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A sustainable competition policy for Europe

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Introduction

At the moment a very interesting debate on sustainable development is going on both in the academic world¹ and in politics². The question that is at stake is pertinent but stays a hard one to tackle: how can we meet the needs of the present generation, without compromising the needs of future generations? Issues like climate change, depletion of natural resources such as oil and fish species, high emission of greenhouse gasses, increasing demographic pressure, ageing and even the financial crisis all show that this question is topical and highly relevant. *Sustainable development* is often mentioned as a solution to the issues mentioned above but always remains a considerable vague concept of which clear results are rarely seen. Nevertheless, some academics are of the opinion that we have to make our ways of governing, producing and consuming more sustainable in the very near future. They consider problems as rapidly increasing scarcity of natural resources and high growth of the world's population (especially in developing countries) as great threats to how our society is structured at the moment.³ Also the European institutions have pointed in many policy documents at the importance of sustainable development within European Union policies and legislation. Sustainable development has even been set out as one of the core objectives of the European Union in the Treaty on European Union (TEU).

Governments, among which the European Union, have developed public policies in areas like the environment and public health which are partly aimed at sustainable development. However, governments often fall short of substantive action in the field of sustainability due to concurring interests or incapacity. Sometimes even the question comes up *which* government has to act (e.g. the Member States or the European Union?). Some academics argue that cooperation between private parties is another effective way of achieving sustainability, and should therefore be promoted. In fact, it could even be a more effective means than governmental intervention. Companies, for example, could try to develop energy saving production methods, or to purchase only fair trade products enabling farmers in developing countries to invest in their future, while fishermen could agree to restrict their catch in order to preserve biodiversity. Often it will however be very difficult for a single market player to implement sustainable production processes by itself. Instead, cooperation between market players could make sustainable development more feasible. If companies will decide to join their efforts on sustainability, competition issues could however arise.⁴ If that is the case there will be a danger of different (European Union) public policies hindering each other in their functioning. While policies directed to sustainable development will see private initiatives as a welcome support to their goals, competition policy might consider the initiatives as a threat to unhindered competition. The question rises if there are possibilities for reconciliation between these two policies. Which approach should be chosen to make sure that sustainable policies will be supported by competition law, instead of being hindered by it? Do clues have to be looked for in the treaties, or is it the task of the Commission, the Community Courts or the National Competition Authorities (NCA's) to find a solution?

In this research the following question will be assessed:
How can public policy objectives which aim at sustainable development be supported more strongly by European Competition Policy at present?

First, public policy within the context of EU law will be discussed. Next, there will be an assessment of the goals and the rules of European Competition Policy. In the third chapter an overview will be given of the legal framework for the implementation of public policies into competition law. In chapter four we will discuss the importance of a sustainable

¹ For instance: Klaas van Egmond, Henk Kummeling, Hans Schenk, Marleen van Rijswijk, Marcus Düwell en Herman Wijffels, 'Voor duurzaamheid moet alles uit de kast' *Trouw* (Amsterdam, 1 November 2010).

² For instance: Climate conferences in Kopenhagen and Bonn, the EU Sustainable Development Strategy, Sarkozy's plans on reform on a new international monetary system.

³ Herman Wijffels (Professor of sustainability and societal change at Utrecht University) gives a comprehensible overview of present sustainability issues in his 'Studium Generale' lecture titled 'Duurzame waarden en maatschappelijke transitie', delivered on 30 March 2010 in Utrecht. <<http://www.sg.uu.nl/prog/2011a/doc/Lezing%20Herman%20Wijffels.pdf>> accessed 30 June 2011.

⁴ T.R. Ottervanger, 'Maatschappelijk verantwoord concurreren. Mededingingsrecht in een veranderende wereld' (2010) 3 Markt & Mededinging 93, 95-96; Lecture Herman Wijffels (n 3) 4.

competition policy and we will give some practical examples of conflict between sustainability and competition policy. Finally, the fifth chapter will contain an analysis including recommendations on future improvements to be made in order to support sustainable policies more strongly under European Competition Policy.

In this research the focus will be on the cartel prohibition of Article 101 TFEU. Nevertheless, other economic public policy areas will be mentioned to serve as examples or points of reference.

1. Public policy within the context of EU law

Before going into an analysis of how certain public policy objectives can be implemented into competition policy it is useful to establish what should be understood by the term public policy. In this chapter an overview will be given of the concept public policy in the scope of EU law, how it evolved and how it will be used in the context of this research.

1.1 Different approaches

Whoever thought that there is a single straight-forward approach to the definition of *public policy*, is wrong. The two sciences which lie at the basis of most European Union policies – law and economics – seem to have totally different approaches to the concept of public policy. The crux lays with the point of departure, which can either be the government or the market.⁵

Legal approach

The way lawyers tend to think about public policy seems to be portrayed quite adequately in a report published by a Dutch think-tank, the *Dutch Scientific Council for Governmental Policy*. In this report it is suggested that a distinction can be made between individual, societal and public interests. Interests are *societal interests* if they are desirable for the society as a whole. Some typical Dutch examples are then given: the installation of street lighting, the maintenance of dykes and the establishment of train services. These interests are not just important for some individuals, but a whole society can benefit from them. According to the Report, something becomes a *public interest* if the government chooses to take up a certain societal interest which it thinks will not be attained (in a correct manner) otherwise. However some societal interests, like the establishment of train services, may not need support of the government in order to come into existence, they may not necessarily be of good quality without help of the government. Other societal interest, like the maintenance of dykes and the prevention of environmental pollution, may not be pursued without governmental interference at all. In this kind of situations a government may decide to transform those interests into public interests and to implement this interest as part of its policies.⁶ From the perspective of a lawyer it is the task of the government to decide, by means of political processes, what interests should become public interests. The government will look at what is best for society as a whole.⁷ The perception of what is best for society is however subject to continues change. Things which are now seen as typical government tasks have not always been and will not necessarily always be typical government tasks.⁸ Public transport and energy supply may be taken as examples. The choice to turn a societal interest into a public interest can have various reasons, e.g. economic, idealistic, practical or social reasons. From a lawyer's point of view it therefore cannot be objectively decided what should be public interests and what should not. This choice should in the end be made by the politically active government based on the wishes of society at that particular moment in time.⁹

Economic approach

Instead of the society as a whole, economists generally take the individual market players as the point of departure. Adam Smith, often called the founder of modern economics, argued that individuals pursuing their own self-interest best promote the public interest.¹⁰ The idea of welfare economics is that if all individuals pursue their self-interests, the market will be able to allocate society's resources efficiently. Efficiency in this context means that the market uses the available resources as optimally as possible. There is no way of generating more output with the same level of input.¹¹ Consequently, if in an efficient market the individual welfare of one person is enlarged, another person's welfare

⁵ Barbara Baarsma and Jules Theeuwes, 'Publiek belang en marktwerking: Argumenten voor een welvaartseconomische aanpak' in Eric van Damme and Maarten Pieter Schinkel (eds), 'Marktwerking en publieke belangen' (Koninklijke Vereniging voor de Staathuishoudkunde, Preadviezen 2009) 24-25.

⁶ Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *Het borgen van publiek belang* (SDU 2000) 19-21.

⁷ WRR Report *Het borgen van publiek belang* (n 6) 46-47.

⁸ Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *Staat in beweging* (SDU 1998) 36-37.

⁹ WRR Report *Het borgen van publiek belang* (n 6) 48.

¹⁰ Joseph Stiglitz and Carl Walsh, *Economics* (4th edition, W.W. Norton & Company, Inc. 2006) 216.

¹¹ *ibid* 221-222.

will be decreased. This kind of efficiency is called *pareto efficiency*.¹² If a market is pareto efficient, there is a balance¹³ in the market. This means that the sum of *consumer surplus* and *producer surplus* is at its highest point. Surplus is a way to measure the gain market players get out of trade: it is the difference between the price a consumer is willing to pay for a certain product and the actual market price (consumer surplus), or the difference between the price for which a producer wants to provide a product and the actual market price (producer surplus).¹⁴ If a market is pareto efficient nobody can be made better off without making someone else worse off.¹⁵ Pareto efficiency is necessary to reach optimal welfare for society.¹⁶ According to many economists *welfare* covers not only financial aspects, but also other things which people value, such as a clean environment and a safe living environment. We can say that economists usually use a broad, or total welfare concept.¹⁷

A market will only be pareto efficient if no *pareto improvements* can be achieved anymore, in other words: when it is not possible anymore to increase consumer or producer surplus without making another market player worse off.¹⁸ This situation will however only exist if the market-mechanism works perfect. In a situation in which the conditions for a perfectly competitive market are not fulfilled, markets will be inefficient. This is almost always the case. If markets are insufficient government intervention can be desirable. The problems which lead to inefficient markets are called *market failures*. There are four types of market failure: imperfect competition, imperfect information, externalities and public goods. In the event of imperfect competition firms are able to set prices too high due to their strong position caused by e.g. a monopoly or oligopoly market structure. Furthermore, consumers and firms must constantly make decisions without possessing all information about e.g. the goods or services they want to purchase. Imperfect –or even misleading– information will influence decisions and can lead to inefficient competition.¹⁹ From an economic perspective markets will also not work properly if individuals or firms take actions which directly negatively affect others but for which no compensation is paid. Environmental pollution is a typical example. These phenomena are called *negative externalities*.²⁰ The idea is that the price system does not work properly here since not all the costs of production have been reflected in the price.²¹ Public goods is the last type of market failure. In this kind of situation a good cannot be enjoyed only by one consumer, but by many others. It is very difficult to exclude persons from this type of goods. Typical examples are: an army and dykes. Public goods is considered to be a market failure because private markets will undersupply them since it is difficult to make all users pay for them.²²

When market failures are present, economists say that there is room for government intervention. A government can issue policies that lead to more efficiency. Market intervention can take place through e.g. antitrust laws, consumer protection legislation, environmental regulations and the provision of public goods. Other reasons that governments can have for intervention are related to the redistribution of income (e.g. in order to provide all citizens with a minimum welfare standard), and to so-called merit-goods and bads. The latter category is not always beneficial according to economists. It does not correct market failures such as negative externalities, nor redistribute income, but it tries to impose social values on individuals. Examples are a smoking ban and high taxes on alcohol. These government policies are said by economists to interfere with the principle of *consumer sovereignty*. This principle holds that individuals are the best judges of what is in their own interest and that they promote their own well-being.²³ This type of

¹² Stiglitz and Walsh (n 10) 221-222.

¹³ Called *equilibrium* by economists.

¹⁴ Stiglitz and Walsh (n 10) 217.

¹⁵ *ibid* 225.

¹⁶ Baarsma and Theeuwes (n 5) 37-38.

¹⁷ *ibid* 30-31; Saskia Lavrijssen, 'What role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?' (2010) 35 *European Law Review* 636, 639-640.

¹⁸ Baarsma and Theeuwes (n 5) 28-29.

¹⁹ Stiglitz and Walsh (n 10) 247-251.

²⁰ Positive externalities do also exist. Stiglitz and Walsh give as an example a homeowner who has a well-kept garden which then the whole neighborhood can enjoy: Stiglitz and Walsh (n 10) 241.

²¹ Stiglitz and Walsh (n 10) 240-242.

²² *ibid* 254-255.

²³ *ibid* 377-380.

policies does not take the market as the point of departure, but the government, which seems to be opposed to an economist's way of thinking.

Finally, however very important, generally economists are of the opinion that whatever policies governments develop to reach whatever goal, those policies should only be pursued if their benefits exceed their costs.²⁴

As we have seen, both lawyers and economists recognise an important task for the government in pursuing public interests. In the scope of this research the government pursuing those public interests can either be the European Union, or governments of individual member states. Lawyers and economists tend to establish what public interests should be pursued in a different manner. Lawyers say that the outcome of the political process decides in which areas government policy should be made, while economists say that it is the market which decides when the government has to step in. Both approaches sometimes render the same outcome and sometimes they do not. For example, it seems that both lawyers and economists will agree that the environment should be protected, be it for different reasons. However, most economists would want to stop protecting the environment from the point the costs would be higher than the (economic) benefits²⁵, while lawyers could have ideological arguments to protect the environment anyway. A smoking ban policy is another example where economists would probably be less enthusiastic than lawyers.

The difference in approach between lawyers and economists is of importance for this research. In the coming chapters it will be shown that the choice of approach towards public policy (legal or economic) influences the way academics think about the reconciliation of certain policy areas in EU law.

1.2 Different types of public policy

After having defined the general concept of public policy from a legal and economic point of view, it is useful for the purpose of this research to further define the definition of public policy. Typically, lawyers would distinguish between *economic* policy on the one hand and *non-economic* public policy on the other hand.²⁶ Economic policy is defined as policy areas with primarily economic goals, while non-economic policy is typically referred to as "the caring, idealistic and spending policy areas, affecting everybody and characterized by the Court of Justice as non-economic, but with economic consequences".²⁷ The latter comprises policy areas such as the environment, culture, public health and education. These policies have goals such as "preserving, protecting and improving the quality of the environment"²⁸, "conservation and safeguarding of cultural heritage of European significance"²⁹ and "improving public health"³⁰. Such goals express ideals fostered by governments which are not of an economic nature. Competition law on the other hand is an example of what is called an economic policy area due to its primarily economic goals. Further analysis of those goals will be conducted in the next chapter. Also the four freedoms (freedom of goods, services, persons and capital) which form the basis of the internal market of the EU are often called economic policies. The economic benefits of interstate trade indeed are an important goal of the internal market. Nevertheless, the internal market also has other goals, such as social and political integration.³¹ Since the

²⁴ Stiglitz and Walsh (n 10) 411-412.

²⁵ *ibid* 411-412.

²⁶ However, legal authors use different terminology for non-economic public policy. Cf Sybe A. de Vries, *Tensions within the Internal Market - The functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing 2006) (horizontal and flanking policies); Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009) (public policy objectives); Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (second edition, Cambridge University Press 2010) (non-economic interests).

²⁷ De Vries (n 26) 8; K.J.M. Mortelmans, 'Horizontal and Flanking Policies' in Kapteyn & Verloren van Themaat, *The Law of the European Union and the European Communities* (fourth revised edition, Wolters Kluwer 2008) 1087; K.J.M. Mortelmans, 'De interne markt en het facettenbeleid na het Keck-arrest: nationaal beleid, vrij verkeer of harmonisatie' (1994) *Sociaal Economische Wetgeving (SEW)* 236.

²⁸ Article 191 TFEU.

²⁹ Article 167 TFEU.

³⁰ Article 168 TFEU.

³¹ Chalmers (n 26) 675-676.

so-called “economic” policies mostly aim at more than just economic goals, their naming is not very fortunate. This is even more true since economists would even never make a distinction between economic and non-economic public policies. In the eyes of an economist everything has an economic aspect. Economists therefore use a broad welfare concept which includes all consumer interests, both their wish for low prices as their desire for a clean environment.³² Therefore the usage of the term *economic policy* could be confusing. Moreover, since no policy is clearly either economic or non-economic, the distinction between economic and non-economic policy is both from a legal and an economics point of view arbitrarily and in many occasions inaccurate. Nevertheless I will choose to use the terminology in this research anyway since most people understand what is meant by them. Economic policy refers to policies such as the four freedoms and competition policy, while non-economic public policy refers to more idealistic policy areas such as the environment, culture, health and education. For the purpose of this research it is important to make this linguistic distinction because in the coming chapters the reconciliation of ‘non-economic’ public policies (especially those related to sustainability) with ‘economic’ policies (especially competition policy) will be discussed.

Although the distinction between economic and non-economic public policy is not clear-cut at all, a difference between the two is sometimes clearly seen. For instance, the importance of non-economic public policy is not always as high-ranked as that of economic policy. When non-economic public policy collides with economic policy and the one has to be balanced against the other, the economic policy is often given precedence. A possible reason is that the economic value of *inter alia* the environment or public health is often very difficult to measure. Hence, for instance in competition policy, core economic goals such as consumer welfare play a leading role, while non-economic policies are not always considered.³³ Nonetheless, it will now be shown that the importance of non-economic policy in EU law has very much increased over the last twenty years and must not be underestimated.

1.3 Development of non-economic public policy in the EU

Although from the signing of the Rome treaty the European Economic Community was an economic community, designed almost exclusively to achieve economic policy aims (with the ultimate aim of achieving *peace* and *prosperity*)³⁴, this changed in 1986. In that year the Single European Act introduced environmental policy into the European sphere of influence.³⁵ Not much later under the Treaty of Maastricht (1992) other non-economic policy areas such as education, culture, public health, and consumer protection were added to the European realm. Most of them included a so-called *policy-linking clause*^{36, 37}. These provisions provide that the public policy objectives mentioned should also be taken into account while implementing other policies of the Community (such as the four freedoms and competition law). Although it seems that economic policy was still the core aim of the European Community, it is undeniable that after the Treaty of Maastricht non-economic public policy became increasingly important.³⁸ Of course, non-economic public policies had already started to develop within EU law before the Single European Act and the Treaty of Maastricht in the context of the internal market.³⁹ Under the Treaty of Amsterdam an independent policy-linking clause on environmental protection was added to first part of the EC treaty.⁴⁰ Under the Lisbon Treaty policy linking became even more important due to the new Article 7 TFEU, which introduced the general requirement that the EU shall ensure consistency between its policies and activities. Along with the Treaty changes the goals of the European Union were gradually widened in the direction of non-economic goals. Now, Article 3 TFEU includes *inter alia* sustainable development, protection of the environment,

³² E.E.C. van Damme, ‘Op de welvaartseconomie gebaseerd mededingingsbeleid’ in J.W. van de Gronden and K.J.M. Mortelmans (eds), *Mededinging en niet-economische belangen* (Kluwer 2001) 55.

³³ Lavrijssen (n 17) 639.

³⁴ Desmond Dinan, *Europe Recast, A history of European Union* (Palgrave Macmillan 2004) 76-77.

³⁵ *ibid* 214.

³⁶ Also often referred to as *integration clauses*, see for instance Nele Dhondt, *Integration of Environmental Protection into other EC Policies* (Europa Law Publishing 2003).

³⁷ Consolidated version of the Treaty establishing the European Community [1992] OJ C 224, e.g. Article 128(4) (Culture), 129(1) (Public Health), and 130r(2) (Environment).

³⁸ Dinan (n 34) 253.

³⁹ This happened especially in the context of Articles 94, 95 and 308 TEC (now: Articles 115, 114 and 352 TFEU), see for further elaboration: De Vries (n 26) 260-261.

⁴⁰ Article 6 TEC, now article 11 TFEU.

cultural and linguistic diversity and social protection as *explicit goals* of the European Union. Hence, due to their increasing importance the question how to conciliate the 'new' non-economic public policy objectives with the traditional economic policies is very topical.

1.4 Non-economic public policy areas of the EU

At present, the European Union has influence – apart from the main economic policy areas (the internal market, competition law, monetary policy, the customs union and the common commercial policy) – in many non-economic policy fields. In none of these fields the EU has exclusive competence to regulate; mostly it shares this competence with the Member States. In some areas the EU merely has a role of supporting, coordinating or supplementing the actions of the Member States. Here, an overview will be given of the non-economic public policy areas in which the European Union is active and which should therefore (due to the policy-linking clauses) be taken into consideration in economic policy areas such as the four freedoms and competition law.

