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Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC

*Assimakis P. Komninos**

I. Introduction

Since the 1st of May 2004 Europe has in place a brand new system of enforcement of competition law. Article 81 EC becomes an integrated provision that will be fully applied by all enforcers and courts. The innovations concerned are not only procedural in their nature but have serious repercussions for the substance of EC competition law. We attempt, firstly, to examine how competition analysis will be affected by this fundamental change and, secondly, to view in this context and try to systematise the non-competition considerations that are bound to arise. Such non-competition concerns, usually associated with the generally-defined “public interest”, underlie the whole question of the interrelationship between competition law and the liberal professions, hence the relevance of this question to the theme of this year’s workshop.

Our aim is to answer the question “what goes under Article 81(1) and what goes under Article 81(3) EC?” and to argue that this bifurcation should not be followed in the taking into account of non-competition concerns. We argue that a better approach is not to import these non-competition concerns into the substance of Article 81(3) EC, thus blurring the purity of antitrust analysis, but rather to deal with them “at arm’s length”, that is, to balance them against Article 81 EC as a whole, following classical constitutional rules on the resolution of conflicts.

II. The “new” Article 81 EC

* White & Case, Brussels; European University Institute, Florence. I have benefited from discussions with Claus-Dieter Ehlermann, Ian Forrester, Petros Mavroidis, Julio Baquero Cruz and Ekaterina Rousseva. The usual disclaimer applies.

The “venerable” Regulation 17/1962 is now past. As a result of a long process that officially started in April 1999¹ and ended only in April 2004 with the publication in the Official Journal of the “Modernisation Package”,² Europe has a brand new enforcement system that will be with us for long.³ The reforms have collectively been known as the “modernisation” of EC competition law.⁴ Naturally, it is more correct to speak of modernisation of EC competition enforcement, rather than law. Indeed, it was not the direct aim of the White Paper or of Regulation 1/2003 to change substantive competition law as such. Admittedly, however, in EC competition law substance and procedure have been intermingled from the outset with the result that matters of procedure have a direct bearing on substance and *vice versa*.⁵

Thus, while it is true that the very broad interpretation of competition restrictions under Article 81(1) EC owes much to the ordoliberal notion of freedom of economic action,⁶ it has also been common to explain this “institutionally”, based on the Commission’s exemption monopoly. According to this line of thinking, the Commission’s central role in EC competition enforcement, coupled with its monopoly to enforce Article 81(3) EC, and the need of uniform application of Article 81 EC in all Member States required giving a broad interpretation to the first paragraph of that provision, thus ensuring that the decision as to whether a given restriction was to be accepted, was taken in a uniform manner by the Commission.⁷ This also partly

¹ *Commission White Paper of 28 April 1999 on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, COM(1999) 101 final, OJ [1999] C132/1; *Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (“Regulation Implementing Articles 81 and 82 of the Treaty”)*, COM(2000) 582 final, OJ [2000] C365E/284; *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty*, OJ [2003] L1/1.

² *Commission Regulation 773/2004 of 7 April 2004 Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty*, OJ [2004] L 123/18; *Commission Notice on Cooperation within the Network of Competition Authorities*, OJ [2004] C 101/43; *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*, OJ [2004] C 101/54; *Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ [2004] C 101/65; *Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters)*, OJ [2004] C 101/78; *Commission Notice - Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty*, OJ [2004] C 101/81; *Communication from the Commission - Notice - Guidelines on the Application of Article 81(3) of the Treaty*, OJ [2004] C 101/97.

³ Compare Ehlermann, “Developments in Community Competition Law Procedures”, 1(1) *EC Competition Policy Newsletter* 2 (1994): “Regulation N° 17 contains all the basic procedural rules for Community competition policy. *If and when it is revised, it will only be revised once for the foreseeable future*” (emphasis added).

⁴ Apart from the *stricto sensu* “procedural” modernisation, one may also speak of a broader modernisation of the EC competition rules that started in 1996 with the publication of the Green Paper on Vertical Restraints. This broader process resulted in “new generation” block exemption Regulations of the Commission, accompanied by soft law Notices and Guidelines and based on a more economic approach, in a new Merger Regulation.

⁵ See, e.g., D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, 1998), p. 334 *et seq.*

⁶ In its recent Notice on Art. 81(3), the Commission seems to depart from the formalistic approach it had pursued in the past, under which almost any agreement that restricted commercial freedom was considered restrictive of competition. This had meant that the substantive analysis was confined under the third paragraph of Art. 81 EC. Under the new Notice, assessing whether an agreement infringes Art. 81(1) EC in the first place requires a substantive analysis of the market and of the economic impact of specific restrictions, while the guiding principle becomes consumer welfare.

⁷ See, e.g., McCullough, “The Continuing Search for Greater Certainty: Suggestions for Improving US and EEC Antitrust Clearance Procedures”, 6 *Nw.JInt’lL & Bus.* 803 (1984), p. 892; Waelbroeck, “Antitrust Analysis

explains the Commission's hesitation towards the introduction of a more economic approach or of a fully fledged "rule of reason" in paragraph 1 of Article 81 EC (as opposed to paragraph 3), since the "rule of reason" would have led to an indirect transfer of competencies from the Commission to national competition authorities and courts.⁸ The fear was also that this might lead to a renationalisation of competition enforcement in Europe, since agreements benefiting from a "rule of reason" would be granted a negative clearance under Article 81(1) EC rather than an exemption under 81(3) EC, thus inviting the application of stricter national competition law.⁹

By the same token, the abolition of the notification and prior authorisation system may also have a certain impact on the substance of EC competition law. The first signs are that the area of that impact will be the substantive relationship between the first and the third paragraph of Article 81 EC. With Article 81 EC being enforced as a unitary norm by Community and national enforcers alike, one can argue that any debate as to the bifurcation of antitrust analysis under the first and the third paragraph of Article 81 EC would only have theoretical importance. Indeed, it has been submitted that it will no longer matter if Article 81(1) EC is interpreted in such a way as to catch almost all agreements restrictive of economic freedom without any economic analysis at all, since such analysis of pro-competitive effects and, thus, the balancing against the anti-competitive effects, will immediately follow under the third paragraph of Article 81 EC, which will now be applied by the same enforcer and in the same forum.¹⁰

However, a first question of utmost practical importance is the burden of proof, which under Article 81(1) EC is borne by the Commission, or by national competition authorities or third parties when that provision is invoked at the national level, whereas under Article 81(3)

under Article 85(1) and Article 85(3)", in: Hawk (Ed.), *North American and Common Market Antitrust and Trade Laws 1987, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1988), pp. 693, 696; Siragusa, "Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules", in: Hawk (Ed.), *International Antitrust Law and Policy 1997, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1998), p. 276; Todino, "Le norme comunitarie di concorrenza nei poteri dell'Autorità garante della concorrenza e del mercato", 12 *Dir.Comm.Int.* 751 (1998), p. 753; Verouden, "Vertical Agreements and Article 81(3) EC: The Evolving Role of Economic Analysis", 71 *Antitrust LJ* 525 (2003), p. 532 *et seq.*

⁸ See e.g. Whish and Sufrin, "Article 85 and the Rule of Reason", 7 *YEL* 1 (1987), p. 19; D'Attorre, "Una 'ragionevole' concorrenza: Il ruolo della 'rule of reason' dopo la riforma del diritto antitrust comunitario", 31 *Giurispr.Comm.* 1-80 (2004), p. 1-92 *et seq.*

⁹ Under the previous system of enforcement, negative clearances were merely of a declaratory nature and have not been generally interpreted to constitute "positive measures" that pre-empt the application of stricter national competition law, in the *Walt Wilhelm* sense (case 14/68, *Walt Wilhelm et al. v. Bundeskartellamt*, [1969] ECR 1).

