Competition Law and Public Interests

Principles for resolving conflicts and an application to the banking sector

Mart Kneepkens

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Cover image: Gerard Dou, *Le Peseur d'or* (1664)

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Uitgangspunten voor het oplossen van conflicten en een toepassing op de bankensector

(met een samenvatting in het Nederlands)

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PREFACE

The spark that once started the run-up to this book was a question that engaged me as a young practising lawyer with some experience in both competition law and financial regulation: to what extent does financial supervisory law affect competition in the banking sector. Although a very interesting and relevant question still, my attention soon shifted to *prima facie* conflicts between on the one hand the measures taken by banks acting to serve banking regulatory interests, and on the other hand competition law. Gradually my curiosity evolved into a study on the friction between competition law and public interests in general, although the focus on the banking sector remained.

In this book I analyse which reconciliation mechanisms are appropriate for undertakings' measures that generate public interest benefits, but that are also within the scope of a substantive competition law prohibition. The term 'reconciliation mechanism' refers to a statutory rule or case law doctrine which can be used to make the substantive prohibitions of competition law compatible with undertakings' measures. I considered the term 'reconciliation' to better express this process than the terms 'balancing' or 'solution', because, as I will argue, effectively no balancing or solving is necessary if the private measure and competition law have the same goal.

This book includes several unconventional or novel notions for improving the application of EU and national competition law. I consider the key contributions of my study to the scholarly discourse to be:

- a proposal of a novel foundation for the application of Articles 101(3) TFEU and 6(3) DCA and the substantive merger control test, due to the use of a specific selection of principles, most notably the 'one-policy-goal-one-instrument' principle, the principle of consistency between the application of a rule and the goal of this rule, and the principle that political choices must be made by democratically legitimised bodies;
- an interpretation of the scope of competition law based on a profound analysis of the theory of welfare economics, including an explication of why paternalistic private measures and welfare improvements due to the internalisation of negative externalities fall outside the scope of Articles 101(3) TFEU and 6(3) DCA and the substantive merger control test;
- an extension of the discourse on competition law and public interests with regard to the merger control regime, which is rare in the scholarly literature;
- the formulation of an innovative view on Articles 106(2) TFEU and 11 DCA,

implying that these provisions can be used as reconciliation mechanisms to allow governments to fully benefit from the advantages of anti-competitive self-regulation that overall furthers society's good;

- a broadening of the notion of the practical impact of the discourse on competition law and public interests, through consistently applying the general discussion to cases in the banking sector – this exemplification is exceptional in the scholarly literature.

For readers who want to quickly grasp the key reasoning of this book I recommend reading the storyline of the book in Part A. of Chapter 7.

ACKNOWLEDGEMENTS

Although conducting this study often felt like a solitary undertaking, and sometimes even a lonely one, clearly I could not have written this treatise without the support of many people. I thank all of them sincerely for their help.

First, I want to thank my supervisors Annetje Ottow and Jaap Bikker. Their guidance, comments and critiques helped me to keep on the right track. I am also grateful to the members of the dissertation committee, Anna Gerbrandy, Fieke van der Lecq, Jarig van Sinderen, Paul de Bijl and Sybe de Vries, for their useful suggestions and comments which allowed me to improve the manuscript.

For my research I spent quite some time at the International and European Law department of the Utrecht University. I really enjoyed those times. I am thankful to the present and former colleagues in the department for their practical help, the inspirational discussions and their very good company. In addition, I want to thank the ABN AMRO Legal department for the support they offered me in the final phase of my enterprise. I appreciate it that from the moment I joined 'Legal', they encouraged me to continue with this study.

Christine Moran did a great editing job and significantly improved the text of this book. I am really thankful for her help. I also want to thank my friend Michiel Kelder for his graphical contribution. In addition, I want to mention the great practical help I received from Marianne Schrik, Bertje and Maarten van der Kroef and my parents. I am very grateful for their support which allowed me to spend the necessary hours on my study.

It is impossible to put in words the gratitude I owe to my partner Saskia. Her support for my venture was entirely indispensable. We truly shared the journey. This one is now finished, but I hope we will make many more together.

Saskia, I dedicate this book to you.

Mart Kneepkens
Amsterdam, December 2016

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TERMINOLOGY

ACM: *Autoriteit Consument en Markt*, i.e. the Authority for Consumers and Markets, the Dutch competition authority. The ACM is the successor of the old Dutch competition authority, the **NMa**. In the body text of this book no references to the NMa are made; references to the ACM are meant to include the NMa.
anti-competitive: depending on the context, infringing the Cartel Prohibition or the SIEC test.
bank: an undertaking that provides classical banking services, e.g. the receiving of repayable funds, the provision of credit and the offering of payment accounts.
bank self-regulation: a voluntarily concluded agreement between among others two or more banks, that aims to regulate their conduct on the market and to (also) achieve public interests.
BIS: Bank for International Settlements.
BRRD: Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.
Cartel Prohibition: both Article 101(1) TFEU and Article 6(1) DCA, unless specified otherwise.
CMA: UK Competition and Markets Authority, i.e. the UK competition authority.
competition law: EU and Dutch competition law.
consumer: an individual, i.e. a natural person, not acting in its business capacity.
Council: Council of the European Union (Article 16 TEU).
DCA: Dutch Competition Act, in Dutch: *Mededingingswet*.
DG COMP: Commission's Directorate General for Competition.
DNB: *De Nederlandsche Bank*, i.e. the Dutch central bank.
ECJ: EU Court of Justice.
EEA: European Economic Area.
EUMR: EU Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings.
European Council: European Council (Article 15 TEU).
EU legislature: with regard to the ordinary legislative procedure, the Council and EU Parliament acting together. For other legislative procedures, as specified by the EU Treaties.
EU Treaties: the TEU and TFEU together.
Exemption Possibility: Both Article 101(3) TFEU and Article 6(3) DCA, unless specified otherwise.
FCA: UK Financial Conduct Authority.

FSA: UK Financial Services Authority, the predecessor of the current FCA and the UK Prudential Regulation Authority of the Bank of England.
FS Act: Dutch Financial Services Act, in Dutch: *Wet op het financieel toezicht*.
GC: EU General Court.
government: refers to democratically legitimised public bodies, such as the legislature, the cabinet and ministers. Although for readability purposes no distinction is made between these bodies, it is acknowledged that a hierarchy exists between them. When this term is used, it is meant to refer to the bodies on the appropriate hierarchy level to procure the discussed action. The terms 'government' and 'state' are used interchangeably.
merger: a 'concentration' within the meaning of the EUMR or DCA.
merger control regime: the rules of the EUMR and DCA that cover the approval procedures for concentrations.
NMa: *Nederlandse Mededingingsautoriteit*, the predecessor of the current Dutch competition authority.
NVB: *Nederlandse Vereniging van Banken*, i.e. the Dutch Banking Association.
OECD: Organisation for Economic Co-operation and Development.
OFT: UK Office of Fair Trading, the predecessor of the current UK competition authority CMA.
public interests: interests that are pursued by the government in the interest of society.
PSD: Payment Services Directive, i.e. Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, on payment services in the internal market.
PSD2: Payment Services Directive 2, i.e. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.
SEPA: the Single European Payments Area.
SGEI: Service of General Economic Interest within the meaning of Article 106(2) TFEU.
SIEC test: the substantive prohibition of the merger control regime to implement a concentration that significantly impedes competition.
state: see under 'government'.
TEU: the Treaty on European Union.
TFEU: the Treaty on the Functioning of the European Union.
Treaties legislature: the EU Member States, as the contracting parties to the TEU and the TFEU.

1. INTRODUCTION

1. WHY THIS BOOK? AN INTRODUCTION

"The Dutch Banking Association considers it important to protect customers against the risks associated with the high costs of housing. For that and other reasons a clear borrowing norm of a maximum of 106% of a property's value is included in the new Mortgage Credit Code (…). We do not comment on the way in which individual banks apply the Code; competition law would not allow this. (…) we emphasise that the Code was written together with the Minister of Finance and the Financial Markets Authority; an agreement is an agreement. This confirms the trend towards less borrowing and increased repayment."[1]

The above citation is part of the reply of the Dutch Banking Association on the news that the French bank BNP Paribas had decided to no longer comply with the Dutch Mortgage Credit Code, an industry-wide piece of self-regulation that existed for more than 25 years. BNP Paribas may have had perfectly valid reasons to abandon the Code,[2] but that is, from a wider perspective, not so interesting. What is intriguing, is the observation that competition law prevents the Association from opining on the compliance of individual banks with the Code. The observation is understandable if competition law is considered: the advice of associations of undertakings that may have the effect that market competition is limited, is liable to violate the cartel prohibition. However, one wonders why competition law would need to stop an industry association, or any gathering of undertakings for that matter, to guarantee that market players comply with a code that clearly serves a public interest (i.e. the prevention of overindebtedness of consumers) and that is drafted and endorsed by the Minister of Finance and the financial markets supervisor. More generally the question can be raised: should competition law block measures that in the end make society better off? If the answer is no, how can we ensure that competition law backs down when it is appropriate? These are the key topics of this book.

[1] See: <http://www.rtlnieuws.nl/economie/banken-chagrijnig-over-hypotheekgedrag-bnp-paribas>

[2] De Volkskrant, *Vereisten Garantiehypotheek Soepeler*, 29 August 2011. The Dutch homeowners association (*Vereniging Eigen Huis*) suspected anti-competitive behaviour by the Dutch Banking Association and filed a complaint with the Dutch competition authority.

2. THE STUDY

The general theme of this book is the clash between on the one hand EU and Dutch competition law, and on the other hand public interests. Competition law is part of competition policy. This public policy has its own goal(s), which may very well differ from the goals of other public policies. It is therefore only to be expected that actions by undertakings that advance a particular public policy can conflict with competition policy's goals and with competition law. This raises the question how the law deals with these conflicts and whether this is satisfactory.

2.1. The research questions

This study tries to answer two questions in the context of the general theme of conflicts between competition law and public interests.

First research question. The first research question of this book is: *Which reconciliation mechanisms are available for undertakings' measures that generate public interest benefits, but that are also within the scope of a substantive competition law prohibition?*

Second research question. The second research question is: *If society's interests take precedence, is the manner in which the reconciliation mechanisms are currently applied the most appropriate manner; and if not, how should the law be applied to achieve the best results for society?*

Some explanation of these questions is opportune:

- The reference to measures that 'are within the scope of a substantive competition law prohibition' in the first research question means that these measures would violate a substantive competition law norm, were it not for the exempting effect of a reconciliation mechanism.
- The term 'reconciliation mechanism' refers to a statutory rule or case law doctrine which can be used to *de facto* override the substantive prohibitions of competition law. Such a legal instrument therefore allows that, under its conditions, private measures which violate these prohibitions are made compatible with competition law. Reconciliation covers both the unification of competition law prohibitions with private measures (if they share a common goal), as well as the subordination of these prohibitions to these private measures (if they have different goals). 'Reconciliation' was found to better express this process than the term

'balancing', because balancing as in 'weighing' effectively does not occur when the private measure and competition law share a common goal ('computation' would then better describe the exercise). Likewise, the term 'solution mechanism' was considered to be less accurate than 'reconciliation mechanism', as there is no real conflict to solve between a private measure and competition law when they share a common goal. The two research questions are answered with regard to reconciliation mechanisms within the realm of competition law.

- In this book the term 'public interests' refers to interests that are (also) pursued by the government through public policies; public interests are therefore similar to 'public policy goals'. An element of such a public policy can be the encouragement by the government of undertakings to take measures furthering a specific interest.

A descriptive overview and a normative position. The first research question needs an answer that is descriptive in nature: the question asks for an overview that pictures the law as it is. In this regard, the room that current law provides for reconciling public interests with anti-competitive effects is investigated. The answer to this question will clarify which options are legally feasible if measures matching the goals pursued by public policies limit competition.

The answer to the research second question, however, has a normative nature: its objective is to establish whether the current status of the law is the most appropriate. The answer is given from the perspective that the law, including competition law and public policy regulations, must ultimately serve society's interests. This implies that in a clash between two public policy goals it can indeed be established which solution maximises society's good. In this book it is assumed that the right choice for this solution depends on society's preferences. In democratic countries society is arguably represented by the elected political bodies. Consequently, it is for these bodies – usually the legislatures – to set the hierarchy between the various public policies so that a conflict between public interests can be solved. Scholars such as economists and lawyers may analyse the consequences, consistency and legality of such hierarchy choices, but they lack methods that can legitimately determine such a hierarchy. In this book, therefore, no hierarchy between public policies is presented, unless such a hierarchy can be derived from the choices of legislatures.

Goal of the study. This study assesses *existing* reconciliation mechanisms. In other words, only the availability and appropriateness of the current law and case law is considered, and proposals to improve the application of the law are also limited to the current law and case law. It is not the aim of this book to rewrite the law or recommend new statutory provisions. On the contrary, this book's ambition is to make proposals for a better application of the existing rules. It was deemed to be

more valuable to demonstrate feasible approaches to the law that may lead to better results, than to argue for justified but improbable changes to the Treaty on European Union (**TEU**), the Treaty on the Functioning of the European Union (**TFEU**), or other laws. Indeed, how likely is it that Article 101 TFEU will be rewritten because of the deficiencies established in a study? Clearly, there is merit in scholarly study which formulates good arguments to change treaties and statutes. Nevertheless, this book, among other things, intends to inspire undertakings, authorities and judges to directly apply new normative approaches, rather than awaiting an overhaul of Article 101 TFEU or Article 6 Dutch Competition Act (**DCA**). That being said, the limitation to existing reconciliation mechanisms is not too confining, as the courts have shown that the boundaries of competition law can be stretched greatly – to unexpectedly remote places... This book recognises this flexibility of the law and uses as a limit the *contra legem* interpretation of the law. The term '*contra legem*' refers here to a "*clearly wrong interpretation*",[3] i.e. an interpretation of the law that would result in an outcome which is clearly contrary to the wording and the knowable goal of this law. Consequently, proposals to apply *contra legem* interpretations are deemed to be unrealistic and inappropriate.[4]

Competition policy and competition law. It is relevant to acknowledge that the research questions only cover cases in which, *prima facie*, competition law prohibitions are infringed. Indeed, the study only covers potential conflicts between public interest measures and competition *law,* and not competition *policy*. EU and Dutch competition law mainly includes three prohibitions: the prohibition to conclude agreements that restrict competition, the prohibition to abuse a dominant market position and the prohibition to implement certain large mergers without prior approval of a competition authority (see Section 5.). One may add to that the EU prohibition to grant state aid without prior approval and the Dutch ban for governmental institutions to unduly compete with private businesses. These prohibitions, however, are just that: rules that prohibit certain behaviour. Competition policy is more comprehensive than competition law; the latter is part of the former. Competition policy goes beyond prohibiting certain acts and also includes state actions to foster competition, such as the liberalisation of undertakings. Situations may arise in which a state supports certain measures because they *increase* competition, while

[3] A. Klip, *Contra Legem*, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 22, 2014, p. 108. With regard to *contra legem* interpretations by the courts, Conway first makes a distinction between the *interpretation* of the law and the *making* of the law – the former being a task of the judge and the latter not – and subsequently describes a *contra legem* interpretation of the law as follows: "*If the judiciary is going beyond what could reasonably be inferred to be the intention of the law-maker, the judiciary is over-stepping its role and engaging in law-making.*" G. Conway, *EU Law*, Routledge, 2015, p. 234.

[4] Of course, this does not mean that one could not recommend changing the law to allow for a rule that fits one's opinion and to evade *contra legem* applications of the law.

these measures simultaneously affect other public interests. Although this would be an example of a conflict between competition policy and another public policy, these cases are not assessed in this book.

Scope of the study. The scope of competition law was briefly set out above. For this book Article 106(2) TFEU is considered to be part of competition law, although

officially its exempting effect extends beyond the EU competition rules. The study covers two substantive competition law prohibitions: (1) the cartel prohibition and (2) the prohibition to implement a merger that significantly impedes effective competition. For practical reasons the prohibition to abuse a dominant market position, i.e. Article 102 TFEU and 24 DCA, is not part of the present study. So-called 'dominance cases' with regard to banks are very rare.[5] Such cases only happen if, briefly put, a single bank has a market share of more than 50%, and there are simply not a lot of markets where this is the case.

Cross references. In this book references to 'section' numbers in a certain chapter refer to specific sections of that chapter, while references to 'chapter' numbers of two digits or more refer to specific sections in the chapter indicated by the first digit (e.g., 'Chapter 2.1.2.' refers to Section 1.2. of Chapter 2.).

2.2. Application to the banking sector

Although this book considers reconciliation mechanisms for anti-competitive measures that generate public interest benefits *in general*, the focus of this book is on measures that serve banking regulatory interests. Banking regulatory interests are the public interests that are served through banking regulation, and they are discussed in more detail in Chapter 3. There are two reasons why this focus is made.

First, applying general principles, analyses and conclusions to specific cases makes it easier to appreciate these principles, analyses and conclusions and to understand what they imply in practice.

Secondly, the focus on the banking sector aims to enrich the discourse on competition law and public interests. Few studies exist that focus on conflicts between EU or Dutch competition law and banking regulatory interests. Other research either discusses conflicts between competition law and other public policies in general, in an abstract

[5] Likewise, 'collective dominance' cases (Section 5.3.) in the banking sector are very rare, too.

way, or focuses on conflicts regarding specific policies other than banking regulation. Furthermore, although a vast economic literature exists on the conflicts between competition and financial stability, scholarly literature on conflicts between financial stability regulation and competition *law* is much rarer. The assessment of banking cases will reveal which conflicts can be expected in this industry and it may be of direct interest for those dealing with bank self-regulation or bank rescue mergers.

So, as a whole this book's findings form a distinct framework for dealing with conflicts between competition law and other public policies. They provide direct normative guidance on how to deal with situations in which banking regulatory interests clash with competition law, but the findings are also suited to apply to clashes between competition law and other public policies.

2.3. Methodology of the study

The objects of this study are competition law and banking regulatory policy. For both objects (only) the EU and Dutch dimensions are studied.

This study is primarily legal research and to answer the research questions an analysis of various legal sources is made. In addition, the study includes an assessment of the rationales for competition policy and banking regulatory policy. For this assessment legal sources are reviewed and relevant insights of economic theory are used.

The first research question asks for a layout of the current application by the courts and authorities of certain competition law topics. This review was made by analysing EU and Dutch legislation, case law, decisions of both the European Commission (**Commission**) as a competition authority and the Dutch Authority for Consumers and Markets (**ACM**), governmental policies and guidelines of the authorities. This exercise results in a layout of the legal *status quo* and an interpretation of the valid law.

Answering the second research question requires a logical and evaluative analysis of the legal *status quo*, as well as an exploration of changes in the interpretation of the law to improve it. It warrants, in addition to a study of legal sources, an economic theoretical analysis of the benefits of competition law. For the application of the findings to the banking sector, a variety of exercises is performed to appreciate the rationales and rules of banking regulatory policy: an assessment of legal sources, a review of relevant economic theory and reports of relevant organisations such as the Organisation for Economic Co-operation and Development (**OECD**) and the Bank

for Internatinal Settlements (**BIS**). The discussions of cases to illustrate the arguments in this book cover EU law cases, as well as cases from the EU Member States the Netherlands, the UK, Ireland and from EEA Member State Iceland.

The study was ended on 1 July 2016. Developments of a later date were only taken into account to the extent explicitly mentioned.

3. RELEVANCE OF THE STUDY

There are three domains in which this book has relevance, i.e.: (1) society, (2) legal practice, and (3) legal academics.

Relevance for society in general. There are several reasons why it is relevant and significant for society that potential conflicts between competition law and public interests are dealt with properly:

- These conflicts constitute clashes between public policies. It can be assumed that each public policy serves certain interests of society. Consequently, if two public policies clash and cannot be fully implemented simultaneously, the interests served by the two policies cannot be maximally served. From society's perspective this means that a second-best option that maximises society's good has to be chosen. Once the second-best option is set, it must be examined how this result can be achieved. For example, it must be established whether the law does not render the accomplishment of this second-best option impossible. This exercise relates to the first research question of this book. One of the questions answered in this book is to what extent competition law can be overridden to attain other policy goals, more specifically banking regulatory goals. This knowledge is crucial for choosing a feasible second-best option.
- The answer to the abovementioned question will show whether the law prevents the attainment of the second-best option from society's perspective. If it does, it is sensible for society to aim for another application of the law that does allow the attainment of the second-best option. The second research question of this book calls for examining if and to what extent the application of competition law should be changed to ensure that it does not block the optimal second-best option. The answer to this question may help to maximise society's good.

Furthermore, elaborating on the abovementioned rationale for this book, in the last decade or so there is a trend towards more perceived conflicts between competition policy and other policies. Sometimes these conflicts are real, sometimes a further look

reveals that in fact no conflict exists.[6] Nevertheless, allegations that competition law unduly limits the accomplishment of certain other public interests are heard more and more in recent years. For example, it has been maintained that competition law blocks the welcome transformation of the old, mere profit-maximising economy into a new, sustainable economy.[7] Similar disparities with regard to the banking sector will probably be the topic of public debate in the near future, too; the next section discusses why this is likely. The consequence of this trend is that in future it will be increasingly necessary to establish a second-best option with regard to clashes between competition policy and other public policies. A rise may be expected in the negative impact on society's good due to settling for options that are less than second-best, because competition law compels such inferior options. To conclude, an appropriate solution for conflicting public policies may contribute to optimally serving society's interests. This implies that not only the best solution must be established, but also that it must be verified whether accomplishing this result is legally possible.

Relevance for legal practice. This book presents several frameworks for applying certain legal provisions which are appropriate mechanisms for reconciling conflicts between competition law and public interests. These frameworks are meant to be based on a consistent application of solid principles and to allow for structured application of the reconciliation mechanisms. In addition, it is set out why the *Wouter*s doctrine[8] is not an adequate method to solve conflicts between competition law and public interests. The proposed frameworks and the appraisal of the *Wouters* doctrine may therefore contribute to more consistent and rightful decision-making and adjudication, as well as increased certainty regarding the legality of anti-competitive agreements.

Although this analysis and the findings of this study relate to public policy interests, its emphasis is on the banking sector. Due to this focus, and especially due to the discussion of banking sector cases, this treatise may be particularly worthwhile for certain bank staff and government officials involved in the financial sector.

[6] The ACM regularly mentions that the impression that cooperations between competitors are always prohibited, is not correct. See e.g. ACM press release of 19 September 2015, *ACM Bevestigt Ruimte voor Samenwerking in Eerstelijnszorg*.

[7] See, e.g., letter of 11 June 2015 of the Dutch employers association VNO NCW and various other industry associations and environmental NGOs to the Dutch Minister of Economic Affairs, requesting him to develop policy that would allow the ACM to take into account 'non-monetary benefits' when applying Article 6(3) DCA.

[8] ECJ judgment 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*.

Relevance for legal academics. A lot has been written about the conflicts between competition law and other public policies and the general interest, over several decades and by many scholars. This book stands out, because it develops, and proceeds from, certain general principles and subsequently applies these principles to both the cartel prohibition and the merger control regime – most literature covers the former only. Furthermore, this study discusses the possible use of Article 106(2) TFEU to solve the conflicts at issue. The possibilities of this provision have hitherto scarcely been explored in this context. Finally, the general findings of this study are applied to cases in the banking sector throughout this book. Answering the research questions with such an extensive focus on this sector is unique and adds a new perspective to the general discourse on conflicts between competition law and other public policies.

4. SETTING THE SCENE: THE DUTCH BANKING SECTOR

4.1. Introduction

Today's banking sector in the Netherlands: still in the aftermath of the 2008 financial crisis, highly concentrated, while 'disruptive' market entry by fintechs and other non-traditional businesses threaten to make the banks obsolete. This summarises, with some exaggeration, the notable characteristics of the Dutch banking sector today. These characteristics are relevant for this study:

- As a result of the crisis the amount of banking regulation has increased tremendously and society's stance towards banks has changed significantly – and not for the better. Banks may need to take additional, unstipulated actions to live up to the new demands of supervisors and society, which actions may lead to unprecedented clashes with competition law.
- A high market concentration could indicate already underdeveloped competition. A lower number of substantial banks may also ease the creation of industry-wide self-regulation, making self-regulation a likely option for banks to pursue shared goals. Self-regulation, however, may easily enter the scope of competition law.
- The rise of new firms which offer novel services that compete with banks' main activities raises questions of how banks individually and collectively should deal with these new competitors. Incumbents may be inclined to protect their market positions against the newcomers, which could result in anti-competitive conduct.

The narrative below covers in more detail those characteristics of the Dutch banking sector that are deemed to be relevant for understanding the significance and findings of this book, insofar as banking cases are discussed.

4.2. The aftermath of the financial crisis

It is stating the obvious to say that the banking sector is currently in a very different shape than before 2008. Nevertheless, it is an important observation for this study. Since the financial crisis exploded in the autumn of 2008, the banking industry has undergone major changes. Governments and supervisors across the globe have committed themselves to prevent the occurrence of a crisis of similar size in the future. The development and implementation of the measures to accomplish this are still in process, but it is expected that the great majority of the implementation will be finished by 2020. The main objective of these measures is to remedy the causes of the crisis, to mitigate the consequences of future crises and to restore trust in the banking sector.

The quantity and impact of the new rules is huge and unprecedented. These rules reflect a new attitude of the public and governments towards banks, which attitude among other things includes the notion that banks have a special function in and responsibility towards society, that their soundness must be improved to avoid future crises, that there are limits to what governments and taxpayers can do to save failing banks and that financial supervision must be strengthened, broadened and deepened.

The crisis has also caused the expenditure of huge sums of taxpayers' funds to save banks. The public's trust in banks was slashed. The crisis presumably caused a credit crunch which has significantly and persistently affected the real economy, and sparked a sovereign debt crisis that could have brought about the insolvency of states and the collapse of the euro monetary system.

As a result of the crisis, the way society regards the banks has changed significantly: "*The banking sector must address the breach of trust between citizens and banks that has arisen. Dutch citizens have, via the State, paid many billions to save the banks and became therefore responsible for the reckless conduct of others. They are entitled to expect that those who are in charge of these firms are of service to citizens and businesses.*"[9] This statement reflects the common notion that banks can no longer predominantly operate in their own interest, like other, normal undertakings, but that their functioning will to a greater extent have to serve the interests of society. As banks will try to serve these public interests through private action more often in future, conflicts with competition law may arise more often, too. How often will mainly depend on the degree to which bank self-regulation is used to pursue these public interests.

[9] Dutch Cabinet's vision document on the Dutch banking sector (*Kabinetsvisie Nederlandse bankensector*) of 23 August 2013, FM/2013/1511M, p. 17 [author's translation].

A large part of this book focuses on self-regulation by banks. Self-regulation has long been a significant instrument for regulating the banking sector. At first sight, the financial crisis has reduced supervisors', governments' and society's appetite for banking self-regulation. However, there is also a force directing banks to new self-regulation. In 2010 the Dutch Cabinet stated that the culture in the banking sector would have to change to avoid another crisis. The Cabinet endorsed the Dutch banking sector's self-regulatory code to accomplish this.[10] Indeed, the Dutch banks have made an attempt to restore trust by concluding a self-regulatory code, the Dutch *Code Banken*,[11] which aims to improve the expertise and operation of the banks' boards of supervisors and directors, to enhance banks' risk management and remove improper remuneration schemes. The effects of the code were, however, limited. It was therefore suggested that banks should cooperate more closely in their attempts and not operate unilaterally.[12] Subsequently, the banks added an extra step, trying to enhance the process of regaining the public's trust by subscribing to a social charter. Pursuant to this charter, all banks will work on the following assumptions: (1) the banking industry is pluriform and offers customers a wide choice, (2) banks are reliable, service-oriented and transparent, (3) bank employees are ethical, expert and professional, and ensure that customers and other stakeholders are treated with care and (4) banks have a social responsibility to contribute to a sustainable economy.[13] This fourth assumption is illustrative for the new view on banks in society. In accordance with this new view it can be expected that society will increase its demands on banks to deliver what society needs and to set aside regular profit maximisation.

Self-regulation is often regarded as a better tool to achieve a culture change in an industry than governmental regulation. Governmental regulation may lead to 'ticking the box' exercises which result in mere compliance with rules instead of the exhibition of desirable conduct.[14] Collective self-regulatory codes may reflect a genuine belief in the appropriateness of the code's principles or rules, as the parties to the code have developed these themselves, which could result in more behaviour truly in conformity with the goal of the code.

[10] Letter of the Dutch Minister of Finance to the Dutch Parliament of 22 December 2010, *Kabinetsreactie Eindrapport Tijdelijke Commissie Onderzoek Financieelstelsel (Commissie De Wit)*, section 2.7.

[11] The Dutch Banking Code (*Code Banken*) of 9 September 2009. As of January 2015 a new Banking Code applies, see: NVB, *Future-oriented Banking - Social Charter, Banking Code, Rules of Conduct*, 2014.

[12] Nevertheless, the restoration of the public's trust in banks is not left to the efforts of the banks, and the government has introduced various rules to improve the public's trust. For example, the government has introduced further regulation on the provision of mortgage loans and consumer credit, the sale of investment products, remuneration schemes, financial education of consumers, the fit-and-proper tests for bank directors and a ban on commissions on the sale of, among others, mortgage loans.

[13] See: NVB, *Future-oriented Banking - Social Charter, Banking Code, Rules of Conduct*, 2014, pp. 6-7.

[14] D.T. Llewellyn, *Reforming the Culture of Banking: Restoring Trust and Confidence in Banking*, Journal of Financial Management Markets and Institutions, Vol. 2, No. 2, 2014, p. 228.

So, while it is to be expected that in the coming years legislatures will only rarely choose self-regulation instead of legislating themselves, the demand for bank self-regulation may rise due to society's requests that the banking sector contributes to achieving public policy goals.

The financial crisis also showed that banks can suddenly become vulnerable and instable, requiring swift measures by governments to save banks and mitigate systemic risk. One of such measures was the takeover of an ailing bank by another bank, for example the takeover of the bank HBOS by Lloyds in the UK (see Box 6.1.). The EU and national merger control regimes do not fully accommodate such emergency takeovers, as appeared to be the case in the UK. The clash between competition law and safeguarding financial stability, a clash also very present in many state aid cases, became real. This issue should be addressed to prevent future problems.

As mentioned above, as a result of the financial crisis a vast number of new rules was introduced. In addition, the institutional structure of financial regulatory institutions in the EU was changed substantially. Box 1.1. below provides an overview of the relevant institutions and summaries of their roles and tasks.[15]

Box 1.1. Overview of EU and Dutch financial regulatory bodies

EU institutional supervisory structure

European System of Financial Supervision
In response to the 2008 financial crisis the EU introduced a completely new institutional structure for the supervision of EU financial markets and firms. The crisis revealed among other things that cross-border problems could not be solved swiftly and effectively by the existing supervisory architecture. It also became clear that stricter and more uniform rules were needed across the EU. The revised supervision structure aims to do away with the cross-border issues and to support the transition to a more extensive and uniform EU regulatory regime.

[15] The terms 'supervisory institution', 'supervisory authority', 'supervisor', 'regulator' and 'regulatory institution' are used interchangeably in this book.

The new institutional architecture, i.e. the European System of Financial Supervision (**ESFS**),[16] consists of four EU bodies:

(1) European Systemic Risk Board, which monitors systemic risk;
(2) European Banking Authority, which contributes to prudential supervision on banks;
(3) European Securities and Markets Authority, which focuses on investor protection and the functioning of financial markets;
(4) European Insurance and Occupational Pensions Authority, which supervises insurance and pension institutions.

The first two bodies are discussed below; the latter two are not because of their insignificant relevance for this book. Within the ESFS, the EU bodies closely cooperate with each other and with the national competent authorities. For example, the national competent authorities remain responsible for the actual supervision of financial institutions – although this role has been taken over by the ECB to the extent prudential supervision of Eurozone banks is concerned (see below).

European Systemic Risk Board: monitoring systemic risk in the EU
The European Systemic Risk Board (**ESRB**) decision making body includes representatives of, among others, the ECB, the Commission, the EU supervisory authorities and the national central banks. Its objective is to exercise macro-prudential oversight of the EU financial system in order to contribute to the prevention and mitigation of systemic risks. To that effect, the ESRB investigates, assesses and monitors systemic risk in the EU and issues warnings and recommendations. Such warnings and recommendations can be directed to the EU in general, to a Member State, or to a specific EU or national supervisory authority.[17] If the ESRB finds that the addressee of a recommendation has subsequently taken insufficient action, it may inform the Council and/or relevant European supervisory authority about its finding.[18] It is relevant to acknowledge that the Member States' authorities are responsible for taking macro-prudential measures – not the ESRB. The ESRB was founded in 2011.

[16] On the ESFS, see e.g.: A.T. Ottow, *The European Supervision of Financial Markets*, The Europe Institute Utrecht Working Paper 02/11, 2011.

[17] Art. 16 of EU Regulation 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

[18] Art. 17(2) of EU Regulation 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

European Banking Authority: ensures uniform application of EU banking regulation
The European Banking Authority is an independent EU authority and its main objective is to support the harmonisation of prudential banking regulation across the EU: "*The main task of the EBA is to contribute to the creation of the European Single Rulebook in banking whose objective is to provide a single set of harmonised prudential rules for financial institutions throughout the EU. The Authority also plays an important role in promoting convergence of supervisory practices and is mandated to assess risks and vulnerabilities in the EU banking sector.*"[19] The EBA does not supervise individual banks, as this is still the responsibility of the Member States' national supervisors. The EBA was established in 2011.

European Central Bank: prudential supervisor for eurozone banks
The European Central Bank (**ECB**) started in 1998 as the main monetary authority for the Member States that switched to the euro as their official currency. In November 2014, however, it also became the principal prudential supervisor for the larger banks in the eurozone. Although the smaller eurozone banks are officially also subject to the ECB's supervision, in practice the primary prudential supervisors for those banks are the national competent authorities. This was a key step in the achievement of the Single Supervisory Mechanism (**SSM**), i.e. the uniform institutional supervisory structure for the eurozone. The introduction of the mechanism was deemed a necessary measure after the sovereign debt crisis, aimed at preventing that banking crises would again endanger the financial soundness of whole Member States.

The ECB is a significant international stakeholder with regard to policies on financial stability and banking supervision: it is represented, for instance, in the G20, the Basel Committee, the BIS, the FSB and the ESRB.

Single Resolution Mechanism: crisis management for eurozone banks
The Single Resolution Mechanism (**SRM**) resembles a decision tree for resolution decisions regarding banks seated in the Member States participating in the SSM. Pursuant to SRM regulation an SRM board is installed and this board takes decisions with regard to *how* failing eurozone banks need to be wound down. (The decision *whether* such a bank is failing, is primarily taken by the ECB.[20]) These

[19] <http://www.eba.europa.eu/about-us>

[20] See Art. 18(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

decisions are taken in conformity with the EU Bank Recovery and Resolution Directive (**BRRD**),[21] as pursuant to the SRM regulation the SRM board takes over certain tasks and powers the national resolution authorities would otherwise have pursuant to the BRRD. Importantly, the Commission and the Council have the powers to veto a resolution decision of the SRM board.[22] The SRM was introduced in 2014.

European Commission: Level 2 measures and state aid decisions
The Commission is not a classical banking supervisor, as it does not have general monitoring or supervisory powers with regard to banks' activities. It has, however, the authority to adopt implementing regulations – the so-called 'level 2 rules' – with regard to various banking activities. The Commission has taken level 2 measures in regulatory areas such as capital adequacy requirements, bank crisis management and investment services.[23] The Commission may therefore be considered a genuine banking *regulator* (in addition to the role it plays with regard to the EU legislative procedures).

In addition, (only) the Commission is authorised to validate state aid provided by a Member State to a bank. Although this is not a financial regulatory power as such, it is specifically relevant when considering the options of rescuing a troubled bank. During the 2008 financial crisis many Member States saw themselves compelled to rescue certain banks, which in most cases amounted to the provision of state aid within the meaning of the TFEU. This was only allowed if endorsed by the Commission. The Commission accepted these rescues, but only on the condition that the rescued banks took sufficient (restructuring) measures to prevent new difficulties in future. The new EU bank crisis management framework aims to make the rescue of banks by the state unnecessary,[24] but there is no guarantee that state intervention will not be needed during a severe crisis. So, as the state aid rules of the TFEU remain fully applicable to bank rescues, the

[21] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

[22] See Art. 18(7) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

[23] For an overview of level 2 measures with regard to financial services, see: <http://ec.europa.eu/finance/general-policy/docs/level-2-measures/level2-measures_en.pdf>

[24] See e.g. Art. 14(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

Commission continues to play an important role in this context. (Furthermore, the Commission has a veto right with regard to bank resolution decisions taken by the board of the Single Resolution Mechanism.[25])

Dutch institutional supervisory structure

Dutch Central Bank: prudential supervisor for the Dutch banking sector
The Dutch Central Bank, in Dutch: *De Nederlandsche Bank* (**DNB**), is the Dutch prudential supervisor for banks, insurers and pension funds. DNB also exercise the national oversight of the payment system. In addition, it is the national monetary authority participating in the European System of Central Banks.

As of November 2014, the ECB has become the prime prudential supervisor of the Dutch banks. In practice this means that the seven largest Dutch banks are supervised by teams composed of both ECB and DNB staff, under the ultimate responsibility of the ECB. The remaining Dutch banks will in practice be supervised by DNB, although the ECB may decide to also directly supervise such a smaller bank. With regard to the supervision of banks, the SSM has not taken away from DNB its tasks with regard to anti-money-laundering and anti-terrorism policies. Furthermore, DNB is responsible for the monitoring of systemic risk in the Netherlands.[26]

Dutch Authority for Financial Markets: market conduct supervisor for the Dutch banking sector
The Dutch Authority for Financial Markets, in Dutch: *Autoriteit Financiële Markten* (**AFM**), is the market conduct supervisor for, among others, the banking sector. In addition, it is the capital markets supervisor (as well as the supervisor of accountants). As the authority itself puts it: "*The AFM promotes the conscientious provision of financial services to consumers and supervises the honest and efficient operation of the capital markets.*"[27]

A key task of the AFM is to ensure that consumers – i.e. non-professional individuals – are treated fairly by financial firms. In other words, it supervises the compliance with financial consumer protection rules. To that effect, the AFM

[25] See Art. 18(7) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

[26] Artt. 4(1) Bank Act and 1:24 FS Act.

[27] <http://afm.nl/en/professionals/over-afm/werkzaamheden/strategische-doelstellingen>

supervises whether such firms comply with the regulations on, e.g., customer due diligence, information provision and adequate firm governance.

Dutch Minister of Finance
The Minister of Finance is politically responsible for the supervision of banks in the Netherlands, to the extent that this supervision is not assigned to the ECB. This supervisory responsibility of the Minister encompasses the applicable regulations, the supervisory institutional structure and the activities of the supervisors.[28] The Minister also has certain direct supervisory powers, e.g. the authority to take extraordinary measures regarding Dutch financial institutions to protect financial stability[29] – although this power has become, regarding significant Dutch banks, rather useless due to the introduction of the SRM.

Authority for Consumers and Markets
The ACM has one specific task in the context of financial supervision. Pursuant to Article 1:25a of the Dutch Financial Services Act (**FS Act**) (*Wet op het financieel toezicht*), the ACM enforces the FS Act provision that stipulates that payment system providers may not unduly hinder the access of payment service providers to their systems.[30] This rule has a competition promoting rationale and therefore the enforcement was attributed to the ACM instead of one of the two financial supervisors. To date, however, this task seems to imply little supervisory activity for the ACM.[31]

4.3. The Dutch banking sector: market structure and competition

The crisis has had and will continue to have a great impact on the manner in which banks will operate and be organised in the coming decades, especially due to the vast number of new regulations.[32] But the crisis has also had a sweeping effect on the structure of the Dutch banking markets and their functioning. The

[28] Parliamentary article, *Kamerstukken II* 2010/11, 31980, No. 4, p. 135 (*Parlementair Onderzoek Financieel Stelsel*).

[29] Article 6:1 FS Act.

[30] See Art. 5:88 FS Act (the Dutch transposition of Article 28 of the Payment Services Directive – i.e. EU Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007).

[31] The ACM will in future also have the task to enforce certain provisions of EU Regulation 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions. See the consultation of the *Besluit Afwikkelingsvergoedingen voor op Kaarten Gebaseerde Betalingstransacties:* <https://www.internetconsultatie.nl/afwikkelingsvergoedingen/document/2203>.

[32] KPMG has issued a report with an overview of the various new financial regulations that have been or will be introduced and the cumulative effects on Dutch banks: KPMG, *The Cumulative Impact of Regulation*, 2012.

pre-crisis starting point was a landscape with several rather highly concentrated retail and wholesale markets. Especially the ABN AMRO divestiture[33] in 2007/08, which was already planned before the crisis began, contributed to this concentration. Due to competition law concerns, the merger between Fortis and certain parts of ABN AMRO led to the sale of some business units to RBS and Deutsche Bank. So, the divestiture first resulted in stronger positions for RBS and Deutsche Bank in the Dutch market. As a result of the crisis, however, RBS has disposed of almost all the former ABN AMRO activities it acquired, and Deutsche Bank planned to dispose of approximately 18.000 of the approximately 23.000 clients it took over from ABN AMRO during the divesture process.[34]

However, the crisis' effects went further than this. First of all, one small bank failed (DSB bank) and another was taken over to prevent future difficulties (Friesland bank), and several foreign banks stopped or reduced their activities in the Netherlands (e.g., the Icelandic bank (branch) Icesave failed and BNP Paribas stopped offering mortgage loans in the Netherlands[35]).

On top of this trend towards more concentration, the Commission's state aid policy affected competition in the Dutch banking markets. It turned out that two major Dutch banks (i.e., ABN AMRO[36] and ING[37]) needed state aid during the crisis, along with the largest of the smaller banks (i.e. SNS bank[38]) and a large insurer that had a significant position as a retail mortgage loan provider (i.e. AEGON[39]). One of the conditions imposed by the Commission in its approval of the state aid for ABN AMRO, ING and AEGON was a price leadership ban. Although imposing such a ban may make sense if the provision of aid to one undertaking is considered in isolation,[40] imposing bans on these major market players (except for the largest, i.e. Rabobank) in a highly concentrated market without genuine discounters may in effect stifle competition.[41]

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[33] In October 2007 a consortium of three banks (i.e. Royal Bank of Scotland, Fortis and Banco Santander) purchased all shares of ABN AMRO. In the next year the three banks divided ABN AMRO Bank between themselves. <https://www.abnamro.com/en/images/Documents/010_About_ABN_AMRO/History/ABN_AMRO_geschiedenis_Fortis_2007-2010.pdf>

[34] See: <https://deutschebank.nl/nl/content/over_ons_nieuws_en_publicaties_strategische_herorientatie_update.html>

[35] ACM report, *Concurrentie op de Hypotheekmarkt. Een Update van de Margeontwikkelingen sinds Begin 2011*, 2013, p. 17. See also: <http://www.bnpparibas.nl/nl/hypotheken/>

[36] Commission decision of 5 April 2011, *Case SA.26674 Restructuring aid to ABN AMRO*.

[37] Commission decision of 16 November 2012, *Case SA.33305 Renotification of capital injection of ING and Case SA.29832 Monitoring of ING*.

[38] Commission decision of 19 December 2013, *Case SA.36598 Restructuring Plan SNS REAAL 2013*.

[39] Commission decision of 17 August 2010, *Case N 372/2009 Restructuring Aid to AEGON*.

[40] A price leadership ban prevents an aided undertaking from undercutting the prices of non-aided firms and therefore limits the adverse effects of the provided aid on competition.

[41] An ACM study has found that the price leadership bans probably had the effect of higher mortgage interest rates. See: ACM report, *Competition and Interest Rates in the Dutch Mortgage Market: An Econometric Analysis of 2004 – 2010*, NMa Working Papers No. 5, 2011, p. 32.

In addition, ABN AMRO and SNS bank were nationalised to prevent their failures. Although this state ownership may not have had direct consequences for the services of these banks, it could be that there will be some direct or indirect influence by the state on how these banks operate.[42] The fact that the Dutch state owned ABN AMRO was certainly relevant with regard to the board's salary raise commotion in 2015, and resulted in the reversal of the announced salary raise.

With regard to the level of competition in the Dutch banking market, the ACM found that for certain retail markets[43] and the SME financing market[44] competition was rather underdeveloped. It is not surprising that these conclusions were drawn, considering the large market positions of the three biggest Dutch banks. Cartels are rather rare, however: the only known cartel involved the banks' joint sale of PIN payment services through their joint venture Interpay.[45] In 2007 the ACM investigated whether the banks colluded with regard to pricing for SME financing, but no evidence for a competition law infringement was found.[46]

Although competition in certain Dutch banking markets may be underdeveloped, one could question whether this is bad news for society: it seems still undecided whether competition decreases the stability of the financial system (see Box 1.2.).[47]

Box 1.2. Competition and financial stability

Among scholars there is debate as to whether competition is good or bad for the stability of the banking sector. With regard to ordinary, non-financial goods, competition can be considered to deliver the best prices for similar products. The producer with the lowest costs will be able to offer the lowest prices and win most customers. Consequently, cost efficiency and the optimal allocation of resources is rewarded and sought. However, this process may be different for financial services. For example, competition between banks on interest rates on the borrowing side could lead banks to provide riskier loans, especially if the higher risk profile of a bank is not an issue for bond holders (because of state guarantees)

[42] Currently (certificates of) some of the shares in ABN AMRO are listed at Euronext Amsterdam, although the majority of the shares are not listed and are still owned by the Dutch state.

[43] ACM report, *Barrières voor Toetreding tot de Nederlandse Bancaire Retailsector*, 2014, p. 13.

[44] ACM report, *Concurrentie op de Markt voor MKB-financiering*, 2015, p. 3.

[45] ACM decision on appeal of 21 December 2005, *Case 2910-864 Interpay*.

[46] ACM report, *Rapportage Rekening-courantkredietverlening aan het MKB*, 2009, p. 4.

[47] The effect of competition policy on banking regulatory policy is outside the scope of this book. This study only covers the opposite effect: how may banking regulatory policy – effected through private measures – infringe on competition law?

or depositors (because of deposit guarantee schemes). Everybody would support bank competition if this could only result in minimising operational costs, but such competition could also induce banks to engage in riskier behaviour.[48]

In fact, the crisis has heated up the debate among scholars on the impact of competition on financial stability.[49] As it is now clear that financial stability is not guaranteed, it is to be expected that policymakers will have to form a more founded and clear view on this issue in the future.

4.4. Major changes for banks' business

In addition to the major regulatory changes due to the intention to prevent a new financial crisis, banks are facing several other crucial challenges for their businesses. One of the key functions that banks perform in today's society is that of payment facilitation. During the last decade especially, two trends in the payment services markets have had, and still have, a significant impact on the banks' activities.

Single European Payments Area. For decades banks have performed their crucial roles in the payment service market. Nevertheless, in the Netherlands they have for a long time provided retail payment services[50] without an extensive regulatory regime. Although DNB has had the task of monitoring and promoting the payment systems already since 1948, this supervisory task did not come with explicit, direct regulatory powers. Banks and other parties active in the retail payment system operated this system primarily on the basis of mutual agreements, while DNB mainly just monitored the functioning of the services – notwithstanding its powers to intervene if financial stability was at risk. However, as the result of, among others things, a wish of the EU to further integrate the various national EU non-cash retail payment services markets, state interference in the payment markets has substantially increased. In 2000 a process was started to achieve a Single European Payments Area (**SEPA**), of which the first elements came into operation on 1 January 2008. The primary goal of the SEPA is to make cross-border, cashless EU payments in euros as easy and fast as cashless national payments. The SEPA was fully implemented in October 2016.

[48] See e.g. E. Carletti, Competition and Regulation in Banking, in: Handbook of Financial Intermediation and Banking, eds. A.V. Thakor & A.W.A. Boot, North Holland, 2008, pp. 466-479; OECD, *Bank Competition and Financial Stability,* 2011.

[49] See e.g. X. Vives, *Competition and Stability in Banking,* IESE Business School Working Paper No. 852, 2010.

[50] I.e. the payment services that citizens and companies use to pay each other, in contrast with wholesale payment services which are used by financial institutions to transact with each other.

The creation of the SEPA is in essence a self-regulatory exercise of the EU banking industry, although it is supported and directed by EU legislation.[51]

Multilateral interchange fees. More regulation has flowed from the Commission's dissatisfaction with the level of Visa's and MasterCard's multilateral interbank fees. The Commission, and various other national competition authorities, considered these fees too high. In an attempt to lower the fees, the Commission has initiated cartel proceedings against Visa and MasterCard – quite successful so far.[52] In addition, in order to get a firmer grip on these interbank fees, a new regulation entered into force, regulating the level of the interbank fees for card-based payments in the EU.[53]

Payment Services Directive 2. Another major change in the payment markets is the entry of non-bank payment service providers. Nowadays the position of electronic payments is omnipresent and sophisticated, and such payments can more and more be made through non-bank payment service providers such as Paypal, Google and telecommunication companies. Policymakers, especially competition authorities, are keen to allow the entry of such new market players, as these companies are expected to increase competition and innovation.[54] New EU legislation, i.e. the Payment Services Directive 2 (**PSD2**),[55] basically requires banks to provide access to payment accounts, if the customer consents, for firms that offer services based on the data of these accounts or that provide payment services based on other banks' payment accounts. The expectation is that due to the PSD2 regime new payment service providers will enter the market and that incumbent banks may be severely affected by new competitors and innovative products.[56]

Fintech. Within the past couple of years a new species of providers of banking services has evolved: the fintechs. 'Fintech' stands for 'financial technology' and the term refers in general to non-banks that offer new, digital financial services – these businesses are

[51] Most notably the SEPA Regulation: EU Regulation No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euros.

[52] Commission decision of 19 December 2007, *Case COMP/34.579 (Mastercard I)*. The decision was upheld by the ECJ: ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I)*. (A subsequent case, *Mastercard II*, is still pending – the Commission has issued its Statement of Objections to Mastercard on 9 July 2015.) The *VISA* decision was a so-called commitment decision (which binds VISA to certain conduct, while not fining it for past behaviour): Commission decision of 26 February 2014, *Case AT.39398 – VISA MIF*.

[53] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.

[54] See e.g.: ACM paper, *FinTech en Concurrentie*, 2016, p. 2.

[55] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

[56] See e.g.: Deloitte, *PSD2 Opens the Door to New Market Entrants*, 2016, p. 10.

often start-ups, but giants like Apple and Google could be considered fintechs as well. The rise of the fintechs is facilitated by new rules such as PSD2, but some key drivers behind this development are the increasing opportunities that technology brings to the financial services industry – including the mining and linking of vast amounts of data – and the general acceptance of non-banks performing banking services by mainly younger customers. To date, fintechs often focus on new services for non-cash payments, but other service categories in which fintechs are active are the provision of credit and investment advice. It is yet unknown which new services and operation methods fintechs may develop in the future and which ones will prevail, but generally the idea is that fintechs will have a large impact on traditional banks and will compel banks to act.[57] Banks are forced to face the new competition and join the innovative developments; they have to allow the newcomers to join the table when agreements on the payment system are being made. This could draw them into anti-competitive conduct.[58]

Cybercrime. In addition to competitive challenges that the combination of new regulations and technological developments create, the increasing digitalisation of banking services causes an increase in cybercrime risks. The legislatures are well aware of the risks that cybercrime create for the financial system and therefore for society.[59] On top of that, self-regulatory initiatives of the financial sector and other stakeholders aim to fight cybercrime.[60] In the Netherlands, it has been argued that the choice of *cooperation*, instead of competition, with regard to the security of their services has led to the relative success of combatting cybercrime.[61] From the perspective of this book this is interesting, as this development could imply a conflict between competition law and the goal of having secure payment systems and a sound financial system.

[57] See e.g.: Commission, *Green Paper on Retail Financial Services*, COM(2015) 630 final, 2015, p. 11; Accenture, *The Future of Fintech and Banking: Digitally Disrupted or Reimagined?*, 2015, p. 6.

[58] See e.g.: ACM paper, *FinTech en Concurrentie*, 2016, pp. 3-4.

[59] The EU and Dutch legislatures have taken various steps to combat cybercrime. Recent examples are (for the EU): EU Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union; and (for the Netherlands) a legislative proposal for an act introducing a reporting requirement for serious breaches of vital IT systems: Parliamentary article, *Kamerstukken II* 2015/16, 34388, No. 2.

[60] Examples of cooperation between Dutch banks with regard to cybersecurity are the Cybercrime Monitoring & Investigation Services (e.g. detecting malware) and the Financial Institutions – Information Sharing and Analysis Centre (FI-ISAC – a forum in which banks share knowledge with each other and with the government on incidents and vulnerabilities); see: NVB Fact Sheet Security and Fraud. <https://www.nvb.nl/verhaal-van-de-banken/5314/2016-veiligheid-en-fraude.html>

[61] Staff member of the Dutch Payments Association (*Betaalvereniging Nederland*) quoted in Het Financieele Dagblad of 1 May 2015, *Aanpak van Cybercrime bij Bank Wordt Exportproduct*, p.1. See also: M. Doeland, *Informatiedeling en Samenwerking Leidt tot Daling Fraude Betalingsverkeer*, Magazine nationale veiligheid en crisisbeheersing, 2016, No. 2, pp. 42-43.

5. AN INTRODUCTION TO COMPETITION LAW

5.1. Introduction

This section provides an overview of the main elements of EU and Dutch competition law. Its purpose is to offer the reader sufficient basic knowledge of competition law terms, so that the analyses and arguments in this book can be understood. The overview is therefore not a detailed explanation of competition law. The overview first covers the three substantive pillars of competition law – (1) the prohibition on anti-competitive agreements, (2) the prohibition to abuse a dominant position and (3) the merger control regime. Next, the EU and Dutch institutional and enforcement contexts are discussed.

Box 1.3. The antitrust provisions of the TFEU

Article 101 TFEU

(1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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.

Article 102 TFEU
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

5.2. Anti-competitive agreements

The EU prohibition on the conclusion of agreements that limit competition, i.e. Article 101(1) TFEU, reads:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, (…)"

The Dutch equivalent of this rule, Article 6(1) DCA, is very similar in substance, the main difference being that the domestic rule does not refer to the effect on trade between EU Member States. In this book these provisions are termed the **Cartel Prohibition**.

Below, the key elements of the Cartel Prohibition are discussed. It may strike lawyers not familiar with competition law that the substance-over-form-adage dominates in competition law. Indeed, substantive competition law could be regarded as legal language expressing economic concepts and reality.

Undertakings. The Cartel Prohibition only applies if two or more *undertakings* conclude an agreement. The term 'undertaking' refers to each entity engaged in an economic activity, regardless of its legal form or status. The concept of an 'economic activity' implies the *offering* of goods or services on a given market – buying products as such is not automatically an economic activity. If several (legal) persons form a single economic unit, such a unit is deemed to be one single undertaking. This means that usually a parent company and its wholly owned subsidiaries form one undertaking in the context of competition law. Agreements between such a parent company and subsidiary fall outside the scope of the Cartel Prohibition, since there is only one undertaking at issue.

It follows from the above that it is decisive whether an entity offers products on a market. This means that governments and state owned businesses are undertakings, when they offer products on a market. However, when governments exercise state prerogatives, i.e. public powers which cover tasks that are essential to the functioning of the state, they are not considered to offer products on a market. The same holds for a private company that exercises, pursuant to a delegation act, such state prerogatives. In sum, a functional approach is required: if an entity (government, company, individual, etc.) engages in an economic activity, those activities fall within the scope of competition law – other activities of these entities don't.

Agreements. The definition of an *agreement* in competition law is broad and includes written, oral, formal and informal agreements. Basically, the form of the agreement is irrelevant, but what matters is that there is a *concurrence of wills* between the undertakings. In certain contexts this concurrence of wills is easily assumed: the existence of an agreement may be established even if a unilateral action or proposal by one firm is tacitly accepted by another business.

Concerted practices. The concept of *concerted practices* refers to situations where undertakings did not properly reach an agreement on their actions, but where nevertheless a meeting of the 'undertakings' minds' results in a practical cooperation which knowingly eschews competition. Some form of direct or indirect contact on the cooperation is needed to bring about the meeting of minds. Independent, unilateral adaptation by one firm to the actions of another firm, without any form of contact, does not constitute a concerted practice. The concept of concerted practices fits well into the substance-over-form-adage: it ensures that mutual coordination falls within the scope of the Cartel Prohibition, even if it cannot be proven that the parties agreed upon the coordination.

Decisions of associations of undertakings. The Cartel Prohibition covers, in addition

to agreements and concerted practices between undertakings, also anti-competitive *decisions of associations of undertakings*. Such associations are typically trade associations, but informal, *ad-hoc* associations are also covered. The inclusion of these decisions in the scope of the Cartel Prohibition ensures that undertakings cannot escape the prohibition by creating a separate association which could coordinate the undertakings' conduct by taking certain decisions.

Competition restriction. An agreement or concerted practice between undertakings only falls within the scope of the Cartel Prohibition if it has *the object or effect of restricting competition*. There is, unfortunately, no clear definition of what a 'competition restriction' is (see also Chapter 2.4.3.). Examples of acts that are usually found to be restrictions of competition are the fixing of prices, information sharing on future prices, the sharing of markets or customers, collective boycotts, plain export bans and resale price maintenance.

There are two types of competition restricting agreements: (1) those that have the *object* of restricting competition, and (2) those that have the *effect* of doing this. 'Object restrictions' are those agreements that clearly have a competition limiting effect, so that an assessment of the actual harm is not needed to establish that the agreement restricts competition. These restrictions are considered to be the most severe violations of competition law; classical price cartels fall within this category. All other restrictions fall into the category of 'effect restrictions'. For this latter category it must be substantiated that the agreement *can* distort actual or potential competition in order for the agreement to be prohibited.

It is relevant to acknowledge that undertakings need not be competitors to be able to restrict competition. Competition may also be restricted due to an agreement between, e.g., a supplier and reseller.

Appreciability. Although the TFEU and DCA provisions do not mention it, it follows from case law that a competition restriction is only prohibited if it *appreciably* affects competition. Consequently the Cartel Prohibition does not block agreements that inflict negligible harm to competition. 'Object restrictions' are deemed to appreciably affect competition, while for 'effect-restrictions' the appreciability must be determined each time.

Effect on inter-state trade. With regard to the EU Cartel Prohibition only, it is a constitutive element that the agreement must appreciably *affect trade between EU Member States*. The rationale for this limitation is that the EU Treaties do not aim to cover purely national situations.

Exemption Possibility. Not all competition restrictions are prohibited. Exemption rules exist, i.e. Article 101(3) TFEU and 6(3) DCA, for those restrictions that – briefly put – make buyers better off overall. This is extensively discussed in Part A. of Chapter 4.

Effects of a violation of the cartel prohibition. A restriction which violates the Cartel Prohibition is *void*, pursuant to Articles 101(2) TFEU and 6(2) DCA. This does not automatically mean that the whole contract in which such a restriction is included, is void. However, if the restriction is crucial for the contract, a civil court may hold the whole contract to be void.

The Cartel Prohibition can be enforced by competition authorities ('public enforcement', see below) and by private parties in civil proceedings ('private enforcement'). The authorities may impose sanctions – such as heavy fines – if they establish a violation of the prohibition, while civil courts may determine the civil law effects of such a violation and may grant compensation for any anti-competitive harm. The ACM may also fine individuals whose actions result in a cartel by undertakings.

5.3. Abuse of a dominant position

The second pillar of substantive competition law is the prohibition to abuse a dominant position. This prohibition is included in Article 102 TFEU:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. (…). "

Its Dutch counterpart, Article 24(1) DCA, is very similar in substance but Article 24 DCA does not include as a constitutive element that trade between EU Member States must be affected.
Below the key elements of these provisions are explained. Note that the concept of 'undertaking' in the context of the prohibition to abuse a dominant position is equal to this concept under the Cartel Prohibition.

Dominant position. Article 102 TFEU and 24(1) DCA only apply to undertakings with a *dominant position* in a market. Briefly put, dominance refers to a situation in which the undertaking concerned has so much economic strength that it can behave to an appreciable extent independently of its competitors and customers. In more economic terms: the undertaking must have substantial market power over a longer period of time. A clear-cut line between dominant/non-dominant does, however,

not exist. A high market share (>50%) is an indication of dominance, but is not a decisive. As a dominant position relates to a strong position in a market, defining the boundaries of a market is very relevant in this respect: the larger the market, the lower the chance that a firm will have a strong economic position in this market.

Interestingly, different undertakings can be *collectively* dominant. This may be the case if, briefly put, these undertakings present themselves, or act together, as a single collective entity in a market.

Abusive conduct. A dominant undertaking may not engage in *abusive conduct*. The prohibition applies to conduct in the market where the firm is dominant, but also to its conduct in other markets. Unfortunately there is no meaningful definition of what constitutes abusive conduct. One description is that an 'abuse' implies the use of methods different from those under normal competition conditions, which has the effect of hindering the maintenance of competition, or frustrating the increase in competition, which still exists in the market at issue. Abuses may have both the effect of exploiting customers, as well as excluding competitors. Examples of abusive conduct are the charging of unfairly high prices to customers, refusal to supply, exclusive dealing arrangements, price discrimination and predatory pricing.

Effects of a violation of the prohibition to abuse a dominant position. The effects of infringing Articles 102 TFEU or 24(1) DCA are similar to those in the event of a violation of the Cartel Prohibition; see above. The law does not include a specific provision rendering agreements violating Articles 102 TFEU or 24(1) DCA void (like Articles 101(2) TFEU and 6(2) DCA). It is yet unclear whether such agreement would indeed be deemed void by Dutch civil courts.

5.4. Anti-competitive mergers

The third pillar of substantive competition law is formed by the rules on concentration control, the main EU ones included in EU Merger Control Regulation (**EUMR**)[62] and the Dutch ones in Articles 26-49 DCA. These rules are in this book referred to as the **merger control regime**. In essence, these rules prohibit mergers or take-overs that would result in undertakings that are so large that they could frustrate competition. The substantive rules of the EU and Dutch regimes are very similar, but the procedural rules differ on various points. The key procedural difference relates to

[62] Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings.

the jurisdictional turnover thresholds: the sizes of the undertakings involved need to be much larger to fall within the EU merger control regime, compared with the sizes relevant for the Dutch merger control regime.

Note that the concept of 'undertaking' in the context of the merger control regime is similar to this concept under the Cartel Prohibition.

Concentrations/mergers. The merger control regime only applies to *concentrations*. A 'concentration' refers to (1) a merger between two undertakings, (2) the acquisition of control over an undertaking by another undertaking and (3) the creation of a full-function, independent joint venture. In practice, the term 'merger' is usually used when discussing a concentration of category (1) or (2) – this custom is also applied in this book.

Substantive test. The merger control regime prohibits mergers that would *significantly impede effective competition*, in particular as the result of the creation or strengthening of a dominant position. This is further discussed in Chapter 2.5.1.

Jurisdiction. The EU and Dutch merger control regimes do not cover all mergers. Only if undertakings of a certain size are concerned, do these rules apply. In addition, these undertakings must have a certain link with the EU and Dutch markets, which implies that they must generate a certain amount of turnover in the EU and the Netherlands respectively.

There are two EU jurisdictional turnover tests:[63]

(1) (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million, and (b) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million; or
(2) (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million; (b) in each of at least three EU Member States the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b) the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million.

[63] Neither test is passed if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU Member State.

The Dutch jurisdictional turnover test is whether (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 150 million, and (b) the aggregate Dutch turnover of each of at least two of the undertakings concerned is more than EUR 30 million.

Procedure. If a merger passes the EU or Dutch jurisdictional turnover tests, it must be notified to the Commission or ACM respectively. A concentration that needs to be notified to the Commission need not be notified to the ACM or any other EU competition authority. It is prohibited to implement a notifiable merger without an approval decision of the Commission or ACM. This is often referred to as the **standstill requirement** (see Chapter 6.4.1.). Such a decision will be provided after the authority has examined the competition effects of the merger. In practice both authorities apply a two-phase examination procedure. In the first phase a relatively limited investigation is performed into whether competition harm is likely. If such harm is unlikely, the concentration will be approved. If harm to competition seems likely, a second examination, consisting of a detailed investigation, must be performed to establish more firmly the likelihood and size of the negative consequences for competition. After this second phase investigation the authorities may block a merger due to its harm to competition, or approve it anyway. If a prohibition decision is expected, often the parties to a merger will offer remedies, i.e., they will amend the scope of takeover to remove the causes of the harm to competition and, consequently, secure an approval decision.

Effects of a violation of the standstill requirement. Undertakings that implement a notifiable concentration without an approval decision can be fined by the Commission or ACM. The Commission may order the reversal of a merger if this deal was not notified and the Commission has prohibited it after the second phase investigation. The ACM may even order the reversal of such a concentration without having taken a prohibition decision. From a civil law perspective, a merger implemented while infringing the DCA standstill obligation, is probably void. With regard to the EU standstill obligation, it is less clear whether the mere violation of this obligation renders the concentration void.

5.5. Competition authorities

There are two institutions that may enforce competition law in the Netherlands: the Commission and the ACM. They are responsible for the public enforcement, i.e. the enforcement by governmental agencies. Unlike civil courts, these competition authorities have the important power to impose fines on undertakings that infringe competition law.

European Commission. The Commission is the EU competition authority. Of course, the Commission has many other tasks and roles in the EU (see Chapter 4.A.2.3.3.). Most of the competition law enforcement activities are performed by the Directorate General for Competition (**DG COMP**), although the Commission as the college of Commissioners takes the most important decisions, such as decisions to establish infringements of the Cartel Prohibition, to impose fines and to determine the outcome of the second phase in a merger procedure. The Commission can only enforce and apply EU competition law, not national laws.

Authority for Consumers and Markets. The ACM is the Dutch competition authority. The ACM was established on 1 April 2013 and is the result of the merger of the former competition authority (the NMa), the post and telecommunication sector regulator and the consumer law authority. As a competition authority it enforces the DCA and EU antitrust law in the Netherlands. In addition, it has regulating or supervising powers with regard to among others the telecommunications, transport, postal services, and energy sectors, and consumer protection in general (apart from the financial service sector); see also Chapter 4.A.2.3.3.

6. OUTLINE OF THIS BOOK

The remainder of this book is structured as follows.

Chapter 2. explores the goals of competition law. Briefly put, it is argued that the underlying goal of competition law is promoting economic prosperity and that its effects can be measured in economic welfare terms. This is a key finding, since it is crucial for the conflict-solving method developed in this book.
Chapter 3. deals with the goals of banking regulation. In this chapter various market failures of banking markets and their regulatory remedies are discussed. It is also set out that banking regulation pursues certain goals that are not market failure remedies.

Chapter 4. answers the two research questions with regard to (1) the Exemption Possibility (i.e. Articles 101(3 TFEU and 6(3) DCA), to (2) Articles 106(2) TFEU and 11 DCA, as well as with regard to (3) the legitimate objective ancillarity doctrine (i.e., the *Wouters* judgment and similar case law).

Chapter 5. provides two case studies, illustrating how the normative findings of Chapter 4. on the Exemption Possibility and on Article 106(2) TFEU may be applied in practice.

Chapter 6. answers the two research questions with regard to the merger control regime.

Chapter 7. has three parts. Part A. provides the storyline of this book. The storyline concisely tells what this book aims to achieve, what has been done to accomplish this and what the findings of this study are. Part B. gives an overview of the conclusions of the separate chapters of this book. Part C. includes final considerations with regard to this study and some recommendations to improve the current application of the law.

2. THE GOALS OF COMPETITION LAW

1. INTRODUCTION

1.1. Introductory remarks

This chapter explores the goals of EU and Dutch competition law. The findings of this analysis are essential for this book, because in this treatise the principle is embraced that if a measure produces a conflict between two different public policies striving for the same overarching goal, this conflict can be solved by establishing which policy measure furthers the overarching goal the most. This measure should then be implemented to maximise the overarching goal, in accordance with the relevant policy. This reconciliation approach based on reference to the overarching goal is used to find answers to the research questions.

This approach may have as a consequence that a measure will *prima facie* violate the rules and principles of a public policy, even though the measure ultimately furthers the policy's underlying goal. In this book it is asserted that in such a situation the policy rules should be applied in a way that allows taking this measure, to the extent this is legally possible.[64] This position is based upon the notion that a statutory norm must not prohibit actions that further the norm's goal(s). This notion is here deemed logical, as serving its goal is the very reason for a norm's existence. If it would block achieving its goal, the norm is in fact harmful to its purpose.[65]

Chapter 3. discusses the goals of banking regulation. It will be explained that banking regulation serves various goals. One important goal of banking regulation appears to be increasing the efficiency of markets, through the remedying of market failures. In this chapter it will be set out that increasing the efficiency of markets, i.e. increasing economic prosperity, is also one of competition law's goals. Consequently, as will be explained in the Chapters 4. and 6., it is possible to reconcile competition law and banking regulatory interests if the effects of a measure causing conflicts further economic prosperity.

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[64] This means that any interpretation that does not result in a *contra legem* interpretation, should be an option. This may mean that another interpretation is applied than the current, standard interpretation of a provision.

[65] *Cf.* E.T. Feteris, *The Rational Reconstruction of Weighing and Balancing on the Basis of Teleological-Evaluative Considerations in the Justification of Judicial Decisions,* Ratio Juris, Vol. 21 (4), 2008, p. 483 (more sources cited there). This approach especially applies to broadly stated norms ('open norms'), such as the substantive prohibitions in competition law, of which the text does not describe concretely the conduct that is prohibited or compulsory.

The discussion of the competition law goals will in part be *descriptive*. In other words, a clarification is provided about which competition law goals can be identified based on legislative history, case law and the decisional practice of the authorities. Nevertheless, the aim of this book is not to just provide an overview of the current state of the law. It intends to propose optimal mechanisms to reconcile competition law and other public policy goals. Consequently, certain changes in the application of competition law are proposed. This chapter recommends a change in the application of the substantive norm of the Cartel Prohibition, so that the goal of competition law is better served and that fits better into the system of the competition law provisions (see Section 4.).

In addition, this chapter provides a normative view on which goal(s) competition law should serve, because a deliberate choice for the most appropriate goal of a statute helps to yield the best results when reconciling public policies through reference to their overarching goal. In addition, establishing one goal for a particular statute makes this law more effective. The normative view expressed in this treatise is that competition law should aim to further economic prosperity through blocking the negative consequences of market rivalry restrictions (see Section 3.4.).

Some scholars have suggested a variety of goals that competition law would serve,[66] but not all of these goals are clearly and consistently regarded aims of competition law by the courts, policymakers and the scholarly community. Over time, there are three goals that most scholars continue to regard as goals of competition law and that are consistently considered by the courts and policymakers to constitute competition law goals – to the extent *EU* competition law is considered. This book limits its discussion to these three key goals. These goals are:

(1) The furtherance of economic prosperity;
(2) The protection of market rivalry;
(3) Contributing to the creation of one EU market.

It will be explained that for *Dutch* competition law the creation of a uniform EU market is not a goal (see Section 7.3.).

[66] See e.g. R. Whish & D. Bailey, *Competition Law,* Oxford University Press, 8th edn., 2015, pp. 19-24; M. Motta, *Competition Policy: Theory and Practice,* Cambridge University Press, 2004, pp. 17-30.

1.2. Outline of this chapter

The structure of this chapter is as follows. Section 2. sets out the theoretical rationales for protecting competition. Section 3. discusses the three goals of the EU antitrust provisions (i.e., Articles 101 and 102 TFEU) as recognised in EU law. Based on the findings of Section 2., Section 4. proposes a test for the EU Cartel Prohibition. Next, Section 5. deals with the goals of the EU merger control regime. Based on the findings of Section 5., Section 6. presents a normative view on how to apply the EU's 'significant impediment of effective competition' (**SIEC**) test. The goals of Dutch competition law are discussed in Section 7.; as explained in that section, it is not deemed necessary to discuss separately the goals of the Dutch antitrust and of the Dutch merger control provisions. Section 8. includes normative views on the Dutch Cartel Prohibition and SIEC test. Section 9. closes the chapter with some conclusions.

2. THE RATIONALES FOR COMPETITION LAW

2.1. The theory of economic welfare

This section sets out the theoretical arguments for the claim that competition may be worth protecting as a matter of public policy. There are good reasons to assume that competition contributes to the furtherance of economic prosperity. Economic theory predicts that markets with perfect competition[67] maximise society's overall welfare. In this theoretical context 'welfare' is a measure of economic wealth, although it has a technical, limited meaning; in this book it is referred to as '**economic welfare**'.

An important preliminary remark should be made: welfare economics is an economic *theory*, which is necessarily dependent on certain assumptions, and it should not be equated with a method to describe reality or predict a real-life future state of affairs. Welfare economics has certain practical and theoretical limitations[68] and it has been pointed out that this theory is based on certain value judgments which need not be universally accepted.[69] Despite these limitations, welfare economics is almost unanimously applied to competition policy issues and cases by scholars and policymakers when establishing the economic consequences of business conduct. It

[67] 'Perfect competition' is a theoretical concept and probably does not exist in reality, but the more a market's degree of competition resembles perfect competition, the more it will maximise society's welfare.

[68] Lianos lists several of these limitations, see: I. Lianos, *Some Reflections on the Question of the Goals of EU Competition Law,* CLES Working Paper Series 3/2013, 2013, pp. 8-13.

[69] For an extensive treatise on this topic, see: W. Beckerman, *Economics as Applied Ethics, Value Judgements in Welfare Economics,* Palgrave Macmillan, 2011.

is therefore here deemed appropriate to assume that welfare economics is a good method to determine the economic prosperity consequences in competition law cases, as long as its limitations are being acknowledged – certain limitations are considered to be especially relevant for this book and are discussed in more detail below.[70]

2.1.1. *Economic welfare as a measure for economic prosperity*

In order to validly claim that someone's prosperity increases because his 'economic welfare' increases, it must be appreciated what the theoretical term 'economic welfare' actually means. If a deep dive is taken to the bottom of the theory of welfare economics, one learns that in this theory 'welfare' refers to a level of utility. The term 'utility' is a rather elusive concept, but it refers to something like 'the buyer's level of satisfaction in consuming a commodity or bundle of commodities'.[71] More utility is better: if a buyer chooses the consumption of one commodity over another, it is assumed that his level of satisfaction – and therefore his utility – rises. Importantly, the buyer's consumption *choice* is assumed to reveal his consumption *preference*, and meeting his consumption preference is assumed to add to his welfare or prosperity.[72]

Utility is a personal feature, and not an objective, universal measure: it cannot legitimately be established that buyer X's utility is higher than buyer Y's utility. In order to make the utility levels of various buyers commensurable and computable they are translated into monetary terms. The translation of buyers' utility into monetary terms occurs through the determination of buyers' behaviour in the markets, i.e. the measuring of the consumer surplus: "*One could say that consumer surplus expresses in observable monetary units an unobservable gain in utility*; (…)"[73]

[70] E.g., the role of 'paternalism' in welfare economics is discussed in Section 2.1.3., and how 'negative externalities' should be dealt with is covered in Chapter 4.A.3.2.

[71] R.S. Pindyck & D.L. Rubinfeld, *Microeconomics,* Prentice Hall, 4th edn., 1998, p. 88.

[72] W. Beckerman, *Economics as Applied Ethics, Value Judgements in Welfare Economics,* Palgrave Macmillan, 2011, p. 37.

[73] P. Johansson, *An Introduction to Modern Welfare Economics,* Cambridge University Press, 1997, p. 41.

The consumer surplus is the difference between the price that buyers actually paid for a product, and the price they would have been willing to pay.[74] Simply put, the individual consumer surplus measures a buyer's consumption satisfaction through a two-step exercise. First, one determines the benefit the buyer derives from purchasing a certain quantity of a commodity by establishing his maximum willingness to pay for these products. Subsequently, one deducts from this benefit the costs for the buyer (i.e., the market price paid by the buyer) to consume this commodity. Consumer surplus should be regarded a genuine manifestation of economic prosperity: "*Consumer surplus is a real part of economic welfare and not some fiction invented by economists. (…) an increase in consumer surplus due to a reduction in the price of the commodity is an actual increase in real income and welfare because it allows the consumer to consume more of other commodities.*"[75] Economists may equate the term 'consumer surplus' with 'consumer welfare'.[76] This may cause confusion, as the technical term 'consumer' refers here to a buyer and not, as in everyday language, to an individual not acting in a business capacity.

To establish the consequences of market change for *society*, the size of consumer surplus is determined with reference to the *market* demand curve, which is the sum of all buyers' individual demand curves. Consequently, it is assumed that an increase in (total) consumer surplus means an increase in the aggregate buyers' welfare.

2.1.2. Determining the size of the consumer surplus

The consumer surplus can usually not be directly derived from observing actual market transactions, since the market prices do not reveal the buyers' maximum willingness to pay. Furthermore, for some products there are no market prices, e.g., for products that are never traded in a market or for products in hypothetical or future markets. For example, if the effect on consumer surplus of an envisaged agreement is to be established, the consumer surplus *after* the implementation of the agreement cannot be ascertained *beforehand*. This is detrimental, because whether an agreement will violate competition law may depend on whether it will increase consumer surplus

[74] N.G. Mankiw, *Principles of Economics,* South-Western Cengage Learning, 6th edn., 2011, p. 140. A consumer may, e.g., value the product equally to its selling price. If this consumer A buys this product, the value of his assets, as he perceives it, remains unchanged. He merely exchanges two items of equal value, i.e. cash for the product. Another consumer, however, may put a higher value on the product than its selling price. If this consumer B buys the product, he pays less for enjoying the product than he would be prepared to. Since in the perception of consumer B the cash he pays for the product reflects less value than the product itself, in his perception the value of his assets rises.

[75] P. Johansson, *An Introduction to Modern Welfare Economics,* Cambridge University Press, 1997, p. 42.

[76] E.g. M. Motta, *Competition Policy: Theory and Practice,* Cambridge University Press, 2004, p. 18.

(see Chapter A.3.1.). In such situations indirect methods are needed to determine any change in consumer surplus. One oft-mentioned method to do so is the use of surveys to discover buyers' willingness to pay for a particular product. For example, a group of producers planning to start an anti-competitive cooperation that would improve the quality of their products could ask (potential) buyers how much they would be willing to pay for the current product and for the improved product. Based on the expected market price if the cooperation is realised and on the information about the maximum prices that buyers would have been willing to pay, the consumer surplus after the cooperation can be computed and compared with the current consumer surplus. Although this survey method comes with all kinds of practical difficulties,[77] in principle it is accepted as a method to establish the consumer surplus.

2.1.3. Conceptual difficulties with determining the consumer surplus

Apart from any practical issue with measuring the size of consumer surplus, there are, in some situations, fundamental problems with measuring consumer surplus.

It follows from the above explanation of what consumer surplus is, that buyers' *preferences*, i.e. the maximum willingness to pay, are crucial for determining the consumer surplus. This could be considered problematic, first of all because it is assumed that the consumer surplus actually indicates buyers' welfare, as meeting one's preferences presumably adds to one's welfare or satisfaction. Secondly, these preferences are used to measure the size of the consumer surplus. The rules, however, would no longer hold (1) if due to information problems buyers cannot make the choices that reflect their 'genuine' preferences, and/or (2) if buyers' preferences can for some reason not be deemed to add to their welfare:

1) ***Information market failures.*** The first situation may occur, e.g., if buyers lack sufficient information to make good buying decisions or if they cannot understand the available information to make such decisions. In this situation the market suffers from an information market failure, which could be remedied by the provision of more or better understandable information (see Chapter 3.6.2.3.). If these failures can be remedied, the subsequent choices of buyers may then reveal their genuine preferences.
2) ***Paternalistic regulation.*** The second situation arises if it is established that, e.g., due to bounded rationality (see Chapter 3.6.2.3.), buyers meet their preferences by making purchases that are contrary to their own best interests. It is then held that the

[77] P. Johansson, *An Introduction to Modern Welfare Economics,* Cambridge University Press, 1997, pp. 105-106.

buyers are not the best judges of what is good for them. In this situation the taking of measures to remedy this flaw implies restricting or curbing the buyers' freedom of choice (i.e. *paternalism*; see Chapter 3.6.2.2.). Assuming that paternalistic measures help to correct the 'flawed' buyer's preferences and so increase his 'genuine' welfare, the consumer surplus of a market without such measures cannot be used for the consumer surplus test: this consumer surplus can simply not be trusted. This has, however, consequences for the possibility to include the effects of paternalistic regulations in the Exemption Possibility (see Chapter 4.A.2.4.).

2.1.4. Producer surplus and total welfare

The counterpart of the consumer surplus is the '**producer surplus**'. Producer surplus is defined as the sum of all profits, i.e. earnings minus costs, made by producers in the industry.[78] Hence, the producer surplus measures the wealth earned by producers by selling a particular product.

The sum of the consumer surplus and the producer surplus is referred to as '**total welfare**' or 'social welfare'.[79] Consumer surplus, producer surplus and total welfare are all sub-categories of economic welfare. If total welfare is at its maximum, the welfare of consumers and producers combined is maximised. Total welfare at its maximum also expresses the maximum economic welfare a market can produce (for given demand and supply structures). The discussion in Chapter 3.5.3.2. on systemic risk as an 'externality', a type of market failure, shows that total welfare is not always equal to *society's* welfare. For example, the welfare of producers and consumers flowing from their transactions may not take into account the costs for third parties and society as whole, and consequently total welfare may be higher than society's welfare. To distinguish between total welfare and society's welfare, in this book the term '**societal welfare**' is used for the latter type of welfare.[80]

2.1.5. Society's well-being and economic prosperity

Many scholars argue that the maximisation of economic welfare – or so-called 'efficiency' – should be a goal of competition law, perhaps even the only goal.[81] Importantly, 'economic welfare' and 'society's well-being' are not synonyms. 'Welfare' within

[78] E.g. M. Motta, *Competition Policy: Theory and Practice,* Cambridge University Press, 2004, p. 18.

[79] A. Jones & B. Sufrin, *EU Competition Law,* Oxford University Press, 5th edn., 2014, p. 12

[80] To prevent confusion, the term 'social welfare', which often is used equal to total welfare, is not used.

[81] E.g.: O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81,* Oxford University Press, 2007, p. 173; B. Baarsma, *Moeilijke Marktwerking en Meedogenloze Mededinging. Een Welvaartseconomisch Perspectief,* TPEdigitaal 4(1), 2010, p. 164.

the meaning of the economic theory of competition has a rather narrow meaning. Economic welfare measures the actual and perceived wealth that is generated in a particular market and may therefore neglect non-material effects and consequences outside the market concerned.[82]

2.2. The harm of imperfect competition for economic welfare

2.2.1. Market power

If a market is perfectly competitive, the selling price of a product equals – simply put – its costs. Indeed, if a seller charged more than the costs of the product, his competitors would undercut his prices, since they could still earn some extra margin on each sale.[83] In other words, competition forces prices down to cost levels.

If competition is imperfect, a seller can raise his prices above costs without being put out of business by competitors undercutting his prices. Why is this harmful for society? It is true that a loss in consumer surplus – due to a price increase – means a gain in producer surplus. This makes sense intuitively: if consumers pay higher prices, they lose, while on the other hand the higher prices mean more profits for the producers.[84] However, *the consumers' loss is not equal to the producers' gain*. Indeed, the former is larger than the latter.[85] Therefore, price increases result in a lower amount of total welfare. The difference in total welfare before and after a price increase is referred to as 'the deadweight loss'; see Figures 1. and 2. below for a simplified illustration of the deadweight loss. The deadweight loss reflects the economic welfare loss that a price increase causes for society as a whole, i.e. buyers and sellers combined.[86]

[82] Townley affirms that welfare in the technical sense is only one way of measuring well-being. He concludes that: *"It does not seem possible to say that the total welfare standard makes 'society' better off, unless one considers the effect on wider public policy goals too."* Ch. Townley, Article 81 EC and Public Policy, Hart Publishing, 2009, p 21. Likewise, Black has argued that the above notion of welfare is 'thin' and not equal to 'well-being' in a broader sense. He maintains that it is 'obscure' to be concerned with the maximisation of welfare in the narrow sense. Black, however, recognises that welfare in the narrow sense could be treated as a proxy for welfare or well-being in a broader sense. However, Black rightly points out that this raises the question what the definition of 'welfare' is. O. Black, *Conceptual Foundations of Antitrust,* Cambridge University Press, 2005, reprint of 2010, p. 37.

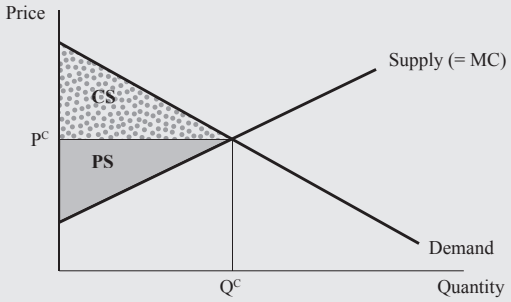
[83] Assuming that the seller and his competitors have an equal costs structure. The theory of perfect competition makes many more assumptions, none of which are wholly applicable to any real world market. It is beyond the scope of this study to elaborate further on this point of the economic theory.

[84] Assuming that the selling price is set at or below the monopoly price level. The monopoly price level is the price level that generates the maximum amount of profits for the producers as a group.

[85] It is assumed that the demand curve is a downward slope of less than 90 degrees.

[86] **CS** = Consumer Surplus. **PS** = Producer Surplus. **PC** = Price under perfect Competition. **PM** = Price under Monopoly. QC = Quantity sold under Competition. QM = Quantity sold under Monopoly.

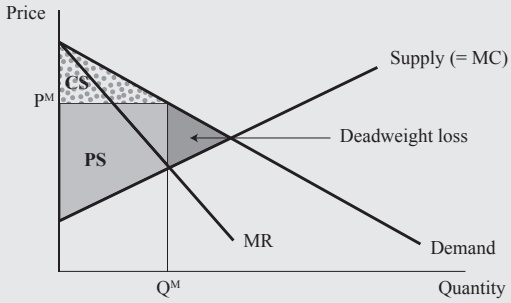
Figure 1. Consumer surplus and producer surplus under perfect competition



- **CS** = Consumer Surplus
- **PS** = Producer Surplus
- **P^C** = Price under Competition
- **Q^C** = Quantity sold under Competition

The total quantity sold on the market (Q^C), and the concommittant price (P^C), depend on where the producers' supply curve intersects with the buyers' demand curve. There is no deadweight loss.

Figure 2. Consumer surplus and producer surplus under a monopoly, including a deadweight loss



- **CS** = Consumer Surplus
- **PS** = Producer Surplus
- **P^M** = Price under a Monopoly
- **Q^M** = Quantity sold under a Monopoly

The total quantity sold on the market (Q^M), and the concommittant price (P^M), depend on where the monopolist's supply curve (i.e. its Marginal Cost curve) intersects with the monopolist's Marginal Revenue curve. There is now a deadweight loss.

In Figure 2. the consumer surplus is smaller than in Figure 1., while the producer surplus is larger in Figure 2. than in Figure 1. However, in Figure 1. the two triangles representing consumer and producer surplus together are larger than the consumer and producer surplus in Figure 2. combined: the deadweight loss triangle of Figure 2. is not part of either the consumer or producer surplus. This deadweight loss represents the welfare loss on the monopoly market compared with the market under perfect competition.

If competition is imperfect, a seller may be able to raise its prices above the level under perfect competition. In such a situation the seller is said to have '**market power**'. The presence of a seller or sellers with market power is considered to be a market failure. A 'market failure' is a market circumstance that has the effect that the functioning of

the market does not result in maximum economic welfare. Competition law is often, especially by economists, considered to be a tool to address the market failure of market power.

2.2.2. *Innovation*

So, above it was set out why restricting competition may be harmful for society. A limitation of competition is expected to result in higher prices. These higher prices mean an overall loss in economic welfare for society. There is, however, yet another reason why less competition affects economic prosperity: less competition may mean fewer incentives to innovate. Less innovation, in turn, implies less increase in economic prosperity.

It is commonly accepted that innovation is the main force behind the increase in wealth for societies.[87] Innovation may improve production methods which allow for producing more with less input, freeing up sources for the production of other products, and it can result in improved product quality and product choice. In addition, innovation not only fosters economic prosperity, it is also a key source for solutions that tackle society's challenges in the spheres of healthcare, the environment, energy policy, food production, etc.[88] So, innovation not only increases the monetary output of the economy measured, but it can also improve the quality of life for many. In other words, the importance of innovation can hardly be overstated.

Indeed, it is generally assumed that competition is a strong driver for innovation.[89] Policy statements on the benefits of competition usually mention that it simulates firms to innovate.[90] In reality and in theory, it is more nuanced. There have been many

[87] L. Peeperkorn & E. Paulis, *Competition and Innovation: Two Horses Pulling the Same Cart!*, in: On The Merits: Current Issues in Competition Law and Policy, eds. P. Lugard & L. Hancher, Intersentia, 2005, p. 21. See also: J.F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 New York University Law Review, 1987, p. 1026; Th. O. Barnett (US DoJ), *Maximizing Welfare through Technological Innovation*, Presentation to the George Mason University Law Review – 11th Annual Symposium on Antitrust, 31 October 2007, pp. 7-9; OECD, *The OECD Innovation Strategy - Getting A Head Start on Tomorrow*, 2010, pp. 9, 21-23.

[88] Commission Staff Working Document, *A Rationale for Action - Accompanying Document to the Europe 2020 Flagship Initiative Innovation Union*, COM(2010) 546, 2010, pp. 8-10; Dutch Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*), *Innovatie Vernieuwd - Opening in Viervoud*, 2008, p. 29.

[89] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 92. See also: R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 6 (also mentioning that it has been argued that competition may sometimes dampen innovation).

[90] Commissioner Vestager, speech of 18 April 2016, *Competition: the Mother of Invention*, at the European Competition and Consumer Day in Amsterdam; Dutch Cabinet's vision document on the Dutch banking sector (*Kabinetsvisie Nederlandse bankensector*) of 23 August 2013, FM/2013/1511M, p. 15.

empirical studies trying to establish whether competition increases innovation and from these studies no clear picture arises.[91] Theory predicts the presence of various different forces between competition and innovation, and which direction this complex of forces goes seems to be situation-specific (i.e., depending on the market structure, the product, the intensity of competition, the country, etc.).[92] A notion that is often considered, is that the causal link between competition and innovation reflects an inversed U-shape: on the one hand cut-throat competition prevents undertakings from earning sufficient profits to invest in R&D, while on the other hand a monopoly situation removes the incentives for the monopolist to come up with better and cheaper products to outcompete its rivals. Consequently, the optimum is in found in the middle, meaning that 'significant competition' between several firms produces optimal innovation output.[93]

Policymakers are not blind to this more nuanced relationship between competition and innovation. For example, the existence of patent law, which allows innovators to exclusively enjoy the fruits of their innovation activities and investments for a certain period through obtaining a patent, reflects the insight that the restriction of future competition may sometimes be necessary to encourage innovation. Even competition law itself acknowledges that sometimes competition is not beneficial for innovation: e.g., certain competition restrictions between competitors are permissible due to the innovation benefits they may produce[94] and for new products it is sometimes allowed for a manufacturer and a distributor to agree on a full exclusive resale arrangement.[95] With a view to economic prosperity, it is therefore sensible that decision makers

[91] E. Brouwer, *Innovatie en Mededinging: Op Zoek naar de Bron van Welvaart en Vooruitgang*, TILEC Discussion Paper, Vol. 2007-021, 2007, p. 33; R.J. Gilbert, *Competition and Innovation*, Competition Policy Center UC Berkeley, 2007, p. 24.

[92] "*Economic theory supports neither the view that market power generally threatens innovation by lowering the return to innovative efforts nor the Schumpeterian view that concentrated markets generally promote innovation by providing a stable platform to fund R&D and by making it easier for the firm to capture its benefits. The incentive to innovate is the increase in profit that a firm can earn if it invests in R&D. This incentive can be decomposed into several economic forces that are present to a greater or lesser degree in different market environments.*" Gilbert identifies four economic forces behind innovation decisions, see: R.J. Gilbert, *Competition and Innovation*, Competition Policy Center UC Berkeley, 2007, pp. 8-9.

[93] "*On the one hand, strong competition encourages companies to innovate to catch up with, get ahead of, or stay ahead of competitors. On the other hand, a degree of market power may stimulate innovation activity by facilitating the recovery of related expenses. In the middle ground, some study has found that many industries exhibit an inverted U-shape correlation between market concentration and business R&D, suggesting (to the extent that concentration and R&D are good proxies for competition and innovation, respectively) that moderate levels of competition are most highly correlated with more innovation. However, the extent of the relation is influenced by the industrial sector and the stage of technological development.*" OECD, *The OECD Innovation Strategy - Getting a Head Start on Tomorrow*, 2010, p. 93.

[94] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

[95] Commission Guidelines on Vertical Restraints of 19 May 2010, para. 61.

applying competition law in cases where innovation is at stake be sensitive to the intricate relation between competition and innovation and do not unthinkingly apply the standard competition law doctrines to these matters.

Future economic theory might teach us more about the causal link between competition and innovation. For the purpose of this book it suffices to establish that (1) innovation is crucial for the wealth (and well-being) of citizens and that (2) the common understanding is that competition generally encourages innovation, although competition need not necessarily be vigorous to maximise innovation output and that competition restrictions sometimes increase innovation. In other words, it is clear that a limitation of competition *can* affect innovation and therefore economic prosperity, which does not mean that a competition limitation *must* hinder innovation.

2.3. The economic prosperity rationale: conclusion

Economic theory substantiates that competition allows for an optimal allocation of resources to the production of various goods and services. Competition also forces undertakings to operate cost-efficiently, because firms with prices that are too high are outcompeted. Finally, competition spurs innovation and innovation increases society's material wealth. These three summarised arguments form the rationale for safeguarding and promoting market rivalry: competition increases economic prosperity.

3. THE GOALS OF EU ANTITRUST LAW

3.1. Introduction

In the previous section it was explained why in general one may expect that competition contributes to the furtherance of society's economic prosperity. This section describes to what extent the furtherance of economic prosperity (Section 3.2.) and the protection of competition, or 'market rivalry' (Section 3.3.), have been embraced as goals of EU antitrust law by the Treaties legislature, EU Courts and Commission. Section 7.2. answers the same questions for Dutch antitrust law. (The goals of the EU and Dutch merger control regimes are discussed in the Sections 5. and 7.2. respectively)

3.2. The goals of EU antitrust law: economic prosperity

Section 2. explained why market rivalry is generally contributing to economic welfare, and therefore to economic prosperity. The next three sections discuss to what extent respectively the Treaties legislature, the Commission and the EU Courts have embraced the theoretical arguments set out above and have considered that EU antitrust law aims to further economic prosperity.

3.2.1. Legislative history EU

From a legal perspective, the question which goals the TFEU antitrust rules aim to achieve may in the first instance be answered by assessing the TFEU itself and its legislative history. The EU Treaties are, however, not explicit about the goal(s) of the antitrust provisions. Establishing the purpose of these rules as envisaged by the drafters of the EU Treaties could therefore be accomplished through assessing the EU Treaties' legislative history. A note of caution is due, however. While investigating the legislative history of the EU Treaties may seem logical for lawyers practising national law and may provide interesting insights, in practice its relevance for the application of EU law is rather limited. The ECJ has only rarely referred to the legislative history of the Treaties to find guidance for interpretation of the Treaties' provisions.[96] Instead, the ECJ mainly applies teleological and contextual interpretation methods. The relevance of the legislative history in the context of treaty negotiations may also be questioned on principle. Since international treaties are the result of negotiations between governments, one particular treaty provision need not reflect a single, unanimous intention of the parties agreeing on the treaty.[97]

Nevertheless, the legislative history may clarify why the EU antitrust rules ended up in the EU Treaties in the first place and therefore what they were supposed to accomplish. Furthermore, although the legislative history of the EU antitrust provisions may not

[96] P. Craig & G. De Burca, *EU Law, Text, Cases and Materials*, Oxford University Press, 6th edn., 2015, p. 63; L. Brown & T. Kennedy, *The Court of Justice of the European Communities*, Sweet & Maxwell, 4th edn., 1994, p. 308.

[97] The legislative history does not necessarily reveal the intention of the treaty drafters. Brown and Kennedy cite professor Pescatore who argued against the use of the *travaux préparatoires* for interpreting the EEC Treaty: "*However, it is precisely one of the rules of negotiation that one does not always reveal one's intentions. It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but on the written formulas of the treaties and only on that. It is by no means certain that agreement on a text in any way implies agreement as intentions.*" Pierre Pescatore was one of the representatives of the Luxemburg government during the negotiations of the EEC Treaty and later became a judge of the ECJ. See: L. Brown & T. Kennedy, *The Court of Justice of the European Communities*, Sweet & Maxwell, 4th edn., 1994, p. 308.

be of great value in practice, the persuasiveness of a normative view on what these rules ought to achieve, increases if one has the Treaties legislature on one's side (for the normative view taken in this book, see below Sections 3.4. and 3.6.).

It was for a long time assumed that EU competition law was mainly based on ordo-liberalistic convictions.[98] This conclusion was based on the fact that the German treaty negotiators were imbued with ordo-liberal orthodoxies, and that Article 102 TFEU seemed to reflect ordo-liberal thought and not a concept already present in US antitrust law.[99] An ordo-liberal aim for EU competition law implied that EU competition law was thought to primarily protect the freedom to compete and market rivalry as a process. This implies that competition was considered an end in itself, not just a means to achieve a certain market outcome.

A recent study on the EEC Treaty's *travaux préparatoires*, however, revealed that the treaty drafters were especially concerned with protecting and enhancing 'productive efficiency'.[100] A key aim of the European Economic Community (**EEC**) was, through the integration of the national markets, to allow for the development of larger undertakings that would be able to reach a scale to produce as efficiently as possible. Considering the strong focus of the treaty drafters on 'raising the standards of living' in Europe, they most likely saw competition as an important means to let customers enjoy lower prices (this mechanism is explained in the next subsection).[101] In other words, the increase in economic prosperity was key, not the protection of the right to compete.

To conclude, it may be ill-founded to conclude that the treaty drafters included the antitrust rules to support the functioning of markets in an ordo-liberal manner. There are indications that they were not primarily concerned with protecting the *process* of market rivalry. Rather, the *efficiency of markets* seems to have been the concern of the 1957 treaty drafters. Nevertheless, as mentioned above, much caution should be exercised when deriving the will of the treaty drafters from the *travaux préparatoires*.

[98] D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, reprint 2003, p. 264. Ordo-liberalism may be described a political philosophy propagating a 'free society' implying the absence of restraints on economic power.

[99] D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, reprint 2003, pp. 264, 343.