1.4.1 The environment (Title XX TFEU)

Sustainable development and a high level of protection and improvement of the environment are mentioned as objectives of the EU in Article 3(3) TEU and should go hand in hand with the economic objectives of the EU. The Union's environmental policy and its objectives are further elaborated on in Title XX TFEU (Articles 191-193). Article 191(1) emphasises that apart from the above mentioned objectives also human health, prudent and rational utilisation of natural resources and combating regional and worldwide environmental problems, including climate change, form part of the goals of the environmental policy. Principles which play an important role within the EU environment policy are the precautionary principle, the preventive principle and the polluter pays principle.⁴¹ Article 191 should be read in conjunction with the policy on energy which promotes *inter alia* the development of new and renewable forms of energy.⁴²

Although the term *sustainable development* is not explicitly mentioned in Title XX, its importance in relation to the Union's environmental policy is shown by the policy-linking clause Article 11 TFEU, which states that 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'.

Contrary to some other non-economic policy areas, the European Union has *specific* harmonisation powers to achieve the objectives related to the Environment. This specific legal basis for harmonisation can be found in Article 192(1) TFEU. Some other non-economic policy areas, such as culture and education, do however not include such a specific harmonisation power. In those areas harmonisation measures may only be issued by the EU if they have as their object the establishment and functioning of the internal market. This 'internal market' legal basis can be found in Article 114 TFEU. The section on public health hereafter will elaborate further on this legal basis. The fact that harmonisation on environmental issues can take place on at least⁴³ two legal bases (the specific and the internal market legal bases) shows that the Environment is considered as an important policy area of the EU.

Over the years many directives and regulations have been developed in the environmental field.⁴⁴ Momentarily, there is environmental legislation in place concerning *inter alia* the promotion of air quality, registration and authorisation of chemical substances, prevention and handling of waste, the quality of drinking water, and many more areas.⁴⁵ Moreover, action plans, strategies and white papers have been developed on *inter alia* the protection

⁴¹ Mortelmans, 'Horizontal and Flanking Policies' (n 27) 1095.

⁴² *ibid* 1094. Also see Title XXI TFEU (Energy).

⁴³ Other even more specific legal bases may be used for legislation on the environment, see for several examples: Mortelmans, 'Horizontal and Flanking Policies' (n 27) 1098.

⁴⁴ Mortelmans, 'Horizontal and Flanking Policies' (n 27) 1102-1104.

⁴⁵ Directive 2008/50/EC of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L 152/1; Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2006] OJ L 396/1; Directive 2006/12/EC of the European Parliament and of the Council on waste [2006] OJ L 114/9; Directive 98/83/EC of the Council on the quality of water intended for human consumption [1998] OJ L 330/32.

of biodiversity in the EU and climate change.⁴⁶ In the preamble of the *Sixth Community Environmental Action Programme* the importance of sustainable development in relation to environmental policy is emphasised. It states: "A prudent use of natural resources and the protection of the global eco-system together with economic prosperity and a balanced social development are a condition for sustainable development."⁴⁷ The *Integrated Product Policy* (IPP) is an example of environmental policy which aims at sustainable development. The IPP strives to improve the environmental performance of products throughout their life cycle, *inter alia* by preventing waste generation at source, enabling green public procurement and encouraging environmentally friendly product design.⁴⁸ The next paragraph will further elaborate on sustainable development.

1.4.2 Public health (Title XIV TFEU)

Article 168 TFEU provides the legal basis for the EU to regulate in the area of public health. Just as in environmental policy the precautionary principle is important within the scope of public health policy. According to Article 168 the Union has the task to encourage cooperation between Member States in the area of public health, and if necessary to support their actions. The actions of the EU are directed to *inter alia* preventing illness and diseases, promoting research into major health risks and monitoring, early warning of and combating serious cross-border threats to health. Also complementing the Member States' action in the field of drugs-related health damage belongs to the EU curriculum.

Different from the provisions on the environment, Article 168 starts off with a policy-linking clause which requires that "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities". Human health is also mentioned in the broader policy-linking clause Article 9 TFEU.

From the wording of Article 168 (read in conjunction with Article 6(a) TFEU) it shows that the EU does in principle not have *specific* harmonisation powers in the area of public health. The Member States are still rather cautious to grant the EU such powers. For the moment they seem to intend to reserve most legislative powers in the area of public health for themselves. There are only three public health areas provided for in Title XIV in which the EU *can* harmonise. These are related to common safety concerns in public health matters (see Article 4(2)(k) TFEU in conjunction with Article 168(4) TFEU). Nevertheless, the fact that Title XIV restricts harmonisation in most instances does not exclude the possibility of harmonisation within the context of the internal market. In fact, Article 114(8) even encourages the EU to take harmonising actions in the field of specific public health issues. For using the Article 114 legal basis, the EU's public health legislation must however comply with the requirements that it genuinely has as its object the improvement of the conditions for the functioning of the internal market, *and* that the legislation aims at the prevention of the emergence of future obstacles (which are likely to occur) to the exercise of fundamental freedoms or competition. These requirements have been set by the ECJ in its *Tobacco Advertising* case⁴⁹, which (apart from public health) applies also to other harmonisation actions of the EU based on Article 114 TFEU.⁵⁰ This case law makes that outside the scope of the internal market it is hardly possible for the EU to carry out harmonisation measures related to public health issues.

Momentarily in the policy area of public health *inter alia* a European drug action plan and strategy are in place, as well as two directives on tobacco (which notably have both as their legal basis *inter alia* Article 95 TEC (now Article 114 TFEU)) and "a network for the epidemiological surveillance and control of communicable diseases in the Community".⁵¹

⁴⁶ Communication from the Commission, 'Our life insurance, our natural capital: an EU biodiversity strategy to 2020' [2011] COM/2011/0244 final (biodiversity); White paper from the Commission, 'Adapting to climate change: towards a European framework for action' [2009] COM/2009/0147 final (climate change).

⁴⁷ Decision No 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme [2002] OJ L 242/1, para 6 of the preamble.

⁴⁸ Decision No 1600/2002/EC (n 47), Article 3(5); Communication from the Commission on the sixth environment action programme of the European Community 'Environment 2010: Our future, Our choice' [2001] COM/2001/0031 final, para 2.3.

⁴⁹ Case C-376/98, *Germany v. European Parliament and Council* (Tobacco Advertising) [2000] ECR I-08419, para 84.

⁵⁰ De Vries (n 26) 267-272.

⁵¹ EU Drugs Action Plan for 2009-2012 [2008] OJ C 326/7; Directive 2001/37/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative

1.4.3 Social policy (Title X TFEU)

Social policy, which concerns the labour market, must be distinguished from environmental policy and public health policy, which have repercussions on the market for goods and services (which we are dealing with in this research).⁵² This is at least the case as far it concerns labour policy. However, we will see in the following section that in the context of sustainable development other areas of social policy can actually play an important role. This is especially the case where it deals with the prevention of social exclusion and quality of life issues. In Article 151 TFEU the objectives of the EU's social policy have been set out, which include *inter alia* 'improved living and working conditions' and 'the development of human resources with a view to lasting high employment and the combating of exclusion'.

Article 9 TFEU provides for a policy-linking clause for social policy. It states *inter alia* that the fight against social exclusion should be taken into account in defining and implementing the policies and activities of the Union.

According to a list in Article 153 TFEU the EU has limited harmonisation powers in some parts of social policy only. The combating of social exclusion has not been included in that list. In the context of social exclusion the European Union can therefore only adopt measures designed to *encourage* cooperation between Member States (Article 153(2)(a) TFEU).

The European Commission has initiated several initiatives to combat social exclusion and poverty so far.⁵³ It uses the open method of coordination to guide and to promote the Member State's actions in these fields.⁵⁴

1.4.4 Other areas of EU policy

This research focuses on sustainable development. For that purpose the non-economic public policies on the environment, public health and social policy are the most relevant. Policy areas which have not been discussed here but which are also considered as non-economic public policy areas⁵⁵ are: Consumer protection (Title XV), Culture (Title XIII), Education, vocational training, youth and sport (Title XII), Energy (Title XXI), Tourism (Title XXII), Civil protection (Title XXIII). The titles refer to their position within the TFEU.

1.4.5 Member State policies

Furthermore, it must be emphasised that *inter alia* in the non-economic public policy areas of the environment and social policy (to a certain extent) the European Union shares its competences with the Member States.⁵⁶ If in such a policy area EU legislation is in place, this legislation is often *minimum harmonisation*, which allows Member States to adopt more stringent measures.⁵⁷ In some policy areas, like culture, tourism and education, the Union's power is even more limited. There it can just support, coordinate or supplement the policies of the Member States.⁵⁸ In these areas, and in public policy areas on which the EU has no legislative competence at all, the power to develop public policy lays exclusively with the Member States. While no policy-linking clauses are in place to include Member State policies into EU economic policies, the question arises whether it is possible or required to do so. This question will be dealt with in Chapter 3.

provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L 194/26; Directive 2003/33/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16; Decision No 2119/98/EC of the European Parliament and of the Council setting up a network for the epidemiological surveillance and control of communicable diseases in the Community [1998] OJ L 268/1.

⁵² De Vries (n 26) 9; Mortelmans, 'Horizontal and Flanking Policies' (n 27) 1088.

⁵³ For example: Recommendation from the Commission on the active inclusion of people excluded from the labour market (notified under document number C(2008) 5737) [2008] OJ L 307/11. More examples can be found on: <http://ec.europa.eu/social/>.

⁵⁴ 'Poverty and Social Exclusion' <<http://ec.europa.eu/social/>> accessed 28 August 2011; The Open Method of Coordination is a voluntary process for political cooperation. See for further reading: Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials* (fourth edition, Oxford University Press 2008) 150-154.

⁵⁵ Mortelmans, 'Horizontal and Flanking Policies' (n 27) 1088 ff.

⁵⁶ Articles 4 and 6 TFEU.

⁵⁷ See eg Article 169(4) and Article 193 TFEU.

⁵⁸ Article 6 TFEU.

1.5 Sustainable development

In this research specific attention will be given to sustainable development. In the *Renewed EU Sustainable Development Strategy* sustainable development is defined as follows:

“Sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs. It is an overarching objective of the European Union set out in the Treaty, governing all the Union’s policies and activities.”⁵⁹

The strategy document observes that our present society shows many unsustainable trends which are in an urgent need for short-term action, however with a long-term perspective. Some given examples of present trends which do not take sufficient account of the needs of future generations and which therefore are not sustainable, are: climate change and energy use, threats to public health, poverty and social exclusion, demographic pressure and ageing, management of natural resources, biodiversity loss, land use and transport.⁶⁰ Sustainable development is not a public policy comparable to the ones mentioned above. It is a core *objective* of the European Union which has been set out in Article 3(3) TEU. As appears from the Treaty this objective must be based on “balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”. Sustainable development is therefore an objective which must be integrated into all levels of policy making. According to the strategy document the main challenge is to change the unsustainable consumption and production patterns of nowadays and to develop an *integrated* approach to policy-making.⁶¹

Within the European Sustainable Development Strategy 7 main objectives (or ‘key challenges’) can be identified⁶²:

1. Limiting climate change
2. Ensuring that transport systems meet society’s needs whilst minimising their undesirable impacts.
3. Promoting sustainable consumption and production patterns.
4. Improving management and avoid overexploitation of natural resources.
5. Promoting good public health on equal conditions and improving protection against health threats.
6. Creating a socially inclusive society, to secure and increase the quality of life of citizens.
7. Actively promoting sustainable development worldwide and live up to international commitments.

In the pursuit of achieving these main objectives a set of principles should be taken into consideration, such as the protection of fundamental rights, involvement of businesses and social partners (corporate social responsibility), policy integration, the precautionary principle and the polluter pays principle.⁶³

Although it becomes neither exactly clear from the Treaty nor from EU policy documents how the concept of sustainable development should be applied precisely, literature gives some guidance on this question. It can be said that the ‘core meaning’ of the concept is: providing for development which lives up *at the same time* to socially, environmentally and economically acceptable standards⁶⁴ (judging from the strategy document (see above) today also public health standards should be taken into account). Sustainable development is said to embody that all the elements (social, environmental, economic, and public

⁵⁹ Note of the Council of the European Union 10917/06, ‘Renewed EU Sustainable Development Strategy (2006)’ [2006] para 1
<<http://register.consilium.europa.eu/pdf/en/06/st10/st10917.en06.pdf>> accessed 27 November 2011.

⁶⁰ *ibid* para 2.

⁶¹ *ibid* paras 2, 10-12.

⁶² See for a full and detailed list: Renewed EU Sustainable Development Strategy (n 59) para 13.

⁶³ *ibid* para 6.

⁶⁴ Nele Dhondt (n 36) 68.

health) are equally important. While at the very beginning of European Community primarily economic concerns did matter, at present it is argued that no hierarchy between policies (formally) exists anymore.⁶⁵ Keeping that in mind, in order to achieve the objective of sustainable development, policy-linking clauses, such as Article 11 TFEU (which even mentions sustainable development as a goal of policy-linking in the area of the environment), play an important role.⁶⁶ They provide for an important legal instrument to integrate sustainable non-economic public policies into economic policy areas on an equal footing. The integration of these types of policies could help the goal of sustainable development to be achieved.

It may be concluded here that sustainable development is a goal of the European Union to which *all* EU policies should contribute. This view has also been expressed by the Commission.⁶⁷ All policies should take the needs of future generations into account by respecting the main objectives of the EU strategy on sustainable development, no matter if it concerns economic or non-economic policies.

1.6 Conclusion

An overview has been given of different aspects and perspectives of public policy in the European Union. As we have seen, integration of economic and non-economic public policy objectives lays at the very essence of the concept of sustainable development. It is this concept which is taken as a point of departure in this research. In the course of this research the relationship between non-economic policies which aim at sustainable development and competition policy (an economic policy) will be assessed.

⁶⁵ *ibid* 70.

⁶⁶ *ibid* 108-110.

⁶⁷ Communication from the Commission 'Partnership for integration - A strategy for Integrating Environment into EU Policies' [1998] COM/98/0333 final, 5.

2. European Competition Policy: goals and rules

The focus of this research lies with the reconciliation of the EU's sustainable policies with European Competition Policy. As already pinpointed at in the introduction, academics sometimes argue that European Competition Policy could hinder the effectiveness of the sustainable policy areas of the European Union and the Member States. Also Competition Authorities, such as the Dutch NMA recognise that the two types of policy are not easily reconcilable.⁶⁸ To illustrate that this friction between competition policy and non-economic policies indeed exists, in this chapter light will be shed on the goals and the rules of European Competition Policy.

2.1 Competition Policy in general

The competition policy of the European Union has been an element of the constituting treaties of the European Union since the Rome Treaty of 1957.⁶⁹ At present competition policy still has a strong basis in the Treaties. Article 3(3) TEU provides: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment (...)"⁷⁰ Article 3(1) TFEU provides: "The Union shall have exclusive competence in the following areas: (a) customs union (b) the establishing of the competition rules necessary for the functioning of the internal market (...)". Some commentators argue that competition policy has nonetheless decreased in importance since the introduction of the Lisbon Treaty due to the 'Sarkozy-change'.⁷¹

The three main elements of European Competition Policy are: the competition law in the Treaties, the case-law of the EU Courts (the European Court of Justice and the General Court), and supervision by the competition authorities. The Treaties lay down rules with the goal to prevent distortion of competition within the internal market, which are clarified and supplemented by the EU Courts. The European Commission and the National Competition Authorities (NCA's) of the Member States are in charge of the supervision and enforcement of European competition law on a daily basis. These competition authorities investigate practices which are possibly harmful to competition and if they consider them to be harmful they will prohibit those practices or grant an exception. Also the decision whether to grant an exception is taken by the competition authorities (or, of course, if appealed: by the courts). This joint-enforcement power of the Commission and NCA's came into being by the introduction of the so-called Modernisation Regulation 1/2003 in May 2004. The regulation states that the competition rules shall be applied by the Commission and the NCA's in close cooperation.⁷² In order to provide nevertheless for a consistent and qualitative application of the competition rules throughout the EU, the Commission issued various guidelines. Hence, the supervisory authorities have a high influence on the application of competition law. The Commission has an especially big role since it also guides the development of European Competition law. For that reason the directives, regulations, guidelines, decisions, recommendations and communications of the Commission should be assessed with great care within the scope of competition policy.

2.2 The goals of competition policy

Over the years many different goals have been inspiring the competition policies of the European Union and the Member States. The goal of competition policy is susceptible to the political thinking of the time and can therefore change over the years.⁷³ At least it must be noted that competition policy is never a goal in itself, but an instrument to reach certain goals.⁷⁴ Hereafter some goals of competition policy will be mentioned. It must be

⁶⁸ 'Duurzaamheid en samenwerken zijn geen concurrenten' (2011) 1 NMagazine 4.

⁶⁹ Richard Wish, *Competition Law* (sixth edition, Oxford University Press 2009) 49.

⁷⁰ Emphasis added.

⁷¹ In section 4.1.1 of this research we will further elaborate on this point.

⁷² Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1, Article 11.

⁷³ Wish (n 69) 19.

⁷⁴ Philip Lowe, 'Preserving and Promoting Competition: A European Response' (2006) 2 EU Competition Policy Newsletter 1 <<http://ec.europa.eu/competition/publications/cpn>> accessed 30 August 2011.

noted that the importance attached to every specific goal depends on the moment in history one is looking at and the legal system one is dealing with.

2.2.1 Protection of consumers, competitors and redistribution of wealth

A first important goal of competition policy can be the *protection of consumers*. In the market for goods and services it can happen that consumers are harmed e.g. by dominant companies misusing their position by setting prices to high. Competition policy is a useful instrument to remedy these situations, for example by imposing fines and the making of agreements with defaulting companies.⁷⁵ A second goal of competition policy could be the *redistribution of wealth*. Governments could find it undesirable that big companies possess a great amount of resources. Competition policy could be used to redistribute some of those resources.⁷⁶ Thirdly, competition law could serve as an instrument to protect small firms from bigger ones and therewith giving all a fair chance in the market. In other words: *protecting competitors* could also be a goal of competition law.⁷⁷

2.2.2 Consumer welfare

Both the former European Commissioner for Competition, Neelie Kroes, *and* the former Chairman of the Dutch Competition Authority (NMa), Pieter Kalbfleisch, stated that consumer welfare is at the forefront of the application of competition law today.⁷⁸ Neelie Kroes stated this in a very clear manner in a speech held in London: "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources."⁷⁹ These statements are confirmed *inter alia* in the Commission Guidelines on Article 81(3) (now Article 101(3) TFEU).⁸⁰ Consumer welfare is by economics generally defined as the maximisation of consumer surplus⁸¹, which is the economic term for the price benefits consumers get out of an economic transaction⁸². It must however be noted that this is the *economic* definition of the concept. Although the term is widely used in the scope of competition law, a clear definition of the concept has (as far as we can see) never been given in the legal context. It is debatable if the concept has the same meaning in competition law as in economics. Remember that economists tend to use a broad welfare concept, also including others than financial interests (such as the environment).⁸³ Within the context of EU competition policy it seems that those non-economic considerations will not so easily been taken into account.⁸⁴ It appears from a recent survey of the International Competition Network (ICN) that many national competition authorities in the European Union consider consumer welfare as an important goal of their policy *and* consider consumer welfare to have a primarily economic meaning.⁸⁵ The Dutch NMa literally replied to the survey that it does not even look at non-economic considerations in its enforcement practice.⁸⁶ In recent court proceedings concerning a concentration between veal producers in the Netherlands the NMa explicitly underlined its economic consumer welfare approach by defending the

⁷⁵ Whish (n 69) 19-20.