¹⁰ This seems to be the position of V.C. Korah, *An Introductory Guide to EC Competition Law and Practice* (Oxford/Portland, 2000), pp. 189, 361; C. Gavaldà and G. Parleani, *Droit des affaires de l'Union européenne* (Paris, 2002), pp. 333-334, 359; A. Albers-Llorens, *EC Competition Law and Policy* (Cullompton/Portland, 2002), p. 72; V.C. Korah and D. O'Sullivan, *Distribution Agreements under the EC Competition Rules* (Oxford/Portland, 2002), p. 120; Gyselen, "The Substantive Legality Test under Article 81-3 EC Treaty - Revisited in Light of the Commission's Modernization 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/London/New York, 2002), p. 197; D. G. Goyder, *EC Competition Law* (Oxford, 2003), pp. 94-95; Venit, "Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty", 40 *CMLRev.* 545 (2003), p. 577. It is interesting to note that the system of legal exception in French competition law resulted in a certain attenuation of the prohibition-exemption dichotomy with the equivalent of Art. 81(3) EC being rarely applied or invoked, while the French competition authority has followed a more global approach based on the rule of reason. See further Idot, "Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE (Règlement 1/2003 et projets de textes d'application)", 39 *CDE* 283 (2003), p. 289, fn. 28.

EC it is borne by the undertakings.¹¹ If Article 81(1) were to be given an unqualified meaning, then the burden of proof would entirely fall upon the parties. On the other hand, if almost all balancing were to take place under the first paragraph, the Commission would be inappropriately burdened. Therefore, the current division between the two paragraphs reflects a fine balance and apportionment of the burden of proof that it would be unwise to tilt.

In addition, apart from the burden of proof, the distinction between the two paragraphs still remains significant. Firstly, as it is rightly pointed out, the Treaty itself requires a two-stage reasoning under the two paragraphs.¹² Secondly, if one gives too broad a meaning to that provision and proceeds to any economic analysis only under the third paragraph, there is a risk that the objective and the function of Article 81 EC as a whole will be compromised, since potentially idle agreements, which would otherwise have escaped the application of Article 81(1) EC, if a narrower meaning were adopted, might not satisfy the two positive and two negative cumulative conditions of Article 81(3) EC and the agreement might end up being prohibited.¹³

Moreover, Article 81(3) EC, as applied by the Commission and by the European Courts, while corresponding to a substantial extent to the US “rule of reason”, is not a very flexible norm. It does not allow for a total welfare test, but only for a consumer surplus standard, since at least some part of the cost savings must be passed on to the consumers.¹⁴ Furthermore, the second negative requirement for an agreement not to eliminate competition means that an agreement creating a monopoly, although socially desirable because of accruing efficiencies, will still be prohibited.¹⁵ Therefore, it should not be excluded that certain pro-competitive agreements escape Article 81(1) EC altogether under a reasonableness test, thus being spared the more inflexible antitrust analysis of Article 81(3) EC. This leads us to the conclusion that the reform should not affect the analysis mechanism under Article 81 EC.

But which is the current standard of analysis in Article 81 EC, if there is one? The question of the relationship between the first and third paragraph of Article 81 EC and the role of economic analysis, if any, under Article 81(1) EC has always been hotly debated and it is one of the areas where the Commission’s and the European Courts’ approaches had not been identical in the past.¹⁶ There is no doubt, however, that such divergence has ceased. The new

¹¹ See Art. 2 Reg. 1/2003.

¹² See Idot, “A French Point of View on the Radical Decentralisation of the Implementation of Article 81(1) and (3)”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 336.

¹³ See Wesseling, “The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options”, 20 ECLR 420 (1999), p. 423; D.N. Tzouganatos, *Exclusive and Selective Distribution Agreements in Free and Unfair Competition Law* (Athens, 2001) [in Greek], pp. 171-172.

¹⁴ See also Eilmansberger, “How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses”, 42 CMLRev. 129 (2005), p. 136, who proceeds to a combined reading of Articles 81(3) and 82 EC.

¹⁵ See, e.g., Lenaerts and Gerard, “Decentralisation of EC Competition Law Enforcement: Judges in the Frontline”, 27 *World Competition* 313 (2004), p. 330, stressing that the Commission promotes “a strict assessment of the likelihood for efficiency claims”. See further Gifford and Kudrle, “European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?”, 48 *Antitrust Bull.* 727 (2003), p. 772 *et seq.*

¹⁶ Among the older literature, see the two groundbreaking articles by Forrester and Norall, “The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law Is and could be Applied”, 21 CMLRev. 11 (1984) and Whish and Sufrin, *supra* note 8. On the Art. 81(1) EC case law, see in general Korah and O’Sullivan, *supra* note 10, p. 80 *et seq.*

economic approach of the European Commission and, at the same time, the recognition by the European Courts that a full-fledged rule of reason analysis can take place only under Article 81(3) EC has eliminated any rightly or wrongly-perceived divergence between Brussels and Luxembourg on Article 81 EC.

Thus, according to the Courts' case law, under the first paragraph of Article 81 EC, agreements have to be examined in their legal and economic context. A recent judgment of the Court of First Instance, summarises that line of cases in the following terms: "[I]t is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) [now 81(1)] of the Treaty. In assessing the applicability of Article 85(1) [now 81(1)] to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned".¹⁷ This implies that a certain degree of economic analysis is called for already at the stage of that provision. Under Article 81(1) falls also the application of the ancillary restraints concept, which covers restrictions of competition that are directly related, necessary and proportionate to the implementation of a main non-restrictive transaction.¹⁸ However, the above economic analysis should be seen more in the context of "reasonableness" rather than as a full-fledged balancing of pro- and anti-competitive effects.¹⁹ In *Métropole Télévision*, the CFI, though admitting that a certain degree of an economics-based approach is called for under Article 81(1) EC, took the view that the balancing of pro-competitive and anti-competitive effects, along with the full examination of the economic efficiencies accruing from an agreement, should only take place under Article 81(3) EC, which is the only provision that can accommodate a "rule of reason" test.²⁰

This case law is in full harmony with the current approach of the Commission. Such an approach can already be traced back to the White Paper²¹ and is further developed in the new Notice on Article 81(3) EC. There, the Commission seems to depart from the formalistic approach it had pursued in the past, under which almost any agreement that restricted commercial freedom was considered restrictive of competition and thus violated Article 81(1) EC. Under the new Notice, assessing whether an agreement infringes Article 81(1) EC in the first place requires a substantive analysis of the market and of the economic impact of specific restrictions, while the guiding principle becomes consumer welfare.²² Ancillary restraints are also examined under the first paragraph of Article 81 EC.²³ The Notice, on the other hand, fully

¹⁷ Case T-112/99, *Métropole Télévision (M6) et al. v. Commission*, [2001] ECR II-2459, para. 76.