[100] P. Akman, *Searching for the Long-Lost Soul of Article 82 EC*, Oxford Journal of Legal Studies, Vol. 29, No. 2, 2009, p. 270. Akman found that the German negotiators in fact proposed provisions on monopolies that deviated from ordo-liberal theory, whereas the French delegation supported draft provisions that were more in accordance with ordo-liberal theory. Akman's conclusion is that "*the drafters were greatly concerned with 'efficiency' and specifically 'productive efficiency'*."

[101] P. Akman, *Searching for the Long-Lost Soul of Article 82 EC*, Oxford Journal of Legal Studies, Vol. 29, No. 2, 2009, pp. 297-298.

These documents may not reflect the 'genuine will' of the drafters, if such a common will would exist in the first place. In this book not much weight is given to the *travaux préparatoires*. The approach here is rather to focus, when relevant, on the intentions of the EU legislature (as opposed to the treaty drafters). These intentions should be derived from legislative texts directly and from the preparatory documents of these legislative texts.

3.2.2. The Commission's policy

Over the last 10-20 years, the force of the theoretical arguments explaining competition's benefits for society and the concomitant justification for a strong competition policy grew within the EU's single most important competition policymaker and enforcer, the Commission. From the late 1990s on, the Commission's policy documents, guidelines, notices and press releases increasingly indicated that promoting consumer welfare is the ultimate objective of competition law. This reflected a policy change. Surely, consumer interests were already recognised by the Commission as an important goal of competition policy before this time.[102] However, consumer interests were not positioned as the dominant or ultimate goal.[103] That changed about two decades ago and to an increasing extent the interests of consumers became the most important – perhaps even single – goal of the Commission's competition policy.

The former Commissioners of DG COMP Mr. Van Miert,[104] Mr. Monti[105], Ms. Kroes[106] and Mr. Almunia have all stressed the predominant role of consumer welfare, e.g.: "*(…) our* [i.e. the Commission's] *ultimate objective is: competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions. Our objective is to ensure*

[102] Commission's XXVth Report on Competition Policy 1995, p. 7.

[103] E.g., in its 24th Report in Competition Policy, the Commission considers that competition policy should benefit both consumers and industry, or – in other words – society as a whole: "*The traditional sphere of action of competition policy is the detection, prosecution and removal of cartels. Restrictive practices, especially those which relate to fundamental aspects of the freedom of action of firms, such as prices or the choice of markets on which firms are present, do serious harm to public well-being by* <u>*depriving society of the benefits*</u> *of an open and competitive single market. The advantages stemming from optimum use of the means of production are usurped by the members of the cartel rather than being* <u>*redistributed to society as a whole and thus benefiting general development.*</u>" [underlining added] See: Commission's XXIVth Report on Competition Policy 1994, p. 19.

[104] Speech of 16 October 1997 by Commissioner Van Miert, *International Cooperation in the Field of Competition, A View from the EC*, Fordham - 24th Annual Conference.

[105] Speech of 28 October 2004 by Commissioner Monti, SPEECH/04/477, *A Reformed Competition Policy: Achievements and Challenges for the Future*.

[106] Speech of 15 September 2005 by Commissioner Kroes, SPEECH/05/512, *Delivering Better Markets and Better Choices*.

that consumers enjoy the benefits of competition, a wider choice of goods, of better quality and at lower prices."[107]

Unfortunately there is some confusion over what precisely the Commissioners meant when they referred to 'consumer welfare'. Does this term mean 'consumer surplus'? Or does it refer to the more general concept of economic wealth for citizens? This is a relevant question, as the verdict on a certain business action may be different depending on whether a consumer welfare/surplus standard is applied, or a total welfare standard.[108] For the present discussion, however, this distinction is not relevant. What matters is that the Commission views the furtherance of economic prosperity as the key goal of competition law.

The rise of maximising economic welfare (or consumer welfare) as the ultimate goal of competition law, as well as the increasing application of economics techniques to assess the business conduct effects on welfare, is often referred to as the 'more economic approach' (see footnote 560). This approach has changed the substance and application of EU competition law over time. Economics, however, have not taken over completely. At some point in time it seemed that the Commission's economics based interpretation of competition law would become the definitive and only framework for applying competition law. The ECJ, however, stopped this advance, as will be explained below.

3.2.3. The EU Courts' case law

Notwithstanding the previous two sections, it is noted that, in the context of EU law, academic theories and the legislative history, and even the Commission's position, are only of so much relevance. Indeed, the ECJ has the exclusive authority to interpret the Treaties' provisions. Therefore, only the Court's take on what the goals of EU competition law are, matter in practice. So, it is a relevant question whether the EU Courts share the views of the Commission and economists by declaring furthering economic prosperity a goal of EU competition law. The answer is that the EU Courts indeed consider increasing economic prosperity a competition law goal, although admittedly the answer is a bit more complicated than this.

[107] Speech of 12 May 2010 by Commissioner Almunia, SPEECH/10/233.

[108] S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 3rd edn., 2010, p. 31.

The ECJ has several times stated what it regards to be the goals of the EU antitrust rules. For example, reference can be made to its statement in the 2009 *Spanish GSK* case: "*(…) it must be borne in mind that the [ECJ] has held that, like other competition rules laid down in the Treaty, [Article 101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such*."[109]

In the *Spanish GSK* case the ECJ also held "*agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of [Article 101 TFEU]*."[110]

Therefore, in this and other judgments the ECJ has put forward four different aims of the Treaties' competition rules:

(1) the protection of the interests of consumers;
(2) the protection of the interests of competitors;
(3) the protection of competition as such, through protecting the structure of the market;
(4) the protection of the creation of a single EU market.

The considerations of the ECJ partly answer the question of what it regards to be competition law's goal, but it also raises new questions as to what the ECJ meant more specifically. For example, when the ECJ referred to 'the interests of consumers' as a goal of EU competition law, it did not explain what exactly this meant. Who are those 'consumers' and which 'interests' is competition law supposed to protect? Although an explanation of the ECJ is lacking, it is most likely that this goal implies the protection of *the economic prosperity of buyers in the market*. Indeed, unlike colloquial usage, the term 'consumer' in the TFEU antitrust rules does not refer to 'individuals not acting in a professional capacity', but to the buyers on a market – regardless of whether they are individuals, end-users or intermediate sellers. Furthermore, as it is widely accepted by economists and policymakers that competition can improve economic prosperity, it is only logical that this is what the ECJ is referring to when it mentions the interests of consumers.

[109] ECJ judgment of 6 October 2009, *Case C-501/06 P GlaxoSmithKline Services Unlimited v. Commission (Spanish GSK-case)*, para. 63. See also e.g. ECJ judgment of 19 March 2015, *Case C-286/13 Dole Food and Dole Fresh Fruit Europe v. Commission*, para. 125.

[110] ECJ judgment of 6 October 2009, *Case C-501/06 P GlaxoSmithKline Services Unlimited v. Commission (Spanish GSK-case)*, para. 61 [underlining added].

However, this does not mean that the prosperity of buyers is the *only* goal of EU competition law. Through the statement in the *Spanish GSK* case cited above, the ECJ dismissed the policy position of the Commission of the last decade or so, in which it regarded maximising 'consumer welfare' as the ultimate aim of competition policy. The significance of this rejection is the fact that the ECJ explicitly refused to limit the aim of the antitrust rules to the interests of consumers. Indeed, it dismissed the stance taken by the General Court's *GSK* judgment of 2006[111] – whose judgment the ECJ reviewed – that consumer welfare was the ultimate objective of the antitrust rules. The ECJ explicitly stated that the interests of competitors and competition as such are goals of competition law, too.

So, it is clear that the EU Courts have accepted that one goal of competition law is the furtherance of economic prosperity. The ECJ has, however, clarified that there are other goals, too. The Court did not set out a hierarchy of all the goals. It may therefore be the case that a certain business conduct furthers one goal, while it harms another. Indeed, it is only logical that market rivalry will hurt competitors. Consequently, uncertainty as to the outcome of the application of competition law arises. This is uncalled for: in Section 3.4. it is asserted that the furtherance of economic prosperity should be the ultimate goal of competition law, and that market rivalry, which could be interpreted as referring to 'the interests of competitors' and 'competition as such', should be considered a subordinate goal.

3.2.4. Conclusion on economic prosperity as a goal of EU antitrust law

Based on the ECJ case law and the Commission's policy it is here concluded that the furtherance of economic wealth is a goal of EU competition law. Furthermore, the theory of economic welfare can arguably demonstrate that maximising economic welfare means that economic wealth is maximised. Nevertheless, even if competition law has as its goal to maximise economic prosperity, it would be too limited a view to consider EU competition law only as a tool to remedy market power. Indeed, EU competition law not only aims to prevent 'anti-competitive' prices on existing markets, but it also strives to safeguard innovation. As will be discussed with regard to the proposed solution scheme, this notion is relevant because it shows that the EU antitrust rules are not only applicable if the creation or strengthening of market power is an issue.

[111] The General Court had stated, among other things: "*In effect, the objective assigned to [Article 101(1) TFEU], which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market, is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question.*" GC judgment of 27 September 2006, *Case T-168/01 GlaxoSmithKline Services Unlimited v. Commission*, para. 118 [case law references omitted] (see also para. 273).

3.3. The goals of EU antitrust law: market rivalry

3.3.1. Introduction

It was set out in the previous section that the maximisation of economic welfare, as a proxy for the furtherance of economic prosperity, is a goal of EU competition law. It follows from the ECJ's case law and the structure of Article 101 TFEU that this is not the only goal. This section discusses the second goal of competition law distinguished in this chapter: market rivalry. In this book, '**market rivalry**' means the battle between suppliers for gaining customers. In this section it is also argued that the protection of the process of market rivalry should, however, be considered a *subordinate* goal.

It only makes sense that market rivalry is a goal of competition law. First of all, since the text of the Cartel Prohibition refers to a restriction of 'competition', it is only logical that the protection of the competitive process – i.e. market rivalry – is seen as a goal of Article 101 TFEU. Furthermore, when considering the structure of Article 101 TFEU, it is rather inconceivable that the prevention of reductions in economic welfare is the only goal of this article. If preventing reductions in economic welfare were the only goal of Article 101 TFEU, an agreement that increases economic welfare would never restrict competition. Consequently, Article 101(3) TFEU would in fact be redundant. Assuming that this rule is *not* redundant, the prevention of reductions in economic welfare cannot be the only goal of competition law.

3.3.2. Commission policy

The Commission indeed considers market rivalry to be a goal of competition law: *"Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article [101(3)] recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article [101] is to protect the competitive process."*[112]

In the context of Article 101 TFEU, the Commission takes the view that whatever benefits an agreement may accomplish, market rivalry may never be completely stopped. However, it seems incorrect to consequently conclude that the Commission regards market rivalry to be the ultimate goal of EU competition law, as it has also

[112] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 105.

repeatedly mentioned that it does not consider 'competition' to be an end in itself but rather a means to an end.[113] Indeed, it follows from the above citation that rivalry is regarded a means to generate dynamic efficiencies. That is, market rivalry is a *subordinate* goal compared with the overarching goal of economic prosperity.

3.3.3. EU case law

Market rivalry as a goal of competition law fits in with the ECJ's view that competition law also protects the interests of competitors, the structure of the market and – especially – 'competition as such'. Indeed, the ECJ's considerations on the goals of the EU competition rules in its judgment in the *Spanish GSK* case can be interpreted as accepting the process of market rivalry as a goal (see Section 3.2.3. above).[114] That being said, the case law of the EU Courts shows that not all restrictions of rivalry can be considered violations of the EU Cartel Prohibition.[115]

Unlike the Commission, the ECJ has not indicated a hierarchy of the goals of competition law it has distinguished. So, without such a hierarchy between market rivalry and economic prosperity as two goals of competition law, legal uncertainty may arise: how to judge an agreement that furthers economic prosperity but restricts market rivalry? In Section 3.4. below a normative view is presented of how this legal uncertainty can be avoided.

[113] "*For the European Commission (…), undistorted competition is not an end in itself. It is a means to enhance prosperity and growth.*" Commissioner Kroes, *The European Commission's Enforcement Priorities as Regards Exclusionary Abuses of Dominance – Current Thinking*, Competition Law International, October 2008, p. 4. See also e.g.: Director-General DG Comp. Ph. Lowe, *Preserving and Promoting Competition: A European Response*, Competition Policy Newsletter No. 2, 2006, p. 1; speech of 6 May 1998 by Commissioner Van Miert, *European Competition Policy*, Bruxelles-De Warande, Management Policy Council.

[114] A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 48; B. Van Rompuy, *Economic Efficiency: the Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU*, Kluwer Law International, 2012, p. 198-199.

[115] J. Faull & A. Nikpay, *The EU Law of Competition*, Oxford University Press, 3rd edn., 2014, paras. 3.219-3.292.

3.3.4. *Competition as a form of economic freedom*

It is here submitted that some scholars have suggested that the protection of competition implies the protection of the 'economic freedom' of market participants.[116,117] Economic freedom refers to a state in which suppliers and buyers can operate in the market without being hindered by the economic power of others. Consequently, undertakings are protected from powerful competitors, and customers are protected from powerful sellers. This notion fits in with the ECJ's view that competition law also protects the interests of competitors, although protecting those interests cannot be equaled with protecting economic freedom.

Admittedly, in EU case law certain indications can be found to hold that economic freedom is a goal of EU competition law.[118] For example, in its 1967 judgment in the *Brasserie de Haecht* case, the ECJ considered that a body of contracts could restrict competition if it "*was capable of restricting the freedom of trade*".[119] Nevertheless, it is also clear from the EU Courts' case law that EU competition law does not aim to ban all restrictions on economic action or rivalry.[120] Along these lines the EU General Court (**GC**) has indeed mentioned, while interpreting the ECJ's case law, that this case law "*makes it possible to prevent the prohibition in Article [101(1) TFEU] from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties.*"[121] The ECJ has indeed never explicitly mentioned that the EU competition rules aim to protect economic freedom. Economic freedom as such does not seem to play a role in the case law and decisional practice anymore.

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[116] O. Andriychuk, *Rediscovering the Spirit of Competition: on the Normative Value of the Competitive Process*, EUI Working Paper Law 2011/01, 2011, pp. 7-9.

[117] The protection of 'economic freedom' is different from the protection of 'market rivalry'. The difference may be found in their respective philosophical foundations. Maier-Rigaud describes that ordo-liberalism, i.e. the political philosophy propagating a 'free society' implying the absence of restraints by economic power, emphasised the importance of economic freedom, but only as a part of the more important and comprehensive notion of political, human freedom. According to this philosophy, complete competition is a necessary precondition for economic freedom and not a result. From ordo-liberalism a neoliberal view on competition was born, i.e. the notion that the freedom to compete is a value in itself – regardless of the economic power of the competitors. F.P. Maier-Rigaud, *On the Normative Foundations of Competition Law*, in: The Goals of Competition Law, ed. D. Zimmer, Edward Elgar Publishing, 2012, pp. 139-150.

[118] A. Jones & B. Sufrin, *EU Competition Law,* Oxford University Press, 5th edn., 2014, p. 41.

[119] ECJ judgment of 12 December 1967, *Case 23/67 SA Brasserie de Haecht v. Consorts Wilkin-Janssen*. Similarly, the Commission has held that "*(…), the exclusive nature of a contractual relationship between a producer and a distributor is viewed as restricting competition, since it limits the parties' freedom of action on the territory covered.*" Commission, XXIIIrd Annual Report on Competition Policy 1993, 1994, para. 212.

[120] E.g. ECJ judgment of 30 June 1966, *Case 56/65 Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH*. See also: J. Faull & A. Nikpay, *The EU Law of Competition*, Oxford University Press, 3rd edn., 2014, paras. 3.231-3.234.

[121] GC judgment of 18 September 2001, *Case T-112/99 Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v. Commission*, para. 76.

All in all, it is here argued that economic freedom as such is not a goal of EU competition law.[122]

3.3.5. Conclusion

Like maximising economic prosperity, market rivalry is a goal of EU competition law. This follows from a textual interpretation of Article 101 TFEU and from the structure of this provision. It can also be substantiated by economic theory, as theory explains how market rivalry can create efficient markets and is deemed to be an incentive for innovation. In other words, competition can be a means to increase economic prosperity. The Commission indeed applies this means-to-an-end approach. The ECJ, however, seems to have set the protection of 'competition as such' on equal footing with the protection of the interests of consumers. Finally, contrary to what some scholars submit, the protection of economic freedom is here not considered to be a goal of competition law.

3.4. Economic prosperity and market rivalry: a normative view

Considering that the TFEU rules serve two different goals, the question arises as to how these two goals relate to each other. The ECJ has not provided clarity on this point, but the Commission takes the view that market rivalry is a subordinate goal vis-à-vis the goal of furthering economic prosperity. The Commission's position is here endorsed: in this section it is set out why economic prosperity should be regarded the ultimate goal of competition law, while market rivalry should be considered an important but subordinate goal.

From a theoretical perspective it is undesirable that a single (competition law) norm must serve two goals, since this is not fully effective. In public policy design it is often considered that the number of independent policy instruments, such as a law prohibiting cartels, should at least equal the number of independent policy goals.[123] In other words, a statutory norm should aim to achieve only one goal, in

[122] See also: L. Ortiz Blanco, *Market Power in EU Antitrust Law*, Hart Publishing, 2011, p. 21.

[123] R.A. Mundell, *International Economics*, Macmillan, 1968, p. 201. For an application to competition law see: L. Peeperkorn & E. Paulis, *Competition and Innovation: Two Horses Pulling the Same Cart!*, in: On The Merits: Current Issues in Competition Law and Policy, eds. P. Lugard & L. Hancher, Intersentia, 2005, p. 25.

conformance with the 'you can't kill two birds with one stone' principle'.[124] This rule, developed by Tinbergen[125] and therefore referred to as the **Tinbergen principle,** implies that two goals cannot be fully achieved by one policy instrument, unless these goals are fully complementary (i.e. the goals never conflict with each other).[126] Indeed, a measure may result in a complete achievement of one goal, but it will then simultaneously affect the other, non-complementary goal. This may turn out to be especially detrimental with regard to open norms, such as the antitrust rules. Indeed, the substance of an open norm depends mainly on its goal(s), since such a norm would usually only be violated if the conduct harms the norm's goal.

The reference to the Tinbergen principle here is not meant to assert that policymakers must never use a single instrument to pursue to different goals, although in general it seems wise that they don't. The Tinbergen principle is discussed in this book as it is a theoretical, sound support for the intuitive thought that 'killing two bird with one stone' is bound to fail. Does this theory predict well what happens in practice? In fact, the simultaneous pursuit of the different goals 'economic prosperity' and 'market rivalry' indeed appears to be problematic. These goals are not fully complementary (i.e., they may sometimes conflict with one another). It is clear that the goal of 'protecting or maximising market rivalry' may conflict with the aim of 'maximising economic welfare': Article 101(3) TFEU is completely based on the notion that restricting rivalry may deliver economic benefits. Furthermore, in Section 2.3.2. it was set out that competition can also reduce innovation, and therefore economic welfare maximisation. This means that in the application of Article 101 TFEU sometimes a choice must be made between protecting rivalry or letting innovation flourish. So, in conformity with the Tinbergen principle, an antitrust provision should not aim to strive for the two mentioned policy goals at the same time. This problem can be

[124] H.E. Daly & K.N. Townsend, *Valuing the Earth: Economics, Ecology, Ethics*, The MIT Press, 2nd edn, 1993, p. 1.

[125] J. Tinbergen, *On the Theory of Economic Policy*, North-Holland Publishing Company, 1952, pp. 27, 39.

[126] See e.g.: H.E. Daly & J. Farley, *Ecological Economics, Principles and Applications*, Island Press, 2nd edn., 2011, p. 414; N.A. Braathen, *Instrument Mixes Addressing Non-Point Sources of Water Pollution*, OECD paper COM/ENV/EPOC/AGR/CA(2004)90/FINAL, 2007, pp. 10-12. There is quite some literature on whether the Tinbergen principle applies in all instances, considering especially its application to complicated situations involving interdependency of instruments and/or goals, 'policy target mixes' and 'policy instrument mixes'. Some researchers have found that the Tinbergen principle does not hold in all situations (see e.g. P. del Rio & M. Howlett, *Beyond the "Tinbergen Rule" in Policy Design: Matching Tools and Goals in Policy Portfolios*, Annual Review of Policy Design, Vol. 1, No. 1, 2013). Although recent study may substantiate that not only a strict 'one target-one instrument' approach is efficient, it seems broadly accepted that in theory a single instrument to achieve different non-complementary policy targets is inefficient. See also: T. Välilä, *'No Policy Is an Island' - On the Interaction between Industrial and Other Policies*, Policy Studies, Vol. 29, No. 1, 2008, pp. 114-115.

solved by either introducing a hierarchy between the norm's goals,[127] or by limiting the norm's goals to just one.

Competition as such, i.e., market rivalry purely as a market process independent from its results, is a different value than economic prosperity.[128] These two values are incommensurable, as they do not share a common denominator: it is not possible to objectively establish that 5% increase in market rivalry equals 5% increase in economic prosperity – or rather 10% or 50% (see also Chapter 4.A.2.3.1.). Choosing one value above the other inherently implies a subjective choice. In a public policy context, this means making a political choice, which implies that a choice for either value cannot be justified *in abstracto*. Indeed, political institutions must therefore make this choice.

Pursuant to this notion, it is argued here that economic prosperity as a goal of competition law should take precedence over market rivalry. Indeed, if protecting market rivalry is favoured over maximising economic prosperity, it may mean that customers' wealth – and ultimately citizens' wealth – is sacrificed for the sake of the maintenance of firms competing with each other. It is here deemed very unlikely that this trade-off is favoured in the EU. In the EU,[129] and in the Netherlands,[130] the political consensus is that competition policy is useful to achieve other, overarching goals – especially economic prosperity.[131] There is no dominant opinion that the 'right

[127] This implies that if an activity harms the dominant goal, it is banned by the norm – regardless of whether the subordinate goal is harmed or favoured. If this activity harms the subordinate goal but does not affect the dominant goal, it is also prohibited.

[128] In this context, scholars have made a distinction between the deontological approach and the utilitarian approach towards competition. The deontological approach regards competition as an important value in itself, regardless of its results. By contrast, the utilitarian approach considers competition valuable because of its results (i.e. maximising economic welfare). O. Andriychuk, *Rediscovering the Spirit of Competition: on the Normative Value of the Competitive Process*, EUI Working Paper Law 2011/01, 2011, p. 1.

[129] See e.g. the European Parliament Resolution of 12 June 2013 on the 2011 Annual Report on EU Competition Policy of the Commission (2012/2306(INI)), para. 2: "*[The Parliament] (s)tresses that competition policy is a cornerstone of the European social market economy; underlines the importance of strengthening antitrust, state aid and merger control measures to ensure economic efficiency, a well-functioning internal market and social progress.*" It was already set out above that the drafters of the EEC Treaty seem to have introduced the antitrust rules for their result, i.e. productive efficiency (see Section 3.2.1. above). For the Commission's position that competition is a means to an end, see Section 3.2.2. above.

[130] See Section 7.2. below.

[131] It is argued by some scholars that the competitive process as an independent goal of competition law is reflected in the fourth condition of the Exemption Possibility, as explained by the Commission in its 2001 Guidelines on Article [101(3) TFEU], para. 105. (see e.g.: H. Schweitzer, *Efficiency, Political Freedom and the Freedom to Compete - Comment on Maier-Rigaud*, in: The Goals of Competition Law, ed. D. Zimmer, Edward Elgar Publishing, 2012, p. 173) However, this argument is not endorsed here: in these Guidelines the Commission merely considers rivalry as a means to achieve economic efficiency and not as a goal of equal importance to economic welfare.

to compete' *in abstracto* must be respected, like the right to vote or the freedom of speech. To the contrary: Article 101(3) TFEU exempts competition restrictions if they yield economic benefits for customers and pursuant to Article 102 TFEU, single undertakings are only held to illegally frustrate competition if they are dominant and display abusive conduct. To conclude, vis-à-vis economic prosperity, market rivalry should not be considered the dominant goal of competition law but *vice versa*.[132]

The above conclusion does not imply that preserving market rivalry is unimportant for competition law or that is not valuable for society. As mentioned above, market rivalry generally increases the efficiency of markets and it is a key driver for innovation. The goals of maximising economic welfare and market rivalry are intertwined and a wise application of competition law may strike a careful balance between these two goals. This is further discussed in Chapter 4.A.5.2.

3.5. The goals of EU antitrust law: the single market imperative

3.5.1. Introduction

Economic prosperity and market rivalry as two of the main goals of EU competition law were discussed above. This section covers the third and last main goal, i.e. the creation of one EU internal market. It is indeed one of the most important objectives of the EU to create a common market without trade barriers (also referred to as '**the single market imperative**'). This objective was for a long time the dominant ultimate goal and still is a key pillar of the EU.[133] Since the start of the EEC, EU competition law has been

[132] There are also difficulties with regard to determining relevant tests for establishing an impairment of market rivalry: how can one measure the level of market rivalry in a market? For example, in the rivalry process competitors are inherently eliminated and this process has therefore a built-in tendency to (temporarily) reduce the number of market players. It would therefore be incomprehensible to prohibit categorically conduct that reduces the number of players. Nazzini has argued that the 'competitive process' cannot be an independent objective of competition law, because it is impossible to formulate a stand-alone test for distinguishing conduct that restricts competition from genuine competing conduct – apart from perhaps agreements not to compete. He argues that the competitive process is a relevant element in competition law, provided it is interpreted in the light of an overarching goal (like economic welfare). Such an interpretation would then imply that a 'restriction of competition' means a frustration of the competitive process which harms the overarching goal. R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford University Press, 2011, pp. 16-17.

[133] "*To begin to appreciate the centrality and force of this idea* [i.e. the single market imperative], *one need only recall that economic cooperation was the last remaining hope for a co-operative Europe that would banish the specter of that continent's nationalist past. Attempts to move toward political union had been rejected, and the plans for a European Defense Community had been defeated. If there was to be a new Europe, it would have to be built on economic cooperation and integration.*" D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, reprint 2003, p. 347.

used to further the creation of an EU internal market. For a long time the single market imperative has therefore been held to be an important goal for EU competition law.

In this section it will first be explained why the EU Treaties and the case law of the EU Courts give reasons to consider this an EU competition law goal (Sections 3.5.2 and 3.5.3.). Subsequently, a normative view on why the forming of a single EU market should not be a goal of EU competition law will be presented (Section 3.6.).

3.5.2. The hierarchy of the Treaties' goals

It follows from the EU Treaties' structure that the EU antitrust rules are meant to contribute to the creation of the EU single market. The treaties imply that to achieve its ultimate goals, the EU will undertake certain tasks and will operate in conformity with certain principles. These tasks and principles are listed in the Articles 3(2) through 6 TEU. For competition policy purposes, the EU's task of establishing an internal market is especially relevant: *"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. It shall promote scientific and technological advance. (…)"*[134]

The internal market the EU strives to establish, is a market in which competition is not distorted. This follows from Protocol 27 of the TFEU, which reads: *"(…) the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, (…)."*

The Treaties' structure connotes a certain hierarchy. Pursuant to Article 3(1) TEU, one of the EU's primary goals is the promotion of the well-being of its peoples. One measure to achieve this overarching goal is the establishment of an internal market, which makes the establishment of an internal market subordinate to the promotion of the well-being of the EU's peoples. In turn, competition policy serves as a means to establish the internal market, which makes competition policy subordinate to

[134] Article 3(3) TEU.

the establishment of the internal market.[135] Based on the Treaties' structure it can therefore be concluded that it is a goal of EU competition law to contribute to the creation of the internal market.

3.5.3. EU case law

The EU Courts have designated EU competition law as a tool to create the internal market. In order to accomplish a single EU market the EU Treaties include various provisions to eliminate governmental measures directly and indirectly hindering trade between the Member States. This elimination could turn out to be without effect if private parties maintained or created barriers to trade between the Member States. The EU Courts have therefore, from the early days of the EU on, consistently held that agreements between undertakings that hinder the integration of the national markets into a single market are prohibited by Article 101(1) TFEU.[136] It continues to do so: e.g., in the 2009 *Spanish GSK* case it has repeated that the single market imperative is a goal of EU competition law (see subsection 3.2.3. above).

In addition, the ECJ has in several cases held that the partitioning of the single market by a dominant undertaking amounts to an abuse within the meaning of Article 102 TFEU.[137]

[135] "*It follows inter alia from Articles 2, 8a and 102a of the EEC Treaty that that treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union. Article 1 of the Single European Act makes it clear moreover that the objective of all the Community treaties is to contribute together to making concrete progress towards European unity. <u>It follows from the foregoing that the provisions of the EEC Treaty on free movement and competition, far from being an end in themselves, are only means for attaining those objectives</u>.*" ECJ opinion of 14 December 1991, *Opinion 1/91*, paras. 17-18 [underlining added].

[136] E.g., in the Consten and Grundig case the ECJ considered that: "*Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [101(1)] is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process.*" ECJ judgment of 13 July 1966, *Case 56/64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission (Consten and Grundig case)*, European Court Report, p. 340 (English version). See also: ECJ judgment of 13 July 1966, *Case 32/65 Italy v. Council and Commission*, European Court Report, p. 408 (English version).

[137] E.g. ECJ judgment of 14 February 1978, *Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission*, para. 159; ECJ judgment of 11 November 1986, *Case 226/84 British Leyland Public Limited Company v. Commission*, para. 11-24; ECJ judgment of 16 September 2008, *Case C-468/06 Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton (GSK Greece case)*, para. 37.

3.5.4. *Conclusion*

The single market imperative is a significant goal of EU competition law. It is not certain whether it is less or more important than the goal of economic prosperity or market rivalry. It has been argued that the ECJ has passed judgments in which agreements that could very well have increased economic efficiency were nevertheless held to constitute a violation of Article 101(1) TFEU since these agreements hindered the creation of the single EU market.[138] However, whether these judgments reflect a hierarchy accepted by the EU Courts is unclear.

3.6. The single market imperative: a normative view

Although it is here acknowledged that the EU Courts consider that the single market imperative is one of the goals of the TFEU antitrust provisions and that the EU Treaties indicate that these provisions are meant to contribute to the creation of the EU single market, in this book the normative view is taken that this is misguided. The attempt to serve two goals, i.e., the increase of economic prosperity and the furtherance of the internal market, through one rule cannot be successful if the two goals are sometimes conflicting.[139] There are examples of cases in which these two goals conflicted.[140]

While here the dominant argument is considered to be the actual existence of cases where the simultaneous pursuit of the two goals was problematic, there are also theoretical insights that support the claim that the Cartel Prohibition should not try to achieve to the same degree both prosperity maximisation and a single EU market. It was already set out above that in conformity with the Tinbergen principle, it can be ineffective to apply an antitrust norm to achieve two goals that may conflict

[138] G. Monti, *EC Competition Law*, Cambridge University Press, 2007, pp. 41-41.

[139] P. Larouche, *Competition Law and Regulation in European Telecommunications*, Hart Publishing, 2000, p. 355.

[140] See: G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 50-51; S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 3rd edn., 2010, pp. 7-8.

(see Section 3.4. above).[141] It is here proposed that only undertakings' conduct that affects competition law's goal of increasing economic prosperity should be deemed to violate the competition rules, and not conduct that frustrates the single market imperative. This means that if, e.g., an agreement increases economic prosperity but also hinders the creation of the single market, this agreement should not be banned. The Commission takes the same position to the extent, at least, that the penetration of new national markets is concerned.[142] In addition, it may be considered that it was the intention of the 1957 treaty drafters that the antitrust rules would enhance and protect market efficiency (see Section 3.2.1. above).

The choice in this book for economic prosperity over the single market imperative is based on the following two arguments.

Suitability. It is here considered that the current antitrust rules are not particularly suitable for banning the hindering of the creation of the single market, while they are rather effective in protecting competition and maintaining economic prosperity. As explained above, competition is a strong tool to create efficient markets and promote innovation, which both increase economic prosperity. The TFEU competition provisions are well-designed for, and effective in, preventing distortions of competition. This is not the case with regard to the single market imperative. There are certain provisions in the EU Treaties that clearly serve the single market imperative. If the wording of these treaty provisions is considered, it is clear that a specific prohibition for private parties to harm the single market imperative would not be phrased as are the TFEU competition law provisions.[143] The wording of such norms would more clearly and explicitly refer to, e.g., conduct frustrating the maintenance and erection of barriers for trade between EU Member States. It is therefore held here that the antitrust rules are better targeted at furthering economic prosperity than at the single market imperative.

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[141] Nazzini argues that 'the protection of market integration' and 'protecting trade' are two goals that competition law could pursue simultaneously. However, Nazzini limits the effects of market integration to economic benefits which may support the achievement of non-economic integration goals. He suggests that if the market integration principle and the trade principle clash, a balance must be struck. It is not clear what he means by that: either the reconciliation of two incommensurable principles – which is problematic – or the computation of the opposing effects on economic prosperity – which would imply that market integration is a subordinate goal vis-à-vis economic prosperity. R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford University Press, 2011, pp. 28-29.

[142] Commission Guidelines on Vertical Restraints of 19 May 2010, para. 61.

[143] E.g., Article 18 TFEU reads: "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. (…).*" Article 34 TFEU reads: "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*" The wording of these provisions clearly cover the creation of a united EU and the abolition of barriers between the EU Member States.

No guidance on application. The emergence of the 'more economic approach' in competition law (see footnote 560) has led to less room for the single market imperative's role. The focus of the Commission's approach towards competition cases is predominantly economic. Indeed, there is no guidance or analytical framework for assessing the consequences for the single market imperative of anti-competitive activities.[144] So, the goal of furthering economic prosperity appears to be the predominant goal nowadays,[145] although it is acknowledged that the single market imperative has not vanished as an EU competition law goal.[146]

Relevance for this book. The relevance of the above discussion for this study is that in the reconciliation frameworks developed in this book, competition interests and non-competition interests are deemed to be commensurable, to the extent the latter can be translated into economic welfare terms. Within these frameworks, briefly put, both competition harm and non-competition benefits are first transposed into economic welfare terms and subsequently balanced against each other in order to determine whether competition law is violated. This mechanism would not be effective if the effects on the single market imperative were also decisive for determining whether

[144] To avoid doubt, it is noted that the Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty do not constitute such a framework. These Guidelines have never been designated to form guidance on whether agreements frustrate the single market imperative and therefore restrict competition. On the contrary, in these Guidelines it is explicitly mentioned that they do not cover the definition of 'a restriction of competition' (para. 4). The Guidelines only cover 'the effect on trade' element of EU antitrust law, which is a jurisdictional element (para. 12), not a substantive norm. Finally, it is mentioned that an agreement may even pass the 'effect on trade' hurdle if it increases the trade between EU Member States (para. 34) – which can clearly not be considered a frustration of the single market imperative. See: Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty of 27 April 2004.

[145] Odudu even argues that the creation of a united EU market ultimately aims to create efficient markets and that therefore the single market imperative should be regarded a subordinate, partial objective of the overarching goal of increasing economic prosperity. O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81*, Oxford University Press, 2007, pp. 19-22. However, this reasoning may only be partly correct, which can be concluded when considering the following statement by former DG COMP Commissioner Almunia: "*We all know that the call of Europe's founding fathers for economic integration had a more profound and more noble motive. After World War II, Europe's countries had to tie their economic links and had to become so closely interdependent that another war would become impossible.*" Speech of 18 October 2012 by Commissioner Almunia, SPEECH/12/742.

[146] See e.g. ECJ judgment of 4 October 2011, *Case C-403/08 Football Association Premier League Ltd and Others v. QC Leisure and Others*, para. 139. Likewise, former Commissioner Almunia has stated in 2011: "*Limiting a distributors' freedom to sell to a consumer that visited its website is a hardcore restriction of competition law. It denies the very existence of Europe's Single Market and is a pointless battle against what has become a reality, that of a growing online market full of potentialities. We will continue to tackle such violations as stated in the new rules on distribution on the so-called "vertical agreements", adopted last year by the Commission. These rules are designed to promote online sales; at same time, they recognise that a company is free to organise its sales or distribution networks as it sees fit. This is in the best interest of consumers and companies alike. The Pierre Fabre ruling underlines the need for a strict application of Single Market imperatives. I intend to explore all the ways in which competition policy can contribute to this agenda by fighting artificial restrictions imposed by some companies to cross-border trade.*" Speech of 24 November 2011 by Commissioner Almunia, SPEECH/11/803.

competition law is violated. However, it was explained in this section why the effects of an activity on the single market imperative should not be decisive for determining whether competition law is violated. So, it is viable to maintain the approach of the frameworks in which an economic welfare calculation can be used to reconcile *prima facie* conflicts between competition interests and non-competition interests.

Even if the above normative view is not accepted, this does not render the solution frameworks useless. It does, however, limit their applicability to actions that do not hinder the single market imperative. So, a decision maker should then first make sure that the action in question does not frustrate the creation of the internal EU market, before proceeding to apply a solution framework.

3.7. Goals of EU antitrust law: other EU policies

After the Second World War cooperation in and integration of Europe was considered a way of preventing new conflicts. However, after the entering into force of the ECSC Treaty in 1952, further plans for integration in the political and defense spheres came to a dead end. Economic cooperation appeared to be the only passable path towards further integration.[147] This economic cooperation led to the creation of the EEC Treaty. More than fifty years later, the EEC Treaty has now evolved from an *economic* cooperation project into the TEU and TFEU, which embrace economic and many *non-economic* subjects. So, the EU nowadays also pursues non-economic goals.

Article 3 TEU states that promoting peace is one of the ultimate aims of the Union. Furthermore, the values of the EU include human dignity, freedom, democracy, equality, the rule of law and human rights. From Articles 3(2) and (3) TEU it is clear that, among other things, the EU (1) aims to form an area in which freedom, security, justice and non-discrimination is ensured, (2) aims to promote social justice, solidarity and protection of the rights of the child and (3) shall respect cultural diversity and ensure the safeguarding of cultural heritage. It is clear that nowadays the EU policies cover many economic, social, cultural and environmental topics.

The fact that the EU has broadened its policy scope does not mean that EU competition law should be used as an instrument to accomplish all these policies' goals. As mentioned above, EU competition law should be focused on the single goal it is particularly capable of serving: maximising economic welfare. Clearly, the focus of

[147] D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, reprint 2003, pp. 342-343.

competition law on economic welfare only does not imply that other, non-economic policies are not important. The EU institutions may need to balance competition policy against other policies. For example, pursuant to Article 7 TFEU, the EU must "*ensure consistency between its policies and activities, taking all of its objectives into account*". In addition, the TFEU includes 'integration clauses' which require the integration of certain interests into the EU's policies and activities. For example, Article 11 TFEU requires that the rules on the protection of the environment be integrated into the EU's policies and activities and Article 12 TFEU includes a similar rule with regard to consumer protection. (The relevance of the integration clauses for this book is further discussed in Chapter 4.A.2.5.) Sometimes competition policy will be outbalanced by other policies, sometimes it will not. The abovementioned stance merely stipulates that the EU antitrust rules must be used as an instrument to maximise economic welfare only and that for other policies other instruments must be applied to reach their goals.

To conclude, in this book the position is taken that competition law must only pursue the furtherance of economic welfare and no other goals. This is by no means a claim that economic welfare is the most important policy goal in general, but only an assertion that other public policy goals need to be pursued through other means than competition law.

3.8. The goals of EU antitrust law: conclusion

It follows from the EU Courts' case law and Commission's views that there are three goals of EU competition law, which can be referred to as 1) the furtherance of economic welfare, 2) the protection of market rivalry and 3) the protection of the creation of the single EU market.

In conformity with the Tinbergen principle, it is here held to be inappropriate that one rule – e.g. the EU Cartel Prohibition – serve two goals of equal ranking. Considering the two goals maximising economic welfare and the protection of market rivalry, it was argued to be unlikely that it was the Treaties legislature's intention that economic prosperity would have to be sacrificed for maintaining market rivalry. Therefore, a normative view on the goals of EU antitrust law is that economic prosperity should take priority over market rivalry. This conclusion does not mean that market rivalry is unimportant for competition law or for society. On the contrary, market rivalry generally increases the efficiency of markets and it is a key driver for innovation.

The single market imperative or other public policy goals should not function as goals for EU antitrust law, because this can conflict with pursuing the goal of maximising economic prosperity. The latter is considered to be the more appropriate goal of the EU antitrust law, particularly because competition law not well suited to ban actions that frustrate the single market imperative.

4. THE EU CARTEL PROHIBITION: A NORMATIVE VIEW

4.1. Introduction

The above sections set out a normative view on what the goals of EU antitrust law are. Considering the notion mentioned in Section 3.4. that a norm should not prevent actions that further the norm's goal, it is now possible to explicate the substance of the Cartel Prohibition. In other words, a particular *test* for the Cartel Prohibition is here proposed. This section builds on the drawn conclusions and provides a normative view on what the substantive norm of the Cartel Prohibition must mean.[148]

Determining the test for the Cartel Prohibition is relevant for this book, because there are two assumptions with regard to the Cartel Prohibition made in this book that are critical for the Exemption Analytical Framework developed in Chapter 4:

(1) One notion accepted in the Exemption Analytical Framework is that in the absence of a legitimately set 'exchange rate', two values cannot be objectively balanced against each other. Indeed, in such a case there is no objective manner to establish which value is the more important one. In Chapter 4.A.2.2.1. it is set out why an objective balancing exercise can be performed, if the benefits of an agreement to be taken into account pursuant to the Exemption Possibility are quantified in monetised economic welfare terms. Since these benefits form only one side of the balancing scale, the other side – i.e. the anti-competitive harm – must be measurable in monetised economic welfare terms, too. It is therefore warranted that it is explained why anti-competitive effects can indeed be measured in monetised economic welfare terms.
(2) It was set out above in Section 3.6. that in this book the stance is taken that the single market imperative should not be a goal of EU competition law. Consequently, this aim cannot be part of a test of the Cartel Prohibition. This fits in with the Exemption Analytical Framework, which proceeds from

[148] As in this book no solution framework for Articles 102 TFEU and 24 DCA is developed, for practical reasons it does not include a normative view on the test of these articles.

the assumption that an agreement's benefits can be taken into account in the Exemption Analytical Framework if they can be translated into monetised economic welfare terms, and this is only a logical assumption if all anti-competitive harm can also be translated into monetised economic welfare terms.

4.2. Normative view on the EU Cartel Prohibition: the two screens-test

In Section 1.1. it was considered that a statutory norm must not prohibit actions that further the norm's goal(s). Furthermore, it follows from the discussion of the Tinbergen principle that it is preferable that *one* norm serve only *one* goal. It was on the one hand explained that the single market imperative should not be a goal of EU competition law. On the other hand, it was set out that the maximisation of economic prosperity should be accepted as the ultimate goal of EU competition law. The protection of market rivalry was considered another – important but subordinate – goal. This all may lead one to conclude that the test of the Cartel Prohibition's should be whether economic welfare is affected. This conclusion is, however, here held to be misguided, among other reasons because the reference to a restriction of 'competition', or market rivalry, in the Cartel Prohibition must mean something. Below it is explained that both market rivalry and economic welfare are relevant elements, and that therefore the Cartel Prohibition test should consist of two screens: (1) a market rivalry screen and (2) an economic welfare screen.[149]

It is here argued that the system of Article 101 TFEU, consisting of both the Cartel Prohibition and the Exemption Possibility, only makes sense if the Cartel Prohibition is not limited to prohibiting economic welfare decreasing agreements. If it were, there would be no need for the Exemption Possibility, which exempts agreements if they increase economic welfare. Indeed, if the test of the Cartel Prohibition is limited to the effect on economic welfare, the balancing of economic welfare increases and decreases would occur in the context of Article 101(1) TFEU, leaving the Exemption Possibility superfluous.[150] As agreements that on balance increase economic welfare should not be prohibited, this implies that the economic welfare consequences of a restriction must be 'calculated': a 'competition law costs benefits analysis' must be made. The economic welfare effects of the 'competition costs' must be balanced against the economic welfare effects of the 'benefits'. Given the bifurcation of Article 101 TFEU, it is sensible that the competition costs are determined in accordance with

[149] Monti makes a similar suggestion when he considers that a 'restriction of competition' consists of two components: a restriction of (1) economic freedom, and (2) market power. G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 49.

[150] G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 26.

Articles 101(1) TFEU, i.e. the Cartel Prohibition, and the benefits in accordance with Article 101(3), i.e. the Exemption Possibility.[151]

Furthermore, it would be rather odd – and indeed unwanted – if market rivalry had no relevance at all in the application of the Cartel Prohibition, considering the legislature's explicit reference to a 'restriction of competition.' Somehow a restriction of market rivalry should therefore be of relevance. If market rivalry were not relevant at all, it would be plausible that the legislature would not have referred a 'restriction of competition', but to a 'reduction of economic prosperity' instead.[152]

Two screens, three efficiency dimensions: one test. However, a limitation of market rivalry should also not be sufficient to fail the test of the Cartel Prohibition, as this would not be in accordance with the notion endorsed in this book that this prohibition aims to further economic prosperity and not market rivalry as such. So, it appears that both market rivalry and economic welfare should be decisive factors for the Cartel Prohibition test, while this provision should not imply an economic welfare balancing exercise (as this would make the Exemption Possibility superfluous).

How can the relevance of both economic welfare and market rivalry be reconciled in one test? This can be done by splitting the ultimate test into two sub-tests, or 'screens'. And how can a reduction of economic welfare be part of the test, while the test must not be whether economic welfare is reduced overall? This can be done by splitting economic welfare into categories, or dimensions, and by requiring that the prohibition test be considered as failed if welfare is reduced in one of these dimensions. So, in this book the stance is taken that an agreement should be deemed to fail the Cartel Prohibition test if it (1) limits market rivalry[153] and (2) reduces *a certain dimension of economic welfare*. A 'dimension of economic welfare' refers here to the components that are held to form economic welfare: (1) allocative efficiency, (2) productive efficiency and (3) dynamic efficiency.

[151] Townley has argued that the economic welfare analysis should be performed within Article 101(1) TFEU, which would limit the balancing act of Article 101(3) TFEU to the consideration of 'the effects of non-competition policies' (Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, pp. 311-312). This is an anomalous and *contra legem* interpretation of the First Condition of Article 101(3) TFEU, since the wording of this condition refers to economic phenomena (i.e. the production/distribution of goods and technical/economic progress).

[152] For a similar view, see: R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford University Press, 2011, p. 17.

[153] It could be difficult to develop a test for determining whether 'market rivalry' is reduced and this exercise will not be accomplished in this book. As a suggestion it is here proposed that in the context of the Cartel Prohibition this test might be whether joint action by undertakings causes a less intense battle to win customers between these (horizontal effects) or other (vertical effects) undertakings.

(1) ***Allocative efficiency.*** A market delivers maximum allocative efficiency if producers' marginal costs equal the valuation by the buyers of one extra produced unit of the product concerned.[154] Indeed, if this buyers' valuation is higher than the marginal costs, it could benefit both producers and buyers if an additional unit of the product concerned were sold; *vice versa* if this valuation is below marginal costs.[155] In a market with maximum allocative efficiency the resources to make a product are allocated to the production process in just the right amount to supply the quantity corresponding to the buyers' demand when the market price equals marginal costs. A restriction of competition may result in companies agreeing to raise the market price above marginal costs – this results in allocative inefficiency. The inefficiency is not that the producers benefit at the cost of the buyers, but rather that because of the higher prices less products are consumed, which results in unnecessary unsatisfied demand; see Section 2.3.1. above.[156]

(2) ***Productive efficiency.*** Maximum productive efficiency is attained if the products offered to buyers are produced for the lowest possible costs. A firm not producing for the lowest possible costs is obliged to charge a higher price than its lower-cost competitors and will consequently be outcompeted in the market.[157] A limitation of competition may reduce the pressure on undertakings to lower their costs to outcompete their competitors, which results in unnecessarily high market prices.

(3) ***Dynamic efficiency.*** Dynamic efficiency is a less concrete concept, but it relates to the economic welfare that a market delivers through innovation, technical progress and quality improvement.[158] As explained above, it is generally assumed that the rivalry between companies to win customers stimulates them to find ways to outperform their competitors, and therefore yields innovation. Since innovation is the main driver of economic prosperity, stifling innovation through limiting competition results in dynamic inefficiency.

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[154] Marginal costs are the costs for making one additional unit of a product. The valuations of all buyers of certain produced amounts of a product form the market demand curve. If the marginal costs of a product are below the market demand curve, the producer could benefit by producing one more unit through selling it above his costs, while the buyers would benefit if the producer set the price of the additional product at or below a market demand curve price (which indeed would still be profitable for the producer).

[155] S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 3rd edn., 2010, p. 25. See also e.g.: A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 8; R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 5.

[156] The economic welfare loss due to the unsatisfied demand is called 'deadweight loss'. A graphical illustration of the deadweight loss model is given in Section 2.3.1.

[157] S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 3rd edn., 2010, p. 25. A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 8; R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 6.

[158] A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 8; R. Whish D. Bailey, *Competition Law*, 8th edn., Oxford University Press, 2015, p. 6.

If the overall effect of an agreement is that economic welfare in total, i.e., all the dimensions of economic welfare combined, is not reduced, the Exemption Possibility could exempt the agreement from the Cartel Prohibition's operation. This could be the case if an agreement lowers one dimension of economic welfare less than it increases another. For example, a cooperation between two undertakings may lead to a greater allocative inefficiency due to a termination of mutual competition, but it may also allow these companies to reduce their production costs (i.e. an increase in productive efficiency) or to develop better quality goods (i.e. an increase in dynamic efficiency). Because of its different effects on the three types of efficiency components, the cooperation agreement may reduce, increase or not affect total economic welfare.

4.3. Normative view on the EU Cartel Prohibition: conclusion

In this section it is argued that although it is the Cartel Prohibition's ultimate goal to further economic prosperity, not every agreement resulting in an economic welfare loss should be prohibited by Article 101 TFEU: it should be necessary that this agreement limits market rivalry, too. However, a restriction of rivalry is not equal to a reduction in economic welfare. A restriction of market rivalry should therefore not be a sufficient condition for a violation of the Cartel Prohibition. Consequently, it was concluded that the Cartel Prohibition's test consists of two screens. This provision only prohibits agreements that (1) limit market rivalry and (2) reduce a certain dimension of economic welfare. A 'dimension of economic welfare' refers to the components that form economic welfare, i.e. allocative efficiency, productive efficiency and dynamic efficiency.

It appears that in a significant number of cases a reduction of market rivalry in fact *increases* economic welfare. An agreement could also lead to the reduction of one dimension of economic welfare while increasing another dimension even more. The Exemption Possibility ensures that if overall economic welfare is not reduced, agreements are not prohibited. Consequently, only agreements that reduce market rivalry and reduce overall economic welfare should be prohibited.[159] Briefly put, competition law should only prevent the negative consequences of restrictions of market rivalry.

[159] Odudu and Loozen take the view that the Cartel Prohibition should merely aim to prohibit collusion which results in allocative efficiency. See: O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81*, Oxford University Press, 2007, p. 102; E.M.H. Loozen, *Het Begrip Mededingingsbeperking zoals Neergelegd in Artikel 101(1) VWEU: een Beslismodel*, Boom Juridische Uitgevers, 2010, p. 43.

This Cartel Prohibition test proposed here differs from the test applied by the courts and competition authorities. In fact, in the case law and decisional practice no such test was developed.[160] Nowadays it is clear from the case law and authorities' decisons that certain categories of agreements are deemed in general to restrict competition: price fixing between competitors, customer allocation between competitors, resale price maintenance, the prohibition of parallel trade, etc. Nevertheless, it not clear which criteria must be met for an agreement to be held 'anti-competitive'. Must economic welfare be reduced by the agreement? If so, by how much? And is this sufficient? Or must the agreement make it more difficult for competitors to win customers? How to distinguish between 'competition on the merits' and objectionable harm to competitors? To what extent must a restriction of trade between the Member States be taken into account in the Cartel Prohibition? The conclusion is that a clear, coherent set of rules that prescribes when an agreement restricts competition, is lacking.

This section does not aim to provide an overview of the legal *status quo* of the Cartel Prohibition; it focusses on certain normative assumptions underlying the Exemption Analytical Framework.[161] What is relevant, however, is to acknowledge that the normative view differs from the legal *status quo*. In practice, it will therefore be necessary for the application of the Exemption Analytical Framework to establish whether the anti-competitive effects of the agreement concerned are deemed to also consist of other harm than economic welfare decreases (e.g. the frustration of the single market imperative). If this is the case, pursuant to the Exemption Analytical Framework the anti-competitive effects cannot be fully included in the balancing exercise of the Exemption Possibility. It is not expected that in practice the establishment of a violation of the Cartel Prohibition *as it is currently applied by the courts and authorities* is based solely on anti-competitive effects that consist of other harm than economic welfare decreases. On the contrary, it is expected that in practice a violation of the Cartel Prohibition will almost always imply a reduction of market rivalry as well as a decrease of economic welfare,[162] which implies a violation of the Cartel Prohibition in accordance with the normative view set out below. So,

[160] Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 206; R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford University Press, 2011, p. 12.

[161] It is for the purposes of this book not necessary to provide a comprehensive description and analysis of the Cartel Prohibition as it currently is applied, since this book focuses on the *reconciliation mechanisms* for conflicts between competition law and banking regulatory interests. The *prima facie* anti-competitive nature of agreements is presumed, as otherwise there would not be any reason to apply a reconciliation method. A *prima facie* anti-competitive nature implies that an agreement violates the competition law unless a specific rule or doctrine applies that lifts the violation.

[162] See e.g. Monti's interpretation of the Commission's policy on the Article 101(1) TFEU test which requires a restriction of market rivalry and an increase in market power (i.e. allocative inefficiency). G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 49.

the Exemption Analytical Framework can probably always be of use, to the extent the anti-competitive economic welfare decreases are concerned.[163]

5. THE GOALS OF EU MERGER CONTROL

5.1. Introduction

This section covers the goals of the EU merger control regime. Unlike the EU antitrust rules, the EU merger control rules are not included in the EU Treaties. They are laid down in a regulation from the Council – the (second) EU Merger Control Regulation (**EUMR**).[164] The first regulation on merger control (the **1989 Merger Regulation**) was introduced in 1989, about forty years after the entry into force of the EEC Treaty.[165] The purpose of the 1989 Merger Regulation, like that of the EUMR, was to ensure that the increasing merger activity in the EU would "*not result in lasting damage to competition.*"[166] Mergers may impede competition due to the combining of the market positions of the merging undertakings, which enhanced market position may enable the merged firm to increase its prices. In addition, a decrease in the number of undertakings in a market may make it easier for them to engage in concertation that limits competition.[167]

Box 2.1. The EU Merger Control Test

Article 2(3) EUMR sets out the hurdle that a merger within the scope of the EUMR must overcome:
A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the

[163] In such cases, the application of the Exemption Analytical Framework may reveal that the agreement's benefits do not outweigh the anti-competitive economic welfare decreases, which implies no exemption for the agreement. However, if the Framework shows that the agreement's benefits outweigh the anti-competitive economic welfare decreases, it cannot be automatically concluded that an exemption is available since the anti-competitive effects that are not economic welfare decreases must still be taken into account.

[164] Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings.

[165] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[166] Recital 5 of the 1989 Merger Regulation and of the EUMR.

[167] For simplicity's sake this book will only deal with so-called 'horizontal' mergers; i.e. mergers between actual or potential competitors. 'Vertical' and 'conglomerate' mergers are not discussed. The conclusions in this section, however, would also apply if these types of merger were to be taken into account. Vertical and conglomerate mergers are generally less likely to significantly impede effective competition than horizontal mergers: see Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 18 October 2008, para. 11.

creation or strengthening of a dominant position, shall be declared incompatible with the common market.

Article 2(1) EUMR stipulates the factors the Commission must take into account when assessing whether a merger is to be allowed:
Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account:
(a) *the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;*
(b) *the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.*

As with regard to the Treaties' antitrust rules, it is important to establish what the objectives of EU merger control are.

5.2. The goals of EU merger control: economic prosperity

5.2.1. Introduction

The substantive test for EU merger control was changed with the introduction of the EUMR and the aim of the merger control regime seems to have changed as well. Briefly put, pursuant to the EUMR, a merger is not permissible if this transaction significantly impedes effective competition (see Box 2.1.); the EUMR's substantive test is also called the **SIEC test**.

5.2.2. *The goal of the 1989 Merger Regulation: market rivalry*

The legal test for a concentration under the 1989 Merger Regulation was whether such a concentration created or strengthened a dominant position *as a result of which* effective competition in the internal market or in a substantial part of it would be significantly impeded.' Concentrations that resulted in a dominant position that impeded effective competition were therefore not allowed. The 1989 Merger Regulation did not clarify what 'a significant impediment of effective competition' was. Nevertheless, after the introduction of the 1989 Merger Regulation, the Commission's point of view was that the "maintenance of a competitive market structure" – or market rivalry – constituted the essential objective of its merger control policy.[168] The focus on a competitive market structure is also apparent from the Commission's initial refusal to clear mergers that would create a dominant position but that would also on balance provide benefits to consumers due to economic efficiencies, such as cost reductions or improved study and development.[169]

5.2.3. *The EUMR introduced the efficiency defence*

The SIEC test of the EUMR is stricter (i.e. more extensive) than the test of the 1989 Merger Regulation. The EUMR's test not only prohibits mergers that lead to dominant positions, but also mergers that significantly impede competition without creating or enhancing a dominant position. With regard to the substance of its test, the EUMR, too, does not stipulate what exactly 'an impediment of effective competition' is. However, the Council included in Recital 29 of the EUMR guidance on how the new merger control test must be interpreted. The EUMR's goal can be derived from this guidance. This recital makes it clear that 'efficiencies' produced by a merger may counteract the anti-competitive effects of the transaction.[170] In that case the merger will

[168] Commission's XXIInd Report on Competition Policy, 1992, p. 22.

[169] "*There is no real legal possibility of justifying an efficiency defence under the [1989 Merger Regulation]. Efficiencies are assumed for all mergers up to the limit of dominance – the "concentration privilege". Any efficiency issues are considered in the overall assessment to determine whether dominance has been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration which would otherwise be prohibited.*" Commission's contribution in OECD Report OCDE/GD(96)65, *Competition Policy and Efficiency Claims in Horizontal Agreements*, 1996, p. 53.

[170] Recital 29 of the EUMR reads: "*In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.*"

not be blocked pursuant to the EUMR. In common competition practitioners' usage this is called the '**efficiency defence**', although strictly speaking the EU concentration control regime does not include a 'defence' (i.e. an exemption possibility; see Section 6.2. below).

Recital 29 EUMR is not explicit about the meaning of the term 'efficiencies' and therefore it is uncertain what exactly the Council had in mind when it introduced the efficiency defence through Recital 29. The Council instructed the Commission to draft guidance on the application of the efficiency defence in Recital 29. The Commission has changed its initial stance and has indeed provided guidance on the efficiency defence.[171] In its guidelines on horizontal mergers the Commission states that the relevant benchmark for assessing whether efficiencies may shield mergers that have anti-competitive effects is whether consumers are worse off as a result of the merger.[172] Indeed, the GC applies the EUMR test in such a way that the mere creation of market power – i.e., the capability to evade the disciplining forces of market rivalry – is not decisive, but rather the harm that such market power may cause.[173] In other words, the test is not whether reduction in market rivalry is too great, but whether the expected *consequences* of increase in market power are unacceptable: "*Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms.*"[174]

According to the Commission, the legal basis for the efficiency defence is Article 2(1)(b) EUMR.[175] Article 2(1)(b) EUMR provides for a non-exhaustive list of criteria that

[171] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, paras. 76 *et seq*.

[172] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, para. 79.

[173] The GC considered in this case that "*Even if the concentration were to increase the intervener's market power, the applicants provide no relevant information as to how that alleged market power would enable the new entity to cause significant harm to competition*", and continued to assess whether the merged entity would be able to increase prices to the detriment of its customers. GC judgment of 11 December 2013, *Case T-79/12 Cisco Systems Inc. & Messagenet SpA v. European Commission*, para. 85.

[174] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, para. 8.

[175] This position is rather odd, since in 1995 the Commission asserted that there was no legal basis in the concentration control regulation for an efficiency defence. Nevertheless, for today's application of the EUMR it is relevant to acknowledge the Commission's current stance. It should be noted that as such Recital 29 cannot introduce a binding legal obligation or interpretation. The recitals of EU legislation do not have the same legal force as the legislation's provisions and do not have independent operative effect (see: T. Klimas & J. Vaičiukaitė, *The Law of Recitals in European Community Legislation*, ILSA Journal of Int'l & Comparative Law, Vol. 15:1, 2008, p. 25). Recitals are used by the EU Courts to interpret legal provisions and as such may have a legal meaning. With regard to the EUMR, the GC has indeed applied Recital 29 in this way.

the Commission has to take into account when assessing a concentration (see Box 2.1.). This list includes the contribution to "*technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.*" In this context, the Commission has stated that ' technical and economic progress' as included in Article 2(1)(b) EUMR "*must be understood in the light of the principles enshrined in Article [101(3) TFEU], as interpreted by the case law of the Court of Justice.*"[176] The GC has endorsed this policy.[177]

Nevertheless, it has been suggested that the efficiencies eligible for consideration in merger cases are different from the efficiencies in Article 101(3) TFEU cases.[178] The suggestion goes that the former type of efficiencies is limited to 'pro-competitive efficiencies', i.e., features that increase competition. This suggestion would be correct if the SIEC test were an 'increasing rivalry test'.[179] Under an increasing rivalry test other welfare enhancing effects do not influence the outcome of the substantive appraisal. As set out above, the Commission's position is different. The GC has accepted the Commission's approach and has also considered the causes of possible price reductions to be efficiencies, and not just competition increasing effects.[180] Furthermore, the EU courts do not distinguish between 'merger efficiencies' and 'antitrust efficiencies', as they use the terms 'efficiencies' and 'efficiency gains' without apparent distinction in cartel, dominance and merger cases.[181]

So, the availability of the efficiency defence implies that the EUMR aims to protect the efficiency of market, i.e. economic welfare. It was already set out above how

[176] Commission Notes on Council Regulation (EEC) 4064/89, in: Commission's IXXth Report on Competition Policy, 1990, p. 266. See also: speech of 3 May 1990 by Commissioner Brittan, SPEECH/90/36: "*Another issue which seems to have caused concern is the inclusion of the words borrowed from Article [101(3) TFEU] "technical and economic progress" in the substantive criteria of the Merger Regulation.*" See further: contribution of the Commission in the OECD Competition Policy Roundtable Report, *The Role of Efficiency Claims in Antitrust Proceedings*, DAF/COMP(2012)23, 2012, pp. 91, 94. Whish & Bailey mention that the Commission's policy on efficiencies in the context of concentration control are clearly motivated by considerations similar to those relevant for its policy on Article 101(3) TFEU. R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 920 footnote 391.

[177] GC judgment of 6 July 2010, *Case T-342/07 Ryanair Holdings plc. v. Commission*, paras. 386-387.

[178] L. Ortiz Blanco, *Market Power in EU Antitrust Law*, Hart Publishing, 2011, pp. 76-77.

[179] This term is used by Lindsay & Berridge. They give as an example of rivalry increasing efficiencies the merger between two inefficient suppliers that are both price-followers, which creates a new company that might compete more actively post-merger. A. Lindsay & A. Berridge, *The EU Merger Regulation: Substantive Issues*, Sweet & Maxwell, 4th edn., 2012, p. 574.

[180] GC judgment of 6 July 2010, *Case T-342/07 Ryanair Holdings plc. v. Commission*, para. 435.

[181] See respectively for cartel cases the *Spanish GSK* judgment of the ECJ, for dominance cases the *Post Danmark* judgment and for merger cases the *Ryanair* judgment: ECJ judgment of 6 October 2009, *Case C-501/06 P GlaxoSmithKline Services Unlimited v. Commission (Spanish GSK-case)*, paras. 128-131; ECJ judgment of 27 March 2012, *Case C-209/10 Post Danmark A/S v. Konkurrencerådet*, paras. 41-42; GC judgment of 6 July 2010, *Case T-342/07 Ryanair Holdings plc. v. Commission*, para. 388.

competition may increase economic welfare (Section 2.1.). The merger control regime could be regarded as a set of rules parallel to the antitrust rules, which together strive for the same goals: "*(…), enforcement of competition rules – including merger control – is a vital tool for public authorities to create the best possible conditions for firms to do business and to help the economy grow.*"[182] In sum, the ultimate goal of the EUMR is not the condition of 'competition' in the sense of rivalry, but 'economic welfare'.[183]

5.2.4. The 'no obstacle to competition' condition

Arguably, the phrase that technical or economic progress may only be taken into account if it does not form 'an obstacle to competition' clarifies that in the SIEC test competition takes priority, and that therefore this is a competition-based test. However, assuming that the Council did not want to introduce a circular argument in the substantive appraisal test, 'an obstacle to competition' must be different from 'a significant impediment to competition', meaning that the former phrase refers to particular degree – i.e. a *higher* degree – of significantly impeding competition. The EU Courts have not yet clarified what exactly 'an obstacle to competition' implies.

In this book it is proposed to interpret this condition as conforming with the Commission's approach on the efficiency defence with regard to Article 102 TFEU cases. In its Guidance on Article 102 the Commission considers that efficiencies may result in certain otherwise abusive conduct escaping the prohibition of Article 102 TFEU, provided that this conduct does not completely eliminate competition, i.e., remove "*all or most existing sources of actual or potential competition.*" The reason for the need to maintain some residual competition is that "*Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains.*" As mentioned above, the Commission has a similar view with regard to Article 101(3) TFEU.

[182] Speech of 8 September 2011 by Commissioner Almunia, *Policy Objectives in Merger Control*, SPEECH/11/561

[183] Other scholars disagree: M. Wiggers, *De NMa en de NZa in de Curatieve Zorgsector*, Kluwer, 2013, p. 276. Szilágyi asserts that "*under the current interpretation of the notion of dominance by the ECJ it is not possible to justify a merger creating or strengthening a dominant position based on efficiency justification.*" P. Szilágy, *How to Give a Meaningful Interpretation to the Efficiency Defence in European Competition Law?*, CLRC Working Paper WP/2011/3, 3rd revised version of November 2011, p. 4. However, this conclusion disregards the EU Courts' acceptance that even abuses of dominant positions may be shielded from prohibition, if they produce large enough efficiencies that also benefit buyers. Hence, it is only logical, although arguably not an automatic consequence, that the creation or strengthening of a dominant position can also be allowed if the accompanying efficiencies are sufficiently large. See e.g.: ECJ judgment of 27 March 2012, *Case C-209/10 Post Danmark A/S v. Konkurrencerådet*, paras. 40-42.

5.2.5. *Economic prosperity as the goal of EU merger control: conclusion*

Above it is shown that the EUMR does not aim to block mergers that have more economic advantages for customers than disadvantages. The SIEC test, like the overall test for Article 101 TFEU, is a welfare test and not a pure market rivalry test.[184] The introduction of the efficiency defence has clarified that economic welfare increases take precedence over market rivalry reductions. Even the prerequisite that a merger may not completely eliminate competition is based on economic welfare considerations, since this condition aims to safeguard future economic welfare increases due to innovation.

5.3. The goals of EU merger control: single market imperative

It is clear from Recitals 2 and 6 of the EUMR that the EU merger control regime is meant to contribute to the creation of the single EU market.[185] It was set out above in Section 3.5.2. that it follows from the architecture of the EU Treaties that the EU antitrust rules are destined to contribute to the forming of the internal market. It is therefore sensible that the merger control regime, which is one of the three pillars of the whole EU competition law, is therefore also meant to contribute to the single market imperative. Indeed, one may consider the introduction of a centralised merger control regime which withdraws from the individual Member States the power to review mergers with a so-called community dimension[186] and which in principle prevents these states from blocking such mergers because of national interests,[187] as a measure directly contributing to the single market imperative.

Unlike the antitrust prohibitions that govern particular business conduct, the mere merging of two independent firms is not liable to frustrate the forming of the internal

[184] *Cf.* e.g. A. Lindsay & A. Berridge, *The EU Merger Regulation: Substantive Issues*, Sweet & Maxwell, 4th edn., 2012, p. 583.

[185] Recital 2 of the EUMR reads: "*For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.*" Recital 2 of the EUMR reads: "*A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. (…)*"

[186] Articles 21(2) and (3) EUMR.

[187] EU Member States may take measures to protect their legitimate interests, but – apart from three predetermined types of interests – this is only allowed if the Commission considers them to be compatible with EU law and principles; see Article 21(4) EUMR. See also Chapter 6.

market. Cartels and abusive conduct may result in maintaining or erecting trade barriers between the EU Member States, but a merger – and a possible increase in market power – as such is unlikely to affect inter-state trade. It is indeed difficult to imagine mergers that would frustrate the creation of a single market. If anything, mergers, especially cross-border mergers, are the result of the integration of the Member States' markets[188] and further the creation of the single EU market. Due to, among other things, the abolishing of trade barriers between EU Member States and the harmonisation of laws in these states, it has become easier and more attractive for firms to enter new national markets through mergers.

Relevance for this book. So, since mergers are not liable to frustrate the single market imperative, it is unlikely that in practice in merger cases, the aim to maximise economic prosperity through safeguarding market rivalry on the one hand, and on the other hand the goal of the single market imperative, will conflict. This means that for the application of the reconciliation approaches set out in Chapter 6., it is in practice not relevant whether the single market imperative is also a goal of the EUMR.[189] In any event, it is here argued – based on the Tinbergen principle set out above – that the EUMR's substantive test should only aim to further maximising economic welfare.

5.4. The goals of EU merger control: other EU public policy goals

As with regard to the EU antitrust provisions, it has been posed that the EUMR should not focus on competition or economic welfare effects only, but that it should also take into account other, non-competition EU policies. This assertion is discussed in this subsection. It should be noted, that this question regarding the multiplicity of competition law's goals is different from the question of whether competition law provides for the reconciliation of different public policy goals (this question is answered in Chapters 4. and 6.).

The drafting history of the 1989 Merger Regulation indicates that it was the Council's intention that the substantive test of the EU concentration regime would include

[188] Recital 3 EUMR; GC judgment of 25 March 1999, *Case T-102/96 Gencor Ltd v. Commission*, para 149.

[189] One could imagine a conflict between the goal of maximising economic welfare and the single market imperative, if a merger furthers the creation of the single market while reducing economic welfare. If market integration factors are relevant in the SIEC test, such mergers may then be allowed by the Commission for not failing the SIEC test. Such cases are, however, not within the scope of the of this book, as for this study the only relevant cases are those mergers that initially *fail* the EUMR test but may nevertheless be allowed due to their benefits for non-competition policies.

a bit of room for including economic non-competition effects,[190] even though the Commission denied this. There are no indications, however, that the Council still had this intention when drafting the EUMR.

The argument that the EUMR aims to achieve not only competition goals may find some support in the regulation's recitals. Recital 23 EUMR states that when the Commission assesses a concentration "*the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 [TFEU] and Article 2 [TEU].*" The GC has indeed considered once that, inspired by this recital, in certain cases the EUMR's objective of protecting competition may have to be reconciled with aim of achieving the social objectives of Article 2 TEU.[191,192] The GC has, however, not repeated this consideration in its later judgments. On the contrary, in 2010 the GC confirmed that the protection of competition is the single objective of the EUMR.[193] In addition, even other recitals of the EUMR indicate that the SIEC test must be limited to elements limiting or promoting 'competition': "(…) *this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, (…).*"[194]

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[190] L.M. Critofano, *The European Communities' Mergers & Acquisitions Regulation: Two-Year Review*, Pace Y.B. Int. L., Vol. 4, No. 1, 1992, pp. 375-376; T.J. Doleys, *The Logic of Delegation: Explaining the Evolution of EU Merger Control*, paper for ECSA 6th Biennial International Conference, 1999, p. 27.

[191] "*For that purpose it must be noted to begin with that in the scheme of [the 1989 Merger Regulation], the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty. (…). Article 2(1)(b) of [the 1989 Merger Regulation] requires the Commission to draw up an economic balance for the concentration in question, which may, in some circumstances, entail considerations of a social nature, as is confirmed by the thirteenth recital in the preamble to the regulation, which states that "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, including that of strengthening the Community' s economic and social cohesion, referred to in Article 130a.*" **GC** judgment of 27 April 1995, *Case T-12/93 Comité Central d'Entreprise de la Société Anonyme Vittel et al. v. Commission (Vittel case)*, paras. 38-39.

[192] In the Vittel judgment the GC had to apply the then applicable 1989 Merger Regulation. This regulation included a recital, i.e. Recital 13, which is equal to Recital 23 EUMR, except that the former included the phrase that the fundamental objectives of the EU Treaties include the "*strengthening of [EU]'s economic and social cohesion, referred to in Article [174 TFEU].*" It has been suggested that omitting this phrase from the new Recital 23 EUMR diminishes the room to take social policy into account in the assessment of mergers (J. Cook & Ch. Kerse, *EC Merger Control*, Sweet & Maxwell, 5th edn., 2009, p. 277), but from a legal point of view this need not be the case: the old Recital 13 affirmed that the objectives of [Article 174 TFEU] are *included* in the EU's fundamental objectives, and did not assert that the objectives of [Article 174 TFEU] are relevant *in addition to* the EU's fundamental objectives.

[193] GC order of 2 September 2010, *Case T-58/09 Schemaventotto SpA v. European Commission*, paras. 108-109.

[194] Recital 6 EUMR.

Furthermore, the Commission has not recognisably given social or other non-welfare objectives a decisive role in its decisions. Nevertheless, it is assumed by some scholars[195] that non-competition factors are considered in the appraisal of concentrations by the Commission, because the decisions regarding concentrations that are subject to a 'second phase investigation'[196] are taken jointly by all commissioners of the Commission. This may provide room for the commissioners other than the Commissioner of DG Competition to bring forward the interests of their directorates-general at the expense of 'pure' competition factors. Nevertheless, the Commission's decisions do not mention non-competition goals as decisive factors for the substantive appraisal. Indeed, the Commission considers that only competition factors and economic welfare effects are relevant: "*mergers and acquisitions will only be prohibited to the extent that they enhance the market power of companies in a manner which is likely to have adverse consequences for consumers, notably in the form of higher prices, poorer quality products, or reduced choice.*"[197] The Commission has also indicated its intention to keep political influence and non-competition considerations out of its substantive appraisals.[198] So, even if non-competition factors were to be included in the Commission's merger analyses, which is rather doubtful, this would not be openly admitted. It can therefore not be concluded that the EUMR genuinely pursues non-competition goals.

5.5. The goals of EU merger control: conclusion

It follows from the discussion above that the goal of the EUMR is to maximise economic welfare, through the blocking of mergers that dampen market rivalry and decrease economic welfare. In other words, the furtherance of economic welfare is the ultimate goal, while protecting market rivalry is a subordinate goal. This finding is equal to the conclusion with regard to EU antitrust law.

The conclusion on the goals of the EUMR is mainly based on the availability of the efficiency defence. Through the introduction and interpretation of this doctrine, the Council and the Commission have clarified that the EUMR's aim is to maintain economic welfare by blocking mergers that create or enhance market power or stifle innovation, and not to safeguard the competitive process as such.

[195] A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 1240; R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 874.

[196] See Chapter 1.5.4.

[197] Commission's Report on Competition Policy 2004, Volume 1, 2005, para. 176.

[198] Speech of 28 September 2010 by Commissioner Almunia, SPEECH/11/166, *EU Merger Control Has Come of Age: "(…) we have preserved the spirit of the original Merger Regulation throughout the years, in particular the idea that the rules on mergers must be enforced on competition principles only*." See also: speech of 4 June 2002 by Commissioner Monti, SPEECH/02/252, *Review of the EC Merger Regulation - Roadmap for the Reform Project*.

6. THE EU SIEC TEST: A NORMATIVE VIEW

6.1. Introduction

In the previous section a normative view on the goals of the EUMR was established. As with the antitrust rules, following the principle that a norm must not block activities furthering its goal, it is possible to provide a normative view on the SIEC test. This exercise is carried out in this section. The arguments for the position taken with regard to the SIEC test are very similar to those of the position taken with regard to EU antitrust law, and therefore reference is made to Section 4. Indeed, reference to this section is also made regarding the reasons why establishing the substance of the test of the EUMR is relevant for this book: establishing this substance is necessary for an adequate functioning of the some of reconciliation methods in Chapter 6.

6.2. Normative view on the SIEC test: the two-screens test

It follows from the previous section that the maximisation of economic welfare should be regarded as the ultimate goal of the SIEC test and that the single market imperative should not be considered an EUMR goal. In addition, market rivalry was shown to be a relevant but subordinate goal. So, similarly to Article 101 TFEU, the SIEC test is deemed to consist of two screens: (1) a market rivalry screen and (2) an economic welfare screen (see Section 4.2.).

However, the substantive norm of the Cartel Prohibition test cannot simply be copied to the SIEC test. There is one legal systemic difference between Article 101 TFEU and the SIEC test: Article 101 TFEU has a bifurcated structure consisting of the Cartel Prohibition and the Exemption Possibility, while the SIEC test implies a single norm without an exemption possibility. For Article 101 TFEU its bifurcated structure implies that the Cartel Prohibition's economic welfare screen filters agreements that reduce welfare in at least one of the three dimensions of economic welfare (i.e. allocative, productive and dynamic welfare), even though overall economic welfare may be increased (as the weighing of overall economic welfare takes places in the Exemption Possibility). As the SIEC test has no bifurcated structure, this implies that the economic welfare screen *does* imply an overall welfare test. For the SIEC test's welfare screen it is not sufficient to split economic welfare into different dimensions and establish whether at least one dimension is affected. The second screen just blocks all mergers that reduce economic welfare in total.

However, the difference between the bifurcated anti-cartel rule and the SIEC test probably has no implications in practice. Indeed, similarly to the exercise performed pursuant to the Exemption Possibility, the application of the efficiency defence implies a balancing of the economic welfare increases against the economic welfare decreases. Typically, the efficiency defence is used to argue that productive efficiency increases due to a merger, outbalance any allocative inefficiency. If this is indeed the case, the merger is allowed. So, similarly to the application of the Cartel Prohibition's welfare screen combined with the Exemption Possibility, the SIEC test may also be applied by establishing a welfare decrease in one dimension and subsequently determining whether a welfare increase in another dimension outweighs the aforementioned welfare decrease.

One difference might be that some unclarity exists with regard to the burden of proof for the efficiency defence, while it is perfectly clear that the burden of proof for the Exemption Possibility rests upon the party claiming the benefit of this provision.[199] However, although one might argue over whether strictly speaking the onus is on the Commission to proof the applicability of the efficiency defence[200] – according to the Commission it is not[201] – , it is in any event clear that in practice the merging parties must provide the evidence required for a successful application of the efficiency defence. This means that in practice the burden of proof for the efficiency defence is on the merging parties, just as the burden of proof for the Exemption Possibility is on the parties to the agreement.

6.3. Normative view on the SIEC test: conclusion

In this book the normative stance is taken that the substantive test of the EUMR consists of two screens: (1) a market rivalry screen and (2) an economic welfare screen. A merger has to go through both screens to be allowed: if the concentration does not limit market rivalry, it is allowed; if the merger on balance does not reduce economic welfare,[202] it is allowed. In practice the application of the SIEC test's welfare screen would be similar to the application of the welfare tests of the Cartel Prohibition and

[199] Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[200] A. Lindsay & A. Berridge, *The EU Merger Regulation: Substantive Issues*, Sweet & Maxwell, 4th edn., 2012, p. 66.

[201] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, para. 87.

[202] In this book no choice between a 'consumer welfare' test or a 'total welfare' test is made. Depending on one's choice, a reduction of economic welfare could therefore refer to a reduction of 'consumer welfare' or 'total welfare'.

the Exemption Possibility: first, a reduction of economic welfare in one dimension, usually allocative efficiency, would be established and subsequently it would be verified whether an economic welfare increase in another dimension outweighs the welfare reduction.

The single market imperative is not taken into account, which follows from the normative position that this is not a goal of the EU merger control regime (see Section 5.3.).

7. THE GOALS OF DUTCH COMPETITION LAW

7.1. Introduction

Sections 2 and 4 above discussed the goals of *EU* competition law, while in this section the goals of *Dutch* competition law are covered. Since these two regimes were created by different legislatures, there might be a difference between the goals the two regimes aim to achieve.

Like the EU Treaties, the DCA itself does not include wording on its goals. Again, one has to look elsewhere to find the goal(s) of competition law. In contrast to the EU Treaties, however, the legislative history of the DCA is extensive and easily accessible. In the Dutch legal context the legislative history of an act is an important source for judges and authorities when interpreting and applying this act. It is therefore useful to investigate the legislative history of the DCA to find its goal(s). Furthermore, in comparison with the EU Treaties' antitrust rules, there is little Dutch case law on the goals of Dutch competition law.[203] Case law is therefore of limited importance.

When establishing which goals the Dutch legislature aims to achieve through the DCA, it is relevant to consider that the substantive rules of the DCA are almost equal to the substantive rules of EU competition law. Since the introduction of the DCA, it has been the explicit intention of the legislature that DCA rules would not be more lenient or stricter than the EU competition rules. The legislature intended that application of the DCA rules would be influenced to a large extent by the judgments

[203] Some rare examples: District Court 's-Hertogenbosch, 28 March 2007, ECLI:NL:RBSHE:2007:BA2126: "*the goal of competition law, i.e. safeguarding a sound free market system* (in Dutch: *gezonde marktwerking*)."; District Court Utrecht, 25 May 2011, ECLI:NL:RBUTR:2011:BQ7388: considering that competition law's goal is that society benefits from welfare maximisation and that competition produces this by keeping prices low.

of the EU Courts and the decisions of the Commission.[204] Although in the legislative history of the DCA no statement can be found, which explicitly confirms or denies that the goals of Dutch competition law are equal to those of EU competition law, the discussion below will show that the goal of the DCA coincides with one of EU competition law's key goals, i.e., the furtherance of economic prosperity.

Unlike EU competition law, the Dutch antitrust rules and merger control regime are part of the same piece of legislation. There are also no indications that the Dutch legislature intended to achieve different goals through on the one hand the national antitrust rules and on the other hand the national merger control regime.[205] The following discussion therefore does not distinguish between the Dutch antitrust provisions and the Dutch merger control regime.

7.2. The goals of Dutch competition law: economic prosperity

Although the DCA does not mention its goals, the goals have been the subject of debates in the Dutch parliament. In the Explanatory Memorandum of the DCA it is mentioned that the DCA aims to prevent the negative economic effects of restrictions of competition.[206] This statement clarifies that the DCA cares about undesirable economic consequences and not so much about competition as such. In other words, competition is merely a means to an end. Indeed, in the debates in the Dutch parliament, the Minister of Economic Affairs has commented several times on the goals of the DCA and the Minister has explained what results the DCA aims to achieve and why, e.g.: "*In my view the competition rules are meant to prevent restriction of competition, not because competition is an end in itself, but because competition leads to efficiency, innovation, lower prices and more options for consumers. In sum, competition promotes welfare.*"[207] Other results mentioned by the Minister that may be added to the quoted results are the raising of the quality of products and the improvement of the international competitive position of the Netherlands.[208] The Minister did not indicate a hierarchy in these results, but it is clear that all these results are strived for because they mean an improvement of welfare. In addition, in the context of merger control, the Dutch legislature has mentioned that the DCA's substantive test for concentrations allows for an efficiency defence as developed

[204] Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, p. 10.
[205] *Cf.* e.g. Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, p. 31.
[206] Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, p. 9.
[207] Parliamentary article, *Kamerstukken II* 2005/06, 30071, No. 6, p. 15 [author's translation].
[208] Parliamentary article, *Kamerstukken II* 2003/04, 24707, No. 6, p. 10

by the Commission.[209] The ACM indeed follows the Commission's practice.[210] To conclude, the underlying goal of the DCA is the improvement of welfare.[211]

It is interesting to acknowledge, considering the ACM's focus on the welfare of *consumers* (in everyday language),[212] that the Minister has explicitly refused to lay down in the act that consumer interests are the ultimate goal of the DCA.[213] Although the Minister acknowledged that the DCA's benefits for consumer are very important, he considered that establishing consumer benefits as the only goal of the DCA would not do the act justice. This is a clear indication that the DCA should not be understood to exclusively serve consumers.[214] In the same statement the Minister mentioned that the DCA aimed to safeguard effective competition, since competition would result in economic efficiency and innovation. This, again, clarifies that market rivalry is merely an intermediate objective of the DCA.

To conclude, it follows from the legislative history of the DCA that the underlying goal of the DCA is the improvement of economic prosperity. This is effected by safeguarding market rivalry, which can therefore be considered an intermediate objective of the DCA.

7.3. The single market imperative and the DCA

Considering the possible goals of EU competition law, there is at least one goal that is not relevant for the DCA: the single market imperative. In contrast to EU competition law, and indeed to the wider EU project, market integration has never been a consideration for introducing competition law in the Netherlands. The Dutch

[209] Parliamentary article, *Kamerstukken II* 2005/06, 30071, No. 3, p. 21.

[210] See ACM decision of 25 March 2009, *Case No. 6424 Ziekenhuis Walcheren - Oosterscheldeziekenhuizen*. Although the ACM follows the steps of the Commission's policy in this case, it may be questioned whether the ACM's findings are correct and whether it in fact performed a mere counterfactual test instead of a genuine efficiency defence analysis.

[211] See also Parliamentary article, *Kamerstukken II* 1996/97, 24707, No. 6, p. 4: The Minister of Economic Affairs: "*I agree (…) that competition is a means to preserve and improve welfare and that it is not a goal in itself*." [author's translation]

[212] "*Increasing consumer welfare is ACM's primary goal*." ACM, *Strategy Document*, 2013, p. 2.

[213] Parliamentary article, *Kamerstukken II* 2003/04, 29276, No. 7, p. 10.

[214] However, this statement should not be understood as the rejection of a consumer surplus/welfare standard in Dutch competition law, as the Minister did not use the term 'consumer' in the technical sense, which covers all types of buyers of products (see Section 2.2.1.).

market is already an integrated one.[215] This begs the question of whether activities that are prohibited by EU competition law only because of their impairment to the single market, should also be prohibited by Dutch competition law. It is reasonable to conclude that such activities should not be prohibited by the DCA, since it would lead to an unnecessary restriction of commercial freedom of undertakings, in the sense that the act would overreach itself. For example, these activities may very well result in an increase of welfare and it would therefore be detrimental if they are prohibited for reasons (i.e. market integration) beyond the legislature's intentions. Proceeding from this stance, judgments of the EU Courts and decisions of the Commission prohibiting activities based on their impairment of the single market should not be applied analogously in exclusively national cases. A disadvantage of this approach is of course that the EU case law and decisional practice could diverge from national case law and decisions. This may affect legal certainty and is contrary to the legislature's wish that Dutch competition law stay in line with EU competition law.

As the single market imperative is not a goal of the DCA, as such it does not bring about any difficulties in applying the solution frameworks developed in this book. It may raise questions about the limits of convergence between EU and national competition law, but that is beyond the scope of this study.

7.4. The goals of Dutch competition law: other Dutch public policy goals

It has been suggested that when applying Dutch competition law the interests of non-competition policies should be taken into account.[216] However, legislative history makes clear that in general this is not the legislature's intention.[217] There is only room for taking other, non-economic interests into account to the extent these interests can be translated into economic consequences.[218] The ACM has also adopted this

[215] J.W. van de Gronden, *Doorleveringsverbod van Geneesmiddelenleverancier in Strijd met Mededingingswet*, Rechtspraak Zorgverzekering, 165, 2003, section 3.1; E.M.H. Loozen, *Uitspraak van het College van Beroep voor het bedrijfsleven in de hogere beroepen van Secon Group B.V. en Gstar International B.V., en de raad van bestuur van de Nederlandse Mededingingsautoriteit tegen de uitspraak van de Rechtbank Rotterdam, 7 december 2005 (case note)*, Markt & Mededinging, Iss. 3, 2006, p. 90.

[216] See e.g.: S. Lavrijssen, *What Role for National Competition Authorities in Protecting Non-Competition Interests after Lisbon?*, 2010, p. 25; T.R. Ottervanger, *Maatschappelijk Verantwoord Concurreren - Mededingingsrecht in een Veranderende Wereld*, Markt & Mededinging, Iss. 3, 2010, p. 96 *et seq*.; J. Mulder, *Op het Snijvalk van Onafhankelijkheid en Openheid: Wat Is de Rol van de ACM in een Duurzame Maatschappij?*, SEW, No. 12, 2014, p. 571 *et seq*.

[217] Parliamentary article, *Kamerstukken II* 2012/13, 33622, No. 7, p. 7.

[218] Parliamentary article, *Kamerstukken II* 2012/13, 33622, No. 7, p. 7; and the Policy Guidelines Competition and Sustainability of the Dutch Minister of Economic Affairs (*Beleidsregel Mededinging en Duurzaamheid*) of 8 May 2014.

approach with regard to antitrust cases, which is extensively discussed in Chapter 4.A.2.10. Furthermore, the ACM has to date not included non-welfare objectives in its substantive appraisals of mergers.[219]

7.5. The goals of Dutch competition law: conclusion

It is here asserted that the DCA's goals and accompanying hierarchy as presented in this act's legislative history should indeed be accepted as the appropriate goals of Dutch competition law: maximising economic prosperity is the ultimate goal, while market rivalry is an important intermediate objective. This normative view is based on the same considerations as those for EU competition law.

It is also sensible to equate the DCA's goals with those of EU competition law: it is the legislature's intention that the DCA's substantive rules closely follow the EU's substantive provisions and since the underlying goals are crucial for the content of the norms in competition law, it is only logical that the DCA aims to achieve the same goals as EU competition law. So, although the DCA is a national law and the Dutch legislature was free to choose substantive anti-cartel rules that deviated from the EU's competition rules when it introduced the DCA in 1998, it chose not to do so. An additional reason for an equal application of the two provisions is that creating a deviating national competition regime makes it more difficult to predict for undertakings whether their measures will be allowed, since two different cartel prohibitions would require two different analyses. As the EU and Dutch Cartel Prohibition serve the same goals, this is confusing.

8. THE DUTCH CARTEL PROHIBITION AND SIEC TEST: A NORMATIVE VIEW

The previous section set out the goals of Dutch competition law. This allows for the establishing of the substantive norms of Dutch competition law, proceeding from the assumption that a norm must not block activities that further the norm's goal(s). The

[219] It has been argued that in the *Ziekenhuis Walcheren – Oosterscheldeziekenhuizen* case the ACM let 'healthcare specific interests' prevail, while applying a pure competition-test or welfare-based test would have resulted in a prohibition of the merger of the two hospitals. E.M.H. Loozen, *ACM en NZa: Houd Je bij Je Leest!*, Tijdschrift voor Toezicht, Vol. 2, Iss. 4, 2011, pp. 42-43, 44. However, the better conclusion is that safeguarding these interests resulted in 'service quality improvements' which can be included in the SIEC test. C. Dekker & E. Belhadj, *Fusie Zeeuwse Ziekenhuizen, Een Blik op de Publieke Belangen in de Zorg Bekeken vanuit Mededingingsrechtelijk Perspectief*, Tijdschrift voor Gezondheidsrecht, Iss. 4, 2009, p. 279. See: ACM decision of 25 March 2009, *Case No. 6424 Ziekenhuis Walcheren - Oosterscheldeziekenhuizen*.

relevance of this exercise was already discussed above: the substance of the antitrust and merger control norms determines the scope of application of the reconciliation frameworks developed in this book.

Section 7.2. clarified that for both the Dutch antitrust rules and merger control regime the ultimate goal is the furtherance of economic prosperity, while the safeguarding of market rivalry is an important subordinate goal. The single market imperative is clearly not a goal of the DCA. So, the goals of Dutch competition law are similar to those of EU competition law (in accordance with the normative view). Therefore, for the substantive tests of the Dutch antitrust and merger control norms reference is made to the corresponding sections on the EU norms; i.e., Section 4.2. for the Cartel Prohibition and Section 6.2. for the SIEC test.

9. THE GOALS OF COMPETITION LAW: CONCLUSION

This chapter's focus was on the goals of EU and Dutch competition law. It started out with an explanation of the rationale of competition law. Economic theory substantiates that competition allows for an optimal allocation of resources to the production of goods and services. Competition also forces undertakings to operate cost efficiently, because firms with prices that are too high due to unnecessarily high production costs, are outcompeted by more cost efficient undertakings. Finally, it was explained that competition can spur innovation and that innovation increases society's material wealth, although it was also recognised that competition does not always increase innovation. These three summarised arguments form the rationale for safeguarding and promoting market rivalry: competition increases economic prosperity.

Based on the EEC Treaty's *travaux préparatoires*, the Commission's policy and the ECJ's case law, it was concluded that the furtherance of economic wealth is a goal of EU competition law. Furthermore, the theory of economic welfare arguably can demonstrate that maximising economic welfare means that economic wealth is maximised. However, it would be a too limited view to consider EU competition law only as a tool to remedy market power or lower production costs. Indeed, EU competition law not only aims to prevent 'anti-competitive' prices on existing markets, but it also strives to safeguard innovation through protecting market rivalry. Innovation is commonly regarded a key driver for economic prosperity.

Indeed, in addition to maximising economic prosperity, protecting market rivalry is a goal of EU competition law. This follows from a textual interpretation of the Cartel

Prohibition and from the structure of Article 101 TFEU. It can also be substantiated by economic theory, which explains how market rivalry can create efficient markets and is deemed to be an incentive for innovation. In other words, competition can be a means to increase economic prosperity. The Commission indeed applies this means-to-an-end approach, which implies that market rivalry is subordinate to economic prosperity. The ECJ, however, seems to have set the protection of 'competition as such' on equal footing with the protection of the interests of consumers (i.e. economic wealth).

Next, it was explained that it is ineffective if the Cartel Prohibition would aim to serve both market rivalry and economic wealth equally, because in practice there are cases where market rivalry does not increase economic prosperity. Additionally, in conformity with the Tinbergen principle, from a logical perspective it is here also deemed inappropriate that one rule – e.g. the EU Cartel Prohibition – serves two goals of equal ranking. Considering the two goals, it was argued that it would be unlikely that it was the Treaties legislature's intention that economic prosperity be sacrificed for maintaining market rivalry. Therefore, the normative view of this book on the goals of EU antitrust law is that economic prosperity should take priority over market rivalry. This does not mean that protecting market rivalry is not important. On the contrary, market rivalry generally increases the efficiency of markets and it is often a key driver for innovation.

The single market imperative is unmistakably also a goal of EU competition law. It is uncertain whether this goal is currently regarded by the EU Courts and Commission as less, equally or more important than the goal of economic prosperity or market rivalry. The normative position taken in this book, however, is that the single market imperative should not function as a goal for EU antitrust law, because this goal can conflict with pursuing the goal of maximising economic prosperity. The latter is considered to be the more appropriate goal of EU antitrust law, particularly because the EU antitrust provisions are not well suited to banning actions that frustrate the single market imperative.

With a view to the Exemption Analytical Framework to be explained in Chapter 4., in this chapter a substantive test for the EU Cartel Prohibition was proposed. It was argued that although it is the EU Cartel Prohibition's ultimate goal to further economic prosperity, not every agreement resulting in an economic welfare loss should be prohibited by Article 101 TFEU: it should be necessary that this agreement limits market rivalry, too. However, a mere restriction of market rivalry is also not sufficient for a violation of the Cartel Prohibition. Consequently, it was proposed that the Cartel Prohibition's test should consist of two screens. This provision should

only prohibit agreements that (1) limit market rivalry and (2) reduce a certain dimension of economic welfare. A 'dimension of economic welfare' refers to the three components that form economic welfare, i.e. allocative efficiency, productive efficiency and dynamic efficiency.

It was found that the goal of the EUMR is to maximise economic welfare through the blocking of mergers that dampen market rivalry and decrease economic welfare. The furtherance of economic welfare is the ultimate goal of the EUMR, while protecting market rivalry is a subordinate goal. This finding is equal to the conclusion with regard to EU antitrust law. It is mainly based on an analysis of the efficiency defence. Through the introduction and interpretation of the efficiency defence doctrine, the Council and the Commission have clarified that the EUMR's aim is to maintain economic welfare by blocking mergers that create or enhance market power or stifle innovation. By doing so, they have marked protecting the competitive process as less important.

In this book the normative stance is taken that the SIEC test should consist of two screens: (1) a market rivalry screen and (2) economic welfare screen. This economic welfare screen has three dimensions: allocative efficiency, productive efficiency and dynamic efficiency. So, if a merger does not limit market rivalry, it should be allowed. Likewise, if the merger does not reduce economic welfare, it should also be allowed. If the SIEC test would be applied in this manner, the application of this test would be similar to the application of the two tests of the Cartel Prohibition and the Exemption Possibility: first, a reduction of economic welfare in one dimension and in market rivalry would have to be established, and subsequently it would have to be verified whether an economic welfare increase in another dimension outweighs the welfare reduction.

With regard to the DCA it was established that maximising economic prosperity is the ultimate goal of the DCA, while market rivalry is an important intermediate objective. It is here asserted that these goals and accompanying hierarchy as presented in this act's legislative history, should indeed be accepted as the appropriate goals of Dutch competition law. This normative view is based on the same considerations as those for EU competition law. Furthermore, it is sensible to equate the DCA's goals with the goals of EU competition law for two reasons. First, it is the Dutch legislature's intention that the DCA's substantive rules closely follow the EU's substantive provisions. In addition, since the underlying goals are crucial for the content of the norms in competition law, it is only logical that the DCA aims to achieve the same goals as EU competition law. So, although the DCA is a national law and the Dutch legislature was initially free to choose substantive anti-cartel rules that deviated from the EU's competition rules, it chose not to do so. Nevertheless, there is one EU competition law goal that is not a DCA goal: the single market imperative.

3. THE GOALS OF BANKING REGULATION

1. INTRODUCTION

1.1. Introductory remarks

This chapter identifies and describes the main goals of, and justifications for, banking regulation. The assessment is descriptive in nature, as this book does not take a normative position on which goals banking regulation should pursue.[220]

Policies with different goals and their concomitant regulations may conflict. From this chapter and Chapter 2, which set out the goals of competition law, it can be derived that the goals of banking regulation and competition law differ. It is therefore not surprising that conflicts between banking regulatory goals and competition law exist; some examples of such conflicts will be discussed in detail in the next chapters. So, this chapter is important for this book, since the identification of the goals of banking regulation substantiates the materiality of the research questions – which proceed from the assumption that conflicts may arise between on the one hand measures aimed at achieving banking regulatory goals, and competition law on the other hand.