⁷⁶ *ibid* 20.

⁷⁷ *ibid* 21-22.

⁷⁸ Speech/05/512 by Commissioner Neelie Kroes "European Competition Policy, delivering better markets and better choices" London, 15 September 2005; Speech by Pieter Kalbfleisch "Consumer Welfare, Innovation and Competition" Innsbruck, 26 February 2009 <http://www.nma.nl/en/images/Consumer_welfare%2C_innovation_and_competition_Innsbruck_februari_200923-155861.pdf> accessed 11 July 2011.

⁷⁹ Speech Neelie Kroes (n 78) 2.

⁸⁰ Communication from the Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C 101/97, para 33.

⁸¹ KJ Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(2) Competition Law Review 121, 124; JF Brodley 'The economic goals of antitrust: efficiency, consumer welfare, and technological progress' (1987) 62 New York University Law Review 1020, 1033.

⁸² Joseph Stiglitz and Carl Walsh, *Economics* (4th edition, W.W. Norton & Company, Inc. 2006), A-2. Also see section 1.1 of this research.

⁸³ See section 1.1 of this research.

⁸⁴ Note that issues such as the environment are only 'non-economic' from a lawyer's point of view. Economists will also consider these issues to be of an economic nature.

⁸⁵ ICN Discussion Document "Competition Enforcement and Consumer Welfare – Setting the Agenda" (2011) 18-34 <<http://www.atp.nl/nma/image.php?id=146&type=pdf>> accessed 11 July 2011.

⁸⁶ *ibid*, 18.

proposed concentration with arguments related to consumer prices.⁸⁷ In an OECD discussion paper the Competition Authority of the United Kingdom, the OFT (The Office of Fair Trading), explained that if it had to assess an environmental agreement between undertakings, it would look primarily at the economic consequences of the agreement for consumers.⁸⁸ Concerning the European Commission, it can be noted that throughout their various policy documents and guidelines they also seem to promote a strict economic approach towards competition law enforcement. Economic benefits for consumers are mentioned as the main reason for an exception to the competition rules, while the policy documents do not mention the possibility of including non-economic public policy objectives in the decision of the Commission.⁸⁹ The 'Guidelines on the application of Article 81(3) of the Treaty' (the Treaty exemption for the cartel prohibition, now 101(3) TFEU) confirm the seemingly indifference of the Commission towards non-economic interests in competition law in clear terms: "The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)."⁹⁰ This statement gives the impression that that inclusion of non-economic policy objectives will *de facto* be hardly ever possible under Article 101(3) (before: Article 81(3) TFEU). One of the conditions of that article is that an exception can be granted to harmful agreements only if they bring about efficiencies related to the production or distribution of goods or to technical or economic progress. Elsewhere in its guidelines the Commission states about these efficiencies that "The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective **economic efficiencies**"⁹¹ (emphasis added). A specific opening for the inclusion of **non-economic** objectives is however nowhere to be found in the Treaty or the Commission's interpretation thereof. In the following chapters we will go further into the Commission's economic approach to competition policy.

2.2.3 The internal market

The last goal of competition policy mentioned here solely exists within the scope of EU competition policy: *internal market integration*. Competition policy has been acknowledged as playing an important role in achieving internal market integration, which is one of the core goals of the European Union (Article 3(3) TEU). The idea of the internal market is based upon the premise that no internal barriers to trade will exist within the EU. Some measures, such as national cartels, market-sharing and import barriers are however capable of closing off the Member States' markets from each other. Competition law offers instruments to combat measures which hinder the integration of the internal market.⁹² For example, in the SAS/Maersk case, two Scandinavian airlines divided certain routes among each other and therewith segmented the market. The European Commission condemned the market-sharing agreements and imposed high fines on SAS and Maersk.⁹³ Except for this negative (prohibitive) role in the scope of promoting internal market integration, competition policy can also fulfil a positive (encouraging) role. For instance, the taking away of trade barriers can encourage companies to engage into inter-state commercial activities.⁹⁴ Also, a producer who wants to penetrate the market of another Member State could be allowed by the Commission to appoint an exclusive distributor in that Member State, without whom he could not have done the task.⁹⁵ Most of the goals mentioned above have been (and are still) important in EU competition policy⁹⁶.

⁸⁷ Rb Rotterdam 25 August 2011 (Van Drie/Alpuro), LJN BT8903, paras 2.5.2-2.5.3.

⁸⁸ OECD paper 'Draft Summary Record of the Roundtable Discussion on Horizontal Agreements in the Environmental Context (27-28 October 2010)' DAF/COMP/M(2010)3/ANN4/FINAL, para 6.

⁸⁹ See for instance: 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' [2011] OJ C 11/1; and Guidelines on the application of Article 81(3) (n 80).

⁹⁰ Guidelines on the application of Article 81(3) (n 80) para 42.

⁹¹ *ibid* para 59.

⁹² Whish (n 69) 22.

⁹³ Commission Decision 2001/716/EC, *SAS/Maersk* [2001] OJ L 265/15, para 5 and Article 1 (decision).

⁹⁴ Whish (n 69) 23.

⁹⁵ *ibid* 23; for a clear explanation of the importance of allowing such agreements, see: Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007), 41.

⁹⁶ Whish (n 69) 19; Monti, *EC Competition Law* (n 95) 20-21; Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057, 1059-1064.

Although by some legal writers the goal of internal market integration has been called the 'first principle' of European Competition Policy⁹⁷, it seems that the goal of *consumer welfare* (the last goal here to discuss) has actually taken that place today.

To conclude, there are many possible goals for competition policy. Many of the five goals mentioned above have been and are still important within EU competition law. However, choosing a (main) goal for competition law is a political process and the goal can change over the years. Within the European Union the focus now lays with the goal of consumer welfare because the European Commission explicitly chose primarily to pursue that goal. The consumer welfare goal can be seen as being primarily of an *economic* nature.

2.3 The competition rules

The main competition rules of the European Union are typically divided into three pillars: Article 101 TFEU lays down the cartel prohibition, which prohibits agreements, decisions and concerted practices which are restrictive to competition; Article 102 TFEU prohibits abusive behaviour of dominant firms; The EC Merger Regulation declares incompatible with the common market concentrations which lead to a dominant position that significantly impedes competition⁹⁸. These rules are all addressed to undertakings. Other competition rules are addressed primarily to Member States: Article 106(1) TFEU prohibits the enactment of anti-competitive measures by Member States in case of public undertakings and undertakings holding special or exclusive rights; Article 107 TFEU declares incompatible with the internal market state aids with an anti-competitive effect; the *useful effect* (or *effet utile*) doctrine requires Member States not to require or favour practices contrary to Article 101 or 102 TFEU⁹⁹. There are also many directives, regulations, guidelines, decisions, recommendations and communications issued by the Commission or the Council which complement and clarify the competition rules. Examples are the 'Regulation On the Implementation of the Rules of Competition in Articles 81 and 82 of the Treaty' (Modernisation Regulation) (Regulation 1/2003) and the 'Commission notice on immunity from fines and reduction of fines in cartel cases'¹⁰⁰. Furthermore there is a large body of case law of the EU Courts (the European Court of Justice and the General Court) which clarifies and supplements the competition rules.

Although under certain circumstances exceptions to the competition rules are possible, the basic rule is that agreements or other practices pursuing non-economic public policy objectives fall within the scope of competition law. They should therefore be in conformity with the above mentioned legislation, just like any other agreement or action with a more economic aim. There are no clauses to exclude entirely from the scope of competition law for instance environmental agreements which have a (potential) harmful effect on competition, but a beneficial effect towards the environment.¹⁰¹ Limited exceptions to the basic rule are possible only in case a certain activity belongs to the essential functions of the state (such as the supervision of air traffic navigation safety)¹⁰² or if a social function is fulfilled on the basis of solidarity (for instance certain social security schemes)¹⁰³. Also collective agreements between labour and employers associations usually fall outside the scope of competition law.¹⁰⁴ For the rest, agreements or other practices with a non-economic policy objective mostly do not automatically fall outside the scope of EU competition law.¹⁰⁵ Those which form an obstacle to competition will either be prohibited, or an exception can be granted *inter alia* under Article 101(3) TFEU (exception to the cartel prohibition), Article 106(2) TFEU (exception for Services of General Economic Interest (SGEI)) or Article 21(4) of the Merger Regulation.

⁹⁷ Monti, *EC Competition Law* (n 95), 41-42.

⁹⁸ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1, para 24 of the preamble.

⁹⁹ Sybe A. de Vries, *Tensions within the Internal Market - The functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing 2006), 172-174; This doctrine is based on Articles 3(1)(g), 10 and 81 or 82 EC (now Articles 3(1)(b) TFEU, 4(3) TEU and 101 or 102 TFEU).

¹⁰⁰ Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17.

¹⁰¹ De Vries (n 99), 101-115.

¹⁰² Case C-364/92, *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-00043, para 28.

¹⁰³ Joined Cases C-159/91 and C-161/91, *Poucet and Pistre* [1993] ECR I-00637, para 18.

¹⁰⁴ Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens* [1999] ECR I-06025, para 57.

¹⁰⁵ De Vries (n 99), 115.

2.4 Conclusion

It may be concluded from this brief overview of European Competition Policy that at present it is not at all easy for non-economic policy objectives to be included in the competition policy of the EU. This seems to be especially due to the strict economic approach used by the Competition Authorities within the European Union. Further analysis of competition law and supervision will be conducted in the following chapters. In the next chapter we will assess the present legal framework for including non-economic public policy objectives in competition law.

3. The legal framework for including non-economic public policy objectives in Competition Law

“There are convincing bases in economic theory, and evidence from case study and econometric analyses, to conclude that, depending upon their design, environmental regulations can constitute substantial barriers to entry in some markets, can provide a basis for predatory behaviour in some markets and can be harmful to competition and welfare through a variety of other channels.”¹⁰⁶

This quote of the OECD underlines that one word lays at the heart of the problem we are dealing with, and that is: conflict. The European Union has several objectives, which from their essence are sometimes incompatible with each other. If this is the case, the question arises which objective or policy is more important. If it is beneficiary for the quality of health care if several hospitals merge into one big organisation, this could be harmful to competition at the same time. Hence, health care policy must be balanced against competition policy. If several firms in the same branch of industry want to conclude cooperation agreements to improve energy management and efficiency, this could at the same time have a levelling effect on their prices. Thus, the cartel prohibition has to be balanced against environmental policy. Both the economic and the non-economic objectives in these examples are important in the scope of EU law. Since the Treaties want to pursue many different objectives, they provoke conflict. In this chapter we will try to assess how conflict is dealt with in the scope of competition law, especially with respect to Article 101 TFEU.

First, it must be noted that conflict will arise *only* if the competition rules are actually applicable to a certain case. If they are not, the non-economic policy objective in question can be pursued without having to worry about possible harmful effects on competition. The applicability of the competition rules will be discussed first. Secondly, we will discuss how conflict is dealt with within the different paragraphs of Article 101 TFEU in order to find out to what extent the Treaties, the Courts and the European Commission require non-economic public policy objectives to be taken into account within the scope of the cartel prohibition.

3.1 When are the competition rules applicable?

As we have seen in chapter two, it is the basic rule that agreements or other practices pursuing non-economic public policy objectives fall within the scope of competition law.¹⁰⁷ This means that they are not immune for the competition rules, but that they should respect the prohibitions set out therein. Nevertheless, the specific characteristics of certain agreements might exclude them from the scope of the competition rules after all. Article 101 TFEU mentions three requirements which must be met before the competition rules will be applicable. There must be proof of the existence of an undertaking, an agreement and an interstate element. These three requirements will be discussed below.

3.1.1 Undertaking

A key element of both Article 101 and 102 TFEU is the word ‘undertaking’. The application of these articles is explicitly confined to restrictive agreements, decisions, concerted practices or abusive behaviour which are carried out by *undertakings*. The *Höfner* case of the European Court of Justice (ECJ) is the landmark case for deciding which organisations should be considered as undertakings in the scope of competition law and which should not. According to this case the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.¹⁰⁸ An entity will relatively easily satisfy this requirement since an economic activity is defined by the ECJ as ‘any activity consisting in offering goods or

¹⁰⁶ OECD paper ‘Environmental regulation and competition’ DAF/COMP(2006)30, 17.

¹⁰⁷ Sybe A. de Vries, *Tensions within the Internal Market - The functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing 2006) 101-115.

¹⁰⁸ Case C-41/90, *Höfner* [1991] ECR I-01979, para 21; similarly see Joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband* [2004] ECR I-02493, para 46.

services on a given market.¹⁰⁹ In the *Wouters* case the ECJ has however established that there are two exceptions. Activities which fall in one of the following categories can not be considered to be economic:

- 1) Activities which, by their nature, their aim and the rules to which they are subject do not belong to the sphere of economic activity
- 2) Activities which are connected with the exercise of the powers of a public authority.¹¹⁰

First category

Entities carrying out activities based on the principle of solidarity are probably the best example of the first category. In *Cisal* a company managing an occupational insurance scheme was not considered to be carrying out an economic activity because it fulfilled an exclusively social function based on the principle of solidarity.¹¹¹ The *AOK Bundesverband* case gives an example from the non-economic public policy area of public health. In *AOK* the ECJ decided that German sickness funds which fulfil an exclusively social function and are based on the principle of solidarity are not undertakings in the sense of Article 101 TFEU.¹¹² In relation to the first category, academics used to mention *Meca-Medina* as probably the only example of a whole non-economic public policy area (sports) which falls outside the scope of the competition rules because it is in itself a purely non-economic policy area.¹¹³ In this case the Court of First Instance (CFI)¹¹⁴ ruled that sport is essentially a non-economic act. Therefore, anti-doping rules which were based on purely sporting considerations (*inter alia* safeguarding the fairness of the game) would – according to the Court – not fall within the scope of the competition rules.¹¹⁵ In July 2006, however, the ECJ ruled on the case in appeal and declared that the CFI had made an error of law in stating that because they are based on purely sporting considerations the anti-doping rules fall by their nature outside the scope of competition law.¹¹⁶ Herewith the Court took away the sole example of that non-economic public policy objectives *could* be inherently non-economic and therefore fall outside the scope of the competition rules.

Second category

Eurocontrol is an example of the second category mentioned in the *Wouters* judgement. In this case the ECJ found that Eurocontrol, an organisation in charge of the maintenance and improvement of air traffic safety, must be regarded as carrying out activities connected by their nature with the exercise of the powers of a public authority. These activities are therefore not of an economic nature.¹¹⁷ For that reason Eurocontrol is not an undertaking in the sense of the competition rules. It has to be noted here, however, that the question whether an entity is an undertaking depends entirely on the specific activities it is carrying out. This means that if Eurocontrol would *also* be a commercial producer of navigation systems, it could be considered to be an undertaking for that part of its activities.¹¹⁸ The ECJ gives an example related to a non-economic public policy objective (environmental protection) in the *Diego Cali* case where it shows that setting tariffs for carrying out anti-pollution surveillance in Genova (Italy) by a private body entrusted with that task by the public authorities is not an economic activity. This is the case because the activities were considered by the ECJ to belong to the essential functions of the State.¹¹⁹

¹⁰⁹ Case 118/85, *Commission v Italy* [1987] ECR 02599, para 7; and Case C-35/96, *Commission v Italy* [1998] ECR I-03851, para 36; Case C-309/99, *Wouters* [2002] ECR I-01577, para 47.

¹¹⁰ *Wouters* (n 109), para 57.

¹¹¹ Case C-218/00, *Cisal v INAIL* [2002] ECR I-00691, paras 37-45. See also these paragraphs for the exact requirements governing which activities based on the principle of solidarity are excluded from the competition rules.

¹¹² *AOK Bundesverband* (n 108), paras 45-66.

¹¹³ De Vries (n 107) 101.

¹¹⁴ After the Lisbon Treaty: the General Court.

¹¹⁵ Case T-313/02, *Meca-Medina* [2004] ECR II-03291 (appealed), paras 45-47 and 65.

¹¹⁶ Case C-519/04 P, *Meca-Medina* [2006] ECR I-06991, paras 32-33.

¹¹⁷ Case C-364/92, *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-00043, paras 27-30.

¹¹⁸ In this respect an interesting follow-up to the Eurocontrol case emerged where the ECJ was asked to declare if other activities carried out by Eurocontrol were of an economic nature anyhow. The court decided however that these activities (the preparation and production of technical standards) are inseparable from Eurocontrol's core activities as mentioned above (the maintenance and improvement of air traffic safety) and are thus not of an economic nature. See Case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission* [2009] ECR I-02207, paras 91-97.

¹¹⁹ Case C-343/95, *Diego Cali* [1997] ECR I-01547, paras 22-24.

The two categories of exceptions mentioned in *Wouters* can be relevant for non-economic public policy objectives. If agreements which aim at achieving non-economic public policy objectives can be subsumed under one of the *Wouters* categories, they will fall *outside* the competition rules. Nonetheless, it can be said that activities related to non-economic public policy objectives are most of the time to be qualified as falling *within* the scope of competition law.¹²⁰ This observation is reinforced by the ECJ's ruling on appeal in the *Meca-Medina* case. The reason for this finding may lie in the scope of the 'undertaking'-concept, which is generally considered to be very broad.¹²¹ In the policy area of public health, for example, the ECJ considered in *Ambulanz Glöckner* that "entities such as medical aid organisations providing emergency transport services and patient transport services must be treated as undertakings within the meaning of the competition rules."¹²² Most probably also most hospital services are economic activities, even if patients do not have to pay for the services by their selves.¹²³ Also in the area of the environment most activities are generally considered to be of an economic nature. In the *DSD* case the Court of First Instance even skipped the question whether a company collecting packaging waste could be considered to be an undertaking. It was simply assumed to be an undertaking.¹²⁴

3.1.2 Agreement

The cartel prohibition is applicable to 'all agreements between undertakings, decisions by associations of undertakings and concerted practices'. All these terms have been given a broad interpretation. Contracts and settlements qualify as agreements and even 'gentleman's agreements' and 'simple understandings' have been said to be agreements in the sense of Article 101 TFEU.¹²⁵ As we will see later in this chapter, the *Wouters* case gives an example of a decision by an association of undertakings (i.e. the Dutch Bar Association).¹²⁶ Concerted practices include loose, informal understandings to limit competition. This is a particularly difficult category to prove because incriminating evidence is often hidden or even destroyed.¹²⁷ For the sake of convenience we will use the term 'agreement' from this point. All the theory discussed below however equally applies to decisions and concerted practices as meant in Article 101(1) TFEU.

3.1.3 Interstate element

As with most other EU policies, there should be an *interstate element* present. This concept means that there may be a possibility that the restrictive agreements, decisions, concerted practices or abusive behaviour in question will affect trade between Member States. Hence, cases which are purely internal to a Member State will not fall within the scope of European Competition Law.¹²⁸

3.1.4 Conclusion

We can conclude here that activities linked to non-economic public policy objectives are generally caught by the competition rules, based on the first three requirements of Article 101 TFEU. As we have seen, in some situations they could fall outside the scope of the competition law after all. However, as De Vries rightly observes¹²⁹, in those situations the reason for their exclusion is not that they may be beneficial to certain non-economic policy objectives, but that they are based on the principle of solidarity or that they belong to the essential functions of the state.

¹²⁰ De Vries (n 107) 115.

¹²¹ *ibid*, 115.

