of profits. See Non-Horizontal Guidelines, paragraphs 39-44, 67-70 and 104-108.

address a more technical question: what kind of evidence is capable of proving requisite elements of the legal tests applied to various theories of competitive harm. This question will be dealt with in a narrow manner on the example of the *Impala* case.

The judgment of the CFI in *Impala* represents a very specific combination of factual and procedural elements. For the purposes of the present discussion, being focused on the role of legal presumptions under the 'convincing evidence' standard applied by the Community courts, it should be emphasized that the *Impala* judgment was rendered under a very unusual procedural situation, which affects the applicability of the respective findings and conclusions to merger assessment in general. Initially, the Commission raised objections against the merger between two recorded music giants Sony and Bertelsmann based on the suspicion of the creation of collective dominance on the relevant market.[51] Concluding its Phase II investigation, the Commission decided that a prohibition decision would not meet the high standard of proof for cases of collective dominance as established by the CFI in Airtours[52] and it chose to clear the proposed concentration. The CFI, when faced by the appeal lodged by Impala, seemed to have realized that its *Airtours* test for collective dominance applied under the 'convincing evidence' requirement might lead to the situation where the merger would be cleared despite the presence of elements characteristic of collective dominance, such as long term alignment of prices.[53] In an attempt to avoid potential under-enforcement of the collective dominance cases the Court significantly relaxed the test for establishing collective dominance. As a result, the Commission appeared in an unusual and somewhat paradoxical position where it had to find 'convincing evidence' that there was no 'convincing evidence' which would allow blocking the merger on the grounds of collective dominance.

One of the key technical characteristics of the economic evidence provided by the Commission in support of its findings in merger assessment is the source from which particular evidence was obtained. It is a matter of investigatory practice employed by the Commission to obtain necessary evidence from the merging parties themselves and from third parties with links to the relevant market – competitors or consumers. The CFI's attitude towards the credibility of different kinds of evidence can produce problematic effects on the Commission's performance in merger investigations.

One of the key arguments in Commission's reasoning was the absence of sufficient transparency on the market due to the opaque nature of the campaign discounts which can vary in numerous combinations depending on the size of the order, the type of the

[51]For discussion of the Commission's statement of objections in the Sony/BMG case see Volcker S. & O'Daly C., 'The Court of First Instance's Impala Judgment: A Judicial Counter-Reformation in EU Merger Control' (2006) E.C.L.R. 27(11): 589-596.

[52]The conditions for establishing collective dominance are: (1) the market must be sufficiently transparent for the undertakings which co-ordinate their conduct to be able to monitor sufficiently whether the rules of co-ordination are being observed; (2) there must be a deterrent mechanism in the event of a deviation from those rules; and (3) the reactions of competitors outside the oligopoly must not be able to jeopardize the results expected from the co-ordination: Airtours Judgment, at paragraph 68.

[53]'Close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances'. Impala Judgment, at paragraph 253.

customer, the nature of the campaign, the genre of the music, and the level of marketing achieved by the retailer among others.[54] According to the Commission various combinations of these factors would cause a vast increase in the number of combinations of rules potentially applicable to campaign discounts alone.[55] The Commission came to this conclusion by examining solely the data on campaign discounts presented by the merging parties. As a result, when invited by the Court to demonstrate the value of the campaign discounts as a percentage of total sales of each of the five major market players the Commission was unable to provide this data.[56] The CFI dismissed the credibility and sufficiency of this kind of evidence stating that although 'the procedure for the control of concentrations does indeed rely to a large extent on trust, [the Commission] cannot go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration'. [57]

Naturally, the merging parties are interested in the outcome of the process and the Commission should not fall victim to an 'information capture' on the part of the parties. Thus, the Commission should conduct its own independent investigation. However, a closer examination of the Commission's arguments that were supported by the evidence obtained from the merging parties raises certain doubts as to the resolute nature of the Court's conclusion. Using the data obtained from the merging parties, the Commission intended to support its argument that campaign discounts depend on the combination of certain factors which increase their diversity and make them more difficult to monitor. Thus, if the campaign discounts were dependant on numerous external factors -that have no link to the company that makes these discounts, what added value will be produced for merger assessment if the Commission collected and calculated campaign discounts for all the five major market players as was suggested by the Court?

The above mentioned example is not the only instance in which the CFI discredited the information obtained from the merging parties. In support of its conclusion regarding the impossibility of establishing an effective monitoring mechanism that would allow five major market players to control the level of prices the Commission relied upon the data presented by the merging parties. This data indicated that the combinations of prices published to dealers (PPDs) 'corresponding to their respective top 20 albums frequently changed considerably from one quarter to another and that the unpredictability of success obliged each major to monitor the PPDs of more than 80 albums'.[58] The CFI found this evidence unclear and unreliable. The Court considered 'surprising' the possibility that PPDs were able to increase from quarter to quarter in such high proportions as submitted by the parties.[59] In addition, the CFI stated that the number of albums, which according to the Commission had to be monitored, 'does not seem to be so high as to render the exercise impossible or even particularly onerous or costly'.[60]

[54]Impala Judgment, at paragraph 95.
[55]Id., at paragraphs 148, 149.
[56]Id., at paragraph 448.
[57]Id., at paragraph 415. Also, compare: 'As regards, more specifically, campaign discounts, the Commission refers essentially to two of its annexes to support its theory that campaign discounts are opaque because of their extreme complexity and their importance. However, it is apparent that the tables in those annexes, which concern only the discounts granted by Sony and BMG for a single year and were drawn up entirely by those undertakings, cannot be considered sufficiently relevant and reliable'. Id., at paragraph 422.
[58]Id., at paragraph 344.
[59]Id., at paragraph 345.
[60]Id., at paragraph 346.

Thus, the question arises whether the Court's suspicious attitude to the evidence obtained from the merging parties should be attached to the specific conditions of the case or whether it reflects a more general approach that disfavours this kind of evidence. The second scenario would warrant further improvements of the Commission's investigatory practices. According to Volcker, 'experience shows that unlike the merging parties who are typically willing to comply with any data request in order expedite clearance; third parties have little incentive to provide complete and reliable data sets on a timely basis. They will be particularly reluctant to do so in a situation where the Commission is investigating coordinated effects concerns, as any finding in this respect may limit their own ability to participate in further industry consolidation'.[61]

The CFI's apparent insistence on obtaining reliable data from third parties also warrants taking a closer look at the way in which the Court assessed such data in the *Impala* case. Later in the judgment the Court provides its own understanding of the wording of the responses to the questionnaires addressed to the recorded music retailers. Notably, the Court's interpretation of the wording of these responses diverges from that of the Commission's.[62] Apparently, the evidence obtained from third parties is not guaranteed to be accepted due to the possibility of diverging appreciation of the same evidence by the Court.

(B) Past conduct versus future conduct

Continuing the discussion on the way legal presumptions can influence the Commission's investigatory practices we shall now address another issue disputed in the *Impala* case. One of the necessary elements of the collusion mechanism according to the *Airtours* test is the existence of the effective deterrence mechanism that would allow participating companies to punish the competitor who deviates from the common pricing policy and thus deter him from such deviations. In the *Impala* case the Commission had to produce 'convincing evidence' that would demonstrate to the Court the absence of the credible deterrence and retaliation mechanism.

Five major companies on the market for recorded music were connected to each other through a series of compilation joint ventures (JVs) and initially, in its statement of objections, the Commission suggested that exclusion from these JVs might constitute an effective deterrent mechanism against deviations from the alleged common pricing policy.[63] However, following its Phase II investigation the Commission dropped these allegations for two reasons: firstly, it could not find any evidence suggesting this mechanism had been used in the past, and secondly, because excluding from a compilation a deviating member could in fact sacrifice any additional profits that might accrue from a compilation featuring the deviator's artists.[64]

The CFI discarded this evidence primarily because it was past-oriented. The Court emphasized that the *Airtours* test does not require the Commission to demonstrate that the retaliation mechanism was actually used to punish the deviator; it is sufficient to prove the

[61]Volcker & O'Daly (2006), at page 596.
[62]Impala Judgment, at paragraph 385.
[63]Id., at paragraph 467.
[64]Id., at paragraphs 164, 165.

mere existence of a credible mechanism that was capable of punishing non-compliance when it occurs.[65] The Court agreed with the applicant that 'the most effective deterrent is that which has not been used'.[66] The most critical points, however, came later when the Court concluded that 'as the assessment of the risk of the creation of a collective dominant position is not, by definition, based on the existence of a prior common policy, the criterion relating to the absence of retaliatory measures in the past is wholly irrelevant'.[67] Certainly this treatment of the evidence of past conduct cannot be elevated to the level of legal presumption, which disfavours the use of this kind of evidence in merger assessment. This, again, is due to the particular circumstances of the specific case.

Nevertheless, there are several problems with this negative attitude towards the admissibility of the evidence of past conduct. Firstly, it should be stated that economic theory does not provide a uniform list of requirements that would support the definite finding of tacit collusion. On this point economic science displays expressed 'theoretical heterogeneity' under which tacit collusion could be found using a variety of complex econometric models.[68] Summarizing various criteria used in these economic models Ordover has concluded that 'evidence of past or present coordination, although not sufficient alone for the proving coordination, can be used to defend the 'mechanism' of coordination'.[69] Nevertheless, a strong presumption against the admissibility of evidence relating to past conduct is not consistent with economic theory and it also operates to significantly limit the Commission's evidentiary support.

Apart from its inconsistency with economic theory, the negative approach towards admissibility of evidence of past conduct could cause confusion in the overall legal assessment of the likelihood of creating collective dominance. It should be noted that the Court initially suspected the existence of collective dominance on the basis of the alignment of prices during an extended period of time, which by its nature is evidence of past conduct and of the structure of the market. Industrial organization economics do not provide very clear guidance as to the extent of volatility and lack of correlation that is consistent with competition as opposed to some form of coordination. According to the economic theories summarized by Ordover, co-movements of different prices within a 'narrow' range can be entirely consistent with either competition or some sort of coordination.[70] Thus, it will be also problematic to justify the Court's approach, which rejected the evidence of past behaviour in determining the existence of the retaliation mechanism but readily admitted the same kind of evidence to presume the existence of price coordination.

4. Taking into account illegality of future conduct

(A) Illegality and its deterrent effect: from Tetra Laval to General Electric

Illegality of future conduct and fear of detection stood alongside numerous other factors that the Commission had to take into account in assessing the likelihood that the respective conduct would be adopted by the merging entities. However, the Commission and the

[65]Id., at paragraph 465.
[66]Id., at paragraph 466.
[67]Id., at paragraph 537.
[68]See generally Tirole J., The Theory of Industrial Organization, Cambridge: The MIT Press, 2003, 239-262.
[69]Ordover, J., 'Coordinated Effects in Merger Analysis: An Introduction' (2007) Colum. Bus. L. Rev, 425.
[70]Id., at paragraph 428.

Community Courts appeared to be in disagreement regarding the role that these factors should play in the context of merger assessment. This section shall address the roots of the disagreement and its potential implications for the merger investigations.