Apart from identifying the main goals and justifications of banking regulation, this chapter also categorises these justifications: it will be explained whether they are 'Efficiency Justifications' or 'Non-economic Justifications'. Sections 2.2. and 2.3. below explain in more detail what these terms mean.

Banking regulatory goals. In this book, 'goals of banking regulation' refers to goals set by *governmental policymakers*, i.e. legislatures and supervisors, that need specific interventions in the banking markets in order to be accomplished. Such interventions in banking markets usually consist of regulations implemented by governments, but regulatory measures can also be taken by the industry players themselves, through self-regulation or rescue mergers. The goals or effects of such private measures are only relevant for this book if they equal goals or effects strived for by governmental policymakers. Indeed, this book analyses the conflicts between the goals of different governmental policies – i.e. banking and competition policies – and not the conflicts between a governmental policy and the private interests of an industry.

[220] It is not necessary for answering the study questions to develop a normative view on the goals of banking regulation. For these questions it is assumed that the public interest, like serving a banking regulatory goal, is given. When answering the question of the existence of appropriate legal reconciliation mechanisms for private measures conflicting with competition law, it suffices to determine the goal(s) of competition law.

1.2. Outline of this chapter

This chapter starts by explaining the rationales for regulating markets in general. The next section of this chapter discusses the importance of banks for today's society. Acknowledging banks' crucial functions is necessary to understand why it is often sensible to regulate banking markets, as the costs and fairness consequences of *not* intervening are deemed to be too severe.

The subsequent sections cover the different justifications for banking regulation. It is common to distinguish two types of banking regulation: prudential and business conduct regulation. Prudential regulation has a "*focus on the solidity of financial enterprises and their contribution to the stability of the financial sector.*"[221] Business conduct regulation covers the manner in which banks do business with their customers and counterparties, i.e., these rules focus "*on orderly and transparent financial market processes, integrity in relations between market parties and due care in the provision of services to clients.*"[222] In this book this standard distinction is followed: after the explanation of why 'competition' as a goal of banking regulation is not explored in this book (Section 4.), Section 5. presents various justifications for prudential regulation and Section 6. covers justifications for business conduct regulation. The regulation of payment systems is typically not included in the two mentioned types of regulation and therefore the justifications for regulating payment systems are presented in a separate section, i.e. Section 7. The conclusions of this chapter are set out in Section 8.

2. RATIONALES FOR MARKET REGULATION

2.1. Introduction

When discussing justifications for intervention in markets by governmental institutions, including regulation, it is useful to distinguish between on the one hand the economic welfare or efficiency rationales, and on the other hand social or moral rationales. The first category of justifications, i.e. the '**Efficiency Justifications**', includes rationales aiming at correcting effects that divert the market from operating completely efficiently: the remedying of market failures to increase social welfare. The second category consists of all other rationales, such as risk or income redistribution, moral or social preferences and safeguarding public values, such as honesty and fairness. In

[221] Article 1:24(1) FS Act.
[222] Article 1:25(1) FS Act.

this book this second category is dubbed '**Non-economic Justifications**'. The applied distinction is useful for analytical purposes and for a better understanding of the normative position in this book: in Chapter 4.A.2.6. it will be explained why all effects based on Efficiency Justifications are likely to fall within the scope of the First Condition of the Exemption Possibility (although not necessarily in the Second Condition's scope), while effects based on Non-economic Justifications are less likely to be included.[223]

2.2. Efficiency Justifications

It is here repeated that economic theory assumes that society's welfare is maximised if markets are fully efficient (see Chapter 2.2.). Greater welfare generally means improved well-being, all other things equal. As governments commonly strive for, among other goals, maximum well-being for their societies, correcting the effects that divert the market from being completely efficient is commonly acknowledged as a rationale for government intervention. These effects affecting efficiency are called 'market failures' in economic theory.[224] When regulation aims to correct a market failure it is based on an Efficiency Justification.

There are many different market failures in banking markets, such as market power, information issues and externalities, several of which will be discussed in more detail below. However, in general governments do not choose to remedy all market failures. Since government intervention by definition affects the unfettered functioning of markets, it may very well have negative welfare effects. So, in theory government intervention is only warranted if a costs-benefits analysis shows that on balance the welfare effect of the intervention is positive. Furthermore, for practical and/or ideological reasons not all market failures that could be remedied are in fact dealt with. Since most markets suffer from one or more market failures, addressing all these failures is unfeasible. Governments only pick and choose the market failures they want to remedy; only those failures they deem sufficiently detrimental are addressed. Since the good functioning of banks is so important for our society, governments have decided to impose a vast amount of regulation to, among other things, remedy many market failures affecting banking markets.

[223] The two terms have previously been dubbed 'Market Justifications' and 'Non-market Justifications'. M. Kneepkens, *The Scope for Exempting Anti-Competitive Self-Regulation from the Cartel Prohibition*, in: When Private Actors Contribute to Public Interests, eds. A. McCann *et al.*, Eleven International Publishing, 2014, pp. 34-35.

[224] P. Johansson, *An Introduction to Modern Welfare Economics*, Cambridge University Press, 1997, p. 60; OECD, *Glossary of Industrial Organisation Economics and Competition Law*, 2006; <http://www.oecd.org/regreform/sectors/2376087.pdf>

2.3. Non-economic Justifications

Although maximising society's welfare, and therefore economic efficiency, is an important objective for governments, other objectives are important, too. Since these objectives are based on normative or value choices, they are referred to as 'political' objectives. In theory, the list of political objectives is unlimited and variable. A government may, for example, decide that increasing the number of bank branches in rural areas is a policy objective. One may agree or disagree with this political choice, but this normative choice cannot be held to be 'incorrect' unless one substitutes one's own political views for this government's view. For this study it is not necessary, nor possible, to discuss all potential political objectives of banking regulation. Only the main political objectives set by the EU and Dutch policymakers are dealt with.

2.4. Paternalism

Policymakers sometimes see the need to protect consumers against the negative consequences of their own choices. They may then adopt paternalistic regulation.[225] The decision on whether a consumer's preference should be respected "*has nothing to do per se with the presence or absence of market failures*."[226] Disregarding a consumer's revealed preference results in paternalism.[227] In this context 'paternalism' implies that the government makes choices for a consumer, in the (perceived) interests of this consumer and regardless of the wishes of this consumer: "*Legal paternalism occurs when the law forces individuals to avoid certain risks ('hard paternalism'), or, without coercion, nudges them away from such risks ('soft paternalism'), on the grounds that otherwise they will make unwise decisions*."[228] In the context of paternalistic bank self-regulation, the government has indeed made the choices for individuals, and banks, but it has left the implementation of these choices to the industry.

[225] For a discussion on the definition of 'paternalism': P. Cartwright, *Banks, Consumers and Regulation*, Hart Publishing, 2004, p. 20.

[226] P. Johansson, *An Introduction to Modern Welfare Economics*, Cambridge University Press, 1997, p. 70.

[227] Paternalistic regulation as defined here is similar to the concept of merit and demerit goods. 'Merit goods' are products or services of which it is held, usually by the government, that buyers consume too few in the interest of society, *if the individual preferences of the buyers are followed*; in turn, 'demerit goods' are consumed too much. Consequently, public policy aimed at increasing the supply of merit goods requires the interference with individual preferences (W. Ver Eecke, *Ethical Reflections on the Financial Crisis 2007/2008 - Making Use of Smith, Musgrave and Rajan*, Springer, 2013, p. 38).

[228] A. Ogus, *The Paradoxes of Legal Paternalism and How to Resolve Them*, Legal Studies, Vol. 30, Iss. 1, 2010, p. 61.

Paternalism requires value judgments by the policymakers. These judgments can be based on Efficiency Justifications or Non-economic Justifications. An example of the former is the decision that buyers' willingness to pay for the correction of negative externalities (such as pollution or system risk) is insufficient. An example of paternalistic regulation based on a Non-economic Justification is the notion that for reasons of citizen inclusion, certain services (such as education or basic banking services) must be offered to the disadvantaged with a subsidy.

3. THE ROLE OF BANKS IN SOCIETY

3.1. Introduction

It is commonly accepted by both economists and policy makers that banks are crucial for the contemporary economy. In Europe banks play a predominant role in financing the real economy. For example, in the euro area bank loans account for around 50-70% of firms' external financing.[229] In this section the importance of banks is further substantiated by facts and figures, and it is explained which functions of banks are so crucial and why this is. There are at least two reasons why it is relevant for this study that the vital role of banks is circumstantiated:

(1) The more important banks are for society, the higher the social costs of ill-functioning banking markets. Consequently, the more likely it is that the benefits of regulating these markets or taking *ad-hoc* measures (e.g. rescue mergers) outweigh the interventions' costs.
(2) Due to the vital tasks banks perform, the dependence of consumers on banks is great and major consumers' interests are at stake. For policymakers this warrants the taking of measures for equity reasons.

[229] "*In the euro area, banks have historically played an important role in financing the real economy. Banks loans account for around 50% of firms' external financing, which is very different from the US where around 80% of firms' financing comes from capital markets (equity and debt securities). The importance of bank-based intermediation in the euro area explains the relatively large size of the euro area banking sector compared with the US - at 270% and 72% of GDP, respectively.*" Speech of 13 November 2013 by Y. Mersch (Member of the Executive Board of the ECB), *SMEs, Banking Union, and Securitisation – Exploring the Nexus*, European Investment Bank's Economics Conference 2013 "Investment and investment finance: putting Europe on a sustainable growth path".

3.2. Banks' essential tasks for society

3.2.1. Banks' essential tasks for society: introduction

The crucial role of banks is acknowledged, for example, by the Commission: "*Banks and investment firms (hereinafter institutions) provide vital services to citizens, businesses, and the economy at large (such as deposit-taking, lending, and the operation of payment systems).*"[230] The Dutch government has characterised banks as providers of important *public services* (in Dutch: *nutsfuncties*).[231] It, too, mentions the intermediation between savers and borrowers and payment services as essential services for society, in addition to banks' role in the clearing and settlement of financial instruments.[232] These statements on the key role banks play in our society do not seem exaggerated; it is indeed hard to imagine that our economies could function properly without well-functioning payment systems and a sufficient flow of credit to prospective homeowners and businesses.

These government statements are not idle talk. During the 2008 financial crisis the banking sector was severely affected and banks in many EU Member States needed government support to survive. The governments of these states took the situation very seriously: "*The European Commission's 2012 State Aid Scoreboard revealed that the volume of national support to the financial sector actually taken by banks between October 2008 and 31 December 2011 amounted to around EUR 1.6 trillion (13% of EU GDP). The bulk (67%) of that support came in the form of state guarantees on banks' wholesale funding.*"[233] Governments go to the utmost of extremes to keep the banking sector functioning.

Indeed, the Dutch government's efforts put in to secure the financial sector, especially banks, were drastic: approximately EUR 14 billion of capital was provided to financial institutions, a guarantee regulation was introduced that would cover up to EUR 200 billion of new credit provided by banks, the major bank ABN AMRO/Fortis was

[230] Commission's proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms of 6 June 2012, COM(2012) 280 final, p. 4 [underlining added].

[231] Parliamentary article, *Kamerstukken II* 2011/12, 33059, No. 3, p. 2. The Dutch banks themselves have also acknowledged that they have a social role to play – in addition to their commercial interests; see NVB, *Future-oriented Banking - Social Charter, Banking Code, Rules of Conduct*, 2014.

[232] The UK government mentions the following core functions of banks: the management of risk, taking deposits, the provision of payments services to firms and households, and the efficient allocation of credit to the real economy. UK HM Treasury's white paper, *Banking Reform: Delivering Stability and Supporting a Sustainable Economy*, 2012, p. 8.

[233] Commission Staff Working Document Accompanying the Report from the Commission on Competition Policy 2012, (COM(2013) 257 final, 2013, p. 1.

nationalised for a price of EUR 17-23 billion, ING received a specific guarantee covering 80% of a portfolio of risky US mortgages worth EUR 30 billion and the coverage of the deposit insurance scheme was increased from EUR 40.000 to EUR 100.000 per depositor per bank. The unprecedented amount of support for the banking sector shows that the government puts its money where its mouth is: since the banks are crucial for the economy, a collapse of the banking sector is to be avoided at all costs.

To better understand the social costs of an ill-functioning banking system, one may consider the adverse effects large banking crises have on a country's economy. In the scholarly literature it is suggested that such crises cause on average a decline in a country's gross domestic product of 8-9%, even though governments usually have taken measures specifically aimed at mitigating the effects of those banking crises.[234] The costs of the measures remedying banking crises are high: there are indications that the fiscal costs of such measures are on average 7-13% of a country's gross domestic product.[235] Apart from the fiscal costs, banking crises impact the growth of the real economy: taking 2008 as a reference point, the Netherlands may have had no GDP increase for eight years.[236] Clearly these costs are huge. Furthermore, it is relevant to acknowledge that large banking crises are by no means rare. In fact, a study counted 124 large banking crises in the period 1970-2007, in both so-called developed and undeveloped countries.[237] Considering the frequency and the impact of banking crises on the economy, it is only sensible that policymakers have decided to adopt regulations to prevent large banking crises. Financial policymakers around the world, including the Dutch and the EU legislature, DNB and the ECB, have therefore declared the good continuance of the provision of banking services, or in other words 'the stability of the banking sector', an objective of banking regulation.[238]

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[234] S.G. Cecchetti *et al.*, *Financial Crises and Economic Activity*, National Bureau of Economic Study, NBER Working Paper No. 15379, 2009, p. 10. The authors mention several channels and mechanisms through which a financial crisis can affect the real economy, including an increase in the interest rates for loans, a lower willingness of banks to lend and an increased risk aversion which drives up risk premiums; see p. 5.

[235] E.J. Frydl, *The Length and Cost of Banking Crises*, IMF Working Paper, 1999, p. 9.

[236] Netherlands Bureau for Economic Policy Analysis (*Centraal Planbureau*), *Centraal Economisch Plan 2014*, 2014, pp. 17, 32.

[237] L. Laeven & F. Valencia, *Systemic Banking Crises: A New Database*, IMF Working Paper, 2008, p. 5.

[238] Dutch legislature: Parliamentary article, *Kamerstukken II* 2003/04, 29708, No. 3, p. 28; EU legislature: EU Regulation 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, e.g. recitals 1 and 15; DNB: *Overview of Financial Stability*, No. 15, 2012, p. 4; ECB: *Opinion on a Proposal for a Regulation of the European Parliament and of the Council on Community Macro-Prudential Oversight of the Financial System and Establishing a European Systemic Risk Board and a Proposal for a Council Decision Entrusting the European Central Bank with Specific Tasks Concerning the Functioning of the European Systemic Risk Board*, 2009, p. 3.

But why are banks so important for society? What do they do that makes them indispensable for society? Companies that are commonly referred to as 'banks' offer a variety of services to their customers. In Europe these services generally include the offering of savings accounts, checking accounts, credit, investment advice, securities accounts, financial instruments, pension products, cash management services, financial advice, capital market services, currency exchange, etc.[239] Not all these services are, however, equally important. It is generally held that one *vital* function of banks is being an intermediary between borrowers and lenders.[240] As a working definition one may define a 'bank' as an institution whose current operations consist in granting loans to and receiving loans from the public.[241] Indeed, this is one of the two services that are usually mentioned as essential services. The other key service in which banks play a crucial role is the operating of the payment system. Both services are discussed below.

3.2.2. Banks' essential tasks for society: financial intermediation

The existence of banks is of course indisputable. But why do banks exist?[242] Why are they necessary, i.e., why do credit providers not lend directly to borrowers?

First, theoretically the existence of banks has been explained by revealing the difficulties of reallocating funds from lenders to borrowers.[243] Banks offer lenders, especially small depositors, opportunities that they would not have without banks, i.e. (1) the 'convenience of denomination' and (2) 'maturity transformation':[244]

(1) 'Convenience of denomination' refers to the possibility of a financial intermediary to group the funds of smaller depositors and to provide the collected funds as one loan to a borrower. It would be rather inconvenient if lenders had to contract a large number of small investors to compound one large loan. Similarly, it would be inconvenient for a small depositor that wants to diversify its invested savings

[239] Annex I of the EU Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 provides a good indication of the services that banks may provide.

[240] Ph.E. Strahan, *Bank Structure and Lending: What We Do and Do Not Know*, in: Handbook of Financial Intermediation and Banking, eds. A.V. Thakor & A.W.A. Boot, North Holland, 2008, p. 121.

[241] X.F. Freixas & J.-C. Rochet, *Microeconomics of Banking*, The MIT Press, 2nd ed., 2008, p. 1.

[242] This question should be understood as an academic, fundamental question about the *raison d'être* of banks, and not as question to the history of banking. On the history of banking see: N. Ferguson, *The Ascent of Money*, The Penguin Press, 2008, p. 41 *et seq*.

[243] D. Heremans, *Regulation of Banking and Financial Markets*, Encyclopedia of Law and Economics, 1999, p. 954.

[244] X.F. Freixas & J.-C. Rochet, *Microeconomics of Banking*, The MIT Press, 2nd ed., 2008, p. 4.

to contract many different lenders.[245]

(2) 'Maturity transformation' means that directly or short-term repayable funds (short maturity) are used for long term loans (long maturity). Again, this activity of a financial intermediary solves the conflicting needs of lenders, who want direct access to their deposits, and borrowers, who need liquidity for a long term.[246]

Secondly, an individual bank can act for many lenders at the same time, making the provision of loans more efficient and cheaper. A person who has a surplus of money may want to lend that money to a person who has a lack of money, provided that he receives a compensation for lending the money. Determining the conditions under which the funds can be borrowed is often problematic, since usually only the borrower has the information on the risk and return of his investment projects. As a consequence, the lender needs to spend time and incur costs to investigate the projects and the financial position of the borrower. In addition, the lender must monitor the borrower's conduct during the term of the loan to ensure that the borrower keeps his promises regarding repayment and avoids risks not agreed to. For many lenders, especially individuals with a limited amount of savings, it is not worthwhile to invest the required time and money in this screening and monitoring process. Banks are entities that take over this screening process from the lenders. Because they specialise in this screening process and can do this for many lenders at the same time, banks are able to do the screening for lower costs than the lenders.[247]

Is the intermediary role of banks really necessary to get funds from lenders to borrowers? Lenders could resort to 'alternative' means such as crowdfunding, but this usually does not solve the abovementioned problems and may therefore often not be a good alternative. Another alternative is selling loans on a market, e.g. by offering listed corporate bonds. This could be a method to take away the screening problems for lenders. Indeed, market prices might be expected to reflect the true value of the loans, as they are expected to include all available information on the creditworthiness of the borrower. However, free-rider problems exist for the gathering of information on and the monitoring of the creditworthiness of borrowers.[248] The bonds market is therefore not a panacea for all lenders' needs.

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[245] Freixas & Rochet call this latter activity 'quality transformation'. X.F. Freixas & J.-C. Rochet, *Microeconomics of Banking*, The MIT Press, 2nd ed., 2008, p. 4.

[246] X.F. Freixas & J.-C. Rochet, *Microeconomics of Banking*, The MIT Press, 2nd ed., 2008, p. 4.

[247] D. Heremans, *Regulation of Banking and Financial Markets*, Encyclopedia of Law and Economics, 1999, p. 954.

[248] S.F. Mishkin, *The Causes and Propagation of Financial Instability: Lessons for Policymakers*, 1997, pp. 57-58. <http://hpi.uw.hu/pdf/s97mishk.pdf >; D. Heremans, *Regulation of Banking and Financial Markets*, Encyclopedia of Law and Economics, 1999, p. 954.

To conclude, banks provide benefits that in practice cannot be provided to the same extent by direct transactions between lenders and borrowers.

3.2.3. *Banks' essential tasks for society: the payment system*

It was mentioned above that one of the reasons that banks are vital for the economy is that they play a crucial role in the payment system. The importance of the payment system for today's economy and society is self-evident. In most economies today, money is in practice the only means of offering consideration for goods or services, including groceries, work, real estate and health care. Without a system of exchanging sums of money between payer and payee these economies would not function at all.[249]

Payments in money can be made in two different ways: with cash or by non-cash means (e.g. giro, check, debit and credit card). In 2010, Dutch consumers used cash for about two-thirds of all point-of-sale payments, although cash only accounted for a bit more than one-third of the value of all consumer point-of-sale transaction.[250]

The most widely known non-cash payment systems are 'retail payments systems', i.e. the system that customers of banks (e.g. consumers, businesses and government institutions) use to make payments to one another. Besides retail payment systems there are also 'wholesale payment systems' or 'high value payment systems'. These systems are used by banks to make payments to each other and to make payments between central banks and individual banks. The amounts of money exchanged through these wholesale payment systems are much larger than the amounts that flow through the retail systems.[251] Disruptions in the wholesale systems therefore have a higher risk of serious consequences. However, the retail payment systems are of great significance for society, too: the consequences for society would be severe if, for example, wages could not be paid anymore.

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[249] The dependence of the economy on payment systems can be illustrated by the following observation (made with regard to the Australian economy): "*Should the interbank payment system be unavailable even for 24 hours, parts of the economy would slow down. Should it be unavailable for a whole week, significant disruption to commerce would result.*" R. Bollen, *A Review of the Regulation of Payment Facilities*, Murdoch University Electronic Journal of Law, Vol. 11, No. 3, 2004, p. 5.

[250] L. Hernandez-Hernandez et al., *Contante Betalingen Geteld "Een Studie naar het Gebruik van Contant Geld in Nederland in 2010"*, DNB study report, 2011, p. 7. In 2014 60% of all point-of-sale transactions were paid by cash; see: NVB press release of 3 September 2014: <http://www.nvb.nl/nieuws/2014/3320/meer-pin-dan-contant-over-vier-jaar.html?cookie=set>.

[251] As an indication: in 2010, the system Target2-NL, the Dutch part of one of the major EU wholesale payments systems, processed EUR 294 billion *each day*. Payments made by consumers through the retail payment system accounted for EUR 149 billion *in one year* in 2010. Sources: (1) De Nederlandsche Bank Annual Accounts 2010, p. 116; and (2) L. Hernandez-Hernandez *et al*., *Contante Betalingen Geteld "Een Studie naar het Gebruik van Contant Geld in Nederland in 2010"*, DNB study report, 2011, p. 7.

Payment systems are complex systems with several actors, including, among others, payers and payees, banks, payment instrument owners, IT companies, payment terminal manufacturers and cash transport companies. Banks are among the key players in a payment system. In wholesale payment systems, they are the predominant payers and payees. For the non-cash retail payment systems, banks facilitate transactions between payers and payees, as most checking accounts are held with banks. They are crucial because currently banks are involved in nearly all retail non-cash payments and the distribution of bank notes and coins. That does not mean that non-bank actors are not important, and in the Netherlands these non-banks parties are subject to DNB's and AFM's regulatory regimes for the payment system, too.[252]

3.2.4. Banks' essential tasks for society: conclusion

It follows from the previous sections that banks play an indispensible intermediary role between lenders and borrowers. Since the flow from lenders to borrowers is essential for the functioning of the economy, banks are crucial for society. Another reason why they are crucial for society is because of their roles in the payment systems.

If the banking sector should fail and not perform these two crucial roles anymore, the social costs would be expected to be enormous. As a consequence, governments consider it highly important that the banking sector functions well and that banks perform their key roles. Unfortunately, there are several market failures that endanger the ability of banks to function well, and therefore regulation is adopted to remedy these imperfections. In addition, banks may, in an unregulated environment, not sufficiently maintain the social or ethical goals of the government and therefore regulation is adopted to ensure that these goals are achieved. This is further discussed in the below sections.

4. COMPETITION AS A GOAL OF BANKING REGULATION

Before further exploring the goals of prudential and business conduct regulation, a brief consideration of effective competition as a goal for banking regulation is appropriate for two reasons. First, in a thorough assessment of banking regulatory goals, competition as a goal should not be overlooked. Secondly, it is necessary to explain why this goal is of little relevance for this book and that the discussion of this goal will be limited to this section.

[252] DNB report, *Oversight op Betalings- en Effectenverkeer 2013*, 2014, p. 4; DNB magazine, *Focus op Betalingsverkeer*, 2008, pp. 18-19. <http://www.dnb.nl/binaries/Focus1_tcm46-210338.pdf>

On a high level, banking regulation may for convenience sake be divided into two categories based on the nature of the rules' goals: economic regulation aimed at improving the efficiency of markets (i.e. the solution of market failures), and non-economic regulation aimed at other objectives, such as solidarity, human rights and fairness.[253] Since competition generally increases the efficiency of markets, it is sensible that 'economic banking regulation' would also strive for more competitive banking markets. This is indeed the case. Examples of economic banking regulation to foster competition between financial institutions are: an EU regulation on interchange fees for card-based payment transactions,[254] an EU directive on mortgage credit (the Mortgage Credit Directive)[255] and an EU directive on payment services (PSD2).[256] Furthermore, in the UK the financial supervisor Financial Conduct Authority (**FCA**) has a specific duty to promote competition.[257]

Policy makers clearly regard competitive banking markets as important.[258] As the examples mentioned above show, they do not just rely on competition law to foster competitive markets. Although they may both aim to further competition, competition law and sector-specific regulation may bring about different effects. There are several differences between generic competition law and sector-specific regulation.[259] One

[253] Prosser identifies three substantive rationales for regulation (and one process rationale): (1) economic efficiency and consumer choice, (2) the protection of rights and (3) social solidarity. Here, the first rationale is dubbed 'economic' and the latter two are grouped together as 'non-economic'. T. Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy*, Oxford University Press, 2010, pp. 11-18.

[254] One way in which this directive promotes competition is the introduction of a maximum level for the multilateral interchange fees applied in payment card schemes, so that the upward pressure on these fees, flowing from rivalry between such schemes, is halted. EU Regulation 2015/751/EU of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (e.g. recitals 10, 12).

[255] One way in which this directive promotes competition is the introduction of a right of early repayment of a mortgage loan, so that consumers can switch more easily.

[256] One way in which this directive promotes competition, is to require that participants of payment settlement systems that grant access to certain payment service providers also offer such access to other payment service providers, which fosters competition between these service providers. EU Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, recital 51.

[257] "*We [the FCA] have a competition objective to promote effective competition in the interests of consumers in the markets we regulate. We also have a competition duty to promote effective competition when addressing our consumer protection or market integrity objectives. What the competition duty means is that we must look to achieve our desired outcomes using solutions that promote competition regardless of which objective we are pursuing.*" FCA publication, *The FCA's Approach to Advancing its Objectives*, 2013, p. 36.

[258] See e.g.: Commission, *Green Paper on Retail Financial Services*, COM(2015) 630 final, 2015, pp. 8-10; Parliamentary article, *Kamerstukken II* 2003/04, 29708, No. 3, p. 4; Letter of the Dutch Minister of Finance regarding the Cabinet's view on the Dutch banking sector of 23 August 2013, FM/2013/1511M, pp. 15-16.

[259] See e.g. A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 53; P. Larouche, *Competition Law and Regulation in European Telecommunications*, Hart Publishing, 2000, pp. 401-402.

key difference is that competition law merely prohibits the lessening of existing competition, while sector-specific regulation may include measures that force undertakings to increase competition in the market. As an example, competition law cannot force banks to agree upon an easy and effective switching service for consumers wanting to change bank accounts, which would facilitate competition, but banking regulation – i.e. the Payment Account Directive[260] – *is* capable of doing this. It is therefore sensible that sector-specific regulation is applied if competition law cannot bring about the desired results, provided that governmental intervention is warranted in general (see Section 2.2.).

For the purpose of this book it is relevant to identify banking regulatory goals that differ from competition law's goals. Although the substance of the competition law rules and the rules of banking regulation promoting competition differ, the goals of these two types of laws do not. Both types aim to increase economic prosperity through the force of competition. So, effective competition as a goal of banking regulation need not be further discussed in this book.

5. GOALS OF PRUDENTIAL REGULATION

5.1. Goals of prudential regulation: introduction

This section covers the rationales for regulating the soundness of banks; the next two subsections cover the rationales behind this so-called 'prudential regulation.'

One objective of banking regulation is to prevent the failure of banks. Although the EU legislature[261] and the Dutch legislature[262] have time and again stated that regulation will not be able to completely rule out each and every bank failure, they have long since adopted regulations aimed at minimising the chance of such failures. There is nowadays also a considerable amount of EU legislation to this effect; much of the (former) Dutch legislation aiming to prevent the failure of individual banks is now replaced by or based on EU legislation.

[260] See: Articles 9-14 of the Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

[261] See e.g. recital 6 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms.

[262] See e.g. Parliamentary article, *Kamerstukken II* 2003/04, 29708, No. 3, p. 29.

From the legislatures' point of view the prevention of the failure of an individual bank is deemed important for two main reasons: (1) to further the stability of the financial sector and (2) to protect the banks' clients:

(1) The first reason constitutes the reduction of systemic risk. The idea is that regulating the soundness of individual banks can reduce systemic risk, because the collapse of a part or the whole of the financial sector can be initiated by the failure of an individual bank and therefore preventing individual banks from failing contributes to minimising the risk of the collapse of the complete system. A further discussion on this topic is included in Section 5.3.
(2) The second reason, i.e. the protection of a bank's customers against the consequences of its failure has several justifications, and these are discussed below.

5.2. Goals of prudential regulation: preventing the failure of individual banks

5.2.1. Efficiency Justification: remedying banks' inherent instability and higher chances of failure

This section covers the rationales for preventing *individual* banks from failing, i.e., the rationales for micro-prudential regulation – in contrast to systemic risk regulation. In this context it is relevant to acknowledge the assumed difference between a bank failure and a non-bank failure: that the *chance* that a bank fails – without regulation – is generally higher than the chance of failure of a non-bank business. Indeed, as intermediaries between depositors and borrowers, banks are organised in a different way than other types of firms: there is a time asymmetry between a bank's assets and its liabilities, since the deposits may generally be withdrawn on demand, while provided credit is only repaid at certain pre-fixed points in time. Consequently, if a sufficiently large number of deposits are withdrawn at once, i.e. a 'bank run' occurs, a bank may face a liquidity shortage. It will then not be able to repay all withdrawing depositors. Indeed, a bank cannot immediately accelerate payment of all outstanding loan agreements. One may regard the queues of money-withdrawing depositors in front of the branches of the UK bank Northern Rock in September 2007 as an example of a recent bank run.[263]

It is relevant to acknowledge that illiquid banks may be perfectly solvent, i.e. their liabilities may be sufficiently covered by assets; the Dutch DSB Bank failed due to a

[263] It has been argued that this run was only the result of existing financial difficulties that at some point in time became publicly known – hence, the run itself did not cause Northern Rock's failure. H.S. Shin, *Reflections on Northern Rock: The Bank Run that Heralded the Global Financial Crisis*, Journal of Economic Perspectives, 2009, Vol. 23, No. 1, p. 102.

bank run while in fact solvent (see Box 3.1. below). However, as long as a bank faces a time asymmetry between its assets and liabilities, it will be exposed to bank runs.

Box 3.1. The failure of DSB Bank

An example of a bank failure due to a bank run is the failure of the Dutch retail bank DSB Bank in October 2009. DSB Bank's assets mainly consisted of mortgage loans provided to Dutch consumers. A large part of these mortgage loans were funded by loans from the ECB to DSB Bank and by funds provided by depositors. DSB Bank earned most of its profits by selling insurance (as an intermediary) that it sold together with the mortgage loans it provided. There was a lot of criticism of the way in which DSB sold this insurance; several individual and collective damage claims based on alleged mis-selling were brought against the bank.

Because of the 2008 financial crisis, DSB Bank began to struggle with its financial position and results. The fatal blow to its existence, however, came after a spokesperson of one of the foundations behind a collective damages claim publicly called upon DSB's depositors to withdraw their money, in order to cause the failure of DSB Bank. Subsequently, a bank run started. Although DSB survived this first bank run, it did not survive a second run that started after it became publicly known that DNB (unsuccessfully) requested the court to apply the official emergency arrangement (in Dutch: *noodregeling*) to DSB Bank, because of the bank's financial troubles following the first bank run.

The figures of the withdrawn funds show that DSB Bank was indeed the victim of a genuine bank run: in the days after the claims foundation's call to start a bank run and on the morning that the request for the application of the official emergency arrangement became publicly known, the average amount withdrawn per client was four times as high as usual (i.e. EUR 20,000 instead of 5,000).[264] On 12 October 2009 DSB Bank became officially illiquid: it could no longer comply with all requests to repay deposits held by it.[265]

[264] Report of the investigation committee on the failure of DSB, *Rapport van de Commissie van Onderzoek DSB Bank*, 2010, p. 210.

[265] Report of the investigation committee on the failure of DSB, *Rapport van de Commissie van Onderzoek DSB Bank*, 2010, p. 210.

The DSB Bank story is just one example of how a bank run can bring down a solvent bank. DSB Bank's failure did not, however, have a domino effect: no other banks were seriously affected. In that respect the judgments of the Dutch Ministry of Finance and DNB were correct: they decided not to rescue DSB because they were not convinced that this small retail bank was a systemically relevant bank.[266]

A panic bank run on a solvent bank exposes a market failure (i.e. a negative externality): the depositors withdrawing their money do not take into account the costs of their actions for other depositors. Furthermore, a bank run on a solvent bank shows that information asymmetry (i.e. another market failure) exists: the depositors apparently do not have the information that the bank is sound and that there is no need to withdraw their funds. Yet another market failure (i.e. a 'coordination problem') may arise: depositors start withdrawing their funds just because they fear others will do so, too.[267]
Governmental policymakers acknowledge the instability of banks due to the time asymmetry between obligations and assets, and they have developed several regulatory tools to remedy the causes of this instability:

(1) Deposit guarantee schemes (**DGS**) are arrangements that provide insurance for depositors: they ensure that depositors are compensated, usually up to a certain amount, if their bank fails.[268] Consequently, the need for depositors to withdraw their funds when they fear their bank becomes insolvent is greatly reduced – as long as the amount of their deposits is less than the maximum insured amount. Governmental regulation often compels banks to join a DGS and such schemes are often subject to governmental supervision, but the membership can also be voluntary. In addition, the DGSs can be of a self-regulatory nature.[269]
(2) A Lender of Last Resort (**LOLR**) facility ensures that a bank that has a liquidity problem can receive funds from a governmental institution to comply with its obligations. Usually the LOLR is the central bank; in the eurozone the national

[266] Report of the investigation committee on the failure of DSB, *Rapport van de Commissie van Onderzoek DSB Bank,* 2010, pp. 207, 218.

[267] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 15.

[268] A DGS serves other purposes, too, and has therefore also other justifications; see Section 5.2.2.

[269] E.g., in Germany there are two non-compulsory, self-regulatory DGSs that provide additional insurance for private and public sector banks respectively, on top of the statutory DGS. In addition, in the past DGSs were non-compulsory and self-regulatory in Italy. See: Financial Stability Board, *Thematic Review on Deposit Insurance Systems*, 2012, pp. 15, 19.

central banks operate as LOLRs, while the ECB monitors any LOLR action.[270] Typically the LOLR facility is only available for solvent banks with liquidity problems. This facility can therefore ensure that banks that are fundamentally sound do not become victims of the inherent mismatch between their assets and obligations maturities. DNB functioned as a LOLR for DSB Bank after the first bank run caused by the public call of a claims foundation to DSB's depositors to withdraw their funds (see Box 3.1. above).[271] In Box 3.2. below, the provision of an LOLR facility is illustrated through a description of the Northern Rock case.

Box 3.2. The LOLR support for Northern Rock

A recent example of LOLR support is the liquidity support that the Bank of England provided to the UK bank Northern Rock in September 2007. In the UK, the Bank of England acts as the LOLR. The decision to provide an LOLR loan must be authorised by the UK's Treasury, which takes a decision after having received the Bank of England's and the Financial Supervision Authority's opinions.[272]

Northern Rock was a bank that was primarily active in the national market for retail mortgage loans. To fund these loans it depended heavily on funds available on the interbank financial markets. Due to the 2008 financial crisis these markets dried up and consequently Northern Rock faced serious liquidity problems.[273]

The UK authorities were worried about Northern Rock's financial difficulties, since they considered that a failure of Northern Rock could significantly affect financial stability.[274] Consequently, they decided that emergency liquidity support, in the form of a LOLR loan, was warranted. Northern Rock received a first tranche of support of GBP 13-14 billion[275] at a penalty interest rate of 1.5 percentage points above the usual rate.[276] More liquidity support and other support measures

[270] See: procedures underlying the Governing Council's role pursuant to Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank with regard to the provision of ELA to individual credit institutions: <http://www.ecb.europa.eu/pub/pdf/other/201402_elaprocedures.en.pdf?e716d1d560392b10142724f50c6bf66a>.

[271] Report of the investigation committee on the failure of DSB, *Rapport van de Commissie van Onderzoek DSB Bank*, 2010, p. 65.

[272] Memorandum of Understanding between HM Treasury, the Bank of England and the Financial Services Authority, paras. 13-14. See: <http://www.bankofengland.co.uk/financialstability/Documents/mou.pdf>.

[273] H.S. Shin, *Reflections on Northern Rock: The Bank Run that Heralded the Global Financial Crisis,* Journal of Economic Perspectives, 2009, Vol. 23, No. 1, p. 102.

[274] Letter of the Bank of England to the Chancellor of the Exchequer (UK Treasury) of 13 September 2007.

[275] UK House of Commons Treasury Committee, *The Run on the Rock,* Fifth Report of Session 2007–08, 2008, Vol. I, para. 333.

[276] D.T. Llewellyn, *The Northern Rock Crisis: a Multi-dimensional Problem Waiting to Happen,* 2008, p. 4.

were provided later, but this did not suffice. In February 2008 the UK government announced that it would nationalise Northern Rock,[277] and subsequently the bank was restructured and sold to Virgin Money.[278]

The regulation addressing banks' inherent instability is based on *Efficiency Justifications*, because it aims to remedy – or neutralise – the abovementioned market failures (negative externalities, information asymmetry and the coordination problem).

5.2.2. *Non-economic Justification: protecting bank customers from grave consequences of bank failures*

Another justification for prudential regulation aimed at preventing an individual bank from failing is that such a failure has severe consequences for the bank's customers. This concern is therefore of a more limited scope than the systemic risk concern mentioned above: the focus is only on the bank's clients and not in general on all parties benefiting from the banking system – such as other banks, other banks' clients and society as a whole.[279] Due to the focus on the survival of a single bank, this justification can also be distinguished from the justification flowing from the importance for society of the banking system as a whole, i.e. the underlying argument for governments to intervene in the banking markets discussed above. Indeed, unless contagion effects materialise, the failure of an individual bank will not stop the remaining banks from functioning, and consequently the banking sector can continue to play its crucial role for the real economy. The goal of preventing the customers of an individual bank being harmed by its failure is therefore a separate justification for regulation.

The protection of individual bank customers was once the reason to introduce prudential regulation in the Netherlands.[280] With the introduction of the Act on the Supervision

[277] Statement of 17 February 2008 by UK Chancellor Mr. Darling.

[278] Statement of 17 November 2011 by UK Chancellor Mr. Osborne.

[279] From this perspective it is not relevant whether the failure of the bank could start a systemic crisis. Consequently, it is not important whether a bank is 'too big to fail' or 'too interconnected to fail'; the clients of each bank deserve the additional protection regulation aims to provide.

[280] In the Netherlands the statutory regulation of the soundness of banks began in 1952. Before that time it was deemed unnecessary to introduce statutory supervision of the soundness of banks. Even during the legislative process of the Bank Act of 1948, an act governing among other things the organisation and tasks of DNB, the legislature considered that the prevailing supervision based on a gentlemen's agreement between DNB and the banks was functioning well. The main reason for this private supervision was that the banks were DNB's debtors and therefore DNB had to supervise their creditworthiness. The legislature decided to continue this system and only included a safety valve provision in case this contractual supervision were terminated or proved to be insufficient. See: Parliamentary article, *Kamerstukken II* 1946/47, 488, No. 5, p. 12.

of the Credit System 1952,[281] the change from self-regulatory, private supervision to governmental supervision was made. In the Explanatory Memorandum of this act it is mentioned that due to the vast amounts of money that are entrusted to the banks, the prevention of bank failures is of great importance to society.[282] In a similar vein, the legislature considered that a bank failure could completely ruin many people.[283]

These considerations for regulating banks are still relevant for present-day regulation. For example, in the new EU directive on deposit guarantee schemes it is stated that the "*[t]he key task of a DGS is to protect depositors against the consequences of the insolvency of a credit institution.*"[284] Recently, the Dutch legislature has introduced legislation to strengthen the positions of derivatives investors through automatic (i.e. statutory) segregation of derivative positions from the assets of banks and other investment firms.[285] This segregation of these positions safeguards the investors' assets in the event of the failure of a bank and is an example of legislation protecting specifically bank customers/investors; such protection is not available for customers of other businesses.

Regulation reducing the chance that banks fail benefits all the bank's clients, consumers and professional customers alike. Indeed, the Dutch Minister of Finance has explicitly stated that not just the so-called 'retail' banking services are vital for the economy, but also, among others, corporate services such as the provision of funds to SMEs, cash management services and the support for the international payments.[286] This indicates that not just *consumers* deserve protection. So, with regard to the objective of at least some regulation aimed at preventing bank failures, no distinction between the types of customers is made. Therefore, this type of regulation is not considered '*consumer* protection' (see Section 6.2. below).

[281] This act introduced the statutory supervision of banks' soundness and it explicitly provided DNB with the statutory task to maintain and further the solvency and liquidity of banks.

[282] Parliamentary article, *Kamerstukken II* 1950/51, 2149, No. 3, p. 6.

[283] Parliamentary article, *Kamerstukken II* 1951/52, 2149, No. 34A, p. 14. The reason why the Dutch legislature deemed it justified that bank customers receive enhanced protection, i.e. more protection than customers of other businesses, is rather unclear. It appears that one reason to distinguish between customers of banks and customers of non-banks is the assumption that many depositors have entrusted a large part of their wealth to a bank and that therefore a failure of this bank has too grave consequences. Indeed, this is a difference between banks and non-banks: the liabilities of a bank vis-à-vis its depositors comprise of an enormous amount of funds, while the liabilities of non-banks vis-à-vis their lenders are usually not as extensive.

[284] Recital 14 of EU directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

[285] This was to be effected through an amendment of the Dutch Securities Giro Transactions Act (*Wet op het giraal effectenverkeer*). The EU directive MiFID, as well as the new MIFID II, aims to achieve a similar result. See: Article 13(7) of Directive 2004/39/EC of the European Parliament and of The Council of 21 April 2004 on markets in financial instruments (**MiFID**); Article 16(8) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (**MiFID II**).

[286] Parliamentary article, *Kamerstukken II* 2010/11, 31980, No. 51, p. 2.

It follows from the very introduction of specific regulation to protect banks' customers from bank failures that policymakers regard the interests of bank customers as different from, and probably more important than, the interests of customers of other businesses.[287] It can be questioned why bank customers deserve more protection than customers of other businesses. One may even question whether regulation is needed to protect a bank's clients from the consequences of its failure: if the consequences of a failure are that grave, clients would probably highly value a bank's soundness. Consequently, banks that are solid are likely to attract more customers. There is therefore an incentive for banks to maintain their soundness on a voluntary basis, which removes the need for regulation.[288] The abovementioned argument dismissing the need for banking regulation is, however, not followed by governmental policymakers as the abundance of rules to protect customers from bank failures shows.

This abovementioned aim of protecting bank customers from the severe consequences of a bank failure does not constitute the correcting of a market failure. This aim is a *Non-economic Justification* – namely the conviction that bank customers deserve more protection against failures than the customers of non-banks.

5.2.3. Conclusion on prudential regulation regarding individual bank failures

There are several justifications for prudential regulation aimed at preventing individual banks from failing, both market and Non-economic Justifications. The Efficiency Justifications include the aim to remedy market failures such as negative externalities, information asymmetry and the coordination problem. Reconciliation of these regulatory measures based on Efficiency Justifications with competition law may be an option, since competition law also aims to correct a market failure, and therefore a legitimate conclusion could be drawn with regard to the desirability of allowing this regulatory measure or not; this is further explained in Chapter 4.A.2.6.

[287] As mentioned above, this type of regulation and its underlying objective should be distinguished from regulation destined to further the stability of the banking sector. This latter regulation aims to protect the whole financial system and its customers from the consequences of the failure of one bank, while the former is motivated by protecting only the customers of this institution.

[288] This argument is made by Benston and Kaufman. See: G.J. Benston & G.G. Kaufman, *The Appropriate Role of Bank Regulation*, The Economic Journal, Vol. 106, 1996, p. 691. As the discrepancy between directly withdrawable funds and long term outstanding loans still exists for solid banks, too, bank runs may continue to occur (see Section 5.3.3.). This argument does, therefore, not remove the rationale for regulation. In addition, it is questionable whether customers can assess whether a bank is solid. In other words, information issues remain present – see Section 6.2.3.

At least one Non-economic Justification is also relevant: policymakers want to protect bank customers from the severe consequences of a bank failure. In Chapter 4.A.2.6. it is explained why measures based on Non-economic Justifications can often not be reconciled with competition law.

5.3. Goals of prudential regulation: mitigating systemic risk

5.3.1. Introduction to systemic risk regulation

The previous section discussed certain rationales for regulating the soundness of banks, with a focus on individual banks. There is, however, another category of prudential regulation and this second category focuses on the banking system as a whole. Certain characteristics of banks and the banking markets make the banking sector as a whole especially vulnerable to system-wide impairments. Certain regulation therefore seeks to remedy the effects of these characteristics and this may be referred to as 'systemic risk regulation'.

There are different views on what kind of risk constitutes 'systemic risk'.[289] Examples of descriptions used, are: (1) the risk that (financial) problems of one financial undertaking spread to other parties operating on financial markets,[290] (2) the risk that problems arise for one or more financial institutions, which endangers the functioning of the financial system as a whole,[291] (3) the risk that the inability of one participant to meet its obligations in a system will cause other participants to be unable to meet their obligations when they become due, potentially with spillover effects (e.g. significant liquidity or credit problems) threatening the stability of or confidence in the financial system[292] and (4) the risk of a large triggering event that may propagate through the financial sector by contagion or a chain reaction, which may cause a financial disruption that will severely affect the whole economy.[293] Although the various definitions encircle more or less the same concept, they do not cover exactly the same instances. For example, some sources stipulate that systemic risk involves some kind of contagion or domino effect, while others merely require that one cause affects a substantial part of the financial system.

[289] A. Sibert, *Systemic Risk and the ESRB*, Note of the European Parliament Directorate general for internal policies, 2009, p. 2; S.L. Schwarcz, *Systemic Risk*, Georgetown Law Journal, Vol. 97, 2008, p. 196; IMF, *Global Financial Stability Report, Responding to the Financial Crisis and Measuring Systemic Risks*, 2009, p. 113.

[290] Parliamentary article, *Kamerstukken II* 2003/04, 29708, No. 3, p. 29.

[291] DNB report, *Kwartaalbericht Maart 2004*, 2004, p. 70.

[292] ECB Glossary: <http://www.ecb.eu/home/glossary/html/glosss.en.html>.

[293] J.B. Taylor, *Defining Systemic Risk Operationally*, 2009, p. 2.

For this study it is not necessary to settle on a tight definition of systemic risk: a working definition that allows for a discussion of the objectives and rationales of systemic risk regulation suffices. In this study the definition of systemic risk in the ESRB regulation is adopted, which defines systemic risk as the risk of disruption in the financial system with the potential to have serious negative consequences for (the internal market and) the real economy.[294]

Not every bank failure implies a systemic risk, not all banks are systemically relevant. A bank is only systemically important if its failure may disrupt the financial system and may have serious negative consequences for the real economy. Whether this is the case will primarily depend on the bank itself, e.g. on its size and role in the financial system. However, a small bank may also become systemically important, e.g., if its failure would be the tipping point for the start of a severe confidence crisis and subsequent disruption of the financial system. In any event, it is relevant to acknowledge that, contrary to the prudential regulation discussed in the previous section, systemic risk regulation does not aim to prevent the failure of *all* banks.

As already mentioned, the Dutch government and DNB decided that the failure of the small DSB Bank in 2009 would not jeopardise the Dutch financial system and therefore they did not take all measures necessary to save this bank (see Box 3.1. above).[295] In contrast, in 2013 the Dutch government and DNB decided that the bigger SNS Bank had to be saved due to the severe consequences its failure could have for the other Dutch banks and the financial system.[296]

5.3.2. *Systemic risk regulation: based on an Efficiency Justification*

The rationale for systemic risk regulation is that systemic risk causes a market failure: systemic risk can be considered a negative externality.[297] The externality effect follows from the fact that the failure of one bank may incur costs on society that are not taken into account

[294] Article 2(c) of Regulation No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

[295] Report of the investigation committee on the failure of DSB, *Rapport van de Commissie van Onderzoek DSB Bank*, 2010, p. 218.

[296] The severe consequences were the result of (1) the extensive call upon the deposit guarantee scheme, which implied high costs and affected capital buffers for the remaining banks, (2) the decrease of confidence in the soundness of the other Dutch banks, which would raise their and the Dutch state's funding costs and (3) the great problems for society because of the blocking of one million retail bank accounts. See: letter of 1 February 2013 by the Minister of Finance, FM/2013/211M, p. 6.

[297] Financial Stability Board, *Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations*, 2009, p. 6; J. Bikker & R. Mosch, *Banken tussen Vrijheid en Regelgeving*, ESB, 93(4543S), 2008, p. 36; K. Boonzaaijer *et al.*, *Systeemrelevantie Beperkt Relevant*, Actualiteiten Mededingingsrecht, Iss. 8, 2009, p. 181.

when the bank determines its risk profile, since the bank, or its owners, does not bear these costs. Indeed, the choice of a bank's risk profile will be determined by the expected return and accompanying risk of the projects in which the bank may engage itself. If this bank only takes into account the risks it bears itself, it may be induced to engage in riskier projects than it would if the risks to society were to be incorporated in the expected return, too.[298] To conclude, regulation aimed at curbing systemic risks is based on an Efficiency Justification.

5.3.3. Systemic risk regulation: the causes of systemic risk

A systemic crisis may develop if one bank's failure leads to the failure of other banks, i.e. the contagion effect, and subsequently to an impairment of the real economy.[299] Economic theory has identified (at least) three ways by which the contagion effect can materialise: (1) through bank runs, (2) via interbank relationships and (3) through an economy-wide decrease in the value of banks' assets. This latter situation may also endanger the banking sector without any contagion effect.

Bank runs. In Section 5.2.1. above it was explained what a 'bank run' is. A bank run can initiate a wave of other runs if it becomes known that the first bank has failed because of its poor assets and the depositors of other banks therefore start doubting the quality of the assets that their own banks hold. These depositors may then conclude that it is better to withdraw their funds from these other banks.[300]A bank run at a single bank may also cause other bank runs if depositors of other banks merely *believe* that their fellow depositors will start withdrawing their funds from these other banks – regardless of the genuine quality of these banks' assets – and these depositors of other banks therefore want to take precautions.[301]

It was set out above that certain regulation may aim to prevent bank runs from happening. Establishing a DGS is an example. Paradoxically, a DGS can also *increase* systemic risk. If the DGS consists of an ex-post financed fund that must be paid up by the surviving banks,

[298] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 13.

[299] Although during the 2008 financial crisis several governmental policies and decisions were unhesitatingly adopted to prevent the contagion effect from materialising, some scholars doubt whether the contagion risk in practice is as large as often thought. See e.g. M. Mink & J. de Haan, *Spillovers from Systemic Bank Defaults*, 2014.

[300] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 15.

[301] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 15.

these payment obligations of the banks to the fund may be so large that they endanger the financial position of these other banks. This was apparently the case when the Dutch SNS Bank was about to fail: one of the reasons the Dutch state did not let this bank fail was the concern that the financial stability of the banking sector would be affected if the surviving banks had to pre-finance the payment of the guaranteed deposits and if the sector would keep a significant unrecoverable claim on the estate of the SNS Bank.[302]

Interbank relations. In addition, contagion may be effected by the relation between a failing bank and other banks. Below two types of such linkages are discussed.

The first type of contagion effect of interbank relations is the exposure a lending bank has due to outstanding loans to a failing bank. If a troubled bank cannot repay its loans provided by another bank, this latter bank may run into troubles itself. Whether such a linkage with a failed bank will cause severe problems for the lending bank depends of course on the impact of the failed loan on the lending bank's assets portfolio.[303] A similar contagion effect follows from the 'financial risk' in payment systems. This financial risk includes 'credit risk' and 'liquidity risk',[304] and implies, briefly put, that an institution does not have the means to comply with its payment obligation.

Contagion through interbank linkages may materialise through yet another channel: contracts between banks and other financial institutions constituting financial products such as share repurchase agreements and derivatives trades.[305] These complex financial products are agreements that usually cover transactions in financial instruments or provide some kind of insurance against interest rate fluctuations or the default of entities or financial instruments (these latter instruments are called 'credit default swaps').

[302] The DGS guaranteed a total amount of EUR 35 billion deposited with SNS Bank. First, DNB would provide this money to the depositors and subsequently the banks would have to pay DNB EUR 5,8 billion each year until the total amount was paid. It was expected that the banks would have to face a bad debt of EUR 5,3 billion. See: Decree of the Minister of Finance of 1 February 2013, *Regarding the Expropriation of Securities and Capital Components of SNS Reaal NV And SNS Bank NV in Connection with the Stability of the Financial System, and to Take Immediate Measures with regard to SNS REAAL NV*, para. 34.

[303] R. Iyer & J. Peydró, *Interbank Contagion at Work: Evidence from a Natural Experiment*, ECB Working Paper Series No. 1147, 2010, p. 7.

[304] 'Liquidity risk' is the risk that an institution cannot meet its payment obligations due to a lack of available liquidity; the payment could be made later, however. 'Credit risk' is the risk that an institution will never be able to comply with its payment obligation. See: BIS Committee on Payment and settlement systems, *Core Principles For Systemically Important Payment Systems*, 2001, pp. 80, 82. The failure to comply with a payment obligation by one bank may affect the soundness of other banks in the event these banks are creditors of the failed bank. E.g., if a merchant's bank has accepted a payment by a customer and credited the merchant's account before it received the funds from the customer's bank, the merchant's bank may incur a loss if the customer's bank fails.

[305] DNB, *Systeemrisico en Besmettingskanalen: de Interbancaire Markt*, Kwartaalbericht Maart 2004, 2004, p. 71.

Just like interbank lending, a bank that is party to such a contract faces the risk that its counterparty will not be able to comply with its obligations, which subsequently endangers the bank.[306] The US financial firm AIG was indeed pushed to failure during the 2008 financial crisis due to its massive sales of credit default swaps with regard to financial instruments that lost a lot of their values during the crisis; see Box 3.3. below.

Box 3.3. The collapse of AIG

Before its downfall, American International Group, Inc. (**AIG**) was the largest insurer in the US. Operating worldwide, it made more than 6 USD billion in profits in 2007 and its shares were worth more than USD 95 billion (on 31 December 2007).[307] During the 2008 financial crisis it faced a sudden liquidity shortage and it had to be rescued by the US government. The downfall of this financial giant was mainly caused by its massive credit default swap (**CDS**) activities.[308]

The CDS that were sold by AIG mainly covered so-called 'asset backed securities', i.e., securities that pay yields based on the principal and interest payments of a collection of many, e.g., corporate or mortgage loans.[309] AIG was to pay the CDS buyers a fee or compensation if a predetermined default event were to affect the asset backed securities; in return, these CDS buyers paid AIG an insurance fee. AIG predominantly operated as a *seller* of CDS; it did not hedge its positions by also buying CDS. Of course, the insurance provided by AIG would be worthless if AIG were to go bankrupt. To address this credit risk, the CDS buyers required AIG to post collateral (such as cash or high quality government bonds) with them.
In the course of 2007 it appeared that many US subprime mortgage loans defaulted and consequently the value of securities backed by these loans decreased. As a result, the value of the insurance provided by AIG for these securities – through its CDS – increased. Certain CDS buyers therefore required AIG to post more collateral: an additional USD 4.5 billion in the beginning of September 2008, and

[306] Another channel through which linkages via credit default swaps contracts can lead to contagion are 'fire sales' of securities used as collateral, which could cause a disrupting decline in the price of these securities. See D. Duffie *et al*, *Policy Perspectives on OTC Derivatives Market Infrastructure*, Federal Reserve Bank of New York Staff Report No. 424, 2010, p. 5.

[307] W.K. Sjostrom Jr., *The AIG Bailout,* 66 Wash. & Lee L. Rev. 943, 2009, pp. 944, 946.

[308] National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* 2011, p. 352.

[309] W.K. Sjostrom Jr., *The AIG Bailout,* 2009, 66 Wash. & Lee L. Rev. 943, p. 955. In essence, the sale of 'asset backed securities' implies that the payments of many individual loan takers are pooled together and distributed over the securities that are offered by the loans pool, so that the payments are passed through in tranches to the buyers of these securities.

probably they would have demanded many more billions soon thereafter.[310] On Friday 12 September 2008 it was estimated that AIG could survive for only one more week without an additional liquidity influx. AIG could not get sufficient funds from market parties anymore, so governmental support was necessary. The US regulators had come to the conclusion that AIG was too big to fail and on Tuesday 16 September – just one day after Lehman Brothers failed – the US government provided AIG with an emergency loan. "*Without the bailout, AIG's default and collapse could have brought down its counterparties, causing cascading losses and collapses throughout the financial system.*"[311]

There were several reasons why the failure of AIG could have had a domino effect. It is relevant to acknowledge that in September 2008 the financial markets were in chaos: some months before Bear Stearns had to be saved with US government support and Lehman Brothers had just failed. In this situation it appeared to be very difficult to predict the consequences of AIG's failure. One incalculable consequence was the effect of AIG's failure on the buyers of AIG's CDS – i.e. several large international banks. For example, European banks had bought these CDS as insurance against a default of certain instruments or entities, and were allowed to hold less capital due to this insurance. If the CDS became worthless, these banks might have had to raise an additional USD 18 billion in capital.[312] Not all banks might have succeeded in raising additional capital and consequently bank failures were a real possibility.

Economy-wide decrease of assets' values. Another cause for a systemic banking crisis is a sudden, large fall in the values of the assets that many banks hold. For example, sharp declines in real estate prices have been the reason for several banking crises – indeed, this was one of the causes of the 2008 financial crisis.

[310] US National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* 2011, p. 344. The credit rating agencies warned that these collateral calls and certain other substantial financial blows could lead to a reduced credit rating for AIG – which in turn implied that AIG would have to provide another USD 15 billion in collateral and cash to its customers and investors. See: US National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* 2011, p. 344-345.

[311] National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* 2011, p. 352.

[312] National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* 2011, p. 348.

There are various ways in which a fall in asset prices could affect a bank, but the materialisation of credit risks[313] seems to be the most important.[314] Credit risks materialise through the financial problems of borrowers arising due to a decline in their wealth. As an example, the sudden fall of house prices may have the effect that mortgage holders are no longer able to repay their loans. If the number of irrecoverable loans is high, the value of a bank's assets will substantially deteriorate. As the value of the houses that served as collateral for the loans decreases, claiming the collateral may not solve the problem. Furthermore, an increase in the supply of houses because of banks cashing in the collateral may have the effect that house prices decline even further,[315] creating a downward pricing spiral. The lower prices not only backfire on the value of the assets the selling bank still holds, but also on the impaired assets *other* banks hold – which may cause a contagion effect.[316] A negative externality materialises: banks do not take into account the consequences for other banks and the stability of the banking sector when they make decisions to sell their assets in troubled times.[317]

5.3.4. Systemic risk regulatory measures

There are several ways to remedy or neutralise the market failures that bring about systemic risk. Examples of prudential regulation addressing the problem of bank runs were provided in Section 5.2.1. The consequences of interbank relations and of economy-wide decreases of asset prices are mitigated through regulation such as:

(1) Capital requirements: these ensure that banks have a minimum amount of capital available as a buffer to absorb any losses due to, among other factors, failing banks and economy-wide decreases of asset prices. These requirements

[313] Credit risks are the risks of loss caused by the failure of a borrower to comply with repayment obligations.

[314] ECB report, *Asset Prices and Banking Stability*, 2000, p. 8.

[315] ECB report, *Asset Prices and Banking Stability*, 2000, p. 9.

[316] The decrease of the assets' prices may be accelerated if the best-placed potential buyers – i.e. other banks – have financial problems themselves and have difficulties raising the funds to buy the assets on sale. This situation may lead to 'fire sales': the forced sale of assets when the expected highest bidders are in practice unable to bid, resulting in prices settling (far) below the value in best use. A. Shleifer & R. Vishny, *Fire Sales in Finance and Macroeconomics*, Journal of Economic Perspectives, Vol. 25, No, 1, Winter 2011, p. 30.

[317] J. Danielson *et al*, *An Academic Response to Basel II*, FMG Special Papers, Financial Markets Group, No. 130, 2001, p. 6.

also limit the amount of credit a bank can provide[318] and increase the value at stake for shareholders;[319] both aspects steer a bank towards less risky behaviour and may help to reduce the chance a bank will fail. Finally, capital requirements can increase the trust of depositors in the banks, which decreases the likelihood of a bank run.

(2) Assets diversification: this regulation may be justified to decrease the chance of a downward pricing spiral to occur: it limits the bank's exposure to a particular asset category.

Ad hoc state measures, such as the provision of rescue loans, the nationalisation of a bank or arranging a rescue merger, are usually also justified by preventing systemic risk to materialise (see Chapter 6.1.1.).

5.3.5. *Conclusion on systemic risk regulation*

The occurrence of a systemic crisis in the banking sector has severe consequences for society. The failure of one or a couple of banks may initiate such systemic crisis. However, when a bank assesses risky investments and the probability and effects of its failure, such a bank only considers the negative effects for itself and its investors, and not the consequences for other banks and society as a whole. This is a market failure (i.e. a negative externality) that affects the banking markets. There is therefore an Efficiency Justification for regulation addressing systemic risk.

Regulation to prevent or mitigate systemic risk is aimed at protecting the complete banking sector and therefore society as a whole. It is not meant to protect an individual, troubled bank or its customers only. This is a relevant observation for this study, since it will be explained in Chapters 4.A.3. and 6.3.3. that the successful reconciliation of measures serving banking regulatory interests and competition law may depend on whether those harmed by the anti-competitive measures – i.e. the

[318] As a bank's assets typically consist of loans, setting a minimum capital ratio limits the bank's possibility to provide credit and therefore its exposure to failing loans. Assuming that capital (C) = assets (A) minus liabilities (L) and a capital ratio of 10% of a bank's assets (C=0.1*A), then A-L=0.1*A. This equals L=0.9A. Hence, for a given amount of liabilities/deposits and a given capital ratio, the (maximum) amount of assets/loans is fixed.

[319] If a bank fails, its shareholders will lose their investment in the bank. The higher the value of the shareholders' investment in the bank, the more they have to lose if the bank fails – consequently, there is an incentive for the bank to behave more prudently the higher the shareholders' value at stake. So, the higher the shareholders' investment in a bank must be pursuant to capital requirements, the more prudently a bank will act. See for a discussion of and criticism on this argument: Th.F. Hellmann *et al.*, *Liberalization, Moral Hazard in Banking, and Prudential Regulation: Are Capital Requirements Enough?*, The American Economic Review, 2000, Vol. 90, No. 1.

bank customers – are in practice also the parties that benefit from these measures. Benefits flowing to others than the bank customers cannot be taken into account.

Although the amount of systemic risk regulation is enormous and its impact on banks is massive, unfortunately it is very difficult to establish whether *in practice* the contagion risk actually exists.[320] Some argue that this is not the case, [321] while others have found systemic risk to be a real-life phenomenon.[322] It can be concluded from the extensive amount of regulation addressing systemic risk that policymakers clearly take the better-safe-than-sorry approach: the consequences of the occurrence of a systemic crisis are so severe that they do not want to take the risk to omit systemic risk regulation and let a banking crisis materialise. This, too, is a relevant observation for this book, as it shows that genuine cost-benefit analyses cannot and need not be made with regard to much of the systemic risk regulation, since policymakers take the benefits of systemic risk regulation for granted (see also Chapter 5.4.2.).

5.4. Rationale for centralised prudential supervision

It follows from the above that bank customers should continuously monitor whether the banks and their products remain sound. The monitoring by customers is, however, not without costs for them: they need to spend time and efforts on collecting, assessing and understanding information on the banks' soundness on a more or less continuous basis.[323] The total amount of monitoring costs can be reduced if not each customer must incur these costs, but just one agency on behalf of them performs the monitoring. In addition to avoiding the duplication of costs, the transfer of the monitoring to a single agency implies that this agency can specialise in monitoring. This implies lower monitoring costs because of economies of scale.[324] Regulation concentrating the monitoring of banks is justified, since it lowers society's supervision costs.

[320] R. Iyer & J. Peydró, *Interbank Contagion at Work: Evidence from a Natural Experiment*, ECB Working Paper Series No. 1147, 2010, p. 8.

[321] Whether banks are in practice indeed vulnerable to bank runs in an unregulated environment is a matter of debate. Certain scholars argue that bank runs tend to be bank-specific instead of industry-wide and that therefore contagion through bank runs in practice does not occur. They put forward that depositors are able to distinguish between good and bad banks. See e.g. G.J. Benston & G.G. Kaufman, *The Appropriate Role of Bank Regulation*, The Economic Journal, Vol. 106, 1996, p. 692.

[322] R. Iyer & J. Peydró, *Interbank Contagion at Work: Evidence from a Natural Experiment*, ECB Working Paper Series No. 1147, 2010, pp. 9-13.

[323] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 24.

[324] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 24; J. Bikker & R. Mosch, *Banken tussen Vrijheid en Regelgeving*, ESB, 93(4543S), 2008, p. 37.

In theory, the market could provide a solution that results in economies of scale in monitoring and in avoidance of the duplication of costs. However, firms offering monitoring services in practice only render their services to professional clients and not to consumers. There is therefore, it has been argued, a need for governmental intervention to provide for monitoring on behalf of (at least) consumers, which brings forth economies of scale in monitoring and the avoidance of the duplication of costs.[325]

Concentrating the monitoring of the soundness and performance of banks at a government agency to reduce costs should be considered an Efficiency Justification, since the rationale is that it is cheaper for society to cluster the monitoring than to have more monitoring mechanisms in place. It may also be more effective, considering the investigation and penalising powers that government institutions may have.[326] Reducing the costs of this monitoring may lower the costs for consuming financial services or free resources to be spent on other goods and services.

5.5. Conclusion on the goals of prudential regulation

Prudential regulation may be divided into two categories: (1) micro-prudential regulation which concerns the soundness of individual institutions, and (2) regulation aiming to mitigate systemic risk.

Micro-prudential regulation aims to prevent individual banks from failing. Banks are inherently more unstable than other businesses, because many of their assets are not liquid (e.g. long term loans to SMEs), while many of their liabilities can be due at once and simultaneously (e.g. funds on saving accounts). The reasons why governments regulate the soundness of banks are the solution of market failures, such as negative externalities and information asymmetry, and to protect bank customers from the severe consequences of a bank failure. So, both Efficiency Justifications and Non-economic Justifications are relevant. Micro-prudential regulation may consist of the creation of a DGS to remove depositors' incentives for a bank run, and LOLR facilities to aid banks which have a short-term shortage of funds but a long-term healthy balance sheet.

[325] P. Cartwright, *Banks, Consumers and Regulation*, Hart Publishing, 2004, p. 77; speech of 4 November 1998 by H. Davies (chairman of the FSA), *Why regulate?*, Henry Thornton Lecture at City University Business School.

[326] J. Bikker & R. Mosch, *Banken tussen Vrijheid en Regelgeving*, ESB, 93(4543S), 2008, p. 37.

Systemic risk is here described as the risk of disruption in the financial system with the potential to have serious negative consequences for the real economy. There are at least three ways through which systemic risk can materialise: (1) through bank runs, (2) via interbank relationships and (3) through an economy-wide decrease in the value of banks' assets. Systemic risk is a market failure, i.e. a so-called negative externality: the costs when this risk materialises are not just borne by the bank and its owners, and those who chose to patronise it, but also by other banks and their customers. Mitigating this risk may therefore increase societal welfare. Mitigating measures involve, among others, capital requirements and assets diversification.

There is merit in concentrating the monitoring of the soundness of banks and the financial sector. Due to economies of scale prudential supervision by a single entity will be cheaper for society. In addition, a single entity can specialise and become more effective. The effectiveness will even increase if the supervisor has investigation and penalising powers.

6. GOALS OF BUSINESS CONDUCT REGULATION

6.1. Goals of business conduct regulation: introduction

The previous section discussed prudential regulation, while this section covers the goals and justifications of business conduct regulation for banks – apart from such goals relevant for the payment system as these are discussed in Section 7. This section only covers such regulation to the extent it aims to protect *consumers*, and regulation to combat crime. In practice, however, business conduct regulation also applies if services rendered are to professional parties, and it may also benefit service providers. It is here repeated that in this book the term 'consumer' refers to a user or buyer of a good or service who is an individual not acting in a business capacity. Due to, among others, less expertise, experience, buying power and available time, there are good reasons why selling to consumers warrants more regulation than selling to professionals. Consumer protection is widely considered a key objective of banking regulation, both by the EU and Dutch legislatures[327] and by scholars.[328] The main justifications are discussed below.

[327] See e.g.: Recital 13 of EU directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes; Parliamentary article, *Kamerstukken II* 2003/04, 29708, No. 3, pp. 28-29.

[328] See e.g.: D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 9; P. Cartwright, *Banks, Consumers and Regulation*, Hart Publishing, 2004.

This section also discusses financial regulations to combat crime. These regulations are, however, not purely business conduct regulations, as to some extent they also address systemic risk or relate to payment systems.[329]

6.2. Goals of business conduct regulation: consumer protection

6.2.1. Consumer protection law v. competition law

Competition law and consumer protection law are sometimes considered to pursue the same aim, i.e., the protection of 'the interests of the consumer' or 'consumer welfare'. However, the objectives and the substance of the rules of the two bodies of law only coincide to a limited extent:

- In the context of competition law the term 'consumer' is different from the term generally applied in consumer protection laws: in competition law, a 'consumer' refers to a buyer of a good or service and can therefore also be a multinational company or central government.[330]
- Competition law does not only protect the interests of a single consumer/buyer, but the economic prosperity of all buyers combined or society's prosperity (see Chapter 2.2.1.1.), whereas consumer protection law addresses the interests of *individual* consumers. Even if it is assumed that the ultimate aim of competition law is protecting consumers' welfare, there is a difference between protecting on the one hand consumers as a group (i.e. safeguarding consumer surplus), and on the other hand each individual consumer. Indeed, maintaining consumer surplus may very well imply choices that favour certain consumers over others.
- As set out in Chapter 2.2.2.1., competition law is directly aimed at remedying one type of market failure, i.e. lack of sufficient competition, through preventing the creation or abuse of market power, which includes refraining from the maximisation of productive efficiency, and through protecting dynamic efficiency via the process of market rivalry. In doing so, competition law contributes to the maximisation of (perceived) economic prosperity that the markets deliver. However, it does not address other market failures, nor is it concerned with the question of whether the markets' results are 'fair' or whether they produce the 'right' products. Consumer protection law is in part aimed at remedying market failures that harm consumers, e.g. information shortages on the market's buying

[329] This choice was made for readability purposes and does not imply a choice for categorising anti-money-laundering/combatting crime rules as prudential, business conduct or a separate type of regulation.

[330] Where competition law practitioners would usually apply the term 'consumer', this book uses the terms 'buyer' or 'customer'. In this book a 'consumer' refers to a natural person not acting in a business capacity.

side, and therefore also contributes to maximising the economic prosperity that markets deliver. In addition, this body of law is also based on fairness considerations that imply, among others, that consumers must be protected against their own preferences. This notion is based on the assumption that consumers do not always make choices that serve their self-interest, including the purchases of certain products.

6.2.2. *Paternalistic regulation*

Policymakers may consider the consumption of certain products or services to be so detrimental or beneficial, that they respectively prohibit or prescribe the consumption of these products or services. For example, AFM distinguishes between customer interests on the one hand and customer satisfaction on the other hand. A customer may be completely satisfied with obtaining a large mortgage loan that allows him to buy a nice villa, but at the same time he may have overborrowed. In the view of the AFM this mortgage loan is provided against the customer's interests and should therefore not have been provided. In this situation consumer preferences differ from the interests of the consumers as the AFM sees them.

There are various reasons why it can indeed be questioned whether a consumer's preferences are consistent with his self-interest. Study and experience show that consumers have generally difficulties with understanding the features and working of financial products, even if they are given all relevant information. Consumers suffer from so-called 'bounded rationality'; this is discussed in more detail in the next section.

In recent years the Dutch legislature and financial supervisors have become more and more aware of the bounded rationality of financial consumers. For example, they now realise that providing consumers with sufficient and comprehensible information does not necessarily result in 'wise' purchases of financial products and services. Consumers appear at times to be unable or unwilling to make the right choices based on the available information and therefore they are to be protected from making the wrong choices. This has resulted in a supervisory trend which is often referred to as 'the central focus on client interests' (in Dutch: *klantbelang centraal*). In general terms, this implies that banks must offer the consumer the services that he needs, and not necessarily those that he initially asked for. In other words, the customer's satisfaction is not decisive. More concretely, the AFM requires that banks offer products and services that are (1) cost efficient, (2) useful, (3) safe and (4) comprehensible. As a consequence, a product may, e.g., not be significantly more expensive than a suitable

alternative, it may not bear risks that the consumer cannot appreciate and it must serve a customer's 'valid needs' (in Dutch: *gefundeerde behoeften*).

The implementation of and 'fairness motive' behind the 'central focus on client interests' approach is well illustrated by the de facto compelled abolishment of a savings account product that offered a high initial interest rate that was subsequently lowered step by step. The AFM's concern with this product was that "*the benefits accrue to the attentive depositor, while the inattentive depositor, your sweet 83-year-old mother-in-law in a retirement home who only expects to receive reasonable interest, is duped.*"[331] So, regardless of the benefits this product offered to certain consumers, the AFM found the product unethical since it exploited inattentive consumers.

6.2.3. *Efficiency Justification: information issues*

A main Efficiency Justification based on a consumer protection goal is the remedying of information problems in retail banking markets. In such markets buyers usually do not have all available information about the products or services they purchase, or about the banks offering them: customers have *imperfect information*. In addition, these customers know less about the bank products than the banks that serve them: there is *information asymmetry* in the market.[332] Imperfect information and information asymmetry may lead to market outcomes with lesser economic welfare than under perfect competition. Although markets on which both buyers and sellers appreciate all available information may only exist in theory, it is widely recognised that without regulation consumers in banking markets will have insufficient information available to make fully informed choices.

These two phenomena are especially likely to be present in *retail* markets, because consumers have generally less expertise in and experience with buying bank services than professional parties have. Below two reasons for the existence of information imperfection and asymmetry are explained.

[331] Th. Kockelkoren, *Het Centraal Stellen van het Klantbelang: Waarom, Wat en Hoe?*, in: Klantbelang Centraal, eds. E. Dieben & F. 't Hart, NIBE-SVV, 2012, p. 176 [author's translation].

[332] This notion is especially true when customers are deposit holders. In certain markets, where bank customers are borrowers, the information asymmetry arises because customers are the ones that hold more valuable information than the banks. Borrowers usually know better than the banks their personal circumstances that increase the chance of failure to repay a loan. This could lead to 'adverse selection': the price for credit for good borrowers becomes too high and they may leave the market, leaving only the bad borrowers. It has been argued that banks have the incentives and possibilities to overcome this problem; regulation would then not be needed. SEO report, *Publieke Belangen en Hypotheekregulering,* 2011, p. 33.

Sufficient and adequate information provision. On the one hand, information imperfection and asymmetry may arise because in an unregulated market there may be incentives for a bank not to provide all information on its products, e.g. because full disclosure of the product's features may reveal that the product does not match the consumer's needs or that the product is not as good as a competitor's offer.[333] In the case of poor information provision by a bank, one may expect the bank's competitors to inform the consumers about the bank's inferior product, so that these consumers will ignore this bank. However, there are reasons why competitors may not do this: they may fear that the loss of trust in the inferior product may also affect the demand for their own products,[334] or they may also benefit from providing insufficient information.[335]

On the other hand, it can be argued that in an unregulated market banks will probably provide sufficient information to their customers. Indeed, banks have incentives to investigate what information their (potential) customers need and to provide this information to them, so that the likelihood increases that their products will be bought.[336] If that were the reality, no regulation would be needed to compel banks to provide sufficient information.

It depends on the strengths of these opposite incentives whether banks' information provision will be adequate. In practice, the inadequate provision of information to retail customers has been one of the reasons that two major financial mis-selling affairs took place in the Netherlands in the period 2000-2010, affecting possibly hundreds of thousands of customers and hundreds of billions of euro's in contract

[333] P. Cartwright, *Banks, Consumers and Regulation*, Hart Publishing, 2004, p. 52; G. K. Hadfield *et al.*, *Information-Based Principles for Rethinking Consumer Protection Policy*, Journal of Consumer Policy, Vol. 21, 1998, p. 153.

[334] In addition, such claims by competitors may be hard to verify in practice, since certain quality or performance features of financial products or suppliers may only be discovered after a long time. As a consequence, the lower quality of products may be concealed for many years, which makes it harder for the higher quality banks to distinguish themselves and earn a higher quality reputation. This may furthermore have the consequence that banks choose to sell inferior products, which generates short-term profits, knowing that non-performance of the product will only come to the surface in the long term. Competition may cause these opportunistic banks to drive well-behaving banks out of the market, or may induce all banks in the market to adopt a strategy of selling inferior products for short-term profits. See: D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 27.

[335] A lack of information on product features may provide the suppliers with market power. If it is difficult for consumers to compare prices, a single supplier raising its price may not lose all its customers, since not all of them will appreciate that prices of other banks are lower. This is an incentive for banks not to supply all useful information. D.W. Carlton & J.P. Perloff, *Modern Industrial Organization*, Pearson, 4th edn., 2005, p. 452.

[336] G.J. Benston, *Regulating Financial Markets: a Critique and some Proposals*, The Institute of Economic Affairs, 1998, pp. 48-49.

values.[337] Financial affairs have also occurred in other countries.[338] These real life examples suggest that without information disclosure requirements banks will not provide all the information useful for consumers to decide on the purchase of financial products and services.

There is an extensive body of legislation on the provision of information to retail bank customers. Examples of bank products covered by such EU laws, which are mostly transposed into Dutch legislation through incorporation in the FS Act, are payment accounts,[339] consumer credit,[340] mortgage loans,[341] investment advice and portfolio management[342] and investment products.[343]

The disclosure of information to consumers can also be effected through self-regulatory measures. For example, the Dutch Code of conduct for mortgage loans includes various information disclosure requirements (see Chapter 5.2.).

Consumers' ability to understand information. Even if banks disclosed all the information they possess themselves, the information asymmetry would unlikely disappear. It has been argued that financial products are technically complex and that even if consumers receive detailed information they are *unable or unconcerned to understand* this information. Indeed, study shows that the knowledge of consumers

[337] One financial mis-selling affair is the so-called 'share lease affair' (in Dutch: *aandelenlease-affaire*), flowing from the sale of products that in essence implied the purchase of shares with borrowed money. Approximately 700,000 share lease contracts were sold and that represented a value of EUR 6.5 billion. See: AFM, *Rapport Aandelenlease ten behoeve van de Minister van Financiën*, 2003, p. 3. The other financial mis-selling affair is the so-called 'profiteering policy affair' (in Dutch: *woekerpolisaffaire*), flowing from the sale of investment-linked insurance contracts. In 2006 approximately 7 million contracts were outstanding, representing approximately EUR 7 billion of premiums paid. See: Letter of the Minister of Finance, summarising a confidential investigation of the AFM, Parliamentary article, *Kamerstukken II* 2006/07, 29507, No. 36; AFM, *Feitenonderzoek beleggingsverzekeringen, Deel I*, 2008, p. 14.

[338] D. Llewellyn provides some examples of financial affairs in the UK. D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 43.

[339] See the PSD: EU Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, on payment services in the internal market.

[340] See the Consumer Credit Directive: EU Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008, on credit agreements for consumers.

[341] See the Mortgage Credit Directive: EU Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014, on credit agreements for consumers relating to residential immovable property.

[342] See MiFID: EU Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004, on markets in financial instruments.

[343] See e.g. the envisaged introduction of legislation regarding a Key Information Document for retail investment products: Commission press release of 1 April 2014, *Basic information for retail consumers: European Parliament and Council back Commission's proposal on a Key Information Document covering retail investments*, STATEMENT/14/94: <http://europa.eu/rapid/press-release_STATEMENT-14-94_en.htm>

about financial products is poor.[344] One reason for this poor understanding may be that consumers for some reason do not make the effort to learn about financial products. However, it is also argued that consumers lack the ability to understand these products: they suffer from 'bounded rationality'.[345,346] If consumers do not know what kind of product they need, if they don't understand the financial products on offer or if they cannot appreciate the soundness of the bank and therefore the quality of certain products, the result may be that products are being sold that are profitable for the banks but not optimally suited for consumers.[347]

Some effects of bounded rationality may be remedied by choosing the 'right' way of presenting information.[348] It is therefore important not only to establish *which* information should be provided to consumers to remedy the information asymmetry, but also *how* this information is delivered to the consumers. Rules on how information is provided may prevent banks from complying with substantive information disclosure requirements by using unnecessarily complex statements when disclosing information.[349]

Another reason why consumers have little knowledge about financial products could be that consumers find that for a certain purchase it is too costly, e.g. in terms of time, to read and compare all the available information.[350]

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[344] DNB report, *Limited Financial Literacy among Dutch Households*, Quaterly Bulletin June 2006, p. 50; Centiq, *Publieksmonitor Wijzer in Geldzaken Augustus 2009,* 2009, p. 5.

[345] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 35; P. Cartwright, *Banks, Consumers and Regulation*, Hart Publishing, 2004, p. 55.

[346] Conlisk lists a large number of examples of bounded rationality. This lists includes, among other things, the habit of individuals to: fail to appreciate the law of large number effects; make errors in updating probabilities on the basis of new information; understate the significance of given sample sizes; make false inferences about causality; ignore relevant information; use irrelevant information (as in sunk cost fallacies); exaggerate the *ex ante* probability of a random event which has already occurred; display overconfidence in judgment relative to evidence; exaggerate confirming over disconfirming evidence relative to initial beliefs. J. Conlisk, *Why Bounded Rationality?*, Journal of Economic Literature, Vol. XXXIV, 1996, p. 670. See also: Oxera, *Behavioural Economics and its Impact on Competition Policy, A Practical Assessment with Illustrative Examples from Financial Services*, 2013, pp. 12-14.

[347] SEO report, *Publieke Belangen en Hypotheekregulering,* 2011, p. 34.

[348] The AFM has given some examples of reasons for why provided information may not be understood by consumers: too complicated usage, too much non-relevant information and confusing presentation of information. AFM, *Leidraad Open Norm "Begrijpelijk/Duidelijk"*, 2007.

[349] G.K. Hadfield *et al., Information-Based Principles for Rethinking Consumer Protection Policy,* Journal of Consumer Policy, 1998, Vol. 21, p. 143.

[350] G.K. Hadfield *et al.*, *Information-Based Principles for Rethinking Consumer Protection Policy*, Journal of Consumer Policy, 1998, Vol. 21, p. 146; D.W. Carlton & J.P. Perloff, *Modern Industrial Organization*, Pearson, 4th edn., 2005, p. 443.

If it turns out that if information disclosure does not help consumers because the information is too difficult to understand or too costly to access, regulatory measures other than disclosure requirements – e.g. standardisation – could be useful to ensure that consumers get the products with the features they want. However, even this may turn out to be ineffective and consequently it may turn out that the better way to protect consumers is to just prohibit the retail sale of certain products or product features.[351] In fact this means that correcting a market failure is no longer possible and that paternalism enters the policy (see Section 2.4. above).

One way to reduce consumers' uninterestedness or inability to understand information on financial products is to enhance their expertise and clarify the importance of this information through financial education. This can be done through, e.g., voluntary private initiatives or public-private cooperations. In the Netherlands, the Dutch Banking Association has developed financial courses for, among others, secondary schools to educate pupils on how to save and spend money wisely.[352] Dutch banks also participate in the Money Wise Platform (*Platform Wijzer in Geldzaken*), a cooperation between, among others, the Dutch Ministry of Finance, the Dutch Banking Association, the AFM and DNB, the Dutch Consumers Association and the Dutch Insurers Association.[353]

6.2.4. *Efficiency Justification: uncertain performance in the long run*

To some extent the quality and performance of certain financial products, especially long-term investment products like endowment mortgages and pension provisions, cannot be established at the moment of purchase. The same applies to products of which the soundness of the bank is a product feature, such as a savings account. Only many years after the initial purchase will the performance of such products and the genuine soundness of its seller – and possible flaws – emerge. So, before purchasing such a financial product, it may be difficult for consumers to distinguish between good or bad quality products. This may provide an incentive for banks to behave opportunistically and lower the quality of the product after it has been sold.[354] Consumers acknowledging this may decide not to buy these products at all out of fear of buying a bad product. The consumers' inability to assess whether a financial

[351] G.K. Hadfield *et al.*, *Information-Based Principles for Rethinking Consumer Protection Policy*, Journal of Consumer Policy, 1998, Vol. 21, p. 159.

[352] See: <https://www.nvb.nl/contentpagina-s/1755/ik-en-geld.html>

[353] See: <http://www.wijzeringeldzaken.nl/english/programmes-and-activities.aspx>

[354] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 22.

product is good or bad may therefore lead to a decline in demand and unsatisfied consumer needs. This means that economic welfare is not maximised. Information disclosure requirements prescribing the provision of information before the purchase cannot solve this issue. Regulation aimed at preventing the lowering of the product quality after the purchase, however, may be effective to remedy this problem (for an example, see the case of the saving accounts with 'roofing tiles constructions' in Section 6.2.6. below).

6.2.5. *Non-economic Justification: protecting consumers from overindebtedness*

The following two subsections focus on Non-economic Justifications for consumer protection rules. In general, these rules are based on political views on fairness and on what role the government has in protecting individuals from adverse actions and events.

An important consumer protection measure based on Non-economic Justification issues from government's wish to prevent consumer overindebtedness. For this reason, the credit provision to consumers has been subject to regulation for decades. Indeed, the Dutch legislature introduced the Money Lenders Act (*Geldschieterswet*), which aimed to ban usury, already in 1932. The prevention of overlending has been part of financial regulation ever since. Although in more recent times information disclosure requirements have become an important tool for the prevention of abuses,[355] limiting the acceptable risk for credit providers through an interest rate maximum – which discourages the lending to individuals who are not creditworthy – remains a principal way of preventing overlending.[356]

Although regulating the provision of credit to consumers may be based on Efficiency Justifications,[357] there are also Non-economic Justifications for rules aimed at preventing overindebtedness. The negative consequences that policymakers aim to avoid by introducing such rules include consumers' loss of self-esteem and social exclusion, as well as related costs for society:

"*Overindebtedness may result in exclusion of individuals and families from society, including a loss of motivation to be engaged in income-generating activities,*

[355] Parliamentary article, *Kamerstukken II* 1986/87, 19785, No. 3, pp. 28, 56.

[356] Parliamentary article, *Kamerstukken II* 1986/87, 19785, No. 3, p. 56.

[357] Rules have Efficiency Justifications if they aim to mitigate market failures such as the limited ability of individuals to consider the future consequences of their actions and to appreciate all conditions under which credit is provided. These market failures may be remedied by, e.g., increasing consumers' expertise in credit products through financial education, or via information disclosure rules requiring clear language on the key features of a credit product (see Section 6.2.3. above).

exclusion from social activities and health problems. This is not only detrimental to the individuals and families concerned, but also to society as a whole as it suffers evident financial loss.[358]
The financial losses to society caused by overindebtedness include social security expenses, tax losses due to the overindebted individuals being unemployed, medical costs, accommodation of those evicted from their homes, low recovery rates of creditors, the loss of members who could potentially contribute to the economy and the overall well-being of society."[359]

The regulations based on Non-economic Justifications flow from the view that society must not accept these consequences for certain political reasons, e.g. because overindebtedness puts people in positions which should not exist in the society as envisioned by the policymakers (i.e. social reasons), or – in the same sense – because it would raise society's costs to elevate the overindebted from these unwanted positions (i.e. economic reasons).[360] The rules do not aim to make the market more efficient by solving market failures. Even efficient market outcomes are deemed to be unacceptable, since the social consequences and costs are held to be unwanted.[361] Indeed, it is a paternalistic stance, since the borrower's (and lender's) own wishes are disregarded and trumped by the government's position.

6.2.6. *Non-economic Justification: prohibitions instead of market regulation*

If it appears that there is no suitable solution for a market failure, the government may decide to completely 'close the market' and prohibit the sale of the product concerned. Hence, such regulation does not improve market efficiency and should therefore be considered a policy based on a Non-economic Justification. This Non-economic Justification may be the prevention of unsuitable purchases by consumers.

An example of the abovementioned situation is the AFM's policy to convince banks not to sell a particular savings product that was not, in the AFM's view, in the interest of consumers.[362] This savings product offered an interest rate that was high in the beginning,

[358] European Council, Recommendation Rec(2007)8, explanatory memorandum, 20 June 2007, para. 36.
[359] European Council, Recommendation Rec(2007)8, explanatory memorandum, 20 June 2007, para. 36, footnote 3.
[360] See e.g.: the Debt Prevention Guide (a publication co-commissioned by the Dutch Ministry of Social Affairs and Employment): N. Jungmann & F. van Iperen, *Over het Belang van Schuldpreventie en de Mogelijkheden om daar Lokaal Invulling aan te Geven*, 2011, p. 10.
[361] Parliamentary article, *Kamerstukken II* 1986/87, 19785, No. 3, p. 56.
[362] The AFM did not adopt a rule prohibiting the concerned savings product, but used informal ways to ban this product from the market. This is not relevant for the purpose of this study, since what matters is that it is an example of (self-)regulation based on a Non-economic Justification.

but later on gradually declined to a level below that of regular savings products (the so-called roofing tiles construction [*dakpanconstructie*]), without clearly informing the depositor of these interest rate reductions. The AFM considered this savings product to be against the interests of consumers, probably because it considered that too many consumers would not be able to balance the short-term benefits of high interest rates against the long-term disadvantages of low(er) interest rates. The authority persuaded the banks to no longer sell these savings products.

The mandatory provision of sufficient and clear information was apparently not sufficiently protective for consumers. The AFM's aim was not to remedy a market failure, but to 'protect' individuals from the adverse consequences of the product concerned. Indeed, well-informed consumers wanting to buy this particular savings product will not be able to do so, since the AFM has decided that it is against their interests to do so.

6.2.7. *Conclusion on consumer protection: Non-economic Justifications*

A rather significant part of banking regulation is motivated by consumer protection. Above it was set out that bank consumer protection regulatory interests can be based on Efficiency Justifications and on Non-economic Justifications. The abundance of bank consumer protection law based on Efficiency Justifications can be explained by (1) the significance of banking services for consumers and (2) the many market failures present in retail banking markets. In other words, there are a lot of problems to fix and it is likely that fixing them does more good than harm.

It is also not surprising that non-market consumer protection justifications have led to sector-specific and substantive banking regulation. Again, banking services are crucial for participating in today's society and therefore almost all citizens use these services. Furthermore, the consequences of buying bad or unsuitable products may be very severe for consumers and it is logical that policymakers try to prevent these consequences from occurring.

With regard to the rationales for remedying the market failures in retail banking markets, it is true that such flaws are present in many consumer markets.[363] Since these market failures are not unique for consumer banking markets, it has been argued that there is no need for a special regulatory regime for these markets.[364] Others disagree, e.g. by mentioning that retail financial markets are different because they are subject to *so many* market failures.[365] This makes it more likely that the economic costs of regulation are outweighed by its economic benefits. (Of course, Non-economic Justifications may also be a reason why retail banking markets are heavily regulated, while other consumer markets are not.) This is a relevant observation, especially for Chapter 4.A. where the balancing of anti-competitive effects and economic benefits of self-regulation is considered, since the higher the economic benefits of mitigating market failures, the greater the chance that they outweigh the adverse effects of anti-competitive self-regulation.

6.3. Goals of business conduct regulation: combatting crime

6.3.1. Non-economic Justification: discouraging and preventing criminal activities

Finally, there is a body of banking regulation aimed at combatting crimes and unacceptable political activities. This body of regulation includes anti-money-laundering rules, tackling terrorism and sanctions against regimes that violate international law or human rights and do not observe democratic or constitutional foundations. This latter type of regulation, financial sanctions rules against 'objectionable' entities, aims to cut off the availability of financial means to these entities.[366] The underlying objective is to maintain or restore international peace and security, to maintain the international legal order, or to combat terrorism.[367] Anti-money-laundering and anti-terrorism rules aim to prevent and suppress crime,

[363] Information issues are omnipresent in retail markets: a consumer only seldom buys a new washing machine or double glazing, which precludes the understanding of such products by experience, and cars and computers are complex products, which make it difficult for consumers to apprehend these goods. Furthermore, long run reliability and credibility are issues in other markets, too: for car repair and house maintenance services it is difficult to ascertain whether the problem was solved in the long run, while the long-term value of further or continuing education may also be hard to establish.

[364] G.J. Benston, *Regulating Financial Markets: a Critique and some Proposals*, The Institute of Economic Affairs, 1998, p. 66.

[365] D. Llewellyn, *The Economic Rationale for Financial Regulation*, FSA Occasional Papers in Financial Regulation, Vol. 1, 1999, p. 39; Oxera, *Behavioural Economics and its Impact on Competition Policy, A Practical Assessment with Illustrative Examples from Financial Services*, 2013, p. 15.

[366] Regulation of the AFM and DNB of 28 September 2005 providing for the compliance by financial institutions with the rules regarding financial transactions imposed by or under the Sanctions Act 1977 (*Regeling toezicht Sanctiewet 1977*), p. 5.

[367] Article 2 of the Dutch Sanctions Act 1977.

including terrorism. Preventing criminals from having financial resources available or enjoying the fruits of their illegal activities is considered an effective way of fighting crime.[368] Undoubtedly, these goals can be considered Non-economic Justifications – they do not aim to remedy market failures.

6.3.2. *Efficiency Justification: enhancing the stability of the banking sector*

However, the regulations on money laundering and terrorism are also Efficiency Justifications[369] – as well as Non-economic Justifications. Policymakers regard money laundering and the use of banks by criminals to constitute a risk to the stability of the financial system. For instance, the BIS has considered that "*public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association by banks with criminals. In addition, banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals.*"[370] More specifically, the involvement of banks with criwme and criminals, intentional or not, may create reputational, operational, legal and concentration risks.[371]

6.3.3. *Conclusion on combatting crime*

Certain banking regulatory interests are based on crime prevention and anti-terrorism policies, as well as on the international sanctions regime. Although these interests primarily reflect non-market considerations, to a certain extent they can be based on Efficiency Justifications, too.

6.4. Goals of business conduct regulation: conclusion

This section discussed the rationales behind business conduct regulation and rules to combat crime. Business conduct regulation generally regulates banks' activities directly vis-à-vis their customers, but this section only covered business conduct regulation to protect consumers.

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[368] *Leidraad Wet ter voorkoming van witwassen en financieren van terrorisme (WWFT) en Sanctiewet (SW)*, p. 2; Memorandum Integriteit Financiële sector en terrorismebestrijding, Parliamentary article, *Kamerstukken II* 2001/02, 28106, No. 2, p. 2.

[369] See e.g.: J. Bikker & R. Mosch, *Banken tussen Vrijheid en Regelgeving*, ESB, 93(4543S), 2008, p. 37.

[370] BIS, *Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering*, 1998, para. 4.

[371] BIS Basel Committee on Banking Supervision, *Customer Due Diligence for Banks*, 2001, p. 3.

Consumers usually lack sufficient experience with and expertise in financial products and their effects. Furthermore, it appears that consumers are often uninterested in gathering and understanding information on financial products or lack the ability to understand this information. As a result, several market failures may be present in retail banking markets. Since the consequences of malfunctioning retail banking markets can be severe, governments have introduced consumer protection rules on a large scale based on Efficiency Justifications. In addition, there have been reasons of fairness to introduce financial consumer protection regulation. This type of regulation is based on particular political views on fairness and the idea that certain citizens deserve additional protection. For example, the negative social consequences of overlending are deemed to be so grave for consumers, that market intervention is warranted; this implies consumer protection regulation based on a Non-economic Justification.

This section also discussed banking regulation aimed at crime prevention, anti-terrorism and executing the international sanctions regime. These rules try, among other things, to identify criminal transactions, to deprive criminals of profits, to thwart terrorist activities and to force foreign states to comply with – simply stated – the international community's legal order. The justifications for these types of regulations are not to make the markets more efficient. These are Non-economic Justifications. Nevertheless, Efficiency Justifications, such as maintaining the stability of the financial sector, may play a certain role when policymakers introduce banking regulation to combat crime. It is thought that the (unintended) involvement of banks with criminal activities may engender, among others, reputational and legal risks for these banks.

7. GOALS OF PAYMENT SYSTEMS REGULATION

7.1. Goals of payment systems regulation: introduction

It was set out in Section 3.2.3. that payment systems play a crucial role in our society. The importance of effective payment systems is closely linked to the function of money in the economy. Societies can nowadays not do without money and consequently they cannot do without payment systems. However, besides (1) securing an effective payment system to support the economy (see Section 7.2.1. below), there are other justifications for regulating payment systems – like (2) minimising systemic risk, (3) consumer protection, (4) efficiency in payment systems (see Section 7.2.2. below) and (5) certain ethical reasons (see Section 7.3. below). The systemic risk and consumer protection justifications were discussed above;[372] below the other three justifications are discussed. The first two of these justifications, i.e., the securing of an

[372] The systemic risk caused by contagion through the payment system was mentioned in Subsection 5.3.3.; the justification for consumer protection with regard to bank services in general were discussed in Section 6.2. and are in general also applicable to payment services offered to consumers.

effective payment system to support the economy and the efficiency of payment systems, are based on Efficiency Justifications. The latter type of rationales constitute Non-economic Justifications. In this section financial inclusion and privacy protection are discussed as examples of such Non-economic Justifications.

7.2. Goals of payment system regulation: Efficiency Justifications

7.2.1. Efficiency Justification: regulating operational risk in payment systems

Due to the great importance of payment systems for society, governments highly value the undisrupted and safe operating of payment systems. To that end there is a specific body of rules for, and supervision of operational elements in payment systems. In other words, the maintenance of reliable and safe payment systems is a public interest in itself.