¹²² Case C-475/99, *Ambulanz Glöckner* [2001] ECR I-08089, paras 20-22.

¹²³ An analogy could be drawn with the free movement rules: in the context of the former Article 50 TEC (now Article 57 TFEU) the ECJ decided that hospital services are activities of an economic character, see Case C-157/99, *Smits and Peerbooms* [2001] ECR I-05473, para 58. See furthermore: De Vries (n 107) 109.

¹²⁴ Case T-151/01, *Der Grüne Punkt – Duales System Deutschland AG* [2007] ECR II-01607, para 12.

¹²⁵ Richard Wish, *Competition Law* (sixth edition, Oxford University Press 2009) 97-102.

¹²⁶ *Wouters* (n 109); Whish (n 125), 102-104.

¹²⁷ Whish (n 125), 104-113.

¹²⁸ The Commission has issued guidelines on this concept: Commission Notice 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' [2004] OJ C 101/81.

¹²⁹ De Vries (n 107) 115.

3.2 A restriction of competition?

As soon as it is established that we are dealing with an undertaking which is pursuing agreements, decisions or concerted practices which may affect trade between member states, we can say that the cartel prohibition of Article 101(1) TFEU is applicable to a certain activity. At that point it should be established whether the agreements in question should be prohibited or allowed. According to Article 101 this question is dependent on whether the agreements "have as their object or effect the prevention, restriction or distortion of competition within the internal market." Or, in other words, those agreements which have an anti-competitive object or effect are prohibited. The ECJ's judgement in *T-Mobile* shows that agreements with an anti-competitive *object* can be defined as "being by their very nature ... injurious to the proper functioning of normal competition."¹³⁰ According to the Court this type of agreements include "partitioning national markets according to national borders" and "making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports [...]."¹³¹ Also price-fixing, market-sharing and the control of outlets belong to this category.¹³² It has been stated and restated by the ECJ many times (*inter alia* in *Consten and Grundig*) that if an agreement has an anti-competitive object, there is no need to take account of its actual effects in the market.¹³³ In other words, a finding of an agreement with an anti-competitive object generates a presumption of illegality and a thorough economic analysis to check this presumption is not necessary.¹³⁴ This point is however not entirely undisputed.¹³⁵ *GlaxoSmithKline* gives an example of an agreement with an anti-competitive object. In this case Glaxo (a producer of medicines) entered into an agreement with Spanish wholesalers which provided that those wholesalers could not export the medicines bought from Glaxo to other Member States. According to the ECJ this practice had an anti-competitive object because it partitioned the market.¹³⁶ In some cases, such as in the *O2* judgement, the ECJ finds that a certain agreement does not have as its object a restriction of competition. Such an agreement can nevertheless have an anti-competitive *effect* if "those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent."¹³⁷ In order to carry out this test, it should be examined what the competition situation would be in the absence of the agreement.¹³⁸ *O2* gives an example of an agreement with an anti-competitive effect. In this case there was a 'roaming' agreement between O2 and T-Mobile, giving O2 access to T-Mobile's network while it was constructing its own network. Although the Commission first found that there was a restrictive effect on competition, it however later decided that the agreement could be exempted under Article 101(3) TFEU.¹³⁹

3.3 Guidelines, notices and block exemptions

Even if an agreement restricts competition attention still has to be paid to the guidelines, notices and block exemptions of the Commission. The Commission has given several nuances to the applicability of Article 101(1) through these publications. Examples are the *Guidelines on Vertical Restraints*¹⁴⁰ and the *Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements*¹⁴¹. Another very important publication is the *Commission Notice on agreements of minor importance*. The Commission has decided in this notice that restrictive agreements could still fall outside the scope of competition law if

¹³⁰ Case C-8/08, *T-Mobile* [2009] ECR I-04529, para 29.

¹³¹ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline* [2009] ECR I-09291, para 60.

¹³² De Vries (n 107), 184; Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services* [1998] ECR II-03141, para 136.

¹³³ *T-Mobile* (n 130), para 29; Joined Cases 56/64 and 58/64, *Consten and Grundig* [1966] ECR English special edition 00299.

¹³⁴ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (second edition, Cambridge University Press 2010) 986; It is however possible for the parties to rebut the presumption that the activities in question cause harmful effects to competition: Chalmers 986-987.

¹³⁵ *ibid* 986-987.

¹³⁶ *GlaxoSmithKline* (n 131) paras 61, 64.

¹³⁷ Case T-328/03, *O2* [2006] ECR II-01231, para 68-71.

¹³⁸ *ibid* para 68-71.

¹³⁹ *O2* (n 137).

¹⁴⁰ Guidelines on Vertical Restraints [2010] OJ C 130/1.

¹⁴¹ 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' [2011] OJ C 11/1.

they are unlikely to affect trade or restrict competition between Members states to an appreciable extent. This is called the *De Minimis* requirement. In the notice the Commission states for instance that agreements between competitors do not appreciably restrict competition "if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement."¹⁴²

The publications which are referred to above limit the application of the competition rules in some specific situations and must therefore be taken into account. They do however not provide for specific exceptions for non-economic public policy objectives.

3.4 Dealing with conflict between non-economic public policy and competition policy in EU law

After the former sections we know that – for example – an agreement between Dutch and Danish fishermen to limit a significant part of the catch of fish in order to protect the ocean's fish population, will most probably be prohibited under the cartel prohibition. All the requirements of Article 101 are fulfilled, including the restriction of competition requirement (the control of outlets is an object restriction). Moreover, the agreement will probably not fulfil the *De Minimis* requirement. In situations like this, the arising of a conflict situation between sustainability objectives and competition policy cannot be ruled out anymore. Whether a prohibition will immediately mean that the environment-friendly agreement cannot be pursued at all, is dependent on whether an exception can be found for it under Article 101(1), 101(3) or 106(2) TFEU. Hereunder an assessment will be made of how EU law deals with a conflict between the competition rules – specifically the cartel prohibition – and non-economic public policy objectives under these articles.

3.4.1 How conflict is dealt with under Article 101(1) TFEU

The Court and the Commission have shown in their judgements and decisions that conflict between competition policy and non-economic public policy can possibly be solved within Article 101 TFEU. This technique has however not been fully crystallised yet and is interpreted and named differently by various legal scholars. Here an overview will be given of some views and approaches.

De Vries and Van de Gronden and Mortelmans refer to the concept of *Inherent Restrictions*. According to this concept some restrictions to competition which are considered necessary (inherent) and appropriate for the functioning of a certain organisation, system or sector may not fall under the cartel prohibition of Article 101(1) TFEU.¹⁴³ The existence of the concept can be inferred *inter alia* from the ECJ's *Gøttrup-Klim* case¹⁴⁴, and the Commission's decisions in *UEFA*¹⁴⁵ and *EPI*¹⁴⁶. The *EPI* case, for instance, deals with a Code of conduct for representatives before the European Patent Office (EPO). This Code stated that a representative could not charge a fee directly related to the outcome of the services he provides. As a result the representative could not, for example, charge higher fees simply because a patent is granted or lower fees if a patent is not granted. Although being restrictive to competition, the Commission considered the Code not to be in violation of Article 101(1) TFEU (then: 85(1) EC). It argued that it was *necessary* in order to guarantee impartiality on the part of representatives and to ensure the proper functioning of the EPO.¹⁴⁷ It can also be argued that the appealed *Meca Medina* judgement gives an example of the inherent restrictions approach. In this case the ECJ decided that the anti-doping rules which in principle could be anti-competitive can be

¹⁴² Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community [2001] OJ C 368/13, para 7.

¹⁴³ De Vries (n 107) 191; J.W. van de Gronden and K.J.M. Mortelmans, 'Het mededingingsrecht en niet-economische belangen: 2003 het cruciale jaar?' in J.W. van de Gronden and K.J.M. Mortelmans (eds), *Mededinging en niet-economische belangen* (Kluwer 2001) 318-323.

¹⁴⁴ Case C-250/92, *Gøttrup-Klim* [1994] ECR I-05641, para 35.

¹⁴⁵ Rejection Decision of the Commission in Case COMP/37 806, *ENIC/UEFA* [2002] para 32 <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37806/37806_7_3.pdf> accessed 27 November 2011. Note that the Commission refers to the *Wouters* case in paragraph 31, which will be discussed hereafter. Nevertheless the UEFA decision is a clear example of the 'normal' inherent restrictions approach.

¹⁴⁶ Commission Decision 1999/267/EC, *EPI* [1999] OJ L 106/14.

¹⁴⁷ *ibid* para 35.

justified by a legitimate objective. According to the ECJ the anti-doping rules are 'inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes'.¹⁴⁸ It is particularly interesting to argue that the inherent restrictions approach is applied in *Meca-Medina* because that would show that by applying this approach, a restriction can be excluded from the scope of competition law on the basis that is necessary for the functioning of a sector which is related to non-economic public policy, namely the sports sector.

In the very interesting *Wouters* case the ECJ introduces an alternative type of the inherent restrictions approach. This type slightly differs from the one discussed above and is called the *mixed inherent restrictions approach* by Van de Gronden and Mortelmans.¹⁴⁹ Under this alternative approach the ECJ does not focus on the necessity (inherence) of the restrictive agreement to the functioning of a certain organisation, system or sector, but it focuses on its necessity for the general interest.¹⁵⁰ The *Wouters* case deals with rules set up by the Bar of the Netherlands (de Nederlandse Orde van Advocaten) which prohibit professional partnerships between members of the Bar (lawyers) and accountants. These so-called 'multi-disciplinary partnerships' have however clear pro-competitive advantages, for instance because they enable clients to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the one-stop shop advantage).¹⁵¹ The Court does nevertheless approve the restrictions imposed by the Bar of the Netherlands. It finds that "the rules set up by the Bar of the Netherlands are necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned."¹⁵² The Court sets out its line of reasoning in paragraph 97 of the judgement. First, it states that not every agreement which restricts the freedom of action of the parties necessarily falls within the prohibition of Article 101(1) TFEU (then: 85(1) EC). It continues by saying that it is de overall context in which the decision was taken or produces its effects which is important for the application of Article 101(1). According to the Court account must be taken of the objectives of the decision. Specifically with regard to the *Wouters* case the Court reasons that those objectives are "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." Finally it applies a proportionality test: "It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."¹⁵³

By concluding that the rules are necessary in order to ensure the proper practice of the legal profession in the Netherlands, the ECJ in fact recognises that the possibility should exist for a certain body (in this case the Dutch Bar Association) to pursue certain objectives –in a proportional way– which are in the general interest, without being in violation of the competition rules.¹⁵⁴ The general interest in the *Wouters* case is the protection of the independence of accountants and the partiality of lawyers.¹⁵⁵ A parallel could be drawn here with the free movement rules. The so-called *rule of reason* exception is applicable to the rules on free movement if it can be shown that there are mandatory requirements of general interest to justify such an exception. Public interests which can lead to a rule of reason exception are for instance consumer protection and environmental

¹⁴⁸ *Meca-Medina* (n 116) para 45; It is true that the ECJ in *Meca-Medina* bases its reasoning on the *Wouters* case, which will be discussed hereafter. However, the subject matter of the two cases differs to the extent that *Wouters* is dealing with an agreement necessary in the general interest (the *alternative type* of the inherent restrictions approach as discussed hereafter), while *Meca-Medina* is dealing with an agreement necessary for the proper functioning of the competitive sports sector (the 'normal' inherent restrictions approach as discussed above).

¹⁴⁹ Van de Gronden and Mortelmans use this term because objectives of general interest are being 'mixed into the competition test in the cartel prohibition', see: J.W. van de Gronden and K.J.M. Mortelmans, 'Wouters: is het beroep van advocaat een aparte tak van sport?' (2002) 51 *Ars Aequi* 441, 459 (case note).

¹⁵⁰ *ibid* 458-459.

¹⁵¹ *Wouters* (n 109) para 79-90.

¹⁵² *ibid* para 107.

¹⁵³ *ibid* para 97.

¹⁵⁴ *Wouters* case note (n 149) 458-459.

¹⁵⁵ Opinion of AG Léger in Case C-309/99, *Wouters* [2002] ECR I-01577, para 105; *Wouters* case note (n 149) 458-459; Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057, 1086.

protection.¹⁵⁶ It must be noted however, that the rule of reason exception in the sphere of the free movement rules is very broad and that the list with possible exceptions is still being expanded in the case law of the ECJ.¹⁵⁷ It is nevertheless unsure what the scope of the mixed inherent restrictions approach is.¹⁵⁸ The *Wouters* case only deals with an agreement set up by a bar association to protect the independence of accountants and the partiality of lawyers. It does not clarify if agreements could also fall outside the scope of Article 101(1) TFEU if they deal with other requirements in the general interest, such as the protection of the environment or of public health. De Vries therefore states that it goes too far to accept that *Wouters* has radical consequences for how non-economic public policy will be balanced with restrictions of competition. The only thing which can be inferred from the case law of the ECJ with certainty is that Article 101(1) cannot be applied blindly. The specific context in which the restrictive agreement functions should always be taken into account.¹⁵⁹

Monti presents a different view on the issue. Instead of deducing the existence of an inherent restrictions approach from cases such as *Gøttrup-Klim* and *EPI*, he focuses entirely on the *Wouters* case. According to Monti the *Wouters* case shows that the Court of Justice chose to transpose the rule of reason exception from the area of the free movement rules to Article 101 TFEU. He states that the *Wouters* case gives strong indications that this *European-style* rule of reason now can also be applied to competition law cases. This would mean that an 'anticompetitive agreement necessary to preserve a domestic mandatory requirement of public policy is allowed to escape the application of Article 81' (now Article 101 TFEU).¹⁶⁰ The term *European-style* rule of reason is used by Monti to distinguish it from the *American-style* rule of reason.¹⁶¹ One must be reminded that the term 'mandatory requirements of public policy' is an open norm in the free movement area. This means that many different public policies could be invoked under the *European-style* rule of reason.¹⁶² Hence, while De Vries says that *Wouters* is relevant to non-economic public policy only to a limited extent, Monti seems to believe that the case has a much bigger impact factor. Monti however acknowledges that a simple transposition of the *European-style* rule of reason from the free movement area to competition law could be difficult. The rule of reason case law has been developed for national legislative measures, while under Article 101 it would be applied to private agreements. Monti nevertheless sees great opportunities if the Court decides to further develop the *European-style* rule of reason in the competition law area in the future.¹⁶³ In chapter 5 of this research we will further anticipate on Monti's *European-style* rule of reason. Furthermore it is interesting to note that Monti explicitly limits the scope of the *European-style* rule of reason to *domestic* mandatory requirements of public policy, meaning those stemming from the Member States (as was the case in *Wouters*).¹⁶⁴

Whish offers the (probably already confused) reader again another view on the issue. His approach primarily differs in terms of terminology. He makes a distinction between *commercial ancillarity* and *regulatory ancillarity*. These terms are not to be confused with the 'ancillary restraints doctrine' which is another (narrower) concept, which is not of direct relevance here.¹⁶⁵ The concept of *commercial ancillarity* very much resembles the concept

¹⁵⁶ W.T. Eijsbouts et al, *Europees Recht Algemeen Deel – sinds het Verdrag van Lissabon* (Europa Law Publishing 2010) 100; Whish (n 125) 763.

¹⁵⁷ Eijsbouts (n 156) 100.

¹⁵⁸ *Wouters* case note (n 149) 460.

¹⁵⁹ De Vries (n 107) 198.

¹⁶⁰ Monti 'Article 81 EC and Public Policy' (n 155) 1086-1088.

¹⁶¹ Under the *American-style* rule of reason the legality of an agreement depends upon the outcome of a balancing of the pro- and anticompetitive effects of an agreement, see Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007) 112. This type of rule of reason is explicitly not applicable in European competition law, as the Court of First Instance has decided in its *Métropole* judgement, see Case T-112/99, *Métropole* [2001] ECR II-02459, para 107.

¹⁶² Eijsbouts (n 156) 100.

¹⁶³ Monti 'Article 81 EC and Public Policy' (n 155) 1089-1090.

¹⁶⁴ Section 5.2 of Monti's article is dealing with 'national interests excluding the application of Article 81', see Monti 'Article 81 EC and Public Policy' (n 155) 1086.

¹⁶⁵ The 'ancillary restraints doctrine' is considered *inter alia* in the *Métropole* judgement (*Métropole* 2001 (n 161) para 104) and covers "any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it"; also see Communication from the Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C 101/97, section 2.2.3; and see also Whish (n 125) 126.

of inherent restrictions as mentioned by De Vries and Van de Gronden and Mortelmans. Whish defines the concept by saying that 'it is possible to argue successfully that restrictions which are necessary to enable the parties to an agreement to achieve a legitimate commercial purpose fall outside Article 81(1)' (now Article 101(1) TFEU).¹⁶⁶ The other concept, *regulatory* ancillarity, covers the *Wouters* case. Whish puts forward that in the *Wouters* case the restriction was not necessary for a commercial purpose, but was 'ancillary' to a regulatory purpose of a public character (the sound administration of justice). Whish further mentions that nothing in the *Wouters* case explicitly limits its application to rules relating to the legal profession.¹⁶⁷ It can therefore be concluded that Whish believes that the *Wouters* case opens the way for a broad interpretation of Article 101(1) and can therefore have serious implications for the treatment of non-economic public policy objectives under the competition rules.

It may be concluded that all the approaches agree that the case law mentioned in this section – and the *Wouters* case in particular – have (at least to some extent) implications for how non-economic public policy objectives are balanced under the cartel prohibition of Article 101(1) TFEU. On the one hand implications can be seen if a restriction to competition is necessary for a commercial sector which is related to a non-economic public policy objective. This was for instance the case in the *Meca-Medina* judgement where the ECJ approved restrictions which were beneficial to the sports sector. On the other hand implications can be seen in situations where the 'Wouters doctrine'¹⁶⁸ is invoked. In those situations restrictions to competition can be justified because they are necessary for a purpose in the general interest. All the approaches discussed above show that particularly the *scope* of the *Wouters* case is a problematic issue. Where some academics are of the opinion or hope that *Wouters* creates the possibility to invoke many non-economic public policy objectives under Article 101, others say that from *Wouters* alone no such implications can be deduced. A related issue is whether the 'Wouters doctrine' only applies to non-economic public policy objective which are formulated by governments of the Member States (as happened in *Wouters*), or that also policies of the EU (or even, as Whish submits, policies of other bodies of international public law¹⁶⁹) can be invoked under the 'Wouters doctrine'. Finally, it is interesting to note that since the introduction of Regulation 1/2003 (the Modernisation Regulation) the practice of *ex ante* notification of restrictive agreements has been abandoned.¹⁷⁰ Instead, at present the Commission only checks *ex post* if agreements are restrictive to competition or not. Having in mind the ambiguity surrounding the approaches mentioned above, it requires a very courageous undertaking which would dare to gamble that its restrictive agreement will not be caught by the cartel prohibition because it can be justified under the 'Wouters doctrine'. In other words, at the moment there is great legal uncertainty as to the applicability of the approaches as discussed above. It therefore seems to be necessary that first of all the ECJ clarifies its point of view on this issue before the 'Wouters doctrine' and even the inherent restrictions / commercial ancillarity approach will be used by undertakings on a bigger scale.