The issue of illegality of future conduct was first addressed by the CFI in the *Tetra Laval* judgment. According to the Commission, Tetra would be able to leverage its dominance on the carton market to the PET market and capture those customers that would transfer from carton to PET packaging by supplying them with PET materials and equipment manufactured by Sidel.[71] In order to achieve this 'channel effect', that would capture future PET customers on this rapidly growing market and therefore create another dominant position, Tetra would have to engage in certain commercial practices such as predatory pricing, price wars and granting loyalty rebates.[72] In reviewing the Commission's forecast regarding the likelihood of Tetra engaging in this practice the CFI noted that according to the established case law a dominant undertaking is under an obligation to modify its conduct so as not to impair effective competition on the relevant market, regardless of whether the Commission has adopted a decision to that effect.[73] Moreover, Tetra's dominant position on the aseptic carton market had already been recognized in the preceding Article 82 judgment and Tetra was under specific obligations to refrain from certain practices in the future.[74]

In the CFI's view, the combination of these circumstances significantly diminished the likelihood of the adoption of abusive practices, which should have been taken into account in the Commission's analysis. In response, the Commission stated that 'the fact that a type of conduct may constitute an independent infringement of Article 82 EC does not preclude that conduct from being taken into account in the Commission's assessment of all forms of leveraging made possible by a merger transaction'.[75]

In an attempt to comprehend the substance of this disagreement between the CFI and the Commission one could conclude that the Court was merely urging the Commission to prove its conduct-based arguments up to the requisite 'convincing evidence' standard, especially in the present case where illegality, fear of detection, previous undertakings and behavioural commitments offered by Tetra constituted important factors that would significantly affect the likelihood of future abusive conduct alleged by the Commission. Under this interpretation, it would appear that the Commission refused to consider such factors as a matter of principle while the Court was calling for a balanced assessment that would take all relevant factors into account. This understanding of the disagreement is supported by the CFI's explanation that illegality of future conduct can be taken into account by comparing it with the incentives, i.e. the commercial interests of the company to engage in the illegal anticompetitive practices. Thus, according to the CFI, the Commission has to measure the degree in which the financial incentives encouraging abusive behaviour will be eliminated or reduced as a result of detection and prosecution.[76] The CFI also ruled that in order to produce such measurement, the Commission must

[71]Tetra Laval Decision, at paragraphs 345, 365.
[72]Tetra Laval CFI Judgment, at paragraph 156.
[73]Id., at paragraph 157.
[74]Case T-51/89 Tetra Pak v Commission (1990) ECR II-309.
[75]Tetra Laval CFI Judgment, at paragraph 158.
[76]Id., at paragraph 159.

consider 'to what extent those incentives will be diminished owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue'. [77]

However, further analysis of the CFI's reasoning raises doubts as to whether such an assessment, even if its immense complexity and uncertainty could somehow be overcome by the Commission, is capable of leading to the conclusion that abusive conduct is likely to occur despite its illegality. In its *Tetra Laval* judgment the CFI suggested that 'although it cannot be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers'.[78] It might appear from this statement that the CFI first created a presumption in favour of the compliance with EC Competition Law by the merging parties and then nevertheless required the Commission to examine all possibilities. Subsequently, the CFI strengthened this presumption by stating that in examining whether the Commission supported its leveraging theory with 'convincing evidence' it is necessary to 'take account only of conduct which would, at least probably, not be illegal'. [79]

In its appeal of the CFI judgment to the ECJ, the Commission objected to the CFI's approach in respect of the assessment of illegality of future conduct and fear of detection as possible deterrents. The Commission argued that requiring such an assessment will present virtually insuperable legal and practical obstacles, because deterrent effect depends upon the strictness of the policy and its enforcement in each Member State, which will be very difficult to assess in accordance with the very high burden of proof established by the CFI. The ECJ aligned with the Commission and ruled that 'the CFI had erred in law in rejecting the Commission's conclusions (…) on the sole ground that the Commission had, when assessing the likelihood that such conduct might be adopted, failed to take account of the unlawfulness of that conduct and, consequently of the likelihood of its detection, of action by the competent authorities, both at Community and national level, and of the financial penalties which might ensue'.[80] In other words, the ECJ did not reject the issue of illegality as a relevant factor, it just emphasized that this factor cannot be assessed according to the standard established by the CFI.

The CFI continued this approach in its *General Electric* judgment. In its *GE/Honeywell* decision the Commission suggested that the merged entity would engage in certain conduct on the engine starters market with a view to weakening its competitors on this market, resulting in the strengthening of their dominant position on the market for large commercial aircraft engines. The alleged conduct would manifest itself in interrupting the supply of engine starters to competitors, refusals to sell them and continuous price increases. Following the *Tetra Laval* precedent, the CFI noted once again that the Commission failed to conduct an assessment of the effects of the potential illegality of this conduct because a

[77]Id., at paragraph 159.
[78]Id., at paragraph 159.
[79]Id., at paragraph 162.
[80]Tetra Laval ECJ Judgment, at paragraph 78.
[81]GE/Honeywell Judgment, at paragraph 305.

refusal to sell to competitors by a dominant undertaking, according the settled case law[82], in itself constitutes an abuse of a dominant position.[83]

What should be noted in the *General Electric* case is that the CFI introduced even more controversy through its recommended cost-benefit analysis of illegality by holding that in its assessment the Commission can 'limit itself…to a summary analysis based on the evidence available to it'.[84] This interpretation of the Commission's duties in this regard is obviously different from the 'convincing evidence' that Commission had to bring in *Tetra Laval* in order to challenge the Court's presumption of the merged entity's compliance with competition law. Apparently, the CFI has elected to follow a middle road between its *Tetra Laval* approach and its dismissal by the ECJ. This explained by the Court's understanding of the inherent difficulty of such analysis and its willingness to award the Commission with reasonable chances of presenting 'convincing evidence' in support of its arguments. The judgment does not provide the Commission with clearer guidance regarding such assessment: 'it is not for the Court to substitute its own appraisal for that of the Commission, by seeking to establish what the latter would have decided if it had taken into account the deterrent effect of Article 82 EC'.[85]

(B) Law or economics?

The fundamental problem with the approach taken by the Community Courts lies in that fact the test for assessing the deterrence effect of illegality proposed by the CFI in its *Tetra Laval* judgment is based not on economic theory but rather on legal presumptions that are inconsistent with economic models. The CFI departs from the strong presumption that a merging entity will not engage in practices that violate EC competition law. This presumption is purely legal and it cannot be supported by the economic theories because from the economic perspective the conduct of a firm is driven by profit-maximization, and the possibility to violate the law in order to achieve higher gains is also assessed from this perspective. In other words, from an economic perspective the firm will violate the law as long as it is profitable to do so.

Following this legalistic rather than economic approach, the CFI required the Commission to assess how the possibility of detection at national and Community levels, based on the actions of the respective competition authorities and courts as well as imposed sanctions, will diminish the firm's incentives to adopt anticompetitive practices. The decentralization of enforcement of EC Competition Law achieved by the adoption of the Regulation 1/2003 makes this task extremely difficult as the Commission is expected to take into account the differing degrees of regulation and effectiveness of enforcement at the level of Member States.

It follows from these considerations that it would be extremely difficult to furnish economic evidence that satisfies the requirements of the legal test established by the CFI regarding the effect of illegality on the firm's incentives to adopt anticompetitive practices. Moreover, following the discourse of *Tetra Laval* it also appears that the Commission does

[82]Joined Cases 6/83 and 7/73 Istituto Chemioterapico Italiano and Commercial Solvents v Commission (1974) ECR 223.
[83]GE/Honeywell Judgment, at paragraph 306.
[84]Id., at paragraph 304.
[85]Id., at paragraph 312.

not enjoy wide margin of assessment under the strong presumption of the Court in favour of the firm's compliance with EC Competition Law. Since economic theory does not offer sufficient guidance on this issue it is suggested that present conflicts should be discussed on the conceptual level of principles and objectives of competition law and policy.

Tetra Laval produced an important conceptual disagreement between the Commission and the Court which went beyond the practical difficulties in assessing the effect of illegality and fear of prosecution on the firm's conduct. As emphasized throughout this present section, the CFI established a strong presumption in favour of compliance with competition law by the merging entity. Similarly, the Commission took a principled position that *ex post* illegality should not prevent the Commission in addressing the problem *ex ante*. Therefore, this debate is also of conceptual nature because it refers to the functions and objectives of the enforcement of EC Competition Law. In an attempt to address this issue one has to enter the domain of competition policy, which is beyond the scope of this article. What can be concluded regarding the role of presumptions on this issue is that a strong legal presumption in favour of compliance with competition law as established by the CFI is purely legalistic and any attempts to satisfy the requirements of the cost-benefit analysis as suggested by the Court are not likely to succeed against this presumption.

5. Conclusion

The present Article was intended to be an analysis of the ongoing development process of merger assessment methodology which is moving towards a more economics-based and effects-based analysis. The legal presumptions discussed can be considered to be tendencies and potential solutions which form part of this ongoing process. They are tendencies because, in the absence of preceding jurisprudence, both the Commission and Community Courts have, on a case-by-case basis, created, defined and clarified the correct legal tests and the elements that should be taken into account when predicting potential competitive effects of notified concentrations. They are also potential solutions to the increasing complexity and sophistication of the merger assessment process described in the introductory section; this phenomenon has to be addressed by means that would allow the Community Courts to carry out judicial review of the Commission's decisions on the basis of a variety of different economic evidence.

Considering the dynamic nature of these developments, one may not be mistaken in thinking that any conclusive statements are somewhat premature. Nonetheless, at this point it should be acknowledged that legal presumptions might potentially play an important role, not only in the legal assessment of mergers and their potential impact on the enforcement policy, but also in the Commission's investigatory practices and the Courts' ability to review economic evidence in merger cases. This article discussed a variety of legal standards related to various phases and areas of merger assessment. Some of them were found useful in guiding the Commission towards more substantiated predictions of future conduct and competitive effects, others were restrictive of the Commission's ability to present available evidence and defend its case. One group of presumptions was considered to be consistent

with mainstream economic theories; a second group deviated from the canons of economic assessment and; finally, there was also a third type of presumptions, which were purely legalistic and should be somehow reconciled with the economic ones.

Regardless of this obvious divergence and apparent inconsistency in the formulation of legal presumptions by the Community courts, which should be also discounted due to the lack of previous experience, certain general remarks can be made. It is submitted that the concept of legal presumptions might be instrumental for the better understanding of the 'convincing evidence' standard and its application in the merger assessment proceedings. As can be observed in the selective case law analysis presented above, the failures of the Commission to satisfy the 'convincing evidence' standard often corresponded with its inability to rebut certain presumptions articulated by the Community Courts. This might suggest that legal presumptions could be considered as a useful tool in dealing with the complexity of merger assessment. Potentially, legal presumptions can assist policy-makers, lawyers and legal scholars in reconciling and coordinating the relationship between *ex ante* and *ex post* enforcement. The analysis of the presumption in favour of compliance due to the fear of *ex post* prosecution represents this border line where two different competition law regimes interact.

EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission

SOTIRIS I. DEMPEGIOTIS*

1. INTRODUCTION AND FRAMEWORK ILLUSTRATION

A. INTRODUCTION

Much ink has been poured for the purpose of illustrating the dimensions of the interaction between European Community (EC) competition law[1] and international commercial arbitration that one might come to consider the topic largely explored, if not exhausted. In reality however, the interface between these two legal orders remains to a large extent unclear and thus open to further deliberation for a number of reasons, the most important of which – in this author's view – are the following.

First, the interface at hand is characterised by a multi-layered complexity anchored in the very nature and the peculiarities of each legal order; it occurs in an intricate legal and regulatory framework, and it seems to be dominated by the conceptual conflict that lies at its heart and arises out of the 'confrontation' between EC competition law and the international commercial arbitration realm, namely between a set of rules of a prevalent public law nature enjoying a supranational constitutional status through inclusion in the EC Treaty[2] and serving as transnational mandatory norms on the one hand, and a private, confidential, flexible, and independent adjudication mechanism for the resolution and final settlement of international commercial (and mostly contractual) disputes on the other.

Secondly, the remarkable dynamics of EC competition and international commercial arbitration as bodies of law, their ongoing expansion in scope and increase in influence worldwide, and the notable proliferation of their gravity within the current global and multi-cultural business environment, especially in terms of policy, legal, and economic considerations.

