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Competition, Regulation and Public Policies

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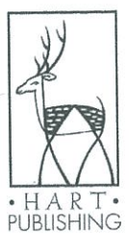

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4. Conclusion

Because the United States and Europe have developed different methods of resolving conflicts between competition and other values, reflecting their different constitutional structures, it is difficult to draw firm comparative conclusions from their experiences. Each approach has its virtues as well as its flaws. By relying heavily upon the courts, the United States runs the risk that lower court judges, unskilled in economic analysis, will provide only uncertain guidance to businesses or will err when deciding that the antitrust laws should give way to another regulatory regime in a particular circumstance. Appellate review and Congressional oversight, however, may ensure that the costs of any such error are not necessarily substantial. Moreover, the United States has the added advantage of flexibility inherent in case-by-case adjudication to resolve conflicts.

In Europe, by contrast, the cost of a judicial error may be much greater because the 'constitutionalization' of competition law in the Treaty precludes legislative oversight of the courts' competition decisions, thereby increasing the likelihood that any judicial error will be long-lived. The Commission has mitigated that risk somewhat by using its limited legislative powers to resolve conflicts ex ante in block exemptions. That practice has the added advantage of giving greater certainty to the business community than does case-by-case judicial decision making.

Finally, both the United States and the EU have managed to incorporate expertise into their systems in different ways. By delegating to DG Comp the decision of whether to exempt a practice or entity from competition law, the European Commission can rely directly upon the agency's economics expertise and experience. The United States has given expert competition agencies little authority to resolve such conflicts, but it has nonetheless managed for several decades to make antitrust jurisprudence increasingly coherent by relying upon appellate judges to deploy at least a basic understanding of economics.

Ian S Forrester

Competition Law and Public Policy Considerations

These annual gatherings in the hills overlooking Florence have materially contributed to the development of the law, by encouraging participants to think about fundamental principles. Our topic is how to reconcile common sense, public interest considerations and the ostensibly bleak prohibitory language of the European Union's competition rules. This chapter will review the ways in which enforcement has softened (or not) to take account of such not easily measurable considerations. It often happens that a practice which involves some restrictive feature is defended on the grounds of public interest. Closer examination may reveal that national law permits the practice; that the practice is part of the normal business model of the accused and others like it; that the sector is of national importance but that its practices are not sanctioned or compelled by national law; or that the practice is part of an extensively regulated industry. Sometimes the measure is a kind of price control, rate-setting or other guild-sponsored imposition. Sometimes the measure is justified by reference to safety, health, the environment, economic crisis or higher sporting or cultural objectives. Having examined a number of successful rationalisations in European competition law, and a greater number of rejected rationalisations, I have to record that it is not easy to find a consistent pattern. Equally it is not easy to be sure whether the outcome was really altered by the public policy, or whether the factor was merely mentioned as something vaguely helpful. The protection of the environment has been invoked in a number of competition cases, but it is difficult to say whether there is a policy of relaxing normally-applicable competition law principles to achieve green goals. The one public policy which seems to be a genuine and consistent driver of competition law is market integration.

My tentative conclusion is therefore not that we need more examples of the relaxing of the competition law rules in favour of causes deemed worthy, like market integration, response to the crisis, or environmental protection, but rather that we need to recalibrate competition law principles to take account of modern doctrines. And that recalibration means not just in published guidance but in arguments submitted to a court which has a judicial standard of legality rather than correctness. US antitrust law, although applied in a very different procedural context, is significantly more 'friendly' to business interests, though more fierce in punishing cartels and cartellists.

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This chapter considers some ancient judicial precedents about restrictive contractual terms, crisis cartels, regulatory measures which restrict competition, collective bargaining, and a miscellany of supposedly relevant public policies. It concludes with a reflection on whether the market integration feature of competition policy needs a fresh look. The public policy of market integration has had a very major impact on competition policy, on the rules governing intellectual property, on the enforcement of competition law and on individual decisions. European competition law is unique in the world in attributing such significance to market integration. It would be proper to give serious reflection to whether this huge policy consideration should be recalibrated in light of modern notions of economic effects and benefits for consumers. I have suggested that the unique emphasis of European competition law on market integration had become a civil religion, and further suggested that the religion would benefit from some sceptical analysis. It would do no harm to reflect on whether we are truly better off with it.

1. Public policy and restrictive contracts: not a new problem

In the era before the Sherman Act,[1] courts confronted the tension between rigid, consistent, inflexible clarity and flexible, unpredictable, arbitrary unpredictability. In the English courts in the reign of the first Queen Elizabeth, litigations arose about contracts in restraint of trade. The problem commonly encountered was constraints on the right of a worker to earn his (always a 'he' as far as I know) living from his trade. These constraints were sometimes entered into by family members, potential competitors or others lacking evident authority to bind the worker not to compete in a particular town or village. In *Colgate v Bacheler*,[2] it was held that

> This condition is against law, to prohibit or restrain any to use a lawful trade … which is against the benefit of the commonwealth, for being freemen it is free for them to exercise their trade in any place.

The old absolute rule was set forth as follows:

> Any deed by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself.[3]

In the famous case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition*,[4] the inventor and entrepreneur sold out his business to an acquirer, and accepted what

[1] The Sherman Act of 1890, probably the best claimant to the title of the world's first antitrust law. But it would be wrong to assume that the Sherman Act was the first legal measure to address restrictive practices.

[2] Cro Eliz 872, 78 Eng Rep 1097 (1596)

[3] *Homer v Ashford* (1825) 3 Bing. 322.

[4] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company* (1894) AC 535.

we would now call a non-compete obligation, restraining himself from engaging 'either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages … or ammunition' anywhere on earth for 25 years. The relevant market was worldwide, and the potential customers were 'Governments and potentates, great and small, civilized and savage, who for purposes offensive or defensive desire … Nordenfelt guns with suitable ammunition'. Thus Mr. Nordenfelt was a precursor of Dr. Reuter, who challenged the length of his non-compete restriction after selling his business to BASF.[5] The plaintiff/inventor/patentee (by now bankrupt and arguing his own case – fluently and powerfully – before the House of Lords) relied on the absolute notion of restraint of trade, especially as set forth in *Homer v Ashford*, cited above. He relied on a number of older cases which struck down as unenforceable restraints on the freedom of individuals to do business.

Lord McNaghten (a celebrated name in legal history) described the tension between competition and the validity of private dealings as follows:

> In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (*Colgate v Bacheler*[6]). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed.

As the Lord Chancellor put it:

> Courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. *But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade.*
> I think it is now generally conceded that *it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on*. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that *in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy,* and is therefore capable of being enforced.
> (emphasis added)

[5] Commission Decision 76/743/EEC, 1976 OJ L254/40.

[6] Cro Eliz 872, 78 Eng Rep 1097 (1596).

The Lord Chancellor said that the function of the courts:

> when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community. When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record *the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other.*

So there was a defeat for the individual who invoked the basic, absolute principle and tried to escape his self-imposed duty not to compete. A worldwide ban on post-sale competitive activity was, on balance, upheld. The courts' discussion of whether to follow a rigid but narrow rule or a 'rule of reason' approach was intriguingly modern. The courts were aware of the need to avoid formalist rigidity, but equally they attached high importance to the binding effect of business decisions.

The application of European competition law as codified in the Treaty of Rome, as amended, (the TFEU, we can be sure, will not be with us in ten years' time, when some new euphonious Treaty has been devised) is primarily the responsibility of the European Commission, which has traditionally been accorded much discretion by the European Courts. Although the Commission is the 'Guardian of the Treaty', it is led by 27 Commissioners appointed by the Member States. These are leading political figures, nearly always former Ministers or even Prime Ministers. Their function is, properly, political. Each is exposed to political influences which are not necessarily coincidental with the objectives of competition law. The exposure to political influences combined with the responsibility of applying the competition law inevitably creates some tension. It used to be that competition law in Europe was more 'political' and less rigid than in the United States; and even today there are probably more occasions in Europe than in the US where one policy is balanced against another.

This tension is evident in the relationship between competition law and industrial policy, competition policy and market integration, competition law and health care, and competition law and public policy on the regulation of professional bodies and sporting ones. That does not mean that enforcement is 'politicised' (though it might be), but it does mean that political goals and public interest choices will never be far away from a big case.

As noted in my reflections for the 1997 workshop in this series,[7] competition policy has been invoked for many different reasons and in many different contexts as a cure for many diseases. In its 2011 Report on Competition Policy the Commission stated that it used competition policy and enforcement as an

[7] Ian S Forrester, in Claus-Dieter Ehlermann and Laraine Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing 1998) p 359.

instrument in the resolution of the financial and sovereign debt crises and as a contributing factor to the wider policy objectives of the Europe 2020 strategy: growth, jobs and competitiveness.[8]

2. Competition law and Industrial policy: crisis cartels

The tension between industrial policy and competition law has been very evident in cases of industrial overcapacity. No Treaty provision specifically provides for the possibility of a suspension of the application of competition rules in times of economic crisis or in the case of industry facing structural overproduction. However, in instances where an industry is plagued with overcapacity and similar structural problems, industry members have claimed that there has been a market failure and that horizontal cooperation to limit production is justified. Indeed, they argue, is it not sensible that an industry combination can resolve the problem better, in a more European manner, than competition law? Why demand bankruptcies and disruptions when negotiated reductions can achieve the same result?