Prospective case law of the General Court concerning the 'Wouters doctrine'

As far as we can see there has not been case law of the Courts after the *Wouters* case which further clarifies the ECJ's approach towards the balancing of public interests under Article 101(1) TFEU. This might however change when the General Court renders a decision in the *ONP* case which has been brought before it in February 2011.¹⁷¹ The ONP (Ordre national des pharmaciens) is a professional body with the task to ensure that pharmacists in France comply with their professional duties.¹⁷² On 8 December 2010 the Commission issued an elaborate decision in which it came to the conclusion that the ONP had infringed Article 101(1) TFEU by pursuing two types of restrictive conduct. First, the ONP issued decisions with the object of imposing minimum prices in the French market for

¹⁶⁶ Whish (n 125) 126.

¹⁶⁷ *ibid* 128-129.

¹⁶⁸ I will use this considerably neutral term from now on to cover the different views on the *Wouters* case as discussed above.

¹⁶⁹ Whish (n 125) 128-129.

¹⁷⁰ Also see section 3.4.2 of this research.

¹⁷¹ Case T-90/11, *ONP* [2011] OJ C 173/13 (action brought on 18 February 2011).

¹⁷² Commission Press Release of 8 December 2010 (IP/10/1683) 'Antitrust: the Commission rules against the Ordre national des pharmaciens for restrictions on competition in the French clinical analysis market'.

clinical laboratory testing services. Second, the ONP issued decisions with the aim of imposing restrictions on the development of certain groups of laboratories on the French market.¹⁷³ In their defence plea the ONP argued that its restrictive behaviour can be justified in the light of the protection of public health. According to the ONP the 'Wouters doctrine' is applicable in this specific case. The Commission did however not agree with ONP on this point.¹⁷⁴ The ONP applied for annulment of the Commission Decision with the General Court. Interestingly, the ONP bases their plea partly on the argument that the Commission wrongfully took the view that the exception set out in *Wouters* does not apply to the present case.¹⁷⁵ Independent of the final result for ONP, it is possible that the General Court will give further guidance on the scope of application of the *Wouters* case (especially in relation to public health) when it issues its opinion in the *ONP* case. For that reason it is important to keep an eye on this case. One should however not expect an answer from the General Court in the near future. In 2010 it took the General Court 45.7 months on average to complete competition proceedings, which is almost 4 years.¹⁷⁶

3.4.2 How conflict is dealt with under Article 101(3) TFEU (the Treaty exception)

If conflict between competition policy and non-economic public policy objectives cannot be solved within Article 101(1), it must be assessed if solutions can be found within Article 101, paragraph 3, which embodies the Treaty exception to the competition rules. This paragraph allows for certain agreements which have an anti-competitive object or effect to be allowed after all if the *economic efficiency* gained by the agreement outweighs the restriction of competition.¹⁷⁷ In addition, the paragraph requires that consumers benefit from those efficiency gains. Article 101(3) therefore seems to serve one of the core goals of competition law: consumer welfare.¹⁷⁸ While in principle consumers are considered to be best off if undertakings are competing with each other, the Treaty apparently also acknowledges that sometimes this is not the case. Article 101(3) offers a solution for those cases where consumers are considered to benefit more if undertakings are cooperating instead of competing. The paragraph provides that the provisions of Article 101(1) can be declared inapplicable in the case of any agreement, decision or concerted practice:

"which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

In order for agreements to be exempted under this article, all four conditions have to be fulfilled. This means that:

- A contribution to the improvement of production or distribution of goods or to promoting technical or economic progress should exist. There must thus be a causal link between the restriction and any such improvement;
- Consumers (including undertakings) should get a fair share of the benefits;
- The restrictions to competition should be indispensable. This is the proportionality principle: the restriction should not go further than is necessary to achieve the desired improvements¹⁷⁹;
- There should be no substantial elimination of competition.

The Court of First Instance has stated *inter alia* in *Métropole Télévision* (2002) that if one of these conditions is not satisfied, the exemption must be refused.¹⁸⁰

¹⁷³ Décision de la Commission C(2010) 8952 final du 8 décembre 2010, *ONP (affaire 39510)*, section 11 (Conclusion), Article premier.

¹⁷⁴ *ibid* section 7.1.7, paras 684-691.

¹⁷⁵ *ONP* (n 171) para 1.

¹⁷⁶ Annual Report of the General Court 2010, *Statistics concerning the judicial activity of the General Court*, 183 <http://curia.europa.eu/jcms/jcms/Jo2_7041/> accessed 13 November 2011.

¹⁷⁷ Monti 'Article 81 EC and Public Policy' (n 155) 1063-1064; Whish (n 125) 151.

¹⁷⁸ See section 2.2.2 of this research for the meaning of the 'consumer welfare' concept within EU Competition Policy context.

¹⁷⁹ De Vries (n 107) 202.

Several documents further clarify the characteristics of Article 101(3). First of all there is Regulation 1/2003 (*The Modernisation Regulation*, introduced in May 2004) by which Article 101(3) has been given direct applicability in the Member States. This means that not only the Commission, but also the national competition authorities and the national courts are allowed to apply Article 101(3) TFEU.¹⁸¹ Union citizens and companies will also be able to invoke this exception to the cartel prohibition before their national courts. Furthermore the Regulation abolished the obligation to notify agreements to the Commission in advance for individual exemption under Article 101(3) TFEU.¹⁸² In 2004 the Commission has also issued its Guidelines on the application of Article 81(3) of the Treaty, which give further guidance on the application of Article 101(3) TFEU by the Commission. In the scope of non-economic public policy objectives the Commission has come up with a very interesting paragraph in these guidelines, which states the following:

According to settled case law the four conditions of Article 81(3) are cumulative, i.e. they must all be fulfilled for the exception rule to be applicable. If they are not, the application of the exception rule of Article 81(3) must be refused. The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition. **Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).**¹⁸³ (*emphasis added*)

Apart from that it promotes that consumers receive a share of the benefits, the text of Article 101(3) does not provide for an exemption for non-economic public policy objectives. The excerpt from the Commission's Guidelines seems to support this view as it states that *other Treaty provisions* cannot be taken into account unless they fit into the structure of Article 101(3). The structure of Article 101(3) only provides for an exemption to agreements which enhance *economic efficiency* and not (at least not explicitly) to agreements which are favouring non-economic public policy objectives, such as the environment.¹⁸⁴ It therefore seems that the only agreements for which an exemption can be obtained under Article 101(3) are those which bring about an enhancement of economic efficiency, such as e.g. an agreement which results in the improvement of products or the reduction of production costs.¹⁸⁵ In other words, the Commission uses a *narrow* consumer welfare approach to assess restrictions to competition under Article 101(3).¹⁸⁶ Compare this to the broad welfare approach taken by economists, which covers not only economic efficiency, but also other things which people value, such as a clean environment.¹⁸⁷

Nevertheless, if one looks further than those guidelines and Treaty texts, there are reasons to believe that there is room for non-economic public policy in Article 101(3) after all. The Court of First Instance decided in – another – *Métropole Télévision* judgement (1996) that in order to grant an exemption under Article 101(3) TFEU, the Commission may “base itself on considerations connected with the pursuit of the public interest.”¹⁸⁸ This seems to imply that the Court uses a *broad* consumer welfare approach. There are more cases where the Courts showed that improvements on other areas than economic efficiency could be a reason for granting an exemption under Article 101(3). *Inter alia* employment¹⁸⁹ and sport¹⁹⁰ were mentioned as reasons for exemption. In his opinion on the *Wouters* case Advocate General Léger even said that:

¹⁸⁰ Joined cases T-185/00, T-216/00, T-299/00 and T-300/00, *Métropole Télévision* [2002] ECR II-03805, para 86.

¹⁸¹ Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1, para 4 of the preamble.

¹⁸² *ibid* Article 1.

¹⁸³ Communication from the Commission 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C 101/97, para 42.

¹⁸⁴ Monti 'Article 81 EC and Public Policy' (n 155) 1063-1064; Guidelines on the application of Article 81(3) (n 183) para 33 and section 3.2 (refers specifically to 'efficiency gains'). In paragraph 59 of these guidelines the Commission literally states that "The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective **economic efficiencies**" (*emphasis added*).

¹⁸⁵ Guidelines on the application of Article 81(3) (n 183) para 33.

¹⁸⁶ Saskia Lavrijssen, 'What role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?' (2010) 35 *European Law Review* 636, 643.

¹⁸⁷ See sections 1.1 and 2.2.2 of this research.

¹⁸⁸ Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision* [1996] ECR II-00649, para 118.

¹⁸⁹ Case 26/76, *Metro* [1977] ECR 01875.

"[...] there are no infringements which are inherently incapable of qualifying for an exemption under Article 85(3) of the Treaty. According to the case-law, the wording of Article 85(3) makes it possible to take account of the particular nature of different branches of the economy, social concerns and, to a certain extent, considerations connected with the pursuit of the public interest."¹⁹¹ (*Article 85(3) is now Article 101(3) TFEU*)

However improbable it seems at present, before the introduction of Regulation 1/2003 (which entered into force on 1 May 2004) even the Commission seemed to adopt a broad consumer welfare approach under Article 101(3). For example in the *Ford/Volkswagen*¹⁹² and *Stichting Baksteen*¹⁹³ cases the Commission took considerations into account related to the maintenance and improvement of the level of employment. In the scope of our research the Commission has however given its most remarkable decision in *CECED* (The European Committee of Domestic Equipment Manufacturers¹⁹⁴). In this decision the Commission offered an exemption under Article 101(3) to an agreement between manufacturers of washing machines (such as Siemens, Miele and Whirlpool) which arranged that energy inefficient washing machines would not be produced anymore after a certain amount of time.¹⁹⁵ According to the Commission the agreement would not only lead to individual economic benefits to consumers (because the new washing machines consume less electricity), but also to collective environmental benefits for society as a whole (because of decreased carbon dioxide emissions¹⁹⁶). The Commission referred specifically to the Treaty's title on the environment.¹⁹⁷ Although in *CECED* there are also individual benefits to consumers, the Commission suggested that just a finding of a collective environmental benefit would have been sufficient to fulfil the second requirement of Article 101(3):

"[...] On the basis of reasonable assumptions, the benefits to society brought about by the *CECED* agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines."¹⁹⁸ (*emphasis added*)

This implies that sustainable policies – which generally offer collective instead of individual benefits – would technically be fit to benefit from Article 101(3).¹⁹⁹ Not much after the first *CECED* case a similar case had been brought before the Commission by *CECED*. In this case producers of dishwashers and electric water heaters agreed to stop producing and importing into the Union high-electricity consumption appliances. Although the agreement had an 'appreciable effect' on competition the Commission informally settled the case and concluded that:

"Objectively, the new electric water heaters and dishwashers will be more efficient and enable consumers to reduce their energy bills. Moreover, lower electricity consumption will indirectly help the Union achieve its environmental objectives."²⁰⁰

Note that in both *CECED* cases the Commission referred explicitly to the importance of the agreements in the light of the achievement of the Union's environmental objectives. Monti even states that *CECED* comes close to making environmental policy a core factor in the assessment under Article 101(3).²⁰¹ Another interesting decision was given more than two

¹⁹⁰ Case T-193/02, *Piau* [2005] ECR II-00209.

¹⁹¹ Opinion of AG Léger in Case C-309/99, *Wouters* [2002] ECR I-01577, para 113.

¹⁹² Commission Decision 93/49/EEC, *Ford/Volkswagen* [1993] OJ L 20/14.

¹⁹³ Commission Decision 94/296/EC, *Stichting Baksteen* [1994] OJ L 131/15.

¹⁹⁴ In French: Conseil Européen de la Construction d'Appareils Domestiques (*CECED*).

¹⁹⁵ Commission Decision 2000/475/EC, *CECED* [2000] OJ L 187/47.

¹⁹⁶ Those benefits gained by decreased CO2 emissions are quantified by the Commission by a comparison between the estimated costs of pollution and the savings achieved by taking inefficient washing machines out of production.

¹⁹⁷ *CECED* (n 195) paras 47-57.

¹⁹⁸ *ibid* para 56.

¹⁹⁹ Monti does not agree with this position. He argues that the Commission has made an error by making its observations in paragraph 56 of the *CECED* decision. See: Monti 'Article 81 EC and Public Policy' (n 155) 1077.

²⁰⁰ Commission Press Release of 26 November 2001 (IP/01/1659) 'Commission approves agreements to reduce energy consumption of dishwashers and water heaters'.

²⁰¹ Monti 'Article 81 EC and Public Policy' (n 155) 1078.

years later in *DSD*. In that case the Commission granted an exception under Article 101(3) partly based on the fact that the restrictive agreement gave “direct practical effect to environmental objectives” of the European Union.²⁰² It can altogether be said that before the introduction of Regulation 1/2003 in 2004 the Commission saw at least some room for the inclusion of (sustainable) non-economic public policies in its assessment under Article 101(3). As a side remark I want to mention that it is not clear-cut if this concerns both the public policies of the European Union *and* the public policies of the Member States. While Monti is of the opinion that only EU policies can be taken into account under Article 101(3), Townley argues that also national policies can be brought under this article.²⁰³

Competition policy after Regulation 1/2003

According to Wish a broad interpretation of Article 101(3) cannot be upheld anymore these days because of the implementation of Regulation 1/2003 in May 2004. He states that at present Article 101(3) should be interpreted in a *narrow* manner. Because Article 101(3) TFEU can now also be applied by national competition authorities (NCAs) and national courts, clear limits should be set as to the scope of applicability of Article 101(3). According to Wish NCAs and national courts are not in the right position to balance a restriction of competition against non-economic public policy objectives such as the EU’s environmental policy. He states that a narrow interpretation of Article 101(3) (taking into account only economic efficiency benefits) would probably be less difficult to apply for NCAs and national courts.²⁰⁴ The Dutch NCA (the NMa) seems to support this view.²⁰⁵ Whether Wish’ view is right or not, the Guidelines on the application of Article 81(3) leave no doubt that from 2004 non-economic public policy does not play a role in the Commission’s assessment under Article 101(3).²⁰⁶ Most probably the NCAs and the national courts will take those guidelines into account when considering an exemption to the cartel prohibition, which makes them a highly relevant indicator of what supervisory practice will look like in the future.²⁰⁷ Section 2.2.2 of this research (on consumer welfare) showed that at present many NCAs indeed use a strict economic approach to competition policy, similar to the Commission’s approach. The Commission’s reference²⁰⁸ to the *Matra Hachette* judgement²⁰⁹ in its Guidelines on the application of Article 81(3) is even said to suggest that non-economic public policy has, according to the Commission, never been and will never be a main reason for an exemption under Article 101(3). Instead, non-economic public policy considerations can, according to this view, only be used to *supplement* the economic benefits created by an agreement.²¹⁰

Although Lavrijssen²¹¹ referred to some paragraphs in the former *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*²¹² in order to show that the Commission nevertheless still has a positive view towards environmental agreements, we must unfortunately conclude that those paragraphs have been removed in the new guidelines, which have been published in 2011.²¹³ It seems that the only way to achieve more legal certainty as to what extent non-economic public policies have to be taken into account under Article 101(3) is a new judgement of the ECJ. Although the Court gave some small hints as to the scope of Article 101(3) in its case law it has not yet been

²⁰² Commission Decision 2001/837/EC, *DSD* [2001] OJ L 319/1, paras 142-146.

²⁰³ Monti ‘Article 81 EC and Public Policy’ (n 155) 1083-1086; Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009) 135-137.

²⁰⁴ Wish (n 125) 155.

²⁰⁵ In their year report of 2009 the NMa states that it is difficult for a national competition authority (NCA) to balance public interests against restrictions to competition. This is primarily the case because it is, according to the NMa, nearly impossible for an NCA to measure the value of a public interest. See: NMa Jaarverslag 2009 “Belangen wegen”, 45

<http://www.nma.nl/images/NMa_Jaarverslag_200922-156708.pdf> accessed 15 oktober 2011.

²⁰⁶ See also: T.R. Ottervanger, ‘Maatschappelijk verantwoord concurreren. Mededingingsrecht in een veranderende wereld’ (2010) 3 Markt & Mededinging 93, 97.

²⁰⁷ Wish (n 125) 156.

²⁰⁸ Guidelines on the application of Article 81(3) (n 183) footnote 54.

²⁰⁹ Case T-17/93, *Matra Hachette* [1994] ECR II-00595.

²¹⁰ Alison Jones and Brenda Sufrin, *EU Competition Law: text, cases, and materials* (fourth edition, Oxford University Press 2011) 244-245.

²¹¹ Lavrijssen (n 186) 643.

²¹² Commission Notice ‘Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements’ [2001] OJ C 003/2, paras 189-197.

²¹³ 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’ [2011] OJ C 11/1, para 18, footnote 1.

conclusive on the matter. Future judgements should show if the ECJ agrees with the Commission's narrow interpretation or if it pleads for a broad interpretation of the exemption to the cartel prohibition after all.²¹⁴

3.4.3 Article 106(2) TFEU: services of general economic interest

A final escape out of conflict with the competition rules for an activity which is inspired on non-economic public policy is getting qualified as a *service of general economic interest* (SGEI). Article 106(2) TFEU provides for a special treatment for those services:

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, **in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.** The development of trade must not be affected to such an extent as would be contrary to the interests of the Union. (*emphasis added*)

In other words, the competition rules can be set aside if that is required for the proper functioning of a service of general economic interest. Provided, however, that the development of trade is not affected to such an extent as would be contrary to the interests of the EU *and* that the principle of proportionality is taken into account (the restriction to competition must be *necessary*).²¹⁵ The next question is of course: what is a service of general economic interest? And moreover: do services inspired by non-economic public policy fall in this category? The term service of general economic interest has not been defined in the Treaty. In its *Fred Olsen* and *FFSA* judgements the Court of First Instance has stated that Member States have a wide discretion in defining what services of general economic interest are.²¹⁶ Undertakings can not decide by their selves to pursue services of general economic interest in order to invoke Article 106(2). In order for Article 106(2) to be applicable those services have to be *entrusted* to the undertaking by a Member State. Both public and private undertakings can be entrusted with the operation of services of general economic interest.²¹⁷ Many services have been recognised by the ECJ to fall under Article 106(2). The provision of basic postal services is a classical example of a service of general economic interest.²¹⁸ For the purpose of this research it is specifically interesting that ambulance services and waste treatment services have also been found to be services of general economic interest by the ECJ. In the *Ambulanz Glöckner* case a national German law protected medical-aid organisations which provided both public ambulance services (the operation of which has been entrusted to them by the regional government) and non-emergency patient transport services from competition by independent undertakings. According to the ECJ the national law was justifiable under Article 106(2) because its existence was necessary for the medical-aid organisations in order to perform their (public) tasks in economically acceptable conditions.²¹⁹ In the *FFAD* case the ECJ held that "the management of particular waste may properly be considered to be capable of forming the subject of a service of general economic interest, particularly where the service is designed to deal with an environmental problem."²²⁰ The Commission's *NAVEWA-ANSEAU* decision illustrates the importance of the proportionality principle in an assessment under Article 106(2). In this decision the Commission did not allow an agreement which would make compulsory the attachment to washing machines and dishwashers of a conformity label certifying that they are in line with the general public health safety requirements laid down by water companies for the avoidance of contamination of publicly-supplied drinking water. Although the Commission acknowledged that services of general economic interest had been entrusted to the water companies, it did not allow the agreement because it concluded that it was more restrictive than

²¹⁴ Whish (n 125) 156; Lavrijssen (n 186) 643.

²¹⁵ Whish (n 125) 233.