¹⁸ *Métropole Télévision, op.cit.*, paras. 107-109.

¹⁹ See Idot, "Avocats et droit de la concurrence : La rencontre a eu lieu...", (2002-5) *Europe* 5, p. 7 ; D'Attorre, *supra* note 8, p. I-99 *et seq.*

²⁰ *Métropole Télévision, op.cit.*, paras. 72-77. A part of commentators had long ago argued that Article 81(1) EC could not in any case accommodate a rule of reason approach (see, e.g., Whish and Sufrin, *supra* note 8, p. 23).

²¹ Para. 57 of the White Paper and para. 11 of the Art. 81(3) EC Notice. See further Vogelaar, "Modernisation of EC Competition Law, Economy and Horizontal Cooperation between Undertakings", 37 *Intereconomics* 19 (2002), p. 21.

²² See para. 13 of the Notice. See further Bourgeois and Bocken, "Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction", 32 *LIEI* 111 (2005), pp. 112-113.

²³ See paras. 28-31 of the Commission's Art. 81(3) EC Notice. The Commission's approach is that "the application of the ancillary restraint concept must be distinguished from the application of the defence under Article 81(3) which relates to certain economic benefits produced by restrictive agreements and which are balanced against the restrictive effects of the agreements". In the view of the Commission, "the application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects". Such balancing should be reserved for Art. 81(3) EC.

adopting the *Métropole Télévision* thesis, relegates all balancing between pro-competitive and anti-competitive effects of the agreement to Article 81(3) EC.

III. Non-competition concerns and Article 81 EC

If it is now clear what kind of economic analysis takes place under paragraphs 1 and 3 of Article 81 EC, an interesting question remains as to whether that provision allows for the taking into account concerns that are extraneous to competition law and to economic progress, but are expressive of other policies, such as environmental, social, or industrial policy, or of the broadly perceived “public interest”.²⁴ This question becomes more relevant under the new system of enforcement because of the fear that the abolition of the Commission’s monopoly of exemption may be an open invitation to national competition authorities and courts to introduce into the tests of Article 81 EC such non-competition aims or the pursuit of the parochially seen public or national interest. This was also a concern during the post-White Paper period leading to the adoption of Regulation 1/2003. The argument went that if non-competition issues were read into Article 81(3) EC, the whole thesis as to that provision’s direct effect and justiciability would be weakened.²⁵ If things like the environment, employment policy, culture, or industrial policy had to be balanced under Article 81(3) EC, then that provision would not be sufficiently precise so as to have direct effect and to be justiciable. If, on the other hand, only competition concerns have to be examined under the four-test rule of that provision, then courts could indeed apply the latter.

Cross-section clauses in some EC Treaty Articles, such as in Articles 6 EC (environment), 127(2) EC (employment), 151(4) EC (culture), 153(2) EC (consumer protection) and 159(1) EC (economic and social cohesion), which call for the “integrating” or “taking into account” of the respective aims in the definition and implementation of Community policies and activities, may add to confusion. We must stress, however, that most of these cross-section clauses mean that the Community must take into account not *national* but only *Community* policies aiming at the protection of these aims. This is explicit, for example, in Article 159(1) EC, which refers to Article 158 EC, and it is arguable that this is implicit in Articles 127(2), 151(4) and 153(2) EC. This is especially true for the two last provisions, which refer to “*other Community policies and activities*”.²⁶ At the same time, the Treaty itself explicitly recognises that the pursuit of certain policies must not prejudice the system of undistorted and free competition, as protected by Articles 81 EC *et seq.* Reference is made to Articles 4(1) *in fine* and (2) *in fine*, 98, 105 EC (economic and monetary union), 27(c) EC (customs union), 154(2) EC (trans-European networks) and 157(3)(b) EC (industrial policy).²⁷ In addition, the Court of Justice has on occasion stressed the need to also take into account the *competition rules*, while

²⁴ We prefer the term “public interest” to “public policy”, which is used by some other authors. The latter term may be prone to confusion because it is used in many instances as a technical term.

²⁵ See Whish, “National Courts and the White Paper: A Commentary”, in: *The Modernisation of EC Competition Law: The Next Ten Years*, CELS Occasional Paper, No. 4 (Cambridge, 2000), p. 75 *et seq.*; Whish and Sufrin, *supra* note 8, p. 150; Immenga, “Coherence: A Sacrifice of Decentralisation?”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 355.

²⁶ Emphasis added.

²⁷ See also Arts. 96 and 97 EC with reference to unilateral measures of Member States adopted for environmental or social policy aims that distort the conditions of competition in the common market.

the Community formulates other policies.²⁸ It should also be mentioned that the protection of free competition is an aim pursued not only under Art. 81 *et seq.* EC and under secondary competition legislation, but also exists in other Community legislative instruments, such as in Community Directives on consumer protection.²⁹

Apart from these policies that are accorded a certain primary status in the EC Treaty itself, there are also other candidate interests vying to be taken into account in the context of competition law enforcement. Culture, the “specificity” of sport, the public interest in safeguarding the independence of the legal profession and other concerns³⁰ have been suggested as legitimate values that have to be balanced against or to be taken into account in the framework of the competition provisions.

We should also stress that this general question is by no means limited to Article 81 EC. It may also affect the enforcement of Article 82 EC.³¹ What makes, however, Article 81 EC more “inviting” to the introduction of non-competition concerns, and thus more vulnerable from an antitrust point of view, is its bifurcated structure (prohibition-exception). This structure makes it tempting for some authors to argue that it must entail some inherent distinction between the substance of the first and that of the third paragraph, otherwise it would never have existed in the first place. Some of those authors would welcome the introduction of non-competition concerns in Article 81(3) EC, as this would provide for an *ex post* justification of that bifurcated structure.³²

IV. The “danger” of importing non-competition concerns into Article 81(3) EC

²⁸ See, e.g., Case C-17/90, *Wieger Spedition GmbH v. Bundesanstalt für den Güterfernverkehr*, [1991] ECR I-5253, para. 11: “In view of the complexity of the cabotage sector, considerable difficulties still stand in the way of the achievement of freedom to provide services in that sphere. This can be done in an orderly fashion only in the context of a common transport policy which takes into consideration the economic, social and ecological problems and *ensures equality in the conditions of competition*” (emphasis added - note, however, that that case was decided before the coming into force of the Maastricht Treaty).