Thirty years ago, in its 12th Report on Competition Policy, the Commission stated that it

> may be able to condone agreements in restraint of competition which relate to a sector as a whole, provided they are aimed solely at achieving a coordinated reduction of overcapacity and do not otherwise restrict free decision-making by the firms involved.[9]

The Commission noted however that 'the necessary structural reorganization must not be achieved by unsuitable means such as price-fixing or quota agreements'.[10] It added that it could authorise sectoral agreements only where the four conditions of Article 101(3) TFEU (Article 85(3) EEC, as greybeards call it) are met, notably: (i) a detailed and binding programme of closures which ensures that overcapacity is irreversibly dismantled and that, while the programme is in operation, no new capacity is created; (ii) consumers not to be deprived of the freedom of choice between competitors; (iii) any information exchange to be solely with a view to supervise capacity reductions; and (iv) limited duration. This approach was reflected in various Commission decisions concerning sectors which had been struggling with production over-capacity. Agreements were notified. Viscount Davignon and other Commissioners helped to broker conclusions. Competition law was in those days at its most political. There were a few cases in which competition authorities considered such arguments in defence only after the competition investigation had been initiated; in that

[8] Report on Competition Policy 2011, COM (2012) 0253, page 1. Also available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0253:FIN:EN:PDF.

[9] XIIth Report on Competition Policy – 1982, paragraph 39.

[10] Ibid.

context, the existence of structural market problems was considered mostly as an attenuating circumstance in the calculation of fines. It seems unlikely that such deals would obtain Commission blessing today, but perhaps that assumes such problems will not arise again. It is also relevant to note that the European Coal and Steel Community was all about industrial coordination and capacity-sharing, so such arrangements have a venerable provenance. We may yet be surprised. I shall now offer some examples in specific cases.

Synthetic fibres and petrochemicals

In *Synthetic Fibres*,[11] the Commission concluded that market forces had failed to bring about the reduction in overcapacity necessary to achieve an effective competitive structure and exempted the agreement under what is now Article 101(3) TFEU. The agreement allowed the parties to achieve higher capacity utilisation rates, better individual specialisation and to restructure in a way that facilitated the organisation of accompanying social measures for retraining and redeployment of workers made redundant. The Commission also found that competition would not be eliminated as there were imports from third countries and substitutable products. The Commission granted a temporary exemption, subject to the condition that the parties refrain from exchanging information about their individual output and deliveries. [12]

Other examples of exemption under Article 101(3) TFEU include bilateral restructuring agreements where some producers agreed to stop making certain products and to specialise in others. Most of these cases concerned situations of overcapacity in the petrochemical industry, with the Commission finding that market forces were too slow to bring about restructuring changes on an individual basis such that reciprocal specialisation could be attained only through an arrangement between the parties. Such bilateral agreements (eg, *BPCL/ICI* and *ENI/Montedison*) reduced the parties' portfolio and avoided overlaps following the restructuring, so the Commission found that an exemption under Article 101(3) TFEU could be granted.[13] The Commission considered that the agreements allowed the parties to rationalise and reduce excess capacity more rapidly and

[11] Commission Decision of 4 July 1984 – *Synthetic Fibres*, 1984 OJ 1984 L207/17.

[12] See Case C-176/99 *Arbed SA v Commission* [2003] ECR I-10687, the 'steel beams case', in which producers of steel were granted a – legal – 'quota system' following the Commission's declaration of a manifest crisis within the meaning of Article 58 ECSC. In 1980, after having attempted to manage the crisis by way of unilateral voluntary commitments given by undertakings as regards the amount of steel put on the market and minimum prices (the Simonet Plan) or by fixing guide and minimum prices (the Davignon Plan, the Eurofer I agreement), the Commission declared that there was a manifest crisis within the meaning of Article 58 of the ECSC Treaty and imposed mandatory production quotas for, *inter alia*, beams. That Community system came to an end on 30 June 1988.

[13] See Commission Decision of 19 July 1984 – *BPCL/ICI*, 1984 OJ L212/1 and Commission Decision of 5 May 1988 – *Bayer/BP Chemicals*, 1988 OJ L150/35, for the restructuring of the petrochemical industry in the UK; Commission Decision of 4 December 1986 – *ENI/Montedison*, 1987 OJ L5/13, concerning the restructuring of the Italian petrochemical industry.

radically than would have been possible otherwise. An exemption under Article 101(3) TFEU was granted.[14]

Stichting Baksteen[15]

A rare example from the 1990s of an authorised crisis cartel was *Dutch Brickmakers*, which concerned the grant of an exemption to an industry capacity reduction programme between Stichting Baksteen ('the Brick Foundation') and sixteen brick producers. The agreement, as originally notified, included the fixing of production quotas and the allocation of all the country's productive capacity. The Commission considered this approach to be 'inappropriate and could not be justified solely on the ground of a crisis in the brick industry'.[16] The original plan was withdrawn and replaced by a new, less rigid, agreement aimed at reducing capacity in order to restore balance of supply and demand. The decision begins with a technical analysis of why capacity reductions are necessary. The production of bricks is capital-intensive so profitability depends on a high capacity utilization rate. Capacity utilization had fallen by ten per cent, prices had fallen by thirty per cent in real terms, consumption by twenty per cent, and stocks had risen by twelve per cent over the desirable level.

The parties therefore agreed to cut capacity by about 200 million bricks, by closing down seven production units owned by four different producers, for at least thirty years. These producers would refrain from selling, for at least thirty years, the dismantled plants to producers within a radius of 500 kilometres of the Dutch frontier. The costs of these closures, including social costs, were to be financed, in 'solidarity', by the sixteen firms which signed the agreement, through a compensation fund managed by the Brick Foundation. The implementation of a social plan for the sector, negotiated with the trade unions, would also be monitored by the Foundation. All parties to the agreement were prohibited from introducing new capacity.

Article 101(1) was evidently applicable, since the agreement, although ultimately pro-competitive, restricted the parties' means of production, investments, and competitive strategies. It could also affect intra-Community trade. Although the market for bricks is fairly regional (the weight of bricks, and their low intrinsic value, make transport over long distances unprofitable), the Commission considered that trade with the bordering regions of Belgium, Germany, and the UK could be influenced.

However, the Commission felt that the agreement qualified for an exemption under Article 103(3) for the following reasons: (i) the agreement was aimed at increasing the profitability of the Dutch brick industry, and its return to normal competitiveness; (ii) in addition, because of the co-ordination of the closures, the

[14] See citations in the previous footnote.

[15] Commission Decision of 29 April 1994 – *Stichting Baksteen*, 1994 OJ L131/15.

[16] Ibid, para 6.

restructuring would be carried out in acceptable social conditions; (iii) consumers were given a fair share of the resulting benefit; (iv) in the long term, the industry would be restored to health and offering competitive supplies; (v) in the short term consumers would continue to have a choice of supplier and security of supply. The Commission accepted that the effect on prices would be offset by diminishing stockpiling costs. The measures were considered indispensable to the attainment of reduction in capacity. The parties would not have been willing or able, in the absence of coordinated action, to make capacity cuts: certain producers had only one kiln and were thus technically incapable of making any capacity cuts; other producers would not have decided to reduce capacity if there was no certainty that competitors would follow their example and provide financial support. The reader is slightly surprised that the outcome was positive.

FNCBV[17]

The *Dutch Brickmakers* case may have engendered, ten years later, optimism as to the prospects for an agricultural crisis cartel. But it was not to be. In December 2006 the then Court of First Instance dismissed an action brought by four French federations of farmers and one French federation of slaughterers. The Court upheld a widely publicized Commission Decision[18] which imposed substantial fines on the federations for concluding a minimum price agreement and agreeing to suspend or at least limit beef imports into France from other Member States. The circumstances were exceptional. The agreement was concluded in an atmosphere of crisis and tension fuelled by widespread demonstrations by farmers, with some tacit tolerance and even support from the French government. (France has an intriguing history of vulnerability to rioting farmers.)