²¹⁶ Case T-17/02, *Fred Olsen* [2005] ECR II-02031, para 216; Case T-106/95, *FFSA* [1997] ECR II-00229, para 99.

²¹⁷ Communication from the Commission 'Services of general interest in Europe' [2000] COM/2000/0580 final, section I.A.2., para 10.

²¹⁸ Case C-320/91, *Corbeau* [1993] ECR I-02533, para 15.

²¹⁹ Case C-475/99, *Ambulanz Glöckner* [2001] ECR I-08089, paras 51-65.

²²⁰ Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD)* [2000] I-03743, para 75.

necessary. In other words, the agreement did not comply with the principle of proportionality.²²¹

It can be concluded that *if* a service which is inspired by a non-economic public policy objective is considered to be a service of general economic interest *and* if the pursuant restriction to competition is considered to be proportional, there is a reasonable chance that the service can be excluded from the competition rules on the basis of Article 106(2) TFEU. Non-economic public policy objectives play an important role in the assessment under that article.²²²

3.5 Conclusion

In general it can be said that European Competition Policy is an economic policy these days which wants to keep itself on a safe distance from non-economic public policy objectives, such as the environment and public health. Although there was a time that the Commission seemed to acknowledge that competition policy has a broader goal than the improvement of the consumer's economic welfare, that path seems to be long time abandoned. The Commission's reserved approach towards non-economic public policy does not necessarily mean that those policies do not stand a chance under the competition rules at all. We saw that Article 106(2) provides for an exception for member state-initiated services which are based on non-economic public policy objectives. Furthermore the Commission in the *CECED* and *DSD* decisions *has* showed willingness to set aside the competition rules under Article 101(3) if an agreement clearly contributes to the achievement of the environmental benefits of the EU. It can still happen that the Commission (maybe inspired by the policy-linking clauses) will repeat this practice in the future. Also in the 'Wouters doctrine' may lay a chance for agreements which clearly contribute to public policy. Especially with regard to legal certainty issues the European Court of Justice which would ideally clarify the scope of both Article 101(3) TFEU and the Wouters case in the near future.

3.6 Summary

In this chapter we assessed how conflict is dealt with in the scope of competition law, especially with respect to Article 101 TFEU. We have concluded that agreements linked to non-economic public policy objectives are generally caught by the competition rules. As we have seen, in some situations they could fall outside the scope of competition law after all. However, in those situations the reason for their exclusion is not that they may be beneficial to certain non-economic policy objectives, but that they are based on the principle of solidarity or that they belong to the essential functions of the state. As soon as non-economic public policy objectives fall within the scope of the competition rules, conflict can arise. There are several ways of dealing with conflict between the competition rules and non-economic public policy objectives. A first way is dealing with conflict within Article 101(1) TFEU. To this end one of the approaches described by De Vries, Mortelmans and Van de Gronden, Monti and Whish can be used. These approaches describe the possibility of excluding agreements from the competition rules because they are necessary *either* for the proper functioning of a certain sector which is related to non-economic public policy (*Meca Medina* case), *or* in the light of the general interest (*Wouters* case). Till today there is legal uncertainty as to the practical usefulness of these approaches, especially because the scope of the *Wouters* case is not clear yet. Some argue that *Wouters* creates the possibility to invoke many non-economic public policy objectives under Article 101, while others say that from *Wouters* alone no such implications can be deduced. In case conflict cannot be resolved within Article 101(1), the Treaty exception of Article 101(3) TFEU can be used. Although both the European Courts (*Métropole* case, 1996) and the European Commission (*CECED* and *DSD* decisions) have shown in the past that there is room for the inclusion of non-economic public policy in Article 101(3), this seems not to be the case anymore. It appears from several Commission documents such as the *Guidelines on the application of Article 81(3)* that at present there is no room anymore for taking into account non-economic public policy in an assessment under Article 101(3). Although the

²²¹ Commission Decision 82/371/EEC, *NAVEWA-ANSEAU* [1982] OJ L 167/39, paras 64-67; the decision was upheld in appeal, see: Joined cases 96-102, 104, 105, 108 and 110/82, *NV IAZ International Belgium* [1983] ECR 03369.

²²² Also see: De Vries (n 107) 171.

present position of the Commission does not seem to be entirely in line with the case law of the Courts, we can only be sure on that point if the Courts clarify their point of view on this matter in future judgements. Finally, conflict can be dealt with by invoking Article 106(2) of the Treaty. If a service which is inspired by a non-economic public policy objective is considered to be a service of general economic interest (and if the proportionality test is passed) there is a reasonable chance that the service can be excluded from the competition rules under Article 106(2) TFEU. It must however be remembered that Article 106(2) is solely applicable if a service of general economic interest has been *entrusted* to an undertaking by a Member State. If this has not happened, this article will offer no conflict solution after all.

4. A sustainable European Competition Policy: between ideal and reality

Based on the findings of the former two chapters it seems that there is considerable legal uncertainty as to the place of non-economic public policy objectives within competition policy. The possibilities for bringing those two types of policies into harmony are approached in different manners by the Treaties, the Courts and the Commission. The Commission, who plays an important role in the interpretation and enforcement of the competition rules, seems not to allow much room for the consideration of non-economic public policy objectives within competition analysis. This is also the case for non-economic public policies which are related to sustainable development issues (or, as I will call them: sustainable public policies). In this chapter I will show that it is of great importance that there will be better and broader possibilities for taking sustainable public policies into account under competition policy. First, some legal, policy and economic arguments will be given to that end. Secondly, three examples will be given which show that conflict between competition policy and sustainability actually can arise in practice. These examples serve as a means to underline that the discussion on a more sustainable competition policy is not merely a theoretical discussion, but in fact directly touches on topical issues in society.

4.1 The importance of a sustainable European Competition Policy

4.1.1 The Treaties

The most obvious argument why the sustainable public policies of the EU should be taken into account under competition law is because it is required by the Treaties (TEU and TFEU): firstly because of their structure and secondly because of policy-linking clauses.

The structure of the Treaties

As has been argued by many legal writers, it is not in conformity with the structure of the Treaties to assess the competition rules in isolation. Instead, they should be viewed in the wider European Union context.²²³ It can be said that the Treaties have a hierarchical structure²²⁴: First, Article 3(1) TEU expresses the goals of the EU: "The Union's aim is to promote peace, its values and the well-being of its peoples" (the Union's values are mentioned in Article 2 TEU, being: human dignity, freedom, democracy, equality, the rule of law and respect for human rights). Subsequently, Article 3(2-6) TEU illustrate by which means these goals should be achieved. For instance: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress [...]." Thirdly, implementation of the means described in Article 3(2-6) is done through the competences which are set out in Articles 2-6 and 119 TFEU. The EU has competence concerning *inter alia* "the establishing of the competition rules necessary for the functioning of the internal market"²²⁵, and "the environment" and "energy"²²⁶. Furthermore, Article 119 adds that for the purposes of Article 3 TEU an economic policy should be adopted which is "[...] conducted in accordance with the principle of an open market economy with free competition."²²⁷ The here mentioned hierarchy of goals, means and competences is laid down in Article 3(6) TEU, which states: "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties." Consequently, the provisions on competition law do not stand on their selves, but must be seen as ultimately implementing

²²³ Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009) 48; Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials* (fourth edition, Oxford University Press 2008) 73-74.

²²⁴ Townley (n 223) 50.

²²⁵ Article 3(1)(b) TFEU.

²²⁶ Article 4(2)(e) and (i) TFEU.

²²⁷ Especially this excerpt of Article 119 TFEU is interesting here. Article 119(1) reads in full: "For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

(in accordance with the means) the goals of the European Union as set out in Article 3(1) of the Treaty on European Union.

It is however arguable that the competition provisions have as their *sole* function to provide free competition for the purpose of a well-functioning internal market and the enhancement of consumer welfare, and that the other means mentioned in Article 3 (such as sustainable development) should be implemented through *other* provisions. As we saw in the former chapter, this seems to be the position taken by the European Commission.

Although it is true that not all Union policies necessarily implement all the goals and means of Article 3 TEU, it seems more likely that the competition provisions should be seen in the broader Union context. It has often been argued that it can be derived from the structure of the Treaties that certain non-economic public policies should be taken into account in the application of European competition policy.²²⁸ The Merger Regulation, for instance, also supports this vision.²²⁹ Article 3(6) TEU does not specify which competences should be used to achieve which goals and means. Therefore, competition law can be said to have a broader function than just supporting the functioning of the internal market and enhancing consumer welfare. Another means which is mentioned in Article 3 TFEU, "sustainable development of Europe based on balanced economic growth", can for instance also be seen as an underlying aim of competition law.²³⁰ Hence, contrary to the position of the Commission, it can very well be argued that sustainable development should be taken into consideration in decision-making under European Competition Law.

It is interesting to add here that there are authors who argue that after the Lisbon Treaty non-economic public policy has gained importance within EU law as compared to competition policy. Their argument is based on a change the Lisbon Treaty has made to the way the treaties refer to competition policy. Before the Lisbon Treaty Articles 2 and 3 TEC described the central goals of the Community and the activities by which these goals had to be achieved. This important part of the EC Treaty made an explicit reference to competition policy (Article 3(1)(g) TEC). After the Lisbon Treaty the goals of the Union and the means to achieve those goals are described in Article 3 TEU. This article does not refer to competition policy. This observation is particularly remarkable if one takes into account that competition policy was explicitly meant to be included among the objectives of the Union in the (never implemented) Constitutional Treaty of the EU.²³¹ Under the auspices of the French president Sarkozy the reference to competition policy was however moved from the Union's objectives to protocol 27, where it is till today under the Lisbon Treaty. This protocol states that 'the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.'²³² Sarkozy said about this change that "We have obtained a major reorientation of the union's objectives", and he also said this meant "the end of competition as an ideology and dogma" in Europe.²³³ As mentioned earlier, there are authors who think that Sarkozy was right and that this change created more room for non-economic public policy objectives since competition law is not included in the goals of the Treaty anymore.²³⁴ Others believe that the function of the former Article 3(1)(g) TEC has been taken over by the new Article 3(1)(b) TFEU, which mentions as one of the competences (not objectives) of the Union 'the establishing of the

²²⁸ Townley (n 223) 52; Hans Vedder, *Competition Law and Environmental Protection in Europe; Towards Sustainability?* (Europa Law Publishing 2003) 168-169.

²²⁹ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1. Para 23 of the preamble states: 'It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.' (*emphasis added*)

²³⁰ See particularly Townley and Vedder, as referred to in n 228.

²³¹ Article I-3 ('The Union's objectives') of the 'Treaty establishing a Constitution for Europe' was meant to read: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.'

²³² Protocol (No 27) to the Treaties on European Union and on the Functioning of the European Union on the internal market and competition [2010] OJ C83/309.

²³³ 'The Sarko show, A new star takes the European stage', *The Economist* (Paris, 28 June 2007) <<http://www.economist.com/node/9407824>> accessed 1 November 2011.

²³⁴ Laura Parret, 'Do we (still) know what we are protecting?' (2009) 010 TILEC Discussion Paper 6-9 <<http://ssrn.com/abstract=1379342>> accessed 2 November 2011.

competition rules necessary for the functioning of the internal market'. Those authors furthermore state that the continued importance of competition policy is proved by the fact that protocols (including protocol 27) have the same legal value as the Treaties and that Article 119 TFEU also explicitly refers to competition policy.²³⁵ In my opinion competition policy is indeed still strongly embedded in the Treaties. Through protocol 27 competition policy has a tight link with the internal market, which is part of the goals and means of the TFEU. Furthermore, the Lisbon Treaty did not change the substance of the competition provisions. Article 3 TEU however seems to give some nuance to the importance of competition policy as it states:

"It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment (...)"²³⁶

In other words, competition is important, but must be linked to a *social market economy* which takes also non-economic values in account, such as *social progress* and *the quality of the environment*. In the EU's 2020 Strategy, which is a response to the economic and financial crisis and offers a long-term approach to get Europe 'back on track', political will is shown to bring the text of Article 3 TEU in practice.²³⁷ One of the key priorities of the Europe 2020 Strategy is related to sustainable growth and seeks to promote "a more resource efficient, greener and more competitive economy." According to the strategy document the key priorities "offer a vision of Europe's social market economy for the 21st century."²³⁸ Consequently, although the act of replacing competition policy to protocol 27 may not lead to a decreased importance of competition policy in itself, Sarkozy's "major reorientation of the union's objectives" might after all become reality through Article 3 TEU in combination with the Europe 2020 Strategy. Hence, a sustainable European Competition Policy is not only required by the structure and the wording of the Treaties but is also gaining political importance.

Policy-linking clauses

Apart from their structure, the Treaties also offer a second argument in favour of a competition policy which supports sustainable policies. As touched upon already in chapter 1, the policy-linking clauses in the TFEU provide for important legal instruments to integrate sustainable non-economic public policies into economic policy areas.²³⁹ Especially after the introduction by the Treaty of Lisbon of a general policy-linking clause in Article 7 TFEU it cannot be denied that the integration of non-economic public policy into economic policy is required by the Treaties. Article 7 provides: "The Union *shall* ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." Concerning sustainability the policy-linking clause of Article 11 TFEU is particularly important, it states: "Environmental protection requirements *must* be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development." Another policy-linking clause which could be of importance in the scope of sustainable development can be found in Article 9: "In defining and implementing its policies and activities, the Union *shall* take into account requirements linked to [...] the fight against social exclusion [...] and the protection of human health." Emphasis has been added to point at the imperative nature of the policy-linking clauses. Hence, policy-linking clauses embody an undeniable obligation for the implementation of sustainable policies into competition law.

²³⁵ Saskia Lavrijssen, 'What role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?' (2010) 35 *European Law Review* 636, 637; Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 6 *European Law Journal* 780, 790-791; B.J. Drijber, 'Het Hervormingsverdrag van de EU: stap vooruit of stap achteruit?' (2007) 5/6 *Markt & Mededinging* 131, 132-134.

²³⁶ Emphasis added.

²³⁷ Commission Communication 'Europe 2020, A strategy for smart, sustainable and inclusive growth' [2010] COM(2010) 2020 final, 2.

²³⁸ *ibid* 10.

²³⁹ Nele Dhondt, *Integration of Environmental Protection into other EC Policies* (Europa Law Publishing 2003) 108-110; Vedder (n 228) 168-169.

4.1.2 The effectiveness of policy instruments

Corporate Social Responsibility

In its policy document on 'Environmental Regulation and Competition' the OECD²⁴⁰ pointed at the increasing variety of policy instruments being used for the attainment of environmental policy objectives. A shift can be seen in the use of traditional *command and control* policy instruments (e.g. permits and exemptions) towards *incentive* policy instruments.²⁴¹ These are policy instruments which do not directly impose a measure onto market players, but rather engage the market players in the process of attaining a certain policy objective. One of the instruments the OECD refers to is Voluntary Agreements (VAs). The concept of a Voluntary Agreement is typically divided in three different types: 1) Agreements which are set-up by companies independently and without involvement of any public authority, 2) Programs set-up by public authorities to which companies are invited to participate on a voluntary basis, 3) Agreements established through bargaining between companies and public authorities. All types of Voluntary Agreements have in common that companies agree to improve their performance in relation to the environment, or to adhere to certain prescribed requirements, on a voluntary basis.²⁴² This kind of good-hearted practice undertaken by companies is often referred to as *Corporate Social Responsibility (CSR)*. According to an EU Communication on CSR, the concept of CSR evolved as a response to the huge impact economic activity has on the environment and society, and because of the increasing demand of consumers and stakeholders for more sustainable production methods.²⁴³ It appears from various EU official documents that Corporate Social Responsibility is seen as an important policy instrument to achieve the goal of sustainable development in general.²⁴⁴ According to the Commission, Voluntary Agreements sometimes have advantages over legislation. Public policy objectives may be achieved in a more effective, cost-efficient and timely manner if companies take up the initiatives themselves.²⁴⁵ Moreover, Voluntary Agreements may even provide for benefits which would not have been obtained through traditional policy instruments at all.²⁴⁶ Looking, for instance, at the failed climate conference in Copenhagen in 2009, climate change is an example of an area where governments fail to achieve substantial results. Results may instead be achieved if companies take initiatives in this policy area.²⁴⁷ Nonetheless, the chance that individual companies can take broad initiatives related to the improvement of the environment on their own, without the perspective of high losses and therewith competitive disadvantages, is very small. Therefore, voluntary initiatives will often have to be part of a sector-wide approach, which however has the potential to cause problems related to competition policy.²⁴⁸

²⁴⁰ Organisation for Economic Co-operation and Development (OECD).

²⁴¹ OECD paper 'Environmental regulation and competition' DAF/COMP(2006)30, 18-19.

²⁴² *ibid* 37-39.

²⁴³ Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development [2002] COM(2002) 347 final, 5-6.

²⁴⁴ Communication from the Commission on the sixth environment action programme of the European Community 'Environment 2010: Our future, Our choice' [2001] COM/2001/0031 final, section 3.3; Decision No 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme [2002] OJ L 242/1, Article 3; Communication from the Commission concerning Corporate Social Responsibility (n 243), chapter 1 (Introduction); Communication from the Commission 'Implementing the partnership for growth and jobs : making Europe a pole of excellence on corporate social responsibility' [2006] COM/2006/0136 final, chapters 1 and 2; Communication from the Commission 'Environmental Agreements at Community Level - Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment' [2002] COM/2002/0412 final, chapters 1-3; Townley (n 223) 36.

²⁴⁵ Directive 2005/32/EC of the European Parliament and of the Council establishing a framework for the setting of ecodesign requirements for energy-using products [2005] OJ L 191/29, paras 16-18 of the preamble; Commission Communication on Environmental Agreements [1996] COM(96) 561 final, 3; also see: C. Townley, 'Which goals count in Article 101 TFEU? Public policy and its discontents: the OFT's roundtable discussion on article 101(3) of the Treaty on the Functioning of the European Union' (2011) 9 European Competition Law Review 441, 445.

²⁴⁶ Townley, *Article 81 EC and Public Policy* (n 223) 36.

²⁴⁷ T.R. Ottervanger, 'Maatschappelijk verantwoord concurreren. Mededingingsrecht in een veranderende wereld' (2010) 3 Markt & Mededinging 93, 96.

²⁴⁸ *ibid* 96; OECD paper 'Environmental regulation and competition' (n 241) 39-40.

Because the EU has ambitions in the field of Corporate Social Responsibility, it is important that voluntary initiatives are not blocked by competition policy.²⁴⁹ If companies face a possible conflict with competition policy they could be discouraged to implement voluntary agreements which may otherwise be able to effectively serve a public policy goal.²⁵⁰ Research conducted on behalf of the Dutch NMA shows that such 'anticipatory behaviour' by companies occurs in the Netherlands.²⁵¹ An example can be seen in the health care sector in the Netherlands where a type of desirable cooperation by health care providers which is called 'chain care' (multidisciplinary care which is bundled and offered in one package) may not be offered because of the fear to be in violation of the competition rules.²⁵² Anticipatory behaviour leads to situations where potentially useful sustainable agreements will never be drafted because of the deterrent effect of competition policy.