Last but not least, the piecemeal and fuzzy way of dealing with international arbitration on the part of the authorities of the EC has been far from helpful in rendering the picture of the relationship between the two more lucid and less patchy. It is indeed interesting that the constant conscious silence over arbitration involving competition law issues relating to Articles 81 and 82 EC and the zeal for tailoring arbitral proceedings to the needs of the EC merger control scheme emanate from the very same institution, namely the European Commission.

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[1] The expression 'EC competition law' as used here includes the area of merger control.

[2] See A. Komninos, 'Arbitration and the Modernisation of European Competition Law Enforcement', (2001), 24(2) World Competition 211, at 222. Note that this constitutional dimension constitutes a unique and peculiar characteristic of EC competition law. The case is different with both Member States' competition laws and the US antitrust law. On this issue, see D. Chalmers, C. Hadjiemmanuil, G. Monti, and A. Tomkins, European Union Law, Cambridge University Press, 2006, at p. 52.

What is more, the latest developments and the present landscape of EC competition law bring the 'competition-arbitration' interface to the foreground and admittedly render it a lively and heated issue among scholars and practitioners of both competition and arbitration communities.

In what follows, an attempt is made to illustrate the current framework of the said interface, to shed some light on certain thorny issues with regard to both competition (Articles 81 and 82 EC) and merger (EC merger control remedies) arbitrations, and finally to draw some useful conclusions from the European Commission's attitude towards arbitration to date in so far as such an attitude may well serve as an indication of the Commission's possible future directions on the topic.

(B) Framework illustration

The analysis in the present essay focuses on a three-dimensional framework which indeed resembles a triangle consisting of three – two relatively and one substantially – new developments within EC competition law regime, and which seems to indicate the emergence of a new era in the interface between competition and arbitration in Europe.

More specifically, Regulation 1/2003, the Modernisation Regulation[3], through the abolishment of the notification mechanism and the European Commission's jurisdictional monopoly on Article 81(3) EC, the introduction of an *ex post* control system with a prevailing underlying self-assessment element, and the explicit provision for the full direct effect[4] (previously grounded on the jurisprudence of the European Courts) of Articles 81 and 82 EC, reflects the EC's desire to move towards decentralisation[5] in the enforcement of these articles and subsequently perhaps towards the enhancement of the role of private enforcement within the EC competition law regime.

The Modernisation Regulation aside, the private enforcement channel of EC competition law is further underlined by the newborn White Paper on private enforcement[6] as a crucial adjudication arena for competition law disputes and as an essential instrument for both the final formulation of the modernised EC competition law and the attainment of its objectives. Arguably, the enhanced role of private enforcement along with the corresponding growing importance of private adjudication in Europe generally constitute a quite clear indication of the significant anticipated expansion of the use of arbitration in the application of EC competition law. This remark notwithstanding, it is pertinent and crucial to note here that both the Modernisation Regulation and the said White Paper remain silent over arbitration. And it is this silence that has divided commentators into those

[3]Regulation 1/2003 [2003] OJ L 1, pp.1-25.
[4]Regulation 1/2003, Article 1.
[5]See Regulation 1/2003, Articles 4, 5, 6, 25(3) and 29(2). See also, M. Dolmans and J. Grierson, 'Arbitration and Modernization of EC Antitrust Law: New Opportunities and New Responsibilities', (Fall 2003), 14(2) ICC International Court of Arbitration Bulletin, pp. 37-51.
[6]White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008.

who perceive it as a 'conscious and prudent choice' on part of the Commission[7], and those who stress that it amounts to a 'conspicuous absence' of arbitration[8].

At the same time, the use of international arbitration as a procedural tool to monitor certain behavioural commitments[9] undertaken in the context of the Commission's so-called 'clearance decisions' – particularly in the field of merger control – constitutes a relatively recent but highly controversial phenomenon. Such decisions consist of two types of beneficiaries: the main ones, that is, the addressees of these decisions, and third-parties, such as competitors or other persons 'worthy of protection'[10] under the relevant decision. The benefit of these decisions is granted on the condition that the main beneficiary is obliged to accept a potential arbitration request from any protected third party. In other words, a denial of such a request on the part of the addressee may lead to the withdrawal of his benefit by the Commission. This may be the case in both the Commission's competition[11] and merger[12] remedies, namely, the Commission's individual exemption decisions under Article 81(3) EC,[13] and its merger-related decisions giving the green light to certain concentrations subject to specific conditions (conditional clearance).

Focusing on Regulation 139/2004, the Merger Regulation[14], international arbitration is used by the Commission with noticeable ardour as a monitoring device for the correct implementation of certain behavioural commitments under the Commission's conditional clearance decisions. Interestingly, the case of arbitration commitments in the context of the EC merger control regime and its remedies scheme is now expressly mentioned in the new draft revised Notice on Remedies[15]. Also, the Commission's existing Model Texts on certain

[7]A. Komninos, above note 1, p. 218.
[8]P. Landolt, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, 2006, p. 39.
[9]Note that the terms 'commitments' and 'remedies' are herein used interchangeably.
[10]See A. Komninos, *above* note 1, p. 217.
[11]See e.g. Dec. 99/781/EC, *British Interactive Broadcasting/Open*, OJ [1999] L 312/1, where among the conditions of an individual exemption under Article 81(3) EC granted by the Commission was the recourse to an 'appropriate and independent arbitration procedure'. For numerous examples and a detailed analysis of the Commission's practice in this respect see M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003, pp. 83 et seq. Also see M. Bowsher, 'Arbitration and Competition', in T. Ward and K. Smith (eds.), *Competition Litigation in the UK*, Sweet & Maxwell, London, 2005, pp. 398-431.
[12]See the arbitration commitments in Cases No IV/M.1185, *Alcatel/Thomson CSF-SCS*; No IV/M.1313, *Danish Crown/Vestjyske Slagterier*; No Copm/M.1684, *Carrefour/Promodes*; No Comp/M.1751, *Shell/BASF/JV-Project Nicole*; No Comp/M.1795, *Vodafone Airtouch/Mannesmann; No Comp/M.1846, Glaxo Welcome/Smithkline Beecham*; and No Comp/JV.37, *BSkyB/Kirch Pay TV*. See also the case No Comp/M.2050, *Vivendi/Canal+/Seagram*, where the Commission underlined the absence of a potential resource to arbitration. After that, a sophisticated ICC arbitration was proposed to the Commission, which finally entertained its concerns. For a detailed analysis of merger remedies see M. Blessing, above note 10, pp. 49 et seq.; also see G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Europa Law Publishing, Groningen, 2006. For an update see G. Blanke, 'The Use of International Arbitration in EC Merger Control: Latest Developments', (2007), 28(12) European Competition Law Review 673.
[13]Note that for the purposes of the present paper, the Commission decisions under Article 9 of the Modernisation Regulation are treated on par with the Commission prior-Modernisation individual exemption decisions under Article 81(3) EC.
[14]Regulation 139/2004 [2004], OJ L 24, pp. 1-22.
[15]See the draft revised Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, (2007), in particular paras 66 and 127. Note that until adoption of the draft revised Notice (2007) -scheduled for early 2008- the old

types of remedies are strongly anticipated to be complemented by a model arbitration clause that may well be used in several merger remedy scenarios[16]. This is why the nature, the parameters, and the future prospects of the so-called 'remedy arbitrations'[17] constitute at present one of the most divisive and burning debates within the arbitration and competition communities in Europe.

2. International commercial arbitration and Articles 81 and 82 EC – Competition arbitrations.

(A) Arbitrability of competition law disputes

In general, arbitrability answers the question of what types of disputes can be submitted to arbitration. Each state, based on its sovereignty, retains the power to formulate its own answer to this question according to the public policy considerations prevailing at a certain time within its domain. Indeed, as noted by some commentators, 'arbitrability determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins.'[18]

Albeit highly controversial in the past, the arbitrability of competition law disputes is now generally acknowledged on both sides of the Atlantic. In the USA, the arbitrability of competition law has not been debated since the dust of *Mitsubishi*[19] case settled. In the EC, the arbitrability of EC competition law was implicitly yet doubtless confirmed in the seminal judgment of the European Court of Justice (ECJ) in *Eco Swiss*[20], where the ECJ also underlined the Member States' interests in the sound and effective operation of arbitration.[21] EC law aside, the current legislation and jurisprudence of the leading European jurisdictions clearly gravitate in the same direction.[22]

It is important to stress at this point that when referring to the arbitrability of competition law, one invariably focuses on the 'civil' aspect of competition law, namely on

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Notice on Remedies, i.e. Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ 2001 C68, remains in force.

[16]J. Luebking, 'Revision of the Notice on Merger Remedies', (2007), 2 Competition Policy Newsletter 6, at 8-9.

[17]As made clear above, arbitration commitments may arise not only in the context of the Merger Regulation and its remedies scheme, namely the Commission's merger-related decisions declaring certain concentrations to be compatible with the common market subject to specific conditions, but also in the context of the Modernisation Regulation, and in particular its Article 9, which clearly, though tacitly, invites arbitration commitments within the scope of the Commission's Article 81(3) EC individual exemption clearance decisions. Such arbitration scenarios are generally termed 'remedy arbitrations' or 'EC remedy-related arbitrations'. Although the present paper is confined to the analysis of the former type of remedy arbitrations, the same analysis applies *mutatis mutandis* to the latter type as well. For a very recent use of an arbitration commitment in a decision under Article 9 of the Regulation 1/2003 see Case Comp/37749 *Austrian Airlines* and SAS AB.

[18]See Carbonneau and Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability', (1994), 2 Tulane Journal of International and Comparative Law 193, at 194.

[19]*Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).

[20]Case C-126/97 *Eco Swiss v. Benetton* [1999] ECR I-3055.

[21]Ibid, para 35.

[22]For a comparative survey see P. Landolt, *above* note 7, Chapter 5. See also D. Rahmann, 'Arbitrability of Antitrust Issues', (1990), 12 Comparative Law Yearbook of International Business 97.

those private law claims adduced and those private remedies sought when an infringement of the competition rules has occurred.[23] By corollary, issues relating to the administrative aspect of competition law, such as disputes as to whether public sanctions in the form of fines following a violation of competition law should be imposed are not considered arbitrable.[24]

In principle, therefore, all disputes arising out of any type of horizontal or vertical collusion (Article 81 EC) or abusive conduct (Article 82 EC) can be submitted to arbitration.[25] However, one should never forget that the *conditio sine qua non* of any arbitration (competition arbitrations included) is the existence of a valid arbitration agreement. Quite importantly, this remark reflects the inherent limits of arbitration as an alternative private justice forum; nonetheless, in practice business contracts frequently feature arbitration clauses. Arbitration, thus, plays a central role in contractual disputes, whereas its role in non-contractual ones is secondary.[26]

More specifically, arbitrability is not contested in relation to disputes arising from multilateral (e.g. among partners) or bilateral (e.g. between a seller and a buyer) contracts with horizontal or vertical dimensions operating either on a long-term or on a transaction-by-transaction basis. Such disputes may well concern several pricing scenarios or price discrimination, exclusivity, market partitioning, tie-in or bundling situations, resale, refusals to supply or other abuses of a dominant position, and the like[27]. In such cases, Articles 81 and 82 EC may constitute the basis of either a claim or a defence, and the remedies[28] (e.g. damages, restitution, or declaratory relief) sought before arbitral tribunals would almost invariably centre upon 'the validity of the contract itself, of its horizontal or vertical restrictions, and on any damages resulting from anti-competitive behaviour.'[29] On the other hand, disputes raising public issues by somehow affecting the society (in the form of a whole class of citizens), disputes involving claims against third parties, as well as disputes where tortious behaviours (outside a contractual relationship) are largely at stake, are normally not considered to be arbitrable. In such scenarios, the dispute in question is extremely unlikely to be covered by a pre-existing valid arbitration agreement. As a general rule, therefore, the arbitrability of EC competition law disputes presupposes a pre-existing contractual relationship or at least contractual framework within which a valid arbitration agreement would exist.