²⁹ See, e.g., *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, OJ [1993] L95/29, Recital 2; *European Parliament and Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts*, OJ [1997] L144/19, Recital 4; *European Parliament and Council Directive 97/55/EC of 6 October 1997 Amending Directive 84/450/EEC Concerning Misleading Advertising so as to Include Comparative Advertising*, OJ [1997] L290/18, Recital 2 *in fine*; *European Parliament and Council Directive 98/27 of 19 May 1998 on Injunctions for the Protection of Consumers’ Interests*, OJ [1998] L166/51, Recital 4; *European Parliament and Council Directive 2001/95/EC of 3 December 2001 on General Product Safety*, OJ [2002] L11/4, Recital 3.

³⁰ On the interface between competition law and the audiovisual policy see Ariño, “Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps”, (2004) *Communications and Strategies*, No. 54, 97.

³¹ For example, such non-economic concerns may be raised under an “objective justification” defence.

³² See, e.g., already Van Houtte, “A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85”, 4 *Nw.JInt’lL & Bus.* 497 (1982-1983), p. 510 *et seq.*; Siragusa, *supra* note 7, p. 285. Eleanor Fox, for her part, would have supported *de lege ferenda* a concentration of all antitrust analysis under Art. 81(1) and a “delegation” of non-competition concerns to Art. 81(3) EC, with the Commission retaining its monopoly to grant such extraordinary exemptions: see Fox, “Panel One Discussion: Compatibility, Efficiency, Legal Security”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), pp. 23-24. See also Immenga, “Editorial: Europäisches Gemeinwohl und nationale Kartellrechtsverfahren”, 16(12) *EuZW* (2005), advancing the proposal that such non-competition concerns may be taken into account by the Commission in positive decisions that according to Art. 10 of Regulation 1/2003 are taken *ex officio* when the Community interest requires.

The position we adopt is that the wording of Article 81(3) EC does not appear to accommodate such non-economic aims. The advantages of a restrictive agreement that nevertheless deserves an exemption must benefit the actual consumers of the specific product and not society at large. Thus, employment or industrial policy considerations, by themselves, cannot lead to the legality of an otherwise anti-competitive agreement.³³ On the other hand, it is not excluded that such concerns may be taken into account as a *further* positive element among other economic efficiency elements of a restrictive agreement, especially if such concerns have an “economic facet”.

Indeed, the cases where the Commission has referred to non-competition considerations in the Article 81 EC context are not rare. We can use as a paradigm the environmental benefits which have been examined by the Commission in a series of decisions under a broad economic efficiency test. To use some examples, in the *KSB/Goulds/Lowara/ITT* case, which concerned the joint research and development of a more environment-friendly pump that would lead to energy savings, the Commission referred to the environmental benefits as an “improvement in operating characteristics” and stressed the fact that the consumers would buy them at the same price as the conventional pumps. Hence the title of the relevant paragraph, “Share of consumers in the benefit resulting from the agreements”.³⁴ In *Assurpol*, dealing with a co-operation agreement between insurance and re-insurance firms aiming at improving the knowledge of risks, at creating financial capacity and at developing technical expertise in insuring environmental damage risks, the whole approach of the Commission was to see all this under “technical and economic progress” and, thus, to exempt the agreement.³⁵ In another case, the Commission published an Article 19(3) Notice (under the old Regulation 17) and indicated its readiness to take a favourable view of a voluntary commitment sponsored by a trade association that aimed at reducing energy consumption by televisions and video recorders in standby mode. The Commission calculated the consumer savings at ECU 480 million per year and also spoke of the “negative externalities” involved in generating this much electricity.³⁶ Further, in *DSD*, the Commission exempted certain exclusivity clauses in a country-wide system for the collection and recovery of sales packaging that met the requirements of German and Community packaging and environmental legislation. While it admitted that the system in question was consistent with the objectives of German and Community environmental legislation, this did not stop it from considering the exclusivity clauses anti-competitive and from exempting them only under specific obligations. Again the exemption alluded to technical and economic progress.³⁷

³³ See Tesauro, “Panel Discussion: EC Competition System: Proposals for Reform”, in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), p. 223; Ehlermann, “The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution”, 37 CMLRev. 537 (2000), p. 549; Burrichter, “Panel One Discussion: Compatibility, Efficiency, Legal Security”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 46. See also Venit, *supra* note 10, pp. 561, 578-579, according to whom the cumulative conditions elaborated in Art. 81(3) EC do nothing more than establish a narrow efficiency/consumer benefit defence.

³⁴ Commission Decision 91/38/EEC of 12 December 1990 (*KSB/Goulds/Lowara/ITT*), OJ [1991] L19/25, para. 27.

³⁵ Commission Decision 92/96 of 14 January 1992 (*Assurpol*), OJ [1992] L37/16, para. 38.

³⁶ Case No IV/C-3/36.494 – *EACEM*, OJ [1998] C12/2, in particular paras. 11 and 12.

³⁷ Commission Decision 2001/837/EC of 17 September 2001 (*DSD*), OJ [2001] L319/1, paras. 142-146.

The most interesting of all these cases so far has been *CECED*.³⁸ This case is often cited by the proponents of the integration of non-competition concerns into Article 81(3) EC and criticised by those opposed to that integration. There, the Commission approved for the first time an agreement to stop production with a view to improving the environmental performance of products. The participants in the agreement, nearly all the European producers and importers of domestic washing machines, agreed to stop producing or importing into the EU the least energy-efficient machines in order to reduce the energy consumption of such appliances and thereby reduce pollutant emissions from power generation. According to the Commission, “[a]lthough participants restrict their freedom to manufacture and market certain types of washing machine, thereby restricting competition within the meaning of Article 81(1) of the EC Treaty, the agreement fulfils the conditions for exemption under Article 81(3): it will bring advantages and considerable savings for consumers, in particular by reducing pollutant emissions from electricity generation. The Commission decision to exempt the agreement takes account of this positive contribution to the EU’s environmental objectives, for the benefit of present and future generations”.³⁹

We believe that what these cases show is that the Commission is ready to debate and to take into account concerns which are not economic in an orthodox sense, but which have economic parameters and can always be measured as such. A Commission official has recently considered the occasional Commission references to non-competition benefits of agreements as “*obiter dicta*” and has argued persuasively that it is only in appearance that some of these benefits are entirely unrelated to competition. Most of them have an economic efficiency facet or lead to some identifiable pro-competitive consumer benefit. Anything else seems to be “*ex abundantia*”.⁴⁰

This approach is followed by the Commission in its Guidelines on horizontal agreements, where it states the following: “The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty as well as in Community environmental action plans, *provided such agreements are compatible with competition rules*. Environmental agreements caught by Article 81(1) may attain *economic benefits* which, either at individual or aggregate consumer level, outweigh their negative effects on competition”.⁴¹ In its recent Article 81(3) Notice the

³⁸ Commission Decision 2000/475/EC of 24 January 1999 (*CECED*), OJ [2000] L187/47.