Farmers' organisations relied on the following factors: (i) drop in the consumption of beef as a result of the 'mad cow' crisis; (ii) intervention measures taken by the Community and national authorities aimed at restoring balance in the beef market; (iii) loss of consumer confidence, linked to the fear of 'mad cow' disease; and (iv) the situation of farmers who, despite Community adjustment measures applied by France, were faced with slaughterhouse entry prices for cows which were falling again, while consumer prices remained stable. The Court found that it constituted a restriction 'by object' and rejected attempts by the parties to invoke exceptional circumstances. Equally, the Court refused to accept that 'the freedom of trade unions to protect their collective interests justified conduct which infringed Article 81(1) of the EC Treaty'.[19]

[17] Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, *upheld on appeal:* Joined Cases C-101/07 and 110/07 *Coop de France bétail et viande and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission* [2008] ECR I-10193.

[18] Commission Decision of 2 April 2003 – *French Beef*, 2003 OJ L209/12.

[19] *FNCBV*, paras 81–94, inducing the regulated character of the market, the ministerial intervention, and the background of the crisis.

The applicants went on to argue that the agreement should benefit from the exemption in Regulation 26/62[20] for activities related to production and trade in agricultural products which are necessary for realizing the objectives of the common agricultural policy. The Court rejected this argument, as the agreement did not stabilize the market or aim to ensure a fair standard of living for the agricultural community, two objectives of the policy.

Alternatively, the applicants asked for a substantial reduction of the fines imposed by the Commission (€12 million (FNSEA); €1.44 million (FNB); €600,000 (JA); €144 million (FNPL); €720,00 (FNICGV); €480,000 (FNCBV)), and indeed, the General Court took into account the economic context of the agreement, but only for purposes of setting the amount of the fine. Here the Court increased the 60% reduction granted by the Commission to a 70% reduction due to the exceptional circumstances of the mad cow crisis and the fact that the agreement was exclusively between federations dealing with two levels of the production chain of a basic agricultural product,[21] a slightly curious rationale for an unsurprising concession.

Irish Beef[22]

More recently, in December 2008, *Irish Beef* concerned an agreement between Irish beef processors to set up the Beef Industry Development Society (BIDS) in order to reduce production overcapacity on the Irish beef market. BIDS produced a rationalisation plan which provided, *inter alia*, for a reduction in capacity of the beef processing industry by 25%. Under the plan, BIDS would offer a standard contract to processors withdrawing from the market (the goers) to whom a compensation payment would be made from a fund generated by a levy on members of BIDS remaining in the sector (the stayers). The Irish Competition Authority challenged the plan, and a reference to the ECJ followed. The Dutch brickmakers and the Italian petrochemical producers fared a lot better.

The ECJ viewed the BIDS arrangements as being intended to enable several undertakings to implement a common policy whereby some processors would be encouraged to withdraw from the market in order to reduce the overcapacity problem which was affecting the beef processors' profitability by preventing them from achieving economies of scale.[23] But each operator should independently determine its own commercial behaviour on the common market, rather than through coordination with others.[24]

[20] Council Regulation 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products, 1962 OJ 30/993, Special Edition 1959-1962, page 129.

[21] *FNCBV*, paras 360–361.

[22] Case C-209/07 *The Competition Authority v Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats* [2008] ECR I-8637.

[23] Ibid, para 33

[24] Ibid, para 34.

In so ruling, the ECJ rejected the argument made by BIDS that the arrangements could not constitute a restriction of competition 'by object' as their intention was not to restrict competition but to rationalise and make more competitive the beef industry by reducing production over-capacity:

> [E]ven supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, *such considerations are irrelevant* ... Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives ....[25]

The arguments in favour of the structural reasonableness of the BIDS deal could be considered, if at all, only in the context of an exemption under Article 101(3) TFEU. However, we learn from *GSK Spain*[26] that the merits of an unwelcome request for exemption must be fairly considered. Such agreements will not be considered as *per se* illegal, since it is theoretically possible that they satisfy the criteria of Article 101(3) TFEU. But winning the argument will not be easy.[27]

Conclusion on industrial policy and competition law

Blessing a crisis cartel has not been known in Europe for about 20 years and seems unlikely now. It seems that industrial restructuring agreements would most probably be considered unlawful.[28] Although there are precedents from the 1980s and 1990s, and although the rationales of those decisions are not time-sensitive,

[25] Ibid, para 21 (emphasis added).

[26] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969.

[27] Joined Cases 56/64 and 58/64 *Établissements Consten SARL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, paras 342, 343 and 347; Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para 85; Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 233.

[28] See the Contribution on Crisis Cartels submitted by the European Union to Session III of the OECD's Global Forum on Competition, 17–18 February 2011, DAF/COMP/GF/WD(2011)20, 27 January 2011. According to the Commission a 'crisis cartel' (Contribution to the Global Forum, paragraphs 5 and 38) may only be tolerable in the rare event that competitive market forces alone would not remove excess – structural (and not cyclical) – overcapacity. Such structural overcapacity only exists 'where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term.' (XIIth Report on Competition Policy (1982), point 38). True, there may be situations in which market forces alone will not be able to remedy problems of overcapacity. This rare event is, according to the Commission, marked by the high costs of giving up overcapacity and stable, transparent and symmetric market structures. Thus, the undertakings involved would be reluctant to give up overcapacity but will rather wait and suffer economic losses for a while until competitors exit the market (Contribution to the Global Forum, paragraphs 8–11, and 42). This is referred to as a 'war of attrition' which could lead to a severe waste of economic resources (Contribution to the Global Forum, paragraphs 8 and 11). Hence, this could substantially harm the industry's competitiveness and ultimately even affect consumers (Contribution to the Global Forum, paragraph 11). Thus the Commission does not entirely close the door on an exemption, but confirms that the door is very stiff.

it is not likely that future parties will be able to invoke them in the present era. Again, we may be surprised, as times are hard.

3. Cautious deference to regulation

Competition law often has to consider specific policy objectives pursued by national legislation or professional organisations. Policy objectives, when expressed in specific regulations, may restrict competition at the expense of promoting a public policy goal. The European Courts have often had to reconcile public policy grounds as set by the Member States (or as borne in mind by Member States when acting) against their potential anticompetitive effect. Some of these disputes have touched the very interesting topic of private freedom of initiative, and even private concertation, within a context of public regulation. Where the regulator acts as the industry recommends, or in other circumstances acts so as to narrow the scope of independent action for individual businesses, the usual rules govern the private operators.

There are a number of disparate authorities, and it is not easy to fit them into a consistent analytical framework. I propose to divide the authorities into three categories: (i) national legislation, notably as to price, where the Member State argues that it does not actively favour anticompetitive arrangements or reinforce their effects, (ii) regulation of professional organisations, notably in sport and (iii) specific social policy objectives.

In *Pascal Van Eycke*,[29] the Court had to review the Belgian legislation governing the interest which may be paid on savings deposits. The interest rates advertised by the banks were reduced after the adoption of the legislation. This legislation had to be viewed in its legal and economic context, as the interest on savings had been exempt from taxation, and there was a significant increase in interest rates which led also to a significant increase of interest on loans. As the self-regulatory attempts to address these problems had failed, the Belgian Ministry of Finance imposed a regulation that fixed the maximum level of the basic interest rate with respect to tax exemptions. Mr. Van Eycke suspected that the rates he was paying were not set purely by market forces. He did not win, but he moved the law forward a little.

The Court held that:

> Articles 85 and 86 of the Treaty are per se concerned only with the conduct of undertakings and not with national legislation. Articles 85 and 86, in conjunction with Article 5, require the Member States not to introduce or maintain in force measures, even of legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, if a Member State were to require or favour the adoption of agreement, decisions or concerted practice contrary to Article 85 or to

[29] Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769.

reinforce their effects, or to deprive its own legislation for taking decisions affecting the economic sphere.[30]

Therefore, the Court did not consider the national legislation to be problematic.

In the later case of *Meng*,[31] the Court was forced to clarify its position. What if the Member State adopts legislation clearly prohibiting normal competition, but there is no direct evidence that there are or were any agreements between undertakings which were favoured or required or whose effects were reinforced, and the legislation does not delegate powers to private traders?

German administrative bodies adopted rules forbidding insurance brokers from providing rebates to customers corresponding to part or all of the commission which the brokers received from insurers on issuance of a policy; the rules applied in the fields of health and liability insurance. Another way of describing the practice would be as a prohibition of price competition between brokers. While there was no evidence of agreements in these sectors, there had apparently been agreements in other insurance sectors. Meng, a broker prosecuted for infringing these rules (that is, for being unfairly price-competitive), challenged the rules, among others, for their incompatibility with the competition rules of the Treaty.[32]

The stakes in the case were high. The Commission tried to extend the *Van Eycke* test by claiming that Member States may not 'adopt a public measure which restricts competition taken with the specific purpose of permitting undertakings to avoid application of Articles 85 and 86 without some public interest being claimed in support'. Repeating the *Van Eycke* formula, the Court stated that there were no agreements to which to link the regulations, and no delegation. The fact that there might have been agreements in neighbouring sectors of the insurance industry was irrelevant; the required agreement had to be in the same sector.[33]

The Court also took a cautious line in *Ohra Schadeverzekeringen NV*,[34] which involved a prosecution for infringements of a Dutch law prohibiting insurance companies from granting rebates to those whom they insured. The Court stated that the Dutch rules neither imposed nor encouraged an illegal understanding between those in the insurance industry. The rules in question did not therefore reinforce an anticompetitive understanding and, moreover, had not been preceded by any private sector agreement or understanding. In addition, private-sector operators were given no individual responsibility by the legislation for its

[30] Ibid, para 16.