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[23]See S. Dempegiotis, 'EC competition law and international arbitration in the light of EC Regulation 1/2003: Conceptual conflicts, Common grounds, and Corresponding legal issues', (forthcoming June 2008), 25(3) Journal of International Arbitration.

[24]See J.D. Lew, L. Mistelis, and S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 485.

[25]For a detailed presentation of various case scenarios of competition arbitrations see M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003, Annex 2, p. 209 et seq.

[26]See L. Idot, 'Arbitration and the Reform of Regulation 17/62', in C. D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland/Oregon, 2003, pp. 307-321, at pp. 309-311.

[27]See J. Dalhuisen, 'The Arbitrability of Competition Issues', (1995), 11(2) Arbitration International 151, at 158-159.

[28]For more details on the remedies that arbitrators can grant under Articles 81 and 82 EC see H. van Houtte, 'Arbitration and Articles 81 and 82 EC Treaty – A State of Affairs', (2005), 23(3) ASA Bulletin 431, Kluwer Law International.

[29]J. Dalhuisen, *above* note 26, at 163.

(B) Arbitrability of Article 81(3) EC and its application by international arbitrators

Prior to the modernisation of EC competition law regime, the arbitrable EC competition rules were Articles 81(1) and (2), and 82 EC. The intriguing question post-modernisation concerns the arbitrability of Article 81(3) EC and its applicability in international arbitration proceedings. The difficulty of this twofold question rests on the public policy considerations rooted in the evaluation of Article 81(3) EC and the subsequent Commission's doubt about arbitrators' ability to deal with such delicate issues. In practice, the testing question is whether international arbitral tribunals can decide on the question of individual exemption under Article 81(3) EC as do national courts now.

As far as the arbitrability of Article 81(3) EC is concerned, it suffices to mention here that thus far the arbitrability of EC competition law appears to have been governed by a single principle: the arbitrators' competence to adjudicate on EC competition law issues must coincide (in terms of scope) with that of national judges. The ECJ in *Nordsee*[30] and *Eco Swiss*[31] appears to be well-informed of this principle: through its complete silence, it implicitly acknowledged not only this principle but also the possibility of arbitrators applying all the EC competition rules having direct effect, as is the case now with Article 81(3) EC.[32] It follows that under the Modernisation Regulation the adjudication arsenal of international arbitrators contains Article 81(3) EC in so far as the same applies to Member State courts. The silence of Regulation 1/2003 in this regard bears the same gravity as the silence of its predecessor, Regulation 17/62.[33] Finally, the non-arbitrability of Article 81(3) EC impairs the effectiveness of arbitration as an adjudication vehicle, thereby thoroughly contrasting with the *Eco Swiss* recognition of the Member States' interests in effective arbitration.[34] As a result, the question of arbitrability of Article 81(3) should be answered in the affirmative.

Turning to the applicability of the said provision in arbitral proceedings, it is really interesting to notice that national judges' capability to deal with the complex policy and economic issues arising out of Article 81(3) EC was at the centre of criticism against Regulation 1/2003.[35] This remark aside, Article 81 EC as a whole constitutes a source of rights and obligations 'enforceable by legal and natural persons as a matter of Community law'[36] due to its direct effect provided for under Article 1 of Regulation 1/2003. In other words, there is no ground to argue that the application of Article 81(3) EC should be treated in a different way 'from any other question of fact or law arising in any international arbitration.'[37] In addition, despite the wording of Articles 5 and 6 of Regulation1/2003

[30]Case 102/81 *Nordsee* [1982] ECR 1095.
[31]See *above* note 19.
[32]See R. Nazzini, 'International Arbitration and Public Enforcement of Competition Law', (2004), 3 European Competition Law Review 153, at 155-156.
[33]Regulation 17 /1962, OJ [1962] L 13/204.
[34]See P. Landolt, *above* note 7, p. 104; See also Article V(2)(a) of the New York Convention on Recognition and Enforcement of Arbitral Awards 1958.
[35]See A. Komninos, 'Arbitration and the Modernisation of European Competition Law Enforcement', (2001), 24(2) World Competition 211, at 222.
[36]R. Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence, and Remedies*, Oxford University Press, 2004, p. 335.
[37]Ibid, p. 337.

the applicability of Article 81(3) EC is not restricted to the ambit of National Competition Authorities (NCAs) and national courts. On the contrary, the mere reason for Articles 5 and 6 of Regulation 1/2003 referring only to NCAs and national courts is that arbitral tribunals fall outside the scope of Article 10 EC. Indeed, if the Commission intended to exclude Article 81(3) EC from the arbitrators' jurisdiction, it would have done so expressly. Again, the silence of the Modernisation Regulation in this respect has the same bearing on the arbitrators' power to apply Article 81(3) EC as that of its predecessor on the arbitrators' power to apply Article 81(1) and (2) EC, namely it simply amounts to an implicit acknowledgement of the arbitrators' jurisdiction over the entirety of Article 81 EC.[38] According to some prominent commentators, such an inference is also in line with the teleological, systematic, and historical interpretation developed by the ECJ and extending also to Regulation 1/2003.[39]

A final practical consideration seems to confirm the soundness of the above standpoint. In fact, the exclusion of Article 81(3) from the arbitrators' arsenal would absurdly put them in the very uncomfortable position of facing a procedural deadlock.[40] Imagine, for instance, an arbitral tribunal coming up with an Article 81(3) EC issue and considering possible solutions: a reference to the Commission is impossible under the new regime, and an Article 234 EC reference to the ECJ would not have better luck owing to the *Nordsee* precedent. The only plausible solution seems to be the activation of the supportive role of a national court. However, it would be really meaningless, even if possible, for a national court to decide only on Article 81(3) EC without applying Article 81(1) EC first. Such a grotesque outcome would clearly contradict with the *Eco Swiss* perspective over effective arbitration mentioned above.

The foregoing argumentation notwithstanding, it is true that the analysis required under Article 81(3) EC involves intricate factual, legal, and economic issues as well as delicate policy considerations. Moreover, international arbitral tribunals – falling outside the scope of Article 10 EC – do not enjoy the cooperation mechanisms provided for under Regulation 1/2003. However, the answer to the above ascertainments should not be the rejection of the arbitrability of Article 81(3) EC and its application by international arbitrators. Instead, a robust solution could be found in the increased awareness of the very peculiarities and pitfalls of competition arbitrations. In this author's view, such an attitude could lead to the taking of appropriate measures[41] with regard to the formulation and conduct of such arbitrations, which would ensure – with an eye on the enforcement stage – that the issues of Article 81(3) EC are seriously considered and carefully addressed.

(C) The duty of arbitral tribunals to apply Articles 81 and 82 EC ex officio

One of the most puzzling and controversial questions in respect of the application of EC competition rules by international arbitrators is whether the latter have a duty to

[38]See C. D. Ehlermann and I. Atanasiu, *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford/Portland/Oregon, 2003. This is the conclusion reached by all the panelists and commentators.
[39]See e.g. A. Komninos, *above* note 34, p. 220.
[40]Ibid, pp. 221-222.
[41]For some workable such measures see R. *Nazzini*, *above* note 35, pp. 336-337.

raise and apply the said rules *sua ponte* when neither party to arbitration invokes such rules in the arbitral process or one party does so and the other opposes. Interestingly, the ECJ has neatly avoided so far to explicitly answer this question and thus to interfere in the arbitration's realm.

Indeed, the ECJ stressed in *Nordsee* that 'Community law must be observed in its entirety throughout all the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it.' Furthermore, in the *Van Schijndel* and *Peterbroeck* judgments[43] the ECJ made clear that national judges have a legal duty or obligation – emanating from Article 10 EC – to consider, raise, and apply EC competition law on their own initiative, provided that the factual scope of the dispute before them is not exceeded. In *Eco Swiss* the ECJ implicitly reconfirmed the said duty of national judges, although the question addressed to it concerned the corresponding duty of arbitrators.[44] In fact, the only duty that the ECJ in *Eco Swiss* expressly referred to was that of national judges to review and annul an arbitral award which is contrary to EC competition law (*in casu* Article 81 EC) on the ground of public policy (*ordre public*) provided that the national procedural laws provide for such an annulment[45]. To put it differently, the *Eco Swiss* judgment reflects the EU legal order's requirements as regards the Member State courts' duties and responsibilities when dealing with arbitral awards. Consequently, it is fair to argue that Community law imposes no direct legal duty or obligation upon arbitrators to raise and apply EC competition law *ex officio*. The ECJ simply recommends in *Eco Swiss* that arbitrators do so in order to protect the status and quality of their award in light of the public policy defence as formulated by and depicted in the combination of the *Eco Swiss* requirements and the test applicable under Article V(2)(b) of the New York Convention 1958. It follows that the answer to the question at issue is not to be found in the framework of Community law, but in that of international arbitration law and practice instead.

International arbitrators have an implicit and *de facto* duty to apply EC competition law *ex proprio motu* when relevant to the dispute before them.[46] This appears to be the case irrespective of the *lex contractus* and regardless of the arbitral tribunal's seat being within or outside Europe. *A fortiori* so, when the *lex contractus* (or the *lex causae*, if determined by the arbitrators) is a Member State law or the seat of arbitration is in the EC or enforcement is likely to be sought in the EC.

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[42]*Nordsee, above* note 29, at 1111, para 14.

[43]Joined cases C-430 – 431/93 *Van Schijndel* [1995] ECR I-4705; Case C-312/93 *Peterbroeck* [1995] ECR I-4599. These two highly controversial judgments raised many complex issues and focused -in the light of the principle of effectiveness of Community law- on the impact of the principle of judicial passivity of national judges on the (non-)application of a Community law rule. In any case, these judgments are not directly applicable to international commercial arbitration.

[44]M. Dolmans and J. Grierson, 'Arbitration and the Modernisation of EC Antitrust Law: New Opportunities and New Responsibilities', (Fall 2003), 14(2) ICC International Court of Arbitration Bulletin 37, at 44.

[45] appears that this is the case with most Member State laws.

[46]See among others, G. Blanke, 'The Role of EC Competition Law in International Arbitration – A *Plaidoyer*', (2005), 16(1) European Business Law Review 169, at 175-176; A. Komninos, 'Assistance to Arbitral Tribunals in the Application of EC Competition Law', in C.D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford/Portland/Oregon, 2003, pp. 363-385, at 369-370; L. Idot, above note 25, at pp. 314-315.