³⁹ See *XXXth Report on Competition Policy – 2000*, paras. 96-97. On *CECED*, see Van Gerven, “The Application of Article 81 in the New Europe”, in: Hawk (Ed.), *Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy 2003* (New York, 2004), pp. 429-430. For other “environmental” cases, see the Art. 19(3) Notice in case No IV/35.742-F/2 – *EUCAR*, OJ [1997] C185/12, and the *ACEA* case, reported in *XXVIIIth Report on Competition Policy – 1998*, p. 151.

⁴⁰ See Gyselen, *supra* note 10, p. 185. Similar is the approach of other (current and former) Commission officials: see Paulis, “Coherent Application of EC Competition Law in a System of Parallel Competencies”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford/Portland, 2001), p. 405, who stresses that “other objectives of the Treaty can only be taken into account if they can be subsumed under the conditions of Article 81(3)”; Marengo, “Panel Three Discussion: Courts and Judges”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 500, describing the occasional Commission remarks going beyond competition as a forgivable weakness.

⁴¹ *Commission Notice - Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements*, OJ [2001] C 3/2, paras. 192-193. Note, however, that the reference to “aggregate consumer level” may be difficult to reconcile with the Commission’s approach in the new Notice on Art. 81(3), which in paragraph 43 states that “the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within *that same relevant market*” (emphasis added).

Commission makes this point clearer: “Goals 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)”.⁴² In addition, it is stated that the condition that consumers must receive a fair share of the benefits implies that the efficiencies which the restrictive agreement generates in a relevant market must be sufficient to outweigh its anti-competitive effects in *that same relevant market*.⁴³ The Commission, therefore, excludes taking into account non-competition concerns and benefits to other classes of consumers or to the society at large under Article 81(3) EC.

It is only in this manner that these cases and the occasional policy statements⁴⁴ of the Commission must be seen. In other words, non-competition aims cannot totally subjugate the competition and economic efficiency methodology of Article 81 EC or redeem a hopelessly anti-competitive agreement or practice. Otherwise, private parties that are engaged in anti-competitive practices would be elevated to guardians of the generally perceived public interest and the independence of competition law and policy would be jeopardised. The Commission, for its part, must only enforce the policies that have been entrusted to it. It must not, and indeed cannot, resolve conflicts of a constitutional nature, which can only be resolved in a court of law.

V. A proposed theory for the resolution of conflicts: *Wouters*

Notwithstanding the above, there are bound to be cases, where the economic facet of the non-competition concern is not evident enough, or where there are no discernible positive effects of an economic nature that can lead to an anti-competitive agreement being positively assessed under Article 81(3) EC. The interface between the general principle of free competition and other objectives of the EC Treaty or the globally-perceived public interest can be better examined under a more systematic analysis that lends itself to more transparency. In all these cases, we are dealing in essence with true conflicts of substantive norms, and this calls for a completely different methodology. It is more correct to balance the protection of competition and Article 81 EC (or indeed Article 82 EC), *as a whole*, against these other fundamental aims expressing the public interest, rather than to admit the latter inside the substance of Article 81 EC (in its first or its third paragraph), thus blurring the purity and independence of competition analysis.

The resolution of such conflicts at the Community law level can benefit from the theories that have been developed on conflicts between constitutional rights. According to the theory of *praktische Konkordanz* (practical concordance),⁴⁵ it should not be taken for granted

⁴² Para. 42 (emphasis added). It is noteworthy that the Commission in the equivalent paragraph 38 of its draft Notice had included another sentence, which was, however, dropped in the final text. That sentence read: “It is not, on the other hand, the role of Article 81 and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in pursuit of general interest aims”. This change of course must certainly reflect the critical comments the Commission received with regard to this very sensitive question.

⁴³ *Ibid*, paras. 43 and 87.

⁴⁴ We refer to the policy statements in Commission annual reports on competition policy. See, e.g., the statements in the *XXVth Report on Competition Policy – 1995*, para. 85: “[The Commission] weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement, and applies the principle of proportionality in accordance with Article 85(3) [now 81(3)]. In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress”.

⁴⁵ The theory of “practical concordance” was developed by Konrad Hesse, a German constitutional lawyer. See K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg, 1999), p. 142. On

that two or more substantive constitutional norms that apply to a specific set of facts are always in conflict. In every piece of legislation and in any concrete case of application a solution has to be found which allows for one principle to be applied as far as possible without violating the other. In other words, an acceptable balance is needed between two equally protected fundamental rights. The apparent conflict should not lead to a poor type of compromise, but rather to a rational balancing of contradictory values, always respecting the principle of proportionality.

This theory could well apply to the resolution of conflicts between the competition rules of the Treaty and other substantive norms, such as the protection of the environment, employment, industrial policy, etc.⁴⁶ Indeed, the Commission's approach to attempt to reconcile such non-competition values with the antitrust criteria in Article 81(3) EC through the "economic facet" of the former can be seen as a successful application of the principle of practical concordance. In other words, the Commission, acting within the limits of its powers, tries invariably to enforce the competition rules in a manner that is friendly to these other norms. This is usually possible, if such objectives can be seen through their economic facet and if it is possible to reconcile them with competition analysis. The line of environmental cases, referred to above, if seen in this particular context, are easy to understand.

The adoption of that approach may also help us to understand the recent *Wouters* ruling of the Court of Justice,⁴⁷ which has given rise to varying interpretations and which is very relevant to the theme of this year's conference. *Wouters* appears to introduce a "rule of reason" approach importing non-competition and non-economic objectives into the first paragraph of Article 81 EC. In that sense, some commentators have spoken of a *sui generis* "European rule of reason" or "social political rule of reason" integrating elements of the Court's four freedoms case law.⁴⁸ Richard Whish, on his part, in his latest edition of "Competition Law" views *Wouters* as a *sui generis* case of "regulatory ancillarity" under Article 81(1) EC.⁴⁹

We submit, however, that *Wouters* does not introduce a rule of reason approach, in the antitrust sense, at least as the late judge Joliet had meant it.⁵⁰ *Wouters* seems to draw inspiration

the usefulness of this theory to the private sphere and to "private regulation" see Engel, "A Constitutional Framework for Private Governance", 5(3) *German Law Journal* 197 (2003), p. 206.

⁴⁶ On the application of this principle to EC competition law, see already Schmid, "Diagonal Competence Conflicts between European Competition Law and National Regulation: A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing", 8 ERPL 155 (2000); Deckert, "Some Preliminary Remarks on the Limitations of European Competition Law", 8 ERPL 173 (2000). We adopt that theory, albeit without necessarily adopting the views of those authors as to the result of the balancing between the conflicting norms.