[31] Case C-2/91 *Wolf W. Meng* [1993] ECR I–5751.

[32] See further Ian Forrester and Christopher Norall, 'Annual Survey of Competition Law', 13 *Yearbook of European Law* 427, 480–481 (1993).

[33] See also Hans Gilliams 'Competition Law and Public Interest: Do We Need to Change the Law for the (Liberal) Professions', in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and (Liberal) Professions* (Hart Publishing, 2005) p 11: 'The regulation that the public authorities had imposed was preceded by a (presumably illicit) agreement between undertakings, and the Commission had pointed out to the ECJ that the public regulation in essence had reproduced the substance of that agreement. The Court nevertheless refused to confirm the applicability of Article 81 EC to the regulation.'

[34] Case C-245/91 *Ohra Schadeverzekeringen NV* [1993] ECR I-5851.

implementation. The legislation itself imposed the prohibition for which Ohra was being prosecuted.

A similarly abstemious approach was followed in *Reiff*.[35] The facts were different in that they involved the setting of road freight tariffs by boards composed of experts selected by the federal Ministry of Transport from a list of nominees recommended by industry members and trade associations. The relevant law provides that the members of the boards would serve in an honorary capacity and would not be bound by orders or instructions (from the companies or associations who paid their salaries, for example). The Minister could attend meetings or send a representative. An advisory committee could issue an opinion on each tariff rate proposal, and the Minister must either approve the rate or impose a different one.

Had the Court felt bolder, it could have observed that if they occurred in a private manner, the meetings of the members of the tariff boards would manifestly have infringed the rules; the Court could also have enquired whether in reality the rates proposed were routinely endorsed by the Minister or whether in reality the board's recommendation was no more than a recommendation. A private cartel which enjoys the chance of having its determinations made legally compulsory is indeed in a most privileged position. The term 'unholy alliance' has often been given to the willing co-operation between the private sector and the public sector to impose private sector decisions by public law compulsion.

The judgment did not give *carte blanche* to unholy alliances. It noted that in the present case the members were independent experts given the job of fixing tariffs in the general interest, subject always to the supervision of public bodies which could overrule them. The Court cautiously held that in these particular circumstances, the EC Treaty did not prohibit such an arrangement.[36] The fact that three cases were decided in parallel suggests that the Court knew well what it was doing. Any *référendaires* who longed for excitement were disappointed. Likewise, in *Arduino*,[37] the legality of a scale setting the minimum and maximum fees chargeable by lawyers in Italy for their services survived hostile analysis. The Italian Ministry of Justice adopted the scale on the basis of a draft prepared by the governing body of the Italian Bar. Before approving a fee-scale, the Ministry was obliged, under a statutory procedure, to consult the Italian Council of State and the Inter-ministerial Committee on Prices. Arduino was a disappointed client. The Court was asked to give its ruling on whether Articles 10 and 81 EC (now Article 4(3) TEU and Article 101 TFEU) precluded Member States from adopting a measure, in accordance with statutory procedures, approving a tariff fixing minimum and maximum fees.

The ECJ held that, although the EC competition rules focused on the conduct of undertakings, Article 81 (read in conjunction with Article 10), prohibited Member States from adopting rules rendering the application of EC competition law ineffective. Articles 10 and 81 were infringed:

[35] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [1993] ECR I-5801.

[36] Forrester and Norall, 'Survey', cited above note 32, at 482.

[37] Case C-35/99 *Manuele Arduino and Compagnia Assicuratrice RAS SpA* [2002] ECR I-1529.

> where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.[38]
>
> In that regard, the fact that a Member State requires a professional organisation to produce a draft tariff for services does not automatically divest the tariff finally adopted of the character of legislation.[39]

The Court noted that the draft required ministerial approval before it could enter into force, and that the Italian courts might depart from the maximum and minimum limits. The Italian State could therefore not be said to have delegated to private economic operators responsibility for decisions affecting the economic sphere (which would have the effect of depriving the provisions of the character of legislation). Thus, the fee schedules were held to be legal, a remarkable outcome: a trade association imposed a tariff on its members in the public interest, but did so with legislative backing, and the measure was lawful.[40] The Commission was, predictably, disappointed and sought to limit the scope of the doctrine.

The same question on Italian lawyers' scale fees arose in the *Cipolla* case.[41] The question was whether the Court could be persuaded to be somewhat bolder than in *Arduino*. The Commission called for a reconsideration of *Arduino*, amongst others, in light of the opinions of Advocates General Jacobs[42] and Léger[43] who suggested a three-fold test: (1) the public authorities of the Member State concerned exercise effective control over the content of the agreement; (2) the State measure pursues a legitimate aim in the public interest, and (3) the State measure is proportionate to the aim which it pursues. The proportionality test put forward by Advocates General Jacobs and Léger would have left a door open to challenge the details of specific tariffs.[44] But the judgment in *Cipolla* closely follows that in *Arduino,* with the Court focusing on the procedural guarantees that ensure that the tariffs are in the general interest, and not just in the interest of the bar association that fixes the draft tariff. Not a great surprise.[45]

4. Deference to professional organisations and their regulations

Public policy considerations also play a role in self-regulation of professional organisations which inevitably limit members' freedom of activity and modes of

[38] Ibid, para 34.

[39] Ibid, para 36.

[40] Ian Forrester and Jacquelyn MacLennan, 'Annual Survey of EC Competition Law', 22 *Yearbook of European Law 2001–2002* 499, 551 (2003).

[41] Joined Cases C-94/04 and C-202/04 *Cipolla and Macrino* [2006].

[42] Opinion in Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

[43] Opinion in *Arduino,* cited above note 38.

[44] Hans Vedder, 'Of Jurisdiction and Justification: Why Competition is Good for Non-Economic Goals, But May Need to be Restricted', 6 *Competition Law Review* 51, 67–68 (2009).

[45] Ibid, at 68.

behaviour. The Court seems to give what could be called deference if the restraint of the competition is justified by objective grounds relative to the proper conduct of the regulated activity. The leading case on deference to public policy-based anticompetitive regulations of professional organisations is *Wouters*.[46] A Dutch lawyer, Mr. Wouters, applied to the Dutch Bar association for authorisation to enter into partnership with an accounting firm. The Bar rules prohibited lawyers from entering multidisciplinary partnerships with accountants. Mr. Wouters initiated proceedings before the Dutch courts, and the case was referred for a preliminary ruling to the ECJ.

The Dutch Bar association was to be regarded as an association of undertakings within the meaning of Article 101(1) TFEU. The Court was also willing to accept that the Dutch ban on multidisciplinary partnerships might limit production and technical development within the meaning of Article 101(1) TFEU, and was likely to affect trade between EC Member States: indeed, it applied to foreign lawyers and accountancy firms wishing to form partnerships with practitioners in several Member States. The Court concluded that the regulation was liable to have an effect on competition. This was not a controversial conclusion, since multi-disciplinary partnerships were under consideration, Arthur Andersen had entered into association with large law firms, and Bars (and professions) were divided as to how to provide for such challenges. Some forbade this form of economic activity, a few did not.

However, the Court then went to examine whether the resulting restrictions were inherent for the pursuit of those objectives, noting that:

> not every agreement between undertakings or every decision of an association 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 [Article 101(1) TFEU]. For the purposes of application of that provision to a particular case, 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*.[47]

The Court upheld the right of a Member State to establish rules governing the exercise of a professional activity in its territory, and accepted the Bar's argument that its rules were needed to promote the independent giving of legal advice and avoid conflicts of interest.[48] The ECJ attributed much weight to the freedom

[46] Case C-309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

[47] Ibid, para 97.

[48] Ibid, para 99: 'in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83 Klopp [1984] ECR 2971, paragraph 17, and Reisebüro, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.'

of the Bar to regulate its own affairs and, in so doing, to restrict the freedom of its members to engage in certain activities. It held that the anticompetitive restrictions resulting from the regulation do not go beyond what is necessary to ensure the proper practice of the legal profession. The Court did not pursue a lowest common denominator approach, and clearly did not try to second-guess the Bar's rules. Accordingly, the EC competition rules did not prohibit the taking of a carefully considered measure by the Bar,[49] which disallows a quite large category of potential economic activity. The collapse of Arthur Andersen in the wake of the collapse of its client Enron has subsequently cooled the enthusiasm for professional experimentation (critics might say miscegenation).