Operational risk is the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events.[373] Operational risk may materialise at one bank, possibly as a result of human error or technical disruption. There may, however, also be causes that affect a larger part of a payment system, e.g., a severe terrorist attack on the IT portions of the system or a major strike of the staff running crucial parts of the system.[374] Regulation to mitigate operational risk and enhance the safety of the systems so that society interests are sufficiently served coincides with the systemic risk regulation that aims to prevent contagion through payment systems. It is based on an Efficiency Justification, as it aims to effect the positive externalities that providers and customers of payment systems produce if they pay for safer systems.[375]

[373] BIS Joint Forum of the Basel Committee on Banking Supervision, *High Level Principles for Business Continuity*, 2006, p. 3.

[374] R. Bollen, *A Review of the Regulation of Payment Facilities*, Murdoch University Electronic Journal of Law, Vol. 11, No. 3, 2004, p. 6.

[375] Economic theory explains why without regulation the market may, from society's perspective, not produce sufficiently reliable and safe payment systems. A safe and reliable payment system benefits all its users and even society as a whole (e.g. through supporting the real economy). However, a particular service provider within the system – such as a bank or a payment product provider like iDeal or Mastercard – and its direct customers, only consider their own benefits in taking measures to secure the relevant service. In an unregulated environment the benefits *for society and other users* of reliable and safe systems are not relevant for the customers of a particular payment service provider and therefore they do not mean to pay for these benefits. Hence, in an unregulated market the 'amount' of safe and reliable services purchased by the direct customers is lower than the amount that would be consumed if the value for society and other users were taken into account by the direct customers. See: S.L. Schreft, *Risks of Identity Theft: Can the Market Protect the Payment System?*, Federal Reserve Bank of Kansas City Economic Review, Iss. Q IV, 2007, p. 24. See also: W. Bolt & S. Chakravorti, *Pricing in Retail Payment Systems: A Public Policy Perspective on Pricing of Payment Cards*, DNB Working paper 331, 2011, p. 3.

To ensure the good functioning of the payment systems, banks and payment service providers are required to have policies in place aimed at managing operational risks; the ESCB and DNB have as one of their tasks promoting the 'smooth operating' of payment systems.[376]

The ESCB, for example, performs its task through the establishing of among other measures, prudential and organisational rules for systemically important payment systems and the concomitant identification of such systems.[377] Furthermore, the Payment Services Directive (**PSD**) is currently the main EU law governing the provision of non-cash payment services.[378] This directive includes the organisational and prudential requirements for payment service providers (excluding banks), as well as rules governing the provision of payment services (also applicable to banks).[379] Its successor, the Payment Services Directive 2 (**PSD2**) has already been adopted and must be transposed into the Member States' national laws by 13 January 2018.[380]

Until recently, the supervision and regulation of the Dutch payment systems – also called 'oversight' – was primarily based on voluntarily concluded covenants between the DNB and the relevant parties. As of 1 January 2015 the FS Act includes a provision pursuant to which obligations with regard to an institution's operations can be imposed in the interests of the sound functioning of payment systems.[381]

In this context it is also relevant that since the attacks on the World Trade Centre in New York in September 2001, there is an increased interest, both on an international and on a national level, in the consequences of major disruptions in the payment system due to calamities such as terrorist attacks, natural disasters, pandemics or computer viruses. International institutions like the Basel Committee of the BIS[382]

[376] ESCB: Article 127(2) TFEU; DNB: Articles 3(1)(e) and 4(2) Bank Act 1998.

[377] Regulation of the European Central Bank (EU) No 795/2014 of 3 July 2014, on oversight requirements for systemically important payment systems; ECB press release of 21 August 2014, *ECB Identifies Systemically Important Payments Systems*.

[378] EU Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, on payment services in the internal market.

[379] See Titles III and IV of the PSD.

[380] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market. This directive aims, among other goals, to enhance consumer protection and create opportunities for offering new types of payment services.

[381] Article 3:17 FS Act.

[382] BIS Joint Forum of the Basel Committee on Banking Supervision, *High Level Principles for Business Continuity*, 2006.

and the ECB,[383] as well as national institutions like the DNB,[384] have issued guidance or adopted measures to ensure the business continuity of, among others, the most important payment systems.[385]

7.2.2. *Efficiency Justification: efficiency of payment systems*

The efficiency – or cost effectiveness – of payment systems is important, among other reasons because additional costs for executing transactions form a barrier to transactions and result in a lower number of transactions than the optimum number.[386] The higher the costs of paying, the less payments and transactions will occur. It is, however, not *per se* the case that payments can be executed in the most cost-effective manner. Indeed, society may benefit from a shift from cash payments to non-cash payments, such as PIN transactions, since the social costs, i.e., the sum of the internal costs for users of these payment methods, are higher for cash than for certain non-cash instruments.[387] In addition, suppliers of payment services may be able to charge prices higher than the competitive (i.e. the most efficient) level: as applicable to all markets, if suppliers of payment systems charge *competitive* prices, the consumption of payment services by users is at its most efficient level.

The market for payment systems has features that increase the likelihood that certain market failures will materialise, and these market failures affect the efficiency of the systems. So, remedying these market failures may warrant regulation. This regulation is therefore based on Efficiency Justifications.

[383] ECB, *Business Continuity Oversight Expectations for Systemically Important Payment Systems*, 2006.

[384] DNB, *Toetsingskader Business Continuity Management Financiële Kerninfrastructuur*, 2011; Platform Business Continuity Vitale Infrastructuur Financiële Sector (of which DNB is a member), *Principles for BCM Requirements for the Dutch Financial Sector and Its Providers*, 2011.

[385] The gist of these principles or rules is that the authorities identify the parties that are critical for the functioning of the major payment systems. Subsequently, these parties have to make plans for how to respond in case of a calamity, so that negative consequences of major disruption are minimised.

[386] M. Bergman *et al, Card and Cash Payments from a Social Perspective*, Sveriges Riksbank Economic Review, Iss. 2, 2008, p. 42; Maatschappelijk Overleg Betalingsverkeer, Werkgroep Kostenonderzoek Toonbankbetaalproducten, *Betalen Kost Geld, Rapport Kostenonderzoek Toonbankbetaalproducten*, 2004, p. 4.

[387] ECB, *The Social And Private Costs Of Retail Payment Instruments. A European Perspective*, Occasional Paper No 137, 2012, p. 38; Maatschappelijk Overleg Betalingsverkeer, Werkgroep Kostenonderzoek Toonbankbetaalproducten, 2004, *Betalen Kost Geld, Rapport Kostenonderzoek Toonbankbetaalproducten*, p. 2.

Some of the abovementioned market failures are:

- The so-called '*lock-in effect*',[388] which may result in inefficient systems outcompeting efficient systems.
- *High sunk investments* required to set up a payment system, making it unlikely that newcomers will enter the market and start competing with the incumbents – consequently these latter firms may be able to raise prices above the competitive level (i.e., they have market power).[389]
- *Market power* may also be the result of interoperability conflicts between different payment systems, as these conflicts may remove the competitive pressure payment systems exercise on each other. Realising interoperability through regulations may create or increase competition between the systems, which could force the prices down.
- Furthermore, it may be costly for society if different payment systems are *not interoperable* or badly connected. Even if different payment systems are offered for the price resulting from perfect competition, the lack of interoperability may imply avoidable costs for society. To resolve interoperability conflicts, intervention in the market may therefore be warranted – like the agreement between the users of the Dutch Postbank system and the Interpay system, concluded after the encouragement of the Dutch Minister of Finance; see Box 3.4. below.

Box 3.4. The road to interoperability between the two main Dutch payment systems

For a long time there were two separate retail payment systems in the Netherlands: the Postbank system and the Interpay system. Briefly put, the large retail bank Postbank ran the former system, while the other Dutch retail banks formed the latter. Each Dutch payment account was part of one of these two systems. It was possible for consumers to make a payment from a Postbank account to an 'Interpay account' and *vice versa*, but the execution of such payment took days more than

[388] The larger the number of users a payment system has, the more valuable it is for users and prospective users. An existing payment system has therefore a significant benefit over new systems, as the smaller number of users of a new payment system makes it relatively unattractive for prospective customers to start using the new system. This may have the result that new, more efficient systems will not develop, because they cannot attract sufficient users. See: DNB report, *Tariefstructuren en Infrastructuur in het Nederlandse Massale Betalingsverkeer*, 2002, p. 3.

[389] 'Sunk investments' are expenditures that cannot be recovered when the investor decides to exit the market. If high sunk investments are required, entering a market may therefore imply a high risk. This high risk may not be offset by high expected returns, especially not in the payment system market where the lock-in effect may make it difficult to steal away customers from the incumbent(s). The fact therefore that an entrant has to make high investments that are sunk before he can enter the payment system market may make it unlikely that entry occurs.

intra-system payments. Already in the mid-70s the government started to push the operators of the two systems to integrate or to improve the interoperability between the systems. However, it took more than 20 years for the operators to achieve full interoperability. It is thought that the competition between the two systems caused the long delay in achieving adequate interoperability.[390] This is plausible, since through effecting a smooth connection between the payment systems, their substitutability would increase and they would become closer competitors – which generally implies less profits *ceteris paribus*.

Nevertheless, even when the interoperability was established in theory in 1997, in practice issues remained. The execution of payments between the two systems took one day longer than the execution of intra-system payments. Such a delay in execution was deemed to be unnecessary and too inefficient, and the Dutch Minister of Finance considered that society as a whole would benefit from a better connectivity between the two systems. He subsequently made an agreement with those banks that used either of the two systems, in order to improve the interoperability between the two systems.[391]

Considering the long time it took all banks to procure smooth interoperability with pressure from the government, it is plausible that without the intervention of the government this interoperability would only have been effected much later or even not at all. This case is therefore an example of how market intervention can solve a market failure that would not have been removed through market forces alone.

Financial supervisors, including the ECB, ESCB and DNB, are given the task of promoting the 'efficiency'[392] of payment systems. For example, it follows from the EU Treaties that the ECB and EU national central banks "*may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment*

[390] Article in the Dutch newspaper NRC of 19 June 1997: <http://retro.nrc.nl/W2/Nieuws/1997/06/28/Eco/01.html>.

[391] Letter of the Minister of Finance, 16 May 2001: Parliamentary article, *Kamerstukken II* 2000/01, 27400 IXB, No. 31; Memorandum of the Minister of Finance on the market for giro payment instruments: Parliamentary article, *Kamerstukken II* 2000/01, 27863, No. 2, p. 24.

[392] The EU and Dutch legislatures have not clearly set out what exactly the procuring of 'efficient' payment systems entails. The Dutch Minister of Finance has taken rather wide view and has explained the efficiency objective by setting out three categories of efficiency: (1) efficient payment instruments, (2) uniformity in infrastructure and (3) market efficiency and competition. Parliamentary article, *Kamerstukken II* **2000/01**, 27863, No. 2, p. 12.

systems within the Union and with other countries."[393] EU actions to increase the efficiency of payment systems include the introduction of the TARGET wholesale payment system by the ESCB[394] and the development of the Single European Payment Area.[395] Examples of national initiatives to improve the efficiency of the payment systems are the agreements that the Dutch payment industry players and the relevant stakeholders make through the organisations Dutch Payments Association[396] and the Dutch Forum on the Payment System.[397] In addition, both EU and Dutch competition authorities have taken action to combat the market power of payment system operators and members.[398]

[393] Article 22 of the Protocol 4 of the TFEU on the statute of the European system of central banks and of the European central bank [underlining added].

[394] The TARGET payment system is a system used by central banks and large financial institutions to execute monetary policy transactions and interbank payments. 'TARGET' is the acronym for Trans-European Automated Real-time Gross settlement Express Transfer system and it is run by the eurozone central banks and the ECB. It was developed to support the euro as a payment means and started as platform that linked together the existing EU Member States' central bank payment systems. As of 2007 the successor system of TARGET, i.e. TARGET2, is functional. TARGET2 is a further integrated, more efficient system and functions as a single technical platform. Due to the TARGET system, cross-border euro payments, e.g., can be executed more efficiently. See, e.g.: ECB website: <http://www.ecb.europa.eu/paym/t2/html/index.en.html>

[395] The SEPA, initially a project started by the European banking industry upon the request of several EU governmental bodies, is a scheme that creates an EU-wide integrated market for electronic retail payments in euros. Briefly put, for SEPA-compliant payments it should make no difference whether an electronic retail euro payment is executed between two national accounts, or is a cross-border payment. Among other goals, SEPA was thought to increase the EU-wide competition between – and therefore the efficiency of – (national) payment systems. The EU legislature highly valued the success of SEPA and therefore it moved from providing strong support to SEPA to regulating the project. Since the progress based on the self-regulatory measures was slow, the EU legislature introduced a regulation that among other things set deadlines for the completion of the project. See, e.g.: Commission press release MEMO/11/936 of 20 December 2011, *Full SEPA (Single Euro Payments Area) Migration - Frequently Asked Questions*; Commission press release IP/10/1732 of 16 December 2010, *Single Euro Payments Area (SEPA): Commission sets deadline for pan-European payment system*.

[396] The Dutch Payments Association (*Betaalvereniging Nederland*) is the association of the Dutch payment industry, including banks. The association takes the position that a "*payment system plays an essential role in the economy, involves numerous stakeholders and is of great social importance. This gives the payment system a public utility function.*" To ensure an "*optimally effective, safe, reliable and socially efficient payment system*" it sets industry standards and develops regulatory implementation schedules. See the website of the Dutch Payments Association: <http://www.betaalvereniging.nl/en/organisation/mission-and-vision/>

[397] The National Forum on the Payment System (*Maatschappelijk Overleg Betalingsverkeer*) is an organisation of various stakeholders of the payment system: it is chaired by the DNB and its members are among others the Dutch Banking Association, the Dutch Payments Association and various organisations representing users of the payment system. The Forum's objective is to promote the efficiency of the Dutch payment system. An example of how this efficiency is enhanced is the Forum agreement that cash payments are rounded off to units of five cents, eliminating the need for and use of one- and two-eurocent coins in the Netherlands. See: <http://www.dnb.nl/en/payments/mob/index.jsp>

[398] Examples of EU and Dutch cases of the competition authorities in the payment services sector are: (1) Commission decision of 17 October 2007, *Case COMP/D1/38606 Groupement des Cartes Bancaires*, (2) Commission decision of 19 December 2007, *Case COMP/34.579 Mastercard* and (3) decision of the NMa (now: ACM) of 24 April 2004, *Case 2910-700 Interpay* (the conviction of Interpay was later withdrawn and the fines for the sanctioned banks were later reduced).

7.3. Goals of payment system regulation: Non-economic Justifications

The previous two subsections discussed Efficiency Justifications for regulating the payment systems. There are, however, also Non-economic Justifications for such regulation and these will be dealt with in this subsection.

7.3.1. Non-economic Justification: financial inclusion

The inclusion in society of more vulnerable citizens is an example of a Non-economic Justification to regulate the provision of payment services. The rationale behind this type of regulation is that it is hardly possible to participate in modern society without access to payment systems. Financial exclusion, including the lack of access to payment services, is thought to lead to *social* exclusion,[399] and the government may have as a policy to ensure or promote the access of all citizens to certain payment systems.[400] This policy is not motivated by the aim of correcting any market failure, but by the consideration that it is fair that all citizens can participate in today's economy. Recently, the EU adopted rules ensuring the access of all consumers to payment accounts.[401] In the Netherlands the access to basic banking services for consumers, including more vulnerable citizens, has been guaranteed via self-regulation already for some years.[402]

7.3.2. Non-economic Justification: privacy protection

Another Non-economic Justification for regulating the payment system is the protection of individuals' privacy. Nowadays almost all citizens have bank accounts and the payments they make and receive via these accounts reveal much about their personal lives. Consequently, banks have access to a lot of personal information. Policy makers may therefore want to introduce specific regulations for banks and other payment service providers to protect the privacy of citizens. Such regulations could, e.g., prohibit the use of the personal information for commercial purposes,

[399] See e.g. Commission report, *Financial Inclusion: Ensuring Access to a Basic Bank Account*, Consultation Document, 2008, p. 2.

[400] See e.g. Parliamentary article, *Kamerstukken II* 2000/01, 27863, No. 2, p. 12.

[401] See: Article 16 of EU Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

[402] NVB published the relevant information on the basis banking covenant (*Convenant Inzake Pakket Primaire Betaaldiensten (Basisbankdiensten))* on its website on 22 February 2012: <www.nvb.nl/publicaties/1703/convenant-inzake-pakket-primaire-betaaldiensten-basisbankdiensten.html>

even if the account holder had given his consent for that. Specific, stricter rules are then warranted by the 'social role' the payment system and banks play in society and by the fact that citizens cannot do without bank accounts.[403] So, this regulation does not aim to remedy a market failure; it constitutes a Non-economic Justification.

7.4. Goals of payment systems regulation: conclusion

Payment services and banks' activities in that context are subject to specific regulations. There are different justifications for that. Applicable *Efficiency Justifications* include minimising systemic risk and malfunctioning systems, consumer protection and promoting efficiency. This section focused on the regulations with regard to the operational risk and to the efficiency of payment systems. Governments are especially interested in these two themes, as well-functioning payment systems are crucial for society and cost-effective systems contribute to society's welfare. In addition, policymakers have *Non-economic Justifications* for regulating payment systems. Such justifications include the prevention of social exclusion through financial exclusion and the protection of citizens' privacy.

8. GOALS OF BANKING REGULATION: CONCLUSION

In this chapter the goals of banking regulation were discussed. Market regulation occurs with certain objectives, such as the mitigation of market failures or the accomplishment of fairness goals. Although regulation may be an effective means to achieve these objectives, this does not automatically mean that regulation should be introduced. As regulation also implies costs, e.g. supervision and compliance costs, and interferes with the principle of free markets, regulation is usually only introduced if its benefits are higher than its costs. This chapter therefore also assessed the importance of banks for society, so that it can be understood why governments regulate the banking sector so heavily.

Banks' significance for society. One reason why governments attach great importance to the manner in which banks operate in the first place is the significance of banks for society. This significance flows from two banking activities. First, banks operate as intermediaries between depositors and borrowers: they facilitate the provision of

[403] E.g., a member of the Dutch Second Chamber of Parliament, Mr. Nijboer, has drafted an official memo meant to let a government policy emerge which prohibits banks from using the personal data generated through payments for commercial purposes. Parliamentary article, *Kamerstukken II* 2014/15, 34033, No. 2, p. 7.

credit by those who have a surplus of money to those who are short of funds. This process is crucial for the economy and therefore for society. Secondly, banks play an indispensable role in payment systems. Payment systems, both cash and non-cash, are vital for society as they make possible the use of money for executing transactions.

If the banking sector does not adequately perform its two crucial roles, the costs for society can be expected to be huge. There are, however, various market failures that endanger the good functioning of banks. In addition, policymakers may deem that in an unregulated environment banks do not sufficiently maintain the government's social or ethical goals. To address these two concerns policymakers have introduced banking regulation on a grand scale.

When considering whether the introduction of banking regulation outweighs its costs, it is important to acknowledge the significance of banks for society: ill-functioning banks are so costly for society that the costs of regulation are often considered to be of less relevance. This is a relevant observation for this study, because for the solution frameworks developed in this book the size of economic benefits of a measure that violates competition law is an important factor.

Justifications for banking regulation. This chapter dealt with the goals of banking regulation. Identifying the rationales for banking regulation explains why policymakers have introduced, or will introduce, rules to regulate banks and their activities. The above treatise shows that there is a wide variety of justifications for banking regulation. These justifications are different from the rationales of competition law (see Chapter 2.). It can therefore be concluded that genuine conflicts between competition law and rules implementing banking policy may arise. Table 3.1. below provides an overview of the justifications for banking regulation discussed in this chapter.

In this chapter the various justifications for banking regulation were divided in two main categories: Efficiency Justifications and Non-economic Justifications. Rules based on Efficiency Justifications aim to remedy market failures. All other justifications are dubbed Non-economic Justifications. This division is significant for this book, as it will be explained in Chapter 4.A.2.6. that conflicts between competition law and rules based on Efficiency Justifications can often be solved through the options competition law currently offers. These options, however, are generally unsuited for solving conflicts between competition law and rules based on Non-economic Justifications. In Table 3.1. it is marked whether a certain banking regulatory rationale is an Efficiency or Non-economic Justification.

Table 3.1. Overview of banking regulatory rationales

Rationale	Efficiency Justification	Non-economic Justification
Prudential Regulation		
Banks' inherent instability, higher chance of failing (bank runs)	•	
Remedying systemic risk	•	
Protecting bank customers from the grave consequences of a bank failure		•
Business Conduct Regulation		
Consumer protection – Information issues	•	
Consumer protection – Uncertain future performance of banks	•	
Consumer protection – Protecting consumers from overindebtedness		•
Consumer protection – Limiting consumers' choice (ban on 'deceptive' products)		•
Combat crime – Deprivation of criminal profits; anti-terrorism; maintaining international peace		•
Combat crime – Maintain financial stability	•	
Payment System Regulation		
Operational risk	•	
Efficiency	•	
Financial inclusion		•
Protection of privacy		•

4. RECONCILIATION MECHANISMS FOR THE CARTEL PROHIBITION

1. INTRODUCTION

This chapter is one of the two main pillars of this study. It discusses three possible legal reconciliation mechanisms for undertakings' measures that are within the scope of the Cartel Prohibition, but that also generate public interest benefits:

- Part A: the Exemption Possibility
- Part B:Article 106(2) TFEU
- Part C: the legitimate objective ancillarity doctrine (the *Wouters* doctrine)

The Chapters 2. and 3. covered the goals of competition law and banking regulation respectively. From those discussions it follows that the goals of these two policies differ. A measure aimed at achieving a banking regulation goal may therefore run contrary to a competition law goal. As a consequence, conflicts between measures serving banking regulatory interests and the Cartel Prohibition may arise when banks adopt self-regulation aimed at achieving banking regulatory interests, but that also affects competition between these banks.

As bank self-regulation aims to achieve goals that are endorsed by the government, it can be expected that this self-regulation produces certain benefits for society. Since competition law is part of public policy, it can be assumed that this policy has benefits for society, too. If bank self-regulation affects competition, a clash between two public policies could arise: the Cartel Prohibition may block the furtherance of banking regulatory goals. If consequently this prohibition were to block the self-regulation, this could be a negative outcome for society if on balance the benefits of self-regulation outweigh its anti-competitive effects.[404]

To mitigate these harsh effects of the Cartel Prohibition, legal reconciliation mechanisms may be used, so that the Cartel Prohibition can be applied or disapplied to bring about the optimal result for society. The three mechanisms that are often held to be candidates to solve conflicts with the Cartel Prohibition are: (A) the Exemption

[404] In reality the self-regulation may have other negative effects for society than its anti-competitive effects, but for analytical purposes it is assumed that no such other effects exist. If in practice such other negative effects do exist, they should be included in the assessment of the desirability of the introduction of the self-regulation.

Possibility, (B) Article 106(2) TFEU and its Dutch counterpart, and (C) the *Wouters* doctrine. These mechanisms have been applied by judges and competition authorities, and/or have been considered by scholars as suited ways to solve the *prima facie* conflict between the Cartel Prohibition and the measure pursuing a public interest. Each of the three parts of this chapter presents a normative view on the appropriateness of one of the three reconciliation mechanism and its application in practice. At the end of each part the conclusions of the analysis of that part are stated. The final Part D. includes the overall conclusions of this chapter, which are also the answers to the two research questions regarding the Cartel Prohibition.

PART A. THE EXEMPTION POSSIBILITY

A.1. THE EXEMPTION POSSIBILITY: AN INTRODUCTION TO THE ANALYSIS

Part A. discusses to what extent banks' measures serving banking regulatory interests that violate Articles 101(1) TFEU or 6(1) DCA should and can be dealt with in the balancing exercise of Articles 101(3) TFEU or 6(3) TFEU.

Briefly put, the Exemption Possibility preserves undertakings' agreements that infringe the Cartel Prohibition, but that also create sufficient benefits for the buyers of the concerned products. The Exemption Possibility does not allow for a simple costs-benefits-analysis for the buyers. This exemption provision only applies if four conditions are fulfilled. This chapter will discuss all four conditions. For each condition a normative view is presented ('What should the interpretation of this condition be according to the author?'), as well as an analysis of the legal *status quo* ('What is the interpretation of this condition by the courts and the authorities?').

Below it is substantiated that to a certain extent the Exemption Possibility allows for an appropriate balancing between competition policy goals and the goals of other public policies. To what extent this exemption provision allows for such a balancing depends on the substance of this provision. It appears that legal scholars have different views on the appropriate interpretation of the Exemption Possibility. In addition, the legal *status quo* of this provision is also not obvious. This chapter presents an interpretation of the Exemption Possibility that is not *contra legem*,[405] that allows for the exemption from the Cartel Prohibition of certain anti-competitive agreements that serve public interests, including certain anti-competitive bank self-regulation

[405] See Chapter 1.2.1.

that is on balance beneficial for society. This interpretation culminates in a framework for solving conflicts between competition law and, e.g., bank self-regulation. The framework will be referred to as the **Exemption Analytical Framework**. The Exemption Analytical Framework is meant to form an underpinned solution scheme that provides decision makers support in taking the right steps – from the perspective taken in this book – in their analyses, and more predictability for the application of the Exemption Possibility. Greater predictability is important, since it is currently not clear how the authorities and courts will apply the Exemption Possibility to self-regulation in the public interest.

To fully appreciate the Exemption Analytical Framework and to learn how the current application of this rule may have to change, the various components of the framework will be compared with the legal *status quo* of the Exemption Possibility. To illustrate the functioning of the Exemption Analytical Framework, Chapter 5. sets out the application of the Exemption Analytical Framework to two real-world examples of bank self-regulation.

The Exemption Possibility includes four conditions:

- **First Condition:** the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress (Section A.2.);
- **Second Condition:** the agreement must allow customers a fair share of the resulting benefits (Section A.3.);
- **Third Condition:** the competition restriction must be indispensable to the attainment of the benefits (Section A.4.);
- **Fourth Condition:** the agreement may not eliminate a substantial part of competition in the market (Section A.5.).

The structure of Part A. follows the four-part structure of the Exemption Possibility. First, Section A.2. discusses which types of 'improvements' fall within the scope of the First Condition. Pursuant to this condition only effects that "*contribute to improving the production or distribution of goods or to promoting technical or economic progress*" are eligible for inclusion the balancing act of the Exemption Possibility. Sections A.2.2. through 2.2.6. include a normative view on the scope of the First Condition, while in Sections A.2.7. through A.2.12. a description of the current status of the law is provided.

Subsequently, Section A.3. covers the two elements of the Second Condition and answers the questions: (1) which persons must be the beneficiaries of the agreement's

improvements and (2) what 'a fair share' implies. In Sections A.3.2-A.3.4. these questions are answered based on the normative principles of this book. The legal *status quo* of the Second Condition is set out in Section A.3.5.-A.3.8.

Next, Section A.4. deals with the substance of the Third Condition. The question answered in this section is what the 'indispensability test' of this condition requires. This section provides a normative interpretation of this condition and also includes a descriptive analysis of the Third Condition.

In Section A.5. the Fourth Condition is discussed. The discussion will clarify what the purpose of this condition is and how its objective can be reflected in a legal test. First, a normative view on these topics is given, and next it is set out how the courts and authorities interpret this condition.

Finally, Section A.6. presents the findings of Part A. of this chapter, in addition to some concluding remarks. It also provides a schematic overview of the Exemption Analytical Framework.

A.2. THE FIRST CONDITION OF THE EXEMPTION POSSIBILITY

First Condition: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

A.2.1. Introduction

In this section the scope of the First Condition of the Exemption Possibility is discussed. When determining the scope for the eligibility of effects, it should first be clarified why a certain category 'effects x' must be *included* (e.g.: why are all apples fruit?). In addition, it should be set out why the category 'effects y' must be *excluded* (e.g.: why are bicycles never fruit?). Indeed, a discussion on the reasons why 'effects x' must be included, does not suffice, as this would not explain whether and why 'effects y' must be excluded from the scope of the First Condition. This section first presents a normative view on which effects should be included and excluded. Next, the legal *status quo* on the scope of the First Condition is dealt with. Finally, the findings of this section are summarised.

A.2.2. Why *all* Economic Benefits must fall within the scope of the First Condition

A.2.2.1. Economic welfare as a suitable common denominator

A main pillar of the Exemption Analytical Framework is the view that a legal provision must produce results that are in conformity with its goal(s) and that it may not prevent the materialisation of effects that pursue the law's goal(s) (see Chapter 2.1.1.). It was set out above in Chapter 2. that the appropriate view is that the underlying goal of competition law is the maximisation of economic prosperity, approximated by the maximisation of economic welfare, while the maintenance of market rivalry is an important intermediate objective to achieve this underlying goal. Articles 101 TFEU and 6 DCA should therefore not block any agreement that on balance increases economic welfare.[406] Consequently, each effect that has the capability to increase economic welfare should be eligible for inclusion in the Exemption Possibility; this is the first test in the Exemption Analytical Framework.

It is here reiterated that, in the context of this book, 'total economic welfare' is composed of (current and future) producer and consumer surpluses (see Chapter 2.2.1.4.).[407] These are values measured in monetary terms. The anti-competitive effects and counterbalancing benefits that affect economic welfare need therefore be measured in monetary terms, too. Indeed, these two types of effects must be comparable, so that it is possible that the contracting parties and competition authorities can determine on objective grounds whether the benefits of the agreement outweigh its anti-competitive effects. If these effects were not comparable, the balancing exercise would be a mere value judgment, the outcome of which depends on the preferences of the decision maker concerned, which is undesirable (this is discussed in more detail in Section A.2.3.2.).

The economic welfare consequences of anti-competitive effects were discussed in Chapter 2.2.2.1. It is clear that these can, in principle, be translated into monetary terms. For an objective balancing exercise it therefore remains necessary that it must be possible to translate the economic welfare improvements of the counterbalancing

[406] The increase of economic welfare can be an increase in total economic welfare, producer or consumer surplus or societal economic welfare, depending on one's preference for either standard (see Chapter 2.2.1.4. above). It is mentioned, however, that the Second Condition of the Exemption Possibility only applies if consumer surplus is increased.

[407] D.W. Carlton & J.P. Perloff, *Modern Industrial Organization*, Pearson, 4th edn., 2005, p. 71. It was mentioned in Chapter 2.2.1.4. that in this book the economic welfare that buyers and sellers generate for society as a whole is termed 'societal economic welfare'.

benefits into monetary terms, too.[408] Such a translation cannot be a mere hypothetical possibility, but must be founded on sound and convincing facts and methods – this is further discussed next. For the purpose of this book, effects that pass this test are defined as '**Economic Benefits**', while other benefits are dubbed '**Non-economic Benefits**'.

When both anti-competitive effects and counterbalancing benefits can be expressed in monetised economic welfare terms, an objective balancing of the anti-competitive effects against the economic welfare increasing effects is possible. A relevant question to be answered is whether this 'economic welfare test' is indeed a proper test, i.e., an adequate mechanism to sieve eligible from non-eligible benefits. Is 'economic welfare' not too broad and general a term, like, e.g., 'well-being' or 'the public interest', to function as an eligibility criterion? Couldn't we express every alleged benefit in economic welfare terms? Two replies are appropriate to this question.

First of all, it would not be problematic at all if each and every beneficial effect could be included in the First Condition. The only relevant criteria are whether the effect can increase economic prosperity (so that competition law's underlying goal is not frustrated) and whether the effect can objectively be compared with the agreement's anti-competitive consequences. The real purpose of the test formulated here is not come up with two categories of benefits, i.e. eligible or non-eligible benefits, but to ensure that only suitable benefits are included. If all thinkable benefits turn out to be suitable, this would not be problematic. As mentioned above, the consumer surplus should be considered an indication of genuine manifestation of prosperity (see Chapter 2.2.1.1.). If buyers value a product feature or consumption effect at a certain price, there should not be objections against including this feature or effect in the measurement of the consumer surplus and buyers' prosperity. In this regard it should not be relevant whether a feature or effect is technical or ethical, economic or non-economic – after all, the 'material wealth' component of a brand image is usually quite small, too…

Furthermore, it is to be expected that certain benefits cannot be *convincingly* translated into economic welfare terms and therefore they are not considered to be Economic Benefits; this is further discussed below.

[408] Strictly speaking, this requirement may be regarded as redundant if it is assumed, as it is in this book, that 'economic welfare' is measured in producer and consumer surpluses. Indeed, producer and consumer surpluses are measured in monetary terms. However, it is deemed useful to specify this second requirement since (1) in other treatises 'economic welfare' may refer to a value of utility that is not expressed in monetary terms and (2) the (im)possibility of translating an effect into monetary terms may in practice form a limit to the eligibility of an effect; see below.

A.2.2.2. The need for convincing substantiation of welfare effects

Above it was mentioned that the determination of the size of the changes in consumer surplus, i.e. the economic welfare enjoyed by buyers caused by the implementation of an agreement, may be determined among other ways through the use of surveys (see Chapter 2.2.1.2.). The possibility to use surveys to establish the size of the consumer surplus illustrates the virtually unlimited scope of the consumer surplus. Indeed, consumer surplus changes can be computed for all kinds of product feature changes or consumption effects: better quality, larger assortment, a nicer look and feel, environment-saving elements, features meant to support the uneducated or disadvantaged, and cultural benefits.[409] If an agreement between banks not to sell these investment products anymore is assessed in the context of the Exemption Possibility, in principle any fairness effects could be included in the equation. In fact, theoretically there does not seem to be a genuine border between welfare effects that can be translated into monetary terms and those that cannot: "*The one obvious instrument of measurement* [for economic theory] *available in social life is money. Hence, the range of our inquiry becomes restricted to that part of social welfare that can be brought directly or indirectly into relation with the measuring-rod of money. This part of welfare may be called economic welfare. It is not, indeed, possible to separate it in any rigid way from other parts, for the part which can be brought into relation with a money measure will be different according as we mean by* can, *"can easily" or "can with mild straining" or "can with violent straining." The outline of our territory is, therefore, necessarily vague.*"[410]

Nevertheless, although the theoretical possibilities and impossibilities of translating effects into economic welfare are relevant, for the application of the Exemption Possibility in practice it is decisive whether the translation is acceptable *in law*. After all, what matters is whether reliance on the Exemption Possibility will survive the scrutiny of the courts.

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[409] An example may illustrate this: through a survey the consumer surplus could be established for the introduction of retail investment products that may not be sold to individuals with limited wealth, because it is deemed unethical that such individuals may have to face the loss of their investments. Intuitively this protection of the underprivileged is not considered an economic benefit of the product, but rather an increase in the sense of justice for some citizens. However, through the willingness-to-pay survey this ethical aspect can be transformed into an effect that can increase economic welfare and can be measured in monetary terms. Hence, it would be eligible in the consideration of the Exemption Possibility

[410] "*[Ctd.] Professor Cannan has well observed: 'We must face, and face boldly, the fact that there is no precise line between economic and non-economic satisfactions, and, therefore, the province of economics cannot be marked out by a row of posts or a fence, like a political territory or a landed property. We can proceed from the undoubtedly economic {at one end of the scale to the undoubtedly non-economic} at the other end without finding anywhere a fence to climb or a ditch to cross.' Nevertheless, though no precise boundary between economic and non-economic welfare exists, yet the test of accessibility to a money measure serves well enough to set up a rough distinction. Economic welfare, as loosely defined by this test, is the subject-matter of economic science.*" A.C. Pigou, *The Economics of Welfare*, Macmillan, 4th edn., 1932, e-book version of the Online Library of Liberty, pp. 13-14 [omission in quoted text added in braces].

Although economic theory may bring forth advanced models and approaches to collect buyers' preferences and to compute consumer surplus, from a competition law *enforcement* perspective it is critical that competition law decisions are made based upon sound economic theories and evidence. This is a legal requirement: the EU Courts have held, e.g., that the party relying on the Exemption Possibility "*must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied.*"[411] The ECJ has also clarified that the Commission may establish the occurrence of a certain benefit if this is "*sufficiently likely*"[412] and that the Commission's exercise may include establishing whether "*it seems more likely either that the agreement in question must make it possible to obtain appreciable advantages or that it will not.*"[413] In other words, it is not necessary to prove one's claim beyond a shadow of doubt, but it is still necessary to bring forward those arguments and facts that make the claim sufficiently probable.

So, the determination of the magnitude of an agreement's benefits need not be precise, but this does not mean that a corroborated estimate of the magnitude of the benefits is easily accepted. Harder cases substantiating a claim regarding an agreement's benefits may require an extensive exercise. In this regard, the Commission has considered that:[414] "*In order to determine the relevance and significance of an economic analysis for a particular case, it is first necessary to assess its intrinsic quality from a technical perspective, i.e. whether it has been generated and presented in a way that meets adequate technical requirements prevalent in the profession. This involves, in particular, an evaluation of whether the hypothesis to be tested is formulated without ambiguity and clearly related to facts, whether the*

[411] ECJ judgment of 6 October 2009, *Case C-501/06 P GlaxoSmithKline Services Unlimited v. Commission (Spanish GSK-case)*, para. 82 [underlining added].

[412] ECJ judgment of 6 October 2009, *Case C-501/06 P GlaxoSmithKline Services Unlimited v. Commission (Spanish GSK-case)*, para. 93.

[413] ECJ judgment of 6 October 2009, *Case C-501/06 P GlaxoSmithKline Services Unlimited v. Commission (Spanish GSK-case)*, para. 94.

[414] The EU Courts take a similar view, while using a different wording (with regard to the standard of review, but this is arguably similar to the standard of proof). The GC has considered, e.g., that its assessment of a claim in the context of the Exemption Possibility includes: "*(…) verifying whether the facts have been accurately stated, whether there has been any manifest error of appraisal and whether the legal consequences deduced from those facts were accurate. It is [nevertheless] for the Court to establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether it contains all the information which must be taken into account for the purpose of assessing a complex situation and whether it is capable of substantiating the conclusions drawn from it.*" [case law references omitted] GC judgment of 24 May 2012, *Case T-111/08 MasterCard, Inc.* et al. *v. European Commission (Mastercard I)*, paras. 201-202. See also: ECJ judgment of 15 February 2005, *Case C-12/03 Commission of the European Communities v. Tetra Laval BV*, para. 39. The Dutch courts follow the EU Courts' approach, see e.g.: Dutch Industry and Trade Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) judgment of 31 December 2007, *T-Mobile Netherlands B.V.* et al. *v. NMa [the ACM],* ECLI:NL:CBB:2007:BC1396, para. 5.2.

assumptions of the economic model are consistent with the institutional features and other relevant facts of the industry, whether economic models are well established in the relevant literature, whether the empirical methods and the data are appropriate, whether the results are properly interpreted and robust and whether counterarguments have been given adequate consideration. Second, one must assess the congruence and consistency of the economic analysis with other pieces of quantitative and qualitative evidence (such as customer responses, or documentary evidence)."[415]

The abovementioned Commission's guidance and case law were established in the context of *administrative* procedures (i.e. procedures in which in first instance the Commission or the ACM have to decide whether the conditions of the Exemption Possibility were fulfilled). For civil procedures, the regular standard of proof in civil proceedings applies, which for Dutch civil proceedings follows from the Code of Civil Proceedings. In (Dutch) civil proceedings the party claiming the benefit of the Exemption Possibility must corroborate his claims with sufficiently concrete facts,[416] so that the court gains 'reasonable certainty' of the correctness of the claims.[417] This is a similar standard of proof as that set by the ECJ in the context of administrative procedures (see above), and in practice the civil courts will demand a similar effort of the party claiming the benefit of the Exemption Possibility to substantiate his claims, to the effort required in an administrative procedure.[418,419]

Therefore, with regard to the requirement of a possible translation of an agreement's benefits into monetary economic welfare terms, the above explanation on the standard of proof implies, among other things, that in non-obvious cases the

[415] Commission, DG COMP Staff Working Paper, *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases*, 2011, p. 3. <http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf>

[416] M.C.M. van Dijk, *Modernisering van het Mededingingsrecht; de Civiele Rechter is er klaar voor, de Partijen ook?*, Markt & Mededinging, No. 1, 2004, p. 6.

[417] D.J. Beenders, *Comment 4 on Article 152(2) Rv*, in: Tekst & Commentaar Burgerlijke Rechtsvordering, eds. A.I.M. van Mierlo *et al*, Kluwer, 5th edn., 2012.

[418] See e.g. for the standard of proof for the infringement of Article 6(1) DCA in civil proceedings: Dutch Supreme Court (*Hoge Raad*) judgment of 21 December 2012, *ECLI:NL:HR:2012:BX0345 case ANVR v. IATA*, para. 3.6.1. See also: (for UK procedures) P. Freeman, *The Significance of Economic Evidence in Competition Cases*, IEA Beesley Lecture Series, 2009, p. 14; E.M.H. Loozen, *Economische Beoordelingen in EU Mededingingszaken, Bewijs- en Toetsingsstandaard volgens de Economische Benadering*, 2013, p. 36.

[419] Although it is acknowledged that the EU Courts give the Commission a 'margin of discretion' with regard to economic matters, over the decades the courts have increased the level of scrutiny of the Commission's economic assessments. It has been argued that now the margin of discretion is rather limited and covers, e.g., the choice of economic models and instruments, but not the subsequent conclusions and interpretation of facts. *Cf.*: J. C. Laguna de Paz, *Understanding the Limits of Judicial Review in European Competition Law*, Journal of Antitrust Enforcement, 2013, p. 16; E.M.H. Loozen, *The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelled Through the Economic Approach*, European Law Review, 39(1), 2014, p. 105. In other words, the Commission has no discretion in deciding whether certain conduct constitutes a restriction of competition.

methods and theories underlying the translation can withstand the scrutiny of relevant professionals, that the data are correctly collected and interpreted and that serious counterarguments are appropriately addressed. This also makes good sense: competition law proceedings involve real-life undertakings and customers, and have real-life consequences. So, competition law litigation is not suited for experiments that have a significant chance of producing incorrect results. When establishing the consumer surpluses for an Exemption Possibility assessment, decision makers should avoid novel and untested theories or methods.[420]

So, it is here concluded that if the translation into monetary economic welfare effects is not sound and convincing, but hypothetical or questionable instead, the beneficial effect of the agreement is not eligible for inclusion in the First Condition. In practice, therefore, there will be limits to the type of benefits that are eligible.

A.2.2.3. Undertakings benefit from anti-competitive profits

It follows from the above discussion that the effects of an agreement aimed at achieving non-competition goals should be included in the balancing act of the Exemption Possibility if these effects are Economic Benefits. This implies that undertakings could restrict competition to their benefit, when this also serves public interests. It has been argued that it would be questionable that undertakings could benefit from anti-competitive profits when pursuing public policy goals.[421] This, however, should for two reasons not be considered problematic.

First, the fact that earning anti-competitive profits is allowed might seem unjust, but it is in the end not relevant. What is relevant is that buyers benefit from increased economic welfare and that the agreement is indispensable. In other words, without this agreement buyers are worse off; that alone is the very reason why the agreement is exempted.

Secondly, applying the Exemption Possibility in a way that allows undertakings to earn anti-competitive profits when pursuing other, non-competition public policy goals does not differ from the (uncontested) application of this rule to standard costs reductions and improvements in quality and innovation. Indeed, the latter application allows undertakings to earn anti-competitive profits, too. This is acceptable, however,

[420] Speech of 23 February 2013 by US FTC Commissioner J.D. Wright, *Evidence-Based Antitrust Enforcement in the Technology Sector*, Bejing Competition Law Center, p. 4.

[421] P. de Bijl & Th. van Dijk, *Mededingingsbeleid en Publieke Belangen: een Economisch Perspectief*, Markt & Mededinging, No. 4, 2012, p. 153.

since buyers are better off on balance – but buyers are also better off if other economic welfare effects are generated. It should not be feared that competition policy is trumped by other policies, since pursuant to the Exemption Analytical Framework the effect will always be that economic welfare is increased and this is in conformity with competition law's goals.

A.2.2.4. Conclusion on the normative view on Economic Benefits

In this book it is asserted that the scope of the First Condition of the Exemption Possibility should encompass all effects produced by an agreement that are able to increase economic welfare and can convincingly be translated into monetary terms – i.e., Economic Benefits as defined in this book. This rule ensures the Exemption Possibility is applied in conformity with the goals of Articles 101 TFEU and 6 DCA.

This approach implies that all kinds of effects can be eligible, including so-called non-economic effects, as in theory all effects can be translated into consumer surplus terms. In practice, however, there are limits to such translations, as such translations must be sufficiently convincing. Indeed, competition authorities and courts, when deciding and adjudicating on the eligibility of certain effects when applying the Exemption Possibility, should only use sound and convincing evidence and methods.

Box 4.1. Authorities' and courts' capability to assess complex economic Iissues

The above explanation raises the following question: are competition authorities and courts – both civil and administrative courts – *capable* of balancing anti-competitive effects against Economic Benefits other than the standard costs reductions and improvements in innovation and quality?[422] Let's first acknowledge that the balancing of anti-competitive effects against these standard effects by the competition authorities and courts is no longer an issue, since the abolishment of the notification system as of 1 May 2004. Any questions on their capability of assessing the *anti-competitive effects* are therefore of no concern – unless one

[422] It is here not considered questionable whether the courts, both administrative and civil, and competition authorities – or private parties for that matter – have the legitimacy to balance anti-competitive effects against Economic Benefits flowing from pursuing other policies. The courts and authorities are not asked to prioritise between competition policy and other policies, but they merely have to establish whether the economic welfare reduction due to the anti-competitive effects is outweighed by an economic welfare increase caused by any Economic Benefits.

would want to question the entire self-assessment system, which is out of the scope of this book.[423]

Another relevant observation is that the standard effects commonly accepted as falling within the scope of the First Condition of the Exemption Possibility relate to a variety of economic welfare increasing effects, including research & development benefits. Whether and to what extent these R&D benefits will be realised is usually inherently uncertain and even if it is assumed that they are, these benefits may only materialise after several years. Valuing these R&D benefits can therefore be very difficult and may require an in-depth study of the case, but nevertheless it is nowadays not questioned that competition authorities and courts are capable of adjudicating cases involving R&D effects. So, with regard to the courts' capability of assessing benefits other than the standard effects, as a matter of principle the complexity of the case should therefore not be a problem. It is here repeated that in the context of assessing Economic Benefits, the authorities and courts are not required to balance incomparable values: both the anti-competitive effects and the Economic Benefits are measured in economic welfare terms. In practice, the real difficulty may be to translate the non-standard effects, such as public policy effects, into economic welfare terms, but this does not mean that the authorities and courts should not be allowed to adjudicate on a case in which such a translation is adequately made.

Furthermore, it is relevant to acknowledge that for the civil courts the manner in which they perform the assessment of complex Economic Benefits in the context of non-competition policies should not differ from their assessment methods for standard efficiency effects: they value the claims of the litigants by weighing the soundness of the submitted evidence,[424] which in practice usually encompasses testing the consistency and plausibility of the arguments and correctness and completeness of the presented facts (see Section A.2.2.2. above). In other words, for the civil courts there will not be a significant difference between assessing the various types of Economic Benefits, and

[423] Some scholars have made this point. E.g., Van Dijk has argued that civil courts are not capable of appreciating the complex economic assessments required for the application of the Exemption Possibility and that therefore they need assistance (e.g. from independent experts or competition authorities) to adjudicate on such matters. M.C.M. van Dijk, *Modernisering van het Mededingingsrecht; de Civiele Rechter is er klaar voor, de Partijen ook?,* Markt & Mededinging, 2004, No. 1, p. 7. With regard to the concern of inconsistent decisions on EU competition law, see Lavrijssen, who rejects this argument: S. Lavrijssen, *What Role for National Competition Authorities in Protecting Non-Competition Interests after Lisbon?,* 2010, p. 20.

[424] M. Monti, *The Application of Community Competition Law by the National Courts in a Directly Applicable Exception System,* ERA Forum, 2001, p. 4; Report of the law firm Houthoff Buruma on the obstacles for private antitrust enforcement in the Netherlands: *De Mogelijkheden voor Civiele Handhaving van de Mededingingsregels in Nederland; een Inventarisatie,* 2005, p. 114.

there should therefore be no reason to doubt their capability. The same conclusion can be drawn with regard to competition authorities.

To conclude, there is no principal difference between assessing standard costs reductions and improvements in quality and innovation, and Economic Benefits that are the result of pursuing non-competition policies. Therefore, the competition authorities and the courts should be held capable of assessing these non-standard Economic Benefits in the context of the balancing exercise of the Exemption Possibility.[425] Indeed, among others the *CECED* case,[426] the *Flowers Auction* case,[427] the *SER Energy Agreement for Sustainable Growth* case[428] and the *Kip van Morgen* case[429] show that the Commission and ACM respectively are willing, and presumably also able, to consider Economic Benefits that are the result of pursuing non-competition policies when applying the Exemption Possibility.

Lastly, in practice the application of the Exemption Possibility does not require a precise calculation of the welfare effects of, on the one hand the anti-competitive effects, and on the other hand the agreement's benefits. It often suffices to establish the nature of both the anti-competitive effects and the benefits, and their probable impact: *"The analysis of pro-competitive and anti-competitive effects under [Article 101(1) TFEU] is often a question of probabilities. What the undertaking invoking [Article 101(3) TFEU] is required to do is to make a convincing case in its favour."*[430] Some authors even argue that in practice no real balancing of the anti-competitive effects and the economic benefits takes place.[431] Whether this latter observation is true or not, it may be expected that in a probabilities analysis it should often be possible to make a well-founded decision on the appropriateness of exempting the agreement. The decisions under a probabilities analysis are easier if experience or theory predicts that the anti-

competitive effects concerned are probably small and the relevant benefits probably

[425] Lavrijssen agrees. S. Lavrijssen, *What Role for National Competition Authorities in Protecting Non-Competition Interests after Lisbon?,* 2010, p. 23.

[426] Commission decision of 24 January 1999, *Case IV.F.1/36.718 - CECED*.

[427] ACM decision of 9 July 1999, *Case 492 Vereniging van Bloemenveilingen in Nederland (Flower Auctions)*.

[428] ACM memorandum, *Analyse van de ACM met betrekking tot de Voorgenomen Afspraak tot Sluiting van 80er Jaren Kolencentrales in het Kader van het SER Energieakkoord,* 26 September 2013.

[429] ACM report, *Analyse ACM van Duurzaamheidsafspraken 'De Kip Van Morgen',* 2014.

[430] J. Faull & A. Nikpay, *The EU Law of Competition,* Oxford University Press, 3rd edn., 2014, para. 3.488. See also: ACM report, *De Beoordeling van Mededingingsbeperkingen als gevolg van Duurzaamheidinitiatieven in de Praktijk,* (Notice on Competition Law and Sustainability), 2013, p. 5.

[431] P. Nicolaides, *The Balancing Myth: The Economics of Article 81(1) & (3),* Legal Issues of Economic Integration, Vol. 32, Iss. 2, 2005, p. 143; P. Kalbfleisch, *The Assessment of Interests in Competition Law: A Balancing Act,* in: Economic Law and Justice in Times of Globalization - Festschrift for Carl Baudenbacher, eds. M. Monti *et al.* Nomos Verlag, 2007, p. 465.

large: it is then reasonable to exempt the agreement. No exemption should be allowed in the *vice versa* situation. It will of course be more difficult to make a call on this if the anti-competitive effects and the economic benefits are probably of a similar magnitude.

A.2.3. Why Non-economic Benefits must not fall within the scope of the First Condition

In the above sections it was set out why Economic Benefits should be *included* in the balancing act of the Exemption Possibility. In this section it is argued that all other benefits should be *excluded* from this balancing act. Indeed, in the Exemption Analytical Framework such Non-economic Benefits cannot be included.

A.2.3.1. No overarching goal as a common denominator

The intrinsic problem with regard to the balancing exercise of the Exemption Possibility is that Non-economic Benefits and anti-competitive effects cannot be adequately compared.[432] Indeed, these two types of effects do not have the same denominator, since the effects of competition law are measured in monetised economic welfare terms and Non-economic Benefits are by definition measured in a different unit. It can therefore not be *objectively* established whether the economic welfare decrease due to the anti-competitive effects is sufficiently neutralised by certain improvements flowing from the restrictive agreement. Indeed, there are no commonly accepted answers to questions like: 'How much economic welfare is it worth sacrificing for the additional social inclusion of 5000 citizens?', or 'What is the right economic price for a 'significant' increase in animal welfare?' One may only argue that the economic welfare costs are 'worth' the improvement of the non-economic value, but there is no objective standard for testing whether such an argument is correct.

[432] *Cf.* P. Crampton, *Alternative Approaches to Competition Law, Consumers' Surplus, Total Surplus, Total Welfare and Non-efficiency Goals*, 17 World Competition, Iss. 3, 1993, p. 57; O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81*, Oxford University Press, 2007, p. 172; For a contrasting view see Townley, who seems to take the view that it should be possible to find a common denominator for competition interests and non-economic interests. However, he considers that the Commission should determine this common denominator if money cannot function as such, by which implicitly he recognises that private parties should not set the common denominator. Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, pp. 304-308.

The lack of a common denominator is problematic for the application of the Exemption Possibility, because allowing Non-economic Benefits to trump economic welfare costs would mean that undertakings would be allowed to decide for their customers what the customers' willingness to pay is for non-economic values. This is further discussed in Section A.2.3.2. below. First, it is analysed, with regard to the EU Exemption Possibility, whether there is indeed no common denominator – or more specifically, whether the EU Treaties might include a common denominator for balancing economic welfare and the effects of EU non-competition policies.

It has been suggested that the EU's overarching goals mentioned in the recitals or the first general provisions of the TEU, e.g. the promotion of the well-being of the EU's peoples, may be used as a common denominator.[433] This notion starts with the correct observations that the EU Treaties contain a legal hierarchy and that competition policy is instrumental to the EU's overarching goals (see also Chapter 2.3.5.2.). Furthermore, it is here acknowledged that competition policy is not the only instrument to achieve the creation of the internal market and the EU's ultimate goals.[434] Nowadays, the EU has developed policies in the spheres of, e.g., monetary policy (i.e., the eurozone), consumer protection, the environment, public health, transport, energy and security & justice matters. It is obvious that the EU cannot perfect all these policy areas at the same time. The realisation of the different policies is bound to result in conflicts between these policies; e.g., it will be shown that competition and consumer protection policies in the banking sector may sometimes clash (see e.g. the case studies of Chapter 5.). In fact, a clash of EU policies lies behind the remarkable agreement of banks not to charge consumers for the exchange of the national currencies into euros at the time of the introduction of the euro: the conclusion of this agreement was requested by the Commission to ease the transfer to the euro as a currency, although in fact it constituted a cartel![435]

Considering the above, it is here on the one hand regarded to be just that *in theory* the pursuit of the ultimate goals of the EU Treaties mentioned in Article 3(1) TEU may result in the resolution of two conflicting EU policies. The EU Treaties have a clear hierarchy and it is considered logical that subordinate policies serve the higher placed goals. Ideally, a conflict between two EU policies should be resolved by realising the best result for a higher goal that both policies share. On the other hand, it is here concluded that the abovementioned suggestion to use the EU's

[433] Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 292.

[434] "*Unlike, for example, the competition provisions of the USA, the [EU] competition provisions are not in stand-alone competition legislation aimed at isolated goals, but are part of a web of inter-related Treaty articles.*" Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 48.

[435] *Cf.* Speech of 22 September 1998 by Commissioner Van Miert, *EU Competition Policy in the Banking Sector*, para. 14.

ultimate goal of the promotion of the well-being of the EU's peoples does not give any guidance *in practice*.[436] Indeed, if one focuses on the concept 'well-being of the EU peoples', it is here held that this concept is too abstract, undefined and open to multiple interpretations, to be of practical use.[437] It does not seem possible to develop a proper balancing scheme for the different policies, with comparable denominators, similar to the balancing scheme of the Exemption Possibility as developed in the Exemption Analytical Framework. This approach would also be impractical, since – in the absence of sufficiently clear binding guidance of the legitimate policymakers – private parties could apply different interpretations of the well-being of the EU peoples, which would result in inconsistent interpretations of the law and even irresolvable conflicts.

It is here considered that this normative view, i.e., disregarding the goals mentioned in Article 3(1) TEU when applying the Exemption Possibility, does not affect the principle that the pursuit of the ultimate goals of the EU should direct the reconciliation of a conflict between two EU policies. The consequence of the normative view is merely that the goals mentioned in Article 3(1) TEU should not be used to solve such a conflict *within the Exemption Possibility*, i.e. through the application by private parties.

The abovementioned normative view is in line with the case law of the ECJ.[438] The ECJ has considered that provisions such as Articles 3(1) and 3(3) TEU and the considerations of Protocol 27 of the EU Treaties formulate general objectives that do not create rights for individuals and undertakings – or the Member States.

[436] See also Townley, who *does* propose to use the EU's goals formulated in the TEU's preamble (which suffer from the same vagueness as the goals included in Article 3(1) TEU) as a 'meta-objective' to solve conflicts within the Exemption Possibility. He also recognises, however, that these goals do "*not immediately, precisely and directly explain what the balance is*", when solving conflicts. Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 293. With regard to the sustainable development goal mentioned in Article 3(3) TFEU, Kingston concludes that due to the ambiguity of this phrase it fails to give "*identifiable instructions to, and imposes no concrete obligations on, policy makers*." S. Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, European Law Journal, Vol. 16, No. 6, 2010, p. 786.

[437] E.g., 'well-being' is a different and more extensive concept than 'welfare': the latter refers to economic prosperity, while the former includes more. Without exploring this complex matter any further, a quotation of a relevant OECD report on the role of 'subjective well-being' with regard to 'overall human well-being' may illustrate that various 'non-economic prosperity' elements are relevant, too: "*This definition is explicitly consistent with approaches that conceive of people's well-being as a collection of different aspects, each of them having intrinsic value. In measuring overall human well-being then, subjective well-being should be placed alongside measures of non-subjective outcomes, such as income, health, knowledge and skills, safety, environmental quality and social connections.*" OECD, *OECD Guidelines on Measuring Subjective Well-being*, 2013, p. 29.

[438] ECJ judgment of 3 October 2000, *Case C-9/99 Échirolles Distribution SA v. Association du Dauphiné and Others*, paras. 22-25.

These general objectives can and are used by the ECJ to interpret among others the EU competition rules, but they are too ambiguous to provide binding directions to private parties for their actions and therefore for solving conflicts between different EU policies.

A.2.3.2. Non-economic Benefits and the democratic legitimacy rule

The lack of an adequate common denominator based upon which it would be possible to objectively determine that the setting aside of the Cartel Prohibition is justified, turns the solution of a conflict between this prohibition and Non-economic Benefits into a subjective, political choice. In sum, it is here asserted that only the legislature should solve such a conflict, since in democratic societies the chosen governments have the strongest and most comprehensive legitimacy to set the hierarchy among legally protected values or legal norms. The above notion is in this book referred to as the '**democratic legitimacy rule.**'

Looking for the appropriate reconciliation of the conflict between the Cartel Prohibition and Non-economic Benefits through the Exemption Possibility, reflects in essence the question as to whether undertakings may collectively decide that buyers must sacrifice their wealth in order to pursue a certain public interest. Considering that this book aims to establish how the legal reconciliation mechanisms should be applied to achieve the best results for society, *cf*. the second research question (Chapter 1.2.1.), the question here is really whether it is in society's best interests that undertakings can decide that statutorily protected economic prosperity of buyers be sacrificed for the furtherance of a certain public interest. In this section an answer is formulated based on arguments regarding legality and legitimacy, more specifically on (1) the legal constitution of society,[439] (2) acceptance by the citizens and (3) moral precepts that can be used to answer this question. Below these three arguments are further discussed.

> *(1) The legal constitution of society.* The legal constitution of society refers to the legal division of authority within society and the hierarchy of different legal acts (the following subsection takes Dutch society as its subject, but most likely also holds for other EU Member States). It can be assessed whether, based on this constitution, it is appropriate that undertakings be granted the authority to decide that the statutorily protected economic prosperity of buyers must be sacrificed for the furtherance of a certain public interest.

[439] The Dutch legislature's expressed views on the goal of the Exemption Possibility are discussed in Section A.2.10. There is no similar material from the Treaties legislature.

In this context it is essential to acknowledge that the economic prosperity of buyers is protected by law, i.e., by the TFEU and the DCA,[440] as this implies that without a legal exemption rule no private measure may affect this prosperity. The statutory prohibition to frustrate competition implies that society as a whole, acting through the legislature, accepts as being right the enforceable limitation of citizens' actions which restrict competition, with the aim to further society's economic prosperity. The question which subsequently arises is when it should be accepted that society's will in this respect can be set aside, so that competition can be restricted. An obvious finding is that society itself, again acting through the legislature, should be able to define the scope of the statutory prohibition protecting competition. Indeed, society may find other values or interests more important than competition or economic prosperity. These preferences of society are materialised by the legislature through legislation, or derivatives thereof such as policies implemented by bodies to which the legislature has delegated some of its authority (in Section A.2.3.3. below the limitations of such authority delegation are discussed).

So, the legislature may legislate and prioritise other values and interests over competition and economic prosperity. It is here asserted that the EU or Dutch legislatures should be able to do this. These bodies can legislate rules of the same ranking as the EU and Dutch Cartel Prohibitions respectively and therefore *only they* should be allowed to set aside these prohibitions.

One might argue that *if* one were to conclude that it is the law that the Exemption Possibility should allow for the inclusion of Non-economic Benefits, private parties would have sufficient democratic legitimacy to solve conflicts between economic welfare furtherance and other public interests. In that case they would derive this power from an act resulting from the legislative processes, i.e. from the law.

It is here asserted, however, that this is not the case. If the Exemption Possibility allowed for the balancing of Non-economic Benefits, this would then render the outcome of such balancing *legal,* but granting undertakings the authority to carry out this assessment would still be contrary to the division of political authority within society. If the legislature delegates its authority to trump the Cartel Prohibition to undertakings – generally and without guidance reflecting society's valuation of different public interests – this would mean that undertakings can

[440] The DCA is clearly an act of the Dutch legislature and since the TFEU was approved by the Dutch legislature through a ratification act, this treaty is an achievement of the legislature, too.

apply their own judgment on how valuable the economic prosperity of their customers is vis-à-vis other values and interests. This is problematic because undertakings are not democratically elected and they are not democratically accountable. Indeed, the government would no longer, directly nor indirectly, control the balancing of public policies and neither could politicians be held responsible for such balancing decisions by the voters. This does not fit in with the role that the government has in society, as the entity responsible for public policies overall and with the responsibility to ensure that delegated authority is exercised to serve to public interest.[441] Only if it were sufficiently clear that the legislature intended that certain values or norms would take priority over other norms or values that it deemed necessary to protect by law, should the former values and norms be allowed to trump the latter. With regard to the balancing of Non-economic Benefits against economic welfare in the Exemption Possibility, such clarity is not given by the legislature. Indeed, the legislature has not expressed which interests or values may trump the furtherance of economic welfare which is protected by the Cartel Prohibition. Furthermore, there are no reasons to assume that the EU and Dutch legislatures intended the Exemption Possibility to form an *ex-ante carte blanche* for pursuing non-competition policy goals at the expense of market rivalry. On the contrary: the Dutch Minister of Economic Affairs has recently stated, in the context of a legislative proposal regarding the possibility to transpose anti-competitive sustainability agreements into law: "*The starting premise is that ultimately the Government and the Parliament are responsible for the balancing of interests, like the consumers' interest and the sustainability interest.*"[442] Likewise, Commissioner Vestager has stated: "*(…) the question of the minimum amount of biofuel that should go into gasoline is not a decision for competition authorities or a horizontal agreement among the suppliers. That decision is one for legislators, through a democratic process. And the same goes for other policy objectives, like promoting human rights, ensuring adequate labour protection, or building a sustainable economy.*"[443]

[441] Report of the Netherlands Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*), *Publieke Zaken in de Samenleving*, Amsterdam University Press, 2012, p. 139.

[442] In Dutch: "*Uitgangspunt is dat de regering en het parlement uiteindelijk over afwegingen gaan als die tussen het consumentenbelang en het duurzaamheidsbelang.*" Letter of the Minister of 24 October 2016, Parliamentary article, *Kamerstukken II* 2016/17, 30196, No. 480, p. 3. Furthermore, with regard to the Dutch Exemption Possibility the Dutch Minister seems to have indicated that that Non-economic Effects cannot be considered in the Dutch Exemption Possibility; see Section A.2.10. below. Furthermore, it seems very unlikely that the Treaties legislature and EU Courts would accept that the single market imperative, which according to the ECJ is a goal of EU competition law, can be frustrated by the actions of private parties that are not clearly based on EU legislation. Houdijk considers that balancing non-economic interests within the Exemption Possibility would require a *contra legem* interpretation of this provision. J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, No. 1/2, 2008, p. 23.

[443] *Speech of 1 December 2016 by Commissioner Vestager, Competition Policy in Context*, 15th OECD Global Forum on Competition.

To conclude, granting to undertakings the general exemption power which is not directed in substance by the legislature would imply that an entity without democratic legitimacy can set aside a fully democratically legitimised decision. This is here deemed inappropriate, as it is against the fundamental basis of a democracy, i.e., that the legislature's acts have the highest authority and responsibility with regard to policymaking. Indeed, if it is accepted that through the application of the Exemption Possibility various Non-economic Benefits (i.e., all kinds of non-competition interests) may trump economic welfare, this may result in a serious devaluation of the protection of market rivalry in favour of values that do not benefit from the same democratically legitimised protection.

The above conclusion does not imply that the value of competition must always take precedence over other values or interests. The legislature, representing society, may deem such considerations as social fairness, animal welfare or employment more important than market rivalry or economic welfare. It can subsequently legislate and subordinate the Cartel Prohibition to its new laws. This is perfectly legitimate, as weighing different values and interests is what political decision making is all about.

But what about corporate social responsibility, or undertakings that want to do the good thing? In Box 4.2. below it is discussed why it is appropriate to reject the possibility that undertakings trump the Cartel Prohibition when they wish to 'tackle social problems'.

Box 4.2. Corporate social responsibility and the First Condition

It has been argued that it is "*very controversial*" that undertakings cannot collectively decide to tackle a social problem, as they are deemed to only serve consumers' economic prosperity.[444] As a consequence, undertakings are hindered in assuming their moral responsibility. This argument is here rejected. In the end the argument states that it is inappropriate that businesses cannot set aside a legally protected value if they collectively want to solve an issue that they regard to be a problem for society. However, this is rather appropriate: on what grounds can businesses decide that it is right to reduce consumers' prosperity in the interest of a problem that these undertakings have labelled a 'social problem'? There are democratic processes to address such subjective, intricate choices.

[444] R. Claassen & A. Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach,* Utrecht Law Review, Vol. 12, Iss. 1 (January) 2016, p. 9.

Democratic processes have, through introducing the Cartel Prohibition, in fact already determined what the moral responsibility of undertakings is: do not reduce consumers' prosperity through collective action. Businesses may see other moral responsibilities or social interests, but these are just their views on what morality is and what the problems of society are. In this book it is claimed that it is not for businesses to decide what is good for society and it is therefore deemed unethical if the views of undertakings take priority over society's position. If there is sufficient support in society for the views of these businesses, the government can act and prioritise the solution of the social problem over competition law in a democratically legitimised way.

(2) Acceptance by the citizens. Below it is discussed whether *a claim to legitimacy* could justify the balancing of Non-economic Benefits with in the First Condition. Indeed, a normative view on the law which prescribes how to change the current (interpretation of the) law could be based on prevailing legitimacy beliefs in society.[445] If it could be concluded that the citizens accept as being right or desirable that undertakings combined may decide that buyers must sacrifice their wealth in order to pursue a certain public interest, this would be a reason to hold that it is in citizens' best interest that undertakings are granted this authority.[446] To be clear, the question is not whether citizens can agree with undertakings that in certain situations wealth must be sacrificed for a certain public interest. This is may very well be the case. However, considering the structure of the Exemption Possibility, the actual question is whether citizens believe that it is right that undertakings can decide for them that their wealth must be sacrificed to serve a public interest (legitimacy when citizens endorse the undertakings' action is discussed below).

[445] This implies the application of 'legitimacy' as a *descriptive* concept, in contrast with legitimacy as a *normative* concept. Legitimacy as a descriptive concept is here used as a virtue of something (e.g. the power of an entity, an action or a rule) reflecting that a certain group of individuals – e.g. the citizens in society – deems this something morally right. There is no generally accepted definition of 'legitimacy', not even of legitimacy as a descriptive concept. Max Weber's work is often used as a starting point in scholarly discussions on legitimacy as a descriptive concept. With regard to political regimes "*Weber distinguishes among three main sources of legitimacy – understood as both the acceptance of authority and of the need to obey its commands. People may have faith in a particular political or social order because it has been there for a long time (tradition), because they have faith in the rulers (charisma), or because they trust its legality – specifically the rationality of the rule of law.*" F. Peter, *Political Legitimacy*, in: The Stanford Encyclopedia of Philosophy (Summer 2016 Edition), ed. E.N. Zalta.

[446] This reason depends on the view that citizens are capable and/or entitled to determine what is in the best interest of society. In this respect it is crucial to acknowledge that the question of this section relates to actual societies, i.e. modern democracies. The question does not relate to hypothetical societies: e.g., the acceptance by the citizens would have less relevance if a country ruled by a dictator is considered. For modern democracies it is here assumed that the wishes of the people reflect society's best interests.

It is here held to be very unlikely that citizens would favour that undertakings have this authority.[447] Although it cannot be excluded that empirical studies show that in certain situations this would be the case, it is doubted that such findings would relate to more than isolated incidents. For this study no instances could be identified in which Dutch citizens favoured undertakings having the authority, pre-empting any citizens' own decision rights, to decide that buyers' economic wealth had to be sacrificed in the public interest.

What if the decision-making power of undertakings were made dependent on citizens' (or the government's) consent?[448] This would mean that the undertakings could not collectively trump the preferences of the citizens anymore. In that case it would be legitimate, within the meaning of this subsection (see footnote 445), that Non-economic Benefits could be balanced against Economic Benefits within the scope of the First Condition. For instance, it could be that empirical study shows that citizens endorse that anti-competitive agreements be concluded for social inclusion purposes (e.g., the offering of free banking services to the underprivileged or the continuance of banking facilities in sparsely populated areas).

If the consent of citizens is imperative for gaining legitimacy, the question is how such consent is established. There is a regular, widely accepted method for ensuring that citizens will hold a measure to be legitimate: the legislative process in accordance with democratically determined rules. There may be other methods for ensuring that no measure is taken without the endorsement of the citizens, such as the involvement of organisations representing citizens (e.g. consumer associations). It will depend on the quality of such alternative methods whether they can truly guarantee that only legitimate measures are taken.[449] In this book it is argued that it is best to aim for the approach that yields

[447] E.g., the declaration of principles of the Dutch Consumers' Association states three fundamental values for consumers: freedom of choice (sovereignty), equality between sellers and consumers, and responsibility vis-à-vis others. The sovereignty and equality principles are difficult to reconcile with the transferring of the discussed decision authority to undertakings. Indeed, in the declaration it is mentioned that consumers could be held to choose products that are produced sustainably, but the sovereignty to make such sustainability choices is not assumed to be limited by undertakings – on the contrary. Consumentenbond, *Uitgangspunten voor het Werk van de Consumentenbond – Beginselverklaring*, 2003, pp. 9, 25.

[448] It is remarked that this question is here limited to the scope of the First Condition. With regard to the Second Condition, an issue may be whether just buyers or also society (i.e. all citizens combined) must be compensated for their/its loss. This issue is not addressed here: it is conceivable that citizens might agree that a Non-economic Benefit can be balanced against an Economic Benefit, but that still the measure would only be permissible if at least buyers are compensated (see Section A.3.3. below).

[449] Parkinson discusses some issues with regard to the legitimacy of decisions taken by representatives of those affected by this decision. E.g., he regards the *accountability of representatives* towards those represented to be crucial, not just the good replication of all those represented by the group of representatives. Parkinson considers: "*(…), to be legitimate, deliberative representation should be based on what I have called election; or it should have just 'recommending power' not decisive power. There is a role for selection-without-accountability in information-gathering, but only as an input into a wider democratic deliberative process in which representatives are directly accountable to the people affected, not as a substitute for such accountable deliberation.*" J. Parkinson, *Legitimacy Problems in Deliberative Democracy*, Political Studies, Vol. 51, 2003, p. 190 [footnote omitted].

the highest level of legitimacy in today's society, namely decision-making by democratically elected bodies.[450] (This may currently be problematic in practice, see also Chapter 7.C.3.)

To conclude, there are no indications that citizens would consider it legitimate that within the scope of the Exemption Possibility undertakings have the authority to decide collectively – independently of the citizens – that the statutory protected wealth of buyers' must be sacrificed for a Non-economic Benefit.

Such legitimacy would, however, be present if citizens endorsed the balancing of this wealth against a specific public interest. However, given that buyers' wealth is statutorily protected by the Cartel Prohibition and considering the lower level of legitimacy that methods alternative to democratic rulemaking have, it is here deemed appropriate that the balancing of Economic Benefits against Non-economic Benefits is based on a democratic rule addressing how this balancing must be done.

(3) Morality. Finally, the question of this section could be answered by taking a position on what is in society's best interest based on personal beliefs – i.e., based on the *assessor's own morality or worldview*. In this case, the answer to whether undertakings should be able to collectively decide when buyers' wealth is traded off against a public interest, would then depend on a certain personal view on morality or worldview. In other words, the question is whether one's own morality or worldview allows that it is *legitimate* (or: right, justifiable, fair, etc.) that undertakings can make this trade-off.[451] For example, one might take the position that social equality and inclusion are more important than consumers' wealth, which would imply that it is legitimate that undertakings cooperate to increase social inclusion while harming their customers' wealth.

It is not rare in legal study that arguments are based on the researcher's own morality, but from a scholarly perspective arguing based only on personal beliefs, has its drawbacks.

[450] It has been argued that although the involvement of interest groups in the democratic rulemaking process can *contribute* to the legitimacy of these rules, it cannot *replace* it – due the lack of genuine representativity of citizens. See: C.W. Anderson, *Political Design and Representation of Interests*, Comparative Political Studies, Vol. 10(1), 1977, p. 135. See also: A. Reale, *Representation of Interests, Participatory Democracy and Lawmaking in the European Union: Which Role and Which Rules for the Social Partners?*, Jean Monnet Working Paper 15/03, New York University School of Law, 2003, pp. 19-20.

[451] This implies the application of 'legitimacy' as a normative concept. "*(…) the normative concept of political legitimacy refers to some benchmark of acceptability or justification of political power or authority and – possibly – obligation.*" See: F. Peter, *Political Legitimacy*, in: The Stanford Encyclopedia of Philosophy (Summer 2016 Edition), ed. E.N. Zalta. Some well-known scholars who developed normative views on (political) legitimacy are Ronald Dworkin, John Rawls and Joseph Raz.

> Although personal views on what is legitimate cannot be deemed correct or incorrect, some views are more appealing and convincing than others. In academic legal study the substance of arguments is essential. In contrast, the identity of a legal researcher is seldom sufficient to deem his arguments convincing. So, in order to convince judges, lawmakers and legal academics, the legal researcher has to provide reasons why this audience should agree with his morality. In academic legal study, a claim that the researcher's own view on morality is the most appropriate one should be based on reasons that clarify how this view fits in the prevailing legal system and to what extent it corresponds with society's take on morality.[452]
>
> A well-reasoned personal belief about legitimacy can therefore be useful for formulating a normative view on the substance of the law, because this belief could be an argument for others to agree with the proposed substance of the law. However, this book is not the place for developing or selecting a normative view on legitimacy. Nevertheless, as explained above, allowing undertakings to decide collectively that buyers' wealth must be traded off against a public interest does not fit well in the prevailing legal system. In addition, it was held above that it is unlikely that many citizens would favour giving this authority to undertakings. These are indications that arguments based on a personal view on morality dictating this authority should be given to undertakings, are probably not deemed convincing in the legal discourse.

The democratic legitimacy rule. The above analyses covered three standards for deciding whether Non-economic Benefits should be eligible for inclusion in the balancing act of the Exemption Possibility: (1) the legal constitution of society (i.e. legality), (2) the acceptance by society (i.e. legitimacy as a descriptive concept) and (3) morality (i.e. legitimacy as a normative concept). The conclusions were that the application of these standards called for the *exclusion* of Non-economic Benefits from the balancing exercise.

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[452] C.E. Smith *et al*, *Criteria voor Goed Rechtswetenschappelijk Onderzoek - De Omgekeerde Route*, Nederlands Juristenblad, 2008, Iss. 12, p. 689. Similarly, Smits argues that with regard to normative positions on the law, it is not legal academics' own views that matter, but the prevailing normative views within the relevant jurisdiction; J. Smits, *Redefining Normative Legal Science: Towards an Argumentative Discipline*, TICOM Working Paper No. 2009/7, 2009, p. 53. If a researcher's claim were to be based merely on the fact that the researcher considers it to be the right one, it would resemble a political or moral-philosophical claim. See also Mackor: "*In general, norm-contentions and norm-recommendations, like the evaluative and persuasive remarks social scientists might add to their papers, should at most play a role in an* obiter dictum *to the 'truly scientific' part of their investigations. In fact, if the* obiter dictum *becomes the main part, the investigation is no longer legal doctrinal, but instead philosophical or political in nature.*" Mackor refers here to contentions and recommendations based on extra-legal criteria, i.e. moral, political, religious or economic criteria. A. R. Mackor, *Legal Doctrine as a Non-Normative Discipline - A Refinement of Niiniluoto's and Aarnio's Distinction between Norm-Descriptions, Norm Contentions and Norm Recommendations*, Recht en Methode in onderzoek en onderwijs, Vol. 2, Iss. 1, 2012, p. 26. In contrast, Vranken seems to disagree: J. Vranken, *Methodology of Legal Doctrinal Study – A Comment on Westerman*, in: Methodologies in Legal Study, ed. M. v Hoecke, Hart Publishing, 2011, p. 117.

In addition, it follows from the parts covering legality and the acceptance by society that the balancing should be only be done by *democratically legitimised bodies*. In this book a measure is meant, roughly, to be democratically legitimate if it is directly or indirectly the result of the legislative process, or if it is subject to adequate control by a democratically elected body.[453] This leads to the formulation of the **democratic legitimacy rule**: the normative view that only the legislature should be able to balance the economic prosperity protected by the Cartel Prohibition against Non-economic Benefits. Indeed, in democratic societies the chosen governments have the strongest and most comprehensive legitimacy to set the hierarchy among legally protected values or legal norms. Such strong and comprehensive legitimacy is deemed required to decide that statutorily protected buyers' wealth should be sacrificed for a Non-economic Benefit, for the reasons set out in the above analyses. This does not mean that the legislature has to take each balancing decision itself. The legislature could delegate its authority to do so to another entity, but this would require the legislature to provide substantive guidance on the weights of the different interests and legislature's control over this body, to ensure that the balancing decisions are in conformity with society's interest (see discussion below in Section A.2.3.3.).

Governments as undertakings and Undertakings as governments. In today's society *state prerogatives* are not only exercised by governmental institutions, but also by private parties such as undertakings, trade associations and NGOs. Does this mean that these non-state actors – including undertakings – are 'democratically legitimised' to make political choices? No, since even if the government does not manage and control the development and/or execution of a policy, this does not mean that it does not have responsibilities and powers with regard to this policy. In such a situation the government keeps its 'overarching responsibility' to check whether the non-government parties indeed serve the public's interests and to intervene if they don't.[454] This implies that ultimately the government decides how different public policies relate to each other, and it is also the only party that can *compel* the prioritisation of certain policies.[455] So, even in a society where the government is not the only entity serving the public's interests, it remains the only entity that ultimately can – directly or indirectly – determine whether one public policy may trump another.

[453] There are various definitions of 'democratic legitimacy'. This study is not the place to explore in depth the different meanings of this concept, nor is it necessary to establish a precise meaning. What is adopted here is the commonly accepted view that the legislature is the highest authority in a democracy (such as the Netherlands), and that the legislature is fully democratically legitimised.

[454] Report of the Netherlands Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*), *Publieke Zaken in de Samenleving*, Amsterdam University Press, 2012, p. 139.

[455] Report of the Netherlands Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*), *Publieke Zaken in de Samenleving*, Amsterdam University Press, 2012, p. 133.

In addition, to the extent undertakings exercise state prerogatives, competition law does not apply to their activities.[456] Consequently, the democratic legitimacy rule does not imply that the Cartel Prohibition prevents the government from organising the state governance as it sees fit and from using private parties to serve the public interest.

It has been argued that the democratic legitimacy rule does not hold, since this rule would imply that also economic activities of the state, i.e., when the state acts as an undertaking, should fall outside the scope of the competition rules because those business activities can be assumed to benefit the general public interest. The critics imply that the democratic legitimacy rule has as a consequence that state undertakings must be allowed to form cartels because those undertakings have the democratic legitimacy to do so. However, since states acting as undertakings *do* fall within the scope of the competition rules, and assuming that this is appropriate, the critique is that therefore the democratic legitimacy rule is not valid:[457] democratic legitimacy is not decisive for trumping the statutory protection of competition and economic welfare. This critique, however, is not convincing for two reasons:

(1) First, one cannot automatically assume that all activities of a governmental institution serve the people's interests or are democratically legitimised to the same degree: government's actions can infringe the law, too. In other words, the activities of a governmental body can conflict with public interests protected by law, the former deriving legitimacy directly from democratic representation and the latter from the democratic legislative procedure.[458] Public law must then provide a solution; in democratic states under the rule of law governmental institutions need to abide by the law. So, if the law states that such institutions may not restrict competition if they perform economic activities, these institutions must indeed comply with competition law. This is not contrary to the democratic legitimacy argument, since it is in fact a democratically legitimised rule that the law takes precedence over other activities of the government.
(2) Secondly, with regard to the EU competition rules and Member States' bodies performing economic activities, it should be recognised that these rules serve an *EU* interest which could be jeopardised if Member States could unilaterally frustrate the effect of the competition rules. In the supranational legal order of the EU created by the Member States themselves and because of the supremacy of EU law, the Member States may only derogate from EU rules if a derogation

[456] See e.g.: ECJ judgment of 18 March 1997, *Case C-343/95 Diego Calì & Figli Srl v. Servizi ecologici porto di Genova SpA (SEPG)*, paras. 16, 23.
[457] Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 89.
[458] O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81*, Oxford University Press, 2007, pp. 46-47.

is provided for in EU legislation or case law; an example of such derogation, i.e. Article 106(2) TFEU, is discussed below in Part B. of this chapter. So, it is appropriate that Member States are not allowed to unconditionally ignore the EU competition rules through invoking their democratic legitimacy.

In sum, private parties should not be allowed to balance anti-competitive effects against Non-economic Benefits because of the lack the democratic legitimacy to trump the values of market rivalry and economic welfare protected by the Cartel Prohibition. The government, however, does have this legitimacy when prioritising policies. If, on the other hand, the government acts as an undertaking and not as a legislature, it is, and should be, bound by the Cartel Prohibition, like private parties.

A.2.3.3. Competition authorities and the democratic legitimacy rule

Now that it has been set out why private parties lack the democratic legitimacy to balance anti-competitive harm against Non-economic Benefits, it will be argued that *competition authorities* do not have sufficient democratic legitimacy to do so either. The Commission and ACM of course have the authority to sanction undertakings that violate the Cartel Prohibition and wrongly claim the benefit of the Exemption Possibility. One might consider that therefore these institutions, instead of undertakings, are the entities that define the substance of the Exemption Possibility and that therefore the democratic legitimacy of the competition authorities should be assessed instead.[459]

Legally it is not correct to regard the Commission and the ACM as institutions determining the fulfilment of the four conditions of the Exemption Possibility. Indeed, the law determines the substance of the four conditions, and the authorities may merely verify whether the law has been complied with. Once an agreement fulfils all elements of the four conditions, the Exemption Possibility applies from that moment – there is no need of involvement of the Commission or ACM. So, it is not right to hold that if the Commission and ACM have the democratic legitimacy to consider Non-economic Benefits in the First Condition, the scope of the First Condition should for

[459] Indeed, remarkably, most scholars, e.g. Mulder and Lavrijssen, discussing normatively the advantages and disadvantages of balancing non-competition interests in the Exemption Possibility, only cover this topic with a view to the opportunities and limits for competition authorities. It is often ignored that under the self-assessment regime it is in principle for the undertakings themselves to establish whether they comply with the Exemption Possibility, and that *civil* courts must apply the Exemption Possibility, too. See e.g.: S. Lavrijssen, *What Role for National Competition Authorities in Protecting Non-Competition Interests after Lisbon?*, 2010; J. Mulder, *Op het Snijvalk van Onafhankelijkheid en Openheid: Wat Is de Rol van de ACM in een Duurzame Maatschappij?*, SEW, No. 12, 2014, p. 569.

that reason encompass Non-economic Benefits. Private enforcement of agreements that generate Non-economic Benefits would then be problematic, if the authorities did not yet assess these benefits. This problem could be solved if the authorities' involvement in the application of the Exemption Possibility to a certain agreement were a constitutive element of the Exemption Possibility. This would mean a return to the pre-2004 notification system which was abandoned due to its ineffectiveness…

That being said, the normative view in this book is that the Commission and the ACM do not have the appropriate democratic legitimacy to balance Non-economic Benefits against economic welfare in the Exemption Possibility.[460]

The Commission. With regard to the democratic legitimacy of the Commission, two aspects are relevant: how this body is formed and what its powers are. Considering the formation process of the Commission, based on Article 17(7) TEU, it is evident that the influence of EU voters on the composition of this institution is rather indirect. The President of the Commission is elected by the EU Parliament, upon a proposal by the European Council. So, formally the Parliament has a great say in determining who the President will be – in practice perhaps the decisive vote.[461] Next, the other members of the Commission are appointed following (1) their selection by the Council, (2) approval of the *whole* Commission by the Parliament and (3) the formal appointment by the European Council. So, while the Commissioners are neither directly nor indirectly elected, the involvement of the EU Parliament[462] and the Council, which can be deemed to have significant democratic legitimacy, provides the Commission itself with some level of democratic legitimacy. This level

[460] For a similar view see: H. Vijlbrief, *Mededingingsrecht en Niet-Economische Belangen*, in: Trust en Antitrust: Beschouwingen over 10 jaar Mededingingswet en 10 jaar NMa, 2008, eds. P. Kalbfleisch *et al.*, NMa Den Haag, p. 107. For a contrasting view see: R. Claassen & A. Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, Utrecht Law Review, Vol. 12, Iss. 1 (January) 2016, p. 9. Claassen & Gerbrandy assert that "*it is the legal decisions by competition authorities that exclude non-economic interests which lack legitimacy.*" They endorse the view that only decisions that are based on a consideration of all relevant interests can have proper democratic legitimacy. However, *democratic* legitimacy does not only depend on the quality of the deliberative process, but also on the processes and institutions involved: a tyrant considering the interests of all stakeholders involved will never make a democratically legitimised decision. In addition, the fact that administrative agencies may only exercise the limited power they have been granted by the (democratically elected!) legislature does not mean that interests outside the jurisdictions of these agencies will be neglected. The legislature remains of course capable of prioritising these other interests over competition law by making new laws.

[461] N. Nugent & M. Rhinard, *The European Commission*, Palgrave, 2nd edn., 2015, p. 77.

[462] The Members of the EU Parliament are directly elected by EU voters. In this book it is assumed that this means that the Parliament has democratic legitimacy vis-à-vis EU citizens. Consequently, the discussion neglects the debate on the fundamental question of whether the EU Parliament can ever have democratic legitimacy if no proper EU *demos* exists. This is a valuable debate, but too extensive for this study and an assessment would not change the position taken in this book. For an overview of the so-called 'democratic deficit debate' see: S. Kröger, *Political Representation and Democracy in the European Union*, in: European Union Power and Policy-making, eds. J. Richardson & S. Mazey, Routledge, 4th edn., 2015, pp. 474-485.

is, however, often perceived to be low.[463] In addition, democratic control of the Commission is exercised by the Parliament (in addition to the Parliament's role in the legislative process) through the Parliament's power to dismiss the whole Commission pursuant to Article 234 TFEU. Since this power of dismissal only relates to the whole Commission and not to individual Commissioners, it is a very far-reaching measure. This may be a reason why it has been *de facto* used only once.[464] This also lowers the level of democratic legitimacy in practice. In sum, it is here concluded that the Commission as an institution has a rather remote democratic foundation. This need not be problematic, however, provided that the Commission does not perform activities that would require significant democratic legitimacy,[465] such as policy-making. The policymaking activities of the Commission are discussed below.

The Commission is of course, unlike many national competition authorities, not just an institution focusing on competition law enforcement. The Commission has several important roles to play in the whole EU sphere. Its primary function and powers are set out in Article 17(1) and (2) TEU[466] and these include, among others, the proactive promotion of the EU's general interest, ensuring the application of EU law and initiating legislative proposals to the EU legislature. To the extent policy-making that is relevant to the present discussion is considered, the Commission's functions may be categorised into two broad areas: (1) the policy initiating function and (2) the executive function:[467]

[463] N. Nugent & M. Rhinard, *The European Commission*, Palgrave, 2nd edn., 2015, p. 238; V.A. Schmidt, *The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?*, Commission Staff Paper - European Economy Discussion Paper 015, 2015, p. 17; V. Miller & J. Lunn, *The European Union: A Democratic Institution?*, UK House of Commons Study Paper, 2014, p. 25.

[464] N. Nugent & M. Rhinard, *The European Commission*, Palgrave, 2nd edn., 2015, pp. 107-108.

[465] A. Menon & J. Peet, *Beyond the European Parliament: Rethinking the EU's Democratic Legitimacy*, Center for European Reform Essay, 2010, p. 6.

[466] Articles 17(1) & (2) TEU:
"*(1) The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.*
(2) Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide."

[467] A. Wonka, *The European Commission*, in: European Union Power and Policy-making, eds. J. Richardson & S. Mazey, Routledge, 4th edn., 2015, pp. 85-86.

(1) Pursuant to Article 17(1) TEU, the Commission has a near-monopoly on issuing legislative proposals. So, the EU legislature can only adopt (primary) legislative acts if the Commission has submitted a proposal.[468] This gives the Commission a very important role in EU policymaking, as some sort of gatekeeper for policy development.[469] However, after the proposal has been issued, the emphasis shifts to the Council and Parliament: the Commission itself cannot adopt legislative acts, apart from some exceptions, and the Commission's proposals can be amended significantly by the Council and Parliament.[470] The substance of EU policies is in the end, therefore, officially not determined by the Commission, but by the Council and Parliament instead. As the proper policymaking is not done by the Commission, the prioritisation of different policies is also not the task of the Commission.[471]

(2) The Commission has several executive roles within the EU governance. This could include the direct implementation of a policy or enforcement of legal rules, e.g. in the area of competition law. More often it means that the Commission develops the rules for Member States or EU agencies which exercise the direct implementation. It may do this if it has been empowered to do so pursuant to Articles 290 and 291 TFEU. These articles allow that legislative acts adopted by the Parliament and Council may include the possibility that the Commission adopts 'non-legislative acts' to further implement and flesh out the legislative act.

[468] It has been observed that currently the Commission in fact exercises its role as initiator of legislative acts at the request of other institutions, especially the Council, to the extent more important acts are concerned. "*It* [i.e. the Commission] *no longer drives the legislative process but plays the part of a useful go-between between the Parliament and the Council, when they so wish*." J. P. Jacque, *Lost in Transition: The European Commission*, in: Independence and Legitimacy in the Institutional System of the European Union, ed. D. Ritleng, Oxford University Press, 2016, p. 18.

[469] The right to issue legislative proposals does not, however, give the Commission an unconditional right to abandon the legislative process at will, even if the Council has not yet acted upon a Commission's proposal. See: ECJ judgment of 14 April 2015, *Case C-409/13 Council of the European Union v. European Commission*, paras. 75-78.

[470] Most EU policies are now developed through legislative acts following this route, i.e. the ordinary legislative procedure of Article 289 TFEU. Briefly put, the procedure prescribes that (1) the Commission submits a proposal for a new act, (2) the EU Parliament and Council adopt their own positions regarding this proposal and (3) these institutions negotiate a joint position, which can subsequently be formally made law, and (4) if no joint position can be reached, the legislative proposal is dismissed. The legislative procedure for acts implementing EU antitrust law is a consultation procedure, *cf.* Article 103 TFEU. This procedure involves (1) a proposal by the Commission, (2) a consultation of the EU Parliament, and finally (3) the adoption of the act by the Council with a qualified majority decision.

[471] The above description is based on the formal legislative roles of the EU institutions, as laid down in the EU Treaties. The Treaties' rules can be held to reflect the preferences of the founders of the EU, i.e. the Member States. Admittedly, in practice the roles of the institutions may differ from the formal roles. R. Thomson, *The Distribution of Power among the Institutions*, in: European Union Power and Policy-making, eds. J. Richardson & S. Mazey, Routledge, 4th edn., 2015, pp. 195, 199. However, if anything, the role of the Commission in the legislative process has become less important; see below.

The non-legislative, *delegated* acts are adopted by the Commission,[472] but the content of the rules is subject to the approval of the Council and EU Parliament and these institutions also have the right to revoke the non-legislative act.[473, 474] In addition, these non-legislative acts are meant to only supplement or implement a primary EU law, or amend non-essential terms of such a law.[475] The Council and Parliament do not have similar powers with regard to *implementing* acts, but these acts are meant to merely facilitate the implementation of the primary acts without amending or supplementing them. This implies that the key elements of a policy should not be determined in these non-legislative acts. The view of the EU Parliament in this respect in noteworthy: "*whereas the Lisbon Treaty introduced the possibility for Parliament and the Council (together referred to as 'the legislator') to delegate part of its own powers to the Commission in a legislative act ('the basic act'); whereas delegation is a delicate operation whereby the Commission is instructed to exercise a power which is intrinsic to the legislator's own role; whereas it is therefore necessary to ensure the correct application of the Treaty, so as to guarantee a sufficient level of democratic legitimacy for delegated acts as well; whereas the starting-point in examining the issue of delegation must therefore always be the freedom of the legislator; whereas according to settled case-law, the adoption of rules essential to the subject matter envisaged is reserved to the legislator; which means that the adoption of provisions requiring political decisions that fall within the responsibility of the legislator cannot be delegated; whereas therefore that delegated power can only consist in supplementing or amending parts of a legislative act that are not essential.*"[476] Consequently, even if the Commission has genuine rule-making powers, the scope of these powers is limited and do not give it the authority to develop the policy's content.

[472] Although the exact boundary between delegated acts and implementing acts is hard to determine, in general the delegated acts are used if non-essential elements of the primary act could be amended, while implementing acts are used if no changes to the primary act are necessary. P. Craig & G. De Burca, *EU Law, Text, Cases and Materials*, Oxford University Press, 6th edn., 2015, pp. 116-120; Z. Xhaferri, *Delegated Acts, Implementing Acts, and Institutional Balance Implications post-Lisbon*, Maastricht Journal of European and comparative law, 20(4), 2013, pp. 563-564.

[473] Article 290(2)(a) TFEU.

[474] P. Craig & G. De Burca, *EU Law, Text, Cases and Materials*, Oxford University Press, 6th ed., 2015, p. 117.

[475] The meaning of 'essential elements' is unclear. The ECJ has recently considered such elements to be "*provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union.*" This consideration does not clarify the matter much. See: ECJ judgment of 5 September 2012, *Case C-355/10 European Parliament v. Council of the European Union (Schengen Borders Code case)*, para. 65; and M. Chamon, *How the Concept of Essential Elements of a Legislative Act Continues to Elude the Court.* Parliament v. Council, Common Market Law Review, Vol. 50, 2013, pp. 857-859.

[476] European Parliament resolution of 25 February 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI)), para. A.

The abovementioned role of the Commission is more ambiguous if one takes the position that, due to some sort of delegation of policymaking powers by the Treaties legislature, the application of the Exemption Possibility *does* include the possibility to consider Non-economic Benefits. Such a form of delegation would make the balancing of Non-economic Benefits legally acceptable, but still undesirable due to the weak democratic legitimacy of the Commission (see also the discussion above with regard to the democratic legitimacy rule and the legal constitution of society). That being said, it should be noted that there are no indications that the Treaties legislature indeed meant to delegate these powers.

In sum, the Commission neither has substantial democratic legitimacy, nor has it been granted formal powers to determine the substance of EU policies. This means it should not be able to prioritise between various EU public policies, and consequently it is not appropriate that the Commission, acting alone, be allowed to balance Non-economic Benefits against economic welfare in the Exemption Possibility.[477] In this respect it is noteworthy to consider the Commission's own view: "*There are however certain limits as to how competition law – as compared to other legal instruments – can take sustainability into account. The relevant* [TFEU] *articles on competition do not empower the Commission, or the national competition authorities, to enter into delicate balancing acts weighing sometimes contradictory public interests when assessing such* [sustainability] *initiatives by business.*"[478] Recently, Commissioner Vestager has reaffirmed this view.[479]

[477] Van Rompuy considers it "*fundamentally problematic*" that undertakings do not know to what extent non-efficiency benefits can be balanced against competition interests. This notion implies, in the absence of legal clarity on the possibility to perform such balancing, that undertakings should not be capable of deciding whether a certain Non-economic Benefit may trump anti-competitive effects. His solution is, however, that the Commission publishes *ex ante* guidance on how to treat conflicts between non-efficiency values and competition concerns. If the Commission were to be the legitimate institution to determine the scope of competition law and the other policy at issue, such an exchange rate for different values could indeed be a solution. However, above it is explained that the Commission – as an executive institution and not the EU legislature – is not the appropriate institution to determine a general hierarchy of the different EU policies. B. Van Rompuy, *Economic Efficiency: the Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU*, Kluwer Law International, 2012, p. 403.

[478] DG COMP letter of 26 February 2016 (re consultation of the Policy Guidelines Competition and Sustainability of the Dutch Minister of Economic Affairs), COMP/A4/D*011157, p. 1.

[479] "*I'm a great believer in corporate social responsibility. I welcome it when companies take a broader view of their role than just selling the best product at the lowest prices but also look at sustainability for example. (…) I also think that a competitive and well-functioning market can be one with fewer opportunities for corruption, and less room for companies to get away with poor treatment of workers and communities. But I don't think it's for competition enforcers to start pursuing those objectives. Because what makes competition enforcement effective is its independence. It works because we take our decisions on the basis of the evidence and the law, <u>without any aim in mind besides a competitive market with a fair deal for consumers.</u> (…) Because competition enforcement can only be truly effective if the public is convinced that enforcers are taking decisions <u>purely in the interests of competition.</u>*" Speech of 1 December 2016 by Commissioner Vestager, *Competition Policy in Context*, 15th OECD Global Forum on Competition [underlining added].