⁴⁷ Case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.

⁴⁸ Among the many and often contradictory commentaries of this case, see Hatzopoulos, "When Lawyers Ignore Competition or State and Semi-state Measures in the Light of Community Competition Rules after the *Arduino* and *Price Waterhouse* Judgments", 50 *Nomiko Vima* 863 (2002) [in Greek], p. 871 *et seq.*; Monti, "Article 81 EC and Public Policy", 39 CMLRev. 1057 (2002); Tizzano, "Note sulla recente giurisprudenza della Corte comunitaria", 7 Dir.Un.Eur. 535 (2002), pp. 546-547; Keppenne, Lagondet and Van Raepenbusch, "Chronique de jurisprudence : Année 2002", 39 CDE 433 (2003), pp. 512-514; D'Attorre, *supra* note 8, p. I-110; Scassellati Sforzolini and Rizza, "La tensione fra regole di concorrenza comunitarie e regole professionali e deontologiche nazionali", 30 *Giurispr.Comm.* II-8 (2003), p. II-25 *et seq.*; Manzini, "I parafernali del giudizio antitrust: Regola della ragionevolezza, restrizioni accessorie, divieto 'per se'", 30 *Giurispr.Comm.* II-285 (2003), p. II-291 *et seq.*

⁴⁹ R. Whish, *Competition Law* (London, 2003), p. 120.

⁵⁰ R. Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Law* (The Hague, 1967). See also Vesterdorf, "Recent Developments in the Case Law of the ECJ and the CFI in the Field of Competition Law", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen*

from the theory of mandatory requirements that was developed in the Court's four freedoms case law.⁵¹ The Court, thus, implicitly recognised that the non-competition concern at issue and Article 81 EC could not be reconciled and that therefore a balancing was called for. In doing so, the Court followed a constitutional law methodology, very similar to that used in four freedoms cases.

If we take a closer look at *Wouters*, we will detect a rather interesting line of reasoning:

The case concerned the decision of the Netherlands Bar Association (NBA) imposing restrictions on multi-disciplinary partnerships between lawyers and accountants and its potentially restrictive effects on competition. The Court started from the premise that lawyers are undertakings and that the NBA was in effect an association of undertakings. While NBA fulfilled a regulatory role, it was neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies, nor exercising powers which are typically those of a public authority. It acted as the regulatory body of a profession, the practice of which constitutes an economic activity. The fact that its governing bodies were composed exclusively of members of the Bar, elected solely by members of the profession, and that in adopting acts such as that regulation, it was not required to do so by reference to specified public interest criteria, supported the conclusion that such a professional organisation with regulatory powers cannot escape the application of Article 81 EC.⁵²

So far so good. Then, the Court attempts to examine the Dutch regulation from an Article 81 EC angle. The Court did not have any difficulty in finding that the NBA regulation was liable to limit production and technical development within the meaning of Article 81(1)(b) EC.⁵³ Then, surprisingly, and while one would have expected the Court to consider the Dutch regulation invalid, since no notification had been filed with the European Commission, the Court proceeds to a U-turn and examines the countervailing benefits of that regulation. According to the Court, account had to be taken of the overall context in which the decision of the association of undertakings was taken or produced its effects, and more particularly of its objectives. The objective here was to ensure that the ultimate consumers of legal services and the sound administration of justice be provided with the necessary guarantees in relation to integrity and experience. Any consequential effects restrictive of competition were inherent in the pursuit of those objectives. Thus, the Court's conclusion was that the NBA regulation banning multi-disciplinary partnerships did not infringe Article 81(1) EC, since it could reasonably have been considered that that regulation, despite the effects restrictive of competition that are inherent in it, was necessary for the proper practice of the legal profession.⁵⁴

Commentators of *Wouters* were quick in grasping the unconventional reasoning. While the Court had found that Article 81(1) EC was infringed, it chose to declare the prohibition inapplicable to this case, in view of the fact that the NBA regulation was justified by a specific public interest: ensuring the proper practice of the legal profession. The Court's line of reasoning seems difficult to follow, but if seen as an (unsuccessful) attempt of reconciliation of the two norms under a "practical concordance" approach, it may become intelligible. The

Kartellrecht, Neuntes St. Galler Internationales Kartellrechtsforum 2002 (Basel/Genf/München, 2002), p. 106, speaking of a "balancing of interests other than that currently known as 'rule of reason'".

⁵¹ See among others the analysis of J. Baquero Cruz, *Between Competition and Free Movement, The Economic Constitutional Law of the European Community* (Oxford/Portland, 2002), pp. 151-153.

⁵² *Wouters, op.cit.*, para. 57 *et seq.*

⁵³ *Wouters, op.cit.*, paras. 86-90.

⁵⁴ *Wouters, op.cit.*, paras. 97-110.

starting point on Article 81(1) EC can be seen as a reconciliation attempt, while when it is clear that a reconciliation is no longer possible, the Court retreats to a constitutional methodology, balancing the anti-competitive effects of the regulation at stake with the public interest. The resolution of this particular conflict results in giving precedence to the public interest. *Wouters*, in other words, is a typical conflict resolution case that bears many similarities with cases resolving conflicts of constitutional rights. It is true that the Court's reasoning leaves a certain "malaise", to use the words of a commentator,⁵⁵ in bringing into competition law an approach based on free movement case law. However, since *Wouters* represents a pure conflict case as between the competition rules and non-competition objectives, it was inevitable for the Court to draw inspiration from the four freedoms line of cases, because that is an area where the Court has acquired extensive experience in dealing with the resolution of similar conflicts.

Wouters shows that pure conflicts between the Treaty competition rules and "political" or "public interest" or "non-competition" concerns certainly cannot be avoided. The difficulty lies in shaping the methodology of resolving such conflicts. One possibility would be to invite these non-competition concerns into the competition law analysis, while another would be to adopt a more normative approach and deal with them as pure constitutional conflicts. Under the latter approach, which is by far more preferable, such concerns are not "invited" into the substance of antitrust analysis. While it is neither arguable nor desirable that the principle of competition should always prevail over other genuine values, that does not mean that the purity of antitrust analysis should be sacrificed in favour of a hybrid system of competition law, where employment, the environment, public health and all different kinds of public interests are imported into Article 81(1) or 81(3) EC. That is why views as to the existence of a "European rule of reason", though challenging, should nevertheless be rejected. The balancing between the competition rules and other values should take place neither in Article 81(1) nor in Article 81(3) EC. Rather, Article 81 EC as a whole may in appropriate circumstances be balanced against public interest concerns. In this sense, the non-economic norm, in *Wouters* the protection of the legal profession's independence, is not brought into the substance of Article 81 EC (in its first or in its third paragraph), thus blurring its purity, but is taken into account at a preceding stage, leading to an exception from the ambit of Article 81 EC as a whole, subject to a control of proportionality. Viewed in these terms, *Wouters* in reality is not an antitrust case and should find its place not in EC competition law textbooks but rather in EU constitutional ones.⁵⁶

Following this approach would not mean that non-competition concerns would never be taken into account under Article 81 EC. According to the practical concordance method, they could be taken into account for as long as the competition-economic balance remains positive. They could not, however, tilt a negative balance. This is exactly the approach that the Commission has followed in its decisions that we referred to above and, indeed, this is what Advocate General Léger had proposed in his Opinion. In paragraph 133 of his Opinion he admitted that "[a]ccording to the case-law, the wording of Article 85(3) [now 81(3)] makes it possible to take account of the particular nature of different branches of the economy, social concerns and, to a certain extent, considerations connected with the pursuit of the public

⁵⁵ Idot, *supra* note 19, p. 7.