Wouters was followed by a more specific case, *Meca-Medina*,[50] where the two European Courts reached their parallel conclusions by very different routes. Mr. Meca-Medina and Mr. Majcen were two professional athletes who competed in long-distance swimming contests. They tested positive for Nandrolone and in consequence were suspended by the International Swimming Federation under the Olympic Movement's Anti-Doping Code. The two athletes complained to the Commission, alleging that the International Olympic Committee's rules on doping control were not compatible with the Community rules on competition and freedom to provide services. Following the Commission's rejection of their complaint, they brought an action before the CFI to have the decision set aside.

The CFI dismissed their action and held that the rules on doping did not fall within the scope of Community competition law. By contrast, on appeal, the Court of Justice held that sport is subject to Community law insofar as it constitutes an economic activity, and that the punitive nature of the rules at issue and the magnitude of the penalties applicable if they were breached were capable of producing adverse effects on competition. Rules of that kind could indeed prove excessive, owing both to the way in which the circumstances in which penalties for doping might be imposed were distinguished from those in which they were not, and to the severity of those penalties.[51] To escape the prohibition on distortion of competition laid down by the Treaty, the restrictions imposed by those rules must be limited to what is necessary to ensure the proper conduct of competition.[52] However:

> As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[53]

[49] Forrester and MacLennan, 'Survey', cited above note 41, at 549

[50] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991.

[51] Ibid, para 42: 'The compatibility of rules with the Community rules on competition cannot be assessed in the abstract. Not every agreement between undertakings or every decision of an association 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 [101 TFEU]. For the purposes of application of that provision to a particular case, *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 and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters and Others, paragraph 97) and are proportionate to them.*' (emphasis added)

[52] Ian Forrester, Jacquelyn MacLennan and Assimakis Komninos, 'Annual Survey of EC Competition Law', 27 *Yearbook of European Law 2005–2006* 521, 540 (2008).

It did not appear that these restrictions went beyond what was necessary to ensure that sporting events took place and function properly. Thus the anti-doping measures under challenge were legitimate and proportionate regulations which were within the scope of the competence of the body adopting them. Thus constitutionally the measures did not escape scrutiny under the competition rules, but they were to be respected as a good faith effort to address an important problem.

However, matters were treated differently in another case concerning sport, *Piau*,[54] on the regulation of football players' agents. Mr. Piau challenged the FIFA Players' Agents Regulation as being anticompetitive. The Court noted that 'the regulation was adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest'[55] unlike the case of *Wouters*. *Piau* suggests a different treatment of cases where the regulation is adopted by private bodies with conferred rule-making power and private bodies applying their internal rules. There seems to be an evident contrast with *Meca-Medina*. The Court nonetheless went on to conclude that the rules on agents were, on their merits, a proportionate and appropriate way to prevent abuses and to protect players. The CFI did not apply the *Wouters* test under Article 101(1) but under Article 101(3) TFEU, and concluded that restrictions stemming from the compulsory nature of the licence might benefit from an exemption. The existence of the regulation was justified by the past behaviour of the players' agents that harmed players and clubs, financially and professionally and 'FIFA's objective to raise professional and ethical standards for the occupation of players' agent in order to protect players who have a short career.'[56] So although the rule-maker had not been publicly endowed with a public function, what it did on its merits deserved endorsement, although the conditions for exemption under Article 101(3) TFEU refer to economic benefits and not public policy benefits.

In *Wouters* and in *Meca-Medina*, the ECJ held that not every agreement or decision restricting the freedom of action of undertakings (or of one of them) necessarily falls within the prohibition. In order to decide whether the Article 101(1) TFEU prohibition applies, national courts and the national competition authorities should consider public interest issues, in spite of the restriction of certain parties' freedom of action. Provided the effect on competition results from the pursuit of those objectives, the prohibition may not apply. Put another way, the ECJ confirmed that the competitive rules of the Treaty are not governed exclusively by competition law concerns in sporting matters. Other legitimate

[53] *Meca-Medina*, cited above note 50, at para 43.

[54] Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, *appeal dismissed*, Case C-171/05 [2006] ECR I-37*.

[55] Ibid, para 74.

[56] Ibid, para 102.

considerations should be respected. If the measures concerned are necessary for a worthwhile purpose (the promotion of the integrity of the legal profession was one such), they may be objectively justified and fall outside the prohibition of the competition rules.[57] The CFI seemed to conduct a similar analysis in *Piau*. Although it had to evaluate if all of the conditions for exemption under Article 101(3) TFEU are met (which only refer to economic benefits and not public policy benefits) it also referred to policy reasons behind the regulation.

Collective bargaining

A good example of cartellised behaviour with strong economic consequences is wage negotiations between employers and trade unions. The ECJ appears to have created a specific category of public policy exceptions from competition law for 'collective bargaining agreements'. In *Albany*,[58] the ECJ held that agreements concluded in the context of collective negotiations between management and labour, by virtue of their nature and purpose, fall outside the scope of Article 101(1) TFEU, where the purpose of the agreement is to improve conditions of work and employment.[59] The Court said in particular,

> it 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 101 TFEU 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 … 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 101(1) TFEU.[60]

The Court seems to be willing to give a free pass to some social policy objectives of Member States and exclude assessment of agreements concluded for the execution of these objectives under competition law. The open question is how broad is the category of social policy objectives to which the Court will grant automatic deference without analysing the anticompetitive nature of the agreements in these areas.

The Court's decision in the celebrated *Bosman*[61] case is not easy to reconcile with *Albany*. Mr. Bosman was the hero and victim of a challenge to the rule

[57] Forrester and MacLennan, 'Survey', cited above note 41, at 550.

[58] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

[59] Heike Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship', EUI Working Paper 2007/30, at p. 4.

[60] *Albany*, cited above note 59, paras 59–60.

[61] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

whereby when a new club hired a young professional footballer, even if he was out of contract and was free to accept employment, the new club should pay a 'training indemnity' to the old club in recognition of its contribution to the development of the player in his early days. The rule was intended to reward, and actually did reward, grassroots efforts to develop talent and also to share revenues between wealthier and poorer clubs. The rule was said to be indistinctly applicable to domestic and international transfers. Mr. Bosman's transfer from Liège to Dunkirk fell through because the Belgian football authorities did not supply promptly to the French football authorities the paperwork to allow him to play professionally in France. The question was whether the practice was to be examined under the rules of competition or of free movement of workers. The former presented the difficulty that was articulated in *Albany*. The latter presented the difficulty that Article 48 EC (now Article 45 TFEU) applied to public sector restrictions, not private sector ones.

Article 48 EC had always been applied to governmental discrimination against foreigners. It had never been applied to private arrangements which regulated the structure of an employment market. The exceptions provided in Article 48 address public policy, public security and public health. It was difficult to see how these might be relevant to the problems of private employment, because Article 48, while relevant to government action, was ill-adapted to deal with the details of employment relationships. It was assumed that Article 85(1) would be more relevant in that football associations agreed between each other upon rules to govern the transfer of out-of-contract players. However, it was unclear what would be the consequences if collective bargaining agreements were to fall within the scope of Article 85(1). Should concertation between employers, or between unions, or between the two, concerning terms of employment be regarded as vulnerable under the competition rules?

The case created huge media interest. There were numerous television crews swarming around the Court on the day of the oral argument, and a flood of extravagant reports about footballer slaves awaiting their freedom, or football clubs awaiting extinction.

The football authorities contended that the transfer fee system applies to every professional player; if the formality of a transfer certificate (domestic or international, as the case may be) applied to all transfers, the obstacle to freedom would not be obvious (Mr. Bosman claimed that international transfers were more difficult than domestic transfers; UEFA denied this):

> those rules [regarding transfer fees] are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.[62]
>
> Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee

[62] Ibid, para 99.

> agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.[63]

The consequence of the judgment was that Article 48 applied to a private sector measure which imposed financial obstacles to taking up a profession or a job whether the job was taken in one's own country or another country. This was a quite radical position, a surprise for most observers.

> although the rules ... apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers.[64]
> Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty.[65]

Thus, Article 48 could apply to the transfer rules. Did this mean they were absolutely prohibited? Or could they be justified, and if so, by reference to what concepts? The Court said an exception to Article 48 could be available

> if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to [respect the principle of proportionality by not being too burdensome]. [66]

If the Court had stopped there, transfer rules could have been legal if they were economically justifiable, in the public interest, and proportionate. It would have been for national courts to decide in particular circumstances whether given rules or given applications of the rules were legitimate. But the Court did not stop there. It went on to discuss the detailed factual justifications offered for transfer fees, and condemned those justifications.

> In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.[67]

This must have been welcome reassurance. But

> The application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.[68]

[63] Ibid, para 100.
[64] Ibid, para 103.
[65] Ibid, para 104.
[66] Ibid, para 104.
[67] Ibid, para 106.
[68] Ibid, para 107.