The ACM. With regard to the ACM, its competition law tasks are limited to the tasks attributed to it by law [480] and these do not include a general power to weigh different public policies.[481] In principle, even the making of competition policy is not a task for the ACM but for the Minister of Economic Affairs, as the ACM's tasks are of an executive and supervisory nature.[482] This is in conformity with the general policy on 'independent executive agencies' (in Dutch: *zelfstandige bestuursorganen*), such as the ACM, which implies that the legislature or minister should make any public policy and that the possibility for independent executive agencies to make policy should be as limited as possible.[483] Unlike ministers, these agencies are not directly accountable to the Parliament and are therefore only remotely subject to democratic control. Consequently, the Dutch legislature takes the stance that in general, policy-making must done by ministers who are directly accountable to the Parliament, while the independent agencies may perform tasks that are more of an executive nature. Indeed, the legislature has expressly given the ACM a limited set of executive and supervisory tasks, and these do not include the weighing of different public policies. To conclude, even though the ACM is a governmental body, it is not the appropriate entity to prioritise between different public policies.

The abovementioned role of the ACM is more ambiguous if one takes the position that the application of the Exemption Possibility *does* include the possibility to consider Non-economic Benefits. As it is of course the authority's task to apply competition law, this would imply that the ACM could consider these benefits in the Exemption Possibility. Admittedly, it can then be argued that the authority is legitimised by law to weigh Non-economic Benefits. It is here asserted, however, that this would be still undesirable for four reasons:

(1) First, allowing the ACM to balance Non-economic Benefits – e.g. fairness and public safety – against economic prosperity gains, implies that the ACM will make genuine political choices. This is not in conformity with the generally aspired

[480] Article 2(2) Instellingswet ACM. See also: Parliamentary article, *Kamerstukken II* 2011/12, 33186, No. 6, p. 11.

[481] Aelen discusses the democratic legitimacy and tasks of the Dutch market authorities at length in: M. Aelen, *Beginselen van Goed Markttoezicht*, Boom Juridische Uitgevers, 2014, pp. 163-173, 256-284.

[482] Parliamentary article, *Kamerstukken II* 2011/12, 33186, No. 3, p. 5.

[483] See e.g. Parliamentary article, *Handelingen II*, 12 March 2002, No. 54, p. 3705. Aelen endorses this approach: M. Aelen, *Beginselen van Goed Markttoezicht*, Boom Juridische Uitgevers, 2014, p. 279. Similarly, Ottow observes: "*In the light of this interpretation of the principle of legality, where the legislator holds primacy, the Dutch legislator and some Dutch authors have claimed that independent national competition and market authorities cannot be attributed powers that involve policy choices; their responsibility is solely to implement (applying the rules) policy decisions taken by the legislator and the minister (making the rules).*" A. Ottow, *Market and Competition Authorities, Good Agency Principles*, Oxford University Press, 2015, p. 71.

division of authority between ministers and independent executive agencies (see above). The reason for charging an independent agency with public enforcement of the DCA is that the Dutch legislature deemed it necessary that competition law decisions be made based upon specific expertise of market supervision and not on political grounds.[484] Valuing non-economic interests, however, is not part of the ACM's specific expertise. In 2010 the UK competition authority OFT came to a similar conclusion: "*In summary, if a broader interpretation of benefits is adopted under Article 101(3)* [TFEU], *then competition authorities may be faced with issues that are better dealt with by government (or at least may require government support). This may undermine their independence and could potentially sidetrack them from dealing with competition issues to dealing with political issues (such as the distribution of gains and losses across different types of consumers)*."[485]

(2) Secondly, the problem remains that Non-economic Effects and anti-competitive effects cannot be compared adequately. The legislature and Minister of Economic Affairs have not explained how the ACM should weigh incommensurable values and without such an explanation the ACM would have to decide itself on the value of incomparable public interests. This would render the ACM a genuine political body, which in turn would raise the abovementioned issue regarding the appropriate attribution of authority to an independent executive agency.

(3) Thirdly, the abovementioned incommensurability creates a divergence issue with regard to the EU Exemption Possibility. The application of the EU Exemption Possibility, including the weighing of Non-economic Benefits and the concomitant inherent subjective balancing of these effects, creates a significant risk of a divergence in substance of the EU Exemption Possibility between the Netherlands and other Member States[486] – which is impermissible because of legal certainty reasons. The divergence could be limited by interference of the Commission,[487] but this would merely shift the legitimacy issue to the Commission and this is indeed an issue (see above). Limiting the balancing of Non-economic Benefits to the Dutch Exemption Possibility is not a viable option, not even if Article 101 TFEU didn't apply, because this would lead to a divergence between the EU and Dutch Exemption Possibility. This would be contrary to the Dutch legislature's intention of close convergence between EU and national competition law.[488]

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[484] Parliamentary article, *Kamerstukken II* 2011/12, 33186, No. 6, p. 11.

[485] OFT Discussion note, Article 101(3) - *A Discussion of Narrow Versus Broad Definition of Benefits*, 2010, para. 3.60.

[486] C. Semmelmann, *The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC*, Global Antitrust Review, Vol. 1, 2008, p. 39.

[487] Commission Notice on cooperation within the Network of Competition Authorities of 27 April 2004, paras. 43 *et seq*.

[488] See e.g. Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, p. 10.

(4) Fourthly, if the stance is taken that the Exemption Possibility allows the balancing of Non-economic Benefits by the ACM, this should not mean that only the ACM would be allowed to value such effects, but private parties and civil courts, too. Indeed, antitrust law is not just enforced by competition authorities, but also by private parties bringing claims to civil courts. As mentioned above, it would be undesirable if private parties were to be allowed to decide that anti-competitive effects must be accepted because of some social or fairness effect of the agreement concerned.

A.2.3.4. The courts and the democratic legitimacy rule

Having considered the democratic legitimacy of private parties and the competition authorities to balance Non-economic Benefits against anti-competitive effects, it is now time to discuss the *courts*.[489] Civil and administrative courts have the authority to review the claims of undertakings and the decisions of competition authorities respectively. So, the courts in the end determine the scope of the Exemption Possibility. But are the courts the appropriate institutions to decide which values or public interests are the more important ones, where and when? If so, is the courts' power to review undertakings' and authorities' decisions sufficient reason to give undertakings the possibility to enjoy the benefit of the Exemption Possibility for agreements that have Non-economic Benefits?

To answer this question it is relevant to make a distinction between conflicting *rights* and conflicting *values*. Judges are well placed to assess conflicting legal rights in proceedings between claimants and defendants. In a society organised in conformity with the *trias politica* principle, like the Netherlands, judges adjudicate in accordance with the law and give judgments on the lawfulness of actions.[490] Briefly put, in

[489] It is here deemed unnecessary for this discussion to differentiate between civil and administrative courts, as the reasoning set out below applies to both types of courts.

[490] "*(…) each state power has its own task and responsibilities. The court provides legal protection and settles legal disputes, (…) This constitutes a review of lawfulness. The court does not enter the political domain with the associated considerations and choices. Separate from any political agenda, the court has to limit itself to its own domain, which is the application of law. Depending on the issues and claims submitted to it, the court will review them with more or less caution. Great restraint or even abstinence is required when it concerns policy-related considerations of ranging interests which impact the structure or organisation of society. (…) Government authorities, such as the State (with bodies such as the government and the States-General), have to make a general consideration, with due regard for possibly many more positions and interests.*" The Hague District Court judgment of 24 June 2015, *Urgenda* case, ECLI:NL:RBDHA:2015:7196, para. 4.95 (translation from Dutch provided by the District Court). For a general analysis of the *Urgenda* case see e.g.: K.J. de Graaf & J.H. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, Journal of Environmental Law, Vol. 27, Iss. 3, 2015.

accordance with the applicable separation of powers, the judges apply the law, while politicians make the law.[491] So, judges must make *legal* decisions, i.e., decisions based on an application and interpretation of the law (which includes legal principles). Consequently, adjudication may very well require the reconciliation of conflicting laws or the balancing of interests based upon different laws or legal principles. This is what courts regularly do when considering cases involving clashes between constitutional rights or fundamental legal principles. Likewise, citizens may enjoy certain rights that are restricted by the Cartel Prohibition, which restriction could be deemed unjust by the courts, resulting in a setting aside of this prohibition.[492] There are, however, differences between on the one hand, e.g., a clash between constitutional rights, and on the other hand the reconciliation of the Cartel Prohibition with Non-economic Benefits through the application of the Exemption Possibility:[493]

(1) Leaving aside the Third and Fourth Conditions, the balancing exercise of the Exemption Possibility, if Non-economic Benefits were to be taken into account, would imply the balancing of *two different public interests with a general impact*. Performing this balancing exercise would make a court a policy priority-setting body, i.e. a political institution. In contrast, a clash between constitutional rights is more constrained to assessing the single legal relationship between the two litigating parties. This is explained below.

[491] This is a simplification of the *trias politica* principle and of reality, but that is not relevant for the present discussion. It is here appreciated that the division between adjudication and rule-making is not always clear, and sometimes judges make, inevitably, 'political' judgments. See: C. J. Stolker, *De Politieke Rol van de Rechter in het Burgerlijk Recht*, in: Rechters en Politiek, ed. M.G. Rood, Tjeenk Willink, 1993, pp. 56-58.

[492] E.g., the US Supreme Court has considered that the collective approaching by competitors of the government to take action that may harm competition, is not prohibited under the US cartel prohibition (i.e. Section 1 Sherman Act), since the prohibition of this petitioning would be contrary to the US Bill of Rights. This principle is known as the *Noerr Pennington* doctrine. "*Grounded in First Amendment principles and concerns about impinging on the governmental decision-making process, the protection provided by* Noerr *and its progeny furthers important goals in our democracy. As the Supreme Court has noted, the right to petition government is 'among the most precious of the liberties safeguarded by the Bill of Rights.'*" FTC Staff Report, *Enforcement Perspectives on the Noerr-Pennington Doctrine*, 2006, p. 3 [footnote omitted].

[493] Komninos, however, sees similarities between the reconciliation of constitutional rights on the one hand, and the balancing of competition law and public interests (e.g. the *Wouters* case). In addition to the arguments below, it is here also submitted that this comparison is not so convincing with regard to cases involving the Exemption Possibility. In these cases there is no conflict between *rights*: buyers do not have the *right* to enjoy the benefits at issue – the Exemption Possibility merely allows that such benefits, *if they materialise*, trump the Cartel Prohibition – while the Cartel Prohibition clearly constitutes a right to be shielded from competition restrictions. A.P. Komninos, *Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC*, University of Oxford Centre for Competition Law and Policy Working Paper (L) 08/05, 2005, p. 13.

The balancing exercise of the Exemption Possibility differs from a classical case where, e.g., two fundamental rights clash,[494] since in the latter case the judge must adjudicate upon the *individual rights* of these two parties and how the conflict in this specific case is to be resolved. For example, a defendant has the right to take action (e.g., publish an article), while the claimant has the right to be sheltered against such action (e.g., protection of privacy). The judge must now decide in this concrete situation which individual right prevails, and he may consider the nature of the published information, the severity of the damage done to the claimant, whether the information is likely to be true, the significance of the information for the public, whether other means of publication would be less intrusive, etc.[495] The individual rights may reflect general interests or values, but still the adjudication concerns private legal relationships between the parties – and not the weighing of abstract public interests.[496]

In contrast, the balancing exercise of the Exemption Possibility takes into account all buyers (or society). On the one hand there is a reduction in economic prosperity for this group, but on the other hand other benefits, such as social inclusion, fairness, safety, employment, etc., could presumably make the buyers (or society) better off.[497] So, in essence the judge is requested to rule on whether buyers as a group are better off with more prosperity or by enjoying the Non-economic Benefit. In other words, this balancing exercise would require a court to decide on a conflict which concerns *"policy-related considerations of ranging interests which impact the structure or organisation of society"*[498] – or the balancing of several general interests, the outcome of

[494] Although courts regularly adjudicate such fundamental rights cases, many commentators consider this problematic, because in cases involving incommensurable rights/interests/values of equal importance, judges cannot but take subjective, political or intuitive decisions. One could therefore doubt whether it is desirable to transpose the same problem to the balancing exercise of the Exemption Possibility. See e.g.: J.H. Gerards, *Belangenafweging bij Rechterlijke Toetsing aan Fundamentele Rechten*, Kluwer, 2006, pp. 4-5; J.M. Smits, *Belangenafweging door de Rechter in het Vermogensrecht: Kritische Beschouwing*, RM Themis, No. 4, 2006, p. 137; S. de Vries, citing others, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, Utrecht Law Review, Volume 9, Issue 1 (January), 2013, p. 170

[495] Smits describes this example: J.M. Smits, *Belangenafweging door de Rechter in het Vermogensrecht: Kritische Beschouwing*, RM Themis, 2006-4, p. 137.

[496] Schutgens makes a similar argument: R. Schutgens, *Urgenda en de Trias*, NJB 2015/1675, 33, 2015, p. 2277, footnote 33.

[497] To avoid doubt, it is mentioned that the balancing exercise does not cover a clash of the rights of the cartelising parties vis-à-vis the rights of the buyers. Instead the balancing is required with regard to harm to, and improvements for, *the buyers only*.

[498] The Hague District Court judgment of 24 June 2015, *Urgenda* case, ECLI:NL:RBDHA:2015:7196, para. 4.95 (translation from Dutch provided by the District Court).

which depends on subjective views. In Western democracies, at least in the Netherlands, such decisions should be taken by politicians and the courts should abstain from adjudicating such conflicts or exercise great restraint.[499]

This would also apply on an EU level: this can be illustrated by the way the ECJ conducts a proportionality balancing exercise when considering mandatory requirement exceptions to the free movement rules. In such cases the ECJ in fact hardly ever reviews the balancing of the free movement rule against the Member State's legitimate interests, as the Court leaves it to the states to determine such public policy choices.[500] Even if the ECJ does consider the balancing exercise, it only applies a marginal review.[501] In the *Wouters* case, where a conflict between competition law and 'legitimate interests' was considered by the ECJ, this court in fact did not also weigh the competition interests against the legitimate interests itself.[502] Instead of applying a real proportionality test *stricto sensu*, which would imply an actual comparison of the significance of the interests at issue, the ECJ readily accepted the position of the body regulating the Dutch Bar that certain competition restrictions needed to be tolerated in the interest of the proper practice

[499] See citation of the *Urgenda* judgment at footnote 490 and also: P. Van Buuren, *Case Note of the Judgment of the Hoge Raad of 16 May 1986 (Landbouwvliegers)*, AB, 574, 1986, p. 25; R. Schutgens, *Urgenda en de Trias*, NJB 2015/1675, 33, p. 2275; L. Bergkamp, *Het Haagse Klimaatvonnis - Rechterlijke Onbevoegdheid en de Negatie van het Causaliteitsvereiste*, NJB 2015/1676, 33, 2015, p. 2281. Admittedly, there is no consensus on the power of Dutch courts to decide on 'political cases'. Nevertheless, those who consider there to be room for the courts to adjudicate policy-related cases that ideally would have been solved by the legislature, generally consider that this should be possible if the legislature hesitates too long with legislating. See: R. van Gestel, Urgenda: *Een Typisch Gevalletje Rechter, Wetgever of Politiek?*, RegelMaat, Vol. 30, Iss. 5, 2015, p. 386; R. van Gestel & M. Loth, *Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?*, NJB 2015/1849, Vol. 37, 2015, p. 2605.

[500] J.H. Jans *et al.*, *Europeanisation of Public Law*, Europa Law Publishing, 2007, p. 159.

[501] "*Our conclusion would be that, though the Court will not rule out a genuine balancing of interests in the context of a proportionality test, as a general rule it will not carry out such a balancing exercise itself. It should be added that, if the Court should nevertheless desire to review situations in the light of this aspect of the proportionality principle, only a manifest error of appreciation would, in principle, result in a breach of the principle. This, too, seems a sensible approach from a constitutional point of view*." J.H. Jans et al., *Europeanisation of Public Law*, Europa Law Publishing, 2007, p. 159 [footnote omitted].

[502] Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 131; I. Wendt, *The Tension between Rules Regulating the (Liberal) Professions and EC Competition Law*, Universitaire Pers Maastricht, 2009, pp. 408-410. See also Houdijk, who argues that due to the political-social nature of the balancing of interests, it is plausible that courts (and competition authorities) take a cautious approach when reviewing a balancing exercise à la *Wouters* involving non-economic goals. J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 20.

of the legal profession.[503] Again, it applied in fact a marginal review.[504] However, a marginal review does not suffice in cases involving the Exemption Possibility: a court cannot hold back when requested to apply the Exemption Possibility in a case between two private parties and must therefore enter the political domain.[505]

To conclude, if courts were required to take Non-economic Benefits into account when applying the Exemption Possibility, they would in fact have to make political decisions. This is not the role for courts in democracies organised pursuant to the *trias politica* principle. Adjudicating on constitutional rights differs substantially from balancing Non-economic Benefits against anti-competitive harm, since these former cases concern in the first place private legal relationships between the parties.

(2) Another reason why the adjudication on conflicting individual rights differs from the balancing exercise at issue, is that the former implies legal proceedings in which both holders of these different individual rights, i.e. the claimant and the defendant, are present. In cases involving the Exemption Possibility the buyers as a group are usually not present, as the parties are mostly the cartelising

[503] ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*, paras. 108-109.

[504] One may argue that in the *Albany* case the ECJ itself basically balanced two EU policies: the EU right to seek improvement of working conditions was balanced against the EU's competition policy – see: A.P. Komninos, *Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC*, University of Oxford Centre for Competition Law and Policy Working Paper (L) 08/05, 2005, p. 16. (*Albany* case see: ECJ judgment of 21 September 1999, *Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, paras. 59-60.) However, the ECJ did not in fact conduct a genuine balancing exercise, since it did not weigh the two different policies against each other. Instead, the ECJ stated that collective bargaining agreements "*by virtue of their nature and purpose*" fall outside the scope of Article 101 TFEU, *not* because the EU employment policy was the more important one. Townley, too, considers that the Court used 'exclusion' as a reconciliation method in the *Albany* case, not 'balancing'. Although he admits that exclusion and balancing sometimes interact, Townley considers them to be different. Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, pp. 29, 59-62 and footnote 102 (p. 61).

[505] It is here submitted that in cases where the EU Courts considered Non-economic Effects in the Exemption Possibility, they did not exercise or assess a balancing test. See: ECJ judgment of 25 October 1977, *Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v. Commission (Metro I case)*; ECJ judgment of 3 July 1985, *Case 243/83SA Binon & Cie v. SA Agence et messageries de la presse (Binon case)*; GC judgment of 11 July 1996, *Case T-528/93 Métropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission (Métropole case)*. De Vries seems to favour a genuine balancing of public interests by the ECJ, at least in the context of clashes between EU fundamental rights and EU free movement rules. He refers to the *Schmidberger* case as a good example (S. de Vries, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, Utrecht Law Review, Vol. 9, Iss. 1 (January), 2013, p. 191). It is here, however, observed that the ECJ mentioned several times in this judgment that the Member States have a "*wide margin of discretion*" when balancing the interests concerned, which may imply that the actual balancing of interests was up to them and not to the Court. See: ECJ judgment of 12 June 2003, *Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich (Schmidberger case)*, paras. 82, 89 and 93.

undertakings and the competition authority or an individually harmed customer. Especially in civil law cases this may imply that the views of the buyers in general may not be expressed, so that it can be questioned whether the balancing of their interests by a court is desirable in such cases.[506]

A.2.3.5. Conclusion on the normative view on Non-economic Benefits

As Non-economic Benefits by definition cannot be translated in monetised economic welfare terms, they do not have the same denominator as anti-competitive effects. It has been suggested that conflicts between different EU policies should be solved by determining which prioritisation of policies serve the overarching goals best. Although it is here regarded correct that *in theory* the pursuit of the EU's overarching goals mentioned in Article 3(1) TEU direct the solution of conflicts between EU policies, it is here also concluded that *in practice* this is not feasible. The concept of the 'well-being of the EU peoples' here held to be too abstract, undefined and open to multiple interpretations, so that this concept cannot be used in a solution mechanism.

As a common denominator between the Cartel Prohibition's goal and Non-economic Benefits is lacking, the solution of conflicts between this prohibition and a public policy pursuing Non-economic Benefits depends on a subjective, political choice. In democratic societies only the chosen governments have the legitimacy to set the hierarchy among legally protected values or legal norms. It is therefore argued in this book that only the state can solve such a conflict. Private parties, competition authorities[507] and courts should not be allowed to decide that competition policy must be trumped by another policy, as they lack the legitimacy to do so. Therefore, Non-economic Benefits should not be eligible for inclusion in the balancing act of the Exemption Possibility.[508] To be clear: this view does not imply that in general the competition rules take priority over other policies. No, the consequence of the endorsed view is only that undertakings do not have the liberty to conclude agreements that produce certain non-economic benefits for society, but also restrict

[506] See also: : R. Schutgens, *Urgenda en de Trias*, NJB 2015/1675, 33, p. 2275, footnote 29.

[507] Suggestions have been made to remedy the democratic legitimacy problem with regard to competition authorities' decisions, by introducing some kinds of democratic legitimised procedures into the competition authorities' decision-making process; see: A Gerbrandy, *Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority,* European law review, Iss. 5, 2015, pp. 769-781.

[508] Similarly, see e.g.: A.P. Komninos, *Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC*, University of Oxford Centre for Competition Law and Policy Working Paper (L) 08/05, 2005, p. 8; J. Mulder, *Op het Snijvalk van Onafhankelijkheid en Openheid: Wat Is de Rol van de ACM in een Duurzame Maatschappij?*, SEW, No. 12, 2014, p. 571.

competition. In fact, this normative view leaves this political choice to the legislatures: the competition rules in the TFEU (and the DCA) can be set aside by other rules in the EU Treaties or by EU legislation (or by other Dutch laws, respectively).

A.2.4. Paternalism and Economic Benefits

It was already explained in Chapter 3.6.2.2. that governments sometimes deem paternalistic measures necessary to achieve a certain policy goal, usually the protection of consumers against objectionable products. Paternalism implies that the government makes choices for consumers in order to serve the (perceived) interests of these consumers and regardless of their actual preferences. A motivation for adopting paternalistic measures may be that the level of 'protection' that consumers enjoy if all market failures are remedied may still be deemed insufficient. Paternalistic measures are motivated by, among other things, the idea that it is *fair* that consumers are protected against, e.g., certain activities of banks, regardless of the wishes of consumers.

It is relevant to realise that if consumer welfare in the technical sense is maximised, which arguably competition law may try to achieve, this does not automatically mean that consumers are sufficiently protected from a paternalistic consumer protection point of view. Paternalistic regulation implies that consumers are not free anymore to make choices based only on their own preferences. As a consequence, paternalistic regulation steers the consumption patterns away from the consumption level brought about by supply and demand forces in a perfectly competitive market.[509] In this regard, the AFM distinguishes between customer *interests* on the one hand and customer *satisfaction* on the other hand. A customer may be completely satisfied with obtaining a large mortgage loan that allows him to buy nice villa, but at the same time this loan may be a product of overlending.[510] In the view of the AFM this mortgage loan is provided against the customer's interest and should therefore not have been provided. In this situation consumer preferences differ from the interests of the consumers as the AFM sees them. Since paternalistic regulation assumes that buyers' preferences are not necessarily appropriate for establishing buyers' economic welfare, consumer surplus is not an appropriate measure of buyers' welfare. Indeed, a proponent of a certain paternalistic measure would argue that the appropriateness of a product and its price cannot be verified merely through inquiring of consumers

[509] For those who believe that a well-functioning market produces the best outcomes for buyers, paternalism may have a negative connotation. For the purposes of this study it is not relevant to take a view on whether a paternalistic approach is desirable or not.
[510] AFM Magazine *Inzicht* No. 21, March 2010, p. 8.

whether they appreciate and/or prefer the product, and how they value it. The replies to such an inquiry cannot necessarily be accepted as indicating appropriateness, the proponent would argue.

Since the 'need' for paternalism means that consumer surplus cannot be used to determine the economic welfare effects of a measure, there are fundamental difficulties with assessing whether anti-competitive, paternalistic self-regulation can benefit from the Exemption Possibility. In other contexts, e.g., if the government considers introducing a paternalistic law, the question of whether such an introduction indeed increases buyers' welfare can be answered because the government deems itself the better judge of what is good for the buyers. Whether this is in fact the case might be questioned, but at least the government has the democratic legitimacy to limit buyers' sovereignty (see Section A.2.3.2. above). Undertakings agreeing upon paternalistic self-regulation do not have the same legitimacy. This is a reason against allowing paternalistic self-regulation to benefit from the Exemption Possibility. Another reason is that, although it is true that undertakings can promote buyers' or society's welfare through pursuing their own interests, it is inherent in most business models that firms will in the end not take measures that are contrary to their own interests. Hence, when undertakings claim to better serve buyers' or society's welfare based on paternalistic views, one may rightfully question this: undertakings should not be the judges of what is good for citizens because of their focus on self-interest.[511]

So, it is here argued that alleged economic welfare improvements based upon paternalistic views, which are not reflected in consumer surplus increases, are not Economic Benefits.

A.2.5. Integration clauses and Non-economic Benefits

A.2.5.1 The use of the integration clauses

As considered above, nowadays the EU covers a wide range of different public policies. To ensure that these different policies are not developed in isolation but together with a holistic view instead, the TFEU includes certain clauses that require or promote coordination between the different policies. These clauses are called **integration clauses** or policy-linking clauses. For instance, Article 12 TFEU stipulates that consumer protection requirements must be taken into account when defining

[511] For non-paternalistic measures with Economic Benefits this self-interested behaviour of undertakings is not an issue, as the economic welfare calculation can appropriately clarify whether buyers are better off.

and implementing other EU policies, while Article 11 TFEU has a similar substance with regard to environmental protection requirements. There are more than ten integration clauses and there is even one catch-all integration clause, requiring that the EU "*shall ensure consistency between its policies and activities, taking all of its objectives into account (…).*"[512]

It has been argued that these integration clauses *require* that Non-economic Benefits flowing from pursuing EU non-competition policies can be decisive when applying the Exemption Possibility.[513] Below it is argued why this is not sufficiently convincing to outweigh the approach taken in the Exemption Analytical Framework.

No clarity on the role of integration clauses. The exact role and application of the integration clauses is unclear. It has been asserted that due to the integration clause of Article 11 TFEU, environmental interests can be taken into account for assessments pursuant to Article 101(3) TFEU.[514] These clauses are, at least in the context of environmental protection, regarded as broadening the competence of the EU and to provide compelling interpretation directions for the legislation of other EU policies.[515] It has even been argued that this provision requires that if competition objectives and environmental objectives are irreconcilable, the environmental interests take priority of the competition objective, to the extent that the measure protecting the environment is in conformity with the EU's proportionality principle.[516] In practice, integration clauses have been used (1) to interpret EU law, (2) to seek in litigation the limits of the scope and exercise of the EU's competence and (3) to seek in litigation the limitation on, and justification for, the Member States' actions within the scope of EU law.[517]

It is sensible that the integration clauses aim to direct their addressees to a consistent and coherent design of their policies. EU policy objectives should not be pursued out of their context, but should be pursued with due regard to the EU's other objectives. So, when an EU institution develops or implements a certain policy, it should therefore choose the form that approaches the goals mentioned in the integration clauses as much as possible, *to the extent this choice does not matter for the main policy*.

[512] Article 7 TFEU.

[513] R. Claassen & A. Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, Utrecht Law Review, Vol. 12, Iss. 1 (January), 2016, p. 8.

[514] J.H. Jans *et al*, *Europees Milieurecht in Nederland*, Boom Juridische Uitgevers, 2000, p. 35. Jans *et al.* discuss the Commission's powers to allow or disallow agreements based on ex-Article 81(3) EC Treaty; the self-assessment regime was not yet introduced.

[515] J.H. Jans, *Stop the Integration Principle?*, Fordham International Law Journal, Vol. 33, Iss. 5, Article 8, 2011, pp. 1540-1541.

[516] Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, European Law Journal, Vol. 16, No. 6, November 2010, pp. 780-805.

[517] S. Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, European Law Journal, 2010, Vol. 16, No. 6, p. 787.

Things get more complicated when such a choice would compromise the main policy, or when a particular choice serves the goal of one integration clause but affects the pursuit of the goal of another. It remains unclear which obligation exactly an integration clause imposes on EU institutions or others in such a situation.[518] More specifically, it is unknown what the effect of the integration clauses on the application of the Exemption Possibility is, since this has not yet been decided by the EU Courts.[519] In the *CISAC* case the Commission discussed the argument of the accused that a prohibition decision of the Commission would hurt cultural diversity in Europe and would therefore be contrary to the objectives included in an integration clause on culture (i.e. the current Article 167(4) TFEU).[520] The Commission merely rejected this argument and did not comment on the potential impact Article 167(4) TFEU had on the substance of Article 101 TFEU. In the *Universal/EMI* case the Commission mentioned that "*Article 167 (4) TFEU requires the Union to take cultural diversity aspects into account in its actions under the other provisions of the Treaties, including the Union competition rules.*"[521] However, this reference of the Commission to the cultural diversity integration clause was made in the context of the Commission's claim that the merger between Universal and EMI would result in anti-competitive effects, among others due to the 'reduction of consumer choice for digital music'. This reduction of consumer choice could also harm cultural diversity and this should therefore be relevant, according to the Commission, when this institution applies competition law. In this context competition policy and cultural interests did not clash, they were fully aligned instead. It would still have to be seen whether the Commission would also be prepared to ignore the outcome of a regular competition law assessment pursuant to Article 101 TFEU, and let cultural policy prevail based on Article 167(4) TFEU.

A.2.5.2. A normative view on the use of integration clauses

It might be that integration clauses, including the catch-all consistency clause of Article 7 TFEU, require the balancing of different policy goals, including competition policy goals.[522] This application is, however, rejected in this book. It is here argued that the

[518] J. H. Jans, *Stop the Integration Principle?*, Fordham International Law Journal, 2011, Volume 33, Iss. 5, Article 8, pp. 1541-1543; S. Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, European Law Journal, 2010, Vol. 16, No. 6, p. 786.

[519] Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 55.

[520] Commission decision of 16 July 2008, *Case COMP/C2/38.698 – CISAC*, paras. 93-99.

[521] Commission decision of 21 September 2012, *Case COMP/M.6458 – Universal Music Group/EMI Music*, paras. 443, 623.

[522] Ch. Townley, *The Goals of Chapter I of the UK's Competition Act 1998*, Yearbook of European Law 29(1), 2010, p. 322.

integration clauses should not play a role in the substance of Article 101 TFEU, which implies that these clauses do not require the inclusion of Non-economic Benefits in the balancing exercise of the Exemption Possibility. Rules to be applied by private parties (e.g. the Exemption Possibility) must not allow or require these parties to prioritise different public policies (see the reasoning regarding the legal hierarchy above).[523] Since the substance of the Exemption Possibility must not depend on the identity of the decision maker, there is no place for the integration clauses in the application of the Exemption Possibility, regardless of its application by an undertaking or the Commission.[524] Only if an integration clause would require that the policy concerned takes priority over competition policy, is there no discretion for private parties to prioritise different public policies and the non-competition policy goal must be included in the balancing act of the Exemption Possibility. It is, however, unlikely that this would be the impact of the integration clauses,[525] considering the wording of these clauses,[526] the reluctance of the ECJ to accept exclusion of competition policy for the benefit of others[527] and the importance of competition policy for the EU's overall project.[528]

To conclude, the integration clauses should not be considered a reason to allow the pursuit of EU non-competition policies to trump the Cartel Prohibition. Consequently, the integration clauses do not influence the substance of the Exemption Possibility and

[523] Townley disagrees. Among other things, he considers it 'appropriate' that the integration clauses can impose obligations on private parties in the context of Article 101 TFEU. However, he merely provides legal systematic arguments why this would be possible or necessary, but he does not explain why in general it is desirable and legitimate that private parties should be able and required to balance different public policies within the Exemption Possibility. Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, pp. 94-98.

[524] Van Rompuy, on the contrary, maintains that the integration clauses demand that the Commission takes certain non-competition policy values into account when applying the Exemption Possibility; it is unclear whether he would also take this position with regard to private parties that apply the Exemption Possibility. B. Van Rompuy, *Economic Efficiency: the Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU*, Kluwer Law International, 2012, p. 400.

[525] *Cf.* Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 53; J. H. Jans, *Stop the Integration Principle?*, Fordham International Law Journal, 2011, Vol. 33, Iss. 5, Article 8, p. 1542. With regard to Article 11 TFEU, Kingston endorses the view that its goals take priority over the EU competition rules: S. Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, European Law Journal, 2010, Vol. 16, No. 6, pp. 789-790. Monti considers this a possibility, too: G. Monti, *EC Competition Law*, Cambridge University Press, 2007, pp. 93-94. The consequences of this view would be very problematic if the goals of two or more integration clauses were to collide.

[526] The wording of the integration clauses does not indicate at all that they require the policies concerned to take priority over other EU policies. Typically, the policies of the integration clauses must be "taken into account", "integrated" or "paid full regard" when other policies are defined and implemented, which at most implies a compromise between the policies at issue.

[527] *Cf.* Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 59.

[528] See e.g. ECJ judgment of 1 June 1999, *Case C-126/97 Eco Swiss China Time Ltd v. Benetton International NV*, para. 36.

therefore the approach taken in the Exemption Analytical Framework is unaffected by the presence and functioning of these clauses.[529]

A.2.6. Conclusion on the normative view on the First Condition

The normative view set out above includes both a test for determining which effects of an agreement should be *included* in the scope of the First Condition, and a rule sifting out the effects that should be *excluded* from this scope. Those effects that should be included, i.e. Economic Benefits, are the effects that can be convincingly translated into monetary economic welfare terms. Economic Benefits may increase economic prosperity and should therefore not be blocked by the Cartel Prohibition. In addition, these effects can be counted in economic welfare, like anti-competitive effects. It is therefore both necessary and feasible that Economic Benefits be included in the scope of the First Condition. It was explained that an applicable condition is that the translation is sufficiently convincing in practice, as in theory all effects of an agreement can be translated into economic welfare. Non-economic Benefits, on the other hand, can by definition not be convincingly transposed into economic welfare effects and therefore an objective balancing against anti-competitive effects by private parties is not possible. Furthermore, it was explained why neither private parties, the Commission, the ACM, nor the courts have sufficient legitimacy to perform a subjective balancing exercise in the Exemption Possibility. For those reasons it is not appropriate that Non-economic Benefits are included in the scope of the First Condition.[530]

With regard to the effects of agreements that have paternalistic motives, it was first explained that paternalistic measures go contrary to buyers' preferences. Next, it was argued that therefore these effects cannot be included in the scope of the First Condition, since undertakings lack the legitimacy to decide for buyers that the anti-competitive harm to them must be accepted while disregarding the preferences of buyers.

[529] This does not exclude the possibility that the integration clauses are relevant for the Commission's enforcement policy: the Commission could, e.g., decide not to initiate proceedings against undertakings that are party to a cartel that serves environmental goals (there is no general duty for the Commission to enforce all possible violations of the EU competition rules; see e.g. A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, pp. 1071-1072). However, if this cartel were adjudicated in civil proceedings, the civil court should only allow Economic Benefits to be decisive in the balancing act of the Exemption Possibility.

[530] The gist of some of the above conclusions on Non-economic Benefits and Economic Benefits was presented in: M. Kneepkens, *The Scope for Exempting Anti-Competitive Self-Regulation from the Cartel Prohibition*, in: When Private Actors Contribute to Public Interests, eds. A. McCann *et al.*, Eleven International Publishing, 2014, pp. 41-47.

Finally, the conclusion was drawn that TFEU's integration clauses do not allow private parties to balance different EU public policies. Therefore, the integration clauses do not prescribe that Non-economic Benefits must be included in the scope of the First Condition.

First Condition in the Exemption Analytical Framework

First Condition: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

Exemption Analytical Framework:

- All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition.
- All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition.
- Paternalistic benefits cannot be considered.

Efficiency Justifications and Non-economic Justifications. When considering the Exemption Analytical Framework and the rationales for (banking) regulation, the question arises as to what extent the benefits of an agreement flowing from Efficiency Justifications or Non-economic Justifications for banking regulation (see Chapter 3.2.) may be included in the balancing act of the Exemption Possibility. A consequence of the approach in the Exemption Analytical Framework is that *in theory* benefits based on an Efficiency Justification may be included in the balancing act of the Exemption Possibility, because by their nature these benefits are aimed at increasing economic welfare. For example, the remedying of an asymmetric information problem may improve the quality of a product and may therefore constitute an Economic Benefit.[531] It may, however, *in practice* be problematic to make a sound and credible calculation or estimate of the economic welfare increase that is generated by this market failure remedy,[532] which means that in practice the benefits of policy measures based on this

[531] Kalbfleisch takes a less favourable view with regard to the balancing of the effects of an asymmetric information remedy against the accompanying anti-competitive effects. P. Kalbfleisch, *The Assessment of Interests in Competition Law: A Balancing Act*, in: Economic Law and Justice in Times of Globalization - Festschrift for Carl Baudenbacher, eds. M. Monti *et al*. Nomos Verlag, 2007, p. 472.

[532] P. de Bijl & Th. van Dijk, *Mededingingsbeleid en Publieke Belangen: een Economisch Perspectief*, Markt & Mededinging, No. 4, 2012, pp. 152, 153.

Efficiency Justification cannot be included in the balancing exercise of the Exemption Possibility. Furthermore, not all effects based on Efficiency Justifications will by their nature be eligible for inclusion in the Exemption Possibility. For instance, an increase in societal economic welfare flowing from the internalisation of negative externalities may not imply a consumer surplus increase and this increase may therefore fail to comply with the Second Condition (see Section A.3.2.).

The reasoning with regard to Non-economic Justifications is similar to the one regarding Efficiency Justifications: the decisive element in the Exemption Analytical Framework is whether the effects constitute economic welfare increases. However, as the full scope of benefits for society based on Non-economic Justifications may not be completely captured in economic welfare terms – it is here recalled that economic welfare does not equal well-being or happiness (see Chapter 2.2.1.5.) – some of these benefits do not fall within the scope of the First Condition.

A.2.7. Introduction to the legal *status quo* of the First Condition

In the previous sections the Exemption Analytical Framework for the First Condition was presented. In other words, a normative view on how the First Condition should be applied, was given: Economic Benefits should be included in the First Condition, while Non-economic Benefits should be excluded. The next sections describe the current state of the law with regard to the substance of the First Condition and compare this legal *status quo* with the normative position set out above.

Box 4.3. Overview of terms

For ease of reading an overview of several related terms used in the above and next sections is provided here.

Term	Explanation	Definition in Section
Economic Benefits	All the benefits of an agreement, which (1) are able to increase economic welfare, and (2) can be translated into monetary terms based on sound economic theories and evidence.	A.2.2.1.
Non-economic Benefits	All the benefits of an agreement that are not Economic Benefits.	A.2.2.1.
Direct Economic Effects	Improvements in the price, quality, range or service of a certain product for the direct and indirect buyers in the market for this product, who are directly affected by the anti-competitive agreement effecting these improvements. (All Direct Economic Effects are also Economic Benefits.)	A.2.9.
Indirect Economic Effects	Effects that have a prima facie economic nature, but that are not Direct Economic Effects. (Indirect Economic Effects are often also Economic Benefits, but this is not always the case.)	A.2.9.
Non-economic Effects	Effects that are neither Direct Economic Effects, nor Indirect Economic Effects. (Sometimes Non-economic Effects are also Economic Benefits, but this is not always the case.)	A.2.9.
Efficiency Justifications	Justifications for regulations that aim to solve market failures.	Chapter 3, §2.2.
Non-economic Justifications	Justifications for regulations that are not Efficiency Justifications.	Chapter 3, §2.3.

A.2.8. The First Condition: EU case law

Although guiding EU judgments are scarce,[533] it is clear that the EU Courts allow for a broad interpretation of the scope of the First Condition. In addition to the classical, commercial improvements, the courts have in the past also taken so-called non-competition interests into account. Indeed, in 1977 the ECJ accepted that supporting employment is an objective that can lead to an exemption based on Article 101(3) TFEU, although it seems that the court in fact considered this a factor contributing to the stability of production.[534] Furthermore, the ECJ considered in the 1983 *Binon* case that protecting the plurality of the media was a benefit that must be taken into account in the EU Exemption Possibility.[535] In addition, in 1996 the General Court accepted that the objective of providing a variety of cultural, educational, scientific and minority TV programmes was a consideration on which an exemption could be based.[536] More generally, the General Court stated in this case: *"(…) in the context of an overall assessment, the Commission is entitled to base its decisions on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101(3) TFEU]."*[537]

Hence, with regard to the question of whether Non-economic Benefits can be decisive, the above cited GC statement is rather clear: they can be decisive, since an exemption can be based on public interest considerations which should be understood to include such effects. Unfortunately, the ECJ, being the highest court, has not yet been so explicit on this question. Nevertheless, its judgment in the *Binon* case shows that even Non-economic Benefits can be decisive. There is no relevant case law after 2004, the

[533] Relevant Dutch court decisions seem to be practically non-existent, and therefore Dutch case law is not discussed here. In any event, due to the concurrence between the substance of EU and Dutch antitrust law, the Dutch courts will most likely apply Article 6(3) DCA in conformity with the EU Courts' practice on Article 101(3) TFEU.

[534] ECJ judgment of 25 October 1977, *Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v. Commission (Metro I case)*, para. 43.

[535] ECJ judgment of 3 July 1985, *Case 243/83SA Binon & Cie v. SA Agence et messageries de la presse (Binon case)*, para. 46.

[536] GC judgment of 11 July 1996, *Case T-528/93 Métropole* télévision *SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission (Métropole case),* paras. 116, 118.

[537] GC judgment of 11 July 1996, *Case T-528/93 Métropole* télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission (Métropole case), para. 118. Houdijk argues that the GC's position does not preclude the scope of the Exemption Possibility covering only effects of an economic nature. He submits that 'public interest' may indeed be included in the balancing act, but only to the extent that it can be translated into economic terms. Although this reasoning is useful for bringing this judgment in line with the Exemption Analytical Framework, it is, however, doubtful that the GC had this reasoning in mind. J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 23, footnote 49.

year in which the application system of the Exemption Possibility was changed (see Section A.2.9. below), but there are no indications that the EU Courts changed their approach after 2004.

As the EU Courts have accepted effects which could be Non-economic Benefits as eligible for inclusion in the balancing exercise of the Exemption Possibility, it should be concluded that effects of an economic nature are eligible (i.e. Economic Benefits), too.

With regard to Non-economic Benefits, it is clear that the positions of the ECJ and the Exemption Analytical Framework differ. Although the EU Courts have not developed a clear, general policy with regard to the eligibility of the benefits of an agreement, the generous treatment by the EU Courts of non-competition effects is most likely to include effects that cannot be considered Economic Benefits within the meaning of the Exemption Analytical Framework. Indeed, the judgments of the Courts do not mention or establish that the effects contributing to these various parts of society must increase economic welfare; this is, however, a criterion for of the definition of Economic Benefit.

As an example, the benefit of maintaining the plurality of the media is not primarily concerned with the availability of sufficient brands or a wide product assortment, but it contributes to the good functioning of the democracy in the EU Member States.[538] Consequently, its contribution to economic prosperity is not decisive. Nevertheless, the fact that the plurality of media is not maintained as a result of consumer demand for the various media, and that therefore news providers have to collude to uphold the plurality, is an indication that overall consumers favour less but cheaper media, over more media that is more expensive. This implies that the promotion of the plurality of the media does not increase consumer surplus.

A.2.9. The First Condition: Commission practice

There is one category of effects that the Commission has over time consistently held to be eligible for inclusion in the Exemption Possibility. These effects are the *costs and*

[538] See e.g. Note 1 of the Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment of 4 February 2014, 2014/C 32/04: "*media freedom and pluralism are fundamental values enshrined in the Charter of Fundamental Rights of the European Union. They are an essential pillar of democracy as the media play an important role in ensuring transparency and accountability and have an impact on the public opinion and on the participation of citizens in and the contribution of citizens to the decision-making processes*."

qualitative efficiencies mentioned by the Commission in its **2004 [101(3)] Guidelines**.[539] A more specific description may be that these effects include improvements for direct and indirect buyers in the market directly affected by the anti-competitive agreement, in the matter of the price, quality, range or service of products in this market. In this book these effects are named '**Direct Economic Effects**'.[540] These effects include the lowering of production costs and the increase of innovation, including the entry of new markets.[541]

Examples of Direct Economic Effects accepted by the Commission when applying Exemption Possibility can be found in its *BNP-Dresdner Bank* decision.[542] This decision concerned a cooperation agreement between the Banque Nationale de Paris (**BNP**) and the Dresdner Bank. BNP was a major bank in France, but hardly active in Germany, and to the Dresdner Bank the opposite applied. The cooperation involved, among other things, the exchange of know-how, the joint development of IT systems, the mutual reselling of the partner's products in the bank's home market and the joint operation in countries other than Germany and France. The Commission held that the banks' customers benefited from the cooperation agreement because of the joint development of new IT systems and products, the enlargement of the banks' offerings through the mutual selling arrangement and agreements on mutual cross-border banking services.[543]

[539] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004.

[540] This definition and term are taken from the OFT. Although the OFT mentioned that it can also be argued that the Commission does not accept *all* direct economic benefits for the balancing act of the Exemption Possibility, here the view endorsed is that the Commission accepts all Direct Economic Effects. OFT Discussion note, *Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits*, 2010, paras. 3.3 and 3.7.

[541] Some examples are discussed in A. Jones & B. Sufrin, *EU Competition Law*, 5th edn., Oxford University Press, 2014, pp. 253-254.

[542] Commission decision of 24 June 1996, *Case IV/34.607 - Banque Nationale de Paris - Dresdner Bank*.

[543] "*An improvement in the production of financial services provided to individuals and undertakings will result from the fact that the two banks will cooperate to improve their organization, in particular by introducing new data-processing tools and expanding their sources of financial data. By transferring existing know-how which, according to a report submitted to the Commission by the two banks, will involve at least half their activities, they will be able to provide improved or new services to their customers. For example, once cooperation is underway, they will be able to provide their customers with new electronic banking services and products, new possibilities relating to account and loan management at national and cross-border level, new forms of information and financial advice and new possibilities for managing capital market transactions, and new types of securities and derivatives. They will also be able to develop new structures for investment loans and import and export financing. The cooperation will also improve the distribution of services and products supplied by the other partner. In almost half the services analysed, that improvement will be achieved by each of the two banks making available to its partner its own products for distribution through its branches on its home market. It will thus be possible to go into one partner's bank and debit a current account held in the other partner's bank. Interconnection between the data-processing systems will also improve banking services across frontiers, especially cross-frontier payments. The cooperation thus satisfies one of the Commission's objectives which is that the services provided by cross-border payment systems are improved.*" Commission decision of 24 June 1996, *Case IV/34.607 - Banque Nationale de Paris - Dresdner Bank*, para. 18.

Direct Economic Effects form the narrowest delineation of eligible effects found in the decisional practice of the Commission. Agreements may, however, also produce benefits that are not Direct Economic Effects:

(1) Certain effects are not Direct Economic Effects, but are nevertheless of an economic nature. In this book these effects are termed 'Indirect Economic Effects'.[544] Examples of these effects are the reduction of financial stability risks because of self-regulation, limiting the risks of overindebtedness of borrowers, and the overall cost reductions that merchants may enjoy if consumers increase their use of payment cards instead of cash, as the result of improvements to the consumer card services. As explained below, it appears that the Commission is much more reluctant to accept *Indirect* Economic Effects than *Direct* Economic Effects.
(2) Effects that are not economic in nature, which means that they are neither Direct Economic Effects nor Indirect Economic Effects, are dubbed 'Non-economic Effects'. These effects are not equal to Non-economic Benefits, a term used in the Exemption Analytical Framework (see Box 4.3.). For appreciating the analysis and arguments in this book it is essential to grasp the different concepts behind the various terms used in this chapter; Box 4.3. gives a brief overview of some relevant terms.

The Commission's position with regard to these two categories of non-Direct Economic Effects seems to have changed after May 2004, as will be explained below.

Pre-2004 Decisional Practice regarding non-Direct Economic Effects. The Commission's policy on the Exemption Possibility may be divided into two periods: the period before 1 May 2004 and the period after this date.[545] The date of 1 May 2004 marks the major shift in the application system of Article 101(3) TFEU.[546] The pre-2004 notification system led to a large number of requests for exemption

[544] This term is taken from the OFT; see footnote 540.

[545] Although the substance of the Commission's post-2004 policy began to develop already around 2000, the year 2004 is chosen as a dividing point since in this year the application system of Article 101(3) TFEU was changed, pursuant to a Commission document setting out its general policy on this provision.

[546] Before 1 May 2004, the Commission was the only institution authorised to apply Article 101(3) TFEU. Undertakings wishing to benefit from the exemption possibility of Article 101(3) TFEU had to notify the Commission of their agreement prior to implementation, and subsequently the Commission could issue a decision declaring the EU Exemption Possibility applicable to the agreement; without such an exemption decision the Exemption Possibility did not apply. The application system of Article 6(3) DCA was a similar notification system, in which the ACM issued the exemption decisions. After the system shifts, the Exemption Possibility became directly applicable: undertakings had to decide for themselves whether their agreements fulfilled the four conditions of the Exemption Possibility and no prior exemption decision was needed anymore. The authorities could only decide *ex-post* that the undertakings got it wrong and that the Exemption Possibility did not apply.

decisions. All these requests overburdened the Commission and therefore the system was changed. As of 1 May 2004, undertakings themselves are responsible for establishing whether their agreements comply with the four conditions of Article 101(3) TFEU.[547] It seems that the Commission's loss of control over the application of the EU Exemption Possibility resulted in a stricter position of this authority on the scope of eligibility of benefits for inclusion in the balancing act of the Exemption Possibility; this is further discussed below.

Before 2004 the Commission had in several cases included non-Direct Economic Effects in the equation of Article 101(3) TFEU.[548] Typical examples of such non-Direct Economic Effects are cultural considerations,[549] energy supply security,[550] environmental effects[551] and employment effects.[552] Nevertheless, it was often unclear in these decisions whether and why the Commission found that these non-Direct Economic Effects trumped the anti-competitive effects. In other words, it was unclear whether the non-Direct Economic Effects alone could be *decisive*, or if they constituted merely benefits worth mentioning but not capable of neutralising the anti-competitive effects. The ambiguity is caused by the lack of explicit statements of the Commission on this point and by the Commission's way of presenting its assessment under the EU Exemption Possibility. In its assessments the Commission often mentioned both Direct and non-Direct Economic Effects as beneficial consequences of the First Condition, without making explicit how large the different effects are and how extensive the harm of the anti-competitive effects is.[553]

[547] The system for applying Article 6(3) DCA was soon brought in line with the application system of Article 101(3) TFEU: as of 1 August 2004 Article 6(3) DCA is an automatic legal exception and the ACM can no longer grant exemption decisions.

[548] In his book Townley elaborates on various different public policy effects that have been considered in the EU Exemption Possibility. Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, pp. 142-168. See also: I. Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, CLES Working Paper Series 3/2013, 2013, p. 45.

[549] Commission decision of 25 November 1981, *Case IV/428 - VBBB/VBVB*, paras. 52, 59; the Commission did not accept a collective resale price maintenance scheme, since its results appeared not to be proportionate and effective. See also: European Commission XXIIIrd Report on Competition Policy 1993, para. 177, explaining the Commission's willingness to accept individual resale price maintenance clauses if this were necessary to enable publishers to produce books in smaller print runs.

[550] Commission decisions of 22 December 1992, *Case IV/33.151 – Jahrhundertvertrag*; and *Case IV/33.997 – VIK-GVSt*, paras. 31-32.

[551] Commission decision of 21 December 1994, *Case IV/34.252 - Philips-Osram*, para. 27.

[552] Commission decision of 29 April 1994, *Case IV/34.456 - Stichting Baksteen*, para. 27.

[553] E.g.: Commission decision of 13 December 1974, *Case IV/14.650 - Bayerische Motoren Werke AG*, para. 24 (and a further explanation in the Commission's IVth Report on Competition Policy 1974, paras. 86-92); Commission decision of 11 October 1988, *Case IV/32.368 - BBC Brown Boveri*, paras. 23-24; Commission decision of 23 December 1992, *Case IV/33.814 - Ford Volkswagen*, para. 36.

Post-2004 Decisional Practice regarding non-Direct Economic Effects. The current, post-2004 approach of the Commission distinguishes between Indirect Economic Effects and Non-economic Effects, although it does not use the terms. It is the result of a development which became especially relevant after 1993. In this year the Maastricht Treaty[554] amended the existing EU treaty and new EU policies were introduced. One of these new policies was the environmental policy. The new EU treaty prescribed, through a so-called integration clause (see Section A.2.5.), that environmental protection requirements had to become an element of the EU's other policies. The Commission therefore had to determine what this meant for its competition policy and the application of Articles 101(1) and 101(3) TFEU. It took the view that environmental effects could be considered for the weighing pursuant the EU Exemption Possibility, but also that the Maastricht Treaty had not amended 101(3) TFEU and, importantly, that therefore all four conditions of the EU Exemption Possibility remained applicable. What this meant specifically can be illustrated by the *CECED* case.[555] In this case the Commission assessed an agreement between producers of domestic appliances on the phasing out of the market of energy inefficient products. According to the Commission, Article 101(3) TFEU could only exempt environment protection agreements if the agreements would "*yield economic benefits outweighing their costs.*"[556] The 'economic benefits' were present in the form of measures removing negative externalities.[557] The Commission was able, apparently, to calculate how much society would benefit in monetary terms from the reduction of carbon dioxide emissions flowing from the agreements concerned. In other words, the Commission translated the environmental benefits into economic effects. Subsequently, it performed the balancing exercise of Article 101(3) TFEU and weighed the 'costs savings' against the expected anti-competitive effects (i.e. price increases).

This approach became standard policy for environment protection agreements:[558] in its 2001 guidelines on horizontal cooperation and Article 101(1) TFEU (**2001 Horizontal Guidelines**), the Commission set out that an agreement's environment improvements could only lead to an exemption pursuant to Article 101(3) TFEU if the *economic* benefits of these improvements outweighed the costs for competition.[559]

[554] The Treaty on the European Union of 7 February 1992, which entered into force on 1 November 1993.

[555] Commission decision of 24 January 1999, *Case IV.F.1/36.718 - CECED*. See also the Commission's case *EACEM* in Commission's XXVIIIth Report on Competition Policy 1998, p. 151-152.

[556] Commission decision of 24 January 1999, *Case IV.F.1/36.718 - CECED*, para. 55.

[557] Commission decision of 24 January 1999, *Case IV.F.1/36.718 - CECED*, para. 56.

[558] Although it did not apply this policy consistently, see: Commission decision of 17 September 2001, *COMP/34493 DSD*, para. 142 *et seq*.

[559] Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements of 6 January 2001, para. 193.

Hence, the Commission took the view that Indirect Economic Effects (i.e. the negative externalities) could be decisive in the balancing act of Article 101(3) TFEU, while Non-economic Effects could not be decisive.[560]

Before the 2004 system change, one concern of the Commission was that the new system would result in an inconsistent interpretation and application of Article 101(3) TFEU by private parties and the various national courts. It therefore issued Guidelines, i.e. the 2004 Article 101(3) Guidelines, to support third parties to 'correctly' apply Article 101(3) TFEU.[561] In the 2004 Article 101(3) Guidelines the Commission states that it will consider effects to comply with the First Condition if these effects can be translated into 'economic efficiency gains'[562] or benefits that have some economic importance.[563] The Commission clearly only holds those effects that produce *benefits of an economic nature* eligible when Article 101(3) TFEU is applied: "*The purpose of the first condition of Article [101(3)] is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article [101(3)]. The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies*."[564] For analytic purposes the Commission divides these efficiency gains into two categories: cost efficiencies and efficiencies of a qualitative nature – i.e. Direct Economic Effects. In the 2004 Article 101(3) Guidelines the Commission extended its older approach on environmental protection to all other policy goals. It stated that "*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 [101(3) TFEU]*."[565] In other words, if the effects of an agreement pursuing a goal of another EU policy can be translated or transformed into economic efficiency gains, these

[560] This shift to an economic approach and interpretation of Article 101(3) TFEU by the Commission is widely recognised. See e.g.: Ch. Townley, *Article 81 EC and Public Policy*, p. 85; R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 166. The Commission's approach on environment protection agreements expressed in the *CECED* case and the 2001 Horizontal Guidelines are in line with a more general trend in the Commission's manner of applying Article 101 TFEU, often dubbed the 'more economic approach'. This trend started arguably in the late 1990s and implies an application of competition law that is based on economic analysis and on the notion that economic welfare maximisation is competition law's goal. Hence, with regard to the Exemption Possibility, it became more relevant whether economic analysis predicted that a restriction could increase economic welfare. The more economic approach was more a gradual development than a revolution, but it became especially relevant after 2004. See e.g.: G. Monti, *EC Competition Law*, Cambridge University Press, 2007, pp. 82-83; A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, pp. 41-42.

[561] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004.

[562] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, paras. 33, 59.

[563] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 50.

[564] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 50.

[565] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 42. The Commission cites, in support of its stance, two EU Court cases. However, it is not at all evident that these judgments support the Commission's approach.

effects are eligible for inclusion in the balancing act of the Exemption Possibility. If such a transformation cannot be made, the effects are not eligible. Although the Commission emphasises the relevance of Direct Economic Effects, the authority did not seem to completely rule out the possibility to include Indirect Economic Effects; as long as it can be substantiated that these effects have "some economic importance", it seemed that the Commission was willing to consider these benefits eligible for inclusion in the Exemption Possibility.

So, the Commission adopted in its 2004 Article 101(3) Guidelines a restrictive approach with regard to the consideration of the benefits of an agreement under Article 101(3) TFEU. The Commission clearly did not want to open the doors for private parties pushing away a strong EU competition policy with a claim of benefitting all kinds of other policy goals.[566] It seems, however, that nowadays the Commission's approach is even stricter than that dictated by its 2001 Horizontal Guidelines and 2004 Article 101(3) Guidelines. In the 2001 Horizontal Guidelines the Commission discussed an example based on the *CECED* case. In its discussion the Commission stated: "*The net contribution to the improvement of the environmental situation overall outweighs increased costs*", though it avoided translating this environmental improvement into economic terms.[567] In the new 2011 guidelines on horizontal cooperation and Article 101(1) TFEU, the Commission discussed the same example. However, in these new guidelines it did not mention environmental improvements as reasons for an exemption at all; the only benefits mentioned are an extended offer of washing programmes and lower running costs in the form of reduced consumption of water, electricity and soap.[568] Hence, the Commission seems to further limit the scope of eligible efficiency gains to Direct Economic Effects. The fact that the Commission no longer presents the remedying of negative externalities caused by CO2 emissions as a reason to grant an exemption, casts doubts on the current willingness of the Commission to accept agreements exclusively producing Indirect Economic Effects, e.g. self-regulation remedying a market failure.[569]

[566] J. Faull & A. Nikpay, *The EU Law of Competition*, Oxford University Press, 2nd edn., 2007, p. 294, note 684.

[567] Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements of 6 January 2001, para. 198.

[568] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements of 14 January 2011, para. 329.

[569] Although the Commission's guidelines merely reflect the policy of the Commission and not the interpretation of the law by the EU Courts, these guidelines have in practice strong directional force with regard to the way of applying Article 101(3) TFEU by private parties, national competition authorities and national courts.

Comparison with normative view. The Commission's position with regard to the scope of the First Condition can be summarised as follows:

- Direct Economic Effects, i.e., improvements in the price, quality, range or service of a certain product for the direct and indirect buyers in the market for this product fall within the scope of the First Condition;
- Indirect Economic Effects, i.e., effects of an economic nature, but that are not Direct Economic Effects, probably fall within the scope of the First Condition, although there are indications that the Commission no longer deems these effects eligible;
- Non-economic Effects, i.e., all effects that are neither Direct Economic Effects, nor Indirect Economic Effects, fall outside the scope of the First Condition.

When comparing the Commission's position and the normative view of this book, it is rather clear that in the Exemption Analytical Framework, Direct Economic Effects may be included in the weighing pursuant to the Exemption Possibility. Direct Economic Effects fall within the definition of Economic Benefits, because lowering production costs increases productive efficiency, while quality improvements and innovation increase dynamic efficiency. Assuming that there are sound and convincing methods that can substantiate these efficiency increases, these effects are accepted in the Exemption Analytical Framework. The same applies to Indirect Economic Effects (although in the context of the Second Condition differences between Direct and certain Indirect Economic Effects may become apparent). So, the Commission's position and the Exemption Analytical Framework do not differ in this respect: Direct and Indirect Economic Effects can be included in the Exemption Analytical Framework.

The approach of the Commission with regard to Non-economic Effects is that these are not eligible for inclusion in the First Condition. This is not in accordance with the Exemption Analytical Framework, since in theory non-economic (e.g. ethical) advantages might be translated into economic welfare, which would then make these advantages Economic Benefits.

A.2.10. The First Condition: ACM practice

The application of the First Condition by the ACM is nowadays similar, or perhaps even equal, to the Commission's approach. Clearly, the ACM has found Direct Economic Effects eligible for inclusion in the First Condition. A recent ACM decision in which the authority accepted Direct Economic Effects is the *GSN* case,[570] see Box 4.4.

[570] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*.

With regard to non-Direct Economic Effects, the practice of the ACM does not seem to have changed because of the abolishment of the notification system. With regard to the ACM's policy on the application of Article 6(3) DCA before 2004, it is relevant to acknowledge that the DCA was only introduced in 1998 – so, there is no pre-1998 case law or decisional practice. In the period before the introduction of the self-assessment system, the ACM meant to follow the Commission's policy with regard to non-Direct Economic Effects,[571] in line with the legislature's intention.[572] Likewise, from its decisions after 2004 it follows that it has no objections to treating Indirect Economic Effects as decisive for the balancing act of the Dutch Exemption Possibility. For example, it has analysed a part of a self-regulatory agreement between certain energy companies and environmental organisations, endorsed by the Dutch Cabinet (i.e. the SER Energy Agreement for Sustainable Growth).[573] The part analysed by the ACM governed the closure of five inefficient power stations, so that pollution could be reduced. The ACM basically applied the Commission's approach in the *CECED* case: it quantified the monetary value of the pollution reductions and compared this with the monetary value of the anti-competitive effects.[574] So, with regard to Indirect Economic Effects the ACM currently might take a broader view than the Commission.

With regard to Non-economic Effects, the ACM's position has been clear throughout the years: Non-economic Effects cannot be decisive when applying Article 6(3) DCA.[575] Furthermore, the Minister of Economic Affairs seems to have indicated that Non-economic Effects cannot be considered in the Dutch Exemption Possibility.[576] However, the application of this guiding principle appears to have changed in the last years due to the rise of cooperations aimed at sustainability goals, which merit assessment under Article 6 DCA. Such sustainability goals also cover issues of a *prima facie* non-economic nature, such as animal welfare. In their positions on the consideration of such sustainability cooperations under the DCA, the Minister and ACM have taken the view that qualitative improvements valued by buyers, and for

[571] E.g. ACM decision of 9 July 1999, *Case 492 Vereniging van Bloemenveilingen in Nederland (Flower Auctions)*, paras. 71-75; ACM decision of 21 December 1999, *Case 528 Vereniging De Nederlandse Dagbladpers (Newspaper Publishers)*, **paras.** 20-23.

[572] Parliamentary article, *Kamerstukken II* 1996/97, 24707, No. 6, p. 54.

[573] ACM memorandum, *Analyse van de ACM met betrekking tot de Voorgenomen Afspraak tot Sluiting van 80er Jaren Kolencentrales in het Kader van het SER Energieakkoord*, 26 September 2013. For a similar approach see: ACM report, *Analyse ACM van Duurzaamheidsafspraken 'De Kip Van Morgen'*, 2014.

[574] See also: ACM opinion (*informele zienswijze*) of 18 April 2011, *Management Plan MSC Shrimp Fishery*, pp. 5-6; ACM report, *De Beoordeling van Mededingingsbeperkingen als gevolg van Duurzaamheidinitiatieven in de Praktijk*, (Notice on Competition Law and Sustainability), 2013 p. 7.

[575] ACM decision of 21 December 1999, *Case 528 Vereniging De Nederlandse Dagbladpers (Newspaper Publishers)*, paras. 20-23.

[576] Parliamentary paper, *Kamerstukken II* 2012/13, 33622, No. 7, pp. 6-7.

which they are prepared to pay, fall within the scope of the First Condition.[577] This seems to imply that if the effects of an agreement can be translated into economic welfare terms, i.e. into consumer surplus effects, the Minister and ACM would consider these effects eligible for inclusion in the First Condition. The ACM has indeed applied this approach in the *Kip van Morgen* case, which included an investigation into the willingness of consumers to pay for better welfare of farmed poultry.[578] In this case the authority assessed whether the price increase in poultry meat due to an industry-wide agreement to improve the welfare of chickens was outweighed by the value that consumers would impute to the welfare improvement.

Box 4.4. *GSN* case

The case involved the creation of a cooperative joint venture between the three largest Dutch banks, Rabobank, ING Bank and ABN AMRO, regarding the processing of cash money (the counting, sorting and recycling of cash), the management of cash transports for ATMs and of the ATM servicing.[579] This joint venture was named *Geldservice Nederland* (**GSN**). Brink's, a cash transport company, submitted a complaint with the ACM. Brink's claimed that for various reasons the banks' cooperation violated the Cartel Prohibition. The ACM decided that indeed it was likely that the creation of GSN could restrict competition on the market of cash transport services (through GSN's buying power).[580]

Nevertheless, the ACM also concluded that the possible competition restriction would benefit from the Exemption Possibility. The ACM held that especially the bundling of the cash transports could lead to lower costs, since a joint planning and execution of transports could prevent duplications and the joint sourcing of transport services could lower the banks' expenses for these services.[581]

In examining the Exemption Possibility, the ACM used the banks' calculation of cost reduction as the result of the bundling of activities; the ACM therefore had an indication of the magnitude of the monetised economic welfare *increases*.[582] It

[577] Policy Guidelines Competition and Sustainability of the Dutch Minister of Economic Affairs (*Beleidsregel Mededinging en Duurzaamheid*) of 8 May 2014, p. 6; ACM, *Position Paper on Competition and Sustainability* (*Visiedocument Mededinging en Duurzaamheid*), 2014, p. 13.

[578] ACM report, *Analyse ACM van Duurzaamheidsafspraken 'De Kip van Morgen'*, 2014, p. 5-6.

[579] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*, paras. 52-55.

[580] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*, para. 41.

[581] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*.

[582] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*, para. 54.

did not establish the magnitude of the economic welfare *decreases* as a result of the possible competition restriction; the ACM merely concluded that due to the existence of sufficient residual competition the benefits outweighed the harm.[583] Apparently, the magnitude of the benefits was so large and the anti-competitive harm so small that an extensive estimation of the latter beforehand was deemed not necessary.

Comparison with normative view. The ACM's position on the scope of the First Condition can be summarised as follows:

- Both Direct and Indirect Economic Effects fall within the scope of the First Condition;
- Non-economic Effects fall outside the scope of the First Condition, although effects with consumer surplus increases *do* fall within the scope of the First Condition.

As mentioned in the previous section, within the Exemption Analytical Framework both Direct and Indirect Economic Effects fall within the scope of the First Condition, too. Pursuant to the Exemption Analytical Framework, Non-economic Effects may also be within the scope of the First Condition, provided that these effects can be translated into economic welfare effects. The Minister of Economic Affairs and ACM now appear to apply a similar approach. So, the normative view in this book and the Dutch legal *status quo* on the scope of the First Condition appear to be the same by and large – see the next section for a more nuanced finding.

A.2.11. Synthesis: EU Courts and authorities do not provide a proper test for First Condition

Even after assessing the case law, decisional practice and guidelines of the authorities the question remains: where exactly is the line drawn between benefits that are eligible and those that are not? When does an effect have *"economic importance"*?[584] Why does the Commission not consider employment effects, such as the maintenance of jobs, to constitute eligible effects?[585] In other words, what is the test for deciding whether an effect of an agreement can be included in the First Condition?

[583] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*, para. 62.

[584] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 50.

[585] It can be concluded that the Commission has considered that although the creation of jobs is beneficial for the Union, the benefits of jobs creation will not be decisive in determining whether the First Condition is fulfilled. See: Commission decision of 23 December 1992, *Case IV/33.814 – Ford/Volkswagen*, para. 36.

First, it is acknowledged that the EU Courts have not formulated general categories of eligible and non-eligible effects since they consider on an *ad hoc* basis whether a specific effect at issue is eligible.

The Commission's position is that EU policy goals can be taken into account in the consideration of the Exemption Possibility, but only if these goals can be 'subsumed' into the four conditions of this provisions;[586] this is neither clarifying guidance in general, nor an explanation of the boundaries of the First Condition.

The Dutch Minister of Economic Affairs and ACM extend the category of eligible effects from Direct Economic Effects to improvements due to the addition of qualitative product features that increase buyers' willingness to pay for the product.[587] The Minister and ACM take these positions in the Minister's *Policy Guidelines Competition and Sustainability*[588] and the ACM position paper on *Competition and Sustainability*[589] respectively. One may expect that the Commission agrees: the Commission has assessed the Policy Guidelines and they were amended as a result of the Commission's reply – while the ACM's paper was brought in line with the policy guidelines. This national approach comes closer to the formulation of a proper test, because it defines one boundary of the eligible category, i.e., a criterion that renders an effect eligible, but it does not clarify whether effects are not eligible if this criterion is not fulfilled or whether other criteria may also point to eligibility.

It could be argued that the authorities have already *implicitly* formulated a test. Indeed, in the wake of the 'more economic approach' the Commission and ACM have stressed that their competition policy activities aim to protect and promote 'consumer welfare'. As mentioned above, in economic theory this term can be equated with 'consumer surplus' (see Chapter 2.2.1.1). Supposing that for policy purposes this equation can also be made, the authorities would determine whether an anti-competitive agreement benefits from the Exemption Possibility if consumer surplus is not affected. As the anti-competitive effects will reduce consumer surplus, the agreement's benefits must increase consumer surplus in order to at least neutralise the anti-competitive effects. This implies that the benefits must be 'consumer surplus

[586] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 42.

[587] Explanatory note to the Policy Guidelines Competition and Sustainability of the Dutch Minister of Economic Affairs (*Beleidsregel Mededinging en Duurzaamheid*) of 8 May 2014, section 3.2.; ACM, *Position Paper on Competition and Sustainability* (*Visiedocument Mededinging en Duurzaamheid*), 2014, p. 13.

[588] Policy Guidelines Competition and Sustainability (*Beleidsregel Mededinging en Duurzaamheid*) of the Dutch Minister of Economic Affairs, 2014.

[589] ACM, *Position Paper on Competition and Sustainability* (*Visiedocument Mededinging en Duurzaamheid*), 2014.

increasing effects.' Consequently, all effects of an agreement that are consumer surplus increasing effects are eligible for inclusion in the Exemption Possibility, while all other effects aren't. This would be in conformity with the abovementioned approach of the Dutch Minister of Economic Affairs and the ACM taken in the *Policy Guidelines Competition and Sustainability* and the ACM position paper on *Competition and Sustainability* respectively. Furthermore, it is indeed often assumed that the Commission indeed applies a 'consumer surplus test'.[590]

Unfortunately, it is unclear whether the term 'welfare' as used by the authorities means 'economic welfare' in the technical sense. The non-technical concept of 'welfare' includes various elements and is not a well-defined concept. In fact, it is not clear which elements are included and which aren't, and it is also undetermined how the various elements can be compared so that for a certain state a particular value of welfare can be computed.

To conclude, the EU courts have not developed a clear test for deciding which effects can be taken into account in the First Condition. Furthermore, although the authorities have been more explicit on this topic, they have also not formulated a clear test for defining which effects fall within the scope of the First Condition and which don't.

A.2.12. Conclusion on the legal *status quo* of the First Condition

It is clear that the EU Courts apply a very broad interpretation of the First Condition and are even willing to include Non-economic Effects. Whether they would be willing to do so after the abolition of the notification system of the Exemption Possibility remains a question to be answered. Nevertheless, it does not follow from the Courts' case law that Non-economic Effects *must* be able to trump anti-competitive effects. In fact, the EU Courts have not provided any guidance on the way to balance Non-economic Effects against anti-competitive effects at all. It remains up to the authorities and courts to perform the balancing exercise in each individual case and make their own decisions on whether the Exemption Possibility applies.

Furthermore, it was explained that the competition authorities clearly consider Direct Economic Effects as eligible. These benefits include improvements for buyers

[590] S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 3rd edn., 2010, p. 29; L. Röller, *Efficiencies in EU Merger Control: Do They Matter?*, in: European Competition Law Annual 2010: Merger Control in European and Global Perspective, eds. P. Lowe & M. Marquis, 2013, p. 61.

in the price, quality, range or service of the product that the buyers consume. Their position is different with regard to Indirect Economic Effects, i.e., other effects with a *prima facie* economic nature, such as the internalisation of negative externalities, or benefits for buyers in other markets, or for society. The treatment of these effects by the authorities is not univocal. The Commission currently seems reluctant to consider Indirect Economic Effects when applying the Exemption Possibility, while on the other hand the ACM does not have difficulties with accepting these effects.[591]

Finally, it was explained that from the case law, the authorities' decisional practice and guidelines, no test for the First Condition can be derived. There are good reasons to assume that the authorities consider all 'consumer surplus' enhancing effects eligible and all other effects not, but this is still uncertain.

A.2.13. Final conclusion on the First Condition

It has been asserted that undertakings lack a mechanism to reconcile private initiatives pursuing societal interests with competition interests in a congruous and non-conflicting manner.[592] This is not true. The Exemption Possibility is a suitable mechanism to do this. Admittedly, societal interests that are Non-economic Benefits cannot be considered in this mechanism, in accordance with the stance of this book, but this is right. It is inappropriate that private undertakings determine that buyers' welfare must be sacrificed due to anti-competitive measures that lack democratic legitimacy.

The main question of Section A.2. is: which types of effects of an agreement should be included in considering the Exemption Possibility? The normative answer given in this book builds on the findings of Chapter 2. A main conclusion of that chapter is that ultimately, competition law aims to further economic prosperity. Economic prosperity can be translated into economic welfare within the meaning of economic theory. Consequently, it is argued above that all effects of an agreement that increase economic welfare and can be monetised, i.e. Economic Benefits, should be accepted in determining the Exemption Possibility. In turn, all other effects, i.e. Non-economic Benefits, should be excluded.

[591] The gist of the above findings on Non-economic Effects, Indirect Economic Effects and Direct Economic Effects was also presented in: M. Kneepkens, *The Scope for Exempting Anti-Competitive Self-Regulation from the Cartel Prohibition*, in: When Private Actors Contribute to Public Interests, eds. A. McCann *et al.*, Eleven International Publishing, 2014, pp. 37-41.

[592] J. Mulder, *Op het Snijvalk van Onafhankelijkheid en Openheid: Wat Is de Rol van de ACM in een Duurzame Maatschappij?*, SEW, No. 12, 2014, p. 570.

Furthermore, it was argued that effects should only be considered to constitute Economic Benefits if this can be substantiated through sound economic reasoning and evidence. This is a necessary requirement, as in theory there are no limits to the scope of Economic Benefits. This does not mean, however, that in practice this substantiation must be precise. The regular standard of proof for competition cases suffices.

It has been argued that including public interest improvements in calculating the Exemption Possibility will result in anti-competitive profits for firms, or in private parties prioritising competition policy over other public policies. These concerns are here deemed to be misplaced, as the only thing that matters is that customers end up better off, which is ensured if all four conditions of the Exemption Possibility are fulfilled.

If the normative view is compared with the legal *status quo*, it is clear that the position taken in this book may be stricter than the approach of the EU Courts. These courts have in the past accepted effects that probably do not qualify as Economic Benefits. It remains to be seen, however, whether their generous approach still applies after the abolition of the notification system of the Exemption Possibility in 2004.

In Section A.2.4. it was explained that this book's normative view is that societal economic welfare improvements of a paternalistic nature cannot be included in the First Condition, because these are effects that are not perceived to be improvements by those affected by the anti-competitive harm. This normative position most likely differs from the legal *status quo*. Neither the EU Courts nor competition authorities have shown that they follow this line of thinking. On the contrary, an example of a case in which the ECJ seems to have deemed paternalistic benefits as eligible for consideration in the Exemption Possibility is the *Asnef-Equifax* case.[593] In this case the ECJ considered that the creation of a creditors register could result in the prevention of overindebtedness (in addition to the greater availability of credit, which results fall within the definition of the First Condition of the Exemption Possibility).[594]

To what extent the EU integration clauses require the consideration of other EU policy interests when applying the Exemption Possibility is yet unclear. Probably they don't. In any event, it was here asserted that the integration clauses should not be

[593] ECJ judgment of 23 November 2006, *Case C-238/05 Servicios de Información sobre Solvencia y Crédito, SL, Administración del Estado v. Asociación de Usuarios de Servicios Bancarios [Ausbanc] (Asnef-Equifax case)*, para. 67.

[594] As will be explained in more detail in the Chapter 5.3.2., the claim that consumers benefit from reduced borrowing possibilities due to measures that aim to prevent overindebtedness, is most likely a paternalistic claim.

used to trump the Cartel Prohibition in this context. Consequently, the integration clauses do not influence the substance of the Exemption Possibility and therefore the approach taken in the Exemption Analytical Framework is unaffected by the presence and functioning of these clauses.

The approach of the authorities may also deviate from the Exemption Analytical Framework. On the one hand, they have taken into account effects that cannot be considered Economic Benefits. On the other hand, they seem to reject the inclusion of certain effects that are Economic Benefits. However, there are indications that the authorities nowadays apply a 'consumer surplus test' for the Exemption Possibility, which would imply a similar test as the test of the Exemption Analytical Framework.

A.3. THE SECOND CONDITION OF THE EXEMPTION POSSIBILITY

Second Condition: the agreement must allow customers a fair share of the resulting benefits.

A.3.1. Introduction

The Second Condition requires that 'the consumers receive a fair share' of the advantages that the anti-competitive agreement yields, where the term 'consumers' must be interpreted as 'customers' or 'buyers'. A crucial question to be answered is *who* the customers are that must receive a fair share of the advantages. There is no controversy that the 'customers' within the meaning of the Second Condition include at least the buyers of the product covered by the anti-competitive agreement. The matter becomes less evident when it must be decided whether future users of the product should be included, or whether buyers of other products are 'consumers' within the meaning of the Second Condition. Furthermore, it is open for debate what a 'fair share' should imply.

Before turning to the key part of this section, another introductory comment is made. It is here held that the Second Condition settles any debate on whether the welfare standard for the Articles 101(3) TFEU and 6(3) DCA is a *total* (or societal) welfare standard or a *consumer* welfare/surplus standard. For the total welfare standard test, the change in the sum of the consumer and producer surpluses is the relevant element. This test is therefore passed in each case where, in monetary terms, the producer surplus increases more than the consumer surplus decreases. Consequently, the size

of the change in consumer surplus is not decisive and huge consumer surplus losses are not automatically excluded. This is not consistent with the Second Condition. Pursuant to this criterion there is a limit to the maximum decrease of the consumer surplus, as it requires that the *buyers* get a fair share of the advantages that the anti-competitive agreement brings forth – regardless of the definition of a 'fair share'. Consequently, by introducing the Second Condition, the Treaty and Dutch legislatures have opted for a consumer welfare standard – although the text of this criterion does not make explicit when the consumer welfare test is passed (see below).[595]

The outline of this section is as follows. Section A.3.2. presents a normative view on who the beneficiaries should be of the improvements within the First Condition. Next, Section A.3.3. gives a normative view on what a 'fair share' should mean. In Sections A.3.6. and A.3.7. the current status of the law on these two elements is set out. Finally, Section A.3.9. draws the findings of these sections together and concludes the discussion on the Second Condition.

A.3.2. The Second Condition: a normative view on the beneficiaries of the improvements

The Second Condition aims to ensure that an anti-competitive agreement generates sufficient benefits for the appropriate group of customers. Proceeding from the conclusion that for the Articles 101 TFEU/6 DCA a certain consumer welfare test applies, a crucial question is *whose* welfare consequences should be considered. Can the group of customers, besides the buyers of the contract products, also include future buyers and/or buyers of other products? The answer to this question is relevant, as a wider group of eligible beneficiaries may make it easier to maintain an anti-competitive agreement.

The treatise below is built upon the normative view on the First Condition. In accordance with this view, only improvements that can increase economic welfare and that can be monetised, are eligible for consideration in the Exemption Possibility. As the Second Condition refers to the improvements of the buy side of the market, it is consumer welfare, or consumer surplus, that is at stake in this condition.

[595] This conclusion does not imply that it is held that the total or societal welfare standard *should not* be the standard; in this book no position is taken on the appropriate welfare standard for competition law. Furthermore, the conclusion does not imply that the consumer welfare standard applies for Articles 101(1) TFEU and 6(1) DCA; the test of Cartel Prohibition may still be either a total welfare standard or a consumer welfare standard. It is, however, concluded that it would be *contra legem* if a total welfare standard were applied in the context of the Exemption Possibility. That being said, it can still be debated what the scope of the consumer welfare standard should be. One may e.g. question whether consumer surplus increases on non-affected market can be included; this will be discussed in the next section.

When, in the context of the Exemption Possibility, the consumer surplus before and after the implementation of the anti-competitive agreement is to be established, it must first be determined what the relevant consumer surplus(es) is (are) for this test. For analytical purposes it is practical to identify three different kinds of consumer surpluses: (1) the consumer surplus of the current, affected (direct and indirect) buyers of the contract products, (2) the consumer surplus of the buyers in non-affected markets and (3) the consumer surplus of the future buyers of the contract product. Below it is explained for each type of consumer surplus whether it should be taken into account in the Second Condition.

Consumer surplus of affected buyers. Even if only the consumer surplus of the current, affected buyers of the contract products is considered, a decision on how to treat these different buyers must be made. Imagine that an anti-competitive agreement both raises prices and increases product quality, in a manner that the consumer surplus (i.e. the aggregate buyers' welfare) is increased. Although this consumer surplus increase indicates an economic welfare increase for the buyers as a group, certain buyers may in fact be worse off due to the price increase or quality improvement. Buyers that already regarded the product's quality as sufficient may not gain from the quality improvement, but nevertheless they lose due to the increase in price. So, in order to allow for a comparison of the consumer surpluses pre- and post-implementation of the agreement, it must be decided whether the welfare of those buyers that do not appreciate the quality improvement is treated as equal to the welfare of the other buyers. If it is so decided, this implies a value judgment that the welfare gains of some can trump the welfare losses of others. Instead of a test that treats the welfare of all current buyers as equal, other tests are possible, too: e.g., a test based on the requirement that the welfare of the poorest buyers is increased while neglecting the welfare consequences for other buyers.[596]

Economics cannot tell which inter-buyer welfare comparison method is the appropriate one.[597] The choice for a certain composition of the consumer surplus that is relevant for the welfare test implies a choice of whether the welfare of certain buyers is more important than other buyers' welfare. For several reasons, however, economic welfare theory cannot clarify with value-free assumptions which kinds of consumer surpluses should be included in the consumer surplus test.[598]

[596] *Cf.* Johansson, this latter test can be dubbed *Rawlsian*, meaning that it is based on Rawls' theory of justice. By contrast, the former test that puts equal weight on the welfare changes of the gainers and the losers can be dubbed *utilitarian*. P. Johansson, *An Introduction to Modern Welfare Economics*, Cambridge University Press, 1997, pp. 131-132.

[597] P. Johansson, *An Introduction to Modern Welfare Economics*, Cambridge University Press, 1997, p. 39.

[598] A value-based test that would probably be accepted by almost everyone is a test based on the so-called 'Pareto criterion.' Pursuant to such a test an agreement is allowed if it makes some better off while making no-one worse off. In practice, the Pareto criterion test will hardly ever be passed.

It is here asserted that the *democratic legitimacy rule* set out in Section A.2.3.2. above holds for the redistribution of wealth or risk between citizens, too. The reduction of the welfare of certain buyers for the benefit of other buyers invites the allegation that this is unfair for the former group of buyers, even if on balance the latter group's welfare increase in monetary terms is larger. Making wealth distributions should therefore be left to the government, which after all has the democratic legitimacy to do so. Consequently, it is not for private parties, i.e. producers concluding an agreement, to decide whether the economic welfare of one group of buyers is equally or less valuable than the welfare of other buyers. The government could, of course, introduce a rule setting out an inter-buyer welfare comparison method which could be applied in the consumer surplus test. This could then be assumed to reflect society's view on how inter-buyer welfare must be compared. As a matter of fact, with regard to the Dutch Exemption Possibility such relevant political choices have indeed been made and they are discussed in Section A.3.6. below.

Consumer surplus of buyers in non-affected markets. Furthermore, if the consumer surpluses of the buyers of the contract product and of the buyers in markets that are not affected by the anti-competitive agreement are considered, one also needs to take a normative view on how to compare a potential welfare loss of the buyers of the contract product to a welfare increase of the buyers of other products. Would it be accepted that certain buyers are harmed by an anti-competitive effect because the buyers of other products enjoy a welfare gain?

Although in principle this requires an inter-buyer welfare comparison similar to the one described above, intuitively it is different from comparing buyers who all face the same price increases and quality improvements. Indeed, it can be questioned whether it is 'fair' that the buyers harmed by the anti-competitive agreement only suffer, while those that aren't harmed only gain. As explained in Section A.3.7. below, the current position of the Commission and Dutch legislature is that this is not fair: they require that those who are harmed by the anti-competitive agreement are at least compensated for their harm; it is currently unknown whether the ECJ takes the same position.

This standpoint may seem a reasonable position at first sight, but it has as a consequence that economic advantages that fall to buyers on other markets or citizens in general cannot be included in considering the Exemption Possibility. So if this approach is accepted, anti-competitive self-regulation that aims to internalise

negative externalities may therefore not benefit from the Exemption Possibility.[599] Because the internalisation of negative externalities usually implies price increases without direct benefits for the buyers, it is to be expected that often buyers will regard this as a decrease in economic prosperity rather than an increase. Or, to be more precise, the whole societal welfare increase due to the internalisation will usually not only (more often: not) land with the buyers. Any welfare increases not benefitting the buyers may then not be used to outweigh anti-competitive effects. As mentioned above, the current political choice is that those who are harmed by the anti-competitive agreement are at least compensated for their harm, implying that societal welfare increase due to the internalisation of negative externalities cannot be decisive in the Second Condition.

Consumer surplus of future buyers. For the application of a consumer welfare test it is also necessary to determine how the welfare of *future* buyers is regarded. Indeed, the advantages of an agreement may be future benefits to be enjoyed by future users. For example, the results of R&D are usually not incorporated in products in the short term (if at all) and therefore it is possible that an anti-competitive agreement that improves innovation only harms current buyers, while benefitting other, future buyers. In addition, bank self-regulation may produce benefits that will mainly be enjoyed by future buyers and citizens, such as the reduction of financial instability risks, due to the reduction of the number of overindebted mortgage loan takers. Again, an inter-buyer welfare comparison – between current and future buyers – must be made to decide how the consumer surpluses of the two groups will be treated. And again, it is here argued that such a decision should be based on a political choice.

Nevertheless, there is an argument for why the political choice should be that the surplus of future buyers must be taken into account. If this is not done, most innovation benefits will not be relevant and this would seriously affect society's prosperity, as innovation, i.e. dynamic efficiency, has been found to be the greatest contributor to society's wealth (see Chapter 2.2.2.2.). If future buyers' welfare increases are not relevant, this will be contrary to competition law's underlying goal, i.e., the maximisation of society's economic prosperity. This would not be appropriate: a competition law should not prevent the conclusion of agreements that pursue its underlying goal.

The puzzle is, however, more complex, since an opinion on future consumer welfare does not only require a value judgment on future *buyers*, but also on future *benefits*. It is one thing to decide whether one's attitude towards future buyers is neutral, protective

[599] The internalisation of negative externalities may imply that certain costs of a product that were not borne by the producer or buyer but by others are now included in the price of this product.

or indifferent, but it is something else to decide on how future benefits must be valued. In general, present benefits are valued higher than equal benefits in the future: it must be worth something to enjoy a product improvement already today instead of having to wait for ten years for this improvement to occur. However, the rate by which future benefits are discounted cannot be determined value-free. In fact, the choice of the rate indicates how much less the welfare of future buyers is valued in comparison to the welfare of the current buyers – a value judgment that can be questioned in the first place.[600]

The position taken in the Exemption Analytical Framework is that the welfare of future generations is certainly relevant, but should be discounted. Apart from the issue that the establishing and valuing of benefits materialising decades from now seems impossible, it is not controversial to draw the conclusion that the people of today do not care as much about their grandchildren's grandchildren, as about their own children – without judging whether this is ethical. In other words, most of us do not extend our consideration of future generations infinitely into the future. So, for that reason alone the consumer surplus of future generations must be valued less than the consumer surplus of today's buyers.[601] Nevertheless, it is appropriate to take the consumer welfare of future generations into account to a certain extent – this is indeed the current status of the law as will be explained below.

A.3.3. The Second Condition: a normative view on the 'fair share' requirement

The Second Condition stipulates that the beneficiaries must receive a certain minimum of benefits: they must receive a 'fair share' of the agreement's improvements. With regard to the question of when the buyers' share of the agreement's improvements should be considered 'fair', no normative position is taken in this book. What is here considered decisive is whether economic prosperity is maintained or increased, as this is the underlying goal of competition law. It is up to the government to decide on where any welfare increases must land and how this is effectuated.[602]

[600] P. Johansson, *An Introduction to Modern Welfare Economics*, Cambridge University Press, 1997, p. 99.

[601] Townley makes the argument that if the interests of all the people of the future are valued equally to the interests of the people of today, these latter interests become insignificant because of the many generations yet to come. Ch. Townley, *Intergenerational Impacts in Competition Analysis: Remembering Those Not Yet Born*, European Competition Law Review, Iss. 11, 2011, p. 584.

[602] In theory, society could place higher value on producer surplus than on consumer surplus gains. It is more likely, however, that such gains are given equal weight or that consumer surplus gains are given more weight. Nevertheless, this valuation remains a political choice.

One may consider an approach that is probably acceptable for many, although not value-free, namely that an anti-competitive agreement must not make anyone worse off, i.e., a more or less 'Pareto efficient agreement' (see footnote 598); where one can of course debate the exact meaning of the definition of 'anyone' (see the previous section). This implies that the buyers harmed by an anti-competitive must at least be compensated for this harm. This compensation could be effected, at least in theory, by welfare distributive measures of the state: by, first, cream skimming the producers that concluded the agreement and subsequently delivering the collected wealth to the buyers. Another redistribution method is stipulating that undertakings can only conclude agreements of which the effects at least compensate the buyers for any anti-competitive harm; in fact this is the current state of the law. Which method is better is in essence the topic of the on-going 'total welfare standard v. consumer welfare standard debate'. Exploring which welfare standard is better suited for the application of competition law is beyond the scope of this book.

It is here held that the choice of a welfare standard must be a political choice, and that a political choice has been made: in the Exemption Possibility a consumer welfare standard applies. This consumer surplus standard is for that reason considered to be the appropriate standard for the Exemption Analytical Framework. This means that in this framework 'receiving a fair share' within the meaning of the Second Condition implies that buyers must be fully compensated for any anti-competitive harm, as will be explained below in Section A.3.7.

A.3.4. Conclusion on the normative view of the Second Condition

When determining the substance of the Second Condition of the Exemption Possibility, it must be established (1) which buyers exactly must receive the benefits of the anti-competitive agreement and (2) how big their benefit should be. It appears that economic theory cannot answer these questions and that they are in fact questions on welfare distribution. Therefore, it is here held that the government must answer these questions and determine the substance of the Second Condition.

With regard to the identity of the buyers who should receive the benefits of an anti-competitive agreement, the legislatures have in any event determined that not each and every buyer must receive these benefits. What matters is that the buyers in the affected market benefit as a group. With regard to buyers in non-affected, related markets, the picture as less clear – this is discussed below in Section A.3.6. The benefits for future buyers are also in the scope of the Second Condition, although at a discounted value. It is here asserted that it is crucial that future buyers' benefits

are also taken into account, as otherwise innovation would be hampered and major economic prosperity increases could be blocked.

With regard to one common Non-economic Justification for regulation, the redistribution of wealth or risks, it follows from this section that this justification can only be effected to a certain extent when applying the Exemption Possibility. Indeed, the mere redistributing of wealth is not considered to be a legitimate function of the Exemption Possibility.

Second Condition in the Exemption Analytical Framework

Second Condition: the agreement must allow customers a fair share of the resulting benefits.

Exemption Analytical Framework:

- Whether the agreement's benefits are sufficiently beneficial depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.
- The group of buyers to be considered consists of the buyers in affected markets, including future buyers. Buyers in non-affected markets must not be considered, unless these buyers are the same persons/entities as the buyers in the affected market.
- Benefits for society must not be considered, in conformity with the legislature's position.
- The beneficiaries receive a fair share of the agreement's benefits only if they are at least compensated for the anti-competitive harm done to them.

A.3.5. Introduction to the legal *status quo* of the Second Condition

The previous section explained the normative view taken in this book with regard to the Second Condition. In this section the current legal status of this condition is set out. First, EU case law and authorities' decisional practice with regard to the group of beneficiaries is covered. Next, the legal *status quo* of the term 'fair share' is discussed.

A.3.6. The Second Condition: the legal *status quo* of the beneficiaries of the improvements

Three different kinds of buyer categories that could be beneficiaries of the improvements within the meaning of the First Condition are discussed below: (1) current (direct and indirect) buyers in the affected market, (2) buyers in non-affected markets and (3) future buyers of the contract product. Finally, paternalism is considered.

It is not controversial at all that, pursuant to the present state of the law, current (direct and indirect) buyers in the affected market can be beneficiaries. It is more controversial whether the other two categories of buyers are within the scope of the Second Condition. The following discussion therefore only considers these latter two categories.

Buyers in non-affected markets. The ECJ has recently, in its *Mastercard I* judgment,[603] provided more guidance regarding the question of whether the benefits for buyers in non-affected markets can be used to compensate the anti-competitive effects of an agreement. Unfortunately, the considerations of the Court do not provide a univocal answer. Remarkably, the guidance follows formally from an interpretation of the ECJ on the First Condition, but in reality the ECJ is interpreting the Second Condition.

The activities that were at issue in the *Mastercard I* case included the offering of credit card services, which involves two different types of customers: (1) merchants who offer their customers the possibility to pay with credit cards in their shops, and (2) consumers or payers who use credit cards to pay for their purchases. Indeed, these credit card services are a product with a so-called two-sided market: simply put, one product that simultaneously serves two distinct types of buyers. One of the questions to be answered in the court proceedings was whether any anti-competitive harm for the *merchants* could be outweighed by advantages for the *consumers*. In other words, is it allowed that an anti-competitive agreement results in welfare distribution from the merchants to the consumers? The ECJ considered that this is indeed possible, provided that the merchants receive at least "*appreciable objective advantages*".[604] In the case at hand, the merchants were found to receive no benefits at all, so the consumers' benefits could not outweigh the anti-competitive harming of the merchants. Nevertheless, the ECJ unfortunately did not clarify what it meant by 'appreciable'.

[603] ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I case)*.

[604] ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I case)*, paras. 237, 241-242 [underlining added].

The result of the ECJ's judgment can be questioned on equity grounds: is it fair that private parties to an anti-competitive agreement can harm one category of customers, because they increase the welfare of other customers? On the other hand, one may argue that as long as societal welfare is increased, everybody could benefit, since the harmed customers could be compensated through other means, such as governmental subsidies. In this book no value judgment is made on this issue. There are, however, three other reasons to criticise the ECJ's judgment: (1) by determining the welfare distribution mechanism in the Second Condition the ECJ made a political decision that should not have been taken by a court but by the legislature instead (see Section A.2.3.4.), (2) the ECJ's approach leaves room for discretion for private parties to decide when the benefits for the harmed buyers are sufficiently 'appreciable', and (3) it seems that the appreciability test also applies if the buyers in two distinct markets share the same identity, which is a needless requirement; the latter two points are discussed below.

- The ECJ's interpretation in the *Mastercard I* case is unsatisfactorily, since it includes an ambiguous appreciability test. Indeed, the ECJ considered in the *Mastercard I* case that in principle, benefits on the consumer services market could outweigh anti-competitive harm on the merchant services market, but that this would not be possible "*in the absence of any proof of the existence of appreciable objective advantages*" of the anti-competitive agreement for the merchants.[605] The ECJ did not explain when advantages must be deemed 'appreciable'. So, now it is up to the parties to an agreement – and if applicable the competition authorities and courts – to set the threshold for determining whether buyers have received enough benefits. Clearly, different opinions on the appropriate threshold will exist and therefore different thresholds will be applied. This is an undesirable situation, as such welfare distribution choices should be made by the state.
- In addition, it seems that the ECJ deems the appreciability test applicable in the case that the buyers in the different markets are in fact the same persons. Indeed, the Court states that without appreciable advantages for the buyers in the affected market, the benefits of buyers in other markets cannot outweigh the anti-competitive effects "*<u>in particular</u> (…) where the consumers on those markets are not substantially the same.*"[606] This statement raises the question of what the ECJ's view is if the buyers in the two markets *are* substantially the same. The Court's line of thinking would be reasonable if it had considered that

[605] ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I case)*, para. 242.

[606] ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I case)*, para. 242.

> outweighing by benefits for the buyers on the markets that were not harmed is not possible *if* these buyers are not substantially the same as the buyers in the affected market. The ECJ did not say this, however: it merely considered that outweighing would be unacceptable *particularly* if these buyers are not substantially the same as the buyers in the affected market.

So, the ECJ seems to take the view that even if the buyers in the markets concerned are substantially the same persons, these buyers need to receive at least appreciable advantages in the market that is affected by the anti-competitive effects. If this is indeed the ECJ's stance, it is here deemed to be unwarranted. The underlying goal of competition law is the furtherance of economic prosperity and if the principle that those who are harmed must be fully compensated is applied, it should not matter what the nature of the economic prosperity compensation is. It may even be the case that the persons harmed could receive more economic prosperity by allowing the anti-competitive agreement and major benefits in a market other than the market harmed, than by rejecting this agreement because it does not generate appreciable advantages in the affected market.