⁵⁶ Contrast the analysis of *Wouters* by the President of the CFI, who expressed doubts as to whether that judgment would constantly be followed, particularly by the CFI (Vesterdorf, in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Neuntes St. Galler Internationales Kartellrechtsforum 2002* (Basel/Genf/München, 2002), pp. 128-129). From an institutional perspective it should come to as no surprise that the more "orthodox" CFI, which has become the "natural judge" in antitrust matters, may view with perplexity *Wouters* and the balancing that this judgment entails, as opposed to the ECJ, which is in essence a more "constitutional" court with long-standing experience in the resolution of constitutional conflicts.

interest”. But it is clear that he was ready to see such concerns only through their “economic facet”: “Professional rules which, in the light of those criteria, *produce economic effects which are positive*, taken as a whole, should therefore be eligible for exemption under Article 85(3) [now 81(3)] of the Treaty”.⁵⁷ The fact that the Court opted to depart from this “easy” solution and to adopt a more normative approach, notwithstanding the rather inelegant reasoning, is not a weakness, but a welcome novelty.

VI. Hierarchies

If any reconciliation between competition law and the conflicting norm cannot be attained, then we are in front of a situation of pure conflict. The resolution of a conflict of this kind inevitably poses the question of hierarchies. At this point, arises the question of the hierarchical status of the Community competition rules and their normative relationship with other Treaty objectives.

It has been argued persuasively that the four freedoms and the competition law provisions of the EC Treaty have enjoyed a certain primacy in the Court of Justice’s case law and in the Commission’s administrative practice.⁵⁸ Indeed, the Treaty competition provisions make up the “economic constitution” of the European Union and their importance has been recognised by the Court of Justice on numerous occasions. Thus, with regard to Article 81 EC, the Court has stressed its primacy in the system of the Treaty, since it “constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”.⁵⁹

On a number of occasions the Community Courts have indeed not shied away from balancing the Treaty competition rules with other fundamental norms of Community or national provenience and usually they have granted precedence to the former. This is, in particular, the case when parties raise pleas against the competition enforcement that rely upon the protection of commercial freedom or on the right to property. Advocate General Cosmas had no difficulty to summarily reject such pleas in the *Masterfoods* case that concerned the sale of ice cream and freezer exclusivity, stressing exactly the primacy of the Treaty competition rules over the right to property.⁶⁰ Similarly, the Court of Justice has rejected non-economic defences raised against the application of the competition rules on many occasions. Where the Court has seen that such arguments were unmeritorious or that simply they could not be reconciled with the core principles of EC competition law, it always came out in favour of the competition rules. To

⁵⁷ Emphasis added.

⁵⁸ See, e.g., Grabitz, “Über die Verfassung des Binnenmarktes”, in: Baur, Hopt & Mailänder (Eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13 März 1990* (Berlin/New York, 1990), p. 1233 *et seq.*; Basedow, “Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft”, in: Due, Lutter & Schwarze (Eds.), *Festschrift für Ulrich Everling*, Vol. I (Baden-Baden, 1995), p. 54.

⁵⁹ Case C-453/99 *Courage Ltd. v. Bernard Crehan* [2001] ECR I-6297, para. 20; case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR I-3055, para. 36.

⁶⁰ Para. 105 of AG’s Opinion, case C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, [2000] ECR I-11369: “There is no doubt that Articles 85 and 86 [now 81 and 82] of the EC Treaty occupy an important position in the system of the Community legal order and serve the general interest which consists in ensuring undistorted competition. Consequently, it is perfectly comprehensible for restrictions to be placed on the right to property ownership pursuant to Articles 85 and 86 [now 81 and 82] of the EC Treaty, to the degree to which they might be necessary to protect competition. Article 222 [now 295] of the EC Treaty may in no event be used as a shield by economic operators to avoid application of Articles 85 and 86 [now 81 and 82] to their detriment.”

mention one example, freedom of expression and the protection of undertakings from unfair competition did not stand in the Court's way in condemning book price fixing in the *VBVB v. VBBB* case. The Court held there that there was not a "real link between the Commission's Decision and freedom of expression as guaranteed by the European Convention, even on the supposition that it might be possible to interpret it in such a way as to include guarantees regarding the possibility of publishing books in economically profitable conditions. To submit the production of and trade in books to rules whose sole purpose is to ensure freedom of trade between Member States in normal conditions of competition cannot be regarded as restricting freedom of publication which, it is not contested, remains entire at the level of both publishers and distributors".⁶¹

The pre-eminence of the competition rules was tested in the context of the drafting of the new European Constitution. Initially, some had thought that such provisions had no place in a programmatic constitutional text, while others thought that the exclusion of the competition and of the free movement rules from that text might be construed as a shift away from those classical priorities of the Community and thus as a "devaluation". The final approach that was followed was deferential to the long-standing constitutional importance of competition law and, indeed, there are good reasons to speak of an "up-grading". Thus, the new Treaty Establishing a Constitution for Europe lists competition law in the guiding principles and objectives of the Union. Article I-3(2) of the Constitution stresses that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market *where competition is free and undistorted*."⁶² The listing of the principle of free competition among the paramount objectives of the Union, goes certainly further than the equivalent provision of Article 3(1)(g) of the EC Treaty. First of all, because competition law is now referred to in the primary provisions of a *constitution*. Its constitutional nature is now celebrated in the primary principles of a formal constitution.⁶³ Secondly, the new text constitutes progress because it refers to the principle of free competition in a positive manner ("where competition is free and undistorted"), rather than in a negative one, as is the case of the current EC Treaty ("a system ensuring that competition in the internal market is not distorted").⁶⁴ This objective constitutes a guiding principle for the interpretation of specific competition provisions and for ensuring consistency among the various policies and activities of the Union.⁶⁵ A further innovation of the Constitution of utmost significance is that competition policy has now been portrayed as the "fifth freedom" of the chapter on the internal market.⁶⁶

Yet it would be incorrect to adduce from the above a general rule of primacy or higher hierarchical status for the competition rules. This seems all the more so, after the Treaty of Maastricht removed from the EC Treaty the Title heading "The Foundations of the Community", which covered all the provisions from the free movement of goods to competition

⁶¹ Joined cases 43/82 and 63/82, *Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB v. Commission*, [1984] ECR 19, para. 34.