The aforementioned statement needs to be clarified on two crucial fronts, namely, the 'relevance test' and the basis of the said implicit *de facto* duty. As far as the former is concerned, arbitration practice and case law have set out a quite practical standard reflected in the following question: *may* the agreement at issue affect the EC territory and particularly the trade between the Member States?[47] In practice, the consideration of this test by arbitrators is based on an Article 7(1) of the Rome Convention approach. As for the latter, international arbitrators have, among other things, two fundamental obligations: first, to make any effort to guarantee the enforceability of their award,[48] and second, to try to meet the legitimate expectations of the parties through their conduct of the arbitral proceedings and their choices thereof.[49] The disregard by arbitrators of transnational mandatory rules (e.g. Articles 81 and 82 EC) objectively applicable to the dispute in hand falls definitely outside the legitimate expectations of the parties and impairs the quality of their award, thereby rendering it susceptible to national courts' scrutiny and risking its unenforceability.[50]

As a consequence, international arbitrators are not bound by any (legal) EC law obligation to deal with EC competition law issues arising in the context of arbitral proceedings. However, in the aftermath of *Eco Swiss*, they have come under an implicit *de facto* duty to consider, raise, and apply EC competition law when relevant to the case before them, in order and to the extent necessary to preserve the quality, effectiveness, and enforceability of their award. Nevertheless, such a *de facto* duty does not entail that international arbitral tribunals are directly bound by the general duty of cooperation enshrined in Article 10 EC and the doctrine of supremacy of Community law,[51] or even by the relevant duty of the preservation and promotion of the uniform and consistent application of EC (competition) law throughout the Community[52]. And indeed, this remark reflects one of the subtlest and most testing issues of competition arbitrations, namely the extremely fine demarcation line between the contractual mandate entrusted to international arbitrators by the parties and the role of the former as private enforcers of public policy.[53]

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[47]P. Landolt, *above* note 7, pp. 133-135. See particularly the M. Blessing's 'application worthiness' criterion analysed by the author.

[48]See e.g. Article 35 of the ICC Rules of Arbitration, which reads: '… [the Arbitral Tribunal] shall make every effort to make sure that the Award is enforceable at law'. See also G. Horvath, 'The Duty of the Tribunal to Render an Enforceable Award', (2001), 18(2) Journal of International Arbitration 135.

[49]For the subtle interrelation of those two obligations see S. Dempegiotis, above note 22.

[50]See Y. Derains, *Specific Issues Arising in the Enforcement of EC Antitrust Rules By Arbitration Courts*, in C.D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford/Portland/Oregon, 2003, pp. 323-339, at p. 336.

[51]Most recently in this regard see Case C-125/04 *Denuit v. Transorient* [2005] ECR I-00923.

[52]For a thorough analysis of this particular viewpoint see N. Shelkoplyas, *The Application of EC Law in Arbitration Proceedings*, Europa Law Publishing, Groningen, 2003, pp. 3-21.

[53]It would probably be more accurate to speak of private enforcers of transnational rules with a constitutional status (i.e. Articles 81 and 82 EC) boasting public policy considerations and aiming at serving and defending the Community public interest.

3. International commercial arbitration and EC Merger Control – Merger arbitrations

(A) Topography of arbitration commitments

Pursuant to the Regulation 139/2004, certain types of concentrations[54] that have a Community dimension[55] have to be notified to and approved by the European Commission prior to their implementation. In such cases, the Commission is entrusted with the substantive appraisal of the operations in hand and – where necessary – with the prevention of those concentrations which are likely to have a significant anti-competitive effect on the internal market.[56] To entertain the Commission's potential concerns over anticompetitive effects, if any, the firms involved in the proposed concentrations tend to offer so-called 'commitments' (or 'remedies', or 'undertakings'). Such commitments may be: structural (such as divestiture); other structural (such as access remedies); or behavioural (concerning the future behaviour of the merged firm).[57] In some cases, the remedies package may consist of a mixture of structural and behavioural remedies.

In recent years, international arbitration has been repeatedly used by the Commission as a monitoring mechanism for the correct implementation of certain behavioural commitments undertaken by firms towards the Commission, in order for the latter to declare the proposed concentration compatible with the common market and to issue a conditional clearance decision.[58] In theory, such arbitration commitments – through their adjudication and procedural monitoring function – appear to vest certain ordinary behavioural commitments with a 'quasi-structural effect'.[59] In practice, this implies that the Commission is very likely to give a green light to a proposed concentration where a behavioural commitment is offered together with 'a workable arbitration commitment for monitoring purposes.'[60]

The submission to arbitration as a procedural commitment under the EC merger control regime has an interesting twofold dimension: on the one hand, it provides for a plain

[54]See Article 3 of the Regulation 139/2004. See also M. Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials*, Cambridge University Press, 2004, pp. 448-453.
[55]See Articles 1 and 5 of the Regulation 19/2004. For an up-to-date analysis on the meaning of 'Community dimension' see M. Dabbah, *above* note 53, pp. 453-459; also see J. Cook and C. Kerse, *EC Merger Control*, Sweet & Maxwell, 4th edition, 2005, pp. 97 et seq.
[56]See Article 2 of the Regulation 139/2004, which sets out the appraisal criteria (Article 2(1)) and the appraisal test (Article 2(2) and (3)) for the substantive assessment of concentrations with Community dimension.
[57]For a full account on this distinction see J. Cook and C. Kerse, *above* note 54, pp. 282 et seq. On the case of behavioural remedies more specifically see K. Paas, 'Non-Structural Remedies in EU Merger Control', (2006), 27(5) European Competition Law Review 209.
[58]For some noticeable recent cases involving arbitration commitments see the following Commission decisions: Comp/M.3083 *GE/Instrumentarium*, decision of 2 September 2003; Comp/M.3225 *Alcan/Péchiney (II)*, decision of 29 September 2003; Comp/M.3280 *Air France/KLM*, decision of 11 February 2004; Comp/M.3916 *T-Mobile Austria/Tele.ring*, decision of 26 April 2006; Comp/M.3998 *Axalto/Gemplus*, decision of 19 May 2006; Comp/M.4180 *Gaz de France/Suez*, decision of 14 November 2006; and Comp/M.4314 *Johnson & Johnson/Pfizer Consumer Healthcare*, decision of 11 December 2006.
[59]See G. Blanke, 'The use of international arbitration in EC merger control – a brief statement', (2007), 12(2) IBA Arbitration Newsletter 30, at p. 31.
[60]Ibid, at p. 32.

and effective adjudication framework within which substantive remedies to competitors or other third parties that need to be protected are offered, thereby addressing the Commission's concerns in this regard; on the other hand, it provides for a familiar and attractive justice forum in the business world, which is tailor-made to the parties' individual needs and business interests, and offers at the same time the firms involved the opportunity to have their commercial disputes resolved in a cost-effective and time-efficient manner. And, indeed, the above described use of international arbitration reflects a highly perceptive choice on part of the Commission, through which it accomplishes a twofold aim, namely to safeguard important competition interests, and to provide gratification to the firms involved by letting them choose their preferable dispute resolution forum.

(B) Arbitration commitments: a novel species of arbitration

It should be clear from the preceding analysis that the 'merger arbitrations', i.e. arbitration commitments under the EC merger control regime, have certain features that clearly distinguish them from traditional perceptions of international arbitration. Various brave attempts have been made to find an appropriate terminology[61] for this newly emerged phenomenon, none of which appears to enjoy a unanimous acknowledgement. The differences in the said terminology clearly depict the different perceptions of the real nature, the precise character, and the actual dimensions of this new development. However, those subtle differences aside, there seems to be a general consensus that this new arbitration phenomenon constitutes a new form of arbitration and signifies a new era in international arbitration as a long-standing private justice forum.

The phenomenon of arbitration commitments brings to the surface the inherent tension between the private nature of arbitration, its flexible and confidential proceedings, and its intrinsic fundamental principle of party autonomy on the one hand, and the rigid administrative framework of EC law and the European Commission's public mandate as the guardian of the Community public interest as well as the Community 'public prosecutor' in EC competition law proceedings on the other.[62] It follows that the cardinal difference between merger arbitration and traditional arbitration is the unprecedented trade-off between public and private interest taking place in the former's realm and reflected in the almost absolute erosion of party autonomy by the dominance of the Community public interest and the need for its protection. And indeed, striking a workable balance between the arbitrating parties' private interests and the Community public interest is far from being

[61]For the term 'supranational' see G. Blanke, 'The Case for Supranational Arbitration – Ideas and Prospects', in G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective*, 19(1) European Business Law Review (special edition), Kluwer Law International, 2008, pp. 1-231, at pp. 17-41; 'International Arbitration in EC Merger Control: A 'Supranational' Lesson to be Learnt', (2006), 6 European Competition Law Review 324; 'The Transformation of International Arbitration and the Emergence of the Supranational Arbitrator: Lessons from EC Merger Control', (2005), 6 International Arbitration Law Review 211. For the terms 'sui generis' and 'regulatory' see M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003. For the term 'regional' ('*régional*') see C. Nourissat, 'L'Arbitrage Commercial International Face A l' Ordre Juridique Communautaire: Une Ére Nouvelle?', (2003), 7 RDAI 761, at 776. Here the author places the 'regional arbitration' on an intermediary level between national and international arbitration.

[62]See G. Blanke, 'The Case for Supranational Arbitration – Ideas and Prospects', in G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective*, 19(1) European Business Law Review (special edition), Kluwer Law International, 2008, pp. 17-41, at p. 20.

an easy task for international arbitrators, the role and powers of whom appear to be enhanced with supranational regulatory -as distinct from merely adjudication- dimensions.

Interestingly, in the case of arbitration commitments, an award on civil law damages (private law remedy) and an order to comply with the Commission's original Commitment Decision (administrative law remedy) may well coexist within the same adjudication forum. This remark captures the dual function of international arbitrators in such cases as 'prolonged arm and instrument'[63] of the Commission (outsourced regulatory task) on the one hand, and as private judges of the claims of the parties (adjudicatory task) on the other. It is against this backdrop that the Commission comes as a guardian of the whole remedy process having 'the last word even over and above' the arbitrators' findings[64].

The foregoing discussion reveals that the classic international arbitration as a private dispute resolution mechanism is undergoing an unprecedented transformation taking place within the wider realm of EC competition law and policy. In this sense, international arbitration is being shaped to meet the specific requirements of arbitration within the said realm and its procedural framework.[65] The aforementioned transformation leads to the formulation of a new species of arbitration distinct from the traditional notion of international commercial arbitration. This new species of arbitration could be described as a *sui generis* arbitration of a hybrid (adjudication - regulation) nature and with supranational (Community level) dimensions. It goes without saying that the transformation of international arbitration as a private justice vehicle results directly in the transformation of the international arbitrators' role as private judges of contractual disputes.[66]

(C) Special features of merger arbitrations: a summary[67]

The pervading net result of the emerging arbitration *status quo* illustrated above is the distortion of almost all the fundamental features of traditional arbitration. Given its limited space, the present article has to confine itself to a mere enumeration of the most significant unique features of merger arbitrations (i.e. arbitrations in the context of EC merger control remedies) with the ultimate aim of underlining the boldest divergences of such arbitrations from traditional international commercial arbitration.

Starting with the foundation of the arbitration structure, the *inter partes*-effect of the contractual agreement to arbitrate has been replaced by a unilateral *erga omnes* offer to arbitrate on the part of third-party beneficiaries (e.g. a competitor). Effectively, therefore, the

[63]M. Blessing, *above* note 60, pp. 10-11 and 196.
[64]Ibid, p. 11.
[65]See G. Blanke, *above* note 61, pp. 19-20.
[66]For a detailed discussion on this issue see G. Blanke, 'The Transformation of International Arbitration and the Emergence of the Supranational Arbitrator: Lessons from EC Merger Control', (2005), 6 International Arbitration Law Review 211.
[67]This summary is grounded primarily on three thorough pieces of work, namely: G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective*, 19(1) European Business Law Review (special edition), Kluwer Law International, 2008, pp. 1-231; G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Europa Law Publishing, Groningen, 2006; and M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003.

commencement of arbitration in such cases does not rest upon party-autonomy or privity, but on a third-party beneficiary's initiative instead. It follows that looser standards of confidentiality apply to such cases given that the Commission stands beyond the reach of the confidentiality rules, and also that the scope of a merger arbitration clause will normally be much narrower than that of a traditional international commercial arbitration clause, due to the former clause's tailor-made drafting to meet the needs and requirements of particular behavioural remedies within the EC merger control regime.