The Commission agrees that the benefits that the harmed users enjoy may also be generated in another market than the market of the products governed by the restrictive agreement. In other words, for the Commission the decisive element is the identity of the buyers and not the affected market(s). A similar approach was taken, for example, in the *Star Alliance* decision. In this case, concerning the cooperation between certain airlines, the Commission acknowledged that the anti-competitive harm would affect a different route (i.e. the Frankfurt-New York route) than the routes that would benefit from the cooperation (i.e. the behind and beyond routes out of Frankfurt and New York). However, since there was "*considerable commonality*" between passengers enjoying the benefits and those suffering from the anti-competitive harm, the Commission allowed the balancing of the benefits against the anti-competitive effects.[607]

In another instance, the ACM has, in a recent Article 6 DCA case, balanced prices increases for electricity consumers against the environmental benefits for the Dutch society:[608] perhaps because virtually all members of society consume electricity. Likewise, in its assessment of the competitive effects of establishing a national mortgage credit guarantee institution (in Dutch: *Nationale Hypotheek Instelling*),

[607] See: Commission decision of 23 May 2013, *Case COMP/AT.39595 - Continental/United/Lufthansa/Air Canada (Star Alliance)*, paras. 56-61.

[608] ACM memorandum, *Analyse van de ACM met betrekking tot de Voorgenomen Afspraak tot Sluiting van 80er Jaren Kolencentrales in het Kader van het SER Energieakkoord*, 2013.

the ACM considered that the benefits (!) of any lower mortgage interest rates for consumers had to be compared with the costs for consumers in case of the failure of a mortgage credit provider, which costs would consist of the payments *by the consumers as taxpayers* under the institution's guarantee scheme. So, the ACM apparently considered that all mortgage credit takers are also taxpayers and therefore the ACM deemed it appropriate to take the potential costs for taxpayers into account, even though not all taxpayers are actual or potential buyers of mortgage loans.

Buyers in non-affected, unrelated markets and society in general. It remains to be seen whether the stance of the ECJ in the *Mastercard I* judgment implies that, when appreciable advantages for the buyers in the affected market exist, benefits for buyers on non-affected, unrelated markets – or society in general – can be used to outweigh any existing anti-competitive effects. In this respect it is relevant to acknowledge, as the ECJ did,[609] that the *Mastercard I* case involved a specific market. In this case a two-sided market product was assessed. The connection between the merchant services market and the consumer services market is indissoluble and tight. It remains to be seen whether a similar approach will be applied when the markets concerned have less close or no interaction.

Prior to the *Mastercard I* judgment it had already been argued that the Second Condition merely requires that users in general, regardless of where they buy, receive a fair share of the agreement's benefits.[610] Indeed, in older judgments the GC seemed to have considered that the test of whether the Second Condition is fulfilled, the economic benefits in any market, or even economic benefits in general, can be taken into account, and not just the benefits in the relevant market affected by the restriction at issue.[611] Likewise, the ACM has balanced the anti-competitive effects in the market for cash transport services against the benefits for users of the payment services and society.[612] Furthermore, in the past the Commission itself did not limit the beneficiaries of the economic benefits to direct and indirect buyers: in the *CECED*

[609] ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I case)*, paras. 237.

[610] Ch. Townley, *Intergenerational Impacts in Competition Analysis: Remembering Those Not Yet Born*, European Competition Law Review, Iss. 11, 2011, p. 582.

[611] E.g., in the *Compagnie Générale Maritime* case the GC considered: "*For the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty (…), regard should naturally be had to the advantages arising from the agreement in question, <u>not only for the relevant market, (…), but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects</u>, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement.*" GC judgment of 28 February 2002, *Case T-86/95 Compagnie Générale Maritime et al. v. Commission of the European Communities*, para. 343 [underlining added].

[612] ACM decision of 3 June 2013, *Case 7512 Brink's Nederland - Geldservice Nederland*, paras. 60-62.

case it considered that the *"(…) environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines."*[613]

However, including society's benefits in the Second Condition is nowadays one step too far for the Commission and the ACM. This is clear from their replies to the consultation of the Dutch Minister of Economic Affairs on the new Policy Guidelines Competition and Sustainability. The Minister intended to change the existing 2014 Policy Guidelines on Competition and Sustainability by, among other things, including in the guidelines the instruction to the ACM to take into account, when assessing the economic benefits of an agreement, the benefits for society as a whole – and not just the benefits for the users of the products concerned.[614] The reason for changing the rather recent guidelines was the discontent with a couple decisions of the ACM blocking sustainability initiatives.[615] In their replies to this consultation both the ACM[616] and DG COMP[617] stated that the Minister's intended interpretation of the Dutch Exemption Possibility would not fit in with the EU Exemption Possibility, because EU law would only allow that the benefits for the users be included in the weighing pursuant to this provision. The Minister subsequently informed the Parliament that he would abandon this envisaged change and would no longer require the ACM to take into account the benefits for society as a whole when applying the Dutch Exemption Possibility.[618] In the recently published, new policy guidelines the Minister indeed did not include this instruction for the ACM.[619] So, the Minister apparently favoured the consistency between the Dutch and EU Exemption Possibility, over the adaption of the Dutch provision to his own preferred views. Indeed, it would have been possible to issue policy guidelines with regard to the Dutch Exemption Possibility only, for those situations in which inter-Member State trade does not occur.[620] In the end, however, it was the Minister's choice not to

[613] Commission decision of 24 January 1999, *Case IV.F.1/36.718 - CECED*, para. 56 [underlining added].

[614] Consultation by the Dutch Minister of Economic Affairs of the new Policy Guidelines Competition and Sustainability, 2015, pp. 1, 9.

[615] Consultation by the Dutch Minister of Economic Affairs of the new Policy Guidelines Competition and Sustainability, 2015, p. 2.

[616] ACM letter of 18 February 2016 (with regard to consultation of the Policy Guidelines Competition and Sustainability), ACM/DM/2016/200906, p. 2.

[617] DG COMP letter of 26 February 2016 (re consultation of the Policy Guidelines Competition and Sustainability), COMP/A4/D*011157, p. 2.

[618] Letter of the Dutch Minister of Economic Affairs of 23 June 2016 (re consultation of the Policy Guidelines Competition and Sustainability), DGETM-MC/16071609, p. 3.

[619] Policy Guidelines Competition and Sustainability 2016 (*Beleidsregel Mededinging en Duurzaamheid 2016*) of the Dutch Minister of Economic Affairs, 2016.

[620] See e.g. DG COMP letter of 26 February 2016 (re consultation of the Policy Guidelines Competition and Sustainability), COMP/A4/D*011157, p. 2.

broaden the scope of the Second Condition and to disallow benefits for non-affected buyers to be decisive.

Considering the democratic legitimacy rule, one could argue that the Minister, as a political institution, has expressed the view that the Second Condition must also cover benefits for society as a whole and that therefore the scope of this Condition should be deemed set correspondingly (ignoring the fact that the Minister had withdrawn his initial proposal). However, in this regard it is relevant to acknowledge that the EU and Dutch Exemption Possibilities are expressions of decisions of political institutions, too, and even expressions of institutions of a higher legal hierarchy than Minister's views or guidelines. Complying with this hierarchy, which is also the result of democratic choices, is not contrary to the democratic legitimacy rule. So, even though the Minister initially intended to broaden the scope of the Second Condition, this is not a reason to hold that it is indeed a Dutch political choice that currently the substance of the Second Condition allows for taking the benefits of society as a whole into account.

Future buyers. In the application of the Exemption Possibility it is commonly accepted that economic welfare increases that only materialise in the future are relevant for consideration, e.g., benefits flowing from innovation are uncontroversially accepted as effects that can outweigh anti-competitive effects.[621] In such analyses for the acceptance of the future benefits it is not required that these benefits accrue to the current buyers. Furthermore, in the context of agreements aiming to achieve sustainability objectives, the Dutch Minister has issued policy guidelines which clarify that the agreements' benefits for future generations are relevant.[622]

Another question is which weight to allocate to the benefits of future generations vis-à-vis the benefits and harm of the present generations; this was already discussed above (Section A.3.2.). It is the Commission's view that some discount factor will be applied to the benefits of future generations,[623] but the law, case law and decisional practice do not provide guidance on how to set the discount factor.

[621] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, paras. 87-88. See also: Ch. Townley, *Intergenerational Impacts in Competition Analysis: Remembering Those Not Yet Born*, 2011, European Competition Law Review, Iss. 11, p. 582. Likewise, in merger control cases, which by definition require a prospective welfare analysis, efficiencies resulting from a merger may outbalance any anti-competitive effect (see Chapter 6.).

[622] Article 2 of the Policy Guidelines Competition and Sustainability 2016 (*Beleidsregel Mededinging en Duurzaamheid 2016*) of the Dutch Minister of Economic Affairs, 2016.

[623] *Cf.* Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 88.

A.3.7. The Second Condition: the legal *status quo* of the 'fair share' requirement

The ECJ has interpreted Article 101(3) TFEU in such way that requires that the benefits of the anti-competitive agreement must compensate for the anti-competitive harm.[624] With regard to Dutch competition law, a democratically legitimised choice with the same substance has been made (expressed by the Minister).[625] So, in the Exemption Analytical Framework it is also required that the Economic Benefits of an anti-competitive agreement must at least outweigh the anti-competitive effects.

A.3.8. Conclusion on the legal *status quo* of the Second Condition

It is clear that the courts and authorities regard the current direct and indirect buyers on the affected market as a group to be eligible beneficiaries within the context of the Second Condition. The ECJ has recently considered that buyers on non-affected but closely related markets may also be eligible, provided that the buyers in the affected market receive "*appreciable objective advantages*." It remains to be seen whether the Court would also deem eligible the buyers in unrelated, non-affected markets or society as a whole (i.e. all citizens combined). The Commission and ACM have in the past balanced the benefits for society against anti-competitive effects, but their current policy is probably to consider such benefits to be non-decisive.

The courts and authorities are also willing to accept future buyers in the affected market as beneficiaries. Indeed, it is quite common to accept that the future benefits of innovation may outweigh today's anti-competitive effects.

The law as it stands currently is clear on the application of the 'fair share' criterion: the eligible buyers as a group must at least benefit by sufficient improvements to fully compensate any anti-competitive harm.

A.3.9. Final conclusion on the Second Condition

The Second Condition contains two elements: it specifies (1) *who* must receive the benefits within the meaning of the First Condition, and (2) *how big* the size of these

[624] ECJ judgment of 11 September 2014, *Case C-382/12 P MasterCard Inc. and Others v. European Commission (Mastercard I case)*, para. 234. See also: Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 85.

[625] See e.g. the Explanatory Notes to Policy Guidelines Competition and Sustainability 2016 (*Beleidsregel Mededinging en Duurzaamheid 2016*) of the Dutch Minister of Economic Affairs, of 5 October 2016, p. 9.

benefits must be. With regard to these two elements of the Second Condition, the Exemption Analytical Framework and the legal *status quo* do not differ significantly, as the former ties in with the latter. Determining the substance of the two criteria requires making political choices, which flow from neither legal nor economic theory. In the Exemption Analytical Framework the political choices made in this respect are therefore subsumed in the framework.

The EU and Dutch legislatures have, as follows from their laws as interpreted by the courts, chosen that eligible buyers must at least be compensated for any anti-competitive harm. So, these buyers as a group may not be made worse off by the anti-competitive agreement. Eligible buyers are in any event the current direct and indirect buyers in the affected markets and future buyers in these markets. The approach regarding buyers in non-affected markets is less clear. The ECJ now accepts buyers in non-affected but closely related markets as eligible beneficiaries, provided that the buyers in the affected market receive "*appreciable objective advantages*." Unfortunately, there is a lack of clarity on this appreciability requirement. Furthermore, it is here recommended that this appreciability requirement does not apply if the buyers in the affected and the non-affected markets are substantially the same.

The position of buyers in unrelated, non-affected markets or society in general (i.e. all citizens combined) is not clear. The ECJ's most recent guidance was given in the context of buyers in a two-sided market, i.e., a non-affected market that was closely related to the affected market. Whether the Court would take the same view when an unrelated market or society in general is involved, remains to be seen. In the past, the Commission and ACM have balanced the benefits for society in general against anti-competitive effects. However, they nowadays would probably not do that anymore, since they take the view that those who are harmed by the anti-competitive effects must also be fully compensated.

A.4. THIRD CONDITION OF THE EXEMPTION POSSIBILITY

Third Condition: the competition restriction must be indispensable to the attainment of the benefits.

A.4.1. Introduction

Pursuant to the Third Condition an agreement can only be exempted if it does not "*impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.*" So, the Third Condition of the Exemption Possibility includes an indispensability test. The approach taken in the Exemption Analytical Framework is that this indispensability test is limited to a *suitability test* of the restriction. This normative approach differs from the legal *status quo*, which implies a 'no-less-restrictive-alternative' test (see below).

This section's structure is as follows. In Section A.4.2. a normative view on the Third Condition is presented. Section A.4.3. covers the legal *status quo* of the Third Condition, while Section A.4.4. explains the reasons why the normative view differs from the legal *status quo*. The findings of the section are included in Section A.4.5.

A.4.2. The Third Condition: a normative view on its scope

The normative answer to the question of what the relation should be between a competition restriction and the benefits within the meaning of the First Condition, is based upon the findings of Chapter 2.1.1.: a norm should pursue its ultimate goal and should not block measures that further this ultimate goal. Consequently, the Exemption Possibility should not block anti-competitive agreements that increase economic prosperity.

So, in the Exemption Analytical Framework the only test that must be passed with regard to the Third Condition is whether a particular restriction is indeed *suitable* for producing the claimed benefits within the meaning of the First Condition. Such a suitability test is useful, since it ensures that the Exemption Possibility implies a real balancing mechanism between the anti-competitive effects and benefits of a particular restraint.

The proposed suitability test aims to investigate the existence of a causal link between the agreed restriction and the claimed benefits. This does not only require

an assessment of the nature of the restriction, but also a judgment on whether it is necessary to bilaterally or collectively agree on such restriction.[626] If it were not required to establish a causal link between the claimed benefits and the restriction, the Exemption Possibility would become something like a negotiation platform. Undertakings could embark on a cooperation that would overall benefit buyers for whatever reasons, while at the same time they could randomly pick a competition restriction they liked – as long as the disadvantages of this restriction did not outweigh the agreement's benefits. This would be contrary to the system underlying the Articles 101 TFEU and 6 DCA, which implies that each appreciable restriction of market rivalry is prohibited because of its presumed disadvantages for economic prosperity, unless it can be substantiated that the restriction itself in fact increases economic prosperity.

It is here argued that it suffices that the Third Condition functions as a *suitability* test. As discussed in the next section, this book takes the view that it is unwarranted to apply the Third Condition as a *proportionality* test implying an investigation as to whether less restrictive alternatives are available.

Third Condition in the Exemption Analytical Framework

Third Condition: the competition restriction must be indispensable to the attainment of the benefits.

Exemption Analytical Framework:

- The applicable test is only whether the competition restriction is *suitable* for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternatives' test is not required.

A.4.3. The Third Condition: the legal *status quo* of its scope

There is no general framework capturing EU Courts' position on the substance of the Third Condition, but from their judgments it appears that they interpret the indispensability test as the requirement to check whether there are less restrictive

[626] If it is likely that the undertakings could have achieved the claimed benefits on their own, there is no reason to conclude an agreement to produce these benefits. Since the conclusion of an agreement is not a *sine qua non* for achieving the benefits, the restriction fails the proposed suitability test. This approach is also part of the Commission's standard approach; see: Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para 76.

means to achieve the benefits considered in the First Condition.[627] For example, in the *Slovak Banks* case the ECJ considered it not indispensable that the incumbent banks formed a collective boycott against a new financial institution to stop it from operating, allegedly, illegally. The Court considered that the banks could have lodged a complaint with the financial supervisor, implying that any illegal activities could also have been stopped by governmental action and that therefore no competition restriction (i.e. the boycott) was necessary.[628]

The Commission takes the view that the application of the Third Condition has two stages. In the first stage it must be established whether the benefits within the meaning of the First Condition, which flow from the envisaged cooperation of the undertakings concerned in general, cannot be achieved through less restrictive means.[629] The Commission maintains that only *realistic* alternatives need to be considered in this first test and that no investigation of all hypothetical alternatives is required. Such realistic alternatives may include the undertakings' independent operations, without any cooperation. This first test serves as a first screening for the Third Condition, which is probably easier to apply than the second test (see below). If it can be established that the type of cooperation that the parties concerned seek is not required because less intrusive alternatives exist, the first test is failed and there is no need anymore to analyse the effects and necessity of the individual restrictions of the cooperation.

The second stage includes an assessment of each competition restriction of the overall agreement in order to establish whether the restriction is reasonably necessary to produce the abovementioned benefits:[630] "*A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise.*"[631] This indicates that this test is more a suitability test than a necessity test, but the Commission maintains that alternatives to the restrictions need to be investigated, too.[632]

[627] See e.g.: GC judgment of 23 February 1994, *Case T-39/92 Groupement des Cartes Bancaires "CB" and Europay International SA v. Commission of the European Communities*, paras. 112 - 113; and GC judgment of 15 July 1994, *Case T-17/93 Matra Hachette SA v. Commission of the European Communities*, para. 138.

[628] ECJ judgment of 7 February 2013, *Case C-68/12 Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s. (Slovak Banks case)*, para. 35.

[629] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 75.

[630] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 78.

[631] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 79.

[632] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 79.

Furthermore, it is sometimes considered that this second test is a sliding scale, meaning that the test becomes stricter the more intrusive the restriction is.[633] This would be rather odd, however, since the intensity of the restriction of competition does not indicate whether the restriction is required to attain certain benefits: a restriction either produces certain benefits or not, regardless of its intrusiveness. Nevertheless, the more intrusive a restriction is, the easier it will be to find less restrictive alternatives.[634] It is therefore better to consider the dependency of the strictness of the second test on the intensity of the competition restriction to be a result of the requirement to check for alternatives. It is therefore not a built-in mechanism that aims to make it more difficult to exempt restrictions when they become more intrusive. This is a relevant point if the requirement to check for alternatives were to be abolished (as it is proposed in the Exemption Analytical Framework), since it can then no longer be held that the second test is stricter the more restrictive the restraint is.

With regard to the application of the Third Condition to bank self-regulation it is relevant to acknowledge that, according to the ACM, this criterion is *"(…) generally <u>not applied too strictly</u> in practice. The key factor is if the restriction to competition can be reasonably considered necessary to achieve the planned benefits. This means that the Commission and the [ACM] generally do not actively seek less far-reaching alternatives. Only if clear realistic and feasible alternatives are available can parties be asked to indicate why these alternatives to the arrangement would be significantly less efficient."*[635] Nevertheless, one should not neglect this condition. For example, in the *Dutch Mortgage Code* case the ACM denied an exemption for certain provisions of self-regulation governing the provision of mortgages to consumers because it did not consider these provisions indispensable (see Chapter 5.4.4.). Especially the

[633] See e.g.: J. Faull & A. Nikpay, *The EU Law of Competition*, Oxford University Press, 3rd edn., 2014, para. 3.494.

[634] In its Guidelines, the Commission indeed claims that the second test of the Third Condition is stricter the more restrictive the restraint is. To substantiate this claim, it refers to a judgment of the GC. See: Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 79. In fact, however, in this judgment the GC considered on this point that "*the applicants' argument that there is no alternative measure less restrictive than the contested agreement is hardly convincing, given the highly restrictive nature of the latter.*" This consideration does not imply that the test is stricter because the agreement is very restrictive, but merely that for such a restrictive agreement it is likely that a less restrictive alternative can be found. See: GC judgment of 28 February 2002, *Case T-86/95 Compagnie Générale Maritime et al. v. Commission of the European Communities*, para. 395.

[635] ACM consultation document, *Position Paper on Competition and Sustainability (Draft)* (*Mededinging en Duurzaamheid (Concept)*), 2013, p. 16 [author's translation, underlining added].

Commission's and ACM's[636] approaches of applying the second test more strictly in cases where the restraint is more restrictive, may make the introduction of certain self-regulation difficult.

A.4.4. The Third Condition: comparison between the normative view and legal *status quo*

Proceeding from the assumption that the Articles 101 TFEU and 6 DCA aim to maximise economic prosperity, the application of this condition in accordance with the legal *status quo* may work counterproductively to achieving that goal. The current application may prevent the exemption of restrictions that produce more economic welfare benefits for buyers than economic welfare losses (i.e. the First and Second Conditions are fulfilled), while market rivalry is also maintained (i.e. the Fourth Condition is fulfilled, too). As a consequence, buyers may be worse off if no exemption is granted because of a failure to fulfil the Third Condition. This effect is the result of the requirements to check for alternatives, which are included in the first and second tests of the Third Condition. The flaw of these requirements is that undertakings are not required to implement less restrictive alternatives that deliver the same benefits. If their intended cooperation is not exempted, undertakings may chose not to cooperate at all. In this respect it is relevant to appreciate that the no-less-restrictive-alternative test relates to the benefits for the buyers and not to the gain for the colluding undertakings. This means that the no-less-restrictive-alternative test does not automatically lead to a win-win situation in which both the buyers and the sellers are better off. It may be that less restrictive means are available to generate the same amount of benefits for the buyers, but if this alternative does not sufficiently benefit the sellers, they will not enter into the agreement. This would then also make the buyers worse off.

The current application of the Third Condition provides a party – e.g. a competition authority – claiming that the Exemption Possibility does not apply, with the possibility to sidestep intricate discussions on the likelihood and magnitude of an agreement's benefits for buyers and on the question of whether these benefits should be deemed to outweigh the anti-competitive effects. This party could sidestep these discussions by substantiating that particular restrictions are not suitable or necessary. Indeed, if

[636] The ACM has considered: "*Ultimately, the criteria of paragraph 3 (of Article 101 TFEU/6 DCA) will always be considered in relation to each other. In particular, the more competition is restricted, the more reason there is to pay more attention to the necessity requirement*." See: ACM consultation document, Position Paper on Competition and Sustainability (Draft) (*Mededinging en Duurzaamheid (Concept)*), 2013, p. 16.

there were some political or stakeholders' support for an industry to achieve a certain goal in the interest of consumers and the industry were to pursue this goal through self-regulation that severely limits competition, a competition authority could evade sensitive discussions on the desirability of pursuing the aforementioned goal at the cost of competition by, if appropriate, showing that the self-regulation is unnecessarily restrictive.[637] If the AFM or DNB encouraged banks to conclude an anti-competitive code that pursues consumer protection goals, the application of the Third Condition could allow the ACM to block this code without having to quarrel over relevance of the code's goals with the other supervisors. This is undesirable if the self-regulation would have made consumers better off.

So, due to the no-less-restrictive-alternative test currently required by law, an exemption is not always granted if buyers are better off with the anti-competitive agreement, but only if the agreement is capable of delivering the maximum economic welfare possible. Although it is of course laudable that the law aims to create maximum economic welfare, it is undesirable if the quest for the perfect world results in the rejection of a better world.[638] Competition law should not merely preserve agreements that in theory deliver the best results, but it should allow all agreements that result in an overall economic welfare increase,[639] while preserving market rivalry to a certain extent (see Section A.5. below), in comparison with the situation without the agreement.[640]

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[637] Indeed, in the context of self-regulation for sustainability purposes, the ACM has considered that: "*If the government instructed market participants to serve a certain interest through self-regulation that may be taken as a confirmation that apparently there is a sustainability objective, this does not imply that the necessity of the specific arrangement has also been confirmed therewith*." See: ACM consultation document, Position Paper on Competition and Sustainability (Draft) (*Mededinging en Duurzaamheid (Concept)*), 2013, p. 17 [author's translation].

[638] Townley argues for a strict no-less-restrictive-alternative test, as this would ensure the generation of the claimed benefits at the lowest welfare costs. He seems to miss the point that if the parties would not implement the agreement solely due to a violation of the no-less-restrictive-alternative test, buyers would be worse off (if the First and Second Conditions are fulfilled). This is here deemed to be contrary to competition law's goal. See Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, pp. 273-287.

[639] The normative view arguing for a suitability test depends on the position that only Economic Benefits are eligible for balancing in the Exemption Possibility. If Non-economic Benefits could also be included, the no-less-restrictive-alternative test would be more appropriate when considering such benefits because such a test then yields the optimal result: it ensures that both economic welfare is maximised and the Non-economic Benefit is achieved; see also Section B.4.1.

[640] With regard to the balancing test in US antitrust law, i.e. the so-called rule of reason in the context of the Sherman Act, the Federal Circuit Courts have also developed a kind of indispensability test. Feldman, among others, criticises this so-called no-less-restrictive-alternative test and asserts that, in a similar vein as in this book, the rule of reason should be limited to a costs-benefits analysis of the effects on competition. He considers that the only function of the 'no-less-restrictive-alternative' test is to establish the intent of the parties to the agreement: if a less restrictive alternative for the agreement exists, it may be inferred that the agreement has anti-competitive purposes. However, such *intent* does not suffice to render the agreement illegal, as anti-competitive *effects* must be present for the finding of illegality. G. Feldman, *Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, American University Law Review, Vol. 58, No. 3, 2009.

A.4.5. Third Condition: conclusion

Building on the finding that competition law aims to further economic prosperity, the normative view taken in this book is that the indispensability test of the Third Condition should be a suitability test only. This implies that it suffices that a causal link exists between the competition restriction and the Economic Benefits taken into account to exempt this restriction from the Cartel Prohibition. This fits into the system of Articles 101 and 6 DCA, which implies that restrictions of market rivalry are prohibited due to their presumed harm to economic prosperity, unless the restriction increases economic prosperity overall.

However, the Exemption Analytical Framework does not require the Third Condition to function as a no-less-restrictive-alternative test. This is not consistent with the current state of the law, as the Commission and the ACM require parties claiming the benefit from the Exemption Possibility to substantiate that the agreement's Economic Benefits cannot be generated through a less restrictive agreement. This requirement is here deemed to be unwarranted. The only thing that matters is that the restriction may not leave buyers worse off. The flaw of the approach of the authorities is that they ignore that undertakings are not *required* to implement less restrictive alternatives when available. So, if their intended cooperation is not exempted for this reason only and the undertakings choose not to cooperate, economic prosperity is not maximised to the extent possible.

A.5. THE FOURTH CONDITION OF THE EXEMPTION POSSIBILITY

Fourth Condition: the agreement may not eliminate a substantial part of competition in the market.

A.5.1. Introduction

The Fourth Condition of the Exemption Possibility requires that the restrictive agreement must not "*afford [the] undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*" According to the Commission, the purpose of this condition is to ensure that the competitive process is protected and always maintained.[641] This notion is accepted in this book,

[641] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 105.

but it will follow from the discussion below that the legal *status quo* and the proposed interpretation of the Fourth Condition differ in some aspects.

Below, first a normative view on the Fourth Condition is presented (Section A.5.2.). Next, in Section A.5.3. the legal *status quo* of the Fourth Condition is set out and in the subsequent section it is identified where the legal *status quo* differs from the normative view. Section A.5.5 closes the discussion on the Fourth Condition with an overview of the relevant findings.

A.5.2. The Fourth Condition: a normative view on its scope

Proceeding from the findings that competition law ultimately aims to promote economic prosperity, and that innovation, and therefore indirectly competition as well, are key drivers of economic prosperity (see Chapter 2.2.2.2.), the function of the Fourth Condition in the Exemption Analytical Framework is to protect competition so that, beyond the short term, innovation is not terminated or significantly hindered. In other words, protecting competition is its means, while safeguarding innovation is the end.

Although market rivalry is generally considered to be the best way to maximise economic prosperity, it may be restricted if it is likely that such a restriction results in even more economic prosperity. It is sensible, however, to set limits for market rivalry restrictions, even if it can be demonstrated that economic prosperity would be further increased through a further restriction of rivalry. This is sensible if it is accepted (1) that innovation is the strongest driver of economic prosperity, (2) that future innovations and their contribution to prosperity cannot be predicted and, finally, (3) that rivalry is a strong incentive for competitors to innovate. These assumptions are indeed accepted in this book. It therefore makes sense to ensure that a certain level of rivalry is always preserved, so that innovation is never eliminated.

Usually the timing, manner and significance of innovation cannot be predicted at the time the balancing exercise of the Exemption Possibility is performed. Although it is unavoidable to leave unknown innovation benefits out of the analysis, it is wise to ensure that these benefits may reach the market when they materialise. It would indeed be foolish if, because of the uncertain character of innovation benefits, these effects were simply ignored, especially since they are deemed to be the greatest driver of economic prosperity. The Fourth Condition may serve as a kind of safety mechanism against the underestimation of the power of innovation.

It seems impossible to determine a general, concrete *test* for the Fourth Condition. In the law such a test has not been developed either (see below). It is clear that 'eliminating competition'

within the context of the Fourth Condition must mean something different than 'restricting competition' within the meaning of the Cartel Prohibition. 'Restricting competition' is a constitutive element of the Cartel Prohibition, and the Exemption Possibility would be meaningless if a violation of this prohibition could never be exempted because of the effect of the Fourth Condition. Hence, for the Exemption Possibility to have a meaning, 'eliminating competition' must refer to a higher degree of competition limitation than the Cartel Prohibition's 'restricting competition' element requires. The difficulty is to determine how high this degree must be.

Furthermore, the Fourth Condition should not be applied through a market share threshold. This would not do, since even if the agreement covered 100% of the present market, the presence of serious potential competition on significant product features would probably still allow future innovation. In addition, credible market entry might deliver innovation even if an agreement covered the total present market.

A general rule in line with the abovementioned function of the Fourth Condition is that an agreement must not eliminate innovation for a key competitive parameter beyond the short term. This would of course require establishing for each specific market (1) what the key competitive parameters of the product are and (2) what the 'short term' implies.[642]

So, it is here advocated that the single direct purpose of the Fourth Condition be to ensure that unknown, possibly large benefits are not completely ruled out. This implies that if the restriction does not legally or in practice frustrate innovation, it must be held that the Fourth Condition is fulfilled.

Fourth Condition in the Exemption Analytical Framework

Fourth Condition: the agreement may not eliminate a substantial part of competition in the market.

Exemption Analytical Framework:

- The restriction must not eliminate innovation on a key product feature beyond the short term.

[642] How long it would be appropriate to hinder innovation for the benefit of other positive effects depends on the typical rate of innovation for the relevant market. In markets with little innovation in the past, it is probably sensible (without specific information to the contrary) to expect little innovation for a longer future period than for markets that have recently experienced a lot of innovation. The 'short-term period' for the former market would therefore be longer than the 'short-term period' for the latter market.

A.5.3. The Fourth Condition: the legal *status quo* of its scope

In this section an explanation of the legal *status quo* of the Fourth Condition is given.

The Commission's approach to the Fourth Condition. The Commission considers that the purpose of the Fourth Condition is to protect the competitive process.[643] This is important since: "*When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.*"[644]

The law on the Fourth Condition is not clear. It is unclear to what extent market rivalry must be hindered for the legal test of the Fourth Condition to be failed. In any event, it is clear that an agreement does not automatically fail this test if one of the undertakings concerned is dominant:[645] the Commission mentioned in its 2004 Article 101(3) Guidelines that restrictive agreements concluded by dominant firms could benefit from the Exemption Possibility.[646] This implies that an agreement eliminating competition to the same degree as a dominant firm, e.g., an agreement covering more than 50% of the relevant market, does not violate the Fourth Condition *per se*. On the other hand, an agreement may also fail to comply with the Fourth Condition if it restricts less than 100% of the market, which follows from the provision's text that refers to the elimination of competition with regard to "*a substantial part of the products in question*" and not to 'all products'.

Furthermore, the Commission holds that for the application of the Fourth Condition it is necessary to consider, in addition to the combined market share of the undertakings involved, which competitive parameter(s) are covered by the agreement.[647] If the agreement only covers certain competitive parameters of the product at issue and market rivalry remains effective with regard to other significant product features, competition will not be deemed to have been eliminated.[648]

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[643] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 105.

[644] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 105.

[645] See e.g. GC judgment of 28 February 2002, *Case T-395/94 Atlantic Container Line AB and Others v. Commission of the European Communities*, para. 330.

[646] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 106.

[647] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 110.

[648] An example can be found in: Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements of 14 January 2011, para. 330.

Hence, it is relevant to recognise that anti-competitive self-regulation joined by all banks offering products on a relevant market need not violate the Fourth Condition. If the self-regulation leaves sufficient room for competition on non-regulated product features, this condition will be fulfilled, regardless of the agreement's 100% market coverage. This reasoning should be applied with caution, however. In its 2004 Article 101(3) Guidelines the Commission states that "*[t]he last condition for exception under Article [101(3)] is not fulfilled, if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition or competition with respect to innovation and development of new products.*"[649] The Commission's reference to 'price competition' is based on a judgment of the ECJ.[650] The ECJ and the Commission, however, unfortunately do not give a rationale for this approach.

Finally, when determining whether the Fourth Condition is fulfilled under the legal *status quo*, it is relevant to determine whether the threat of new market entrants imposes real competitive pressure on the actual market players.[651] If the barriers to entry into the market are sufficiently low, the threat of potential competition may force the actual suppliers that are parties to the agreement to offer competitive prices and to keep innovating, even if competition among these actual suppliers is eliminated.

The ACM's approach to the Fourth Condition. The ACM will follow the Commission's abovementioned approach.[652] In addition, the ACM has considered that the test of the Fourth Condition is dependent on the magnitude of the benefits of the agreement. If the agreement generates large benefits for consumers, a higher degree of competition restriction can be accepted.[653] Although this position seems to be in line with the notion that economic prosperity is the ultimate goal of competition law and that competition is a means to an end, there are reasons to apply this 'interdependency concept' with reluctance. This is discussed in the next section.

[649] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 110 [footnote omitted, underlining added].

[650] This follows from a footnote in the text of the Guidelines. This judgment is the *Metro I* judgment: ECJ judgment of 25 October 1977, *Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v. Commission (Metro I case)*, para. 21.

[651] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 114.

[652] ACM, Richtsnoeren toepassing artikel 6, lid 3, Mededingingswet, 2005.

[653] ACM consultation document, Position Paper on Competition and Sustainability (Draft) (*Mededinging en Duurzaamheid (Concept)*), 2013, p. 17.

A.5.4. The Fourth Condition: comparison between the normative view and legal *status quo*

The strict view taken by the ECJ and Commission that the Fourth Condition is not complied with if price competition is restricted, is not part of the Exemption Analytical Framework. It is here held that it is questionable why price competition may not be completely eliminated if sufficiently sizeable benefits flow from the price restriction: it may be perfectly possible to determine whether buyers are better off if the restriction is implemented. Such a restriction does not imply the blocking of unpredictable benefits. Hence, the Commission's general reasoning behind the Fourth Condition that inevitably short-term efficiencies will be outweighed by certain long-term losses is not an issue with regard to price restrictions, because the accompanying long-term losses can be determined beforehand. Therefore, there is no reason to automatically reject the complete elimination of price competition.

With regard to the ACM's position that the test of the Fourth Condition is dependent on the magnitude of the benefits of the agreement, two points of criticism are raised. First, the fact that future-yet-unknown innovation is the major cause for the growth of society's economic wealth and that competition is a major motive for innovation implies that even more allocative and productive efficiency generated today may not easily outweigh tomorrow's dynamic efficiency (i.e. innovation). It would be a rather far-reaching decision if short-term benefits were deemed to be so large that it warranted innovation being almost or completely terminated, especially because it is unknown which benefits innovation may yield. A link between the magnitude of the benefits and the acceptable limitation of market rivalry is therefore here deemed to be uncalled for. Instead, it is here advocated that the decisive element for the test of the Fourth Condition should be the degree of market rivalry necessary to ensure sufficient innovation. Although in practice this degree of market rivalry may never be known, this notion may nevertheless help decision makers: for a particular market they could identify the likely innovation mechanisms and establish whether the competition restriction will significantly affect such mechanisms.

Secondly, the inter-dependency concept makes it harder to apply the Fourth Condition, since it requires not just establishing the degree of competition after the agreement is concluded, but also a judgment call on whether the economic benefits are sufficient to outweigh the limitation of competition. It is important to acknowledge that the determination of the ACM differs from the determination of the agreement's anti-competitive effects on the one hand, and the agreement's benefits in the context of the First and Second Conditions on the other hand. A judgment under the Fourth Condition requires weighing *market rivalry* against economic welfare losses, while the

latter assessment implies – as asserted in this book – a comparison of economic welfare decreases and increases (see Section A.2.). For an assessment of the Fourth Condition to work in practice, it must be clear *how* market rivalry can be balanced against economic welfare increases and *when* the latter can trump the former. The ACM has not provided such guidance. In any event, the inclusion of a separate determination procedure for the Fourth Condition would unnecessarily complicate the application of this provision and it is also for this reason that this test is not part of the Exemption Analytical Framework.

A.5.5. Fourth Condition: conclusion

The notion that the Fourth Condition is meant to protect the process of market rivalry to safeguard economic prosperity in the longer term can be found in the authorities' guidance and is also endorsed in this book. The normative view here is that this notion is sensible, since it is assumed (1) that innovation is the strongest driver of economic prosperity, (2) that future innovations and their contribution to prosperity cannot be predicted and, (3) that rivalry is a strong incentive for undertakings to innovate. Consequently, it is appropriate to apply a rule that prohibits an agreement that eliminates innovation on a key product feature beyond the short term. The Fourth Condition as currently interpreted by the Commission and ACM has a similar but somewhat different substance. First, the Commission, as well as the ECJ, seems to rule out the limitation of price competition. Secondly, the ACM takes the view that market rivalry may be restricted more if the agreement's benefits are greater. In the Exemption Analytical Framework these two views of the authorities are considered unnecessary for the purpose of the Fourth Condition.

A.6. THE EXEMPTION POSSIBILITY: CONCLUSION

A.6.1. Final conclusion on the Exemption Possibility

In this Part A. it was considered to what extent the Articles 101(3) TFEU and 6(3) DCA are feasible legal means for reconciling undertakings' anti-competitive measures that generate public interest benefits with the Cartel Prohibition. The main findings and arguments of Part A. are set out below.

An analysis of the case law and of the decisions and policies of the Commission and ACM showed that the Exemption Possibility can indeed be used as a reconciliation mechanism. Unfortunately, the EU Courts and competition authorities have not developed a clear definition of which public interest benefits can be reconciled with anti-competitive effects in the Exemption Possibility. In the decades before 2004, the year in

which the self-assessment regime was introduced, the EU Courts passed judgments which did not set any limits with regard to the nature of public interests benefits eligible for inclusion in the Exemption Possibility. No such judgments were passed after 2004. The Commission and ACM take the view that those public interests that can be translated into economic terms can be included in the determination of the Exemption Possibility, although the Commission may deem the scope of this category to be smaller than the ACM.

With regard to the First Condition of the Exemption Possibility, it was discussed how the Exemption Possibility should be applied in order to achieve the best results for society. Pursuant to the normative view in this book it is sensible that an exemption from the Cartel Prohibition is available for competition restrictions that overall further economic prosperity, as such restrictions would in the end contribute to the goal that the Cartel Prohibition serves. It was therefore concluded that all benefits of an agreement that present an increase in economic welfare, i.e. all Economic Benefits, should be eligible for balancing against the welfare decreases of any anti-competitive effects. As an additional prerequisite it was held that the translation of the benefit into monetised economic welfare terms must be based on sound facts and convincing methods. On the other hand, it was also concluded that the Exemption Possibility is not an appropriate mechanism to balance non-economic welfare effects against anti-competitive effects. Such a balancing, involving Non-economic Benefits and anti-competitive effects, requires a subjective decision on whether the economic welfare of buyers can be exchanged for the pursuit of other interests or values, and to what extent. Such a decision is a political decision and should be made by politicians with democratic legitimacy. The idea behind the application of the Exemption Possibility after the introduction of the self-assessment regime, however, is that in the first place undertakings themselves must determine whether this provision applies. Consequently, allowing Non-economic Benefits to be included in the First Condition of the Exemption Possibility would give colluding undertakings the power to decide for the buyers how much economic wealth the latter have to sacrifice to enjoy some non-economic value or interest – this is here deemed inappropriate, considering the statutory protection that the buyers' economic wealth enjoys through the Cartel Prohibition.

In the context of the Second Condition it was argued that a competition restriction should only benefit from the Exemption Possibility if it at least fully compensates any anti-competitive harm, in conformity with the legislatures' choices. The EU and Dutch legislatures' intentions are crucial in this context, since the decision as to who must make good the anti-competitive harm and for how much, is in fact a political one. Therefore, the compensation should land with those who are harmed by the

anti-competitive effects, since otherwise the application of the Exemption Possibility would result in a welfare redistribution between different groups of buyers, which was not envisaged by the government. The compensation may also benefit future buyers, because it would be detrimental to society's economic prosperity if the fruits of future innovation were impeded. This implies a wealth redistribution from current buyers to future buyers, but this is a legitimate redistribution as it is in conformity with the legislatures' intentions. Economic welfare improvements landing with other, non-affected buyers or other persons in society should not be included in the determination of the Exemption Possibility. Other means, e.g. Article 106(2) TFEU (see Section B.3.), should be used to solve a conflict between a measure pursuing these latter improvements and the Cartel Prohibition.

Considering the goal of the Cartel Prohibition, i.e., the furtherance of economic prosperity, it was held that the Third Condition of the Exemption Possibility should not include a no-less-restrictive-alternative test. The law is currently interpreted in a way that such a test applies. As a result, a competition restriction which increases economic welfare is only allowed if the welfare increase cannot be achieved through a less restrictive measure. This is not sensible, as insisting on a less restrictive measure may deprive colluding undertakings from their incentive to agree upon the restrictive agreement and, consequently, a welfare increase could be abandoned. This result would be contrary to the Cartel Prohibition's goal.

Safeguarding and increasing competition may increase economic prosperity through the prevention of price increases due to market power, production costs reduction and innovation. Since innovation is generally thought of as being the main force behind economic prosperity growth, it is appropriate that protecting and promoting innovation is taken extra care of. The difficulty of innovation, and especially future innovation, is that the size of its benefits is hard to predict in the present. The uncertainty of these innovation benefits may be so significant that it would be imprudent to allow them to outweigh any anti-competitive effects, i.e., the uncertainty is too substantial to qualify these innovation benefits as Economic Benefits for the purpose of the First Condition. So, the acknowledgement that innovation is crucial for society's economic prosperity but that the benefits of innovation are hard to determine in the present, led to the conclusion that it is sensible to prescribe that a restriction must never block innovation on a key product feature beyond the short term. This is the Fourth Condition's role in the Exemption Analytical Framework. This rule ensures that innovation may keep contributing to society's prosperity, even though at the moment the competition restriction is agreed upon the innovation benefits are unpredictable.

The normative views on the four conditions of the Exemption Possibility culminate in the Exemption Analytical Framework, which is presented in a summarised version in Section A.6.2. below.

Further to the analysis in this Part A., in this book it is concluded that the Exemption Possibility must be applied if Economic Benefits are concerned. If Non-economic Benefits are concerned, or if the Second, Third or Fourth Condition are not fulfilled, the Exemption Possibility must not be used.

A.6.2. The Exemption Analytical Framework

First Condition in the Exemption Analytical Framework

- All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition.
- All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition.
- Paternalistic benefits cannot be considered.

Second Condition in the Exemption Analytical Framework

- Whether the agreement's benefits are sufficiently beneficial, depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.
- The group of buyers to be considered, consists of the buyers on affected markets, including future buyers. Buyers on non-affected markets must not be considered, unless these buyers are the same persons/entities as the buyers on the affected market.
- Benefits for society must not be considered, in conformity with the legislature's position.
- The beneficiaries receive a fair share of the agreement's benefits, only if they are at least compensated for the anti-competitive harm done to them.

Third Condition in the Exemption Analytical Framework

- The applicable test is only whether the competition restriction is suitable for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternatives' test is not required.

Fourth Condition in the Exemption Analytical Framework

- The restriction must not eliminate innovation on a key product feature beyond the short-term.

PART B. ARTICLE 106(2) TFEU

B.1. ARTICLE 106(2) TFEU: AN INTRODUCTION TO THE ANALYSIS

After having explored the possibilities of the Exemption Possibility as a reconciliation mechanism in Part A., Part B. deals with yet another mechanism: Articles 106(2) TFEU and 11 DCA.

Governments have several ways to bring about the effects that they strive for in society. They can enforce prohibitions or requirements, provide subsidies, levy taxes or – relevant for this section – ensure that their citizens are able to receive selected, meritable services and goods. Some of these services or goods may be non-economic in nature, like police protection or dikes, while others have a more economic flavour, such as social housing or university education. With regard to these economic services, governments may very well, when executing their public policies, want to deploy undertakings to provide the services they deem indispensable for their citizens.

Since undertakings performing economic activities are subject to competition law, there could be instances when competition law frustrates the execution of a public policy in the way the government deems most fit. This has been acknowledged by the Treaties' and Dutch legislatures. They have therefore provided for exemption possibilities for the application of competition law to an undertaking's activities that are the result of a task entrusted to them by the state: Articles 106(2) TFEU and 11 DCA. The ECJ has considered that the purpose of Article 106(2) TFEU is "*to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the [EU's] interest in ensuring compliance with the rules on competition and the preservation of the unity of the [EU Market]*."[654] So, the purpose of this provision is in the first place to assist the Member States – unlike the Exemption Possibility, which is a provision that serves undertakings and customers. Article 11 DCA is very similar to Article 106(2) TFEU, and it was the intention of the Dutch legislature that Article 11 DCA would be applied and interpreted as its EU counterpart.[655]

For this book it is relevant to establish whether Article 106(2) TFEU is an appropriate solution framework for reconciling banking regulatory interests with the interest of ensuring that competition in the markets is maintained. First, in Section B.2., the

[654] ECJ judgment of 19 March 1991, *Case C-202/88 France v. Commission of the European Communities*, para. 12.

[655] See: Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, pp. 63 - 64. References to Article 106(2) TFEU are meant to include Article 11 DCA, unless mentioned otherwise.

substance of Article 106(2) is analysed, and particularly whether, based upon the established legal *status quo*, this provision is in practice a realistic solution framework for the conflict at issue. In Section B.3. the relation between Article 106(2) and the Exemption Possibility is explained. Finally, a normative view will be given in Section B.4.: in this section it will be discussed if and to what extent Article 106(2) TFEU *should* be used as the most appropriate solution framework for reconciling banking regulatory interests with competition interests.

Box 4.5. Article 106(2) TFEU

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.

Leaving revenue-producing monopolies out of the discussion, for a lack of relevance for this book, it follows from the text of Article 106(2) TFEU that five conditions must be fulfilled for a successful application:

(1) SGEI condition – a 'Service of General Economic Interest' (SGEI) must be at stake;
(2) Entrustment condition – public authorities must have 'entrusted' the task of rendering this service to an undertaking;
(3) Obstruction condition – an exemption is necessary, because otherwise the service cannot be provided due to the 'obstruction as the result the application of EU (competition) rules';
(4) Undertaking condition – the service provider must be 'an undertaking';
(5) Union trade condition – 'trade must not be affected to such an extent as would be contrary to the interests of the Union' due to the trumping of the EU (competition) rules.

Article 106(2) TFEU can be relied on by both EU Member States and undertakings. Article 11 DCA has a similar content,[656] but this provision can only be relied on by

[656] Article 11 DCA: "*To agreements, decisions or practices within the meaning of Article 6(1), involving at least one undertaking or association of undertakings to which the operation of services of a general economic interest has been delegated by law or by an administrative agency, Article 6(1) shall apply only in so far as the application of that provision does not prevent the performance of the special task delegated to the undertaking or association of undertakings.*"

undertakings.[657] Considering Article 11's substance and the Dutch legislature's intention that this provision would be interpreted in line with Article 106(2) TFEU, it is here assumed that if the conditions of Article 106(2) TFEU are fulfilled, the conditions of Article 11 DCA are also fulfilled.

B.2. ARTICLE 106(2) TFEU: THE LEGAL *STATUS QUO*

B.2.1. Introduction

Article 106(2) TFEU has especially been used to avoid the application of the prohibition to abuse a dominant position (Article 102 TFEU) and the prohibition to provide state aid (Article 107 TFEU). Indeed, ensuring that otherwise unprofitable services are nevertheless rendered often implies the granting of exclusive rights – liable to create a dominant position – or state aid to undertakings. However, Article

106(2) TFEU has been used to prevent the application of Article 101(1) TFEU, too.[658] In principle, this article could therefore also apply to anti-competitive self-regulation. Nevertheless, as set out above, there are five conditions that must be fulfilled in order for Article 106(2) TFEU to apply. Below the substance of Article 106(2) is analysed in more detail. Only the first three conditions are discussed, as the conditions (4) and (5) do not warrant further discussion in this book.[659]

B.2.2. The SGEI condition

Article 106(2) TFEU can only be applied if the activity that infringes competition law is an SGEI. Consequently, when considering the activities of banks, it is crucial to establish whether banking services can constitute an SGEI. In that respect it is relevant that the Treaties do not include a definition of SGEIs, and neither has such a definition been developed in EU case law.

[657] Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, p. 64. In addition, Article 11 DCA only provides an exemption for infringements of the Cartel Prohibition – not for the prohibition to abuse a dominant position (see Article 25 DCA). Furthermore, Article 11 can only set the *Dutch* Cartel Prohibition aside and not its EU counterpart.

[658] ECJ judgment of 27 April 1994, *Case C-393/92 Gemeente Almelo et al. v. Energiebedrijf IJsselmij NV*, para. 51. See also: T. Prosser, *The Limits of Competition Law, Markets and Public Services*, Oxford University Press, 2005, p. 126.

[659] Condition (4) will be easily fulfilled, as banks are clearly undertakings within the meaning of this provision. Condition (5) is not discussed, as it seems to lack importance in general (*cf.* A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 652).

The Commission uses the following 'working definition': "*SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention.*"[660] This is a broad definition, insofar that it may mean that *all* services that are regulated by the government could be SGEIs, provided that they deliver outcomes in the overall public good (which is a rather ambiguous condition). With regard to banking services, various services would arguably be covered by this definition. Indeed, banking regulation ensures that the quality and safety (riskiness) of many banking services is improved to levels that most likely would not have been reached without regulation.

A good example of banking services that have already been considered as SGEIs are the so-called 'basic banking services' (see Chapter 3.7.3.1.).[661] These services generally include offering payment accounts and other standard banking services to economically disadvantaged retail customers, or the operating of bank branches in isolated locations.[662] The rationale behind assigning such tasks to banks is that governments consider it crucial that these services are offered to their citizens, while without such assignments banks would not provide these services, as they are commercially not viable. There are more examples of banking activities that have been regarded as SGEIs. A Commission report mentions various bank activities that, according to EU Member States, constitute SGEIs: providing a (geographically) comprehensive financial infrastructure, promoting of SMEs, granting or guaranteeing of export credits, providing social housing loans, providing municipal financing, financing of infrastructure projects, contributing to regional development and raising funds for the financing of a Member State.[663] The Commission's telling, general comment on this list was that it would assess each claim on a case-by-case basis. It would, therefore, be mistaken to conclude that most banking services as they are rendered nowadays are indeed SGEIs. On the contrary, it follows from the *Züchner*

[660] Commission Staff Working Document, *Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in particular to Social Services of General Interest*, 2013, p. 21.

[661] Commission Staff Working Document, *Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in particular to Social Services of General Interest*, 29 April 2013, p. 25.

[662] References to relevant cases can be found in: Commission Staff Working Paper, *The Application of EU State Aid Rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation*, SEC(2011) 397, 2011, p. 20, footnote 87.

[663] Commission report to the Council of Ministers, *Services of General Economic Interest in the Banking Sector*, 17 June 1998 (presented to the ECOFIN Council on 23 November 1998).

judgment of the ECJ that in general banking services do not constitute SGEIs.[664] Likewise, the Commission has rejected the assertion that providing access to banking services to citizens in general, without a focus on, e.g., the least well off, constitutes an SGEI, in the absence of proof that the population in general has difficulties in accessing banking services.[665]

So, to what extent is it realistic that certain banking services will be considered SGEIs by the EU Courts? The ECJ has considered that the EU Member States have wide discretion in defining what constitutes an SGEI.[666] This wide discretion allows for a more tailor-made approach, so that the different preferences of the various states for the provision of services to their citizens can be adequately addressed. Nevertheless, the ECJ has stated some elements that must be present for a service to constitute an SGEI.

The ECJ has held that an SGEI must be of "*general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities*."[667] So, although the states have wide discretion in determining whether a particular service is an SGEI, it must be substantiated that this service somehow distinguishes itself from other, 'common' economic services. Unfortunately, this is not an obvious criterion to apply. When the services that have been accepted by the EU Courts as SGEIs are considered, no clear picture emerges: these services range anywhere from utilities to sectoral supplementary pension services. For example, mooring services in ports have been accepted as an SGEI,[668] but dock work has not.[669] Furthermore, it can be derived from case law that the compulsory training of chartered accountants[670] and copyright fees collecting services[671] are probably not SGEIs either.

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[664] ECJ judgment of 14 July 1981, *Case 172/80 Gerhard Züchner v. Bayerische Vereinsbank AG (Züchner case)*, para. 7. The GC later referred to the *Züchner* judgment when it considered: "*Thus, SGEIs are distinguished in particular from services in the private interest, even though that interest may be more or less collective or be recognised by the State as legitimate or beneficial (see, to that effect, Züchner, (...) paragraph 7 (...))*." See: GC judgment of 12 February 2008, *Case T-289/03 BUPA and Others v. Commission*, para. 178.

[665] Commission decision of 10 May 2007, *On the Special Rights Granted to La Banque Postale, Caisses D'epargne and Crédit Mutuel for the Distribution of the Livret A and Livret Bleu*, para. 155.

[666] K. Lenaerts, *Defining The Concept Of 'Services Of General Interest' In Light Of The 'Checks And Balances' Set Out In The EU Treaties*, Jurisprudence, 19(4), 2012, p. 1258-1259.

[667] ECJ judgment of 10 December 1991, *Case C-179/90 Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA*, para. 27.

[668] Jones & Sufrin provide a more extensive list, see: A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 637.

[669] ECJ judgment of 10 December 1991, *Case C-179/90 Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA*, para. 27.

[670] ECJ judgment of 28 February 2013, *Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência (OTOC case)*, para. 105

[671] ECJ judgment of 27 February 2014, *Case C-351/12 OSA - Ochranný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.*, para. 81.

Furthermore, the GC has determined that SGEIs must have a 'compulsory' nature. This requirement implies that the undertaking assigned with the task to render the services is indeed required to do so – without, in principle, the possibility to reject customers. This does not preclude some latitude for the service provider when deciding the exact content of its service, nor does it mean that no competition on the market is possible anymore: e.g., some price competition may still be possible.[672]

Nevertheless, the compulsory nature of the service seriously limits the use of Article 106(2) TFEU for banking activities. Indeed, bank services are subject to numerous prohibitions, but banks nevertheless remain free to determine whether they perform the regulated activity and whether they serve certain customers. Banks are, for instance, not obliged to provide loans to consumers. However, if they do, they must comply with several rules. To conclude, if anti-competitive self-regulation needed the benefit of Article 106(2), the law as it currently stands requires that the banks have a duty to render the service covered by the self-regulation. This is, however, seldom the case.

Finally, the GC has stated that an SGEI must be 'universal' in nature. However, the court did not mean that an SGEI needs to be 'universal' in the sense that it must be offered to all potential customers in a whole state.[673] It is not clear what exactly the universality requirement means. Probably it must be understood in conjunction with the compulsion requirement, implying that within preset limits the service must be provided to anyone requesting it.[674] This could in practice be problematic with regard to banking services, as set out above.

To conclude, various banking services could in principle be classified as SGEIs. Many banking services considered important for society and citizens that are not (sufficiently) provided under free market conditions, are likely candidates for becoming SGEIs. However, although banking services are heavily regulated, in practice there are only a very small number of services that banks are obliged to provide. This currently hinders these services from being categorised as SGEIs.

B.2.3. The entrustment condition

For article 106(2) TFEU to apply, an undertaking – or more undertakings – has to be 'entrusted' with the delivering of an SGEI. This means that the state must have

[672] GC judgment of 12 February 2008, *Case T-289/03 BUPA and Others v. Commission*, paras. 188-189.
[673] GC judgment of 12 February 2008, *Case T-289/03 BUPA and Others v. Commission*, paras. 186-187.
[674] W. Sauter, *Public Services in EU Law*, Cambridge University Press, 2015, p. 60.

acted to assign the undertaking with the delivering of an SGEI: merely tolerating, approving or endorsing the rendering of certain services does not suffice.[675] This can be illustrated by a consideration of the Commission in the context of an Article 101 TFEU payment services case, in which it rejected the application of Article 106(2) TFEU because "*the Eurocheque system was set up on the initiative of private financial institutions (…). Neither those institutions, nor the association set up as a result of their initiative, were at any time entrusted with the operation of a service of general economic interest by a measure adopted by the public authorities. This view cannot be affected by the fact that the Eurocheque system operates with the knowledge and indeed the express approval of the competent authorities in the countries concerned, nor by the fact that in some countries there has been an explicit legal act in favour of the system or part of it.*"[676]

This is relevant, since state acts expressly assigning an SGEI are seldom taken with regard to the provision of banking services. The provision of these services is of course heavily regulated, and may even be promoted by the government, but governments usually do not take decisions or introduce laws requiring banks to deliver certain services.[677] There is, on the other hand, no reason why an EU Member State could not assign an SGEI through a specific act setting out the SGEI to be delivered.[678]

If a state were to consider assigning the provision of banking services as an SGEI, it is relevant to appreciate that it might entrust more than one undertaking with the task to provide a particular SGEI. It is not necessary that each and every bank is individually entrusted with an SGEI by governmental decision. Indeed, entrusting banks with the task to deliver an SGEI can be done through a general measure applicable to all banks.[679]

If governments were to take an entrustment measure, the content of the measure could include a detailed description of how to act in the public interest, i.e., a concrete description of how Economic or Non-economic Benefits must be delivered.

[675] A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 635.

[676] Commission decision of 10 December 1984, *Case IV/30.717 - Uniform Eurocheques*, para. 29.

[677] The ACM (then: NMa) followed a similar reasoning when it dismissed the claim of the Dutch General Practitioners Association (*Landelijke Huisartsen Vereniging*) that general practitioners could benefit from Article 106(2) TFEU. The ACM considered that these doctors are not explicitly entrusted with the provision of certain services, i.e. with a specific task. ACM decision of 21 December 2001, *Case 2513/40 Landelijke Huisartsen Vereniging*, paras. 45-46.

[678] E.g., the UK government was held to have 'entrusted' the delivering of a financial SGEI, i.e. basic banking services, through the conclusion of a contract. See: Commission decision of 13 February 2002, *Case State Aid No N 514/2001 – United Kingdom*, para. 36.

[679] GC judgment of 12 February 2008, *Case T-289/03 BUPA and Others v. Commission*, paras. 182-184.

To the extent this would therefore no longer require arrangements between the entrusted undertakings to enable compliance with the entrustment measures, there would be no need for self-regulation anymore. Governmental regulation would then indeed have made self-regulation superfluous and, consequently, there would be no need for Article 106(2) TFEU. However, it is also possible that arrangements between the banks might still be required to perform the entrusted tasks. For example, if the government required all banks to give the customers of competitor banks access to their own ATMs, it could be necessary for the banks to agree jointly on an adequate allocation of their ATMs across the country – otherwise the risk might emerge that banks would significantly reduce the number of their ATMs in the hope to free-ride on the ATM offerings of their competitors. So, even if an entrustment act is taken, self-regulation could still be called for.

B.2.4. The obstruction condition: a proportionality test

Finally, it is relevant that Article 106(2) TFEU can only be used to trump the Cartel Prohibition insofar as this prohibition would 'obstruct' the performance of the SGEI. This condition does not require that compliance with competition law must make the performance completely impossible. It is sufficient that competition law would not allow for the operation of the service under economically acceptable circumstances. It is therefore appropriate to regard this condition as a proportionality test.[680] What exactly this test implies is not entirely clear: the EU Courts have not applied this requirement consistently.

When analysing EU case law it is somewhat unclear whether the proportionality test implies a 'least restrictive measure' proportionality test or a less stringent test. The former test ensures that the competition restriction is only allowed if an alternative measure, which would restrict competition less, is not available. There is case law in which the least restrictive measure test was applied,[681] but there is also case law in which the application of this test was deemed unnecessary and where the courts did not examine the existence of less restrictive alternatives.[682] It has been concluded that usually a less stringent test is applied and that the EU Courts examine whether the competition restriction is *manifestly disproportionate*.[683] This implies that unless it is clearly not the case

[680] A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 641; W. Sauter, *Public Services in EU Law*, Cambridge University Press, 2015, pp. 61-64.

[681] E.g. ECJ judgment of 25 June 1998, *Case C-203/96 Chemische Afvalstoffen Dusseldorp BV and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Dusseldorp case)*, para. 67.

[682] E.g. ECJ judgment of 23 October 1997, *Case C-157/94 Commission of the European Communities v. Kingdom of the Netherlands*, para. 58.

[683] Sauter dubs the less stringent test the 'manifest disproportionality' test. W. Sauter, *Public Services in EU Law*, Cambridge University Press, 2015, p. 61.

that the Cartel Prohibition would block the performance of the assigned task under economically acceptable conditions, the proportionality test is passed and the Cartel Prohibition can be set aside.[684]

For this section it is not necessary to determine the exact scope of the proportionality requirement. What is relevant is the finding that such behaviour as 'cherry-picking' or free riding by competitors of the undertaking entrusted with the SGEI has been accepted by the EU Courts as conduct that could obstruct the performance of this SGEI.[685] This is relevant, as self-regulation, through which banks voluntarily bind themselves, may often have the aim of preventing cherry-picking. Cherry-picking occurs, e.g., if certain institutions provide products that reduce systemic risk but are more expensive, while others keep offering cheaper, riskier products. These high-risk-low-price products could lure away customers from the well-behaving banks. If cherry-picking is possible, banks are unlikely to switch to offering safer products, as they will fear losing customers to the cherry-picking banks. Systemic risk will therefore not be reduced. In fact, this situation is a form of *market failure* (i.e. a coordination problem), which can be overcome by binding rules that compel all firms to offer the lower risk products.

Binding rules to solve a market failure can be the result of self-regulation, but they can of course also be the result of governmental regulation. The introduction of governmental regulation exclusively cannot lead to the violation of the Cartel Prohibition, so it can be argued that governmental regulation is a less restrictive means than self-regulation. Consequently, if the proportionality test implied a 'least restrictive measure' test, Article 106(2) TFEU would never be an option to uphold self-regulation. This is argument is, however, not convincing, since for the level of competition in the market it is irrelevant whether conduct restrictions are required by self- or governmental regulation. The fact that governmental regulation falls outside the jurisdictional scope of the Cartel Prohibition does not mean that it cannot have competition restrictive effects equal to the effects of a cartel. Indeed, the EU Courts probably do not follow the above argument. In the *Wouters* case the Advocat General discussed at length application of Article 106(2) TFEU to the anti-competitive rules of the Dutch Bar, but he never considered that this provision would not be applicable because such rules could also have been introduced by law.[686]

[684] *Cf.* GC judgment of 12 February 2008, *Case T-289/03 BUPA and Others v. Commission*, para. 268. See also: ECJ judgment of 19 May 1993, *Case C-320/91 Criminal proceedings against Paul Corbeau*, para. 16.

[685] E.g.: ECJ judgment of 19 May 1993, *Case C-320/91 Criminal proceedings against Paul Corbeau*, paras. 17-18.

[686] Opinion of Advocate General Léger of 10 July 2001, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten.*

B.2.5. Conclusion on the legal *status quo* of Article 106(2)

In this section the substance of Article 106(2) TFEU has been set out. There are five conditions that must be fulfilled for a successful application of this provision: (1) the SGEI condition, (2) the entrustment condition, (3) the obstruction condition, (4) the undertaking condition and (5) the Union trade condition. Three of them were discussed:

(1) The SGEI condition: not each business activity falls within the scope of Article 106(2). The activity must be a Service of General Economic Interest, which implies that the service must be 'special' compared to ordinary commercial activity and that the entrusted undertaking *must* deliver the service upon request.
(2) The entrustment condition: there must be a state act specifically entrusting the undertaking(s) with the obligation to deliver the specific SGEI.
(3) The obstruction condition: without the restriction of competition, the delivery of the SGEI would be obstructed. In practice this means, usually, that the argument that restricting competition in favour of the provision of the SGEI is needed, may not be manifestly disproportionate.

In theory, there is no reason why, with the support of the government, certain bank self-regulation could not fulfil these conditions. In practice, however, there seems to be only a very limited number of bank self-regulation cases suitable for Article 106(2) TFEU. Indeed, with regard to such self-regulation, the SGEI condition and the entrustment condition are seldom fulfilled: banks are seldom officially obliged by the government to provide certain services.

B.3. THE NEED FOR ARTICLE 106(2) TFEU

There is no need for Article 106(2) TFEU – and its concomitant formalities – if the bank self-regulation can benefit from the Exemption Possibility.[687] This is not a mere hypothetical situation: e.g., the remedying of a market failure is considered to be a

[687] It is not appropriate to rely on Article 106(2) TFEU if the Exemption Possibility applies; this would legally also not be possible. Article 106(2) functions as a general derogation clause for EU law. Hence, it can only be applied if there is an EU rule to be set aside. If the Exemption Possibility applies, the Cartel Prohibition does not apply. So, Article 106(2) TFEU cannot be invoked.

legitimate reason to entrust undertakings with an SGEI.[688] In such cases, any anti-competitive self-regulation meant to make the provision of the SGEI possible is based on an Efficiency Justification and, as explained in Chapter A.2.6., the legality of anti-competitive self-regulation based on an Efficiency Justification can probably be assessed in the context of the Exemption Possibility. As a successful application of the Exemption Possibility removes the violation of the Cartel Prohibition, Article 106(2) is superfluous in such situations.

Clearly, Article 106(2) TFEU is needed if anti-competitive self-regulation is not exempted pursuant to the Exemption Possibility. [689] Indeed, in such cases Article 106(2) will be *necessary* to escape the application of the Cartel Prohibition. It should be noted that due to the entrustment condition, Article 106(2) TFEU can only be applied if the state endorses the anti-competitive self-regulation. With regard to the arguments below it is therefore assumed that the state indeed prefers undertakings to employ self-regulation. Below it is set out why such state support does not prevent the application of the Cartel Prohibition and why therefore Article 106(2) is needed.

- First of all, it is here mentioned that competition law does not apply to undertakings if their anti-competitive actions are *de jure* or *de facto* required by the state. However, if the state merely encourages certain actions or leaves the undertakings room for competition, competition law is fully applicable.[690] So, in those cases, if the state would prefer undertakings to engage in self-regulation, there is still a need for Article 106(2) to save the firms that are party to self-regulation.
- Secondly, government measures that promote or compel undertakings to violate EU competition law may be illegal based on the legal principle of 'Union

[688] Commission report to the Laeken European Council, Services of General Interest, COM(2001) 598 final, 2001, para. 3. Sauters even asserts: "*Using the instrument of SGEI requires taking clear decisions to define closely the public interest involved because the legitimate scope of SGEI is limited to what is necessary to attain the relevant public interest objectives. Market failure arguments will be key here.*" W. Sauter, *Services of General Economic Interest and Universal Service in EU Law*, TILEC Discussion Paper DP 2008-017, 2008, p. 36.

[689] Unless the *Wouters* doctrine applies; this doctrine is, however, deemed insupportable in this book – see Section C.3.

[690] See e.g. ECJ judgment of 14 October 2010, *Case C-280/08, Deutsche Telekom AG v. European Commission*, paras. 80-82.

loyalty'.[691] Pursuant to this doctrine, the government measure is itself (also) problematic, not just the cartel of the undertakings. Indeed, the ECJ has stated that the principle of Union loyalty requires "*the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to [Article 101 TFEU] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere*.[692] So, without prejudice to a successful claim to Article 106(2) TFEU, it would be a violation of EU law by the state if the state were to entrust the rendering of an SGEI to banks and they were encouraged to form a cartel in order to render the SGEI adequately.

- Furthermore, even if the government takes a decision that leaves the banks no discretion to adopt certain anti-competitive self-regulation, this self-regulation remains subject to the operation of competition law. Indeed, it follows from the *CIF* case that a domestic competition authority (see Box 4.6.):

  (1) must, in conformity with the abovementioned Union-loyalty doctrine, disapply government measures that are found to contravene EU competition law,
  (2) may first not sanction undertakings for complying with this national measure violating EU competition law, but
  (3) may fine these undertakings later if they maintain the anti-competitive conduct after the decision holding the national measure to be illegal has become definitive.[693]

  So, although in conformity with this case law an authority may in first instance not fine the banks that are party to state-compelled anti-competitive bank self-

[691] The Union-loyalty doctrine is nowadays based on Article 4(3) TEU. This article stipulates that: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*" The ECJ has interpreted this provision such that the EU Member States may not introduce legislation that would prescribe or encourage undertakings to conclude agreements contrary to EU antitrust law. See e.g. ECJ judgment of 4 September 2014, *Case 184/13 API - Anonima Petroli Italiana SpA v. Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico (API case)*, paras. 28-29.

[692] ECJ judgment of 21 September 1988, *Case 267/86 Pascal Van Eycke v. ASPA NV*, para. 16.

[693] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para. 58.

regulation, this self-regulation is to be dissolved if these banks want to avoid being liable to fines later.[694] Through invoking Article 106(2) TFEU, however, governments escape the effect of the *CIF* judgment.

Box 4.6. *CIF* case

The 2003 *CIF* case[695] concerned the operation of an Italian association of manufacturers of matches, i.e. the *Consorzio Industrie Fiammiferi* (**CIF**), which was founded by law and had the legal monopoly to sell matches on the Italian market. The main question in this case was whether the manufacturers involved in anti-competitive activities could be held to violate the EU Cartel Prohibition if their activities were required by a national law that contravened EU law.

The case started with an investigation of the *Autorità Garante della Concorrenza e del Mercato*, i.e. the Italian competition authority (**AGCM**). The AGCM concluded the CIF was involved in certain activities that restricted competition but that were also required by law – although other anti-competitive actions of the CIF were not prescribed by law. It was, however, also the conviction of the AGCM that the Italian law prescribing CIF's anti-competitive actions was contrary to EU law, as it violated the principle of Union loyalty (see this section above).[696] As the primacy of EU law meant that this Italian law would have to be disapplied, the question arose as to what this would mean for the anti-competitive actions of the CIF: would these actions have to be deemed violations of the Cartel Prohibition after the disapplication of the national law, or does the requirement to comply with national law shield them from violating the EU Cartel Prohibition?

The GC adjudicating the case first repeated the effect of the Union-loyalty principle in the context of antitrust law, which requires that "*(…) the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings*

[694] The ECJ considered with regard to this future conduct of undertakings: "*(…) once the national competition authority's decision finding an infringement of Article [101 TFEU] and disapplying such an anti-competitive national law becomes definitive in their regard, the decision becomes binding on the undertakings concerned. From that time onwards the undertakings can no longer claim that they are obliged by that law to act in breach of the Community competition rules. Their future conduct is therefore liable to be penalised.*" ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para 55.

[695] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*.

[696] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para. 29.

(…)."[697] Next, it referred to the primacy of EU law which "*requires any provision of national law which contravenes a Community rule to be disapplied, regardless of whether it was adopted before or after that rule.*"[698]

The GC considered that this duty to disapply national law is also applicable to a national competition authority. Nevertheless, the consequences of such disapplication for the undertakings concerned depended on the effect of the principle of legal certainty. Indeed, the court considered that it would be contrary to legal certainty if undertakings were held accountable for violating antitrust law although they were obliged to do so by law.[699] So, such undertakings would not be liable for infringing the Cartel Prohibition until the decision of a competition authority to disapply the national law has become definitive.[700] However, after this decision has become definitive, the undertakings would be fully accountable – even if the national law still applied.[701]

To conclude, it follows from the *CIF* judgment that due to the Union-loyalty principle, Member States may not issue national legislation which compels undertakings to violate the EU Cartel Prohibition. In addition, once a competition authority has decided definitively that this legislation must be disapplied due to the Union-loyalty principle, the undertakings themselves become liable for violating this prohibition. This means that in the end national laws cannot save anti-competitive self-regulation unless Article 106(2) TFEU applies. Pursuant to this provision, the EU Treaties rules, including Article 4(3) TEU upon which the Union loyalty provision is based,[702] do not apply if these rules would obstruct the performance of an SGEI.

Even if states see the benefits of undertakings engaging in self-regulation, the mere fact that governments – presumably representing society's interests – support such self-regulation does not remove it from the ambit of competition law. So, there is still a need for Article 106(2) TFEU when the Exemption Possibility does not apply.

[697] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para. 45.

[698] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para. 48.

[699] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para. 53.

[700] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, paras. 53-54.

[701] ECJ judgment of 9 September 2003, *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato (CIF case)*, para. 55.

[702] ECJ judgment of 4 September 2014, *Case 184/13 API - Anonima Petroli Italiana SpA v. Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico (API case)*, paras. 28-29.

B.4. NORMATIVE VIEW ON ARTICLE 106(2) TFEU

B.4.1. Analysis of the three relevant conditions

This section gives a normative view on the appropriateness of Article 106(2) TFEU as a reconciliation mechanism. In the previous section it was explained that Article 106(2) TFEU could in some situations be needed to ensure that EU Member States are capable of balancing the benefits of competition against the benefits of banking self-regulation, or – more generally – to reconcile competition interests with other public policy interests. Below it is argued that the application of Article 106(2) in this way is in general an appropriate reconciliation mechanism, although some adjustments in its application should be made.

The SGEI condition. First, it should be acknowledged that competition interests are 'merely' a public interest like any other. It is therefore sensible that governments may sometimes want to prioritise other policies over competition policy. Prioritising or striking a balance between public policies, which may be needed because their aims conflict or because of the limitation of public funds available, is indeed a core task of the government. It is for that reason only logical that no public policy is *in abstracto* and always put above other policies. So, it is here deemed to be appropriate that Article 106(2) TFEU allows governments to trump competition law for the benefit of other public policies.

In addition, it is here considered that Article 106(2) TFEU should not be limited to the performance of certain activities, but should also include the 'non-performance' or withholding of objectionable activities. In other words, it should also be possible for Member States to rely on Article 106(2) if they introduce prohibitions which require anti-competitive self-regulation for their adequate implementation. As an example one may imagine that the state introduces the statutory prohibition to finance 'controversial weapons production', without providing a list of controversial weapons.[703] The government, as well as banks, may prefer that the banks jointly agree on a list with specific weapons on it, so that the competition for weapon producers' loan business does not undermine the concept of 'controversial' and the goal of the law is indeed achieved. A counterargument would be that it is to be preferred that the state itself draw up this list, making any self-regulation superfluous. However, this reasoning also applies in general if the government entrusts the provision of SGEIs to undertakings: the state could indeed also compel the provision of such services by

[703] An example presented at a competition law seminar in Amsterdam in October 2015 by a representative of Rabobank Netherlands.

law, which would then render Article 106(2) TFEU redundant. In practice, however, this provision has proved its value and relevance. There appears to be a preference for governments to achieve certain policy goals by deploying undertakings, be it for the provision of SGEIs or for the design of the rules covering market conduct. It would therefore be unwise to delete Article 106(2) altogether. The extension of Article 106(2) to self-regulation meant to flesh out statutory prohibitions should not be unlimited, however. Only the SGEI condition needs some different interpretation; the requirements of the other four conditions remain appropriate (without prejudice to the above normative arguments). The SGEI condition would have to be extended to 'activities to enable the operation of a *general economic interest prohibition*'.

What exactly a *general economic interest prohibition* would distinguish from a regular prohibition, should not be defined beforehand. It would suffice if general economic interest prohibitions had 'special characteristics' as compared with other prohibitions – in the same way that SGEIs can be distinguished from regular services.[704]

The Entrustment condition. Furthermore, currently Article 106(2) TFEU only applies if the bank *must* in principle render the SGEI to anyone interested. For banks, however, there is rarely a requirement to provide a certain service. This condition is uncalled for, if Article 106(2) TFEU is meant to function as a complete reconciliation mechanism for the Member States when they wish to use undertakings to support their public policies. Such a policy need not be that the SGEI must be rendered to all interested customers. It can be left to the Member State when designing its public policy to decide which level of market coverage it deems sufficient. Such a requirement would especially be excessive if the market itself is already able to ensure that the services are rendered to those customers to whom the Member State considers these services must be provided. Admittedly, taking this approach could imply that *all* regulated economic activities may qualify as an SGEI and that Article 106(2) TFEU would be in principle available for all these activities. This could seriously undermine the effect of the TFEU's competition rules, and indeed of other TFEU provisions, which would change the nature of Article 106(2) TFEU from an exception possibility to a general rule potentially covering a significant part of all economic activity. To address this problem, it is here asserted that the application of Article 106(2) TFEU should require an explicit opinion of the governmental body that the performance of the SGEI is deemed to be more important than the interests that competition law protects. This would imply a genuine policy choice, as merely the fact that a state entrusted a business with an SGEI task does not by definition mean that the state

[704] See e.g., ECJ judgment of 10 December 1991, *Case C-179/90 Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA*, para. 27.

intended that this undertaking could violate competition law if this would obstruct the performance of the is task. In practice, it seems that Article 106(2) TFEU has to date only been successfully applied if the state itself also claimed that competition law had to be set aside. This implies that indirectly the application of Article 106(2) TFEU to trump the Cartel Prohibition is already dependent on specific endorsement by the state. This is here indeed considered to be preferable.

In addition, it is deemed to be right that competition law can be trumped only if it is clear that *the state* has decided to set aside of competition law, and not just because certain private parties prefer this. This follows from the legitimacy argument explained above (Section A.2.3.2.). Consequently, the entrustment condition is considered to be an appropriate necessary requirement.

The Obstruction condition. With regard to the obstruction condition or the proportionality test, its legitimacy is here held to be dependent on whether it is (also) a Member State claiming the benefit of Article 106(2) TFEU:

- The proportionality test in its most stringent form, i.e., the no-less-restrictive-alternative test, is in this book considered the most appropriate form if *only undertakings* claim the exemption benefit. If this test is not passed, this means that the public task can be sufficiently performed while maintaining higher economic welfare. In this book it is held that it is not up to undertakings to balance society's economic welfare against other public interests (see Section A.2.3.2.). Undertakings would therefore only be allowed to sacrifice society's economic welfare if without this sacrifice they cannot sufficiently perform the task assigned to them by the government.[705]
- If *a Member State* claims the benefit of Article 106(2) TFEU, it is here deemed best that the proportionality test should merely imply a manifestly-disproportionate-check. This is consistent with the stance in this book that it is legitimate that the government balances competition interests against other public interests (see Section A.2.3.2.). In the Article 106(2) Analytical Framework, a 'manifestly-disproportionate check' would indeed be the applicable test, considering the requirement that the state has expressed in its entrustment measure that the

[705] The difference to the normative view on the proportionality test of the Third Condition of the Exemption Possibility, which proposes a 'suitability test', should be acknowledged. The consistency between the normative view regarding the Third Condition and the normative view on the obstruction condition is maintained because in the Exemption Analytical Framework the Exemption Possibility only applies to Economic Benefits with sufficient advantages for buyers, while Article 106(2) TFEU also applies to such benefits that do not serve buyers sufficiently and to Non-economic Benefits. This difference justifies why in the former case the suitability test suffices, while in the latter case such a suitability test would be inappropriate.

performance of the SGEI is more important than the interests that competition law protects.

B.4.2. Conclusion of the normative view on Article 106(2) TFEU

Article 106(2) TFEU is a provision that aims to reconcile the Treaties' rules, especially those on competition and the 'four freedoms' articles, and the Member States' legitimate wish to deploy undertakings to advance their public policies. It can be used in cases where the Exemption Possibility does not apply to shield anti-competitive self-regulation, provided that five conditions are fulfilled.

The normative view taken here is, first of all, that Article 106(2) TFEU fulfils a legitimate aim. It is sensible that Member States may sometimes see the need to trump competition law in society's interest and that it should then not matter whether society's interest is served by undertakings or not. Next, the required involvement of the state, through the entrustment condition, ensures that the subordination of competition law has sufficient democratic legitimacy. However, currently an entrustment act does not need to include a specific consideration regarding the subordination of competition law. It is here proposed that these acts should include such a consideration, so that a real balancing exercise is made and the state's preference for the provision of the SGEI over the protection of competition is made clear. If such a determination is made by the state, it is sufficient that the applicable proportionality test is merely a permissive 'manifestly disproportionate check' – not a stringent no-less-restrictive-alternative test. Finally, it is here asserted that Article 106(2) TFEU should also be available for governments to ensure that undertakings engage in anti-competitive self-regulation to prevent the offering of objectionable activities. This means that this provision should not be limited to the *offering* of services, but also to the *avoidance* of offering services.

B.4.3. Article 106(2) Analytical Framework

SGEI condition in the Article 106(2) Analytical Framework
SGEI condition: a service of general economic interest must be at stake.

Article 106(2) Analytical Framework:

- The rationale for using Article 106(2) TFEU must be an Efficiency Justification or Non-economic Justification, which distinguishes the SGEI from ordinary economic services.
- The withholding of the provision of certain services may also be the subject of Article 106(2).

Entrustment condition in the Article 106(2) Analytical Framework
Entrustment condition: public authorities must have 'entrusted' the task of rendering this service to an undertaking.

Article 106(2) Analytical Framework:

- The entrustment act of the government must include its view that remedying the Efficiency Justification or Non-economic Justification is more important than safeguarding competition.
- It is not a requirement that the service provider make its service available to all interested buyers.

Obstruction condition in the Article 106(2) Analytical Framework
Obstruction condition: an exemption is necessary, because otherwise the service cannot be provided due to the 'obstruction as the result the application of EU (competition) rules'

Article 106(2) Analytical Framework:

- The application of Article 106(2) TFEU is subject to a 'manifestly-disproportionate check'.

Undertaking condition in the Article 106(2) Analytical Framework
Undertaking condition: the service provider must be 'an undertaking'.

Union trade condition in the Article 106(2) Analytical Framework
Union trade condition: 'trade must not be affected to such an extent as would be contrary to the interests of the Union' due to the trumping of the EU (competition) rules.

PART C. LEGITIMATE OBJECTIVE ANCILLARITY DOCTRINE

C.1. LEGITIMATE OBJECTIVE ANCILLARITY DOCTRINE: INTRODUCTION TO ANALYSIS

This Part C. covers the last of the three reconciliation mechanisms analysed in this study: the '**legitimate objective ancillarity doctrine**'. This doctrine is based on the *Wouters* case[706] (see Box 4.7.) and has been further developed in the case law after this judgment. The term legitimate objective ancillarity doctrine is chosen because this doctrine could arguably be seen as an exception doctrine for competition restrictions when they pursue a 'legitimate objective' and the restriction is 'ancillary' to the pursuit of this objective.[707]

In the *Wouters* case the ECJ accepted – or rather: introduced – for the first time the possibility of investigating the compatibility of agreements pursuing regulatory interests with Article 101(1) TFEU. The case concerned a regulation of the Dutch Bar Council that prohibited members of the Bar from joining partnerships of non-lawyers without the Council's approval; see Box 4.7.

Box 4.7. Background of the *Wouters* case

The *Wouters* case involved two registered Dutch lawyers – Mr. Wouters and Mr. Savelbergh – who wanted to join, as lawyers, the accountant firms Arthur Andersen and Price Waterhouse in 1994 and 1995 respectively. Their plans were blocked by the Dutch Bar Council, however, which applied a Council Regulation that prohibited members of the Dutch Bar from joining a partnership of non-lawyers without prior approval of the Council. The reason why the Council did not authorise its members to join accountant firms was that it considered this to be incompatible with issues including the lawyers' duties to operate independently

[706] ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*.

[707] Whish & Bailey refer to this doctrine as the 'regulatory ancillarity' doctrine. They distinguish this doctrine from the classic, economic ancillarity (or 'inherent restrictions doctrine'), which they dub 'commercial ancillarity'. In this book the term 'regulatory ancillarity' is not used, since the wordings of the relevant judgments do not indicate that the *Wouters* doctrine is limited to objectives pursued by regulations, but rather indicate a broad application to all kinds of legitimate objectives. (R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, pp. 136, 138.) Examples of other terms used to refer to the *Wouters*-based exception from the Cartel Prohibtion are: 'public interest ancillarity' (Faul & Nikpay) and 'deontological ancillarity' (Loozen). See: J. Faull & A. Nikpay, *The EU Law of Competition*, Oxford University Press, 3rd edn., 2014, para. 3.243; E.M.H. Loozen, *Professional Ethics and Restraints of Competition*, E.L. Rev., 31(1), 2006.

and to observe strict professional secrecy. The Council Regulation was based on a statutory provision (Article 28 of the Law on the Bar [*Advocatenwet*]) enabling the Council to adopt regulations governing the proper practice of the legal profession.

The two lawyers initiated legal proceedings to annul the Council's prohibition decisions, claiming that the relevant provisions of the Council Regulation violated the EU's rules on competition, and on the right of establishment and the freedom to provide services. Ultimately the highest competent Dutch court referred a couple of preliminary questions to the ECJ. One question was whether the Council Regulation provision prohibiting lawyers from joining partnerships with non-lawyers constituted a restriction of competition and consequently a violation of the Cartel Prohibition.

The ECJ's answer ran counter to the Advocate General's opinion and is rather surprising. The Court considered that the Regulation's provision could indeed limit competition, but that it was not contrary to the Cartel Prohibition because it was inherent to pursuing a legitimate objective: "*However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, (…). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.*"[708]

The ECJ has not yet limited the scope of the legitimate objective ancillarity doctrine,[709] nor did the ECJ indicate which objectives are eligible for the applica-

[708] ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*, para. 97 [underlining added].

[709] In its relevant judgments after the *Wouters* case it uses wording along the following lines to set out the applicable assessment framework: "*For the purposes of application of [Article 101(1) TFEU] to a particular case, account must first of all be taken of the overall context in which a decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives (…). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives. In that context, it is important to verify whether the restrictions thus imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives.*" ECJ judgment of 18 July 2013, *Case C-136/12 Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato*, paras. 53-54 [references to case law omitted from citation, underlining added].

tion of this doctrine.[710] So far, legitimate objectives accepted by the ECJ include the pursuit of (1) the proper practice of the legal profession (the *Wouters* case),[711] (2) the fair conduct of professional sport and the protection of the health of professional athletes (the *Meca-Medina* case),[712] (3) sufficient quality of the services of chartered accounts (the *OTOC* case)[713] and (4) providing certain 'guarantees' to the users of geologists' services (the *Italian Geologists* case).[714] Dutch courts have also applied this doctrine to Article 6 DCA cases.[715]

To conclude, with the *Wouters* judgment the ECJ created – out of the blue – the possibility that agreements that restricted competition would fall outside the scope of the Cartel Prohibition because they produced certain non-economic benefits, without a proper balancing of the different interests at stake, as well as sidetracking the Exemption Possibility.

So, in the *Wouters* case the ECJ established that decisions of associations of undertakings that (1) are inherent to the pursuit of legitimate objectives and (2) are proportionate, are compatible with the Cartel Prohibition despite their competition restricting effects. Below the legitimate objective ancillarity doctrine is discussed in more detail, including whether this doctrine could serve to resolve conflicts between banking regulatory interests and the Cartel Prohibition.

[710] The GC has considered that a measure that has as its object to restrict competition cannot also have a legitimate objective. GC judgment 27 July 2005, *Joined Cases T-49/02 to T-51/02 Brasserie Nationale SA (formerly Brasseries Funck-Bricher and Bofferding), et al. v. Commission of the European Communities,* para. 85.

[711] ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case),* paras. 97, 107.

[712] ECJ judgment of 18 July 2006, *Case C-519/04 David Meca-Medina and Igor Majcen v. Commission of the European Communities (Meca-Medina case),* paras. 43, 45.

[713] ECJ judgment of 28 February 2013, *Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência (OTOC case),* paras. 94, 95.

[714] ECJ judgment of 18 July 2013, *Case C-136/12 Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato,* para. 53. The ECJ's reference to 'guarantees' for the users of the services is probably meant to reflect the following requirement the Italian geologists with regard to setting their fees: "*in order to ensure that the services provided are of the requisite quality, a geologist engaging in professional activity in whatever form (…) must always ensure that the fee charged is commensurate with the scale and difficulty of the task to be performed, the dignity of the profession, technical knowledge and the commitment required*." (See para. 9 of this judgment.)

[715] See e.g. the cases discussed below: Trade and Industry Appeals Tribunal *(College voor beroep voor het bedrijfsleven)* judgment of 2 may 2006, ECLI:NL:CBB:2006:AX0125; and Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079.

C.2. THE LEGITIMATE OBJECTIVE ANCILLARITY DOCTRINE: LEGAL *STATUS QUO*

C.2.1. Introduction

The EU Courts have applied the legitimate objective ancillarity doctrine several times, but nevertheless much unclarity with regard to the scope of this doctrine remains.[716] The Commission has also not set out its position on the legitimate objective ancillarity doctrine – which is unfortunate but also obvious considering the complex and controversial nature of the doctrine.[717]

C.2.2. The scope of 'legitimate objectives'

It is still unclear which types of objectives can be deemed *legitimate* objectives, meaning that they can be excepted from the Cartel Prohibition based on the legitimate objective ancillarity doctrine. Unclarity on this point is problematic, since it the legitimacy of the objective is a prerequisite for applying the legitimate objective ancillarity doctrine.[718] Until now, it seems that the ECJ applies a broad interpretation of what a 'legitimate objective' can be. In e.g. the *OTOC* case the ECJ accepted as a legitimate objective the "*guarantee of the quality of the services offered by chartered accountants*" through "*a system of compulsory training for chartered accountants, which is likely to ensure the necessary guarantee of further training and continued professional education, thus contributing to the sound administration of undertakings' accounting and taxation matters*."[719] So, the scope of the category 'legitimate objectives' is so broad that even 'the maintenance of the quality of services'

[716] *Cf.* ACM, *Position Paper on Competition and Sustainability* (*Visiedocument Mededinging en Duurzaamheid*), 2014, p. 10. It is e.g. uncertain whether the legitimate objective ancillarity doctrine can only be applied with regard to decisions of certain associations of undertakings. The ECJ's explanation for maintaining restrictions that pursue a legitimate objective compatible with the Cartel Prohibition does not depend on the nature of the entity implementing the restriction. As a consequence, it seems plausible that the ECJ would be willing to apply the legitimate objective ancillarity doctrine to decisions of all kinds of associations of undertakings, and even 'regular' agreements between undertakings. See e.g.: E. Pijnacker Hordijk, *Beoordeling van Duurzaamheidsinitiatieven onder het Kartelverbod*, Markt & Mededinging, No. 6, 2013, p. 190.

[717] In 2004, after the abolition of the notification system, the Commission introduced its 2004 [Article 101(3) TFEU] Guidelines. In these guidelines it provided guidance on how to interpret Article 101(1) TFEU, but it did not mention the legitimate objective ancillarity doctrine at all. Although the *Wouters* judgment was already two years old when the Guidelines were adopted, the Commission chose not to elaborate on it.

[718] E. Pijnacker Hordijk, *Beoordeling van Duurzaamheidsinitiatieven onder het Kartelverbod*, Markt & Mededinging, No. 6, 2013, p. 190.

[719] ECJ judgment of 28 February 2013, *Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência (OTOC case)*, paras. 94, 95.

can be a legitimate objective. This is remarkable, since the measures to achieve such an objective are typically assessed within the context of the Exemption Possibility. It is unclear whether the ECJ accepted in this case the guarantee of a specific service level only because of the special tasks that accountants have in society, or that it would be willing to accept the maintenance of product quality in general as a legitimate objective; the wording of the ECJ does not indicate that the first interpretation is the correct one. (In Section C.3.4. below a normative view on this point is presented.)

Furthermore, contrary to what certain scholars have suggested, the ECJ has not limited the doctrine to measures that are objectively necessary to achieve certain objectives *set by the government*. It follows from the case law, i.e. the *Meca-Medina* case,[720] that the legitimate objectives that may be pursued pursuant to the doctrine need not be set by the government or another democratically legitimised institution: in this case the objectives were set by the International Olympic Committee.[721] The legitimate objectives, pursued by regulations of the IOC were "*to combat doping in order for competitive sport to be conducted fairly and that (this) included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.*"[722] These objectives were not formulated by a governmental institution, but by an international sports

[720] This case involved two professional long-distance swimmers, Mr. Meca-Medina and Mr. Majcen, who tested positive for the banned substance nandrolon after a World Cup-race in 1999. Subsequently, the swimmers complained to the Commission that the anti-doping rules of the International Olympic Committee violated the Cartel Prohibition, because the rules were overly strict and could therefore exclude innocent or negligent athletes from competing professionally. The Commission and GC dismissed the swimmers' claims, as they held that the anti-doping rules had a purely sporting nature and did not fall within the scope of the Cartel Prohibition. As a consequence, there was no need to apply the legitimate objective ancillarity doctrine. The ECJ disagreed and found that the anti-doping rules could fall within the scope of the Cartel Prohibition. It subsequently applied the legitimate objective ancillarity doctrine and considered that the anti-doping rules pursued a legitimate objective and were proportionate; the ECJ therefore dismissed the claims of the swimmers, too. Commission decision of 1 August 2002, *Case COMP/38158 Meca-Medina and Majcen*; GC judgment of 30 September 2004. *Case T-313-02 David Meca-Medina and Igor Majcen v. Commission of the European Communities*; ECJ judgment of 18 July 2006, *Case C-519/04 David Meca-Medina and Igor Majcen v. Commission of the European Communities (Meca-Medina case)*.

[721] Loozen asserts that the legitimate objective ancillarity doctrine is only available for objectives set by the government; however, the *Meca-Medina* case proves otherwise. Indeed, Houdijk and Pijnacker Hordijk disagree with Loozen. E.M.H. Loozen, *Zelfregulering door en voor de Vrije Beroepen: Toch maar liever geen Algemeen Belang Rule of Reason,* NTER, No. 9, 2007, p. 162; J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 24; E. Pijnacker Hordijk, *Beoordeling van Duurzaamheidsinitiatieven onder het Kartelverbod*, Markt & Mededinging, No. 6, 2013, p. 190.

[722] ECJ judgment of 18 July 2006, *Case C-519/04 David Meca-Medina and Igor Majcen v. Commission of the European Communities (Meca-Medina case)*, para. 43.

federation.[723] Likewise, the Dutch Trade and Industry Appeals Tribunal has applied the legitimate objective ancillarity doctrine to rules on the education of golf trainers, instituted by the Netherlands Golf Federation.[724]

With regard to the question of whether banking regulatory interests would be eligible for inclusion in the legitimate objective ancillarity doctrine as currently applied by the authorities and courts, it is here submitted that this seems to be feasible. With reference to the taxonomy of the types of banking regulatory interests as developed in Chapter 3.2., both Efficiency Justifications[725] and Non-economic Justifications[726] could be held eligible. Nevertheless, compliance with banking regulations is most likely not a legitimate objective that can be pursued through collective action (e.g. coercion of collective boycott): in the *Slovak Banks* case the ECJ considered that "*(…) it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements (…) the application of statutory provisions may call for complex assessments which are not within the area*

[723] There is no consensus on whether the *Meca-Medina* case has indeed widened the application of the *Wouters* doctrine to all kinds of 'legitimate objectives'. E.g., Pijnacker Hordijk and Mulder argue that the legitimate objective ancillarity doctrine is also a suited framework for assessing agreements pursuing environmental goals. E. Pijnacker Hordijk, *Beoordeling van Duurzaamheidsinitiatieven onder het Kartelverbod*, Markt & Mededinging, No. 6, 2013, p. 190; J. Mulder, *Op het Snijvalk van Onafhankelijkheid en Openheid: Wat Is de Rol van de ACM in een Duurzame Maatschappij?*, SEW, No. 12, 2014, p. 578. Weatherill takes a different view and suggests that in the *Wouters* case and in the *Meca-Medina* case the ECJ applied two distinct legal doctrines, implying that the *Meca-Medina* judgment did not widen the *Wouters* doctrine to all kinds of non-economic, legitimate objectives, but instead should be considered to fall within the classical ancillary restraint doctrine. S. Weatherill, *Anti-Doping Revisited - The Demise of the Rule of "Purely Sporting Interest"?*, E.C.L.R., 27(12), 2006, p. 653. Whish & Bailey also consider it uncertain that the ECJ would be willing to apply the legitimate objective ancillarity doctrine to private cooperations that have environmental benefits. R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 141.

[724] This case involved two professional golf trainers who did not follow golf-trainer education as recognised by the Netherlands Golf Federation. As a consequence, the pupils of these trainers could not take the Federation's exam required for playing on golf courses of the Federation's clubs (i.e., 90% of the golf clubs and 50% of the golf courses in the Netherlands). The trainers claimed that this rule of the Golf Federation violated the Cartel Prohibition, since it effectively prevented them from working as professional golf trainers. The ACM and the Rotterdam District Court disagreed, considering that the rule was a pure sports regulation and did not fall within the scope of the Cartel Prohibition. On appeal the Trade and Industry Appeals Tribunal held that the rule was *not* a pure sports regulation and it subsequently applied the legitimate objective ancillarity doctrine. The Tribunal accepted that the Federation's rule pursued a legitimate objective, but it found that it was not proportionate. ACM decision of 20 December 2002, *No. 2505/41, R. en G. v. Nederlandse Golf Federatie*; Rotterdam District Court judgment of 30 December 2004, ECLI:NL:RBROT:2004:AS9177; Trade and Industry Appeals Tribunal (*College voor beroep voor het bedrijfsleven*) judgment of 2 May 2006, ECLI:NL:CBB:2006:AX0125.

[725] E.g., improving 'product quality' has been accepted as legitimate objective: ECJ judgment of 28 February 2013, *Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência (OTOC case)*, para. 94.

[726] E.g., the safeguarding the 'sound administration of justice' has been accepted as a legitimate objective: ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*, para. 97.

of responsibility of those private undertakings or associations of undertakings."[727] So, in this case the ECJ did not accept that collective action to ensure compliance with the law fell outside the scope of the Cartel Prohibition.

It might be argued that only an objective that is directly or indirectly pursued by *public law* can be granted an exception pursuant to this doctrine.[728] However, in its judgments the ECJ has never indicated that a public law nature of the objective is a decisive factor. Furthermore, although it can indeed be argued that so far the ECJ has limited the successful application of the legitimate objective doctrine to such objectives, it has also never rejected an application because of the absence of a public law nature of the claimed legitimate objective. So, it is not at all obvious that only measures aimed at pursuing objectives that have a basis in public law can be excepted pursuant to the legitimate objective ancillarity doctrine. On a national level, there is Dutch case law in support of the view that the legitimate objective ancillarity doctrine is only available for objectives with a public law character. In the *Friesian Horses* case the Dutch Appeals Court in Arnhem considered that combatting the inbreeding of Friesian horses was not a legitimate objective within the context of the legitimate objective ancillarity doctrine,[729] since it was not "*an important (public) interest (…) that resembles the (non-economic) objectives that were relevant in the two abovementioned judgments of the ECJ* [i.e. the *Wouters*- and *Meca-Medina* judgments]."[730] The appeals court distinguished the objectives in the *Wouters* case and the *Meca-Medina* case from the objective in the *Friesian Horse* case because

[727] ECJ judgment of 7 February 2013, *Case C-68/12 Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s. (Slovak Banks case)*, para. 20.