A critical note on CSR (and rebuttal)

A critical note which justifiably can be made – and has been made²⁵³ – in the respect of CSR is that voluntary actions by companies are not always the most effective way of achieving sustainable public policy objectives. Sometimes other approaches will be more effective, such as government regulation. It could be argued, for instance, that it would be more effective if the road to a sustainable cocoa producing sector would be paved by governments which enforce national laws and aid in setting up necessary infrastructures, than by companies who collectively try to improve life for cocoa producers.²⁵⁴ It can also be argued that the shrimps population in the North Sea would be protected more effectively if quotas are set up by the government, than if 'catch limitation' rules are introduced by the fisheries sector themselves.²⁵⁵ Indeed, rules set up by a government will sometimes lead to a more powerful and effective approach to sustainability problems. A government could impose rules on all competitors in a market at once and rules might also be more effectively enforced by a government. Besides that, the danger always exists that companies use sustainability objectives as a means to reach their actual economic objectives.²⁵⁶ In this way sustainability is merely used as a cover instead of as the primary reason to pursue certain sustainable activities. Another problem could be that voluntary agreements are difficult to review for governments and competition authorities.

Even if voluntary actions of companies are in a certain situation not the most effective way of pursuing sustainability objectives, this does not automatically mean that they should not be taken into account in EU competition policy. A first reason is that voluntary agreements (and CSR in general) are seen as a useful policy instrument by the Commission. If the Commission indeed wants to encourage such agreements, conflict with the competition rules is not desirable. Secondly, voluntary agreements may be suitable to bridge the relatively long time it can take before government regulation is designed and implemented. Thirdly, Corporate Social Responsibility may be more than just an alternative means to achieve public policy objectives. Society may, for example, find it desirable that companies start to actively participate in society by taking certain moral responsibilities such as caring for the environment, without necessarily being forced by the government. Fourthly, designing governmental regulation may be considered a waste of public money if companies are also able to implement sustainability improvements in the same area themselves (although maybe in a slightly less effective way).²⁵⁷

²⁴⁹ Townley, *Article 81 EC and Public Policy* (n 223) 36-37.

²⁵⁰ *ibid* 36-37.

²⁵¹ Rob van der Noll, Barbara Baarsma, Nicole Rosenboom and Jarst Weda, SEO Economisch Onderzoek Report 2010-76, 'Anticipatie op kartel- en concentratietoezicht' (January 2011) iv-vii <http://www.nma.nl/images/Anticipatie_op_kartel-_en_concentratietoezicht_Eindrapport22-154614.pdf> accessed 3 November 2011.

²⁵² Yvonne Maasdam, 'Publieke belangen in de zorg geborgd door toepassing van de mededingingsregels door de Nederlandse Mededingingsautoriteit?' (2011) 60 *Ars Aequi* 540, 541.

²⁵³ J. Parlevliet, M. Drahos, 'Is mededingingsbeperking nodig voor duurzaamheid? Drie case studies uitgelicht' (2011) 3 *Markt & Mededinging* 96.

²⁵⁴ *ibid* 99-101.

²⁵⁵ *ibid* 96-98.

²⁵⁶ 'Duurzaamheid en samenwerken zijn geen concurrenten' (2011) 1 *NMagazine* 4, 6.

²⁵⁷ The last two arguments are inspired by Townley, see: Townley, *Article 81 EC and Public Policy* (n 223) 32.

Other policy instruments

Also other policy instrument than Voluntary Agreements may be useful to achieve sustainable public policy objectives, but at the same time may be harmful to competition. In its 'Guidelines on state aid for environmental protection' the Commission acknowledges that State Aid measures can in some cases result in a higher level of environmental protection and sustainable growth than if no State Aid were given.²⁵⁸ The Union's directives on waste management and recycling also bare competition issues in them.²⁵⁹ Pursuant to *inter alia* the *packaging of waste* directive²⁶⁰ Member States often require companies to take care of the management of packaging waste after disposal. In most Member States companies cooperate with each other to fulfil their obligations by setting up non-profit organisations to take care of collecting and recovering the waste. The cooperating companies mostly are the only shareholders of these organisations. These kind of cooperation structures may have anti-competitive implications, which in principle fall under the competition rules. For instance, due to harmonised waste management costs among competitors, competition could be ruled out on this important price component. Also, competition may be hampered if certain waste management systems exclude other competitors than their own shareholders from their services.²⁶¹ ²⁶² Although the latter example may be prohibited by the Competition Authorities more easily, the former will not always be possible to rule out. Hence, in order to pursue some of the EU's very own sustainable policies to their full extent, European Competition Law needs to take non-economic public policy objectives on sustainability into account.

4.1.3 Economic arguments

As established in chapter two, these days *consumer welfare* is an important goal of European Competition Policy. Often, scholars write about the 'economisation of European competition law', meaning that economic analysis has been playing a much larger role in competition law enforcement over the last twenty years.²⁶³ If that is indeed the case, one could argue that for the purposes of competition policy the concept of consumer welfare should be interpreted in the way welfare economists tend to do it. We already saw that economists generally use a broad welfare concept, including not only financial aspects, but also other things which people value, such as a clean environment and a safe living environment. Economists state that for reaching an optimal welfare standard market efficiency needs to be at its highest point. However, markets are never totally efficient, due to the existence of market failures, such as environmental pollution. As seen above, one of the instruments to remedy environmental pollution is the conclusion of Voluntary Agreements among competitors. These could however be harmful to competition. Although the Commission seems reluctant to include non-economic policy considerations as these in its economic analysis, economists would certainly not rule out inclusion from the outset. From an economics perspective everything can be translated into economic terms, including environmentally friendly and sustainable production processes.²⁶⁴ Hence, the enhanced environmental friendliness of a certain product (due to the effects of a Voluntary Agreement for instance) could enlarge the value a consumer attaches to that product. Even if prices will increase slightly this will result in a higher consumer surplus, and thereby a so-called pareto improvement.²⁶⁵ This would bring the market a bit closer to efficiency, which is the higher goal for economists. Van Damme captured welfare economist's stance towards the implementation of other policies into competition law in a nice one-liner: 'A cartel is prohibited, unless it results in a pareto improvement'.²⁶⁶ Hence,

²⁵⁸ Community Guidelines on State Aid for Environmental Protection [2008] OJ C 82/1, sections 1.1 and 1.2.

²⁵⁹ OECD paper 'Environmental regulation and competition' (n 241) 182-185.

²⁶⁰ Directive 94/62/EC of the European Parliament and Council on packaging and packaging waste [1994] OJ L 365/10.

²⁶¹ In this case competition is hampered on the *downstream market for waste management*, while in the former example competition issues are present in the *upstream market* in which the core tasks of the competitors lie (e.g. producing televisions or food).

²⁶² OECD paper 'Environmental regulation and competition' (n 241) 182-185.

²⁶³ Lavrijssen (n 235) 636.

²⁶⁴ *ibid* 639.

²⁶⁵ Kingston (n 235) 800-801.

²⁶⁶ E.E.C. van Damme, 'Op de welvaartseconomie gebaseerd mededingingsbeleid' in J.W. van de Gronden and K.J.M. Mortelmans (eds), *Mededinging en niet-economische belangen* (Kluwer 2001) 55, 56-57.

if competition enforcement is really in the process of economisation, it would not be logical for competition authorities to rule out non-economic public policy objectives from their analyses.

4.2 The conflict between sustainability and competition policy in practice

In this section I will focus on some practical examples where conflict between the cartel prohibition and the EU's sustainable policies exists, or is likely to arise.

4.2.1 Self-regulation in the dairy sector

In a research on self-regulation in the dairy sector, Gerbrandy and De Vries found that the European competition rules give only very limited leeway to dairy farmers to make use of self-regulation. They however observe that there are (especially after the Lisbon Treaty) increased possibilities to take non-economic interests in account under competition law.²⁶⁷

In 2015 the European Commission will abolish the European milk quotas, which has led to protests by dairy farmers. The farmers fear that the abolishment of the quotas will endanger the stability of the milk supply, the stability of their incomes, and the maintenance of the countryside. According to the farmers the dairy market is not an ordinary market where supply and price-setting can be left completely to the market mechanism. They say that individual dairy farmers cannot influence the total production of the market. Therefore, farmers will expand their production both in a shortage situation with a high milk price (to increase profit) and in a surplus situation with a low milk price (to increase efficiency and lower the costs).²⁶⁸ While the abolition of the quotas is approaching, European dairy farmers see self-regulation as an alternative solution to secure their incomes. Self-regulation would enable the farmers to produce in a market-oriented way and to earn their income through the maintenance of a cost-effective milk price.²⁶⁹ The self-regulation would *inter alia* consist of joint agreements by farmers to set prices and quotas. These measures would however in principle be in violation of competition law (these are object or hardcore restrictions). Also other types of self-regulation, such as recommended prices and information sharing, could cause competition problems (they might be qualified as *effect* restrictions).²⁷⁰ Gerbrandy and De Vries observe that if proposals for self-regulation by dairy farmers will indeed be restrictive to competition, the self-regulation might still be justifiable in the light of their *necessity* for some public policy objectives linked to agricultural policy. Food supply and the conservation of the natural environment are mentioned as examples of such policy objectives.²⁷¹ The authors are however unsure if such an 'inherent restrictions' approach²⁷² – whereby both a necessity and a proportionality test have to be conducted – is able to justify the hardcore restrictions which could be caused by self-regulation in the dairy sector. Their uncertainty stems primarily from the continued haziness surrounding the scope of the inherent restrictions approach.²⁷³ The authors see Article 101(3) TFEU as a more viable escape from a conflict with competition law. According to them, self-regulation in the dairy sector can possibly be exempted under Article 101(3) if it clearly contributes to objectives related to the environment. They consider that the third condition of Article 101(3) (proportionality) will however cause the primary difficulty in this respect.²⁷⁴ Especially if the dairy farmers will introduce hard-core restrictions on competition proportionality problems can arise.²⁷⁵ Finally, Gerbrandy and De Vries observe that self-regulation could escape from the cartel prohibition if dairy farmers will be explicitly entrusted by a national government with tasks related to nature and the environment. In such a situation the dairy farmers may be considered to perform services of general

²⁶⁷ Anna Gerbrandy and Sybe de Vries, *Agricultural Policy and EU Competition Law – Possibilities and limits for self-regulation in the dairy sector* (Eleven International Publishing 2011) 49.

²⁶⁸ *ibid* 15-16.

²⁶⁹ *ibid* 18.

²⁷⁰ *ibid* 18, 24-26.

²⁷¹ *ibid* 37.

²⁷² See section 3.4.1 of this research for further elaboration on this approach.

²⁷³ See section 3.4.1 of this research; Gerbrandy and De Vries (n 267) 37.

²⁷⁴ Gerbrandy and De Vries (n 267) 39-40.

²⁷⁵ *ibid* 40, 49.

economic interest, which can under some circumstances be exempted from the competition rules by Article 106(2) TFEU.²⁷⁶

This interesting research on self-regulation in the dairy sector shows that invoking sustainability arguments may be useful for certain sectors in their attempt to escape from the cartel prohibition. It shows that the relation between competition law and sustainability objectives is a topical issue which is worth to be explored. Nonetheless, there are two critical notes which can be made as to the dairy farmers case. First, the conclusion which is drawn by Gerbrandy and De Vries seems to be overly positive. Indeed, as the authors rightly point out, the *CECED* decision of the Commission gave a significant indication that sustainability arguments can be taken into account under Article 101(3) TFEU.²⁷⁷ Also the policy-linking clauses indeed provide a strong argument to this end.²⁷⁸ Nevertheless, the exact goal of, and approach to, competition law is *in practice* still primarily a matter of politics.²⁷⁹ Since the Commission made it clear that non-economic public policy objectives should not play a role in present-day competition analysis, the dairy farmers will in principle not be able to pursue self-regulation on such a basis at present. This is even the case for restrictions which are not hardcore restrictions (which will according to Gerbrandy and De Vries be always hard to justify²⁸⁰). Secondly, it can be said that the case of the dairy farmers perfectly supports the arguments of those authors who have a critical stance towards Corporate Social Responsibility.²⁸¹ It shows from the case as presented by Gerbrandy and De Vries that a possible appeal on sustainability arguments by dairy farmers would ultimately be inspired by their wish to secure their own incomes. In that case sustainability arguments will indeed merely be used to cover the actual economic objectives of an agreement.

4.2.2 Binge drinking

In his article in the Cambridge Yearbook of European Legal Studies, Townley uses 'binge drinking' in the UK as an example for why sustainability arguments (in this case: public health) should be taken into account under Article 101 TFEU.²⁸² Binge drinking is a widely known problem, not only in the UK, but for instance also in the Netherlands where it is called 'comazuipen' (coma drinking).²⁸³ The term refers to drinking a large amount of alcohol in a small space of time, mostly with the intention of getting drunk.²⁸⁴ Raising the price of alcohol (which is relatively low in the UK) is acknowledged by many as one of the ways to fight the problem of binge drinking. Although the government can set minimum prices, it has been part of UK government policy to encourage initiatives by private parties. Tesco, a UK supermarket chain, indeed promised to review its alcohol prices. They however only wanted to do so if their competitors did the same, since they would otherwise be priced out of the market. Here competition law comes into the picture. Tesco argued that acting together with other supermarkets to achieve public health benefits would be in violation of competition law.²⁸⁵ As we can see, Tesco shows anticipatory behaviour towards competition law, which withholds it from going into price agreements with other supermarkets. Private initiatives to achieve the sustainability objectives which are supported by the government will therefore not be started due to the discouraging effects stemming from competition policy.

²⁷⁶ *ibid* 41; see section 3.4.3 of this research for further elaboration on services of general economic interest.

²⁷⁷ Gerbrandy and De Vries (n 267) 38.

²⁷⁸ *ibid* 38.

²⁷⁹ See section 2.2 of this research.

²⁸⁰ Gerbrandy and De Vries (n 267) 40, 49.

²⁸¹ See section 4.1.2 of this research for their arguments.

²⁸² Christopher Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer' in C. Barnard (ed), *The Cambridge Yearbook of European Legal Studies* (Oxford, Hart Publishing, 2007--2008) 348-349.

²⁸³ 'Aantal gevallen comazuipen weer fors gestegen' *De Volkskrant* (31 May 2011)

<<http://www.volkskrant.nl/vk/nl/2672/Wetenschap-Gezondheid/article/detail/2439595/2011/05/31/Aantal-gevallen-comazuipen-weer-fors-gestegen.dhtml>> accessed 11 November 2011.

²⁸⁴ 'Safe. Sensible. Social. The next steps in the National Alcohol Strategy' [2007] 3

<http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_075218> accessed 11 November 2011.

²⁸⁵ Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer' (n 282) 348-349.

4.2.3 The shrimps fisheries sector

In April 2011 the Dutch competition authority (the NMa) issued an informal opinion²⁸⁶ on the MSC Management Plan 2011-2015²⁸⁷ of the Dutch shrimp fisheries sector, which was drafted by several organisations of shrimp producers. Through the management plan the producers wanted to implement some principles which are required before an ecolabel issued by MSC (the Marine Stewardship Council) could be used by the sector. If this label is found on seafood this means that the seafood is produced in a sustainable way because it respects three principles: the method of fishing does not contribute to overfishing, it has minimal effect on the ecosystem and it is effectively managed. In order to implement these principles the producer organisations of shrimp fishermen inserted rules in the management plan which should be adhered to by its members. The NMa assessed these rules and issued an informal opinion as to its compatibility with the Dutch cartel rules (as laid down in Article 6 of the 'Mededingingswet' (Mw)) and with the European cartel rules (as laid down in Article 101 TFEU).²⁸⁸

The NMa divides the rules in the MSC Management Plan into three categories:

- A) Rules which do not have negative effects on competition,
- B) Rules which are potentially restrictive to Articles 6(1) Mw or 101(1) TFEU but which can be justified under Articles 6(3) Mw or 101(3) TFEU,
- C) Rules which are potentially restrictive to Articles 6(1) Mw or 101(1) TFEU but which cannot be justified under the Treaty exemption.

It appears from the informal opinion that no research is done by the NMa as to whether the rules contained in the MSC Management Plan have an inter-state effect. This shows particularly from the fact that the NMa continuously mentions the applicability of the Dutch Mededingingswet (Mw) or the EU competition rules.

Under category B) the NMa *inter alia* lists rules related to the reduction of by-catch (the catch of unwanted species) and those related to inspections at the off-loading sites. About these sustainability-improving rules belonging to category B the NMa observed that although they will possibly be restrictive to Art. 6 Mw, those restrictions will probably be sufficiently compensated by "the improvements of the production or distribution or the technical or economic progress" which will be realised through the rules. In other words, they will fall under the exception of Articles 6(3) Mw or 101(3) TFEU.

It clearly shows from the NMa's assessment of the category B) rules that the NMa on the one hand recognises that those rules are designed to improve the sustainability of the shrimp fisheries sector, but on the other hand strictly focuses on the economic efficiency improvements which can be achieved through the rules. At no point the NMa includes in its assessment the beneficial effects on the environment which could be achieved by the rules. Due to the focus on economic efficiency arguments, the NMa's assessment under Article 101(3) seems to be perfectly in line with the Commission's Guidelines on the application of Article 81(3) of the Treaty. These guidelines indeed leave no room for taking into account non-economic public policy objectives (such as sustainability objectives) under an Article 101(3) assessment.²⁸⁹ They encourage a narrow approach to consumer welfare, which indeed seems to be used by the NMa in the case at hand.

Under category C) the NMa lists the rules which limit the amount of shrimps caught. These rules have as their goal to improve and maintain the population of North Sea shrimps (as required by the MSC). The NMa observes that such 'catch limitation' rules will lead to a decrease of supply of shrimps and that they will therefore have as their effect the increase of prices and the restriction of competition. The 'catch limitation' rules are thus prohibited under Articles 6(1) Mw and 101(1) TFEU. They can only be exempted under Articles 6(3)

²⁸⁶ Informele zienswijze Managementplan MSC Garnalenvisserij (kenmerk 7011/23.B27) <http://www.nma.nl/documenten_en_publicaties/archiefpagina_documenten_en_publicaties/Informele_zienswijzen/default/informele_zienswijze_managementplan_msc_garnalenvisserij.aspx> assessed 21 oktober 2011.

²⁸⁷ The NMa's informal opinion is based on the MSC Management Plan, version Januari 2011. This version is available on request at the Dutch Competition Authority (NMa).

²⁸⁸ Article 6(1), (2) and (3) Mw have almost exactly the same text as Article 101(1), (2) and (3) TFEU. See: <<http://wetten.overheid.nl/BWBR0008691/>> accessed 21 oktober 2011.

²⁸⁹ See for further analysis of these guidelines sections 2.2.2 and 3.4.2 of this research.

Mw and 101(3) TFEU if the economic benefits of the rules outweigh the restriction to competition. Without even mentioning the other requirements²⁹⁰ of Articles 6(3) Mw and 101(3) TFEU the NMa concludes that an appeal on those articles would fail on the third requirement (indispensability). In other words, the Treaty exemption will not apply because the rules are not indispensable for the achievement of their objective (improving and maintaining the population of North Sea shrimps). In that regard the NMa observes that limitations on catch or production are serious restrictions on competition. Indispensability can therefore *only* be proved in the case at hand if there is an actual or potential and real threat to the continued existence of the population of North Sea shrimps. According to the NMa there is no prove from the presented research reports that there are problems with the shrimp population in the North Sea. Consequently, the 'catch limitation' rules cannot said to be indispensable and can thus not be exempted from the cartel prohibition.