In addition to the features stressed above, it is important to note the expedition requirement under the arbitration commitments, which is vividly depicted in the strict time limits imposed for both the conduct of the arbitral process and the rendering of the arbitral award. As for the arbitral award itself, two crucial features are worth mentioning: first, the formalities associated with such merger arbitration awards in terms of publication requirements; and secondly, the fact that the said awards appear to be more 'fragile' than the ordinary arbitral awards in terms of finality and enforceability 'to the extent that the Commission remains free to make its own assessments of the commitments in question under the Merger Regulation,'[68] Of course, in this regard, '[i]f a Member State court finds the award to be incompatible with the Commitment Decision, it will not enforce the award.'[69]

Last but not least, an inherent unique feature of merger arbitrations is the almost unavoidable dialogue between the international arbitrators and the European Commission. This dialogue ensures the compatibility of the resulting arbitral award with the Commission's original Commitment Decision (Community level) on the one hand, and secures the enforceability of the said award before the Member State courts (national level) on the other. Furthermore, depending on the case at hand, this dialogue may take several different forms. More specifically, it may rest upon 'general reporting requirements to the Commission', or 'the arbitrator's entitlement to make requests of information or interpretation to the Commission in relation to the remedy provisions of individual remedy packages', or 'the Commission's overall role as *amicus curia*' in the arbitral process.[70] Finally, the aforementioned dialogue indicates, among other things, the 'high level of technicality'[71] of the merger arbitration proceedings and the corresponding qualifications and expertise in EC competition law required of arbitrators handling such cases.

4. Conclusion

In recent years, arbitrating competition (and merger control) issues has become a fundamental feature of the world of international arbitration and a testing aspect of the international arbitration profession. Indeed, arbitration practitioners seem to have realised that the handling of EC competition law issues is now an integral part of their 'competence'

[68]G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Europa Law Publishing, Groningen, 2006, p. 193.
69Ibid.
[70]See G. Blanke, *above* note 61, at p. 22. On the specific and quite thorny issue of the Commission's role as *amicus curiae* in arbitral proceeding see C. Nisser and G. Blanke, 'Reflections of the Role of the European Commission as *Amicus Curiae* in International Arbitration Proceedings', (2006), 4 European Competition Law Review 174.
[71]See G. Blanke, *above* note 61, at p. 37.

particularly in the light of a crucial parameter of the EC modernisation programme, namely the rapidly growing 'awareness of private law remedies'[72] as a possible response to anticompetitive conducts. As a result, international practice shows that arbitral tribunals are dealing with EC competition law issues more and more frequently and more and more reliably having become aware of their role as organs operating within the private enforcement system of EC competition law.[73] Moreover, the Commission through its Modernisation Regulation attempts to reinforce the integrity and effectiveness of the enforcement of EC competition law. In this context, the addition of arbitration to the private enforcement arsenal of EC competition law as an alternative arm seems to coincide with the Commission's objectives under the new regime. The direct implication of such an acknowledgment is the legal problems emanating from the application of Articles 81 (as a whole) and 82 EC by international arbitrators.

At the same time, the Commission sees arbitration as a credible instrument of resolving not only competition (Articles 81 and 82 EC) but also merger control (Regulation 139/2004) issues, and envisages a novel form of arbitral proceedings where it or other national authorities could intervene, if necessary, as *amici curiae*. In fact, in the last few years, the Commission has adopted a practice of using arbitration proceedings as a viable way of monitoring certain behavioural commitments undertaken in the context of the Commission's competition (Article 9, Regulation 1/2003) and merger (EC merger control remedies) related clearance decisions. This newly emerged arbitration phenomenon constitutes a novel species of arbitration which needs first to crystallise into a definite form and then to be fully tested in practice. Until then, one may have to be content with studying the evolution of this new development, and to follow the heated and divisive debate over its real nature and actual dimensions conducted among the leading scholars and practitioners in this fascinating area of law.

It is important to note that the framework of the interplay between the EC competition law and international arbitration highlighted above contrasts sharply with the complete absence of any EC legislation on arbitration. This apparent contradiction explains the reason why there seems to be a common ground among commentators and practitioners of both legal fields that the time has come for the Commission to reconsider its silence over arbitration through a soft law approach (e.g. a Notice). This would indeed be a wise choice of 'educational interest'[74] in terms of building an EC competition law culture among arbitrators. This culture would be extremely valuable considering the close interface between the bodies of law under examination here and their exposure to the evolution and challenges of the modern age. In this regard, the express mentioning of the arbitration commitments in the new Commission draft Notice on Remedies,[75] though confined to the area of merger control, should be considered a positive first step in the right direction.

[72]See R. Nazzini, *above* note 35, p. 25.
[73]Ibid, p. 326.
[74]This term is borrowed from L. Idot, *above* note 25, p. 321.
[75]See paras 66 and 127 of the draft revised Notice on Remedies. See also *above* note 14.

Judgment of the European Court of First Instance in T-271/03 Deutsche *Telekom v. Commission*

1. The Commission Decision 2003

In 2003 the European Commission adopted a decision in which it fined Deutsche Telekom ('DT') 12.6 million for ab using its dominant position in the German telecommunications market over a period of more than 5 years.

More specifically, DT was found dominant both in the market of wholesale access to the fixed telecommunications network (local loops), which allowed competitors of DT to further provide their end customers with various access services[1], and in the market of retail access to the local loops, with a market share of 95%. DT abused its dominance in the market for direct access to its fixed network by charging unfair prices to competitors in the form of a margin squeeze; i.e. the charges paid by competitors for wholesale access (which are regulated by the Regulatory Authority in Germany – Reg TP) were higher than the charges paid by DT end customers on a retail level for fixed line subscriptions. This resulted in reduced price competition[2], which further deprived consumers of the benefit of choice.

The Commission adopted the following method to find the margin squeeze: It is sufficient to show a disproportion between the wholesale and retail prices charged, together with a commercial discretion to reduce or end the margin squeeze on the part of the dominant undertaking, in order to find a restriction of competition (paragraph 105).

As regards this test, the Commission stated that an abusive margin squeeze exists if the difference between the retail prices charged by a dominant operator and the wholesale prices it charges to competitors is negative or insufficient to cover the product-specific costs incurred by the dominant operator in providing its own retail services in the downstream market (paragraph 107). Furthermore, given that Reg TP applies single charges for wholesale services, yet the downstream services provided vary in nature (analogue, ISDN and ADSL lines), the retail price against which the comparison is made should be the average retail access prices for all three services.

The Commission, indeed, found that for the period 1998 – 2001 there was a negative spread between the wholesale and retail prices charged by DT, which DT was in a position to end entirely by increasing its retail charges for narrowband connections since there was scope within the sector-specific regulation measures.[3]

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[1]The retail access services include narrowband services (analogue and digital (ISDN) connections) and broadband services (ADSL connection).

[2]If access on a wholesale level is costlier than retail access, competitors are necessarily faced with the option of either exiting the market or incurring losses.

[3]Although call services and access services are distinct, and the former were not taken into account when calculating the margin squeeze, they were cumulatively subject to the same price ceiling until 2002; this meant that by reducing call charges, there was scope for increasing access charges. The Commission depicted that DT lowered its call charges substantially, without redirecting the amount released from such reductions towards an increase of retail access charges.

Moreover, for the period 2002 until the adoption of the decision, the spread was positive but insufficient to cover DT's product-specific costs linked to the provision of retail services and DT could have reduced the margin squeeze by increasing the ADSL retail access charges, as it is a retail service exempt from regulation and there was no scope during that period for increasing retail narrowband prices.[4]

The Commission noted in its decision that, in respect of the effects on the market, none of DT's competitors had acquired a significant market share throughout the duration of the infringement. As regards the alternative technical infrastructure available to competitors in order to offer their customers access services on a retail level (among others, satellites, power lines and upgraded cable TV networks), they was not sufficiently developed during the period of the infringement and thus, not equivalent to the DT network and the latter was impossible to replicate.

2. The Court of First Instance (CFI) judgment

DT challenged the Commission decision before the CFI advancing four pleas in law; only the first, comprising of four parts, will be explored below as it refers to the infringement of the Article 82 EC.

(A) DT claimed that there was no abuse of dominance, since there was no sufficient scope to avoid the margin squeeze

DT's main arguments were, firstly, that the retail prices were charged following examination and authorisation by RegTP, which in itself means that the conduct is not abusive (paragraph. 76) and, in any case, RegTP has the responsibility to take into account competition law considerations (allegedly proved by relevant regulatory and court decisions) - thus, RegTP should have rejected the application concerning retail access charges.

Nonetheless, DT concluded that, even if it were responsible for compliance with competition law, there was no scope to end the margin squeeze for the period 1998 – 2001 due to the price ceiling for retail prices. As for the alleged margin squeeze in respect of the period 2002 – 2003, DT contested that any such abuse could not be ascribed to it because it did not have unlimited leeway in increasing ADSL retail prices.

DT also pointed out that the Commission failed to show how the alleged margin squeeze for the period 2002-2003 would have been avoided by increasing retail prices for ADSL connection. They went on to challenge the wholesale market definition as a unified market, arguing that ADSL and other access services can be marketed separately due to line sharing.

[4]The narrowband retail prices, unlike the wholesale prices which were fixed due to national regulation, were subject to a price cap system, which, however, did not apply for the broadband (ADSL) retail prices. Given that the price cap system changed from 2002 and separated call and access charges, and given that the price ceiling for narrowband was almost exhausted by DT at that time, the only legal means to reduce the margin squeeze was increasing ADSL prices.

The CFI upheld the Commission's findings for both abuses and rejected all arguments advanced by DT. In its preliminary observations the CFI clarified that in order for the national legal framework to have the effect of rendering antitrust law inapplicable to anticompetitive activities, the restrictive effects of competition must originate solely in the national legislation (paragraph 87).[5]

For both infringement periods the CFI held that DT could increase the retail narrowband services while respecting the overall price ceilings through its application to RegTP; the fact that DT must request approval by RegTP for its charges does not absolve it from responsibility to comply with EC Competition law because the very fact that it has the ability to influence its charges by way of application proves that any restrictive effect on competition does not originate solely from national legislation (paragraph 105).

As to the responsibility of the RegTP to comply with EC competition law, the CFI underlined that such a fact did not derive from national legislation and the evidence provided by DT (RegTP decisions) proved the exact opposite; i.e. that the regulatory authority did not consider the Article 82 EC. Nevertheless, even if RegTP was obliged to consider whether retail charges proposed by DT complied with EC competition law, the Commission could not be bound by a decision taken by a national body pursuant to the Article 82 (paragraph 120).[6]

The CFI concluded that DT had the scope to increase its retail charges because it could influence those by way of its applications submitted to RegTP and therefore, it had a special responsibility, as incumbent, to apply for an adjustment of its charges at a time when those charges had the effect of impairing genuine undistorted competition on the common market (paragraph 122).[7] The fact that it did not use its discretion to that direction (no applications were made for increasing both analogue and ISDN line access charges) fully justifies the findings of the Commission.

Finally, the Commission's argument concerning the margin squeeze since January 2002 was upheld. The CFI concluded that there was scope for a limited increase of the ADSL charges, which would have indeed increased the average retail prices and, thus, reduced the margin squeeze for the contested period; answering the DT allegation that ADSL and narrowband retail markets are different, the CFI crucially noted that ADSL can not be offered to end-users on its own because, for technical reasons, it always involves an upgrading of narrowband connections. The DT challenge of the market definition was disregarded by the CFI.