Assuming this to be true, the virtue of transfer fees was not that they remove the benefits of wealth from wealthy clubs, but that smaller clubs were given financial benefits. Thus transfer payments from wealthy clubs to smaller clubs were, according to the football authorities, a valuable mechanism for redistribution of income within the sport.

> It must be accepted that the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players.[69]

This was a recognition of what could be a pressing reasons of public interest. But:

> because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.[70]

This paragraph seems unconvincing, though I am ready to confess the narrow-mindedness of a disappointed advocate. Why should uncertainty of outcome be a bad thing for an economic organization, especially in the field of sport? However, if training young players may be a lawful justification for the transfer rules, why should it be unlawful because of the difficulty of matching the fee generated by one player's transfer with the costs of training that player? Of course a club's earnings in this manner were contingent and uncertain. But many clubs (like Brechin Rovers, Brønby and others) earned vital income in this manner when their young stars moved on to bigger clubs.

The Court thus concluded:

> Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.[71]

The Court said that there was no need to consider the legality of the system under the competition rules for as long as the transfer system was illegal under a different part of the Treaty. The debate continued!

5. 'It is not for you to decide'

The EU Courts' jurisprudence and the Commission's decision-making practice have also generated another group of public policy cases where private practices

[69] Ibid, para 108.
[70] Ibid, para 109.
[71] Ibid, para 114.

are rejected under the competition rules, even though public policy arguments are invoked.

'Safety would be at risk'

Hilti AG v Commission[72] concerned the disposition of the appeal against the 6,000,000 ECU fine imposed in December 1987 on the largest producer of nail guns, nails, and cartridge strips in Europe. The proceedings before the Commission seem to have been rather bad-tempered, and the intensity of the debate before the Court seems also to have been particularly vigorous. The question was whether Hilti could properly forbid the use of rival nails on its guns, on the grounds, *inter alia*, of safety.

The Court upheld the Commission's finding that nail guns, nails, and cartridge strips constituted three different markets. Hilti had argued that there was only one market for fixing systems of all brands made by all manufacturers. The Court rejected this argument, stating that in the absence of other legislation all producers were free under Community law to make products designed for use with other producer's devices, unless by so doing they violated a patent or other intellectual or industrial property right. If Hilti were correct, nail gun producers could exclude the use with their equipment of products other than those bearing their own trademark.

Hilti's arguments about the alleged incompatibility or inferiority of its competitors' nails, which Hilti claimed were unsuitable for Hilti nail guns, were rejected. A company in a dominant position could not, on its own initiative, take measures to eliminate from the market products it considered dangerous or at last inferior in quality to its own. The Court noted that Hilti had not taken any legal steps to establish that its competitors' products were dangerous when used with Hilti products. A company's interpretation of national rules on a producer's responsibility for its own products could not prevail over the Community's competition rules. This is the line which has broadly been followed thereafter. It is not likely that an enforcer of the competition rules will refrain from applying the otherwise applicable rule by reference to private concerns about safety; but cases will arise where products manifestly present regulatory challenges and where it would be reckless to ignore these.

'The publicly-conferred privilege is antiquated and discriminatory'

It regularly happens that privileges conferred by a public authority have an effect on competition and are challenged for that reason. One may contrast the

[72] Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439.

grant of exclusive access to a cemetery (*Bodson v Pompes Funèbres*)[73] with the grant to a docking company of a compulsory exclusivity reinforced by a nationality clause.

In *Merci Conventionali Porto di Genova SpA v Siderurgica Gabriella SpA*,[74] an Italian steel company and the company which had been given the exclusive right to operate in the port of Genoa were in litigation over the charges for port services, which the customer regarded as excessively costly and inadequate. Article 110 of the Codice Navigazione provided that unloading operations in the port of Genoa must be reserved to docking companies whose workers were Italian nationals. The Genoa court referred a number of questions concerning the propriety under Community law of the state of affairs which prevailed in the port, and which apparently had the effect of obliging the unfortunate shipper to pay a lot of money for undesired services. The European Court observed that a port undertaking which had the exclusive right to perform port operations for a third party was indeed an undertaking granted exclusive rights by a Member State within the meaning of Article 90(1) EEC (now Article 106(1) TFEU). As a result, Member States could not enact or maintain in force any measure which was contrary to the rules of the Treaty. Article 48 EC prohibited a Member State from adopting provisions reserving to its own nationals the right to work in a national enterprise.

As regards the exclusive rights given to certain enterprises at the port, the Court recalled that an enterprise which enjoyed a legal monopoly in a substantial part of the Common Market could be dominant, and had no difficulty in concluding that the market for unloading services at the port of Genoa was sufficiently large to constitute a substantial part of the Common Market. Merely creating a dominant position by granting exclusive rights was not in itself incompatible with Article 90. However, the result would be different when the enterprise endowed with these rights was led to exploit its dominant position in an abusive manner by the mere exercise of the rights conferred upon it, or where such rights were liable to create a situation where the enterprise would be tempted to abuse its position. The Court then observed that the national regulations in question were liable to encourage or to permit the payment for services not requested, the charging of disproportionately high prices, or the refusal to use modern technology in favour of slower and more costly techniques, or to grant price reductions unless at the same time charging other users more. The Court therefore held that the Member State, by adopting a rule such as was before the Court, had created a situation contrary to Article 90. Postal delivery services are another area of contention, where cost-efficiency and public service seem to be opposed.

[73] Case 30/87 *Corinne Bodson v Pompes Funebres* [1998] ECR 2479.

[74] Case C-179/90 *Merci Conventionali Porto di Genova SpA v Siderurgica Gabriella SpA* [1991] ECR I-5889.

'The technology leads to unfair competition'

Italy v Commission[75] was procedurally unique in that one Member State was appealing against a competition decision condemning the practices of a public entity in another Member State and even more intriguing in that the government of the other Member Stare intervened in support of the Commission. In 1982, the Commission had condemned British Telecom under Article 86 EEC, finding that it had abused its dominant position by restricting UK message-forwarding agencies from relaying telex and telephone messages originating outside the UK to other countries. British Telecom said that it applied the restrictions only because of international agreements to which it was party along with other national telecommunication authorities. The fact that British Telecom did not appeal against the Commission's decision and that the British Government intervened in support of the Commission against Italy's appeal suggests strongly that British Telecom was glad to be free of an inconvenient agreement. In those circumstances, it must have been evident that Italy's prospects of success were not good. Italy argued that a public entity's activities could be challenged under Article 90 EEC or, conceivably, Article 169 EEC, but not under Article 86 EEC. The Court replied that the management of a telecommunications network was a business activity subject to Article 86. The practices complained of were not compelled by the Government or by statute. The Court also rejected the suggestion that a national monopoly can maintain schemes intended to preserve its monopoly, since otherwise there could be a breach of Article 222 EEC (Article 345 TFEU), which states that national rules on property ownership shall be unaffected by the Treaty. Then the Italian Government asserted that the message-forwarding agencies in question were abusing the public network

> ... by using special equipment, which with the aid of computer techniques enable a large number of messages to be forwarded in a very short time.[76]

The Court answered first that this had not been proved, and then added, more significantly:

> In the second place the employment of new technology which accelerates the transmission of messages constitutes technical progress in conformity with public interest and cannot be regarded *per se* as an abuse.[77]

In dealing with the interpretation of Article 90(2), the Court tartly pursued this point in quite capitalist terms:

> It should be observed that, whilst the speed of message-transmission made possible by technological advances undoubtedly leads to some decrease in revenue for BT, the presence in the United Kingdom of private forwarding agencies attracts to the British public network, as the applicant itself oversees, a certain volume of international

[75] Case 41/83 *Italy v Commission* [1985] ECR 873.
[76] Ibid, para 24.
[77] Ibid, para 26.

> messages and the revenue which goes with it. The Italian Republic has totally failed to demonstrate that the results of the activities of those agencies in the United Kingdom were, taken as a whole, unfavourable to BT, or that the Commission's censure of the schemes at issue put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view.[78]

Finally, the Court stated that the international agreements which bound British Telecom did not, in fact, proscribe the practices which British Telecom was reluctantly prohibiting on the basis of the agreements. The result of the appeal was not, in all the circumstances, very surprising. However, the judgment was important as the national operator maintained direct control of individual subscribers' use of the network, and strongly discouraged the intervention of intermediaries who offered a better deal to subscribers. The case is authority for the proposition that avoiding the use of better technology is a bad reason for prohibiting the use of superior technology. The public policy seemed unpersuasive and the Court condemned it.

'The need for numbers'

Decca Navigator System[79] presented a complex and intriguing decision under both Article 86 EEC and Article 85 EEC in a field (maritime radio navigation systems) bordering on a public service. The facts, in addition to being dense and complicated, certainly encouraged the Commission to present the case as a populist defence of users against monopoly power which had been applied in a way which seems to have been almost callous.