It is unfortunate that the NMa does not go into the first condition of Article 101(3) here. That condition requires an improvement of economic efficiency. Instead, the NMa focuses solely on the third requirement: the indispensability condition. To focus solely on that condition is no problem since the conditions of 101(3) are cumulative. Proving that one is not fulfilled is sufficient to show that Article 101(3) is not applicable. It is however interesting what the NMa would have decided if the catch limitations *had* been indispensable. Would the rules be allowed? Would sustainability arguments have prevailed over economic efficiency? Most probably this is not the case. If the NMa uses the same narrow consumer welfare approach under category C) as it used under the assessment of category B), then the NMa would not consider catch limitation to be justifiable under 101(3) either. In the end, a narrow consumer welfare approach does only offer room for economic arguments, not for sustainability arguments.

4.3 Conclusion

The practical examples on the dairy sector, binge drinking in the UK and the shrimp fishing sector underline that a more sustainable competition policy can have a direct and beneficial impact on the role private parties play in pursuing sustainable public policy objectives. The creation of wider possibilities under competition policy for voluntary actions in the field of sustainability is desirable for reasons related to the structure of the Treaties, the Commission's support towards Corporate Social Responsibility and for reasons related to the so-called 'economisation of competition law.' Even in certain situations where government regulation may be more effective than voluntary actions by companies, those voluntary actions may be still suitable *inter alia* to bridge the relatively long time it can take before government regulation is designed and implemented. Hence, even in such a situation a more sustainable competition policy would still be desirable.

²⁹⁰ See section 3.4.2 of this research.

5. Analysis: up to a more sustainable competition policy

In this chapter I will explore how sustainable policies of the EU can be protected more strongly under European competition policy. First, it is necessary to illustrate *which* aspects of competition policy constitute the greatest burdens to achieve this goal. We will assess the position of the Treaties, the Courts and the Commission to see if their possible adjustment could be helpful to the development of a more sustainable competition policy. Secondly, we will explore *how* certain aspects of European competition policy can be adapted in order to create a more effective protection of sustainable policies under competition policy.

5.1 Which aspects of European competition policy need improvement?

5.1.1 The Treaties

For the purpose of creating a more sustainable competition policy it is unnecessary to change the Treaties. Both through their hierarchical structure and through the policy-linking clauses the Treaties already provide sufficient opportunities for balancing competition policy with the sustainable policies of the EU. It is true that the texts of the cartel prohibition (Article 101(1) TFEU) and the Treaty exception (Article 101(3) TFEU) do not provide for an explicit exemption for sustainable policies in their selves. From the layered structure of the Treaties it however seems clear that the policies of the Union together (including competition policy) contribute to the attainment of the objectives and the means of the Union. This finding means that also 'the sustainable development of Europe [...] and a high level of protection and improvement of the quality of the environment' (which is part of the 'means' mentioned in Article 3(2) TEU) can be seen as an underlying aim of competition policy. These sustainable interests must therefore be considered under competition analysis. Subsequently, the policy-linking clauses (especially Articles 7, 9 and 11 TEU) provide for an even stronger argument that the Treaties do not dictate a purely economic competition policy. In fact, the Treaties explicitly promote a competition policy which takes sustainable non-economic public policy objectives into account.²⁹¹

5.1.2 The case-law of the Courts

Through their case-law the European Courts have confirmed and possibly widened the opportunities for balancing competition policy with sustainable policies under Article 101 TFEU. On the one hand the *Wouters* case introduced a specific approach for taking non-economic public policy objectives into account under Article 101(1). On the other hand, the Courts stated in several cases that also other policy areas than economic efficiency could be taken into account under Article 101(3).

Article 101(1)

It is true that the ECJ has not sufficiently crystallised the *Wouters* case yet. However, as mentioned before, Monti sees great opportunities if the Court decides to further develop the *European-style rule of reason* in the competition law area in the future. Monti argues that if the ECJ introduces new policy arguments to justify the non-application of Article 101(1), the problem of price-fixing agreements in the book sector could for instance be resolved. He submits that under a widened *European-style rule of reason* the Court can decide whether price-fixing agreements, albeit anti-competitive, are necessary to protect the various domestic interests in relation to preserving the diversity of the press.²⁹² If one applies Monti's view to sustainable policies, it can very well be that certain voluntary agreements can be exempted from Article 101(1) in the future because they are necessary for the protection of public health or for the maintenance of the quality of the environment. In this respect it is interesting to keep an eye on the *ONP* case where a professional organisation of pharmacists argued that its anti-competitive behaviour can be justified in the light of the necessity for the protection of public health in France.²⁹³

²⁹¹ See section 4.1.1 for further elaboration on the Treaty structure and policy-linking clauses.

²⁹² Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057, 1089-1090.

²⁹³ See section 3.4.1 (at the end) of this research for further elaboration on the *ONP* case.

Article 101(3)

The CFI explicitly stated in the *Métropole* case (1996) that in order to grant an exemption under Article 101(3) TFEU, the Commission may “base itself on considerations connected with the pursuit of the public interest.” Also in other cases the Courts showed that improvements on other areas than economic efficiency could be a reason for granting an exemption under Article 101(3). Inter alia employment and sport were mentioned as reasons for exemption.²⁹⁴

It can be concluded that the European Courts have demonstrated – although certainly not in a very clear manner – a positive stance towards balancing non-economic public policy objectives under Article 101 TFEU. Although further clarifications by the Courts would be gladly welcomed, it cannot be said that the case-law of the European Courts creates an obstacle on the road to a more sustainable competition policy.

5.1.3 The European Commission

The goal of competition policy is susceptible to the political thinking of the time.²⁹⁵ The European Commission is the main interpreter of the competition rules in the EU at this moment in time and it has made a clear choice for consumer welfare as the main goal of present-day European competition policy. In addition, it appears from various Commission publications that the Commission considers consumer welfare to have primarily an economic meaning. This interpretation has also been adopted by many National Competition Authorities.²⁹⁶ The Commission’s strict economic approach towards European competition policy is probably the main burden to a more sustainable competition policy. Although the Treaties and the European Courts have clearly created opportunities for taking non-economic public policy objectives into account under competition policy, the Commission repeatedly rejects these opportunities in its guidelines. A clear example of this practice is the Commission’s approach towards Article 101(3) TFEU where it explicitly confines the competition analysis to economic aspects²⁹⁷, while excluding the consideration of other policies²⁹⁸.

It can be concluded that the main obstacle on the road to a more strongly protection of sustainable policies under competition policy are not the Treaties or the case-law of the Courts, but is in fact the Commission’s *interpretation* of these sources of law. For the development of a more sustainable competition policy it is therefore necessary to review the Commission’s approach towards European competition policy.

5.2 How can European competition policy become more sustainable?

In order to open up competition policy to non-economic public policy objectives several approaches have been suggested in literature.²⁹⁹ In my opinion the focus of any adaptation should be on the Commission, because most improvements can be achieved there. A clearer body of case-law from the ECJ would also be helpful. Nonetheless, on that point patience is probably the most suitable approach. Hence, the focus is on the Commission. For the benefit of sustainable development the Commission would ideally depart from its strict economic approach. A new approach should offer sufficient possibilities to balance competition interests with sustainability interests. For the purpose of such a paradigm change I will present several suggestions in this section. They can be seen as a humble advice to the European Commission. The suggestions presented in this section can be applied separately or in combination.

²⁹⁴ See section 3.4.2 of this research.

²⁹⁵ Richard Wish, *Competition Law* (sixth edition, Oxford University Press 2009) 19.

²⁹⁶ See section 2.2.2 of this research.

²⁹⁷ Communication from the Commission ‘Guidelines on the application of Article 81(3) of the Treaty’ [2004] OJ C 101/97, para 33 and section 3.2 (refers specifically to ‘**efficiency gains**’). In paragraph 59 of these guidelines the Commission literally states that “The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective **economic efficiencies**” (emphasis added).

²⁹⁸ Guidelines on the application of Article 81(3) (n 297) para 42; see sections 2.2.2 and 3.4.2 of this research for further elaboration on these guidelines.

²⁹⁹ Monti suggests for example to partly rewrite Article 101, see Giorgio Monti, ‘Article 81 EC and Public Policy’ (n 292) 1096-1099.

5.2.1 Reforming the consumer welfare goal

An important step towards a sustainable competition policy would be taken if the Commission would reform competition policy's consumer welfare goal. Such a reform can be structured in two different manners: either by moving towards a *broad* consumer welfare approach, or by moving towards a *total welfare* approach.

Moving towards a broad consumer welfare approach

A *broad* consumer welfare approach, as opposed to a *narrow* consumer welfare approach offers room not only for the inclusion of economic interests under competition analysis, but also for the inclusion of non-economic interests. Remember that economists generally use a broad welfare approach which includes not only financial aspects, but also other things which people value, such as a clean environment and a safe living environment.³⁰⁰ Although it is clear that the Commission uses a narrow consumer welfare approach at present, there are indications that the Commission has been willing to apply a broad approach in the past. In the *CECED* decision the Commission clearly distinguished between two types of benefits for consumers. On the one hand consumers would encounter *economic* benefits from the restrictive agreements (in the form of cheaper energy bills). On the other hand, the agreements would also benefit consumers through the environmental results of the agreements.³⁰¹ By mentioning an environmental argument in its reasoning, the Commission in fact seems to allow a broad consumer welfare approach in its analysis. Unfortunately, by issuing various guidelines orientated at a more economic competition analysis, the Commission moved away from a broad consumer welfare approach. These strictly economic orientated guidelines, and the *Guidelines on the application of Article 81(3) of the Treaty* in specific, should first of all be opened up to non-economic interests if the Commission would want to make competition policy more sustainable.

Moving towards a total welfare approach

Aiming at a *total* welfare approach goes one step further than aiming at a broad consumer welfare approach. Reforming competition policy's present (economic) consumer welfare goal to a total welfare goal – even only to a limited extent – would enable the Commission to take non-economic interests into account even on a wider scale. It would mean that competition policy's focus would move away from the consumer and will be directed merely on society as a whole. The Commission has showed some elements of a total welfare approach in the past. In both *CECED* cases and in the *DSD* case the Commission referred explicitly to the importance of the restrictive agreements in the light of the achievement of the Union's environmental objectives.³⁰² The Union's environmental objectives favour society as a whole, and not just consumers. Therefore, it can be argued that by including such an argument the Commission used elements which are connected to a total welfare approach to competition policy. It is however true that the Commission only used these arguments as side-argumentation, while the main arguments were still related to the benefits for consumers.

The Commission could draw inspiration from Australian competition policy, which embodies strong elements of a total welfare approach. The Australian competition rules provide for the possibility to apply a so-called *net public benefit test*. Through this test anticompetitive agreements can be exempted from competition law for a defined period of time if they provide public benefits that outweigh public detriments. The test does not require that efficiencies generated by agreements are necessarily passed on to consumers. An exemption can be granted under this test even to agreements that would otherwise be *per se* illegal. In order to apply for an exemption under the *net public benefit test* companies should notify their agreement to the Australian Competition & Consumer Commission (ACCC). This authorisation process enables the ACCC to exempt restrictive agreements which correct market failures (such as environmental externalities) and agreements which facilitate compliance with environmental laws.³⁰³ The Australian approach to competition policy is very interesting because it offers substantive possibilities to take non-economic

³⁰⁰ See section 1.1 of this research.

³⁰¹ See section 3.4.2 of this research.

³⁰² See section 3.4.2 of this research.

³⁰³ OECD paper 'Draft Summary Record of the Roundtable Discussion on Horizontal Agreements in the Environmental Context (27-28 October 2010)' DAF/COMP/M(2010)3/ANN4/FINAL, paras 8-12.

public policy objectives into account under competition analysis. Although the Australian *net public benefit test* has been laid down in the law, it may not be *per se* necessary to change the European competition rules in order to apply a similar test in the EU. The Treaties in principle offer room for the inclusion of non-economic interests under competition policy, mainly due to the policy-linking clauses. It could therefore be sufficient to lay down a *net public benefit test* in the Commission's guidelines. The Commission's *Guidelines on the application of Article 81(3) of the Treaty* would probably be most suitable for this end.

Another manner of inserting elements of a total welfare approach in European competition policy could be by using a broader interpretation of the text of Article 101(3) TFEU. This article allows for certain agreements to be exempted from the cartel prohibition which contribute to 'improving the production or distribution of goods or to promoting technical or economic progress.' At present the phrase 'improving the production or distribution of goods' is interpreted in strict economic terms.³⁰⁴ Using a total welfare interpretation, the same phrase could be understood as also including production and distribution improvements with the primary goal of making goods more sustainable. In this way an agreement between producers to switch collectively to green energy will for instance be easily justifiable under Article 101(3).

5.2.2 Re-introducing sustainable block exemptions

Block exemptions are publications of the Commission (usually in the form of guidelines or regulations) which justify a whole category of agreements under Article 101(3) TFEU. In this way block exemptions provide desirable legal certainty for companies. The creation of block exemptions is envisaged in Article 101(3), which states that 'any agreement *or category of agreements*' can benefit from the exception mentioned in that article.³⁰⁵ Till 1 January 2011 a specific block exemption was in place which dealt with environmental agreements. The block exemption was part of the *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*.³⁰⁶ On 1 January 2011 new Guidelines entered into force, which did not contain a block exemption on environmental agreements.³⁰⁷

The old guidelines offered several possibilities for environmental agreements between undertakings to be exempted from the competition rules. Nonetheless, not all environmental agreements could be exempted. According to the old guidelines, agreements which do not place a precise individual obligation upon the parties or which only loosely commit the parties to contributing to the attainment of a sector-wide environmental target, were not likely to infringe the cartel prohibition.³⁰⁸ Also environmental agreements which have only little effect on product diversity or on purchasing decisions, and innovative agreements which give rise to genuine market creation, would in principle fall outside the cartel prohibition.³⁰⁹ According to the guidelines, some environmental agreements *may fall* under the cartel prohibition, for example those which appreciably restrict the parties' ability to decide what products to produce and how to produce them.³¹⁰ This could be the case with agreements whereby the parties allocate individual pollution quotas and agreements whereby an undertaking is appointed as exclusive provider of collection and/or recycling services.³¹¹ The guidelines indicate that the block exemption did not apply to environmental agreements which do not really cover environmental objectives, but merely use them as a means to cover their real economic objectives.³¹² Hence, competition interests were still carefully protected under the block

³⁰⁴ Paragraph 59 of the Guidelines on the application of Article 81(3) (n 297) literally states that "The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective **economic efficiencies**" (emphasis added).

³⁰⁵ Whish (n 295) 164.

³⁰⁶ Commission Notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements' [2001] OJ C 003/2, paras 189-197.

³⁰⁷ 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' [2011] OJ C 11/1, see particularly para 18, footnote 1.

³⁰⁸ Guidelines on the applicability of Article 81 to horizontal cooperation agreements (n 306) para 185.

³⁰⁹ *ibid* paras 186-187; Whish (n 295) 598.

³¹⁰ Guidelines on the applicability of Article 81 to horizontal cooperation agreements (n 306) para 189.

³¹¹ *ibid* paras 190-191.

³¹² *ibid* paras 188.

exemption for environmental agreements. Nevertheless, the old guidelines provided clear possibilities for including sustainable interests under competition analysis. The new guidelines do not include such possibilities at all. They do not contain a separate chapter on environmental agreements. Instead, it is stated in the new guidelines that 'depending on the competition issues 'environmental agreements' give rise to, they are to be assessed under the relevant chapter of these guidelines, be it the chapter on R&D, production, commercialisation or standardisation agreements'.³¹³

The old guidelines furthermore included an interesting example of an environmental agreement which would be eligible to be exempted based on the block exemption for environmental agreements. This example exactly resembles the Commission's *CECED* decision. The example states that an agreement signed among "almost all Community producers and importers of a given domestic appliance (e.g. washing machines), [...] to no longer manufacture and import into the Community products which do not comply with certain environmental criteria (e.g. energy efficiency)" could be exempted from the cartel prohibition. According to the example the reasoning for the exemption would include *inter alia* an environmental argument, namely that "The net contribution to the improvement of the environmental situation overall outweighs increased costs."³¹⁴ The new guidelines include almost the same example, except for the fact that the environmental argument has been left out, leaving only economic arguments.³¹⁵ This change makes it another time very clear that the Commission has shifted towards an increased economic approach towards competition policy. A case similar to *CECED* will therefore not occur with the present guidelines in place.

If the Commission would want to make competition law more sustainable a first step in the right direction would be to re-introduce a block exemption for environmental agreements. Although such a block exemption still carefully protects competition interests, it also provides for clear and broadened possibilities to include sustainable interests under competition analysis.

5.2.3 Problems connected to a more sustainable competition policy

Although the implementation of the suggestions as presented above would contribute to a more sustainable competition policy, there are also problems which are likely to arise. First, it is difficult to balance public interests against restrictions to competition. This is primarily the case because it is very difficult for competition authorities to measure the value of a non-economic public policy interest and its contribution to total or consumer welfare.³¹⁶ Secondly, also a legality problem could arise in this context. Under a total or broad consumer welfare approach competition authorities will have to take decisions as to which public interest in which situation must have precedence over competition policy. These are difficult and politically sensitive decisions and it is debatable if competition authorities are sufficiently legitimated to take those decisions.

Consequently, the suggestions presented in this chapter at least need to be explicitly supported by governments in order to mitigate the legality problem. The question as to how balancing of economic and non-economic policies can be made more feasible for competition authorities is a very difficult one and would be an interesting topic for further research.

³¹³ Guidelines on the applicability of Article 101 to horizontal co-operation agreements (n 307), para 18, footnote 1.

³¹⁴ Guidelines on the applicability of Article 81 to horizontal cooperation agreements (n 306) para 198.

³¹⁵ Guidelines on the applicability of Article 101 to horizontal co-operation agreements (n 307) para 329.

³¹⁶ Lavrijssen S, 'What role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?' (2010) 35 European Law Review 636, 640; NMa Jaarverslag 2009 "Belangen wegen", 45 <http://www.nma.nl/images/NMa_Jaarverslag_200922-156708.pdf> accessed 15 oktober 2011.

5.3 Conclusion

In this research we illustrated that the conflict between competition policy and sustainable policies (such as the environment and public health) is a topical issue. The examples on the dairy sector, binge drinking and the shrimp fisheries sector illustrate this. The most important elements for answering the main question of this research 'How can public policy objectives which aim at sustainable development be supported more strongly by European Competition Policy at present?' lie with the European Commission. The Treaties nor the case-law of the European Courts form an obstacle on the road to a more strongly protection of sustainable policies under competition policy. The Treaties explicitly promote a competition policy which takes sustainable policies into account and also the European Courts have demonstrated in their case-law a positive stance towards a sustainable competition policy. It is however the Commission's *interpretation* of these sources of law (mainly through its guidelines) which forms the main obstacle to a more sustainable competition policy. The suggestions presented in this chapter are therefore all directed to the European Commission.

The Europe 2020 Strategy titled 'A strategy for smart, sustainable and inclusive growth' as presented by the Commission in March 2010 gives hope that the Commission will make its approach to competition policy more sustainable in the future.³¹⁷ Nevertheless, criticisms which have been discussed in this research show that it would be in addition very useful to conduct further research in the future on the importance of a more sustainable competition policy.³¹⁸ It might be necessary to emphasise even more to the academic world and to society as a whole that it is not merely a theoretical discussion but that it is actually very important for the present generation and for the generations to come that sustainable development lies at the heart of all aspects the European Union, including competition policy.

³¹⁷ Commission Communication 'Europe 2020, A strategy for smart, sustainable and inclusive growth' [2010] COM(2010) 2020 final.

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