[728] The IOC's (international) public law status is acknowledged by many, e.g.: Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079, para. 4.17; L.W. Valloni & T. Pachmann, *Sports Law in Switzerland*, Kluwer Law International, 2011, p. 65 ; K. Foster, *Is there a Global Sports Law*, in: Lex Sportiva: What is Sports Law?, eds. R.C.R. Siekmann & J. Soek, Asser Press, 2012, p. 48.

[729] The *Friesian Horses* case concerned a rule of the Dutch Royal Association '*Het Friesch Paarden-Stamboek*', an association promoting interests related to the Friesian horse and keeping the official Friesian horse studbook. The Friesian horse breed suffers from significant inbreeding, and to combat inbreeding the contested rule instituted a maximum mating number for stallions. A member of the Association violated this rule and was subsequently fined by the Association. In the collection procedure initiated by the Association, the fined horse breeder claimed that the anti-inbreeding rule was void because it violated the Cartel Prohibition and that therefore the imposed fines were invalid, too. The rule allegedly restricted competition since it limited the possibilities for owners of Friesian horses to offer mating services. The Arnhem District Court applied the legitimate objective ancillarity doctrine and found that the anti-inbreeding rule pursued a legitimate objective and was proportionate. The Arnhem Appeals Court disagreed: it held that the objective pursued by the contested rule was not a legitimate objective within the context of the legitimate objective ancillarity doctrine. Arnhem District Court judgment of 30 January 2008, ECLI:NL:RBARN:2008:BC3895; Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079.

[730] Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079, para. 4.17.

of the public law nature of the objectives in the former two cases[731] – which the objective in the *Friesian Horse* case apparently lacked.[732] So, the Arnhem Appeals Court concluded that "*maintenance and improvement of cultural-historical and valuable Dutch heritage*"[733] were not legitimate objectives within the context of the legitimate objective ancillarity doctrine.

C.2.3. The proportionality test

With regard to the proportionality test, ECJ case law indicates that a no-less-restrictive-alternative test applies. For example, in the *API* case the ECJ investigated the anti-competitive measures at issue, and it concluded that they were not necessary to achieve the alleged legitimate objective and that less restrictive alternatives were available.[734] Likewise, the ECJ considered in the *OTOC* case that the legitimate objectives at issue could have been achieved through less restrictive means.[735] The Dutch Trade and Industry Appeals Tribunal will assess whether less restrictive means are available, too.[736]

So far, the ECJ did not apply a proportionality test *stricto sensu*, i.e., a genuine balancing of the interests at stake and establishing which interest takes priority. In the *Wouters* judgment the ECJ considered that the competition restrictions were proportionate to achieving their aim because they did not "*go beyond what is necessary*."[737] Likewise, in the *Meca-Medina* case the ECJ verified whether the justification of the competition restrictions was based on a "*manifest error*".[738] This implies that the ECJ does not substitute its own weighing of the interests at stake for

[731] The Appeals Court held that the Council regulation in the *Wouters* case was of a public law nature, while in the *Meca-Medina* case the organization instituting the contested regulation (i.e. the IOC) was a public law institution.

[732] Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079, para. 4.17. Arguably the contested rule and/or the Association were also of a public nature, since the Association's regulating authority was indirectly granted by an EU directive; see the Arnhem District Court judgment of 30 January 2008, ECLI:NL:RBARN:2008:BC3895, para. 3.2.

[733] Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079, para. 4.17.

[734] ECJ judgment of 4 September 2014, *Case C-184/13 etc., Anonima Petroli Italiana SpA v. Ministero delle Infrastrutture e dei Trasporti (API case)*, paras. 51-56.

[735] ECJ judgment of 28 February 2013, *Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência (OTOC case)*, paras. 98-99.

[736] Trade and Industry Appeals Tribunal (*College voor beroep voor het bedrijfsleven*) judgment of 2 May 2006, ECLI:NL:CBB:2006:AX0125, para. 5.8.

[737] ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*, para. 109.

[738] ECJ judgment of 18 July 2006, *Case C-519/04 David Meca-Medina and Igor Majcen v. Commission of the European Communities (Meca-Medina case)*, para. 50.

the weighing done by the undertakings. It seems that the Court does not want to get involved in such intricate issues of valuing different public interests. This approach is sensible, as such valuation involving political public policy choices is better left to politicians.[739]

C.2.4. Conclusion on the legal *status quo* of legitimate objective ancillarity doctrine

To conclude, with regard to the scope of the legitimate objective ancillarity doctrine it is found that:

- The scope of the eligible types of the legitimate objectives seems to be broad, and both Economic and Non-economic Benefits are probably eligible for consideration;
- The legitimacy of an objective does not depend on the endorsement of a democratically legitimised institution, as the ECJ has held rules set by the IOC to be legitimate, too;
- There are indications that the legitimacy of an objective may depend on a public law nature, although this has never explicitly been mentioned by the EU Courts;
- Claiming the benefit of this doctrine will only be successful if no less restrictive means are available for achieving the legitimate objective at stake. However, the EU Courts will most likely not second-guess the undertakings' judgment that the legitimate objective is more important than maintaining competition (i.e., the courts will not apply a proportionality test *stricto sensu*).

So, with a view to banking regulatory interests, there is a reasonable possibility that these can be excepted from the Cartel Prohibition's scope through applying the legitimate objective ancillarity doctrine. The nature of the interests will probably not be an issue, although it may be that a 'public law basis' is required. Although the group of banks agreeing upon bank self-regulation would most likely not have a public law status, the regulatory interests themselves could be within the realm of a provision of statutory banking regulation or be endorsed by a supervisor – this might then cater to the public law basis requirement.

[739] See also: J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 20. See also Section A.2.3.4. above.

C.3. NORMATIVE VIEW ON THE LEGITIMATE OBJECTIVE ANCILLARITY DOCTRINE

C.3.1. Introduction

In this section normative views on the legitimate objective ancillarity doctrine are presented. This is done through three different approaches. The appropriateness of the legitimate objective ancillarity doctrine in general is considered from two different angles.[740] First, the docrine is assessed from the standpoint that it is a competition law counterpart to the *Cassis de Dijon* rule of reason. Next, the doctrine is analysed from the position that the doctrine is meant to maintain anti-competitive agreements that are objectively necessary to comply with governmental regulation. Finally, the appropriateness of the doctrine is assessed from a legal systematic point of view, meaning that considering the existence of the Exemption Possibility the appropriateness of the doctrine for solving conflicts with Economic Benefits is discussed.

The discussion below assumes that the government prefers undertakings to pursue certain legitimate objectives through self-regulation. This section therefore does not further cover the balancing of competition interests and Non-economic Benefits *without* such a state preference. It is here asserted that the effect of the legitimate objective ancillarity doctrine should not be that a statutorily protected value and its underlying goal – i.e., competition and the maximisation of economic prosperity respectively – can be set aside in the pursuit of a 'legitimate objective' without any interference of the (EU or Dutch) legislature.[741] This produces a democratic legitimacy problem, since the protection of competition is democratically legitimised, while the prioritisation of another value is not. It was already extensively explained in Section A.2.3.2. that this is not desirable.[742]

[740] Other 'angles' have been suggested, Jones & Sufrin list some more: A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 248.

[741] For a view in favour of using the *Wouters* doctrine to balance non-competition interests, see: A.P. Komninos, *Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC*, University of Oxford Centre for Competition Law and Policy Working Paper (L) 08/05, 2005.

[742] Pijnacker Hordijk submits that rejecting the legitimate objective ancillarity doctrine for non-economic interests, such as the improvement of animal welfare, has the unfortunate consequence that undertakings' cooperations to achieve all kinds of "*rather legitimate interests*" cannot be implemented. But he also acknowledges that the legitimacy of each cooperation project must be verified in order to prevent abuse. So, in fact he clarifies the problem of his

C.3.2. Legitimate objective ancillarity as an internal market rule of reason

Since the ECJ delivered its *Wouters* judgment there has been a debate as to the appropriateness of this judgment. One of the arguments supporting this judgment is that it constitutes a transposition of the 'rule of reason' for the EU internal market rules into competition law, and that such a rule of reason in competition law is commendable. In the context of the TFEU rules on the 'four freedoms' – i.e., the free movement of goods, of persons, of capital and of services – the ECJ developed the so-called rule of reason in the *Cassis de Dijon* case;[743] in this book this doctrine is called the '**internal market rule of reason**'.[744] In brief, pursuant to the internal market rule of reason the Member States may derogate from the general prohibition to take measures that frustrate the enjoyment by citizens of the four freedoms: the states are allowed to take measures to pursue certain non-economic public policies, which measures violate the EU's four freedoms rules (see Box 4.8. below). Some authors deem the introduction of a similar rule of reason for competition law seemly, since in some situations entities subject to competition law should have the same room for manoeuvre as the Member States have due to this rule of reason.[745] Indeed, so the argument goes, without this room for manoeuvre private bodies would not be able to function as, e.g., regulating bodies, which *de facto* would hinder Member States in freely designing their internal institutional governance.[746]

own position: how can it be verified whether an objective is legitimate and more important than competition? The protection of competition is in any case legitimate; both the Dutch and the Treaties legislature decided to protect it. E. Pijnacker Hordijk, *Beoordeling van Duurzaamheidsinitiatieven onder het Kartelverbod*, Markt & Mededinging, No. 6, 2013, p. 191. Apparently certain environmental improvements do not have the same support in society, since otherwise these could be incorporated into laws. Some people may be disappointed that the furtherance of certain non-economic interests is blocked by competition law, but do these people represent the majority? It must be acknowledged some may prefer a more sustainable society, while others prefer lower prices. (See e.g.: ACM report, *Analyse ACM van Duurzaamheidsafspraken 'De Kip Van Morgen'*, 2014, p. 6.) Democratic voting and legislative processes ensure that the rules in democracies reflect a legitimate outcome; private cooperations that set aside laws do not produce such outcomes. Furthermore, those who advocate that competition law must not block private initiatives to achieve, e.g., sustainability objectives, never suggest that anti-pollution laws may also be set aside if this would lower consumer prices – which could be considered the achievement of a legitimate objective, too. It therefore seems that these advocates do not propose the balancing of different public interests in conformity with society's preferences, but they rather seem to consider environmental interests to be superior to competition interests. This superiority is clearly not (yet) accepted by society.

[743] ECJ judgment of 20 February 1979, *Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon case)*.

[744] The internal market rule of reason must be distinguished from the balancing method for the US cartel prohibition (i.e. the Sherman Act, Section 1), which is also called a 'rule of reason'.

[745] See e.g.: Schweitzer, H., *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81*, Working Paper LAW 2007/30, 2007; J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 22.

[746] The hindering of a free choice of institutional design would be an unjustified violation of the principle of national institutional autonomy. Pursuant to this principle, the EU law respects the institutional structure of a Member State. With regard to the principal of national institutional autonomy see: J.H. Jans *et al.*, *Europeanisation of Public Law*, Europa Law Publishing, 2nd edn., 2015, p. 19.

Box 4.8. Four Freedoms Rule of Reason

The internal market rule of reason was applied for the first time by the ECJ in its *Cassis de Dijon* judgment in a case involving the free movement of goods, and since then the Court has applied it in cases involving the other three 'internal market freedoms'.[747]

The *Cassis de Dijon* case involved an importer of French blackcurrant liqueur who was prohibited to sell its product in Germany. At the time, a German law prescribed that fruit liqueurs had to have at least 25% alcohol, while the cassis de Dijon liqueur contained only 15-20% alcohol. In the legal proceedings that followed the prohibition, the ECJ was requested to rule whether the German law violated the TFEU-provisions on the free movement of goods (e.g. the old Article 30 EEC Treaty). The ECJ held that since there was no EU law regulating the minimum percentages of alcohol, national laws that frustrated the free movement of alcoholic beverages across the EU Member States could be accepted if these laws were necessary "in order to satisfy mandatory requirements".[748] (Instead of the term 'mandatory requirements', the case law now usually refers to 'public interest objectives'.[749]) Germany advocated its law was necessary to achieve certain public health and consumer protection objectives. Although the ECJ did not question the legitimacy of pursuing these objectives, it found that the German law did not meet the necessity requirement.

The internal market rule of reason may be seen as the recognition that arranging a society in conformity with the needs and wishes of the people requires the balancing of various public policies and therefore the state may sometimes have to decide that trade policy must make room for other public policies. The internal market rules in the TFEU appeared to be so strict that it was recognised by the ECJ that a trade restriction was sometimes inevitable to achieve a perfectly legitimate objective. The internal market rule of reason is only available for the states and other entities subject to the internal market rules.

[747] Although some regard the *Dassonville* judgment as the birth of the internal market rule of reason doctrine: S. de Vries, *Dassonville*, in: Het Recht van de Europese Unie in 50 Klassieke Arresten, eds. Beukers *et al.*, Boom Juridische Uitgevers, 2010, p. 94.

[748] ECJ judgment of 20 February 1979, *Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon case)*, para. 8.

[749] See e.g. ECJ judgment of 5 April 2001, *Case C-123/00 Christina Bellamy and English Shop Wholesale SA*, para. 18.

The internal market rule of reason has nowadays developed into an exemption possibility for national measures that pursue legitimate objectives but also violate the EU rules on the four freedoms, provided that six conditions are fulfilled:[750]

(1) There are no EU rules that already regulate the legitimate objective;
(2) The national measure may not directly discriminate against goods/persons/capital/services from other EU Member States;
(3) The pursued objective may not be purely economic (no other real limitations apply, however);
(4.) The protected public interest must be real and/or be the subject of consistent policy, so that purely hypothetical dangers are disregarded and national and foreign equivalents are treated equally;
(5) The national measure must make a *real* contribution to the achievement of the objective, i.e., a measure that is not suited to its aim is not accepted;
(6) There must not be a less restrictive alternative for the national measure.

When these conditions are considered, it becomes apparent that the internal market rule of reason does not imply a proper *balancing* exercise: the weight of the public interest is not compared with that of the freedom of trade that is affected.[751] In practice, the ECJ leaves it up to the EU Member States to balance these different public values.

The internal market rule of reason in the Wouters judgment? There are good reasons to conclude that in the *Wouters* judgment the ECJ imported its internal market rule of reason doctrine into competition law.[752] In the paragraph in this judgment where the ECJ states that not every restrictive decision falls within the Cartel Prohibition, it refers to case law (i.e., the *Reisebüro Broede* case) in which it applied the internal

[750] See also: D. Chalmers *et al., European Union Law,* Cambridge University Press, 3rd edn., 2014, pp. 892-941.

[751] Jans mentions that in theory the proportionality principle also demands that the trade restricting effect of the national measure may not be disproportionate to the pursued aim, which implies a form of balancing. However, he also submits that the EU Courts usually do not carry out this determination. J.H. Jans, *Evenredigheid Revisited,* SEW, No. 7/8, 2000, pp. 271, 274.

[752] G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 112.

market rule of reason.[753] As a consequence, some commentators have concluded that the ECJ meant to transpose the internal market rule of reason doctrine to the field of competition law.[754] Even the GC, which first had dismissed the existence of a rule of reason within the Cartel Prohibition,[755] now seems to accept that the *Wouters* judgment has in fact introduced the internal market rule of reason into Article 101(1) TFEU.[756]

It is not that obvious, however, that the transposition of the internal market rule of reason was indeed the aim of the ECJ. In fact, the phrases that the ECJ used were rather similar to the ones it uses to present the 'commercial ancillarity doctrine'.[757] It is, however, also relevant to acknowledge the difference in this respect between legitimate objective ancillary restraints and commercial ancillary restraints. Pursuant to the commercial ancillarity doctrine, a competition restriction does not violate the Cartel Prohibition provided that, briefly put, this restriction is (1) needed for the success of a larger project that does not limit competition, is (2) directly related to this project and is (3) proportionate.[758] Both the 'legitimate objective ancillarity doctrine' and the 'commercial ancillarity doctrine' cover restrictions that are *inherent* in the

[753] "*For the purposes of application of [Article 101(1) TFEU] to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.*" ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters case)*, para. 97 [underlining added].

[754] G. Monti, *Article 81 EC and Public Policy, Common Market Law Review, Vol. 39, Iss. 5, 2002, p. 1087;* R. O'Loughlin, *EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ* Wouters *Decision*, E.C.L.R., 24(2), 2003, pp. 68-69.

[755] GC judgment of 28 March 2001, *Case T-144/99 Institute of Professional Representatives before the European Patent Office v. Commission of the European Communities*, para. 66.

[756] GC judgment of 27 July 2005, *Case T-49/02 Brasserie Nationale SA (formerly Brasseries Funck-Bricher and Bofferding),* et al. *v. Commission of the European Communities*, para. 85.

[757] In the *Wouters* judgment and in the *Meca-Medina* judgment the ECJ refers to the case law of the commercial ancillarity doctrine to underpin its approach that is here termed the legitimate objective ancillarity doctrine. See: ECJ judgment of 19 February 2002, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Wouters* case*)*, para. 109; ECJ judgment of 18 July 2006, *Case C-519/04 David Meca-Medina and Igor Majcen v. Commission of the European Communities (Meca-Medina* case*),* paras. 42, 47. So, perhaps legitimate objective ancillary restraints should rather be considered to be equal or similar to commercial ancillary restraints. E.g., Advocate General Trstenjak suggests that both 'commercial ancillary restraints' and 'legitimate objective ancillary restraints' are part of one larger doctrine, i.e., the ancillary restraints doctrine. Opinion of Advocate General Trstenjak of 4 September 2008, *Case C-209/07 The Competition Authority v. Beef Industry Development Society Ltd And Barry Brothers (Carrigmore) Meats Ltd*, para. 54, footnote 35.

[758] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, paras. 29, 31; R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, pp. 136-138.

pursuit of another, main objective. However, the latter doctrine only applies if the main project in fact results in the increase in competition. It is then only sensible that the Cartel Prohibition does not block subordinate restrictions needed to make this pro-competitive project work.[759] In fact, this approach resembles a classical counterfactual analysis,[760] and as such does in principle not interfere with the application of the Exemption Possibility.[761] The overall pro-competitive outcome is, however, not a condition in the legitimate objective ancillarity doctrine: the effect on competition of the 'overarching project' does not seem to matter, the only prerequisite is that it is a *legitimate objective*.[762] Indeed, the ECJ did not examine the effect on competition of the pursuit of the legitimate objective in its judgments decided in accordance with the legitimate objective doctrine. It examined, however, the competitive effects of the decisions inherent to the pursuit of these objectives. So, the legitimate objective ancillarity doctrine does not imply a counterfactual analysis, but rather procures the exclusion of competition law, subject to a proportionality test.

As explained above, it is in fact not certain whether the legitimate objective ancillarity doctrine is a pure competition law counterpart of the internal market rule of reason, or rather a sub- or side-category of the commercial ancillarity doctrine. Nevertheless, for the purposes of this book it is more interesting to establish whether there *should* be a kind of internal market rule of reason for competition law; this question is answered in the next section.

No need for an internal market rule of reason for competition law. The following discussion focuses on the argument that the legitimate objective ancillary doctrine should provide an exception possibility from the Cartel Prohibition for anti-competitive state-like measures in the same way that the internal market rule of reason provides an exception possibility from the internal market rules for trade-restricting state measures.

When considering whether the internal market rule of reason should be transposed

[759] On the 'overall pro-competitive effect' see: Opinion of Advocate General Léger of 10 July 2001, *Case C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, paras. 103-104; A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, pp. 246-249.

[760] *Cf.* T.C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, William & Mary Business Law Review, Vol. 3, Iss. 1, 2012, p. 125.

[761] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, paras. 30.

[762] G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 128. Admittedly, it could be argued that the implementation of a commercial transaction that improves competition constitutes a legitimate objective.

to competition law, it is relevant to acknowledge the crucial difference between the internal market rules and the Cartel Prohibition: the former are directed at the EU Member States, while the latter is directed at private parties.[763] Above it was set out that the crucial difference between the state and private parties is that the acts of the former have democratic legitimacy and those of the latter do not (see Section A.2.3.2.). It is not problematic to allow governments to decide that one policy must be trumped by another, since it can be assumed that the government will make this decision in the general public interest and they are democratically legitimised to do so. Private parties, on the other hand, can be assumed to act in their own interests,[764] which may or may not coincide with the general public interest. The determination that a private party (also) pursues the general public interest, however, cannot be done by this party, since it lacks the legitimacy to decide on behalf of the people; only the state has this legitimacy.[765]

In the literature it has been mentioned, in defence of the ECJ's *Wouters* judgment, that the democratic legitimacy argument is nowadays not valid anymore since in practice the state regularly delegates its regulatory powers to private bodies.[766] Nowadays these non-government parties play a key role in the development and execution of various non-economic and economic policies. This is the result of governments delegating their policy tasks to these parties for practical and ideological reasons, which include the idea that in principle market forces produce maximum welfare, and the acknowledgement that market parties are better positioned to develop and execute certain policies. So, since the regulatory measures of such private bodies often fall within the scope the Cartel Prohibition, these measures should be eligible for the

[763] In practice this distinction may be less clear cut: e.g., the Cartel Prohibition is directed at undertakings, which include state bodies that perform economic activities (see also Chapter 1.5.2.).

[764] O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81*, Oxford University Press, 2007, p. 51; S. de Vries, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, Utrecht Law Review, Volume 9, Issue 1 (January) 2013, p. 190.

[765] Houdijk argues that the legitimate objective ancillarity doctrine does not provide (associations of) undertakings the possibility of prioritising between different public policies, but rather that this doctrine gives *competition authorities* and *courts* a balancing mechanism to verify whether regulatory measures of undertakings must be excepted from the Cartel Prohibition. This argument is here rejected, since (1) it cannot be denied that the doctrine is simply a general framework that allows undertakings, under certain conditions but without prior approval of a democratic legitimised institution, to trump competition law, (2) competition authorities and courts also lack the democratic legitimacy to prioritise between public policies (see Sections A.2.3.3. and A.2.3.4. above), and (3) although courts have the jurisdiction to more or less review each measure of the state or a private party, the courts will generally, and in any event with regard to the legitimate objective ancillarity doctrine, only verify whether the party relying on this doctrine has applied its conditions correctly. A court will not substitute its own subjective position on the different public policies for that of the party concerned (as Houdijk himself acknowledges). J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, pp. 18, 20.

[766] J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 17.

legitimate objective ancillarity doctrine in the same way that governmental measures are eligible for the internal market rule of reason – or so the suggestion goes.

However, the above suggestion is mistaken, because it mixes up two different concepts, i.e. (1) the applicability of competition law to the exercise of state powers and (2) the need for democratic legitimacy to set aside laws.

(1) ***State powers, a jurisdictional issue.*** The question as to whether competition law applies to actions that are deemed to be the exercise of state prerogatives or powers, is a *jurisdictional* question. This question finds its answer in the aim of competition law. It is settled case law that the exercise of such powers is not governed by competition law.[767] The exercise of state powers is excluded from the scope of competition law regardless of the identity of the exerciser, which implies that both governmental institutions and private parties can exercise state powers and that competition law does not apply to these activities.[768] This is desirable, since this approach ensures that governments are not prevented from choosing the institutional design of the state and the attribution of state powers to the various institutions and bodies in society.

(2) ***Democratic legitimacy, a constitutional issue.*** The question of whether, and which, legitimacy is required to set aside values protected by statute, is a *constitutional* (or state governance) question. It is answered by determining the attribution of powers within a state. The principle that it is not for private parties to prioritise between public policies but only for institutions with sufficient democratic legitimacy, can (and should) be unaffected by the trend of delegating state tasks to private bodies and *vice versa*. It has already been explained that the prioritisation of public policies should remain a government exercise, since this requires political choices and therefore sufficient democratic legitimacy.

An analogy may clarify the above difference between the jurisdictional issue and the constitutional issue: the erection of traffic lights is a genuine state task and it is up to the state whether it allows this use of public space; citizens would presumably not be allowed to place traffic lights as they like – this distinction follows from the different powers that the state and the citizens have. This is a *constitutional matter*. Subsequent to the state's decision, the traffic lights can be placed by either governmental officials or by a contractor company. When the contractor has been given the task to erect the traffic lights, it should not be obliged to have a permit, if these officials do not need a

[767] See e.g.: ECJ judgment of 18 March 1997, *Case C-343/95 Diego Calì & Figli Srl v. Servizi ecologici porto di Genova SpA (SEPG)*.

[768] Likewise, a governmental institution will be subject to competition law if it performs economic activities.

permit either, as it is performing a governmental task at the request of the state. It is a *jurisdictional matter* that the state's public space permit rules would not apply to the state itself, and should not apply to private entities performing a governmental task at the request of the state.

Usually there is no need at all to prioritise between different public policies when a private body performs a state prerogative that was delegated to it. This body – as well as a governmental institution – must just perform its delegated task in accordance with the law, which implies that its measures may not contravene national and EU law. Consequently, the fact that many government tasks are nowadays performed by private parties does not require that such parties gain the authority to balance public policies.[769]

To conclude, there is no need to transpose the internal market rule of reason to competition law. The Cartel Prohibition does not prevent states from delegating certain state powers to private bodies without such a rule. Considering that such a rule is not necessary, it can be concluded that the availability of some kind of rule of reason bears the risk of it being applied to purely private measures (i.e. other than measures which are the state's prerogative). This is undesirable: the democratic legitimacy argument fully applies to these situations.[770]

C.3.3. Legitimate objective ancillarity doctrine needed for government instructions?

It has also been argued that a kind of balancing of non-competition interests against competition interests within the Cartel Prohibition is justified, to the extent that the legitimate objective pursued by the competition restricting agreement has been

[769] Even if some prioritisation between specific public policies is required for the private party to perform its task, the government could also delegate this prioritisation power – but only explicitly so that the democratic legitimacy to do so is guaranteed.

[770] Even Houdijk, who prefers the legitimate objective ancillarity doctrine as *the* method to solve conflicts between competition law and non-competition interests, acknowledges that comparing the values of competition and non-competition policies implies political-social choices and that competition authorities and courts will therefore probably exercise restraint when reviewing such choices. Surprisingly, he does not make the obvious step and conclude that only a democratically legitimised institution can make such political-social choices. He mentions that the courts and authorities will usually respect the choices made by the legislature, implying that they will acknowledge the importance of protecting the rule of law (referring to the *Wouters* case). However, it is relevant to acknowledge that in fact the regulation of the Dutch Bar was *not* a measure of the legislature, while the protection of competition had been guaranteed by both the Dutch and the Treaties legislature! J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, p. 20.

determined by the government.[771] The prerequisites for a successful application would then be, so the argument goes, that the restriction is 'objectively necessary' to achieve the objective set by the government.[772] This implies that the (association of) undertakings that take the anti-competitive measure do not have discretion with regard to the measure's substance: the measure concerned *must* be taken since otherwise the legitimate objective cannot be achieved.[773,774]

The position taken in this book is that the government must indeed determine beforehand that a certain interest is a *public* interest, but also that this is insufficient. The fact that the government has earmarked a certain objective as being worth pursuing in the public interest does not mean that it has also automatically prioritised this objective over market rivalry. The government's position may be that such a prioritisation is warranted, but the opposite may also be true. When the government itself sets its goals it does not necessarily determine these goals' importance relative to other goals beforehand; if certain rules pursuing one goal contravene rules pursuing another goal, the government may *ad hoc* determine a prioritisation or compromise. So, on the one hand it cannot be automatically assumed that a private body taking an anti-competitive measure to achieve an objective set by the government always makes the same prioritisation choice as the government would have done.

On the other hand, it can be argued that if the government has taken stock and decides that it was indeed warranted that the protection of competition has to be set aside by the private body to pursue another objective, this setting aside is democratically legitimate. Consequently, the democratic legitimacy argument would not be an objection to a private body subsequently implementing this choice of the government. Since, in accordance with this view, the private body taking the measure

[771] E.M.H. Loozen, *Zelfregulering door en voor de Vrije Beroepen: Toch maar liever geen Algemeen Belang Rule of Reason*, NTER, 1997, No. 9, p. 162; E.M.H. Loozen, *Professional Ethics and Restraints of Competition*, E.L. Rev., 31(1), 2006, p. 47. Others disagree, e.g. J.C.A. Houdijk, *Zelfregulering door de Vrije Beroepen en het Mededingingsrecht: Enige Argumenten vóór een Algemeen Belang* Rule of Reason, NTER, 2008, No. 1/2, pp. 24-25.

[772] In this line of thinking, the doctrine developed in the *Wouters* case resembles to a certain extent the classical case law doctrine of 'ancillary restraints'. The ordinary ancillary restraints doctrine upholds restrictive agreements that are necessary and proportionate to achieve a legitimate commercial purpose, while pursuant to the *Wouters* doctrine the pursuit of ethical or other non-commercial objectives can (also) result in compatibility with the Cartel Prohibition.

[773] E.M.H. Loozen, *Zelfregulering door en voor de Vrije Beroepen: Toch maar liever geen Algemeen Belang Rule of Reason*, NTER, 1997, No. 9, p.158.

[774] In this context it is also relevant to reiterate that undertakings are *de facto* not subject to the Cartel Prohibition, if anti-competitive self-regulation is *de jure* or in practice required by the government. However, when assessing such a case, a national competition authority or court is obliged to disregard national legislation that is contrary to EU competition law, and banks may be liable to sanctions if they maintain the self-regulation after the authority's finding that there has been a violation of EU competition law (see Box 4.6. above).

is *de facto* bound to take this specific measure – since it is objectively necessary – there is no risk that the public interest will take precedence over this body's interests.

So, the legitimate objective ancillarity doctrine may be a solution framework for self-regulation aimed at pursuing the public interest which is both anti-competitive, and is adopted pursuant to a governmental act which explicitly calls for setting aside the protection of competition law. It should be noted that this interpretation greatly reduces the scope of the doctrine as it is currently applied. Furthermore, it is here argued that even in this reduced form the legitimate objective ancillarity doctrine should not be used as the legal framework for conflicts between the Cartel Prohibition and the public interest, as there are specific statutory provisions that apply to such cases and that could solve conflicts, i.e.: Article 106(2) TFEU and 11 DCA. As a statutory solution framework already exists, the judge-made legitimate objective ancillarity doctrine is obsolete.

C.3.4. Economic Benefits within the legitimate objective ancillarity doctrine

In this book the position is taken that the legitimate objective ancillarity doctrine should not be used to solve conflicts between the Cartel Prohibition and self-regulation aimed at pursuing Economic Benefits. The scope of the doctrine is here deemed to be too broad. More specifically, it is advocated that it would be uncalled for if benefits that can be taken into account in the Exemption Possibility, such as the maintenance of product quality, were to be an objective falling within the scope of the legitimate objective ancillarity doctrine, since it would largely deprive the Exemption Possibility of its use.[775]

Currently, any anti-competitive effects flowing from e.g. quality-improving agreements are balanced against their benefits within the context of the Exemption Possibility. This is only logical, since pursuant to the First Condition of the Exemption Possibility an agreement "*promoting technical or economic progress*" could be exempted from the Cartel Prohibition. In other words, the Exemption Possibility is meant to be *the* framework for assessing agreements with economic welfare improvements and anti-competitive effects. Moving the assessment from this provision to the Cartel Prohibition and the legitimate objective ancillarity doctrine would substantially affect the use of the Exemption Possibility – against the apparent intention of the Treaty

[775] An interpretation of legitimate objectives that would also allow quality improvements to fall within the scope of the legitimate objective ancillarity doctrine, would also question the existing case law and decisional practice in which such improvements are assessed within the context of the Exemption Possibility. This raises concerns of legal certainty.

and Dutch legislatures. Indeed, according to the Arnhem Appeals Court, restraint must be exercised when applying the legitimate objective ancillarity doctrine, as the Exemption Possibility would lose much of its use, if restrictions necessary to achieve certain objectives could be exempted without an Exemption Possibility analysis.[776]

Sidestepping the balancing exercise of the Exemption Possibility when assessing the legality of agreements that improve product quality by applying the legitimate objective ancillarity doctrine has the disadvantage that this may affect customers' economic welfare. Quality improvement is not necessarily beneficial for buyers, since they may not demand the implemented improvements or because the improvements raise prices more than the buyers value them.[777] In competitive markets, implementing quality improvements that are not sufficiently appreciated by buyers is likely to be punished, since it either raises the producer's costs while he cannot recoup these costs, or because the improvements raise the selling price which will steer buyers to competitors' products. If the cooperation between undertakings also limit competition, this self-correcting mechanism of the market may not function. So, accepting quality improvements as a legitimate objective within the context of the legitimate objective ancillarity doctrine, may remove a large amount of cooperation that restricts competition from the anti-cartel scrutiny, while it is certainly not obvious that this cooperation is in fact beneficial for buyers.

To conclude, the legitimate objective ancillarity doctrine is not an appropriate framework for solving conflicts between the Cartel Prohibition and agreements that pursue Economic Benefits, as this would result in sidestepping the Exemption Possibility. This means that this doctrine could prevent the application of the balancing of various types of welfare effects of an agreement, as prescribed in the Exemption Possibility, unlike the *commercial* ancillarity doctrine, which only implies the weighing of subordinate anti-competitive effects against overarching pro-competitive effects (i.e., a counterfactual analysis). This is here held to be uncalled for, as it is deemed to be against the legislatures' intentions considering the purpose of this provision, and a test for ensuring that economic welfare is increased, is abandoned.

[776] Arnhem Appeals Court judgment of 17 November 2009, ECLI:NL:GHARN:2009:BL7079, para. 4.18.

[777] Undertakings often cooperate to improve the quality of their products, e.g. by setting quality standards or through the transfer of knowledge useful for improving a product. Product quality may even encompass added features or services; the 'improvement of product quality' may include many types of change to a good or service. E.g., Garvin, often cited when it comes to scholarly literature on product quality, identified eight dimensions of product quality: (1) performance, (2) features, (3) reliability, (4) conformance, (5) durability, (6) serviceability, (7) aesthetics and (8) perceived quality. D.A. Garvin, *What Does "Product Quality" Really Mean?*, Sloan Management Review, 1984 fall issue, p. 25 *et seq*.

C.3.5. Conclusion on the normative view on the legitimate objective ancillarity doctrine

It has been asserted that the legitimate objective ancillarity doctrine is a welcome addition to competition law, as it supposedly allows for the unfettered deployment of undertakings by governments as desired for their internal institutional governance. The legitimate objective ancillarity doctrine, so the argument goes, mirrors the internal market rule of reason and as such makes an exemption from the *competition* rules for public interest reasons available for undertakings. In this book this argument is, however, not accepted. This argument seems to be based upon a mix-up of two different issues: a *constitutional* issue, and a *jurisdictional* issue:

- The constitutional issue concerns the legitimacy to prioritise public interests. In democracies this power is for the government, as a representative of society. The legitimate objective ancillarity doctrine violates this fundamental pillar of democratic societies, since pursuant to this doctrine private parties receive this power to prioritise. This doctrine is therefore uncalled for.
- The jurisdictional issue relates to the scope of competition law, which is confined to activities of an economic nature. This implies that both businesses and governmental bodies performing 'activities of an undertaking' are subject to competition law, while *vice versa* both businesses and governments are not subject to competition law if they exercise state powers. So, there is no need for the legitimate objective ancillarity doctrine for those undertakings that exercise state prerogatives. In turn, firms that perform economic activities should be subject to the Cartel Prohibition, just like governments that perform such activities.

A governmental measure designating a certain interest as a public interest is not sufficient to solve the constitutional issue. When taking such measure, governments usually do not declare that other public interests are of a higher or lower rank. An express governmental statement prioritising the legitimate objective over competition interests would be necessary to solve the constitutional issue. For such cases, however, there is already a statutory exemption possibility: Articles 106(2) TFEU and 11 DCA (as interpreted pursuant to the normative view in this book). Consequently, there

is no need for a judge-made exemption rule.[778] Finally, it is here submitted that with regard to Economic Benefits, it would be inappropriate to apply the legitimate objective ancillarity doctrine, because the Exemption Possibility is especially designed for considering such benefits. The application of this doctrine to Economic Benefits also has the disadvantage that it does not guarantee that buyers are compensated for any anti-competitive harm; the Exemption Possibility, on the other hand, does imply such a compensation.

For the above reasons the position taken in this book is that the legitimate objective ancillarity doctrine is not an appropriate way of reconciling competition law with other public interests.

To be complete, the below Box 4.8. explains why the similar-yet-different *Albany* doctrine is rejected for similar reasons.

Box 4.9. Immunity exceptions – the *Albany* case

The approach taken by the ECJ in the *Albany* case[779] is, compared with the approach taken in the *Wouters* case, a different but similar way of solving the conflict between competition law and the pursuit of public interests. In the *Albany* case the ECJ declared Article 101 TFEU inapplicable to collective bargaining agreements due to their nature; in fact it created a crude immunity exception for such agreements. The *Albany* doctrine differs from the legitimate objective ancillarity doctrine: for one thing, the latter implies a proportionality test and

[778] Mulder argues that the legitimate objective ancillarity doctrine is an appropriate reconciliation mechanism for conflicts between the Cartel Prohibition and non-economic interests. He considers that the entity or entities taking the anti-competitive measure must have some public law foundation and that the political position is expressed that the non-economic interests trump any competition interests. Subsequently, the competition authority must check whether the competition restrictions are inherent to the pursuit of the non-economic interests. Mulder's view is here partly endorsed, in the sense that this book's view is that a sufficiently strong democratically legitimised expression of political will should be able to subordinate competition law. If such a will exists, there is, however, no role anymore for a competition authority: such authorities are not suited to second-guessing political choices. In addition, the public law nature of the entity taking the measure should be irrelevant: it suffices that the politicians deem the anti-competitive measure more important than competition policy. For these reasons this books takes the view that Article 106(2) TFEU is a better reconciliation mechanism, or that governmental measures should solve the conflict. J. Mulder, *Op het Snijvalk van Onafhankelijkheid en Openheid: Wat Is de Rol van de ACM in een Duurzame Maatschappij?*, SEW, No. 12, 2014, p. 577.

[779] ECJ judgment of 21 September 1999, *Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie (Albany case)*.

the former does not.[780] The doctrines are also similar, however, as both allow for a mechanism to declare anti-competitive agreements pursuing public interest outside the scope of the Cartel Prohibition.

The facts of the Albany case. The starting point of the *Albany* case was the existence of an official textile sector pension scheme in the Netherlands. This official pension scheme was operated by the National Textile Pension Fund. The Fund was set up in the context of collective agreements between associations of employers and trade unions. In accordance with Dutch pension law, at the request of these parties the Minister of Social Affairs made the affiliation to the Fund compulsory for all textile companies. The Fund could, however, grant exemptions from this mandatory affiliation. The Dutch textile company Albany International did not want to affiliate itself to the Fund. One of its claims was that the compulsory affiliation was an agreement contrary to the EU Cartel Prohibition, since it constituted an agreement between undertakings (i.e. the employers) that restricted competition through precluding employers from competing for employees on the basis of attractive pension schemes.[781] The issue resulted in court proceedings and in that context the ECJ was (indirectly) requested to consider Albany's claim in a preliminary reference procedure.

The ECJ came back with a surprising and unprecedented answer: it concluded that collective bargaining agreements between associations of employers and of employees do not fall within the scope of competition law *because of their nature and purpose*.[782] The Court held that the social policy objectives of such collective agreements, which are supported by rules in the EC Treaty and other EU instruments,[783] "*would be seriously undermined if management and labour were subject to Article [101(1) TFEU] when seeking jointly to adopt measures to improve conditions of work and employment.*"[784]

[780] Ch. Townley, *Article 81 EC and Public Policy,* Hart Publishing, 2009, pp. 64-65. G. Monti, *EC Competition Law,* Cambridge University Press, 2007, p. 113. Although not relevant for this section, one may question this difference: arguably (1) the legitimate objective ancillarity doctrine does not include a proper balancing of different objectives (i.e. a proportionality stricto sensu test), or (2) one may regard the exclusion method in fact a balancing method in which the balancing has been done beforehand, in an abstract manner (see: Ch. Townley, *ibid*, p. 61, footnote 102).

[781] Opinion of Advocate General Jacobs of 28 January 1999, *Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie,* paras. 72-74.

[782] ECJ judgment of 21 September 1999, *Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie (Albany case),* para. 60.

[783] ECJ judgment of 21 September 1999, *Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie (Albany case),* paras. 54-58.

[784] ECJ judgment of 21 September 1999, *Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie (Albany case),* para. 59.

Assessment of the Albany case. So, in fact the ECJ declared collective bargaining agreements immune to competition law, a far-reaching outcome.[785] The exact substance of these agreements is not relevant and no proportionality test is required.

The ECJ has so far developed only one area of immunity: the exception for collective bargaining agreements.[786] As the EU Courts have often applied the Cartel Prohibition to banking activities, it is not a question whether currently banking activities can benefit from immunity – they clearly don't. So, with regard to the legal *status quo* the discussion can be very brief: no immunity exceptions for agreements that pursue banking regulatory interests exist.

The normative position taken here is that an immunity exception as a solution mechanism should be rejected.[787] With regard to banking regulatory interests that constitute *Non-economic* Benefits it is here, again, asserted that due to the democratic legitimacy argument it is inappropriate that bank self-regulation is excepted from competition law without governmental involvement (see A.2.3.2.). In addition, with regard to banking regulatory interests that constitute *Economic* Benefits, it can be questioned whether an automatic prioritisation of banking regulatory interests will always serve society's interests best, as it is not obvious that all types of banking regulatory interests always reflect a greater economic welfare increase than the economic welfare decrease caused by the anti-competitive effects. It is, e.g., not obvious that any welfare increase due to an agreement remedying information asymmetry always outweighs any welfare decrease caused by anti-competitive effects of this agreement. Admittedly, it may be expected that the avoidance of severe financial stability risks or the maintenance of bank activities crucial for society will always outweigh anti-competitive effects in economic prosperity terms. It could therefore be argued that specifically for agreements

[785] The exception for collective agreements created by the ECJ has been transposed into a statutory exception with regard to the Dutch Cartel Prohibition. See Article 16 DCA.

[786] See e.g. also ECJ judgment of 21 September 1999, *Case C-115-117/97 Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen;* and ECJ judgment of 3 March 2011, *Case C-437/09 AG2R Prévoyance v. Beaudout Père et Fils SARL (AG2R case)*. It has therefore been mentioned that: "*These cases [i.e. the AG2R case and Albany case] may be seen as establishing a sui generis rule for collective labour agreements rather than establishing a more general principle excluding from the scope of Article 101(1) agreements which are consistent with, and intended to facilitate, the achievement of other EU objectives*." D. Bailey & V. Rose, *Bellamy & Child: European Union Law of Competition,* Oxford University Press, 7th edn., 2013.

[787] Gerbrandy seems to disagree: A. Gerbrandy, *Toekomstbestendig Mededingingsrecht,* Markt & Mededinging, No. 3, 2016, p. 109

furthering such interests an immunity exception should apply. It is here submitted, however, that it would be more appropriate to secure such interests directly through governmental measures as to avoid welfare redistributions by private parties.

C.4. FINAL CONCLUSION ON THE LEGITIMATE OBJECTIVE ANCILLARITY DOCTRINE

The current status of the law is that in accordance with the legitimate objective ancillarity doctrine, competition restrictions are excepted from the Cartel Prohibition, provided that these restrictions (1) are inherent to the pursuit of a legitimate objective and (2) are proportionate. The scope of the eligible types of legitimate objectives seems to be broad and includes both Economic and Non-economic Benefits. Furthermore, it was concluded that the 'legitimacy' of an objective does not depend on the endorsement by a democratically legitimised institution, as the ECJ has held rules set by the IOC to be legitimate, too. Next, it was found that there are indications that the legitimacy of an objective may depend on a public law nature, although this has never explicitly been mentioned by the EU Courts. Finally, it may be that claiming the benefit of this doctrine will only be successful if no less restrictive means are available for achieving the legitimate objective at stake. However, the EU Courts will most likely not second-guess the undertakings' judgment that the legitimate objective is more important than maintaining competition; i.e., the courts will not apply a proportionality test *stricto sensu*.

With regard to the normative position regarding the legitimate objective ancillarity doctrine, it was first repeated that the effect of the doctrine should not be that a statutorily protected value and its underlying goal, i.e., competition and the maximisation of economic prosperity respectively, can be set aside in the pursuit for a 'legitimate objective' without any interference of the legislature. As explained in Section A.2.3.2. above, this produces a democratic legitimacy problem, since the protection of competition is democratically legitimised, while the prioritisation of another value is not.

Assuming that the legislature has expressed its preference for the legitimate objective over competition, it might be argued that the legitimate objective ancillarity doctrine is a welcome addition to competition law, as it supposedly allows for the unfettered deployment of undertakings by governments if desired for their internal institutional governance. The doctrine, so the argument might go, mirrors the internal market rule of reason and as such makes available for undertakings an exemption from

the competition law for public interest reasons. This argument is here, however, not accepted, because it unnecessarily mixes up two different issues: a constitutional issue, and a jurisdictional issue.

It has also been argued that a kind of balancing of non-competition interests against competition interests within the Cartel Prohibition is justified, to the extent that the legitimate objective pursued by the competition restricting agreement has been determined by the government. This implies that the (association of) undertakings that take the anti-competitive measure do not have discretion with regard to the measure's substance: the measure concerned *must* be taken since otherwise the legitimate objective cannot be achieved. The position taken in this book is that the government must indeed determine beforehand that a certain interest is a public interest, but also that this is insufficient. The fact that the government has earmarked a certain objective as being worth pursuing in the public interest does not mean that it has also automatically prioritised this objective over market rivalry. The government's position may be that such a prioritisation is warranted, but the opposite may also be true.

Finally, it was argued that with regard to Economic Benefits, it would be inappropriate to apply the legitimate objective ancillarity doctrine, because the Exemption Possibility is especially designed for considering such benefits. The application of this doctrine to Economic Benefits also has the disadvantage that it does not guarantee that buyers are compensated for any anti-competitive harm. The application of the Exemption Possibility, however, would require that buyers are compensated.

To conclude, the legitimate objective ancillarity doctrine is not accepted as an appropriate reconciliation mechanism in this book.

PART D. CONCLUSION ON THE RECONCILIATION MECHANISMS

This chapter discussed the legal reconciliation mechanisms for undertakings' measures that generate public interest benefits but that also violate the Cartel Prohibition.

D.1. Conclusion Part A.

Part A: Exemption Possibility. In Part A. it was considered to what extent the Articles 101(3) TFEU and 6(3) DCA are feasible legal means for reconciling undertakings' anti-competitive measures that generate public interest benefits, with the Cartel Prohibition. An analysis of the legal *status quo* showed that the Exemption Possibility can indeed be used as a reconciliation mechanism. Unfortunately, the EU Courts and

competition authorities have not developed a clear definition of which public interest benefits can be reconciled with anti-competitive effects in the Exemption Possibility.

The normative views of this book on the four conditions of the Exemption Possibility led to the formulation of the Exemption Analytical Framework (see also the box below):

- With regard to the First Condition of the Exemption Possibility, it was discussed how the Exemption Possibility should be applied in order to achieve the best results for society. It was argued that all benefits of an agreement that present an increase in economic welfare, i.e. all Economic Benefits, should be eligible for balancing against the welfare decreases of any anti-competitive effects. It was also held that the translation of the benefit into monetised economic welfare terms must be based on sound facts and convincing methods. Next, it was concluded that the Exemption Possibility is not an appropriate mechanism to balance non-economic welfare effects, i.e. Non-economic Benefits, against anti-competitive effects. Indeed, this would require a subjective decision on whether the economic welfare of buyers can be exchanged for the pursuit of other interests or values, and to what extent. Since such decisions are political decisions, they should be made by politicians with democratic legitimacy and not by undertakings.
- In the context of the Second Condition it was argued that a competition restriction should only benefit from the Exemption Possibility if it at least fully compensates any anti-competitive harm, in conformity with the legislatures' choices. The compensation should land with those who are harmed by the anti-competitive effects, since otherwise the application of the Exemption Possibility would result in a welfare redistribution between different groups of buyers, which was not envisaged by the legislature. The compensation may also benefit future buyers, because it would be detrimental to society's economic prosperity if the fruits of future innovation were impeded. This would then imply a wealth redistribution from current buyers to future buyers, but this is a legitimate redistribution as it is in conformity with the legislatures' intentions.
- Considering the goal of the Cartel Prohibition, i.e. the furtherance of economic prosperity, it was held that the Third Condition of the Exemption Possibility should merely require a 'suitability test', and not the no-less-restrictive-alternative test of the legal *status quo*. A no-less-restrictive-alternative test is not sensible, as insisting on a less restrictive measure may deprive colluding undertakings from their incentive to agree upon the restrictive agreement and consequently a welfare increase could be abandoned. This result would be contrary to the Cartel Prohibition's goal.
- It was acknowledged that innovation is crucial for society's economic prosperity

but that the benefits of innovation are hard to determine in the present. This led to the conclusion that it is sensible to prescribe that a restriction must never block innovation on a key product feature beyond the short term. This is the Fourth Condition's role in the Exemption Analytical Framework. This rule ensures that innovation may keep contributing to society's prosperity, even though at the moment the competition restriction is agreed upon the innovation benefits are unpredictable.

D.2. Conclusion Part B.

Part B: Article 106(2) TFEU. In Part B. it was analysed to what extent Article 106(2) TFEU (and Article 11 DCA) is an appropriate reconciliation mechanism. Article 106(2) TFEU is a provision that aims to reconcile the Treaties rules, especially those on competition and the 'four freedoms' articles, and the Member States' legitimate wish to deploy undertakings to procure their public policies.

Article 106(2) TFEU has five conditions that must be fulfilled for a successful application of this provision: (1) the SGEI condition, (2) the entrustment condition, (3) the obstruction condition, (4) the undertaking condition and (5) the Union trade condition. In theory, there is no reason why, with the support of the government, certain bank self-regulation could not fulfil these conditions. In practice, however, there seems to be only a very limited number of bank self-regulation cases suitable for Article 106(2) TFEU, partly because banks are seldom officially obliged by the government to provide certain services.

The normative view taken here is that it is sensible that Member States may sometimes see the need to trump competition law in society's interest. The required involvement of the state through the entrustment condition ensures that the subordination of competition law has sufficient democratic legitimacy. However, currently an entrustment act does not need to include a specific consideration regarding the subordination of competition law. It was proposed that these acts should include such a consideration, so that a real balancing exercise is made and the state's preference for the provision of the SGEI over the protection of competition is made clear. If such a balancing exercise is undertaken by the state, it is sufficient that the applicable proportionality test is merely a permissive manifestly-disproportionate check and not a stringent no-less-restrictive-alternative test. Finally, it is here asserted that Article 106(2) TFEU should also be available for governments to ensure that undertakings engage in anti-competitive self-regulation to prevent the offering of objectionable activities. This means that this provision should not be limited to the *offering* of services, but also to the *avoidance* of offering services.

D.3. Conclusion Part C.

Part C: legitimate objective ancillarity doctrine. Part C. covered the legitimate objective ancillarity doctrine based on the *Wouters* case. It was concluded that for banking regulatory interests there is a reasonable possibility that the legitimate objective ancillarity doctrine may in practice function as reconciliation mechanism. It may be that a 'public law basis' is required, but that need not be an obstacle. Although the group of banks agreeing upon bank self-regulation would most likely not have public law status, the regulatory interests themselves could be within the realm of a provision of statutory banking regulation or be endorsed by a supervisor; this might then cater to the public law basis requirement.

It has been asserted by others that the legitimate objective ancillarity doctrine is a welcome addition to competition law, as it supposedly allows for the unfettered deployment of undertakings by governments if desired for their internal institutional governance. This stance was rejected. It was held that the doctrine violates a fundamental pillar of democratic societies, since pursuant to this doctrine private parties receive the power to prioritise public policies. An express governmental statement prioritising the legitimate objective over competition interests would be necessary to solve this constitutional issue. For such cases, however, there is already a statutory exemption possibility: Articles 106(2) TFEU and 11 DCA, if interpreted pursuant to the normative view in this book. Furthermore, it was concluded that there is no need for the legitimate objective ancillarity doctrine for those undertakings that exercise state prerogatives, since these activities fall outside the scope of the Cartel Prohibition anyway. Finally, it is here submitted that with regard to Economic Benefits, it would be inappropriate to apply the legitimate objective ancillarity doctrine, because the Exemption Possibility is especially designed for considering such benefits.

Synthesis of the findings of Parts A, B, C. If the conclusion of Parts A., B. and C. are brought together, the following process for determining the appropriate reconciliation mechanism emerges:

(1) If the agreement's effects constitute Non-economic Benefits, i.e. the First Condition is not fulfilled → Article 106(2) TFEU or governmental legislation (see Chapter 7.C.3.).
(2) If the agreement's effects constitute Economic Benefits that outweigh the affected buyers' anti-competitive harm, and the Third and Fourth Conditions are fulfilled → Exemption Possibility.
(3) If the agreement's effects constitute Economic Benefits that do *not* outweigh the affected buyers anti-competitive harm, i.e. the Second Condition is not fulfilled →

Article 106(2) TFEU or governmental legislation.

(4) If the agreement's effects constitute Economic Benefits that outweigh the affected buyers anti-competitive harm, but the Third or Fourth Condition is *not* fulfilled → Article 106(2) TFEU or governmental legislation.

(5) Exemption Possibility not available for the competition restriction, but an entrustment act including a specific consideration regarding the subordination of competition law is provided → Article 106(2) TFEU.

(6) Exemption Possibility and Article 106(2) TFEU not available for the competition restriction → governmental legislation.

(7) The legitimate objective ancillarity doctrine should not be applied.

So, although the Exemption Possibility and Articles 106(2) TFEU and 11 DCA can function as a legal mechanism to trump the Cartel Prohibition, there will still be competition restrictions that cannot be excepted based on either mechanism. If it would nevertheless be beneficial for society to set aside the Cartel Prohibition for such agreements, appropriate alternative solutions should be applied. These are discussed in the final chapter of this book.

D.4. The Exemption Analytical Framework

First Condition in the Exemption Analytical Framework

- All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition.
- All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition.
- Paternalistic benefits cannot be considered.

Second Condition in the Exemption Analytical Framework

- Whether the agreement's benefits are sufficiently beneficial, depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.
- The group of buyers to be considered, consists of the buyers on affected markets, including future buyers. Buyers on non-affected markets must not be considered, unless these buyers are the same persons/entities as the buyers on the affected market.
- Benefits for society must not be considered, in conformity with the legislature's position.
- The beneficiaries receive a fair share of the agreement's benefits, only if they are at least compensated for the anti-competitive harm done to them.

Third Condition in the Exemption Analytical Framework

- The applicable test is only whether the competition restriction is suitable for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternatives' test is not required.

Fourth Condition in the Exemption Analytical Framework

- The restriction must not eliminate innovation on a key product feature beyond the short-term.

D.5. The Article 106(2) Analytical Framework

SGEI condition in the Article 106(2) Analytical Framework
SGEI condition: a service of general economic interest must be at stake.

Article 106(2) Analytical Framework:

- The rationale for using Article 106(2) TFEU must be an Efficiency Justification or Non-economic Justification, which distinguishes the SGEI from ordinary economic services.
- The withholding of the provision of certain services may also be the subject of Article 106(2).

Entrustment condition in the Article 106(2) Analytical Framework
Entrustment condition: public authorities must have 'entrusted' the task of rendering this service to an undertaking.

Article 106(2) Analytical Framework:

- The entrustment act of the government must include its view that remedying the Efficiency Justification or Non-economic Justification is more important than safeguarding competition.
- It is not a requirement that the service provider make its service available to all interested buyers.

Obstruction condition in the Article 106(2) Analytical Framework
Obstruction condition: an exemption is necessary, because otherwise the service cannot be provided due to the 'obstruction as the result the application of EU (competition) rules'

Article 106(2) Analytical Framework:

- The application of Article 106(2) TFEU is subject to a 'manifestly-disproportionate check'.

Undertaking condition in the Article 106(2) Analytical Framework
Undertaking condition: the service provider must be 'an undertaking'.

Union trade condition in the Article 106(2) Analytical Framework
Union trade condition: 'trade must not be affected to such an extent as would be contrary to the interests of the Union' due to the trumping of the EU (competition) rules.

5. CASE STUDIES ON THE CARTEL RECONCILIATION MECHANISMS

1. INTRODUCTION TO THE CASE STUDIES

The previous chapter dealt with three possible reconciliation mechanisms for solving conflicts between public interests and the Cartel Prohibition, i.e. the (1) Exemption Possibility, (2) Articles 106(2) TFEU and 11 DCA, and (3) the legitimate objective ancillarity doctrine. Pursuant to the normative position taken in this book, the first two mechanisms were deemed appropriate solution methods. The way in which these mechanisms should be applied, as it is asserted here, was expressed in two compact solution frameworks, the Exemption Analytical Framework and the Article 106(2) Analytical Framework. Since the analysis and reasoning of the previous chapter was rather abstract in nature, it is considered illuminating to illustrate the two frameworks by applying them to actual cases. Below, the Exemption Analytical Framework and the Article 106(2) Analytical Framework are applied, first, to the case of the Dutch mortgage loan code (Sections 2.-5.), and secondly to the case of the commission ban on distributing investment funds (Sections 6.-8.). Since the legitimate objective ancillarity doctrine is not considered to be a suitable reconciliation mechanism, the application of this doctrine is not further clarified through case studies.

CASE STUDY 1 – THE DUTCH MORTGAGE LOAN CODE

2.1. Introduction to the case study of the Mortgage Loan Code

In this section the Dutch Code of conduct for mortgage loans (the **Mortgage Loan Code**) (in Dutch: *Gedragscode Hypothecaire Financieringen*) is analysed. This case is particularly interesting because it shows how different governmental institutions (i.e. the ACM, DNB, AFM and Minister of Finance) may have different views on how anti-competitive effects and banking regulatory interests must be weighed against each other. It is therefore evident that the conflict between these two types of interests is real and pertinent, and not 'fabricated' by undertakings pursuing their self-interest.

The fact that different governmental institutions have different opinions on the outcome of the weighing of public interest issues – which is the case with regard to the Mortgage Loan Code – shows that a well-founded solution scheme with predictive outcomes for market parties is called for. In this context it is relevant to appreciate that it is likely that an governmental institution will attach more importance to the

interests it is appointed to serve in the first place and is most familiar with.[788] This is, however, problematic because it may not do justice to interests of society as a whole. In this case the reconciliation of the conflicting interests depended on the institutional architecture: since the ACM had the authority to block the Mortgage Loan Code, its view was decisive and trumped the views of the other institutions. Below it is shown how the application of the Exemption Analytical Framework may have solved the conflict between anti-competitive effects and banking regulatory interests in the case of the Mortgage Loan Code.

2.2. Background of the 1998 Mortgage Loan Code

In the Netherlands, a code of conduct for mortgage credit providers has been in force since 1990. The first code was basically introduced to convince the legislature to give up its plans to introduce certain regulations on the provision of mortgage credit.[789] Since its introduction, the code has been amended several times. The current Mortgage Loan Code[790] was introduced in August 2011, but the case that is analysed here concerns the draft code of October 1998. The 1998 Mortgage Loan Code was endorsed by almost all mortgage credit providers operating in the Netherlands, such as the banks, insurers and pension funds. It is a form of self-regulation that was 'managed' by an association formed by all the credit providers: the *Contactorgaan Hypothecair Financiers* (**CHF**). The 1998 Mortgage Loan Code included rules on the provision to consumers of credit destined for the purchase of a residential immovable property in Europe, of which the repayment is secured by a right of mortgage on that property. The objectives of the Code included the adequate provision of information to consumers and the prevention of excessive borrowing. It was drafted after the government, consumer organisations and intermediaries were consulted.

In 1990, when the first version of the Mortgage Loan Code was introduced, the DCA and ACM did not yet exist. The rules on competition of the EEC Treaty, however, were applicable. The notification system was also still in place and therefore only the Commission could apply the EU Exemption Possibility and provide an exemption to

[788] For Economic Benefits, this issue can be mitigated by applying clear tests – like in the Exemption Analytical Framework – using sound economic models and solid evidence, when the Exemption Possibility is applied. Discussion between competition authorities and financial supervisors can then focus on arguments on the merits, i.e. on the correct use of the evidence, the models and tests. If a clash between the Cartel Prohibition and Non-economic Benefits is at stake, a political body, and not market supervisors, should intervene and weigh the different interests,.

[789] Parliamentary article, *Kamerstukken II* 1986/87, 19785, No. 3, p. 3.

[790] See: <https://www.nvb.nl/publicaties-standpunten/publicaties/1671/gedragscode-hypothecaire-financieringen-code-of-conduct-for-mortgage-loans.html>

Article 101(1) TFEU (see Chapter 4.A.2.9.). The CHF notified the Commission of the 1990 Mortgage Loan to receive an exemption decision. The Commission replied to the CHF that it would not investigate the matter due to a lack of priority – a common reply in those days. The lack of priority was caused by *"the evidently minor impact of the said agreement on the competitive relations between the parties."*[791]

After the coming into force of the DCA in 1998, the CHF requested the ACM to provide an exemption from Article 6(1) DCA based on the Dutch Exemption Possibility. As the Dutch notification system was still in place, only the ACM could provide such an exemption from Article 6(1) DCA. However, before the ACM had reached a decision, the CHF decided that the 1990 Mortgage Loan Code needed to be amended. Subsequently, the CHF submitted a new code to the ACM: the 1998 Mortgage Loan Code.

A relevant difference between the 1990 code and the 1998 code was that in the latter code, a provision was included that restricted the interest-only part of the loan; as discussed below, (only) this new rule was held to be problematic by the ACM.[792] This is a remarkable conclusion, as will be discussed below, because years later the AFM insisted on introducing a similar provision in the interest of consumers, and the legislature currently also effectively disapproves of such loans. So, there was not just a conflict between different interests, but the two authorities even chose conflicting solutions.

2.3. 1998 Mortgage Loan Code: violations of the Cartel Prohibition

The ACM found that four provisions of the 1998 Mortgage Loan Code violated the Dutch Cartel Prohibition,[793] because these provisions restricted the credit providers' commercial policy with regard to significant competitive parameters:[794]

[791] Letter of the Commission to the CHF of 30 May 1990 in Commission Case IV/33.678.

[792] As this clause was not included in the 1990 code that the Commission had assessed, the Commission's and ACM's conclusions are not inconsistent.

[793] In its decision on the exemption request the ACM held that the majority of the provisions of the 1998 Mortgage Loan Code related to the promotion of the comparability of mortgage loan products and to the provision of information. These provisions were found not to restrict competition. The ACM drew the same conclusion with regard to the introduction of a complaints committee whose decisions could be appealed against with the courts. ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 68.

[794] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, paras. 69-70, 77.

(1) Article 6 of the 1998 Mortgage Loan Code set a minimum interest rate for the calculation of the percentage of the consumer's income that could be spent on interest payments.
(2) Article 7 of the 1998 Mortgage Loan Code was a provision fixing the maximum interest-only part of the loan to 75% of the liquidation value of the mortgaged property.
(3) Article 11 of the 1998 Mortgage Loan Code included the rule that a consumer could make extra instalments in a non-cumulative manner up to an amount equal to 10% of the initial sum of the mortgage loan, without any obligation to pay compensation.
(4) Article 12 of the 1998 Mortgage Loan Code provided for maximum compensation fees for full early repayment of the loan in case of certain specific situations. For instance, in the event of the decease of the borrower, his estate would not be liable for a fee for full early repayment of the loan. In addition, Article 12 of the draft Code provided for rules when, and to what extent (i.e. a maximum), a consumer would be liable for penalties for early repayment in the event of voluntary and non-voluntary sale of the mortgaged house.

Consequently, the ACM assessed whether these provisions could be exempted from the Dutch Cartel Prohibition, based on the old Article 17 DCA (now Article 6(3) DCA). In general, it can be remarked that the ACM's analysis in its decision is rather concise and briefly substantiated. Nevertheless, although the decision does not provide a fully fledged picture of the ACM's reasoning behind its conclusions, the decision includes enough considerations to compare the ACM's approach with the Exemption Analytical Framework.

3.1. Article 6 – Substance and conflict

Article 6 of the 1998 Mortgage Loan Code was mainly presented as a rule to prevent overindebtedness. It prescribed that for mortgage loans with a fixed interest rate for five years or less, the calculation of the maximum loan amount had to be based on the interest rate for loans with a fixed interest rate five years set by the DNB – the so-called 'notional interest rate'.[795] Everything else equal and assuming that the notional interest rate was higher than the actual, fixed interest rate for loans of five years or less, the consequence of Article 6 was that the maximum loan amount would be

[795] For loans with fixed interest rates for longer periods the actual interest rate of the loan could be used. It should be acknowledged that this rule governs the calculation of the amount of the mortgage loan and not the interest rate actually charged.

lower than the amount calculated with the actual rate.[796] The lower loan amount as a result of the application of Article 6 of the 1998 Mortgage Loan Code was thought to support the prevention of overindebtedness.[797]

Nevertheless, although Article 6 of the 1998 Mortgage Loan Code also prescribed the formula for calculating the maximum amount of the mortgage loan,[798] the code did not prescribe all parameters for this formula. For example, the credit providers were free to use their own loan-to-income ratios, i.e., the maximum part of a borrower's income that may be spent on mortgage loan expenses.[799] So, it can be questioned whether Article 6 indeed contributed to the prevention of overindebtedness.[800] Nevertheless, for practical purposes it is here assumed that the ACM and CHF were correct when they found that Article 6 could contribute to preventing overindebtedness. It is, however, still relevant to acknowledge that the credit providers were free to use their own loan-to-income ratios, since this was a reason for the ACM to conclude that the CHF did not completely equalise the maximum loan amounts that credit providers could offer a particular borrower. Consequently, the Fourth Condition of the Exemption Possibility was fulfilled (see Section 3.5.). In any event, this leads to the conclusion that, since it was still possible to compete on the maximum of the loan amount possible, the claim that Article 6 of the 1998 Mortgage Loan Code prevented overindebtedness was not particularly convincing.

[796] The maximum borrowing capacity of a consumer depends in part on income available for interest payments. For a given percentage of income available for interest payments, a higher interest rate implies a smaller amount of credit. The application of a fixed minimum interest rate, pursuant to Article 6, therefore ensured a certain maximum amount of credit, *ceteris paribus*.

[797] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, paras. 46, 79. A smaller loan and accompanying lower interest payments also reduce the risk of the inability to pay the interest when the interest rates increase.

[798] The maximum mortgage loan expenses had to be calculated as if the mortgage loan was a 30-year annuity mortgage loan.

[799] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 85.

[800] Article 6 of the 1998 Mortgage Loan Code prevented the credit providers to use, for the loans covered by this provision, a lower interest rate than the set minimum rate. Everything else being equal, this would also limit the amount of the loan, and prevent competition that could lead to irresponsible credit provision, since the loan amount is calculated based on certain maximum monthly expenses for interest and repayment. (ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, paras. 83-84.) However, as long as the credit providers were free to determine the maximum monthly expenses, competition on the amount of the loan remained possible and a minimum interest rate would not do much. Admittedly, for all mortgage loans that were provided under the Dutch state guarantee scheme (in Dutch: *Nationale Hypotheek Garantie*), the maximum monthly expenses were set by an independent body, ultimately precluding competition on this parameter.

The ACM found that Article 6 of the 1998 Mortgage Loan Code violated the Dutch Cartel Prohibition. The authority did not indicate the severity of the anti-competitive effects of Article 6, but it mentioned that the fixed interest rate was an important element for the calculation of the maximum amount of the loan.[801] It is indeed clear that the maximum amount of credit a lender is prepared to provide is an important element for many borrowers. If competitors industry-wide restrict rivalry on a significant competitive parameter, this is almost by definition a violation of the Cartel Prohibition.

So, Article 6 implied a *prima facie* conflict between competition law and a banking regulatory interest: this provision violated the Cartel Prohibition but at the same time delivered the benefit of supporting the prevention of overindebtedness. Below it is explained how this conflict is resolved within the Exemption Analytical Framework.

3.2. Article 6 – First Condition

First Condition in the Exemption Analytical Framework

First Condition: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

Exemption Analytical Framework:

- All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition.
- All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition.
- Paternalistic benefits cannot be considered.

The ACM concluded that for two reasons Article 6 delivered benefits within the meaning of the First Condition of the Exemption Possibility. The first type of benefit was the prevention of excessive borrowing which can result in financial problems

[801] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 71.

for individual households.[802,803] The second type was the promotion of 'stable economic development', an indirect effect brought about through the prevention of financial difficulties for households, which would subsequently prevent any economic downturn that these difficulties might cause.[804] (It is here assumed that 'stable economic development' differs from a 'stable financial system'; the prevention of systemic risk is discussed below in Section 4.2.) Unfortunately, the ACM did not indicate the magnitude and likelihood of these benefits, nor did it explain when and how the benefits would be achieved.

How should one assess these two types of benefits in the Exemption Analytical Framework? Answering this question requires establishing whether the benefits are 'Economic Benefits' (see Chapter 4.A.2.2.1.). In other words, it must be established whether the particular type of benefit can increase economic welfare, and whether it can be convincingly translated into monetary terms. These are challenges for economic study and it is beyond the scope of this book to make such economic assessments. Nevertheless, even without an in-depth economic analysis some relevant observations can be made.

Prevention of overindebtedness – Translation into Economic Welfare. The effect of the prevention of excessive borrowing can (also) be considered an economic welfare effect. In fact, this effect can be regarded as a product modification which reduces both the loan's riskiness and its maximum amount. Although it will not be easy to establish the change in consumer surplus due to the product modification caused by Article 6, there are techniques to do this, e.g., through the use of survey data.

It should be noted that this change does not only imply *benefits* for borrowers: especially for those borrowers that would not have had affordability problems with riskier loans, this modification may be detrimental as it reduces the maximum amount they can borrow, and therefore their preferred house may be unattainable (see Section 3.3.). So, it remains to be seen whether there would indeed be a change in consumer surplus.

[802] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 79.

[803] In the *Asnef-Equifax* case the ECJ had considered that preventing overindebtedness is benefit within the meaning of the First Condition: ECJ judgment of 23 November 2006, *Case C-238/05 Servicios de Información sobre Solvencia y Crédito, SL, Administración del Estado v. Asociación de Usuarios de Servicios Bancarios [Ausbanc] (Asnef-Equifax case)*, para 67.

[804] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 80.

Prevention of overindebtedness – Paternalism. The consequence of Article 6 of the 1998 Mortgage Loan Code was that consumers who wanted a mortgage loan with a fixed interest rate of less than five years, as well as the credit providers, were deprived of the possibility to opt for a larger loan based on the actual interest rate paid. However, according to the DNB, consumer organisations and banks, such a rule was in the consumers' best interests.[805] Unfortunately, the ACM did not clarify why it assumed that consumers were better off having their choice of mortgage loans limited, and why these consumer protection effects could be balanced against anti-competitive effects. Measures to prevent overindebtedness that directly limit the availability of credit for consumers are usually based on paternalism: due to several manifestations of consumers' bounded rationality it is determined that consumers should not freely choose the mortgage loan they prefer (see Chapter 3.6.2.5.). For example, in the Netherlands credit providers have a duty to lend responsibly,[806] which implies that the lender must independently establish whether the borrower can afford the desired loan.[807]

Although the ACM's decision and the 1998 Mortgage Loan Code are not explicit about the CHF's justifications for preventing overindebtedness through limiting the options for borrowers, the paternalistic element is inevitable, at least in part. A part of the financial damage that borrowers can suffer as the result of overindebtedness and that is avoided because of the responsible lending rule can be considered to constitute paternalistic economic welfare improvement. On the other hand, of all the avoided damage due to the responsible lending rules, the damage avoided because of the rules that borrowers *preferred to be applicable at the time they took out their loans* is not a paternalistic benefit but a genuine consumer surplus increase.

A question is how paternalistic economic welfare increases should be taken into account. As set out in Chapter 4.A.2.4., paternalistic economic welfare increases, which are not reflected in consumer surplus, cannot be taken into account when verifying whether the First Condition of the Exemption Analytical Framework is complied with. In a regular public policy cost-benefit analysis, all damage to users that is avoided as the result of a certain policy could be taken into account, but this is not in conformity with the Exemption Analytical Framework's approach to determining the Exemption Possibility.

[805] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 46.

[806] Article 4:34 FS Act. Although the commercial interests of credit providers would require them to check the creditworthiness of borrowers and their ability to pay the interest and the redemptions anyway, the responsible lending provisions focus on the affordability of the loan from the consumer's perspective.

[807] See also: Article 18 of the EU Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

Arguably, non-paternalistic benefits, i.e. consumer surplus increases, may materialise if it appears that without the additional protection against overindebtedness consumers would borrow more *"than they (on reflection) would ideally like."*[808] This may be the case if borrowers suffer from bounded rationality and if it is assumed that borrowers prefer to borrow responsibly, i.e., not more or with more risk than is in their own interest. Responsible lending rules may then increase consumers' economic welfare. In fact, it could then be assumed that consumers prefer paternalistic regulation, in part because consumers acknowledge that they are insufficiently suited to make decisions for themselves (perhaps the regulation is then not so 'paternalistic' anymore…). Nevertheless, the ACM's decision and the 1998 Mortgage Loan Code do not include indications that such an assumption was made, let alone any substantiation that this assumption is correct. Interestingly, there are also no indications that the government had determined that paternalism was preferred, which to a certain extent could have supported the assumption that consumers preferred paternalistic regulation.[809] If consumers themselves disagree with the paternalistic rule makers, it is problematic to translate into economic welfare effects the consumer gains of Article 6 that these rule makers mean to accomplish.

To conclude, without a convincing argument that consumers preferred the introduction of a rule like Article 6 of the 1998 Mortgage Loan Code, it cannot be assumed that this provision would have a positive effect on consumer surplus. Consequently, the consumer gains of Article 6 that the CHF meant to accomplish should not be eligible for inclusion in assessing the Exemption Possibility.

In addition, even if there *were* a convincing argument that consumers preferred the introduction of Article 6, the scope of the consumers' economic welfare increase would be very difficult to establish, since it would require determining the demand curve for mortgage loans of fully informed and rational consumers.[810] It is doubtful

[808] FSA Consultation paper, *Mortgage Market Review: Proposed Package of Reform*, 2011, para. 163.

[809] On the contrary, at the time the government had merely insisted on self-regulation that would ensure better information for borrowers, while maintaining the consumers autonomy to make their own borrowing decisions. See e.g.: Parliamentary article, *Aanhangsel Handelingen II* 1996/97, No. 424, 24 December 1996.

[810] In the context of the introduction of new retail mortgage loan provision regulations, the former UK Financial Service Authority (**FSA**) conducted a consultation (the **FSA Mortgage Market Review**) in December 2011, including a cost-benefit analysis of the introduction of provisions including the so-called affordability rules. These affordability rules differed from Article 6 of the 1998 Mortgage Loan Code, but they had a similar objective (i.e. the prevention of overindebtedness) and similar effects (less risky loans, and fewer and smaller loans provided). Due to the borrowers' bounded rationality, the FSA decided that a *welfare* analysis was not appropriate and therefore it opted for a *well-being* analysis. It should be acknowledged, however, that in the Exemption Analytical Framework, well-being is not the designated denominator. In addition, the FSA's choice for a well-being analysis has been criticised by Stern and Europe Economics, among others. See: FSA Consultation paper, *Mortgage Market Review: Proposed Package*

that for this exercise a sound and convincing method that would deliver reliable results is available. This is another reason why in this case the paternalistic economic benefits can not be taken into account in the determination of the Exemption Possibility (see Chapter 4.A.2.2.2.).

It is relevant to repeat that within the Exemption Analytical Framework, buyers' benefits that cannot be adequately translated into economic welfare, i.e., Non-economic Benefits, cannot be used to outbalance anti-competitive effects. Such benefits produced by responsible lending rules might include the reduction of consumers' stress, loss of self-esteem and social exclusion. These benefits must be ignored in the context of the Exemption Possibility. It is here reiterated that this does not mean that such effects, like paternalistic benefits, are irrelevant, but merely that there are not suitable for balancing against anti-competitive effects within Article 101 TFEU or 6 DCA. A method to reconcile these benefits with anti-competitive effects is the application of Article 106(2) TFEU or 11 DCA (see Section 5.).

A More Stable Economy – Translation into Economic Welfare. When determining whether the benefits of 'a more stable economy' are Economic Benefits, it may be questioned whether it can be made sufficiently clear to consumers what these benefits of 'a more stable economy' would be. It is necessary that consumers understand this, so that they can adequately choose between loans subject to Article 6 and loans that are not. Their preferences reflect the changes in consumer surplus.

Examples of difficulties with expressing what an improvement in 'the stability of the economy' is, are the estimation of the size of the benefits due to their complexity, the uncertainty and the interactions between various markets, establishing the allocation of the benefits over society[811] and the effects of other regulations that would probably be introduced in the counterfactual situation (i.e., other regulations introduced to stabilise the economy, if Article 6 is not implemented). As a consequence, it is not

of Reform, 2011, paras. 166-168; J. Stern, *Mortgage Market Review, Welfare Analysis Peer Review For Financial Services Consumer Panel*, 2012, pp. 12-14; Europe Economics, *Peer Review of Part of Cost-Benefit Analysis in Mortgage Market Review*, 2012, para. 2.32.

[811] In the FSA Mortgage Market Review, the macro-economic impact of the affordability rules is estimated, and this may serve as an illustration of the difficulty in establishing the size and allocation of the effects of Article 6 on the whole economy. With regard to the impact of these rules on other markets and economic forces, by way of illustration the following observations of the FSA are presented: a reduction in mortgage lending is assumed to increase the banks' lending to undertakings, which increases corporate investments, and production capacity, and ultimately GDP. However, a reduction in mortgage lending also reduces the demand for houses and depresses their prices; it therefore also reduces consumer expenditure and increases consumer savings, which may dampen inflation in the long run. FSA Consultation paper, *Mortgage Market Review: Proposed Package of Reform*, 2011, paras. 146-156.

obvious that these effects can be presented as a product modification for which the consumers' preferences can be measured, e.g. through the use of reliable survey data.

Conclusion. It is difficult to conclude here whether Article 6's benefits in preventing financial difficulties for households constitute Economic Benefits, since the ACM did not clarify whether this provision's effects were in line with the borrowers' preferences. In fact, there are no indications that the ACM considered this relevant. It is surprising, and disappointing from this book's stance, that the ACM accepted that the reduction of overindebtedness was 'an improvement of the distribution of mortgage loans' without considering, at least not in its decision, why consumers would prefer this, or why it was legitimate that the consumers' freedom of choice could be limited by an agreement of private parties.

With regard to the Article 6's indirect benefits of promoting a more stable economy, the application of the Exemption Analytical Framework would most likely deviate from the ACM's conclusions, because there would probably not be any sound and convincing way to substantiate these benefits and because the societal economic welfare increases are not considered when applying the Second Condition.

The ACM did not even try to indicate the magnitude of Article 6's benefits, and in general this can be regarded a serious flaw in the ACM's decision. Of course, in 2000 the Commission had not yet published its 2004 Article 101(3) Guidelines, so it is logical that the ACM did not carefully follow the approach set out in those guidelines. Nonetheless, in order to judge whether certain benefits may outweigh the anti-competitive effects of an agreement, it is at the very least required that the likelihood and estimated magnitude of these benefits be established.

3.3. Article 6 – Second Condition

Second Condition in the Exemption Analytical Framework

Second Condition: the agreement must allow customers a fair share of the resulting benefits.

<u>Exemption Analytical Framework</u>:

- Whether the agreement's benefits are sufficiently beneficial depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.

- The group of buyers to be considered consists of the buyers on affected markets, including future buyers. Buyers in non-affected markets must not be considered, unless these buyers are the same persons/entities as the buyers in the affected market.

- Benefits for society must not be considered, in conformity with the legislature's position.

- The beneficiaries receive a fair share of the agreement's benefits only if they are at least compensated for the anti-competitive harm done to them.

In the previous section it was analysed whether within the Exemption Analytical Framework the alleged benefits of Article 6 of the 1998 Mortgage Loan Code would be eligible for inclusion in the consideration of the Exemption Possibility. In this section it is assessed whether the borrowers would receive a *fair share* of these benefits. Pursuant to the Exemption Analytical Framework, it is therefore required that the anti-competitive harm for the borrowers is outweighed by eligible benefits for these borrowers. For this assessment two elements need to be known: (1) the size of the increase of economic welfare for the borrowers, i.e., the consumer surplus increase, and (2) the size of the anti-competitive effects for the borrowers.

The ACM decision does not include any calculation or estimation of the size of the benefits for the borrowers. To make such a calculation is also outside the scope of this book. Nevertheless, it is appropriate here to make some observations on such an exercise.

In the Exemption Analytical Framework, and pursuant to the current law, it is not required that *each* borrower in fact benefit from the concluded agreement; it suffices that the borrowers in the affected market as a group are at least compensated for the anti-competitive harm done to them. So, it is relevant to what extent the overindebtedness reduction effects of Article 6 of the 1998 Mortgage Loan Code are beneficial to the concerned borrowers collectively. In that respect it should be acknowledged, as mentioned above (Section 3.1.), that the reduced riskiness of the mortgage loans comes with a reduced maximum loan amount. Consequently, whether the effects of Article 6, apart from its anti-competitive effects, are on balance beneficial for borrowers depends on (1) how many consumers benefit from the reduced riskiness and what the magnitude of these benefits are, and (2) how many consumers are harmed by the reduced maximum loan amount and what the

magnitude of this detriment is.[812,813] In its decision the ACM did not even mention the possible negative effect of the reduced maximum loan amount for consumers. The positive effect of Article 6 for borrowers may, on the other hand, be overstated. Consumers that preferred the product modification of a less risky loan could very well have taken such a loan without the application of Article 6: there is no need for an industry-wide rule limiting the freedom of choice of consumers to cater to the needs of borrowers that prefer to choose less risky loans anyway. In other words, the additional benefits created by Article 6 for the group of consumers preferring less risky loans may be insignificant. Only the consumers that prefer to be protected against their own bounded rationality may benefit from this rule; but, as explained in the previous section, it is unlikely that these benefits are eligible for inclusion in the determination of the Exemption Possibility.

With regard to the indirect benefit of a more stable economy, this effect can be regarded the internalisation of a negative externality: overindebtedness not only implies costs or risks for the credit provider and loan taker, but indirectly also for third parties that are affected by an economic downturn caused by the financial difficulties that overindebtedness may cause. In the Exemption Analytical Framework the economic welfare increases due to the internalisation of negative externalities are usually not considered when applying the Second Condition of the Exemption Possibility; see Chapter 4.A.3.2.

[812] E.g., for its new policy on retail mortgage loan provision, in 2009 the AFM performed a concise analysis of the negative effects for borrowers of its proposed measures, which implied a reduction of the maximum borrowing capacity: AFM, *Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2009, pp. 33-35.

[813] In the FSA Mortgage Market Review the FSA attempted to calculate the overall effect on well-being (a measure similar but not equal to welfare) of the envisaged responsible lending rules. In this regard it tried to establish the "*[t]he positive effect [is] that some people will avoid repayment difficulties, arrears, or repossessions on the mortgages they would otherwise have taken out*", as well as the "*negative effect of the MMR* [i.e. the responsible lending rules]*[is] that some people who in practice would have been able to afford the mortgage they would have taken out if the MMR had not been in place, some of whom will be prevented from taking their desired mortgage as a result of failing the affordability assessment required by the MMR*." FSA Consultation paper, *Mortgage Market Review: Proposed Package of Reform*, 2011, paras. 170, 173.

3.4. Article 6 – Third Condition

Third Condition in the Exemption Analytical Framework

Third Condition: the competition restriction must be indispensable to the attainment of the benefits.

Exemption Analytical Framework:

- The applicable test is only whether the competition restriction is suitable for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternative test' is not required.

It is here reiterated that in the Exemption Analytical Framework the Third Condition of the Exemption Possibility includes the 'suitability test': can the envisaged restriction deliver the claimed benefits? In other words, the Third Condition implies testing whether a causal link between the restriction and benefits exists. As mentioned above, in contrast with the Commission's standard approach, in the Exemption Analytical Framework the Third Condition does not include no-less-restrictive-alternative tests for the overall agreement and for each individual restriction (see Chapter 4.A.4.3.).

In its decision the ACM did not present an analysis along the lines of the Commission's standard approach, but it rather applied a suitability test as proposed in the Exemption Analytical Framework. The ACM held that competition among credit providers pushed them to offer the largest possible loans and consequently a credit provider would prefer applying interest rates as low as possible when calculating the maximum loan amount he could offer. Article 6 of the 1998 Mortgage Loan Code ended competition on this point and would therefore indeed result in lowering the maximum loan amounts. So, collective action appeared to be necessary to achieve the intended result. Applying the Exemption Analytical Framework would result in the same analysis and finding, provided it is ignored that the absence of an agreement on the maximum loan-to-income ratio still allowed competition on the maximum loan amounts.

3.5. Article 6 – Fourth Condition

Fourth Condition in the Exemption Analytical Framework

Fourth Condition: the agreement may not eliminate a substantial part of competition in the market.

Exemption Analytical Framework:

- The restriction must not eliminate innovation on a key product feature beyond the short term.

As explained in Chapter 4.A.5.2., the function of the Fourth Condition in the Exemption Analytical Framework is to ensure that the unpredictable benefits of innovation are not banned beforehand. As the application of the notional interest rate as a minimum rate probably does not relate to any innovation with regard to the provision of mortgage loans, it is very likely that the Fourth Condition is fulfilled.

The ACM concluded that the Fourth Condition was fulfilled, too. The reason for this conclusion was that the notional interest rate was only one of the parameters used to calculate the borrower's maximum loan amount. Apart from the loan-to-income ratio, as mentioned above, the credit providers were also free to include in or neglect for this calculation such data as the expected continuation of the borrower's income, the income of a spouse, pre-existing payment obligations of the borrower and the morality of the borrower.[814] Hence, the ACM's analysis is more in line with the Commission's approach, since it effectively established whether there sufficient residual competition with regard to other competitive parameters.

4.1. Article 7 – Substance and conflict

Article 7 of the 1998 Mortgage Loan Code prescribed that the interest-only part of a mortgage loan[815] could be at most 75% of the auction value of the mortgaged house. Again, the purpose of this provision was the prevention of overindebtedness: if borrowers are obliged to pay instalments, they gradually reduce the amount owed

[814] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 85.

[815] An interest-only loan is a loan without periodic redemptions but with periodic interest payments only.

to the credit provider, which reduces the likelihood that, in the event of falling house prices, the sale price of the house will be less than the amount owed.[816] Furthermore, Article 7 was deemed to enhance the stability of the financial system: this provision reduced the risk for banks to provide mortgage loans, since the buffers created by the instalments reduced the impact of borrowers who cannot comply with their financial obligations anymore (in case, after a forced auction, the sale price of the house is not be enough to repay the initial loan).

The ACM found that Article 7 of the 1998 Mortgage Loan Code violated the Dutch Cartel Prohibition, as it reduced the borrowers' choice: loans with an interest-only part of more than 75% of the property's value would no longer be available. The size of the interest-only part of the loan was deemed to be a significant competitive parameter.[817] Indeed, there was significant demand for mortgage loans that were >50% interest-only: in 2000 20-30% of the provided mortgage loans were >50% interest-only,[818] and this percentage rose to 47% in 2008.[819] In other words, the interest-only part of the loan was an important product feature. The restriction of consumers' choice on this point could therefore have resulted in a significant reduction of consumer surplus.

So, Article 7 of the 1998 Mortgage Loan Code served two banking regulatory interests – consumer protection and safeguarding the financial stability – while it restricted competition. Below it is explained how the Exemption Analytical Framework would solve the conflict of these competing public interests within the Exemption Possibility.

[816] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 48.

[817] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 94.

[818] AFM, *Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2009, p. 11.

[819] AFM, *Feedbackstatement Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2010, p. 10.

4.2. Article 7 – First Condition

First Condition in the Exemption Analytical Framework

First Condition: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

Exemption Analytical Framework:

- All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition.
- All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition.
- Paternalistic benefits cannot be considered.

The application of the First Condition in the Exemption Analytical Framework separates the agreement's benefits that can be translated into economic welfare, from those benefits that *cannot*. With regard to the first banking regulatory interest that Article 7 served, i.e., consumer protection through the prevention of overindebtedness, this exercise has already been set out in Section 3.2. It was there concluded that the prevention of overindebtedness is unlikely to constitute an Economic Benefit.

With regard to the second banking regulatory interest of Article 7, the protection of financial stability, it is concluded that this is indeed a benefit that *in principle can be translated into economic welfare terms*. *In practice*, however, this seems much more difficult. As explained in Chapter 3.5.3.2., the risks that banks, and mortgage loan providers in general, pose on the stability of the financial system form a negative externality. The internalisation of negative externalities increases societal economic welfare.[820] Nevertheless, although in theory this internalisation could result in Economic Benefits, it is less clear that this is feasible in practice. Indeed, there are pertinent difficulties in establishing the size of these effects in a sound manner. It has even been argued that it is so difficult to quantify the benefits of increased financial stability, that it is not appropriate to use classical cost-benefit analyses to determine the desirability of measures increasing financial stability, e.g.: *"(…) because the*

[820] I.e. the sum of the economic welfare that producers and buyers generate for society; see Chapter 2.2.1.4.

financial system is so complex that it is impossible to prove *that financial regulation will* succeed *in avoiding or mitigating crises.*"[821]

Without a doubt, establishing the benefits of certain self-regulation for financial stability is very difficult, even if it is acknowledged that for the Exemption Possibility no exact calculations are required since sound estimates suffice (see Chapter 4.A.2.2.2.). Perhaps a 'shortcut' reasoning is appropriate for these kinds of benefits, if it is undisputed that the accompanying economic welfare increases for the borrowers are so large and robust that the anti-competitive effects are certainly outweighed.[822] After all, the Second Condition only requires that it is *probable* that the buyers are not made worse-off. In any event, whether such an exercise is too difficult for the determination cannot be judged here and should be assessed on a case-by-case basis. However, unless an easy 'shortcut reasoning' can be applied, due to the complexity it will probably be difficult to use the improvements of the financial stability in determining the Exemption Possibility.

4.3. Article 7 – Second Condition

Second Condition in the Exemption Analytical Framework

Second Condition: the agreement must allow customers a fair share of the resulting benefits.

Exemption Analytical Framework:

- Whether the agreement's benefits are sufficiently beneficial, depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.
- The group of buyers to be considered consists of the buyers in affected markets, including future buyers. Buyers in non-affected markets must not be considered

[821] H.J. Allen, *A New Philosophy for Financial Stability Regulation*, Loyola University Chicago Law Journal, Vol. 45, 2013, p. 189. Allen therefore proposes to apply a form of the 'precautionary principle' to assess whether measures to safeguard financial stability are beneficial on balance. This principle implies that there is a rebuttable presumption that financial stability regulation is warranted. Nevertheless, Allen acknowledges that this precautionary principle could be incorporated in some form of cost-benefit analysis. See: Allen, cited above, pp. 195-196.

[822] For a critique see e.g.: J.H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, The Journal of Legal Studies, Vol. 43, No. S2, 2014, p. S63 *et seq*. Cochrane argues that the effects of banking crises need not be large and that other causes than financial instability – such as bad (financial) regulations and policies – create much greater costs.

unless these buyers are the same persons/entities as the buyers in the affected market.

- Benefits for society must not be considered, in conformity with the legislature's position.
- The beneficiaries receive a fair share of the agreement's benefits, only if they are at least compensated for the anti-competitive harm done to them.

In its decision the ACM concluded, without any substantiation, that despite the financial stability benefits and the consumer protection benefits that Article 7 of the 1998 Mortgage Loan Code implied for the borrowers, the reduction in choice (i.e. the anti-competitive effect) was so severe that it could not be held that the buyers received a fair share of the benefits.[823] The ACM omitted to estimate both the magnitude of the anti-competitive effects and the benefits for the borrowers. This is unfortunate, since it can now not be verified whether the ACM based its conclusion on a correct analysis. The application of the Second Condition in the Exemption Analytical Framework requires a monetisation of both the consumer surplus losses due to the restriction's anti-competitive effects and of the consumer surplus gains because of the restriction's benefits. Carrying out such an economic exercise is outside the scope of this book, but with regard to Article 7 of the 1998 Mortgage Loan Code the following observations can be made regarding the application of the Exemption Analytical Framework.

With regard to the consumer surplus losses, it is relevant, that many consumers favour mortgage loans that are completely or partially interest-only loans and therefore the limiting of this product feature may very well result in significant consumer detriment.[824] Consequently, the additions to the consumer surplus as a result of the restriction must also be significant, so that on balance borrowers are not made worse off.

With regard to the size of benefits of Article 7, first the financial stability benefits are discussed and next the benefits of reducing overindebtedness.

[823] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, paras. 89, 113.

[824] In the present case the maximisation of the interest-only part of the loan did not affect the maximum loan capacity, since another rule in the code prescribed that this capacity always had to be calculated based on the monthly payment obligations of a 30-years annuity mortgage loan.

Financial stability benefits. The risks that financial products cause for third parties or society are negative externalities. The benefits of remedying a negative externality for society would normally not be considered in the Second Condition. However, mitigating this negative externality may form an exception to this general rule, as will be explained below.

Incorporating the risks for financial stability into the price of a mortgage loan is probably not just a cost increase, but rather a product modification, which implies a demand curve shift. Indeed, although disruption in the financial system harms the real economy and society, it causes of course the most immediate damage to the financial sector. In an unregulated setting a bank does not take into account the risks it imposes on third parties, such as the customers of other banks. Likewise, the bank's own customers are affected by the omission of other banks to take financial stability risks into account. Consequently, for bank customers there is merit in having an industry-wide regulation that ensures that the risks taken by other banks do not affect their bank. In other words, it is to be expected that borrowers would value the introduction of an industry-wide rule that reduces the risk for financial instability. The protection of financial stability appears to be an effect that may be translated into consumer surplus increases. Only if the borrowers' appreciation is insufficient, from the government's or rule-maker's perspective – this empirical question cannot be answered here – would there be a need for paternalistic measures and would the abovementioned paternalism caveat apply.

Preventing overindebtedness. In order to establish to what extent borrowers may appreciate that the introduction of the restriction would reduce the likelihood that the sale price of the house would be less than the amount owed, it must also be determined how large this likelihood would be in the counterfactual situation, i.e., the situation without the restriction. In other words, it is not sufficient to merely substantiate that the likelihood of residual debts decreases, but it is also necessary to establish the magnitude of the improvement for consumers. For example, some have doubted that the provision of interest-only mortgage loans resulted in a substantial problem with regard to residual debt risks,[825] while others acknowledged that the provision of these loans indeed caused an undesirablely high chance of too-large residual debts.[826] Furthermore, it must be established whether and to what extent the maximisation of the interest-only part improves the situation: the monthly instalments of a regular annuity mortgage loan consist in the first years of predominantly interest

[825] Consumentenbond, *Reactie op Consultatiedocument van de AFM*, September 2009, Toetskader Hypothecaire Kredietverlening, 2009, pp. 12-13.

[826] See e.g.: SEO report, *Publieke Belangen en Hypotheekregulering*, 2011, pp. 78, 83.

payments, while only later does the repayment of the principal increase. This means that in the first years such an annuity mortgage loan very much resembles an interest-only mortgage loan,[827] which begs the question how effective the proposed rule is, or whether additional measures with regard to annuity mortgage loans could be required.

In addition, it is relevant to acknowledge that certain effects may have a *paternalistic* motive and that therefore it may be impossible to translate these effects into consumer surplus. The AFM has considered that a good argument for maximising the interest-only part of a loan is that a substantial percentage of consumers who took an interest-only loan were unaware of the fact that on the expiration date the loan must be fully repaid, and that they may not have saved enough funds for this.[828] In fact, this shows a lack of knowledge on the part of these consumers. Maximising the interest-only part is one way to remedy this information issue: albeit it an incomplete and drastic solution. However, it can also be concluded that most consumers (56%) in fact were aware that they had to repay the loan on its expiration date and at least for these borrowers it is paternalistic to decide that they may not take a loan that has to be fully repaid on the expiration date. It has been set out in Chapter 4.A.2.4. that paternalistic benefits cannot automatically translate into consumer surplus effects; on the contrary, in principle this cannot be done.

Opposite Positions of the AFM/Minister and the ACM. Although this book is not the right place to come to a definitive conclusion on whether the Second Condition was fulfilled, it is here observed that it is by no means obvious that the benefits of introducing a maximum interest-only part of 75% of a mortgage loan are on balance detrimental for consumers. Indeed, in 2011 the Minister and the AFM agreed that an even stricter rule, limiting the interest-only part to 50% of the loan, was necessary to ensure a sufficient degree of consumer protection.[829] The Dutch associations of banks and insurers adopted this rule into the Dutch Mortgage Loan Code, in a (successful) attempt to prevent the introduction of a governmental rule prescribing the repayment

[827] E.g.: after five years the repaid part of a 30-year annuity mortgage loan with an interest rate of 3%, is only 11%. See: <https://www.consumentenbond.nl/hypotheek/annuiteiten-of-lineaire-hypotheek>

[828] An AFM study of 2008 revealed that 44% of borrowers who recently took a (partial) interest-only loan did not know that on the expiration date the loan had to be fully repaid. AFM, *Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2009, p. 11; AFM, *Feedbackstatement Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2010, p. 10.