Racal Decca developed and operated a system known as the Decca Navigator System (DNS) based on transmission of signals from groups of land-based stations which are received by special receivers on ships or boats at sea. Racal Decca provided the signals in the UK and Denmark. It was also the principal manufacturer of receivers, which it hired out or, after 1983, sold, the proceeds being used to finance the operation of the system. With the arrival of competing suppliers (one a subsidiary of Philips) in the early 1980s, Racal Decca resorted to a combination of litigation, negotiation based on a dubious claim of copyright in information relating to DNS, and altering the frequency of signals (thereby apparently causing some navigation difficulties to boats using even Racal Decca's own equipment). It succeeded in concluding agreements with two of the competing suppliers which essentially assigned the market for pleasure boats to them, reserving commercial shipping to Racal Decca; these were notified to the Commission, which also received complaints.

The Commission found that Racal Decca was dominant in the separate markets for transmission of signals (despite arguments that there could not be a market for

[78] Ibid, para 33.
[79] Commission Decision of 21 December 1988 – *Decca Navigator System*, 1989 OJ L43/27.

a service for which there was no distinct payment) and supply of the receivers. The abuses were the agreements with the two suppliers, which excluded them from the commercial market, and the changes in signals, which obstructed or coerced those competitors who were unwilling to enter into such agreements.

However, the Commission seems to have made heavy weather in dealing with some of Racal Decca's defences. Racal Decca said its service was costly to operate, and it needed a guaranteed source of revenue to finance it. The Commission replied righteously that:

> no undertaking has the right to ensure the continuation of its business by means which infringe ... competition law. Therefore, the criticized behaviour remains abusive even if there were no other alternatives to those of ceasing to supply and abandoning the market for DNS transmissions.[80]

It went on to find that alternative solutions were available, namely, either having the transmission chains taken over by the State and running them for the State on a service basis (as had been done in most countries), or, when the technology became available, equipping the receivers with renewable electronic devices which would have to be purchased from Racal Decca. However, one may feel that the idea that Article 86 might have the effect of compelling dominant enterprises to sell their business to the State is a little startling. Again, rather unpersuasive public service arguments were indignantly rejected.

The civil religion of parallel trade

For a young competition lawyer of my generation in Europe, it was axiomatic that competition law favoured parallel trade, and that contractual hindrances to parallel trade were the easiest way to incur a fine. At a time when enforcement was rather passive and not very investigative, the existence of a contractual ban was simple to verify. Defences criticising free-riding or arguing that the ban had not been enforced were always unsuccessful. Fines rose to levels deemed high in those days (the fines in the *Pioneer* cases[81] in 1979 were a watershed at some ten million dollars), and all sorts of products were targeted (clothes, alcohols, construction materials, tennis balls, cars). If enforcement policy were a tree, by far its biggest branch would be parallel trade.

Academic criticism in the 1980s and 1990s of what I have called the 'civil religion' of parallel trade focussed more on the absence of effects and the textual absolute nature of the infringements than on whether consumers were really better off as a result. One can debate whether the policy was a diversion from better targets like cartels or state aids, or for its time made good sense. Today the Common Market is more economically diverse than ever, and price discrimination may be wise commercial policy. Indeed, without price discrimination, lower-

[80] Ibid, para 113.

[81] Commission Decision of 14 December 1979 – *Pioneer Hi-Fi Equipment,* 1980 OJ L60/21.

priced markets might never be served at all. It is probably desirable that the classic and unique feature of EU public policy as to competition should be reappraised.

I suggest that the most consistent theme of public policy running through forty-five years of enforcement is market integration. The policy adopted by the Commission as an enforcement priority in *Grundig v Consten*[82] and endorsed by the Court remained a very high priority for thirty-five years. Contractually banning parallel trade was close to an absolute offence so grave that not fuelling parallel trade was said to be an offence in *Bayer/Adalat.*[83] Following the judgments in that case, and following the embracing of the relevance of effects and consumer welfare, the preoccupation with helping parallel traders has diminished. The contending policies (common sense versus the civil religion) were examined in two pharmaceutical cases referred from Greece, where the volumes exported had reached astonishing levels. (Over 80% of some medicines delivered to patients and pharmacies in the UK had been put on the market in Greece at the very low Greek price and immediately exported to UK wholesalers.)

Ever larger volumes were ordered by Greek wholesalers who wanted to supply wholesalers in Germany or the UK, where prices were much higher. The core problem was how to decide the volumes of product which should be delivered to exporting wholesalers. It was agreed that there were no contractual prohibitions. It seemed strange to imagine that producers of medicines must supply the North Sea countries at the price in one of the weakest Mediterranean economies. Yet there is a rich volume of precedent blessing the activity of parallel trade. The judges addressed the gap that the *Bayer/Adalat* judgment had left open: could unilateral volume reductions by a dominant player constitute an abuse? Which policy should prevail?

In *Lelos*,[84] the ECJ broadly confirmed the legitimacy of dominant pharmaceutical companies taking steps to protect their commercial interests even if this involves limiting parallel trade. While the ECJ rejected some of the technical and economic arguments of the pharmaceutical industry as to the role of parallel trade and the worthiness of its protection under EC competition law, the judgment confirms that dominant pharmaceutical companies can refuse to supply wholesalers with 'significant quantities of products that are essentially destined for parallel export'.

The factual background to the case was as follows. In 2000 and 2001, complaints were lodged with the Hellenic Competition Commission (HCC) against GlaxoSmithKline (GSK) by a number of wholesalers, alleging that by limiting supplies of three drugs from its Greek subsidiary, GSK was abusing its dominant position. The wholesalers in question had been addressing ever-larger orders of these three medicines to GSK, mainly for export, to exploit the price differentials in prescription medicines between EU Member States. In 2000, GSK took the

[82] *Consten and Grundig,* cited above note 27.

[83] Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, *upheld on appeal*: Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittef-Importeure eV and Commission v Bayer AG* [2004] ECR I-23.

[84] Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE v GlaxoSmithKline* [2008] ECR I-7139.

decision to suspend supplies of these medicines to wholesalers for a few weeks to ensure that pharmacy supplies were restored. Subsequently, it decided to supply wholesalers with quantities corresponding to Greek annual consumption plus a safety margin (amounting up to 25% of annual Greek consumption). In 2003, the HCC referred the case to the ECJ,[85] asking whether GSK's refusal to supply, in unlimited quantities, all the orders placed by wholesalers, could constitute an abuse of dominant position.

The Court had two astonishingly divergent opinions from Advocate General Jacobs and Advocate General Colomer, so the outcome was by no means certain. In its judgment, the ECJ began by confirming that it may be an abuse of a dominant position for a dominant pharmaceutical company to prevent all parallel trade. This was not a controversial proposition as it was agreed that GSK had never prohibited all exports, but on the other hand if limitless volumes have to be delivered to Greek wholesalers at the Greek price, great financial and commercial disruption would be caused. The ECJ considered that parallel trade may in principle open up an alternative source of supply to buyers, and may bring some benefits to the final consumer. But a dominant pharmaceutical company must be able to defend its own commercial interests by adopting reasonable and proportionate measures:

> the Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceuticals company would be not to place its medicines on the market at all in a Member State where the price of those products are set at a relatively low level.[86]

The ECJ continued:

> Thus, although a pharmaceuticals company in a dominant position, in a Member State where prices are relatively low, cannot be allowed to cease to honour the ordinary orders of an existing customer for the sole reason that that customer, in addition to supplying the market in that Member State, exports part of the quantities ordered to other Member States with higher prices, it is none the less permissible for that company to counter in a reasonable and proportionate way the threat to its own commercial interests potentially posed by the activities of an undertaking which wishes to be supplied in the first Member State with significant quantities of products that are essentially destined for parallel export.[87]

Thus a dominant pharmaceutical company can protect its own commercial interests when confronted with orders that are out of the ordinary, in terms of quantity in light of both the previous business relations with the wholesaler concerned and the requirements of the market in the Member State concerned. It is for the national court to decide whether the orders placed by the wholesalers were ordinary and whether GSK's decision to limit supplies was proportionate to the need to protect its own commercial interests.

[85] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609.

[86] *Lélos*, cited above note 82, para 68.

[87] Ibid, para 71.

The ECJ thus confirmed that dominant pharmaceutical companies are entitled to adopt measures responding to – but not prohibiting or eliminating – parallel trade, and that such measures are not contrary to the EC competition rules. This was not an easy or obvious battle.

I cannot be optimistic that these disputes will end with the *Lelos* case; hence the recommendation that the civil religion be not immune from doctrinal reflection.