(B) DT challenged the method used by the Commission to find abuse as unlawful

The main arguments of DT were firstly that the retail prices taken into account for the calculation of the margin squeeze should include revenues not only from the provision of telephone lines (access services), but also from other services as well

[5]See T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission* [2000] ECR II - 1807 paragraph 61
[6]See C-344/98 *MasterfoodsandHB* [2000] ECR I – 11369 paragraph 48
[7]See C-322/81 *Michelin v. Commission* [2003] ECR II -4071 paragraph 97

(e.g. call services). As to the method itself, DT asserted that it is erroneous to rely exclusively on DT's charges and costs instead of taking into account the situation of DT's actual and potential competitors. Finally, DT complained that the wholesale prices were inflated because discontinuance charges should not have been included in the calculation as they were not payable on a retail level.

The CFI affirmed that the Commission was correct to examine a vertically integrated undertaking such as DT on the basis of the proposition of whether an economic operator that is just as efficient would be able to offer its retail services without incurring a loss, as this method is in line with case-law on the abusive nature of a dominant undertaking's pricing practices (paragraphs. 187 - 193). Furthermore, taking into account the particular situation of competing undertakings would be contrary to the general principle of legal certainty (paragraph. 192).

The CFI also succinctly showed that calculating access services revenues in isolation was required, firstly, for the purposes of compliance with EU law (tariff rebalancing) and secondly, because it was the only way to examine, on the basis of equality of opportunity, whether competition was really distorted or not (paragraphs. 198 – 203)[8].

Finally, the CFI upheld the Commission's reasoning that, when calculating wholesale charges paid to DT, which comprise of one-off and monthly charges, discontinuance charges must be taken into account, since, together with access charges, they amount to the one-off charges received by DT.

(C) DT spotted an error in the calculation of the margin squeeze made by the Commission

DT found an error in the product specific costs which altered the amount of the spread and they contended that the margin squeeze should be reduced by such an amount. The Commission admitted the calculation error before the CFI, but stated that the lawfulness of the contested decision was not affected.

The CFI concluded that, as regards the negative spread of the infringement period 1998 – 2001, there was no need to examine further the product-specific costs, and as for the period from 2002 onwards, the test would still result into a margin squeeze had the correct amount been taken into consideration; the CFI underlined that the abuse under scrutiny was the nature of pricing practices and not the precise spread thereof (paragraph 223).

[8]Despite the fact that call and access services constitute a 'cluster' from the subscribers' standpoint, DT's competitors needed access to the local loops in order to offer such services; for finding an abuse for the access services market, call charges had to be set aside (paragraph 200).

(D) DT CONTENDED THAT THERE WAS NO ACTUAL EFFECT ON THE MARKET.

DT argued that the pricing practice *per se* did not constitute an abuse[9] and that in line with European Court of Justice (ECJ) case-law and the Commission's decisional practice, evidence is required that the conduct in question constitutes either a barrier to entry or helps remove competitors from the market. According to DT, there were opportunities for entering the market since competitors can cross-subsidize each other in order to make up for any deficits in their connection costs; in addition, examples of significant market shares that have been acquired by competitors in urban areas were mentioned by DT and also supported the claim that competition has developed, as a whole, better in Germany than in other Member States.

The CFI established that the Commission was correct in finding that due to the existence of the margin squeeze alone competition in the market for retail access services was restricted; the Commission did not need to further demonstrate anti-competitive effects. Nevertheless, it emphasised that the fixed telephone network served as the only infrastructure through which DT's competitors could have made a viable entry onto the downstream market and was thus indispensable; this meant that a margin squeeze between the wholesale and retail access prices would in principle hinder the growth of competition.

With respect to the cross-subsidization practices, the CFI concluded that the very fact that the incumbent did not have to follow the same practice in order to offset losses in the retail access market translated into a distortion of competition not only in the said market, but in the telephone calls market as well[10].

The CFI underlined that the market shares of DTs competitors remained very small since the liberalisation of the market, and in line with all the above, served as proof of the restrictions imposed in the growth of competition. The market shares of competitors in urban areas did not suffice as an argument to affect the previous finding, since they were still very small when examining the German market in its entirety.

3. COMMENT

This judgment is delivered in affirmation of the 2007 Commission decision against Telefonica[11] and in anticipation of the decision on the appeals lodged, despite some crucial differences between the two cases (e.g. Telefonica had even greater discretion in price setting). The CFI essentially confirmed that incumbents can not rely on the national regulatory framework as an objective justification for conducts otherwise illegal,

[9]DT contended that in a margin squeeze case the relevant case-law criteria would be those of AKZO; the Commission failed, in the opinion of DT, to prove that after excluding competitors from the market DT would be able to offset the losses incurred as a result of its low-price policy, as such thing did not happen in the present case.
[10]See note 5. Needless to say, the prices at which the DT competitors could offer retail call services would have to be lower than the respective DT retail charges, thus, necessarily loss making.
[11]Case COMP/38.784 - *Wanadoo España v. Telefónica*

contributing further to the growing discussion on the interrelationship of sector-specific regulation and the Article 82 EC applications[12]. The crucial point was whether the incumbent had the discretion to satisfy both the price ceiling set out in national legislation and the EC competition rules, and whether it used its discretion to that direction. Article 82 EC was infringed precisely because of DT's failure to exercise its discretion to increase retail access prices. Moreover, a point substantially illustrated in the judgment, even when a regulatory authority is obliged to consider compliance with the EC competition law, it cannot bind the Commission in not finding an infringement of the EC competition law.

The CFI additionally upheld the method for finding a margin squeeze proposed by the Commission, despite the fact that *'the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze…'* (paragraph 188).[13] In essence, it endorsed the Commission's view in its previous judgments on margin squeeze following the "as efficient competitor test" (2003 Commission decision, Telefonica), in alignment with the guidance set out in the Commission's Discussion Paper (2005 D.P., paragraph 220). Accordingly, it rejected a *per se* assessment of whether retail prices are themselves abusive (i.e. predatory) and underlined that in margin squeeze cases, it is the specific difference of prices and not the specific price level that matters.

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[12]Case COMP/ 37.507 – *Generics/ Astra Zeneca*, 15.06.2005, Case C-53/03 *Syfait & Others v. Glaxosmithkline*, opinion of Advocate General Jacobs 28 October 2004 and judgment of the ECJ of 31 May 2005 ('Syfait I'), Cases C-468-478 Sot. Lelos kai Sia EE & Others v GlaxoSmithKline, OJ [2007] C-20/03-13 ('Syfait II').
[13]Emphasis added.
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Decision No 385/V/2008 of the Greek Competition Commission in the *Vivartia* Group case concerning the deep frozen vegetables distribution sector

1. Factual Background

General Foods S.A., a Greek company active in the market for production and distribution of deep frozen vegetables in Greece, was acquired by Greek Delta Holdings S.A. and the latter was renamed as Vivartia S.A. The Greek Competition Commission ('GCC') launched an investigation on its own initiative into the sector of production and distribution of deep frozen vegetables for potential infringements of Articles 1 and 2 of Greek Law 703/1977 and of Articles 81 and 82 EC.[1] Vivartia's activities were scrutinised as part of the GCC investigation and it was fined accordingly by the GCC for the abovementioned infringements as successor of General Foods S.A.

General Foods distributed its produce of frozen vegetables, both unpacked and packed, to supermarkets, catering companies and deep frozen products wholesale companies (DFPWCs), and with the latter (i.e. distributors) it entered into two types of agreements:

(a) Storage agreements, according to which the DFPWCs would store the quantities of frozen vegetables and deliver them to the customers of General Foods against a fee amounting to a percentage on the price of the products delivered according to the General Food pricelists to customers.

(b) Special Cooperation Agreements (SCAs) according to which the DFPWCs (23 in total) would purchase from General Foods at the wholesale prices determined in General Foods' wholesale pricelists and then sell to their customers at a retail price that had to match the official pricelist of General Foods; moreover, the wholesalers were restricted to distributing products in their allocated geographical area, without *'intervening or, directly or indirectly, influencing other areas'*. In addition, the SCAs were accompanied by a commercial circular distributed by General Foods which prohibited the purchasing and distribution by the DFPWCs of competitive products without General Foods' prior written consent.

2. Findings of the GCC

The GCC investigated five out of the 23 DFPWCs in order to find potential infringement of Greek and EC competition law, in particular regarding the resale price maintenance provisions in the SCAs for the years 2005-2007.

It was found that for the years 2004-2006 all DFPWCs would purchase at the same price on the basis of General Foods wholesale pricelists and mandatorily sell at the same price to retailers, reaping rebates (which were the same for all DFPWCs) agreed in the SCAs

[1] The text of articles 1 and 2 of Law 703/1977 reproduces articles 81 and 82 of the EC Treaty respectively, save for the effect on trade requirement.

and the commercial circular. The DFPWCs would not add a profit margin in the wholesale price lists received and thus would rarely grant rebates to retailers[2]; essentially the DFPWCs made a profit from the grants determined by General Foods.

The GCC moved on to define the relevant product and geographical market[3]; the relevant product market was defined as the wholesale market of deep frozen vegetables for domestic use and the relevant geographical market was defined as the Greek territory in its entirety. The GCC found that General Foods was dominant in the retail market of deep frozen vegetables since 2001, due to its high market share of 70% in that market and the strong brand name it enjoyed. Moreover, General Foods was also found to be dominant in the wholesale market of deep frozen vegetables. In coming to this conclusion the GCC took into account the market share of General Foods in the wholesale market of deep frozen vegetables and the way in which the products were made available in the retail market: on one hand, there were direct distribution agreements between General Foods and big supermarket chains and, on the other hand, distribution was effected through the DFPWCs to small retail shops (in which competitive products were rarely available); in addition, significance was attributed to the inelastic consumer demand resulting from the fact that small retail shops primarily offered General Foods vegetables due to the strong brand name and the high quality of the product.

(A) The GCC's legal assessment of the resale price maintenance and the market partitioning provisions in the SCAs

The GCC stated that the resale price maintenance vertical agreements, requiring the buyer to sell not below or at a particular price, as well as the market partitioning agreements were contrary to the Article 1 of Law 703/1977 and Article 81 EC. The SCAs were vertical agreements having as their direct object the restriction of competition as regards the provisions determining the resale price to retailers[4]. The fact that those agreements were of a standardised form and were circulated to all distributors was irrelevant, since the execution of such an agreement by the distributors clearly demonstrated a concurrence of wills to conduct themselves in the market in a specific way. The GCC underlined that agreements having as direct object the restriction of competition are considered anticompetitive irrespective of their actual implementation. The direct object of restriction of competition alone suffices to establish infringement of Law 703/77 and Article 81 EC[5].

Resale and price maintenance vertical agreements have as object the restriction of competition: they are capable by their very nature of restricting competition so there is no need to further prove their effect. As a result, they are classified as hardcore restrictions under the EC Block Exemption Regulation (BER) 2790/2004 (Article 4(a) thereof) and

[2]The retailers' prices would, however, vary substantially, as the relevant enquiry confirmed.
[3]In accordance with the Commission's Notice on the definition of relevant market for the purposes of Community competition law (OJ (1997) C 372/5 paragraphs 7 and 8).
[4]Paragraph 47 of European Commission Guidelines on Vertical Restraints – OJ (2000) C 291/1
[5]See T-67/01 *JCB Service v. Commission* [2004] E.C.R. II – 49 paragraphs 103 -107

are not entitled to an exemption under Article 81(3) EC. Consequently, the contested provisions in the SCAs, which actually determined the prices to retailers in a compulsory and not indicative manner (i.e. per se anticompetitive object), resulting in the fixing of price levels were void as being contrary to Article 1(1) of Law 703/77 and could not be exempted under Article 1(3) of Law 703/77.

Similarly, an agreement contemplating market partitioning is considered to have as its object the restriction of competition and constitutes a hardcore restriction under Article 4(b) of BER 2790/1999, which, again, does not allow exemption under Article 81(3) EC. The obligation on the DFPWCs not to sell their products outside their exclusive territory as determined by General Foods in the SCAs was restrictive of competition and consequently void as contrary to Article 1 of 703/77 .