⁶² Emphasis added.

⁶³ On the principle of free competition as a constitutional principle in EU law see Müller-Graff, "L'économie de marché concurrentielle comme principe constitutionnel commun dans l'Union européenne", in: *Études en l'honneur de Jean-Claude Gautron, Les dynamiques du droit européen en début de siècle* (Paris, 2004), p. 479 *et seq.*

⁶⁴ This constitutionalisation of the competition rules has not been missed and is severely criticised by the proponents of a more "social" Europe. See, e.g., the article by professor Antonis Maniatakis under the title "Fraudulent Constitutionalisation" in the Greek Sunday paper *To Vima*, 27 March 2005, p. A39.

⁶⁵ See Commissioner Mario Monti delivering his last official speech "A Reformed Competition Policy: Achievements and Challenges for the Future", Center for European Reform, Brussels, 28 October 2004, in: <http://europa.eu.int/comm/competition/speeches>.

⁶⁶ *Idem*.

law, and categorised the above as simply the Community's "Policies".⁶⁷ A similar categorisation is followed in the Constitution, where competition is listed as one of the Union's "Internal Policies".

It is, therefore, not difficult to admit that the resolution of conflicts will not always lead to competition law's primacy. As in *Wouters*, in *Albany* and in a related string of cases involving social security funds, the Court did not find it difficult to resolve a similar conflict to the detriment of the Treaty competition rules. In *Albany*, it held that collective agreement between employers and employees to set up a supplementary "second pillar" sectoral pension fund did not "by virtue of their nature and purpose" fall under Article 81 EC.⁶⁸ In doing so, the Court balanced the competition rules against the social policy provisions of the Treaty. It placed particular emphasis on the fact that under Article 3(1) EC the activities of the Community include not only "a system ensuring that competition in the internal market is not distorted" but also "a policy in the social sphere". Similarly, Article 2 EC provides that a particular task of the Community is "to promote throughout the Community a harmonious and balanced development of economic activities" and "a high level of employment and of social protection". It seemed, therefore, that "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 85(1) [now 81(1)] of the Treaty".⁶⁹

Irrespective of which norm prevails as a result of the balancing, our conclusion is that competition law has nothing to fear from the resolution of conflicts with other objectives of a non-economic nature, if predictable normative criteria are followed. What would be dangerous for competition law, however, would be to import into its substantive analysis extraneous theories and concerns and thus to jeopardise the purity of antitrust analysis.

⁶⁷ See Basedow, *supra* note 58, p. 55. This point is also stressed by former Judge Edward, who interprets many recent cases such as *Albany* and *PreussenElektra* (cases C-67/96, C-115/97 to C-117/97 and C-219/97, *Albany International BV et al. v. Stichting Bedrijfspensioenfonds Textielindustrie et al.*, [1999] ECR I-5751; case C-379/98, *PreussenElektra AG v. Schlesweg AG*, [2001] ECR I-2099) in light of these Treaty amendments. See Edward, "Recent Case Law of the European Court of Justice", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001), p. 51; *idem*, "Competition and National Rule-making", 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/London/New York, 2002), p. 136.

⁶⁸ *Albany*, *op.cit.*, para. 60.

⁶⁹ *Albany*, *op.cit.*, para. 54. The Court has followed the same approach in other cases affecting social policy. See, e.g., cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, [1999] ECR I-6025; case C-219/97, *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, [1999] ECR I-6121; cases C-180/98 to C-184/98, *Pavel Pavlov et al. v. Stichting Pensioenfonds Medische Specialisten*, [2000] ECR I-6451; case C-222/98, *Hendrik van der Woude v. Stichting Beatrixoord*, [2000] ECR I-7111.

VII. Epilogue: Decentralising *Wouters*

The foregoing interpretation of Article 81 EC may indeed be more appropriate under the new decentralised system of enforcement, which opens up that provision to the purview of national courts that are not suitable fora for the balancing of non-competition objectives.⁷⁰ That may also explain the Commission's absolute denial in the White Paper of the possibility of any non-competition concerns being taken into account.⁷¹ This will not mean that national courts will never touch upon non-competition concerns.⁷² Nevertheless, this will be a balancing act that will be undertaken not in the context of the first or the third paragraph of Article 81 EC, but at a different level, as between the whole of Article 81 EC and the conflicting non-competition norm, always subject to the principle of proportionality.

A more specific question that arises at this point, is whether the conflicting norm itself can be applied horizontally as between individuals by a national court (horizontal direct effect). The Treaty provisions that refer to such (non-competition) policies are only addressed to the Commission and to the Community at large, therefore lacking direct effect and, in any case, they cannot be applied as between individuals horizontally. Individuals are not intended by the Treaty to be the direct enforcers or formulators of the Community environmental or employment policies. What, however, national courts will essentially do, is to take these concerns into account as *inherent limitations* to the competition rules, in the same way as a constitutional right is given effect by a court subject to inherent limitations. This methodology is very similar to the mandatory requirements limitations that have been recognised at the four freedoms area. It is only in this context that the question of justiciability must be understood. In other words, national courts will not turn themselves into the enforcers of these policies as such, but rather they will abstain from applying the competition rules – which, on their part, *are* horizontally directly effective – in a particular case.

Before concluding, a related final objection that needs to be addressed, is whether the inherent limitations to the competition rules can be relied upon by private parties. A negative answer to this would contradict the Court of Justice's existing case law. Since *Wouters* has been considered by most commentators as following a four freedoms approach and as importing into the competition field the theory of mandatory requirements, it is useful to refer to the *Bosman* case, where a similar argument had been made, according to which Member States alone were able to rely on limitations to the free movement of people principle. The Court, however, rejected this argument by stressing that “there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question”.⁷³ It is assumed that the same would also be true for mandatory requirements, which are not expressly mentioned by the Treaty, but which have been considered by the Court of Justice as inherent to the Treaty.

⁷⁰ See Whish and Sufirin, *supra* note 8, p. 150; Immenga, *supra* note 25, p. 357.

⁷¹ Para. 57 of the White Paper. As mentioned above, this approach is also followed by the Commission in its Art. 81(3) EC Notice, which avoids any reference to a *Wouters* kind of “exception”.

⁷² See Edward, “Panel Two Discussion: Coherence”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 296.

⁷³ Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman, Royal Club Liégeois SA v. Jean-Marc Bosman et al.*, and *Union des Associations Européennes de Football (UEFA) v. Jean-Marc Bosman*, [1995] ECR I-4921, para. 86. See also Baquero Cruz, *supra* note 51, p. 111.