6. Other public policy considerations: the environment and others

The Treaty's competition rules apply to all industrial sectors. The TFEU provides only for a limited application of the competition rules in the agricultural sector, and there have been a few cases on food products, notably French spirits. However, the secondary EU legislation makes competition law applicable to agriculture with certain exemptions to Article 101 TFEU in order to ensure a proper functioning of the Common Agricultural Policy and its national organisations of agricultural markets.[88] The TFEU also provides for exemptions for nuclear energy and military equipment.[89]

There are also certain exceptions for certain agreements on rail, road and inland waterway transport aiming at technical improvements or achieving technical cooperation. There used to be a special block exemption for liner conference agreements, which in effect allowed price-fixing, market-sharing and revenue-pooling cartels, as liner conferences would bring stability to the market.[90] The scope of this exemption was narrow, however, and in a series of decisions the Commission condemned market-sharing and price-fixing arrangements which were held to fall outside the block exemption.[91] The block exemption for liner shipping was repealed in 2006 (with effect from 2008).

There are currently no specific EU rules or guidance on how environmental benefits associated with a horizontal agreement between competitors may take the agreement outside the prohibition on anticompetitive agreements,[92] but such

[88] Council Regulation 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, 2006 OJ L214/7.

[89] EU Member States may not adopt regulations that would deprive EU competition rules of their effectiveness. Thus, Member States (legislative, executive, regulatory authorities) may not adopt regulations that would encourage or force undertakings to violate EU competition law and if they do, regulations should be disapplied. A Member State, for instance, may not approve any price-fixing arrangements between companies contrary to the EU competition rules.

[90] Council Regulation 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, 1986 OJ L378/4.

[91] See, eg, Case T-86/95 *Compagnie Générale Maritime and Others v Commission* [2002] ECR II-1011; Case T-395/94 *Atlantic Container Line AB v Commission* [2002] ECR II-875.

[92] The Commission provided some guidance on the assessment of environmental agreements in its 2001 Horizontal Guidelines (Commission Notice – Guidelines on the applicability of Article 81 to horizontal co-operation agreements, 2001 OJ C3/2). However, the revised Horizontal Guidelines published in 2011 (Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements,

arguments are often made. In practice, the Commission mentioned environmental benefits in its exemption decisions, to the extent that those benefits could be subsumed under the general conditions of Article 101(3): to benefit from the exemption under that provision, the agreement must 'contribute to improving the production or distribution of goods or advance technological and economic progress' and allow 'consumers a fair share of the resulting benefit'.

Thus, for example, in *KSB/Goulds/Lowara/ITT*,[93] 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 consumers would buy them at the same price as conventional pumps. In *Assurpol*,[94] the Commission exempted 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, reasoning that due to these benefits the agreement could be seen as contributing to 'technical and economic progress'. It is difficult to know if the 'green' credentials of the deal really affected the outcome. In another case, the Commission 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.[95] One has to doubt whether environmental factors were in these cases more than background context and decorative arguments. In *DSD*,[96] 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 EU environmental legislation, this did not stop it from considering the exclusivity clauses anticompetitive and from exempting them only under specific obligations. The exemption was granted supposedly because the agreement generated environmental benefits that were considered to contribute to technical and economic progress.

There is an interesting exception to my thesis that the environment does not really shape competition policy. Indeed, it was a coordinated discontinuation of production (echoes of crisis cartels!). In *CECED*,[97] the Commission came close to treating environmental interests as a core argument for granting an exemption to a restrictive agreement, approving 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. The Commission exempted the agreement reasoning that

> [a]lthough participants restrict their freedom to manufacture and market certain types of washing machine, thereby restricting competition within the meaning of [Article 101(1) TFEU], the agreement fulfils the conditions for exemption under [Article 101(3) TFEU]: 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.[98]

Other Commission decisions show that the Commission is sceptical about justifying hard-core competition restraints such as price-fixing or output limitation, notwithstanding possible environmental benefits.[99] One striking example is *VOTOB*,[100] where the Commission condemned a Dutch industry association representing six companies offering bulk liquid tank storage facilities for agreeing on a uniform environmental surcharge to customers. VOTOB had entered a covenant with the Dutch government accepting important reductions in the firms' emissions of certain pollutants. To finance their efforts, the firms jointly decided to ask their clients to pay an environmental surcharge, and agreed on the surcharge level. The Commission reasoned that the agreement on the fixed fee harmonised the costs and thus excluded competition on an important price component and was not necessary to achieve the environmental benefits. It is difficult to reconcile the *VOTOB* and *CECED* approaches.

One of the difficulties in analysing the miscellany of arguments and rationales invoked in competition cases is knowing whether the invoked factors were taken seriously and might have made a difference to the outcome. As we can see in connection with the environment, it is unclear whether possible benefits for the environment have had the effect of changing the otherwise applicable rules of competition, or their application. By contrast, there can be no such hesitation with respect to market integration. The whole point of these cases was indeed to dispense with the otherwise necessary consideration of the economic merits of the measure at stake.

7. Conclusions

Many public policy arguments are made in the course of competition cases in Brussels and in Luxembourg. There are many cases where public policy

2011 OJ C11/1), no longer include a section on environmental agreements. The Commission's approach is that such agreements should be analysed in the framework of standardisation agreements.

[93] Commission Decision of 12 December 1990 – *KSB/Goulds/Lowara/ITT,* 1991 OJ L19/25, para 27.
[94] Commission Decision of 14 January 1992 – *Assurpol,* 1992 OJ L37/16, para 38.
[95] *EACEM,* 1998 OJ C12/2 (Article 19(3) Notice), in particular paras 11 and 12.
[96] Commission Decision of 17 September 2001 – *DSD,* 2001 OJ L319/1, paras 142–146.
[97] Commission Decision of 24 January 1999 – *CECED,* 2000 OJ L187/47.

[98] See XXXth Report on Competition Policy (2000), paras 96–97.
[99] See Commission Decision of 21 December 1988 – *Ansac,* 1990 OJ L152/54, para 23; see also 2001 Horizontal Guidelines, cited above, para 188.
[100] See XXIInd Report on Competition Policy (1992), paras 177 *et seq.*

is invoked as a ground for a tolerant application of the competition rules; the attempt is usually unsuccessful. Most appear to have failed, and even when they have been successfully invoked, the decisions often give the impression that the public policy consideration has been decorative rather than substantive. As to crisis cartels and coordinated capacity reductions, modern practice probably indicates that they are rarely capable of being defended but the door is not completely closed. In many cases, arguments of public health and safety have been rejected. In considering price-setting by public authorities, the ECJ has been notably deferential to state discretion, even if private interests seemed very close behind. Governmental policy in setting prices has been accorded tolerant non-interference. In connection with the environment, I have difficulty in deciding whether we are seeing competition policy being applied intelligently or whether environmental policy is being skilfully balanced against competition policy. One big exception to the inconsistent fortunes of policy arguments in competition law is market integration, which has been a potent and usually consistent force which has overridden normal competition law analysis. It is time to refresh that doctrine, reflecting on whether it needs adaptation for this millennium. The merits of the civil religion of market integration as a driver of competition policy deserve to be reconsidered.

*Philip Lowe**

Conclusions

1. In the context of the latest major economic recession, competition authorities do not appear to have given in to any pressure to relax enforcement of antitrust and merger rules in order to help companies stay in the market and preserve jobs. In Europe, some evidence suggests relatively low rates of exit of large firms with much higher rates for smaller ones. While the recession tends to reveal more starkly the competitive disadvantages of weaker firms, the tendency is for the scarce resources of private and public budgets to be used for short-term measures to increase 'short-term profitability' and without provision for investment in the structural reforms and innovation which will improve long-term competitiveness. State aid control can usefully guide investment into these areas. The application of the 'as efficient competitor' test,[1] accompanied by a convincing theory of harm to consumers, can be a bulwark against protecting competitors rather than competition. In the banking sector, concerns about systemic risk and long-term financial stability dominate over the need for bank restructuring, and the weakness of individual banks and low levels of interbank lending exacerbate the recession.
2. The focus of competition law on preventing or sanctioning a weakening of competition related only to market power makes it less relevant and visible at a political level at a time when the principal concern of public policies is to stimulate economic recovery, including measures to promote competition and innovation, for example by encouraging new entrants. An excessively narrow definition of the remit of competition authorities, limited to the control of market power, could lead to a reduction in their influence, whereas their role in advocating pro-competitive solutions to meet market failures in other areas of public policy could be crucial to identifying ways out of economic and financial crisis.
3. Competition policy within any jurisdiction also needs to take into account the external trade environment, in particular because a narrow assessment of an agreement or merger may ignore their potential negative impact on security of supply or import dependence.
4. The aim of competition policy, including but not limited to law enforcement, is generally accepted as being: to make markets work for the benefit of consumers.

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[1] The 'as efficient competitor' test was endorsed in the Commission's Guidance Paper on exclusionary abuses and has likewise been endorsed by the ECJ. See, eg, Case C-208/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-9555, para 177.