As practices restrictive of competition covering the entire territory of a Member State can hinder the attainment of the single market objective of the EC, they may affect the pattern of trade between Member States. Therefore, the above agreements were also in breach of Article 81 of the EC Treaty.

Owing to the hardcore restrictions explored above, no exemption was provided under Article 81(3) as the required objective financial advantages and benefits that must be passed on to consumers were not met.

(B) The GCC's legal assessment of non-compete obligations

The commercial circular distributed to all DFPWCs prohibited them from distributing or trading competitive products; the GCC found this provision to be a non-compete obligation (single branding) as a result of unilateral conduct and went on to make a proper assessment.

Given the generality of the provision, the duration of the non-compete obligation (2004-2006) and the dominant position of General Foods in the relevant market, the implementation of such an obligation amounted to foreclosure of actual and potential competitors on a wholesale level, thus, constituting an abuse of dominant position in breach of Articles 2 of Law 703/77 and 82 EC . Consequently, such obligations were found to be objectionable.

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[6]See *Miller International Schallplatten GmbH v. Commission*, [1978] E.C.R. 131 paragraph 7

[7]See paragraphs 138 et seq. of the Guidelines on vertical restraints. Paragraph 141of the Guidelines shows that the same evaluation criteria apply for non-compete obligations imposed by dominant companies, as it is the intention of the Commission not to allow a behaviour that would be punished under Article 81 to escape being caught by the net of Article 82 EC.

[8]See *Hoffmann-La Roche v. Commission* [1979] E.C.R. 461 paragraph 89;T-65/89 *BPB Industries plc and British Gypsum Limited v. Commission* [1993] E.C.R. 11 – 389 paragraphs 65-70

3. Fines

The GCC decided firstly to exempt the DFPWCs from a fine, in line with the Commission's stance that when the initiative for entering into restrictive agreements lay with an incumbent party, it does not appear appropriate to impose fines on the weaker distributors (See *Mercedes Benz v. Commission* paragraph. 233, OJ 2002 L 257 p.1).

Given the duration and seriousness of the breach of Articles 1 and 2 of Law 703/77 and 81 and 82 EC, the fines imposed amounted to €468,870.

4. Comments

This decision is interesting for several reasons. First, it comes in the aftermath of the milk cartel case in Greece, whereby the decision of the GCC issued in December 2007 imposed a fine of 48.2 million Euros on the 5 largest milk producers in Greece (Vivartia being one of them and fined alone a total of €15,979,070). Secondly it supplements EC case-law regarding agreements containing an element of price fixing, which is considered by the European Commission to be one of the hardcore restrictions of Competition (BER 2790/99 Article 4(a) in conjunction with Guidelines on Vertical Restraints), thus affirming that breach of Article 81 EC is realised even if such an agreement is not implemented (See *Hasselblad v. Commission* [1984] E.C.R. 883, *Ahlström Oy. v. Commission* [1988] E.C.R. 5193).

Finally, it is worth noting that Articles 29 and 30 of Law 703/77 provide for the possibility to impose criminal sanctions upon the individuals managing firm(s) to which a breach is attributed; no such sanctions were imposed in the case however. Furthermore, the amount of the fines was reduced due to the cooperation of General Foods throughout the investigation and its move to strike out the arrangements under investigation prior to the issuing of the decision by the GCC.

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Alison Jones & Brenda Sufrin. EC Competition Law: Text, Cases and Materials, Oxford University Press, 3rd ed., 2008, ISBN 978-0-19-929904-1.

EC Competition Law by Professors Alison Jones and Brenda Sufrin, has, to a great extent, achieved its intended goals. These goals, as clearly stated in the Preface, include an important attempt 'to provide students and others interested in competition law with as comprehensive as possible a package of text, commentary, and materials as is possible given the confines of space'. Many students using this book had the impression that it is 'self sufficient'. Although the book is relatively big (1430 pages), I do not think that this is of any significant disadvantage; so long as it is capable of attaining the goals behind it.

The book covers several important issues and topics such as the origins of competition law, horizontal and vertical restraints, mergers, intellectual property rights, enforcement, among others. It explores competition law ranging from its early beginnings to its modern developments.

The first chapter is an introduction to the basic concepts of competition and its origins and objectives in the EU and US legal systems. This is very useful not only for European students but also for those who are not familiar with the EU System or competition law in general. It is interesting to see references to Ordoliberalism in the context of discussing the historical origins of competition law in Europe. This school of thought had a major impact on the development of EC competition law. Its proponents, basically, believed that there should be 'constitutional' protection to the competitive process in the market place.

Following the introduction, the book begins – as do many other EC competition law books – exploring Articles 81 and 82 EC Treaty. The writers set the analysis in a chronological order, where: in chapter 3 they introduce the elements of Article 81; chapter 4 explores the relation between Articles 81 and 82 EC; chapters 5, 6 and 7 deal with abuse of dominance; and in chapter 11 the writers discuss cartels and oligopolies. Locating chapter 11 in its position however – after the chapters dealing with Article 86 EC (state aid) and distribution agreements and Intellectual Property Rights (IPR) (chapters 8, 9 and 10 respectively) is quite unclear. These three chapters are definitely related in one way or another; however it would have made more sense for chapter 11 to feature as chapter 8 in the book especially since it deals with Articles 81 and 82 EC infringements. In short, I had the feeling that chapter 11 is misplaced between chapter 10 (IPR) and chapter 12 (Mergers).

The book – throughout the different chapters – refers to several similarities and differences between the US and EU systems. This is of appreciable value because it gives the reader a broader view of the nature of the US system without discussing it in detail. This facilitates exploring the extent by which EC competition law has been influenced by the US system. Apparently, there are still many differences between the two systems in theory and practice as argued in the book.

Furthermore, the book has thrived in providing a simplified explanation of many economic theories and their relation to competition law. This is welcome given that competition law incorporates many of these theories and students with legal background are not usually familiar with them.

For those who would be interested in reading the entire book, and not simply particular chapters, it might appear to be daunting. There is an element of repetition in the book in relation to the discussion on basic concepts and issues, such as the objectives of competition law. Moreover, the writers, in many cases, refer to relevant case law and explain it but then insert the text of the relevant decision as well; probably this is unnecessary since they had already offered a sufficient account of the decision. On numerous occasions, sentences are repeated more than once on the same page using very similar wording. Nevertheless, the only advantage I can see in these repetitions is the ease of reference to other chapters which the reader is able to benefit from. Furthermore, some sentences were ten lines or more without having any full stops which made it a bit lengthy and needed more effort to follow.

Notwithstanding these different criticisms, Professors Jones and Sufrin have given students a book, which offers them a one-stop shop and which is rich in updated case law, scholarly articles and legislative materials. The book is of an added value as a starting point for those interested in the subject. Moreover, the presence of an online resource (which is updated twice per year), where recent and current developments are provided, qualifies this book to maintain its leading position as an excellent introduction to EC competition law.

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Maher M. Dabbah. Competition Law and Policy in the Middle East, Cambridge University Press, 2007, ISBN 978-0-521-86908-9

This book provides an overview on competition law and policy in the Middle East including countries in North Africa (hereinafter MECs). It has an introductory chapter which explains the geographical coverage, current economic and political scenes taking place in the region. The writer assures that 'not in a single middle eastern country has competition law developed into a mature branch of law with a sound and strong policy to support it'.[1] The second chapter is dealing with Islamic principles of competition law. Dabbah sufficiently argues that Islam as a religion has a complete set of rules and principles governing competition within its free market. He adds that these regulations are present since the seventh century. Moreover, he proves beyond reasonable doubt that Islam did not only provide for a set of competition law principles but also for the relevant mechanisms of their execution. I believe that although these principles have been discussed within Islamic scholarship, Dabbah is among very few who dealt with the means of their enforcement in practice. It would have been better if the writer emphasised the role of the second source of Islam which is Hadith (statements of the Prophet). There is an abundance of relevant statements and precedents that would have provided more legal basis for the arguments posed. However, at any rate one cannot undermine the significance of this chapter as it opens several opportunities for further research and exploration.

I believe that the writer has adopted an analytical-descriptive approach in his assessment to the Middle Eastern countries. Basically, competition law in the Region is analysed in a certain framework. In the first section, of the assessment, he clarifies the background of the system of competition in the respective country. Secondly, he identifies the aims and objectives of the relevant law. Next, the scope of prohibition and the agreements and practices prohibited is discussed. Fourthly, he gives a brief account on the structure, powers and functioning of the competition authority implementing the law. Then, he discusses the penalty system of the country and finally builds up an analytical conclusion drawing up his own reflections and suggesting recommendations.

Chapter three discusses the situation of competition law and policy in Israel. Despite the fact it is considered the oldest competition law system in the region (1959), it is classified with the other MECs. They neither have a mature competition law nor a strong policy to support it. Throughout the analysis it is clear that the disturbed political and economic situations of Israel are hindering the adoption of a proper system of competition law. It is also clear that politics has a great influence on its competition policy threatening the efficiency of its overall competition law system. The writer concludes this chapter by suggesting means to overcome the deficiencies identified. As for the following chapter it deals with the most successful Middle Eastern experience in competition law: the Republic of Turkey. Turkey has been undertaking a progressive developmental approach to cope with the European standards through an adaptation process. However, the writer has been able to point out some controversial concepts

[1] See page 4.

embodied in the Turkish system, most notably, the 'presumption' concept and the lack of public awareness. He also pointed out other deficiencies then proposed means for improvement.

In the following chapters the writer divides the remaining Middle Eastern countries according to their geographical location and proficiency in competition law. The first classification is that of 'Maghreb Countries'. It is very interesting how the writer delved into each system and provided a considerable assessment to each country. Most remarkably, the writer discussed the progress by the Libyan regime in the process of adopting a competition law. Although very briefly in few pages one can sufficiently note the major developments in this regard. However, the writer did not shed the light on what might be considered an important factor in Libya which is that of Religion. Islam, at least as the regime usually claims, is an important component of the system. If this is truly the case one might expect Islamic influences on the law.

Other classifications were made to combine Syria and Lebanon, Gulf countries and Jordan as different regions. The writer provided a similar assessment as previously noted. As for Egypt, the writer provided what I believe to be the best ever attempted analytical assessment to the 2005 law. Moreover, he discussed in brief two prominent cases currently handled by the Egyptian Competition Authority, namely the Cement and Steel cases. As for Palestine and Iraq I was expecting more emphasis on their disturbed political and economic situations. This is because, as the writer noted earlier, previous experiences proved that the mere presence of a legal framework is not sufficient to having a successful competition law regime. Yet, it was interesting to learn about the modern legal structures of both countries and their current developments.

The conclusions of the book in the final chapter are quite impressive. The courageous criticisms and reflections provided denote that they are deduced by a well informed analytical scholar. It is truly the case that there is a concentration of wealth in most of these countries. Inaccurate approaches adopted without understanding the rationale of competition law or its function within the market; among twenty-one MECs twenty have Islamic law origins and they all failed to rely or refer to it in this regard. Moreover, one of the most important conclusions in the book is the writer's assertion that countries can in exceptional cases resort to price regulation especially in wheat and milk as both of these markets are highly sensitive in the region. I totally agree that price regulation is still sometimes needed to stabilise certain sensitive markets in countries where competition culture is still developing.

In short, this book clearly reflects the tremendous effort exerted by the writer therein. It is a highly valuable guide to competition law and policy in the Middle East. The language of the book is clear, simple and readable. This book excelled in providing a brief analysis without affecting the sufficiency of the content. It is a valuable pioneering book in the field and for the Middle East as a whole.

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Aim:

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

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