[829] Letter of 21 March 2011 by the Dutch Minister of Finance: Parliamentary article, *Kamerstukken II 2010/11*, 29507, No. 94, pp. 1-2. Perhaps surprisingly, during the build-up in 2009-2011 to the new 2011 Mortgage Loan Code, the improvement in the stability of the financial system seemed to play no role as a benefit of introducing a maximum interest-only part.

within seven years of the loan part in excess of the house's purchase price.[830] So, although from a legal perspective the new rule formed an agreement between private parties, this agreement was clearly concluded because of the will of the Minister and AFM that the credit providers improve the consumer protection effects of the Mortgage Loan Code.[831] The Dutch Home Owners' Association[832] endorsed the new stricter rule. It has been reported that the Dutch Consumers' Association also favoured this new rule,[833] although this association had previously questioned whether interest-only mortgage loans indeed formed a significant, industry-wide risk of overindebtedness.[834]

Unfortunately the Minister and the AFM have not mentioned whether they considered the perceived benefits of the stricter rule for consumers to outweigh its anti-competitive effects, so that it cannot be concluded that ACM drew the wrong conclusion in 2000 (the ACM did not publish its opinion on the new 2011 Mortgage Loan Code either). Nevertheless, it may be presumed that the Minister and the AFM considered that the benefits trumped the anti-competitive effects: the ACM requested the AFM in November 2009 to verify whether its new mortgage loan policy would comply with the four conditions of the Exemption Possibility. It can be assumed that the Minister and the AFM checked whether the new 2011 Mortgage Loan Code complied with competition law, since this code was accepted as an alternative in the new governmental regulation.[835]

In any event, it is at least remarkable that in 2011 the Dutch banks, among others, openly agreed upon an anti-competitive restriction that, with a different but essentially similar substance, had not met the Second Condition of the Exemption Possibility ten years earlier according to the ACM. Presumably, the banks' self-assessment of the 2011 rule resulted in the conclusion that this agreement complied with all four conditions of the Exemption Possibility. Since the banks and the ACM drew different conclusions with regard to the fulfilment of the Second Condition of Article 7, or a

[830] It has been reported that the AFM disliked the Minister giving the banks the opportunity to evade governmental regulation through introducing stricter self-regulation. See: Het Financieele Dagblad of 30 November 2010, *AFM Boos over Aanpak Hypotheek*, p. 11.

[831] The Minister and AFM, however, did not prescribe or compel the CHF to conclude the new Mortgage Loan Code. In other words, the association still had discretion with regard to the substance and conclusion of the agreement, which means that the Cartel Prohibition remained applicable (see footnote 690).

[832] Vereniging Eigen Huis, press release of 20 December 2010.

[833] Consumentenbond, statement of 24 March 2011 with regard to the introduction of the new rule in the 2011 Mortgage Loan Code.

[834] Consumentenbond, *Reactie op Consultatiedocument van de AFM, September 2009, Toetskader Hypothecaire Kredietverlening*, 2009, pp. 12-13.

[835] Letter of 21 March 2011 by the Dutch Minister of Finance; Parliamentary article, *Kamerstukken II 2010/11*, 29507, No. 94.

similar rule, the question of course arises as to which conclusion is the right one.[836] It may be relevant in this context that in 2009 the AFM took the view that because of their increased popularity, interest-only mortgage loans had become a problem.[837] If this view was right, which has been challenged by others,[838] the introduction of Article 7 in 2000 could probably have contributed to limiting this problem. Consequently, it can be questioned whether the ACM was correct in prohibiting this rule. Admittedly, it might also be possible that after 2000 certain relevant facts changed, and that because of that two different but both correct conclusions were drawn; this study has not identified such a change, however.

The impression arises that it depends on the *decision maker's tasks,* i.e. serving competition interests in the case of the ACM and serving the protection of financial consumers in the case of the AFM and the Minister of Finance,[839] whether the decision-maker deems the restriction concerned permissible. This cannot be the case: the application of competition law in equal situations should lead to equal outcomes; the identity and focus of the entity performing the competition law assessment should not matter. Indeed, the significance of the consumer protection benefits should be assigned the same value by regardless which decision-maker: a contract party, a judge, the ACM or another governmental institution. If this is not the case, legal certainty is at issue and undertakings cannot determine whether their activities are legal; the Exemption Analytical Framework aims to provide this legal certainty.

[836] Even though the notification system was replaced for the self-assessment system in 2004, the substance of the Cartel Prohibition and of the Exemption Possibility did not change between 2000 and 2011. So, the law applicable to Article 7 of the 1998 Mortgage Loan Code and to the 2011 rule was unchanged.

[837] AFM, *Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2009, p. 11; AFM, *Feedbackstatement Consultatiedocument Toetskader Hypothecaire Kredietverlening*, 2010, p. 10.

[838] Consumentenbond, *Reactie op Consultatiedocument van de AFM*, September 2009, Toetskader Hypothecaire Kredietverlening, 2009, pp. 12-13.

[839] The focus of the actual parties to the code, i.e. the credit providers, is probably on their own interests and not on competition or consumer protection interests; their view is therefore not so relevant for determining whether consumers receive a fair share.

4.4. Article 7 – Third Condition

Third Condition in the Exemption Analytical Framework

Third Condition: the competition restriction must be indispensable to the attainment of the benefits.

Exemption Analytical Framework:

- The applicable test is only whether the competition restriction is suitable for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternative test' is not required.

The ACM concluded that Article 7 was not indispensable to protecting consumers from overindebtedness, nor to protecting financial stability.[840] First, the ACM stated that limiting the interest-only part of loans would only in part contribute to preventing overlending, since loans could still be higher than the execution value of the house (in practice up to 125%). Furthermore, the authority suggested that overborrowing could be limited by charging higher interest rates for the interest-only part of the loan that exceeded 75% of the execution value. The ACM was correct in its view that limiting the interest-only part of loans is not the only way of preventing overindebtedness and that other measures are also needed to accomplish this. Nevertheless, Article 7 specifically addressed the problem that financial distress could affect consumers more severely if they had not already (in part) repaid their loans.[841] The other measures are not capable of mitigating this specific issue.

With regard to financial stability concerns, the ACM pointed out that DNB already required banks to hold additional capital for mortgage loans that exceeded 75% of the execution value, and it implied that Article 7 would not be necessary anymore. This reasoning seems incomplete, as DNB's policy may function as a discouragement to providing loans of more than 75% of the execution value, but Article 7 also had a different effect. This provision was meant to specifically address the risks of not periodically repaying parts of the mortgage loans, too.[842]

[840] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, paras. 90-93.

[841] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 48.

[842] ACM decision of 4 May 2000, *Cases 235 and 1189, Contactorgaan Hypothecair Financiers en Gedragscode Hypothecaire Financieringen*, para. 50.

Within the Exemption Analytical Framework the Third Condition implies a check on whether it is necessary that action be taken collectively. With a view to that, it could argued that each bank could have unilaterally decided to limit the interest-only part of the mortgage loans it provided to help to protect its customers against overindebtedness. Article 7 would then fail the indispensability test of the Third Condition, also pursuant to the Exemption Possibility Framework. However, with regard to the goal of protecting financial stability, this would not do. With unilateral action a bank cannot protect itself against the risk of financial instability caused by other banks. In addition, with regard to the goal of preventing overborrowing, a reason that perhaps warrants a collective action is the presence of a first-mover disadvantage that would block the taking of unilateral measures. Such a disadvantage could arise if sufficient customers of a bank limiting the interest-only part of mortgage loans went to banks still offering loans with greater interest-only parts, which would render the limitation policy unprofitable. A collective action makes switching to others banks impossible. Whether this first-mover disadvantage existed in practice cannot be established here, but at first sight it seems plausible.

Contrary to the ACM's judgment, in the Exemption Analytical Framework Article 7 would probably be deemed to comply with the Third Condition, as it is a suitable manner to address the specific risks of consumers not repaying their loans (before the loans' expiration dates).

4.5. Article 7 – Fourth Condition

Fourth Condition in the Exemption Analytical Framework

Fourth Condition: the agreement may not eliminate a substantial part of competition in the market.

Exemption Analytical Framework:

- The restriction must not eliminate innovation on a key product feature beyond the short term.

Although the ACM is not explicit about it, the authority probably found that Article 7 did not comply with the Fourth Condition. Indeed, it held that the limitation of the interest-only part of standard mortgage loan products by the whole industry was a severe restriction of competition on an important product feature.

In the Exemption Analytical Framework the Fourth Condition's aim is to safeguard innovation benefits in the longer term. Although it is a factual question, it seems unlikely that Article 7 significantly hindered the generation of innovation benefits for mortgage loan products.

5. Application of Article 106(2) TFEU to Case Study 1

Sections 3. and 4. covered the application of the Exemption Analytical Framework to the case of the Mortgage Loan Code. This section discusses the application of Articles 106(2) TFEU and 11 DCA with regard to the Cartel Prohibition.[843] As set out in Chapter 4.B.1., if Article 106(2) TFEU was applied to Articles 6 and 7 of the Code, they could have escaped the effects of the Cartel Prohibition. Since in reality these articles were not applied in the case of the Mortgage Loan Code, the discussion below only sets out a normative view on how these articles might have been applied; for readability purposes references are only made to Article 106(2) TFEU, but these are meant relate to Article 11 DCA as well.

The Article 106(2) Analytical Framework

SGEI condition in the Article 106(2) Analytical Framework
SGEI condition: a service of general economic interest must be at stake.

Article 106(2) Analytical Framework:

- The rationale for using Article 106(2) TFEU must be an Efficiency Justification or Non-economic Justification, which distinguishes the SGEI from ordinary economic services.
- The withholding of the provision of certain services may also be the subject of Article 106(2).

[843] The undertaking condition and Union trade condition of Article 106(2) TFEU are not discussed, due to a lack of significance.

Entrustment condition in the Article 106(2) Analytical Framework
Entrustment condition: public authorities must have 'entrusted' the task of rendering this service to an undertaking.

Article 106(2) Analytical Framework:

- The entrustment act of the government must include its view that remedying the Efficiency Justification or Non-economic Justification is more important than safeguarding competition.
- It is not a requirement that the service provider make its service available to all interested buyers.

Obstruction condition in the Article 106(2) Analytical Framework
Obstruction condition: an exemption is necessary, because otherwise the service cannot be provided due to the 'obstruction as the result the application of EU (competition) rules'

Article 106(2) Analytical Framework:

- The application of Article 106(2) TFEU is subject to a 'manifestly-disproportionate check'.

Undertaking condition in the Article 106(2) Analytical Framework
Undertaking condition: the service provider must be 'an undertaking'.

Union trade condition in the Article 106(2) Analytical Framework
Union trade condition: 'trade must not be affected to such an extent as would be contrary to the interests of the Union' due to the trumping of the EU (competition) rules.

The first question to answer is whether the provision of mortgage loans to consumers should be considered an SGEI.[844] This is a matter of public policy; it is for the government to determine. Nevertheless, from a legal perspective, it can be mentioned that this is feasible because 1) Member States enjoy a wide margin of discretion when labelling a particular economic activity as an SGEI, and 2) this activity may be regarded to have 'special characteristics' compared with other services. These special characteristics are due to the extensive regulation of this service and the significance

[844] Whether the provision of mortgage loans would be deemed an SGEI in accordance with the current state of the law, is another question. Probably not, if only because banks are not required by law to provide such loans to interested consumers (see Chapter 4.B.2.2.).

of the service in the eyes of the government, which follows from the position that it is in the general interest that many citizens are capable of acquiring their own house. Furthermore, pursuant to the normative view taken in this book, it should not be necessary that a bank be required to provide a mortgage loan to each interested consumer if this consumer is eligible for receiving such a loan in order to qualify for the provision of mortgage loans as an SGEI.

With regard to the entrustment condition, it is probable that the Minister of Finance or the Cabinet would be willing to take an entrustment measure considering their support for the Code – assuming there was a legal basis for such as measure. In this book it is maintained that the entrustment measure should include an explicit consideration by the governmental body that the anti-competitive effects of the undertakings' self-regulation are outbalanced by its benefits in the general interest.

Finally, the obstruction condition, or proportionality test, is most likely fulfilled, since due to the explicit endorsement of the entrustment measure by the government, only the manifestly-disproportionate-check must be performed (*cf.* the normative view in this book). Admittedly, one may question the effectiveness of Article 6 of the Code in protecting borrowers against overindebtedness, as the credit providers were free to use their own loan-to-income ratios, but this is a factual question to be solved in an in-depth analysis.

CASE STUDY 2 – THE COMMISSION BAN AGREEMENT

6.1. Introduction to Case Study 2

In February 2013 the AFM announced that it had reached an agreement with six Dutch major banks on the termination of the provision of investment services paid for by so-called kickback or distribution fees – hereinafter: the Commission Ban Agreement. Such fees are commissions paid by an investment fund or its manager to the intermediary who realised a sale of a fund's product. **The Commission Ban Agreement** provided for the abolishment of the receiving of any such commission from the funds and funds' managers. Apparently, the conclusion of the agreement was initiated by the banks, while the AFM merely coordinated the conclusion process. The real reasons that the banks started this initiative are unknown, but it is clear that the agreement was concluded after the Minister of Finance had announced

that he intended to introduce governmental regulation establishing a commission ban.[845] It is unclear why the banks did not want to await the outcome of the legislative process; the AFM favoured not awaiting the legislative process in part because of the uncertainty of the result.[846] Together the six banks covered 80% of the Dutch retail investment services market.[847]

Banks and other investment firms often operate as intermediaries between investors and providers of investment products, e.g., investment funds or investment fund managers. Before the ban on commissions was implemented, a common method of payment for intermediary investment services was through commissions paid by investment funds to banks. In the commission-based system each fund manager pays a single and/or continuous fee to the bank for the rendering of distribution services of the fund's products, which distribution services also include the investment service provided to the investor. Indirectly the distribution fees are paid for by the investors, since these fees are yielded by the investors paying purchase fees to the investment funds. So, although in the commission-based system the investors do not directly pay the investment firms for their services, indirectly the investors do pay them through the fees paid to the funds. In other words, receiving an investment service based on the commission system is not free, although to some investors the system may have seemed to be free since they made no direct payments the investment service provider.

The aim of the Commission Ban Agreement was to increase the transparency and independence of the provision of retail investment services.[848] Briefly put, there were consumer protection motives behind the agreement.

The *transparency* of the services rendered to consumers was expected to increase, since the switch to the direct payment system implied pre-sale clarity on the service price as well as the abolishment of hidden commission payments of the fund managers to the banks. It can be doubted to what extent the Commission Ban Agreement was necessary to increase transparency, since it would have also been possible to agree on an increase of transparency through improved disclosure requirements.[849]

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[845] See: letters of the Minister of Finance of 15 March 2011; Parliamentary article, *Kamerstukken II* 2010/11, 31980, No. 38, pp. 5-6; Parliamentary article, *Kamerstukken II* 2012/13, 21 50107, No. 971, p. 3.

[846] According to an AFM spokesperson; see: <http://www.fondsnieuws.nl/nieuws/headlines/artikelen/15259-herenakkoord-over-afschaffen-kickback.html>

[847] According to an AFM spokesperson; see: <http://www.fondsnieuws.nl/nieuws/headlines/artikelen/15259-herenakkoord-over-afschaffen-kickback.html>

[848] AFM, press release of 14 February 2013.

[849] At the time of the conclusion of the Commission Ban Agreement, the Dutch Decree on the Supervision of the Conduct of Financial Enterprises pursuant to the Act on Financial Supervision (in Dutch: *Besluit Gedragstoezicht financiële ondernemingen Wft*) already included certain disclosure requirements for commissions. These requirements were included in Article 168a of this Decree, which provision implemented Article 26 of Commission Directive 2006/73/EC of 10 August 2006 (i.e. the EU Directive implementing the MiFID).

The increased *independence* of the investment firms as a result of the Commission Ban Agreement is effected through the abolishment of the conflicts of interest between the bank as a reseller of the funds' products on the one hand, and the consumer as an investor on the other hand. These conflicts arise, first, because a bank is mainly or partially incentivised to resell investment products that deliver it the highest commissions, while consumers are best served by suitable investment products for the lowest price – hereinafter: the '**product bias**'. The best product for a consumer need not be the most attractive product for a bank to resell and in those situations there is an incentive for the bank not to offer a consumer the most suitable product – at least in the short run.[850] Even in the context of execution-only services – implying that the investor is not guided by the bank when making investment decisions – commissions may cause a conflict of interest, since it is attractive for a bank to only offer the funds that pay the highest commissions regardless of whether they are the best funds for their customers.[851] In addition, a conflict of interest exists with regard to the number of sales – hereinafter: the '**sales bias**'. Since a bank receives a commission for each sale, it is in the bank's interest that an investor make as many purchases as possible, while the optimal number of transactions for an investor is lower since he needs to take the transaction costs into account, too. Consequently, a bank has an incentive to advise executing more transactions than is optimal for the investor.

It can be argued that if a bank would systematically offer services that are only in its own interest and not necessarily in the interest of its customers, this would become known in the long run (see Chapter 3.6.2.3.). As a consequence, customers would no longer patronise this bank and its investment services business would then cease to exist. To avoid this happening, it is rational for a bank to serve its customers' interests only. Whether the customers indeed exercise a disciplining force on a misadvising bank depends in part on the ability of customers to identify the bank's wrong advice and investment choices; the Dutch Government has concluded that consumers do not possess this ability.[852] This is in conformity with the general notion on the ability of consumers to discipline financial intermediaries.[853]

[850] There has been debate about whether investment services providers in general indeed focus on their own interests and not on their customers' – some market parties have denied that this has been the case. See: Dutch Association of Financial Intermediaries and Advisors (*Vereniging van Vermogensbeheerders & - Adviseurs*), *Reply to the Consultation Document 'Amendment Act 2014 to the Act on Financial Supervision' of 29 April 2013*, p. 3.

[851] See e.g. the Explanation to the Amendment Decree Financial Markets 2014, published in the Dutch Government Gazette (in Dutch: *Staatsblad*) No. 537, 2013, p. 26. This should only be a problem if insufficient investors switch from investment firms that do not offer the best products for investors to firms that do offer the best products.

[852] Explanation to the Amendment Decree Financial Markets 2014, published in the Dutch Government Gazette (in Dutch: *Staatsblad*) No. 537, 2013, p. 26.

[853] See e.g., in the context of intermediary services including provision of mortgage loans and life insurance: SEO report, *Evaluatie Provisieregels Complexe Producten*, 2010, pp. 7-8.

Since the Commission Ban Agreement was an agreement between undertakings, it is relevant to check whether it restricted competition and violated the Cartel Prohibition. There is no decision or public opinion of the ACM on the Commission Ban Agreement, nor is there a court judgment on the compatibility of the agreement with the Cartel Prohibition. Nevertheless, there are good reasons to assume that the agreement restricted competition.

6.2. Violation of the Cartel Prohibition

The Commission Ban Agreement reduced consumers' choice since it precluded consumers from purchasing investment services based on a commission business model. The agreement implied, among other things, that consumers had to pay directly for investment advice instead of paying for this advice indirectly over time, through the commissions that the fund manager pays to the bank. Especially for those consumers who are not able or willing to directly pay a considerable fee for such advice, the commission ban may mean the loss of a preferred service model. Furthermore, the cost for the consumer of a commission-based investment service could be lower than a service based on direct payment to the bank.[854]

The Commission recognises the reduction of product variety as an anti-competitive effect in the context of Article 101 TFEU,[855] so it is probable that the reduction in choice as a result of the Commission Ban Agreement formed a restriction of competition within the meaning of this provision. The ACM also considers the reduction of product variety to be a restriction of competition; the Dutch Mortgage Loan Code is an example of this: the banks' envisaged agreement to limit the interest-only part of a mortgage loan was deemed to reduce consumers' choice and therefore violate the Cartel Prohibition (see Section 2.3.).[856]

[854] This mechanism is explained by Oxera; Oxera, *Retail Distribution Review Proposals: Impact on Market Structure and Competition*, 2009, pp. 40-41. This report was written at the request of the UK FSA, the predecessor of the current FCA, to set out the competitive implications of the introduction of regulation that includes on a commission ban for investment products.

[855] Commission Guidelines on the application of Article 81(3) of the Treaty of 27 April 2004, para. 16. The *CECED* case discussed in Chapter 4.A.2.9. is a concrete example of a case in which the Commission considered the reduction of consumer choice to be anti-competitive; due to the collective agreement consumers would be deprived of the possibility to buy 'unsustainable' but legally produced washing machines (Commission decision of 24 January 1999, *Case IV.F.1/36.718 - CECED*). The *Intel* case is another example, in the context of Article 102 TFEU: Commission decision of 13 May 2009, *COMP/C-3/37.990 - Intel*, paras. 1598-1603.

[856] In general, undertakings are required to determine their commercial conduct independently. So, if an undertaking unilaterally and independently decides to reduce its assortment, the Cartel Prohibition does not apply, but a collective agreement to reduce product variety usually falls within the scope of this prohibition.

What was the magnitude of the anti-competitive harm? One possible method for establishing the consumer detriment as the result of the sales bias may be to first determine, e.g. through spot checks, the expected percentage of transactions that seem to be motivated by the sales bias, and subsequently to use this percentage to calculate the amount of avoidable transaction costs based on the annual expenses of retail investors on transaction costs. A similar method could be used to establish the costs of mis-selling due to inappropriate advice.

There are other methods to get some indication of the scope of the benefits of all avoided mis-selling and unnecessary transaction costs. When the FCA planned to introduce regulations including a commission ban for retail investment products, it performed a cost-benefit analysis. For this analysis it calculated the consumer harm of various financial affairs in the past that were caused by the mis-selling of financial retail products. The FCA was apparently able to establish the percentage of products that were mis-sold in the context of those affairs, as well as the accompanying damage for the investors. This allowed the UK authorities to estimate in monetary terms the annual consumer detriment that could be avoided by introducing the new regulations, which approach assumes that the investigated mis-selling was caused by flaws that have been remedied by the new regulations.[857]

This book is not the appropriate place for establishing firmly the magnitude of the anti-competitive harm of the Commission Ban Agreement. There are, however, reasons to consider this harm to be significant. First, before the agreement was concluded, the majority of consumers chose to receive investment advice on a commission basis and not through direct payment, even while there were investment firms offering services based on direct payment.[858] This indicates that the commission-based service was the preferred service method. Secondly, it's been reported that in the UK after the introduction of rules similar to the Commission Ban Agreement, a significant number of consumers seeking financial advice no longer have access to this service.[859] This implies that due to the direct payment requirement a significant number of consumers

[857] FSA (now: FCA), *Policy Statement 10/6 - Distribution of Retail investments: Delivering the RDR - Feedback to CP09/18 and final rules*, 2010, Annex 1, paras. 44-56.

[858] E.g., in 2008 the industry association for 'genuinely independent' investment firms (i.e. the *Vereniging Echt Onafhankelijke Vermogensadviseurs*) was formed. Members of this association do not accept commissions from investment funds or other third parties, or they directly transfer any commission received to the customer. See: Het Financieele Dagblad, 10 January 2009, p. 14.

[859] It's been reported that after the introduction of a commission ban on various financial products, 60,000 consumers seeking financial advice were turned down by financial advisors. See e.g.: <http://www.ifaonline.co.uk/ifaonline/news/2322640/fca-still-struggling-to-gauge-true-effects-of-advice-gap> The commission ban may indeed have had significant adverse consequences, see e.g.: <https://www.ftadviser.com/2016/07/19/regulation/rdr/fca-admits-rdr-contributed-to-advice-gap-chujPxa8fmBkivLaaAxxfN/article.html>

are deprived of their favoured service. It also casts doubt on the effectiveness of the Commission Ban Agreement to increase consumer protection, since due to the impossibility to receive advice, consumers may decide to invest without expert guidance and turn to execution-only services. To conclude, the magnitude of the anti-competitive harm is probably substantial. A more concrete quantification and translation into economic welfare terms could be provided through the survey method (see Chapter 4.A.2.2.2. above).

7.1. Commission Ban Agreement – First Condition

In this section the First Condition of the Exemption Analytical Framework is applied to the case of the Commission Ban Agreement.

First Condition in the Exemption Analytical Framework

First Condition: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

Exemption Analytical Framework:

- All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition.
- All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition.
- Paternalistic benefits cannot be considered.

The major benefit realised by abolishing the commission system is the removal of the conflict between the banks' interests and the investors' interests. Since the banks will not receive any payment from the fund managers anymore after the conclusion of the Commission Ban Agreement, they become indifferent with regard to the selection and recommendation of investment funds. Consequently, they have an incentive to select and recommend the funds that are the best for their customers, since this will in the long term probably contribute to a good reputation and therefore customer demand. The removal of the product bias is expected to reduce the sale of unsuitable products to consumers, which is beneficial for them. In addition the sales bias of the banks is removed, since they do not earn more if more transactions are made – most likely, a

bank only earns more if it provides more investment services to its customer.[860] The benefits for the consumers are that they are not burdened with, or recommended to, incur more costs than appropriate. Other consumer benefits might develop, but since it is not quite sure whether this will happen, these are not further discussed here.[861]

The benefits produced by the Commission Ban Agreement can be translated into economic welfare. In fact, this agreement results in the offering of a new type of investment service, both with regard to the method of charging the investors as well as to the expected quality improvement of the service. Through establishing the demand curve for this new service the consumer surplus can be determined. The demand curve for the new service may be determined before the introduction of the Commission Ban Agreement through the use of the survey method. Consequently, the economic welfare consequences of the introduction of the Commission Ban Agreement can be determined by comparing the demand curve for the investment services covered by the Commission Ban Agreement and the demand curve of the investment services offered by the six banks before the introduction of this agreement.

[860] This only holds if investment firms are not reluctant to charge a service fee if they advise not to purchase a product; this may not necessarily be true. See for a description of this phenomenon: FSA (now: FCA), *Consultation Paper 09/18 - Distribution of Retail Investments: Delivering the RDR*, 2009, Annex 2, para 29.

[861] As mentioned in Section 6.1., it is doubtful whether the claimed transparency benefits will arise and whether the Commission Ban Agreement would be the cause of that. Other benefits that might arise are (1) an increase in consumers' trust in investment firms, since they realise that the conflicts of interest are removed, which could lead to consumers seeking advice who otherwise would not have done so due to mistrust in the industry, and (2) fiercer price competition because investment firms now shop around unbiasedly for their customers and are better able to identify funds charging prices that do not correspond to their quality. The mechanism of benefit (1) is described in: FSA (now: FCA), *Consultation Paper 09/18 - Distribution of Retail Investments: Delivering the RDR*, 2009, Annex 2, paras. 36-36. The mechanism of benefit (2) is described in: Oxera, *Retail Distribution Review Proposals: Impact on Market Structure and Competition*, 2009, on pp. 42-44.

7.2. Commission Ban Agreement – Second Condition

Second Condition in the Exemption Analytical Framework

Second Condition: the agreement must allow customers a fair share of the resulting benefits.

Exemption Analytical Framework:

- Whether the agreement's benefits are sufficiently beneficial depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.
- The group of buyers to be considered consists of the buyers in affected markets, including future buyers. Buyers in non-affected markets must not be considered, unless these buyers are the same persons/entities as the buyers in the affected market.
- Benefits for society must not be considered, in conformity with the legislature's position.
- The beneficiaries receive a fair share of the agreement's benefits, only if they are at least compensated for the anti-competitive harm done to them.

The previous section dealt with the question which benefits of the Commission Ban Agreement can, in conformity with the Exemption Analytical Framework, fall within the scope of the First Condition. The Second Condition concerns the compensation of the investors harmed by the anti-competitive effects of the Commission Ban Agreement. The investors must at least be fully compensated for the anti-competitive harm affecting them, in order for the Second Condition to be fulfilled. One can of course only determine whether the investor benefits outweigh the anti-competitive harm, if the magnitude of this harm is known. Although an accurate estimate of the magnitude of the harm cannot be provided here, it was mentioned above that the magnitude of the anti-competitive effects is probably substantial. As a consequence, the scope of the benefits for the harmed investors must also be substantial to make sure that these investors are at least compensated for their harm.

7.3. Commission Ban Agreement – Third Condition

Third Condition in the Exemption Analytical Framework

Third Condition: the competition restriction must be indispensable to the attainment of the benefits.

Exemption Analytical Framework:

- The applicable test is only whether the competition restriction is *suitable* for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternative test' is not required.

Within the Exemption Analytical Framework the Third Condition implies a suitability test of the restriction which aims to check whether there is a causal link between the restriction and the claimed benefits within the meaning of the First Condition (see Chapter 4.A.4.2.). In that respect it can be concluded that the abolishment of the commission system indeed removes the product and sale biases. However, it is questionable whether it was necessary that the banks *agreed on a collective abolishment* of this system. Indeed, each bank that cared about the conflict of interest and wanted to get rid of it for commercial or ethical reasons could have decided to do so unilaterally. At first sight there seems to be no need at all to act collectively to take measures to remove the product and sale biases. The Commission Ban Agreement would therefore also fail the indispensability test of the Third Condition pursuant to the current status of the law.

A reason that perhaps does warrant a collective action is the presence of some sort of first-mover disadvantage that would block the taking of unilateral measures. Such a disadvantage might arise if sufficient customers of a bank abolishing the commission system switched to investment firms that still apply this system, which would render the abolishment unprofitable. A collective action removes the reason to switch, as all banks apply the same system. It cannot be established here whether this first-mover disadvantage existed, but if it did it casts doubt on the desirability of the abolishment from the customers' perspective. Furthermore, the fact that investment firms catering to about 20% of the market did not join the Commission Ban Agreement implies that customers could still switch away from the banks that abolished the commission system. In other words, the first-mover disadvantage problem may not have been solved, which means that this problem cannot be used as a justification for the collective action. To conclude, there are reasons to doubt whether legitimate reasons existed for collectively abolishing the commission system. Consequently, the Commission Ban Agreement may not have fulfilled the Third Condition of the Exemption Possibility.

7.4. Commission Ban Agreement – Fourth Condition

Fourth Condition in the Exemption Analytical Framework

Fourth Condition: the agreement may not eliminate a substantial part of competition in the market.

Exemption Analytical Framework:

- The restriction must not eliminate innovation on a key product feature beyond the short term.

The last condition of the Exemption Possibility concerns the residual competition. As explained in Chapter 4.A.5.2., in the Exemption Analytical Framework the purpose of the Fourth Condition is to ensure that the restriction does not preclude the materialisation of future, unknown innovation benefits. There are good reasons to conclude that the Commission Ban Agreement complies with this condition. First, after the conclusion of the agreement, customers who did not appreciate the abolishment of the commission system could still go to the investment firms that were not parties to the agreement, which represented 20% of the market. Secondly, the Commission Ban Agreement governed only one product feature and consequently various product parameters, such as the service price and quality, remained subject to competition. So, there is still quite some residual competition and sufficient room for the realisation of future innovation benefits.

8. Application of Article 106(2) TFEU to Case Study 2

This section discusses whether Articles 106(2) TFEU and 11 DCA would be appropriate mechanisms for reconciling the Commission Ban Agreement with the Cartel Prohibition as regards the public interest. These articles have in practice not been applied to this case, so below only a normative view on how these articles may have been applied is presented.[862] For readability purposes references are only made to Article 106(2) TFEU, but these are meant relate to Article 11 DCA as well.

[862] The undertaking condition and Union trade condition of Article 106(2) TFEU are not discussed, due to a lack of significance.

The Article 106(2) Analytical Framework

SGEI condition in the Article 106(2) Analytical Framework
SGEI condition: a service of general economic interest must be at stake.

Article 106(2) Analytical Framework:

- The rationale for using Article 106(2) TFEU must be an Efficiency Justification or Non-economic Justification, which distinguishes the SGEI from ordinary economic services.
- The withholding of the provision of certain services may also be the subject of Article 106(2).

Entrustment condition in the Article 106(2) Analytical Framework
Entrustment condition: public authorities must have 'entrusted' the task of rendering this service to an undertaking.

Article 106(2) Analytical Framework:

- The entrustment act of the government must include its view that remedying the Efficiency Justification or Non-economic Justification is more important than safeguarding competition.
- It is not a requirement that the service provider make its service available to all interested buyers.

Obstruction condition in the Article 106(2) Analytical Framework
Obstruction condition: an exemption is necessary, because otherwise the service cannot be provided due to the 'obstruction as the result the application of EU (competition) rules'

Article 106(2) Analytical Framework:

- The application of Article 106(2) TFEU is subject to a 'manifestly-disproportionate check'.

Undertaking condition in the Article 106(2) Analytical Framework
Undertaking condition: the service provider must be 'an undertaking'.

Union trade condition in the Article 106(2) Analytical Framework
Union trade condition: 'trade must not be affected to such an extent as would be contrary to the interests of the Union' due to the trumping of the EU (competition) rules.

First of all, with regard to the need to apply Article 106(2), it is here repeated that this article should only be used if a competition restriction cannot be exempted pursuant to the Exemption Possibility. It follows from the above discussion with regard to the Exemption Possibility that all the Commission Ban Agreement's benefits are most likely Economic Benefits and not Non-economic Benefits (see Box 4.3.). In other words, the limits that the scope of the First Condition sets are no reason to turn to Article 106(2) TFEU. Nevertheless, the Agreement may have generated paternalistic welfare effects which are excluded from the scope of the Second Condition. If the eligible economic welfare effects did not outweigh the anti-competitive harm and the government (e.g. the AFM) wanted to materialise these paternalistic welfare effects anyway, Article 106(2) could be useful. In addition, the Third Condition may not have been complied with, as there are reasons to assume that a collective action by the banks was not necessary to eliminate commissions. This is another reason why Article 106(2) TFEU may be needed as a reconciliation mechanism.

For a successful application of Article 106(2) TFEU it is necessary that the service at issue is an SGEI. It is here deemed possible that the provision of investment services with regard to investment funds to retail clients is an SGEI. These services appear to be different from ordinary economic services, which can be concluded from the extensive government involvement in regulating these investment services (for the involvement of the Ministry of Finance and the AFM, see Section 6.1.). Reasons for this involvement may be the difficulties that consumers have with understanding these services and the great impact that the improper provision of investment services may have for consumers. Without specific regulation covering these investment services, they would probably not be provided in a manner acceptable for the government. The remedying of the market failure associated with the receipt of commissions from investment funds for the distribution of fund participations, may therefore be considered a justification that is different from the regulation of other economic services, and the government could therefore rightfully consider the provision of fund distribution services an SGEI. In any event, whether the provision of investment services with regard to investment funds will actually be deemed an SGEI, will depend to a large extent on the government's arguments on the importance of this service for society and for governmental intervention to ensure the appropriate provision of the service.

The prohibition to receive commissions from investment funds when distributing participations in these funds is not an instruction by the state to perform a certain activity, but rather a measure curbing the performance of an activity. However, this is not problematic pursuant to the Article 106(2) Analytical Framework (see Chapter 4.B.4.1.).

With regard to the entrustment condition, it is probable that the Minister of Finance would be willing to issue an entrustment act which would also include the subordination of competition interests. Indeed, before the banks entered into the Agreement, the Minister had already announced that he would be willing to legislate to procure a commission ban.[863] As governmental regulation would have obliged the banks to ban commissions and competition would consequently have automatically been restricted, it is to be expected that the Minister favoured solving the market failure over maintaining competition.

Finally, it has to be assessed whether it is not manifestly disproportionate to set aside the Cartel Prohibition in order for the banks to be able to conclude the Commission Ban Agreement. This requires a verification of whether it is clearly not the case that the Cartel Prohibition would prevent the banks from distributing investment fund participations without receiving commissions from the funds, under economically acceptable conditions. In this respect the discussion regarding the Third Condition is relevant (Section 7.3.). It was considered doubtful whether a collective action was needed to ban commissions. A bank could probably also decide unilaterally and independently to ban the receiving of commissions, while still rendering its service under economically acceptable conditions. This is of course a factual question which cannot be answered here, but even without further substantiation it should be doubted that the obstruction condition was complied with in this case. For that reason Article 106(2) TFEU would not apply. If both the Exemption Possibility and Article 106(2) cannot be relied upon to subordinate the Cartel Prohibition, other means are required: governmental legislation could be needed (see Chapter 7.C.3.).

[863] See: letters of the Minister of Finance of 15 March 2011: Parliamentary article, *Kamerstukken II* 2010/11, 31980, No. 38, pp. 5-6; Parliamentary article, *Kamerstukken II* 2012/13, 21501-07, No. 971, p. 3.

6. RECONCILIATION MECHANISMS FOR THE MERGER CONTROL REGIME

1. INTRODUCTION

1.1. Introductory remarks

This chapter discusses, in the context of mergers, the potential conflicts between on the one hand competition law and on the other hand public interests served by such transactions. This discussion is made concrete through the specific application of the merger control regime to 'emergency takeovers': an acquisition by one bank of another bank in financial difficulties, which acquisition is required or supported by the financial supervisors or government. The framework proposed therefore focuses on financial stability as a public interest. Nevertheless, this framework can also be used to consider potential conflicts with other public interests. Potential conflicts between merger control rules and the public interest are less prevalent than such conflicts in the context of the Cartel Prohibition, but still they arise occasionally.[864] An example of a public interest relevant in merger cases is the maintenance or increase of local or national employment, as a concentration could preserve weak companies or create a new business which generates new jobs.[865] Other examples of public interests that could be held relevant in the assessment of mergers are public security[866] (including the security of the energy supply[867]), plurality of the media,[868] the protection of cultural diversity[869] and health interests.[870]

The supervisors or government would support an emergency merger due to the risks that a failure of the troubled bank would pose for the stability of the financial sector, or due to the harm of the discontinuance of the failing bank's crucial functions

[864] See also the OECD report, *Public Interest Considerations in Merger Control*, 2016.

[865] See e.g. GC judgment of 27 April 1995, *Case T-12/93 Comité Central d'Entreprise de la Société Anonyme Vittel et al. v. Commission of the European Communities (Vittel case)*, paras. 38-39.

[866] Article 21(4) EUMR.

[867] Commission decision of 26 September 2006, *Case No. COMP/M.4197 - E.ON/Endesa*, para. 40.

[868] Article 21(4) EUMR.

[869] See e.g. Commission decision of 21 September 2012, *Case COMP/M.6458 - Universal Music Group/EMI Music*, paras. 443, 623, 633.

[870] See e.g. ACM decision of 25 March 2009, *Case No. 6424 Ziekenhuis Walcheren - Oosterscheldeziekenhuizen*.

for society.[871] The acquisition would serve the stability of the sector by rescuing the failing bank, keeping it running and consequently avoiding any contagion effects (see Chapter 3.5.3.3.).[872] It is relevant to acknowledge that not all bank failures pose a risk to financial stability. Banks that must be saved because of the unacceptable risks their failures imply for financial stability, are said to be 'too big to fail'. If the government and/or supervisors allow the troubled bank to fail, it is not 'too big to fail' and any acquisition is not an emergency takeover for the purposes of this book. 'Too big to fail' must be interpreted broadly: it does not only refer to the size of the bank, but may also refer to the special function of the bank in the financial system and even to the current state of the public's confidence in the banking sector.[873] In this book it is assumed that the authorities will indeed not allow banks that are 'too big to fail' to go bankrupt and it is also assumed that the relevant states are capable of ensuring this. States may prevent a failure by an orchestrated emergency takeover,[874] but also by other means such as a bail-in exercise,[875] the provision of government support, or nationalisation (see below).[876]

Not all emergency takeovers result in competition problems. In general, only concentrations that result in high post-merger combined market shares are deemed to limit competition. If no lessening of competition as a result of the concentration is to be expected, the concentration control rules will not prohibit the concentration and the takeover can be executed. Consequently, no conflict between banking regulatory interests and competition law arises. Nevertheless, if the competition limitation is such that the emergency takeover is prohibited by the concentration control rules, a

[871] Such an early support action for these reasons is feasible. E.g., the two main objectives of the current EU bank recovery and resolution regime (see Box 6.2.) are "*to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system.*" See: Recital 5 of EU Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

[872] In the remainder of this chapter references to the financial stability interests that states aim to serve through rescue measures are meant to include the interests of the continuance of a bank's crucial activities. The findings regarding the former interests indeed also hold for the latter.

[873] If recently several other banks have collapsed, even the failure of a small, unimportant bank may significantly affect the confidence in the banking sector and may therefore substantially affect financial stability.

[874] For completeness' sake it is mentioned that not all faltering 'too big to fail' banks can be saved by other banks. The troubled bank may be too big to be properly absorbed by another bank, or no other bank may be willing to take the risk to acquire the ailing bank. The analysis in this chapter only covers situations in which an emergency takeover is a realistic option.

[875] A 'bail-in' means, briefly put, the write-down of a bank's liabilities (i.e., debt owned by the bank's creditors) or the conversion of such liabilities into shares. Since the introduction of the BRRD/SRM (see Box 6.2.) the bail-in tool is now a power for supervisors in the EU and it is regarded as an important method to minimise state support for failing banks.

[876] In practice nationalisation is often combined with the provision of state support.

potential conflict arises between competition law and banking regulatory interests. Such conflicts are further discussed in this chapter.

1.2. Outline of this chapter

This chapter presents a normative view with regard to the reconciliation of the banking regulatory interests served by a rescue takeover and the merger control regime. This framework includes an interpretation of the law that is not *contra legem* and that produces the most appropriate solutions in accordance with the normative principles of this book. This chapter also provides an analysis of the relevant legal *status quo* of the EU and Dutch merger control regimes. This analysis helps to clarify the differences between the law as it currently stands and the normative view presented in this book. The chapter also describes several case studies to illustrate the mentioned reasoning.

The remainder of this chapter is organised as follows. Section 2. deals with the benefits of an emergency takeover over a pure state solution, so that it becomes clear what is missed if competition law blocks such a deal. Next, in Section 3., it is assessed to what extent a 'normal' application of the merger control rules, i.e., an application of the SIEC test, could solve the conflict between competition law and financial stability interests. This assessment covers the substantive rules, while the next Section 4. focuses on procedural obstacles of a normal application of the merger control rules to solve the conflict. Sections 5. and 6. discuss respectively specific EU and Dutch merger control exception provisions that *prima facie* may be appropriate reconciliation mechanisms. The chapter ends with an overview of its conclusions.

There is one reconciliation mechanism that is not further discussed in this chapter. Pursuant to Articles 106(2) TFEU and 41(3) DCA[877] respectively, the EU and Dutch merger control regimes may not prevent undertakings from providing an SGEI. So, if a merger is necessary for an undertaking to render an SGEI, this merger must not be blocked. For a discussion of banking activities as an SGEI and the other relevant conditions, see Chapter 4.B.2.2.; it is here repeated that under the current law it is unlikely that banks would comply with these conditions.[878] Nevertheless, if the

[877] Article 41(3) DCA: "*If at least one of the undertakings involved in the concentration is entrusted with the provision of services in the public economic interest, by law or by an administrative body, a license may be refused only if such refusal does not obstruct the performance of the duties entrusted to the undertaking or undertakings in question.*"

[878] The author is not aware of any successful application of Article 106(2) TFEU or 41(3) DCA to a merger case. For an *unsuccessful* claim to Article 41(3) DCA, see: ACM decision of 13 October 1999, *Case 807 Staatsloterij - Lotto - Bankgiroloterij*, paras. 180-196.

application of Article 106(2) and its Dutch counterparts were more encompassing, in conformity with the normative view of this book, these provisions could become relevant.

But first comes a brief discussion covering a specific UK legal regime for reconciling financial stability interests with UK merger control regime, and a description of the *Lloyds/HBOS* case.

The Lloyds/HBOS case. This chapter focuses on reconciliation mechanisms available in EU and Dutch law. Nevertheless, with regard to the UK merger control regime, recently a specific reconciliation mechanism for financial stability interests was introduced. It allows the UK Chancellor of the Exchequer (the minister of finance) to set aside the merger control regime if he regards this to be needed in the interest of the stability of the financial system. This mechanism is explained in more detail below through a description of the *Lloyds/HBOS* case. The *Lloyds/HBOS* case is relevant for this chapter, as it is a real-life example of a rescue merger that would not have passed the SIEC test. Box 6.1. provides a summary of the relevant facts and legislative regime and later in this chapter this case will be analysed with regard to the rationales for the UK government to prefer a private solution.

Box 6.1. *Lloyds/HBOS* case

The *Lloyds/HBOS* case refers to the acquisition of HBOS plc. by Lloyds TSB Group plc. (**Lloyds**) that was completed in January 2009. HBOS and Lloyds were financial service companies with substantial banking activities, mainly located in the UK. Both banks are currently part of the Lloyds Banking Group plc.

The underlying cause of the merger was the 2008 financial crisis. During the two days after the collapse of Lehman Brothers on 15 September 2008, the market's confidence in HBOS evaporated and its share price fell by 40%. HBOS was a bank 'too big to fail' and the UK government was greatly concerned about the troubled situation of HBOS. In the night of 17 September 2008, as several newspapers reported,[879] the UK Prime Minster Brown 'brokered' the merger between the two banks. Indeed, on 18 September Lloyds and HBOS announced their agreement on a merger. The acquisition of HBOS by Lloyds was thought to solve the former's problems in part by restoring the market's confidence in HBOS and by reducing HBOS' dependence on wholesale funding (a further discussion

[879] See e.g. Financial Times of 18 September 2008, *Lloyds TSB Seals £12bn HBOS Rescue*.

of the merger's rationale is provided below). Indeed, the three UK financial supervisory institutions – called the Tripartite Authorities[880] – endorsed the need for a takeover of HBOS by Lloyds.

The merger did not fall within the scope of the EU concentration control regime, since apparently more than two-thirds of the turnover of both undertakings was in the UK (see footnote 63). The UK merger control regime – laid down in the Enterprise Act 2002 (**Enterprise Act**) – did apply, however. Contrary to the EU and Dutch systems, the UK merger control regime does not imply a compulsory notification for certain concentrations and therefore it does not include a standstill requirement either (see Section 4. below). The UK regime provides that after a notification or independent *ex officio* discovery, the CMA (previously the OFT) performs a preliminary investigation into the transaction. It will then determine whether this transaction may result in the substantial lessening of competition in the UK. If the CMA finds that this is the case, it must refer the concentration to an 'Inquiry Group' (previously the Competition Commission), which group consists of a selection of members of the CMA Panel.[881] The Inquiry Group then assesses whether the merger indeed results in the substantial lessening of competition. If this Group concludes that a concentration substantially lessens competition, it may impose remedies to solve this. It can also impose remedies on an already implemented concentration.

UK law provides for a deviating procedure if the merger may affect certain public interests listed in the Enterprise Act. The procedure at the time of the *Lloyds/HBOS* case – similarly to the current procedure[882] – implied that the Secretary of State could give an intervention notice to the OFT if he believed that the concentration could influence the public interest. Subsequently, the OFT had to report its findings to the Secretary and not to the Competition Commission. The Secretary had the power to clear the concentration if he believed that the public interest required this, even if the concentration was likely to substantially lessen competition.

With regard to the envisaged merger between HBOS and Lloyds, the OFT reached the conclusion that there was a realistic prospect that this merger would significantly lessen competition in the personal accounts market, the Scottish banking market

[880] These authorities were: the Bank of England, the Financial Services Authority and Her Majesty's Treasury.
[881] The members of the CMA Panel are independent experts and are appointed by the Secretary of State.
[882] For the current CMA procedure with regard to mergers involving public interests: CMA document, *Mergers: Guidance on the CMA's Jurisdiction and Procedure,* 2014, Section 16.

for small and medium sized enterprises and the mortgages market.[883] It was likely that at least the conclusion with regard to the personal accounts market would hold after an elaborate second phase investigation, since the expected deterioration of competition was worse than in the case of the blocked merger of 2001 between Lloyds and Abbey National.[884] After he received the OFT report, the Secretary issued an intervention notice since he believed that the stability of the UK financial system was relevant for the consideration of the transaction. Consequently, after having found that the envisaged merger could result in the substantial lessening of competition regarding at least three product categories, the OFT referred the merger to the Secretary of State and not to the Competition Commission.

The protection of the UK's financial system is listed as a public interest in the Enterprise Act, *but only as of 24 October 2008*: the law was changed especially to enable the Lloyds/HBOS merger. Before this date, only 'national security' and 'media considerations' were listed as public interests. By changing the Enterprise Act, the benefits of the envisaged concentration for financial stability could override any anti-competitive effects. Indeed, on 31 October 2008 the Secretary of State announced that he had cleared the Lloyds/HBOS merger since he found that the financial stability benefits outweighed the expected anti-competitive effects.

The decision to amend the law especially to accommodate the Lloyds/HBOS merger has been criticised and some have argued that other forms of governmental intervention would have had better results.[885]

The Lloyds/HBOS merger was notified for approval to the competition authorities in at least the Netherlands, Germany, Spain, Ireland and the US.

[883] OFT, *Report to the Secretary of State for Business Enterprise and Regulatory Reform on the Anticipated Acquisition by Lloyds TSB plc of HBOS plc,* 24 October 2008, paras. 141, 173, 203.

[884] In 2001 Lloyds, then the bank with the largest market share in the personal accounts market, intended to acquire the fifth largest bank, i.e. Abbey National. This deal was blocked by the UK Competition Commission, partly due to the lessening of competition in the said market. The following figures illustrate this decline: the Herfindahl-Hirschman Index (a measure of industry concentration) would increase from around 1,420 to 1,650 and Lloyds' post-merger market share would increase from 22% to 27%. See: Competition Commission, *Lloyds TSB Group plc and Abbey National plc: A Report on the Proposed Merger*, Cm 5208, 10 July 2001, paras. 2.50-251. In the *Lloyds/HBOS* case, however, the figures were worse: the Herfindahl-Hirschman Index would increase from around 1450 to 1950 and Lloyds' post-merger market share would increase from 19% to 33%. See: OFT, *Report to the Secretary of State for Business Enterprise and Regulatory Reform on the Anticipated acquisition by Lloyds TSB plc of HBOS plc,* 24 October 2008, para. 106.

[885] See e.g. J. Vickers, *Central Banks and Competition Authorities: Institutional Comparisons and New Concerns,* BIS Working Paper, No, 331, 2010, p. 25; H. Mathur, *The UK OFT Waives Competition Law in the Interest of "Maintaining the Stability of the UK Financial System" and Clears a Major Concentration in the Banking Sector (Lloyds-HBOS),* L'Institut de droit de la concurrence - Antitrust Encyclopedia, 2008.

2. RESCUE MERGERS: THE BENEFITS

2.1. Introduction

In this section it is set out how an emergency takeover can help to safeguard financial stability. This analysis covers two questions: which problems can an emergency takeover solve? And what are the benefits of an emergency takeover over other measures, such as state support only? The former question seeks to identify the rationales for using emergency takeovers to remedy financial stability concerns. The answer to the latter question should explain why governments could prefer a private takeover instead of pure state support. This is relevant, since a government has in principle the power to save banks in various ways, and presumably they will only back up a rescue merger if the state regards such a merger as the most appropriate way.

The state, which is here considered to be the representative of society, would be deprived of the benefits of an emergency takeover if the merger control rules prohibited such takeovers. In other words, for society the benefits of safeguarding economic prosperity procured by the merger control regime may come at the cost of not enjoying the specific advantages an emergency takeover can bring about.

'Too big to fail' banks will by definition not go bankrupt, since the government will always save them. When analysing the benefits of a takeover of a troubled bank by another bank, these should therefore be compared with the alternative option: state support. So, this chapter distinguishes between these two types of rescue measures:

- 'State support' constitutes all measures taken by the state to rescue a bank, not just 'state aid' within the meaning of Article 107 TFEU. Nationalisations that constitute *notifiable* concentrations do not fall into this category (see below).
- 'Private takeovers' include all concentrations within the meaning of the EU and Dutch merger control regimes, including nationalisations that constitute notifiable concentrations.

The next three sections cover the types and effects of state support, and the benefits of emergency takeovers over such state support.

In practice, other rescue measures than the two types mentioned above can be taken, such as capital contributions by existing bank owners and the bail-in of existing creditors (see Box 6.2. below). The rescue of a bank will in reality often involve a combination of various measures, e.g., the provision of state aid, the bail-in of certain

creditors and the acquisition of bank activities by a private party. Nevertheless, for the discussion of this chapter it suffices to focus on these two types of measures: (1) those that can be blocked by the merger control regimes (private takeovers), and (2) those that are deemed to be in the best interests of society by the state and that may imply costs for society (state support).

Box 6.2. Merger control regulation and bank recovery and resolution rules

A recent post-crisis development is the introduction in the EU and the Netherlands of specific rules to govern the rescue and resolution of ailing banks. An important finding with regard to the relevance of this chapter is that the new rules do not affect the applicability of the EUMR for emergency takeovers within the jurisdiction of this regulation, and that for only certain rescue mergers the EU national concentration control regimes no longer apply.

As a result of the 2008 financial crisis, the Dutch and EU legislatures have introduced specific rules to prevent ailing banks from failing and to ensure an orderly and cost-efficient resolution of failing banks. The Dutch legislature first introduced the so-called Intervention Act (in Dutch: *Interventiewet*), which became applicable as of January 2012.[886] The EU followed suit and introduced the Bank Recovery and Resolution Directive (**BRRD**)[887] in June 2014 and the SRM Regulation in July 2014 (see Box 1.1.). These three 'crisis prevention acts' now form the Dutch bank recovery and resolution regime.

The bank recovery and resolution regime provides for authorities with specific, far-reaching powers to prevent bank failures and to ensure an appropriate resolution of failed banks. One of these powers is the *compulsion* of the sale of a bank or parts of it to a willing private buyer.[888] This raises the question, if such a sale implies a concentration within the meaning of competition law, of whether the Dutch and/or EU merger control regimes apply if such an anti-crisis measure is taken.

- The answer is clear with regard to the applicability of the DCA: no approval of the ACM is required if a concentration is the result of the exercise of a *resolution*

[886] It has now been applied once, i.e., with regard to the nationalisation of the Dutch SNS Bank (see Section 2.2. below). The provisions of the Intervention Act were in fact included in the FS Act. Due to the transposition of the BRRD into the FS Act as of 26 November 2015, these provisions were changed extensively.

[887] EU Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. The BRRD's transposition deadline was 31 December 2014.

[888] Article 38(1) BRRD; Article 3a:28 FS Act.

power (i.e. a rescue power used by the authority when a bank is likely to fail).[889]

- Since the BRRD and the SRM Regulation do not state that the EUMR does not apply to any mandatory sale, it should be concluded that the EU merger control rules fully apply.[890]

Nevertheless, it may be beneficial for financial stability that a bank or parts of it are sold before the authorities make this mandatory. Indeed, an ailing bank may avoid a likely failure by a sale of divestiture in the so-called 'early intervention' stage, i.e., before the bank reaches the situation of a likely failure. At this stage the authorities cannot exercise their resolution powers. (They could use their persuasive forces or other powers, but only the exercise of a 'resolution power' sets aside the national merger control provisions.) Consequently, even the DCA would apply to such a non-mandatory merger.

To conclude, the specific bank crisis prevention rules only set aside the *national* merger control rules, and only if the authorities exercise their *resolution power*s.[891] In all other cases the bank recovery and resolution regime does not provide for an exception from the merger control rules.

[889] *Cf.* Articles 63(2) BRRD (i.e. Article 3a:6(1) FS Act). The exercise of a 'resolution power' is here meant to include the application of a resolution tool within the meaning of Article 2(1)(19) BRRD.

[890] Indeed, the Dutch legislature has mentioned that measures taken pursuant to the FS Act provisions that are the transpositions of the BRRD provisions cannot set aside the EUMR. See: Parliamentary article, *Kamerstukken II* 2014/15, 34208, No. 3, p. 81.

[891] Within the meaning of Article 2(1)(20) BRRD.

2.2. State intervention and nationalisations

State support to save a faltering bank may take several forms, including the provision of additional guarantees for bank debts,[892] new capital injections[893] and the purchase or guarantee of impaired assets.[894] These 'financial interventions' can strike at the roots of a bank's financial troubles. A transfer of ownership of the troubled bank, i.e., a governmental or private takeover, is often used as support, too. Such a transfer, however, mostly does not remedy financial wrongs. In principle it only changes the identity of the owner of the ailing institution, although a private takeover may yield certain financial benefits (see the next section). Nevertheless, for transfers of ownership to the state the picture looks somewhat different, as it may have additional benefits compared with a private takeover.

Nationalisation may be a useful flanking measure of a bank rescue, even if the transfer of ownership from the private sector to the state does not in itself remedy problems with regard to such issues as liquidity shortages or failing assets.[895] As

[892] Government guarantees that go beyond the common guarantee of certain retail deposits may induce more lenders to provide loans to the faltering bank and may reassure existing lenders, as the repayment of the guaranteed loans is secured by the government. Briefly put, any positive difference between the market rate for such guarantees minus the price paid to the government by the bank constitutes state aid within the meaning of the TFEU. See e.g.: Commission Communication of 25 October 2008, *The Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis*.

[893] Capital injections, or recapitalisation, increases the troubled bank's equity base, which functions as a buffer against asset declines (see Chapter 3.5.3.4.). Briefly put, any positive difference between the price that the government paid for the assets minus the market price for these assets constitutes state aid within the meaning of the TFEU. See e.g.: Commission Communication of 15 January 2009, *The Recapitalisation of Financial Institutions in the Current Financial Crisis: Limitation of Aid to the Minimum Necessary and Safeguards against Undue Distortions of Competition*.

[894] If a bank ran into troubles due to the failing of certain assets, the relief of these assets could pull the bank through its difficult times. The government could support a bank by buying the bad assets. Briefly put, if the government pays the bank more for the assets than a market investor would have done, the bank receives state aid within the meaning of the TFEU. See e.g.: Commission Communication of 26 March 2009, *On the Treatment of Impaired Assets in the Community Banking Sector*.

[895] An example of a share purchase deal is the acquisition of the Dutch operations of Fortis Bank and of ABN AMRO Bank by the Dutch state (announced on 3 October 2008). The Dutch state bought the shares in the companies that operated the said businesses from the Fortis holding company. See: <http://vorige.nrc.nl/international/article2008873.ece/Dutch_government_nationalises_Fortis_and_ABN_Amro> An example of the nationalisation of a bank is the expropriation of the shares in and subordinated bonds of SNS Bank by the Dutch state. See: Decree of the Minister of Finance of 1 February 2013, *Regarding the Expropriation of Securities and Capital Components of SNS Reaal NV And SNS Bank NV in Connection with the Stability of the Financial System, and to Take Immediate Measures with regard to SNS REAAL NV*. It may be concluded from the decision of the European Court of Human Rights in the *Northern Rock expropriation* case that the expropriation of shares for the purpose of safeguarding financial stability does not in itself usually violate the right of peaceful enjoyment of possession of Article 1 of Protocol No. 1 to the ECHR, provided that national law provides for this expropriation and that the former shareholders receive a proper compensation. This compensation could be nil if the bank can only survive because of government support. See: European Court of Human Rights decision of 10 July 2012, Application No. 4940/10, *Dennis Grainger and others against the United Kingdom*, paras. 38-43.

mentioned above, additional financial intervention is often necessary to strike at the causes of a bank's difficulties. Nationalisation may ease the taking of such measures. For example, in his expropriation decree regarding SNS Bank, the Dutch Minister of Finance, after having established that the main difficulty for SNS Bank was its poor solvency situation, mentioned that the nationalisation facilitated the transfer of certain liabilities into equity, the separation of the worst business unit from the healthier parts of the bank, the injection of new capital into the bank without benefiting any shareholders that would not have injected new funds and the taking of further measures to solve the problems without the risk that the general meeting of shareholders could block such measures.[896] Of all these advantages, only the transfer of certain liabilities into equity could directly solve the financial problems of SNS Bank. Such a transfer was only possible through expropriation.

Nationalisations and the merger control regime. It is relevant to acknowledge that nationalisations, i.e. the purchase of a bank by the state, may escape the rules of the merger control regime. If state acquisitions were treated similarly to private acquisitions, any acquisition of a bank by the state would constitute a concentration, as the state can be considered an undertaking within the meaning of competition law (as it runs or owns several businesses; see Chapter 1.5.2. for a concise explanation).

However, a special rule applies with regard to the acquisition of control over undertakings by national or local governments. With regard to establishing the jurisdiction for the Commission (and the ACM)[897] to assess an envisaged concentration that involves a public body as the acquirer of control, only the turnover of the public body's economic unit that gains control over the target company must be taken into account.[898] If the target company will post-merger be part of an independent centre of commercial decision-making that does not yet control another business, no turnover of the public body may be taken into account for the jurisdictional

the ECHR, provided that national law provides for this expropriation and that the former shareholders receive a proper compensation. This compensation could be nil if the bank can only survive because of government support. See: European Court of Human Rights decision of 10 July 2012, Application No. 4940/10, *Dennis Grainger and others against the United Kingdom*, paras. 38-43.

[896] Decree of the Minister of Finance of 1 February 2013, *Regarding the Expropriation of Securities and Capital Components of SNS Reaal NV And SNS Bank NV in Connection with the Stability of the Financial System, and to Take Immediate Measures with regard to SNS REAAL NV*, para. 50.

[897] The Dutch concentration control regime applies this approach, too. See e.g. letter of 18 December 2013 by the ACM to NL Financial Investments (a foundation created by the Dutch state to manage the shareholdings of several financial institutions) regarding the applicability of the Dutch merger control regime to the transfer of the shares of SNS Reaal from the Dutch state to NLFI.

[898] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings of 16 April 2008, paras. 192-194. For an application of this rule see e.g.: Commission decision of 14 May 2009, *Case COMP/M.5508 SOFFIN/Hypo Real Estate*, paras. 5-25.

turnover test. Assuming that besides the public body and the faltering bank there are no other undertakings concerned within the meaning of the EUMR, the jurisdictional turnover thresholds are not met. Consequently, the concentration need not be notified to the Commission since the jurisdictional turnover test requires that *at least two* undertakings generate a certain amount of turnover (see Chapter 1.5.4.). In practice, therefore, the government can circumvent the application of the EU and Dutch concentration control regime to its bank nationalisations by ensuring that the bank is controlled by an independent centre that does not yet control another business.[899]

To conclude, nationalisation may have certain benefits over a private takeover when the remedying of the weak position of the bank is concerned, especially since nationalisation eases certain financial interventions. Nevertheless, governments may not favour a bank purchase by the state, as nationalisation may be more costly for taxpayers than a private deal. This is further discussed below.

2.3. Rescue mergers: benefits for the state

How can a private takeover improve a bank's troubled position and why would the state prefer a private solution over a nationalisation or pure state support? These questions are answered in this section; the next section discusses the benefits that an emergency takeover may have for bank customers.

To appreciate why a private takeover could be preferred by the government, it is worthwhile to analyse the *Lloyds/HBOS* case. Box 6.3. lists the reasons mentioned by the UK's finance ministry as to why the merger of HBOS with Lloyds TSB would result in a stronger bank than HBOS alone, which would also enhance financial stability: (1) improved confidence, (2) an improved business model, (3) a better capital base, (4) a reduced reliance on wholesale funding, (5) an improved credit rating, (6) a broader business base, and (7) the addressing of funding issues.[900]

[899] Indeed, the EU Member States acquired several banks during the 2008 financial crisis, but only in a limited number of cases did these acquisitions fall within the jurisdiction of the Commission, including: Commission decision of 14 May 2009, *Case COMP/M.5508 SOFFIN/Hypo Real Estate*; Commission decision of 4 August 2010, *Case COMP/M.5861 Republic of Austria/Hypo Group Alpe Adria*; and Commission decision of 21 February 2013, *Case COMP/M.6812, SFPI/Dexia*.

[900] Letter of HM Treasury to the OFT, para. 15 *et seq*. (included in: OFT, *Report to the Secretary of State for Business Enterprise and Regulatory Reform on the Anticipated Acquisition by Lloyds TSB plc of HBOS plc, 24 October 2008*, p. 116).

Box 6.3. *Lloyds/HBOS* case: benefits of a private emergency takeover

In its letter to the OFT explaining its view on the takeover of HBOS, the UK's HM Treasury listed seven benefits of the merger:

(1) Improved confidence: the arguments of HM Treasury regarding this benefit were not made public, so one can only speculate on its considerations. Nevertheless, the Bank of England has mentioned that the merger with a stronger partner would improve HBOS' financial position and therefore limit the risk of a further loss of confidence, which would also reduce the risk of a 'wider loss of confidence' – this probably refers to confidence in the banking sector as a whole. Furthermore, it maintained that "*confidence in the consistency and effectiveness of the authorities' intervention has been key to the re-establishment of stability*" and that a delay in the prompt and successful implementation of the merger could undermine that confidence.

To what extent is the improved confidence a benefit of a private merger, and could it not have been achieved through some form of public support? According to the Bank of England's line of reasoning the improvement of confidence in HBOS is the result of solving HBOS' financial problems, which in fact could have been achieved through a private takeover but also through public support. The reduction of the risk of a loss of confidence in the wider financial system is achieved through remedying its cause, i.e., the financial difficulties of HBOS, and by displaying the effectiveness of the supervisors' actions. Again, this could also have been achieved through state support instead of a private takeover.

(2) Improved business model: HBOS' business model was to an important degree dependent on wholesale funding. It provided more funds than it received from depositors and therefore HBOS had to borrow additional liquidity from large, 'wholesale' lenders. It also had significant exposure to the mortgage market. This appeared to be an unsustainable situation when the wholesale funding market dried up after the collapse of Lehman Brothers. Apparently, changing HBOS' business model was crucial to solving its problems. The merger with Lloyds would create the opportunity to change this weakness. The post-merger combined entity would be less dependent on external funding. Furthermore, Lloyds' business model was regarded as more conservative and it was therefore expected that Lloyds' management would be able to steer the HBOS business in a new, more conservative direction.

It seems sensible that the transformation into a new type of bank can be realised more effectively and efficiently by joining a bank that resembles this new type of bank, than by an independent course, which would be the situation if HBOS were to be rescued by governmental aid. Therefore, if the change of the business model of a 'too big to fail' bank is required, a merger with another bank that has experience with an appropriate business model may make more sense than nationalisation or a capital injection by the government.

(3) Better capital base: as the capital base of Lloyds was better than HBOS' capital base, the merged entity capital position was better than the pre-merger position of HBOS. However, Lloyds' pre-merger capital base was better than the post-merger base of the combined entity. As a matter fact, soon after the announcement of the merger, the capital position of both banks combined was deemed to be insufficient. The banks were recapitalised by the government.901 Lloyds has claimed that without the merger it would not have required this state support, but this claim has been contested.902 If Lloyds had indeed already had insufficient capital, the sum of state support for the two banks separately might not have differed much from the state support needed for the merged bank.

In any event, with regard to the improvement of the troubled bank's capital base there will only be an advantage in a rescue merger over governmental support alone if the merged entity requires less aid by the government than the two independent banks when a takeover takes place. It is therefore wrong to only consider the capital base improvements of the acquired bank, since the possible deterioration of the capital position of the acquiring bank should be taken into account, too.

(4) Reduced reliance on wholesale funding: HBOS had a significant wholesale funding gap, as mentioned above. It was proposed that merging with Lloyds would remedy this. It seems that this benefit is already counted, as it is included in the 'improved business model' benefit.

(5) Improved credit rating: a bank's credit rating is perceived as a reflection of its creditworthiness. The better the rating, the lower the interest rates the bank

[901] UK House of Commons Treasury Committee, *Banking Crisis: Dealing with the Failure of the UK Banks,* Seventh Report of Session 2008–09, 2009, p. 58.

[902] UK House of Commons Treasury Committee, *Banking Crisis: Dealing with the Failure of the UK Banks,* Seventh Report of Session 2008–09, 2009, pp. 52-53.

must pay when borrowing. As Lloyds' credit rating was better than HBOS' and with the new recapitalisation scheme of the UK government in place, it was expected that HBOS' rating would improve.

Since a bank's credit rating is derived from other factors, such as the confidence in the bank, its capital position and assets' quality, an improvement of the rating flows automatically from an improvement of these other factors. Listing an improved credit rating as an independent benefit is therefore misplaced. As the improvement of these other factors were already mentioned as benefits of the merger, the improved credit rating is a double-counted benefit. Furthermore, merging a bank with a lower credit rating (HBOS) with a bank with a higher rating (Lloyds) may lead to a deterioration of the latter's credit rating. In the present case this was prevented by the government's recapitalisation scheme, but without the merger such capital injections into the two banks could of course also have been made. It is therefore doubtful whether, with regard to credit ratings, the takeover had any benefit over mere state support.

(6) Broader business base: Lloyds' business was more diverse than HBOS' and therefore it was less exposed to the impairment of a single business line. It was expected that post-merger the combined entity would maintain the broader business base, and this was considered an advantage.

To the extent that this benefit refers to the broadening of HBOS' business, it is double-counted as this was already mentioned under the 'improved business model' benefit. It might be that adding HBOS' business to Lloyds' further diversified the latter's operations and that this was advantageous. However, there are no references to this rationale and it can be questioned whether adding a troubled business to a sound business in fact improves the latter's position.

(7) Addressing funding issues: HM Treasury does not discuss this benefit substantively, but refers to the submissions of the Bank of England and the Financial Services Authority. However, these submissions focus on the wholesale funding gap, a point that was already considered by the HM Treasury. It therefore seems to be a double-counted benefit.

2.3.1. *State benefit 1: improvement of ailing bank's business model*

It can be derived from the analysis in Box 6.3. that with regard to remedying the problems that HBOS faced, a takeover of HBOS by Lloyds appears to have generated only one sure benefit over a pure public solution: the improvement of the business model. It is likely that a bank can achieve a change of business model more effectively and efficiently if this is pursued under the wing of a bank that already applies the desired business model, than if it has to do this on a stand-alone basis after receiving state support. A takeover might provide the new owners with the power to appoint the members of the management and/or supervisory boards of the acquired bank. This could give the acquiring bank the possibility to take certain strategy and business decisions, including with regard to the acquired bank's business model and its remuneration scheme.[903]

2.3.2. *State benefit 2: piggybacking on acquirer's strong capital base*

Another benefit of the takeover by Lloyds over state support might have been the piggybacking of HBOS on the better capital position of Lloyds, with the consequence that the state support for HBOS could have been lower. The UK government may for that reason have favoured the merger over state intervention: "*I think you have to ask yourself what the alternative would have been had Lloyds not taken over HBOS at the time. It would have been almost certainly that HBOS would have found it very difficult to continue. That would have meant the Government and the taxpayer intervening to support the totality of HBOS.*"[904] In theory the merger of a sound bank with an ailing bank may reduce the amount of required support for the latter, but whether it worked out in practice in the *Lloyds/HBOS* case cannot be determined here: there are claims that both HBOS and Lloyds had insufficient capital bases before the merger and this implies that the 'piggybacking argument' does not hold.[905]

[903] If poor management is considered an independent problem and therefore affects the confidence in a bank, gaining such decision-making powers could directly remedy a cause of the bank's difficulties and restore confidence. Nevertheless, most banks run into troubles due to immediate financial difficulties. A change of management may be a necessary step to solve the problems, but it is probably insufficient, since it does not improve the bank's existing financial position.

[904] *Cf.* an official spokesman of the former UK Prime Minster Brown, 16 February 2009: see <http://www.theguardian.com/politics/2009/feb/16/lloyds-nationalisation>

[905] An example shows why: if bank A requires a recapitalisation of EUR 1 billion to meet the regulatory standards and bank B needs EUR 2 billion, the merged bank A+B would need a recapitalisation of EUR 3 billion (this simplified example does not take the reduction of concentration risk into account). The amount of required (state) support pre- and post-merger is therefore equal. This would be different if bank B requires a recapitalisation of EUR 2 billion to meet the regulatory standards and bank A has excess capital of EUR 1 billion: the amount of required support for the merged bank A+B is then only EUR 1 billion.

A private takeover may in general, however, have certain financial benefits and therefore the amount of the state's financial intervention may be smaller if a bank is rescued with a private emergency takeover. Indeed, if a healthy bank with an abundant capital base acquires a bank that lacks sufficient capital, the post-merger capital base of the two banks together may be rather sound and a governmental capital injection can be smaller or even unnecessary. This saves taxpayers' money.[906] Similar reasoning holds with regard to liquidity positions: if the buying bank has sufficient liquidity for both itself and for making up the liquidity shortages of the purchased bank, additional state support is not needed anymore.

2.3.3. Other state benefits

A third benefit of a private takeover over a nationalisation may be that when a private party acquires a bank, the state does not pay a purchase price. This benefit would probably mainly be of a political nature, since commercially the state would not be worse off if it paid the right price for the ailing bank, because it receives one asset, i.e. the bank, in return for another asset, i.e. cash.

Finally, a fourth benefit may be that for the government a private solution can be advantageous if it regards bank ownership by the state as a distortion of the free market system.[907]

2.4. Rescue mergers: benefits for bank customers

The previous section dealt with the advantages and disadvantages of emergency takeovers from the state's perspective. This section discusses why bank customers may prefer rescue mergers over state support.

[906] Parliamentary article, *Kamerstukken II* 2011/12, 33059, No. 3, p. 34.

[907] E.g., the Dutch government favours a banking sector with banks owned by private owners only, see e.g.: letter of the Dutch Minister of Finance on the state's participation in various financial institutions of 24 January 2011, Parliamentary article, *Kamerstukken II* 2010/11, 28165, No. 117, p. 5. The UK government has a similar approach, see e.g. with regard to the return to private ownership of the banks RBS and Lloyds: speech of 19 June 2013 by UK Chancellor of the Exchequer Osborne, at the Mansion House. Regarding the preference for private solutions, see e.g.: DNB, *Staatsdeelname als Uiterste Remedie in een Bankencrisis: Lessen uit de Praktijk*, Kwartaalbericht December 2008, p. 30.

2.4.1. Customers' benefit 1: lower bail-in amount

A private takeover could be better for the troubled bank's creditors, since their claims might then be maintained completely, while this is in any event unlikely to be the case if state support is granted. Indeed, in conformity with the BRRD, SRM and the Commission's financial crisis state aid regime,[908] certain large depositors and debt holders may have to contribute to the rescue of a bank that is saved by the government. This is part of the so-called bail-in by creditors. In practice, this means that they lose all or some of their claims against the bank. In the case of a private takeover by a bank, the acquirer may accept no or less contribution from the creditors than the government or than state aid legislation requires,[909] since the acquirer may value the troubled bank more highly than the government,[910] and/or because the acquirer's costs for saving the target may be less than the government's, due to the good capital position of the acquiring bank (see above).

2.4.2. Customers' benefit 2: avoidance of resolution taxes

Furthermore, the rescue of the bank by the government may indirectly impose costs on other banks and their customers. In accordance with the Dutch deposit guarantee scheme,[911] the banking industry has to pay the guaranteed deposits if a bank fails. This situation may also arise under the rules of the new EU directive on deposit guarantee schemes.[912] Since the

[908] In accordance with the Commission's financial crisis state aid regime both shareholders and junior capital holders must contribute to the rescue of a bank: Commission Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') of 30 July 2013, para. 19.

[909] The lower contribution by the creditors can also be the result of the punishment and prevention effects that state aid remedies have. (B. Lyons & M. Zhu, *Compensating Competitors or Restoring Competition? EU Regulation of State Aid for Banks During the Financial Crisis*, J Ind. Compet. Trade, 2013, pp. 46-47) Indeed, the Commission's practice of demanding a contribution by the bank and its shareholders and junior capital holders "*is necessary to ensure that rescued banks bear adequate responsibility for the consequences of their past behaviour and to create appropriate incentives for their future behaviour.*" (Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules of 19 August 2009, para. 22.). A private party buying a troubled bank is only interested in a large enough contribution to make its purchase worthwhile.

[910] The higher valuation may flow from the synergy effects (i.e. costs savings) that the combination of the two banks produces and these effects will not arise if the troubled bank remains independent.

[911] Article 11 of the Dutch Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees under the FS Act (*Besluit bijzondere prudentiële maatregelen, beleggerscompensatie en depositogarantie* Wft.)

[912] Commission memo of 15 April 2014, *Deposit Guarantee Schemes – Frequently Asked Questions*. See also: the EU DGS directive, i.e. Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, p. 149. New legislative measures to further harmonise and merge national schemes in the eurozone have now been proposed by the Commission: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme (EDIS), COM(2015) 586 final, 24 November 2015.

banks will not have to pay if a bank is saved by the government, they may have to contribute to the rescue of a bank by paying the government.[913] These additional costs may be passed on to the customers of the banks. In the event of a private takeover such an exceptional taxation need not be imposed on the banks.

All in all, it may be concluded that bank customers experience certain benefits if a bank is rescued through private merger instead of via state support, but their gain may not be that substantial.

2.5. Rescue mergers: conclusion on the benefits

To conclude, a private takeover, i.e., the merger with another bank, has certain the benefits in comparison with state support. Such a takeover may make it easier to change the troubled bank's business model, and also allow it to piggyback on the acquiring bank's better capital position. In addition, a private solution is likely to be cheaper for the state than a nationalisation. Furthermore, private ownership of businesses in general is often considered to be more appropriate than state ownership. Finally, bank customers may prefer a rescue merger because it may imply a less intrusive bail-in and avoid the levying of resolution fees.

In the next section it will be discussed to what extent these benefits for the state or society and the advantages for bank customers can be reconciled within the SIEC test with any anti-competitive effects of an emergency takeover.

3. BALANCING IN THE SIEC TEST

3.1. Introduction

It was set out above how an emergency takeover may rescue a bank and therefore assure financial stability, as well as what the benefits of such a takeover are compared with other rescue measures. These benefits would be foregone if merger control rules prohibited an emergency takeover due to its anti-competitive effects. This section explores the possibilities for taking into account the positive effects an emergency takeover has on financial stability in the conventional merger control framework (the SIEC test). As explained in Chapter 1.5.4., the EU and Dutch concentration control regime aims to prevent the limiting of competition

[913] The Dutch state recouped part of its expenditures to save SNS Bank in 2013 by levying a 'resolution fee' on all Dutch banks. It was deemed justified to do so, as the state intervention prevented the payout by the Dutch DGS Fund, and consequently the surviving banks did not have to compensate the DGS Fund. See: Parliamentary article, *Kamerstukken II* 2012/13, 33653, No. 3.

as a result of mergers and takeovers. To that effect, Articles 2(3) EUMR and 41(2) DCA stipulate that a concentration that significantly impedes effective competition in the EU or the Netherlands, respectively, is prohibited.[914] This prohibition is here called the SIEC test and this test forms the substantive appraisal test of the concentration control regimes.

Before considering the weighing of financial stability benefits within the SIEC test, Section 3.2. first explores whether for emergency takeovers the counterfactual analysis of the SIEC test should allow for the so-called 'failing firm defence', i.e., a semi-exemption from the SIEC test for undertakings that are about to go bankrupt. Next, Section 3.3. discusses the weighing of financial stability benefits. Finally, Section 3.4. summarises the findings of this section.

3.2. The failing firm defence

Due to EU case law and Commission guidelines, the merger control regime currently includes the 'failing firm defence': an otherwise unacceptable merger with a failing undertaking is nevertheless allowed, because the post-merger competition situation will not be worse than the post-failure competition situation without the concentration. Below it is considered whether this doctrine can be relevant for assessing rescue mergers.

3.2.1. Substantive appraisal of mergers: a counterfactual analysis

To establish whether the SIEC test is violated, the competition authorities generally compare the post-merger competition situation with the pre-merger situation and assess whether post-merger competition is significantly limited *as a result of the merger*. This is a prospective counterfactual analysis: would future competition be restricted too much if the concentration is allowed, compared with the situation in which the concentration is banned?[915]

Since merger control cases require a prospective analysis, it is in certain cases not effective to merely compare the pre-merger situation with the post-merger situation. If the undertaking

[914] Article 2(3) EUMR should be considered the key substantive provision of the EUMR. As the EUMR – briefly put – aims to prohibit mergers that restrict competition, this provision ensures just that. Article 2(2) EUMR states that a concentration that does not significantly impede competition shall be declared compatible with the common market. This provision must not be understood to mean that if a merger does not limit competition there can be no other laws to prohibit it and that it is by definition allowed. Article 2(2) EUMR merely makes explicit that it is correct to make an *argumentum a contrario* with regard to Article 2(3) EUMR: if a merger does not produces anti-competitive effects, the EUMR does not prohibit it.

[915] This counterfactual analysis differs from the counterfactual analysis in antitrust cases. In antitrust cases the analysis is *retrospective*: what would competition have looked like if the conduct at issue had not occurred? By contrast, the merger control analysis is *prospective*: what will the competition situations look like if the merger is banned and what if it is allowed?

to be acquired (the target company) is in financial difficulties and is bound to fail, it does not make sense to base the counterfactual analysis on the existing pre-merger situation. In such a case, the coming failure of the target company must be taken into account, as well as its consequences for competition. That is, in the counterfactual situation – the market without the envisioned concentration – it must be taken into account that the failing company will no longer be a source of competitive pressure and that the customers of this company will most likely turn to one of the remaining suppliers in the market. This may result in the conclusion that a concentration that would normally lead to an unacceptable post-merger combined market share must be allowed, since this high market share is likely to result anyway if the target company fails. This is the so-called 'failing firm defence'.

3.2.2. The failing firm defence: the legal status quo

The failing firm defence may be considered as a structured counterfactual analysis which should clarify whether the merger concerned should be allowed since the deal itself is not causing competition concerns: the failure of the target company would result in a similar lessening of competition. This doctrine is originally a US merger control concept that entered EU merger control law via a 1994 decision of the Commission.[916] The ECJ subsequently set the conditions that had to be met for merging parties to successfully rely on the failing firm defence, which differed somewhat from the Commission's conditions.[917] The Commission has currently incorporated the ECJ's stance in its standard policy on the application of the failing firm defence.[918] To date, the Commission has only rarely accepted this defence.[919] With regard to the DCA, the ACM follows the Commission's and ECJ's lines when assessing the failing firm defence,[920] but the ACM hasn't even once accepted this defence to date.[921]

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[916] E. Navarro *et al.*, *Merger Control in the European Union - Law, Economics and Practice*, Oxford University Press, 2nd edn., 2005, p. 336. See Commission decision of 14 December 1993, *Case M.308 Kali + Salz/MDK/Treuhand*, para. 70 *et seq*.

[917] ECJ judgment of 31 March 1998, *Joined Cases C-68/94 and C-30/95, France, and Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC), respectively, v. Commission of the European Communities*, paras. 109-125.

[918] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, paras. 89-91.

[919] See e.g. Commission decision of 11 July 2001, *Case M.2314 BASF/Eurodiol/Pantochim*; and Commission decision of 9 October 2012, *Case M.6796 Aegean/Olympic II*. In another recent case the Commission accepted a 'failing division defence': Commission decision of 2 September 2013, *Case M.6360 Nynas/Shell/Harburg Refinery*.

[920] See e.g. ACM decision of 8 July 2005, *Case 1538/De Telegraaf - De Limburger*, para 28 *et seq*.

[921] However, it has been argued that the ACM accepted in the *Ziekenhuis Walcheren - Oosterscheldeziekenhuizen* case an efficiency defence that resembled a failing firm defence, but this argument is not endorsed in this book; see footnote 210. See: ACM decision of 25 March 2009, *Case No. 6424 Ziekenhuis Walcheren - Oosterscheldeziekenhuizen*.

The low success rate for failing firm defences is probably due to the strict conditions that must be fulfilled for a successful application.[922] The Commission has explained that in general, a failing firm defence can be accepted if it is established that as a result of the envisioned concentration "*the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.*"[923] Nevertheless, the Commission's standard policy is not that it merely performs a counterfactual analysis taking into account the failure of the target company. Instead, it will assess whether three preset conditions are fulfilled:[924]

(1) It must be established that the failing firm will leave the market in the near future if it is not acquired by another undertaking.
(2) There may not be a less anti-competitive acquisition feasible than the envisioned merger.
(3) It must be established that without the envisaged merger the assets of the failing firm will inevitably exit the market concerned. This means that it must be established that investors would not be prepared to buy the assets in the course of bankruptcy proceedings and keep them in the market.[925]

3.2.3. The failing firm defence: a normative view

Although at first sight the failing firm defence seems an obvious argument to be considered when assessing an emergency takeover, in fact it is not. An emergency takeover by definition implies a bank that is 'too big to fail' and that will always be rescued by the government. So, there is no failing firm: the counterfactual situation is that the bank will remain in the market, either as a result of a nationalisation or after receiving state support. It is therefore inconceivable that, as the Commission has suggested,[926] in the counterfactual situation distortions of competition will arise as a result of a failure of the banking system without the emergency takeover. Indeed, if it is known that a bank's failure could cause a systemic crisis, the state will always intervene to prevent this from

[922] Especially the third condition discussed below. See: D. Gore *et al.*, *The Economic Assessment of Mergers under European Competition Law*, Cambridge University Press, 2013, p. 312.

[923] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, para. 89.

[924] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, para. 90.

[925] Contribution of the Commission in the OECD Competition Policy Roundtable Report, Failing Firm Defence, DAF/COMP(2009)38, 2010, p. 184.

[926] Contribution of the Commission in the OECD Competition Policy Roundtable Report, *Failing Firm*, DAF/COMP(2009)38, 2010, p. 188.

happening.[927] As a consequence, the first of the abovementioned conditions set by the Commission will not be fulfilled in the event of an emergency takeover.

This does not mean that if the counterfactual situation is a supported stand-alone bank, the prospective analysis of an emergency takeover should use the *existing pre-merger* situation as the counterfactual situation. This would be especially erroneous if the troubled bank is expected to receive state aid within the meaning of Article 107 TFEU if the emergency takeover does not occur. Indeed, the Commission's approval of granting state aid will probably be accompanied by business conduct restrictions for the aided bank, which limit this bank's ability to compete. The Commission usually imposes such restrictions, so that the other, non-aided banks will be less affected by the granted aid that resulted in keeping a competitor operating. So, the relevant counterfactual situation for an emergency takeover of a 'too big to fail' bank will probably be that the troubled bank remains operational, *although exercising less competitive pressure than before*.

Furthermore, the Commission has maintained that the fulfilment of the third condition is also required in the event of bank mergers.[928] However, the application of the condition that the assets of the failing firm must leave the market is not unambiguous in bank merger cases; it can be doubted whether this is feasible.[929]

Considering that the Commission takes the view that for rescue mergers concerning banks, too, the third criterion applies unconditionally, the failing firm defence as developed by the ECJ and the Commission is in fact not suitable for application in emergency takeovers. This was recognised by the OFT in the *Lloyds/HBOS* case.[930]

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[927] The only instances in which this reasoning would not hold are those in which the relevant state would not be able to rescue the failing bank.

[928] Contribution of the Commission in the OECD Competition Policy Roundtable Report, *Failing Firm Defence*, DAF/COMP(2009)38, 2010, p. 188. According to the Commission, it 'only makes sense' for a bank to acquire another bank if this acquisition would generate efficiencies for the acquiring bank, and therefore the failing firm defence is only available for takeovers of fundamentally healthy banks. The Commission proposes that if a takeover does not create such efficiencies, the deal is not executed and that other rescue measures are taken instead. The Commission's view seems to mix two different things, i.e. (1) the question of whether the failing firm's assets will leave the market and (2) whether the business rationale for taking over the troubled bank is legitimate. The latter question is not part of the Commission's failing firm defence test and seems inappropriate, as the answer to the question will not explain whether in the counterfactual situation competition is better or worse. Although this question is relevant, especially for the state authorities that must decide whether to steer to an emergency takeover or go for state intervention only, it should not be included in a substantive competition appraisal of an emergency takeover.

[929] "*The assets of a financial company are made up, primarily, of a portfolio of debtors. The idea that an entire portfolio of debtors would inevitably exit the market appears to make little sense.*" Contribution of Danmark in the OECD Competition Policy Roundtable Report, *Failing Firm Defence*, DAF/COMP(2009)38, 2010, p. 98.

[930] OFT, *Report to the Secretary of State for Business Enterprise and Regulatory Reform on the Anticipated Acquisition by Lloyds TSB plc of HBOS plc*, 24 October 2008, para. 59.

Cases involving the failing firm defence applied to rescue mergers. Other supervisors seem to have accepted failing firm defences in emergency takeovers, but a closer look reveals that they applied a general counterfactual assessment and indeed not a proper failing firm defence analysis. Two cases, namely the Icelandic *Islandsbanki/Byr* case and the Irish *Allied Irish Banks*/EBS case, are presented below to illustrate this.

Box 6.4. *Islandsbanki/Byr* case

In 2011 the Icelandic Competition Authority approved the acquisition of the Icelandic bank Byr by another Icelandic bank, i.e., Islandsbanki, reportedly based on a failing firm defence argument.[931,932] Byr was the fourth largest bank of Iceland and had run into difficulties due to the 2008 financial crisis. The granting of certain state aid to solve Byr's financial problems was approved in April 2011,[933] but in the course of 2011 it became clear that this aid was insufficient: Byr could not meet its capital requirements.[934] Since it was not considered feasible that Byr could operate sustainably as a stand-alone bank in the longer term, it was decided that Byr had to be sold.[935] Since Byr was considered 'too big to fail' by the Icelandic government, a failure of this bank was not an option.[936] According to the Icelandic government, the only acceptable purchase offer for Byr was made by Islandsbanki,[937] the third largest bank in Iceland. Since the three largest Icelandic banks had a combined market share of almost 90% and were held to distort competition due to their collective strong market position, the acquisition of Byr by Islandsbanki impeded competition and would normally not have been allowed by the Icelandic Competition Authority.[938] Nevertheless, the authority allegedly accepted the acquisition because of a failing firm defence.

[931] Icelandic competition lawyers have reported that the Icelandic Competition Authority applies the failing firm defence doctrine in accordance with the conditions set out by the Commission in its Horizontal Merger Guidelines. See e.g.: H.M. Óttarsdóttir, *Getting the Deal Through, Merger Control 2011,* Global Competition Review, 2010, p. 189.

[932] Icelandic Competition Authority, *Annual Report on Competition Policy Developments in Iceland 2011,* p. 7.

[933] EFTA Surveillance Authority decision of 13 April 2011, *Case No. 69666 on state aid for the establishment and capitalisation of Byr hf.*

[934] EFTA Surveillance Authority decision of 19 October 2011, Case *No. 70526, Iceland/Islandsbanki/Byr,* para. 9.

[935] EFTA Surveillance Authority decision of 19 October 2011, Case *No. 70526, Iceland/Islandsbanki/Byr,* para. 33.

[936] EFTA Surveillance Authority decision of 19 October 2011, Case *No. 70526, Iceland/Islandsbanki/Byr,* para. 34.

[937] EFTA Surveillance Authority decision of 19 October 2011, Case *No. 70526, Iceland/Islandsbanki/Byr,* paras. 14, 19.

[938] EFTA Surveillance Authority decision of 19 October 2011, Case *No. 70526, Iceland/Islandsbanki/Byr,* paras. 45, 84. See also: Icelandic Competition Authority, *Consultation Paper on Competition in the Financial Market,* ICA Publication Series 1/2011, 2011, Section 2.5.

It appears, however, that the authority did not accept a *genuine* failing firm defence, in the sense that it did not apply the three conditions of the failing firm defence as stipulated by the Commission. In fact, the Icelandic Competition Authority instead performed a classical counterfactual analysis: it established that the only realistic alternative to a takeover by Islandsbanki was a regulatory measure implying a temporary takeover of Byr by the Icelandic Financial Supervisory Authority and a subsequent transfer of Byr's assets to one of the three large Icelandic banks.[939] The harm to competition due to this regulatory measure would have been similar to the harm that a takeover by Islandsbanki would cause and therefore the Icelandic Competition Authority cleared the merger. Indeed, it did not apply the abovementioned third condition (i.e. establishing whether Byr's assets would inevitably leave the market).

Box 6.5. *Allied Irish Banks/EBS* case

Another case in which a failing firm defence seems to have been accepted at first glance, is the acquisition of the Irish financial institution EBS Building Society (**EBS**) by the Irish bank Allied Irish Banks plc (**AIB**). Both banks were deemed 'too big to fail'.[940] The decision including the substantive competition appraisal of this merger has not been made public, but it has been indicated that a failing firm defence was applied and accepted.[941]

The 2008 financial crisis had a severe impact on the Irish banking sector. To tackle the immediate problems of the Irish banks, the Irish government intervened in the sector on a large scale and provided many banks with state support. Over the years the government developed a plan to restore the Irish banking sector for the future and embarked on a restructuring of the sector. A key element of the restructuring plan was the creation of two national universal full-service banks, which would form the two core pillars of the Irish banking industry.[942] One of these two banks was to be formed by merging AIB with EBS. Since the Irish government had a majority stake in AIB and fully owned EBS, the government was in a good position to realise this. Indeed, on 26 May 2011 it was announced that AIB would buy ESB.[943]

[939] EFTA Surveillance Authority decision of 19 October 2011, Case *No. 70526, Iceland/Islandsbanki/Byr,* paras. 45, 87-88.

[940] Commission decision of 2 June 2010, *Case State aid N 160/2010 – Ireland, Recapitalisation of EBS,* para. 36; Commission decision of 12 May 2009, *Case State aid N241/2009 – Ireland, Recapitalisation of Allied Irish Bank by the Irish State,* para. 60.

[941] Irish Competition Authority, *Annual Report 2011,* 2012, p. 36; H. Kelly & B. Costelloe, *Global Legal Insights, Merger Control,* Global Legal Group Ltd., 2011, p. 113.

[942] Irish Minister of Finance, *Minister's Statement on Banking Matters,* 31 March 2011.

[943] AIB, press release of 26 May 2001.

From a competition perspective it is relevant that both AIB and EBS had sizeable market shares in the Irish market for mortgages. In practice the merger would reduce the number of significant mortgage suppliers from four to three. It was therefore concluded by the Minister's Competition Advisor that it was likely that the merger would substantially lessen competition, assuming that EBS could continue to operate as an independent bank.[944] In other words, the acquisition of EBS would normally fail the substantive appraisal test. However, the Irish government asserted that there was no realistic prospect for EBS to continue to operate on a stand-alone basis. So, for the scenario that EBS could not continue to operate as an independent bank and no alternative options to the acquisition by AIB were feasible, the Competition Advisor concluded that the merger did not substantially lessen competition.[945] In accordance with this reasoning there was no other option, i.e., no counterfactual situation, for the envisaged acquisition.[946] It could therefore not be concluded that any competition distortion was the result of the merger, since abandoning the merger was not an option. The Irish Minister of Finance indeed determined that the merger would not substantially lessen competition and the deal was therefore approved.[947]

Again, a classical counterfactual analysis was sufficient to substantiate that there were no anti-competitive effects *caused by the merger*. The failing firm defence and its three criteria were not applied.[948]

[944] Charles River Associates, the appointed Competition Advisor to the Irish Minister of Finance, *Acquisition by Allied Irish Banks of EBS Building Society, Executive Summary of the Advice,* 23 June 2011, para. 6.

[945] Charles River Associates, the appointed Competition Advisor to the Irish Minister of Finance, *Acquisition by Allied Irish Banks of EBS Building Society, Executive Summary of the Advice,* 23 June 2011, paras. 8-11.

[946] Charles River Associates, the appointed Competition Advisor to the Irish Minister of Finance, *Acquisition by Allied Irish Banks of EBS Building Society, Executive Summary of the Advice,* 23 June 2011, para. 11.

[947] Irish Minister of Finance, *Proposed Acquisition by Allied Irish Banks, plc of EBS Building Society,* 28 June 2011.

[948] Of course, the appropriateness of the Minister's decision hinges on whether there was indeed no other option for EBS than a takeover by AIB. It may be questioned whether there was no other option. The Irish government decided to cancel the sale of EBS to a private consortium only one day before it announced its two-pillars restructuring plan and it did so because the consortium's bid was not sufficiently "*commercially attractive*". See: Irish National Treasury Management Agency, *NTMA Statement on EBS Sale Process,* 30 March 2011. In addition, it can be doubted whether EBS indeed had no future as a stand-alone bank: the sale process of EBS was based on the assumption that it could continue to operate independently (see: Commission Decision of 11 October 2010, *Case State aid C25/2010 (ex-N212/2010) Restructuring of Educational Building Society - Ireland,* para. 70). It may be that the Irish government's stance on EBS' stand-alone future changed after it learned that EBS needed significant additional capital buffers at the end of March 2011 (as did AIB), but the aggregated amount of aid provided to the merged bank AIB/EBS equalled the amount EBS and AIB would have needed if they continued to function independently (see: Commission decision of 15 July 2011, *Case State aid SA.33296 (2011/N) – Ireland Emergency recapitalisation in favour of the merged entity Educational Building Society / Allied Irish Banks plc.,* paras. 28, 34). In addition, the consortium had apparently announced that the stress test results would not frustrate their wish to acquire EBS (see e.g.: Independent.ie, *Stress Tests No Threat to EBS Sale - Cardinal,* 30 March 2011.

3.2.4. The failing firm defence: conclusion

Above it has been set out that the failing firm defence doctrine as developed by the Commission cannot be applied to emergency takeovers. Although at first sight some authorities appear to have applied this defence to emergency takeovers, a closer look reveals that indeed the failing firm defence doctrine is not applied in such takeovers.

3.3. The application of the SIEC test to rescue mergers

In Chapter 2.5.2.5. it was explained that the SIEC test implies an economic welfare standard rather than a pure competition standard. This section sets out the implications of this finding for the assessment of emergency takeovers under the EUMR and the DCA. The type of emergency takeover that is considered in this chapter is a concentration that would increase the market power of the combined bank after the takeover more than what would usually be acceptable to the competition authorities. Consequently, the concentration would normally be blocked and customers would be saved from any anti-competitive harm that the increase in market power would have caused. In the sections below, the application of the SIEC test to the benefits of a rescue merger for customers and the state or society is dealt with.

3.3.1. Balancing of customers' benefits in the SIEC test

The benefits for customers of an emergency takeover vis-à-vis a pure state intervention, namely the (full or partial) maintenance of creditors' claims and the avoidance of resolution fees for the surviving bank (see Section 2.4.), imply respectively (1) a lowering or prevention of losses for customers, and (2) a prevention of increased prices. Below it is discussed whether these benefits can be included in the assessment of whether the SIEC test is passed.

It follows from the rationale behind the counterfactual analysis that this test requires that if customers are worse off without the concentration, a merger deal must not be blocked. The efficiency defence and failing firm defence doctrines make this abundantly clear, too. Within the efficiency defence doctrine, the increased market power consequences are trumped by the benefits of costs savings, quality improvements or innovation. The failing firm defence takes into account the harm to competition due to the failure of the undertaking, although it can also be argued

that such harm should be included in the application of the SIEC test.[949] Hence, it is uncontroversial that the SIEC test is not violated if a merger results in the realisation of price decreases.

Proceeding from the notion that the advantages for customers are crucial, it is only sensible to accept that the SIEC test is not violated if a merger results in the prevention of customer losses or increased prices.[950] In fact, the ACM adopted this approach in the *Rabobank/Friesland Bank* case when it stated that the deterioration of competition in the Frisian SME banking market due to a failure of Friesland Bank, i.e. under the counterfactual situation, would be worse for Frisian SMEs than the possible anti-competitive effects of a takeover by Rabobank.[951] Although the Commission's Horizontal Merger Guidelines do not deal with it, there appears to be no sound reason why increased customer losses and prices in the counterfactual situation should not be considered in a substantive appraisal exercise.

It is here submitted that benefits of lower customer losses and less increased prices should be eligible for inclusion in the SIEC test. (Whose benefits exactly may be included is further discussed in the next section.)

It is here repeated that the costs avoided due to preventing a systemic crisis, the gains in financial stability and the benefits of the continuance of the ailing bank's 'public function' should *not* be included in the appraisal of the emergency takeover. Indeed, the counterfactual situation regarding a 'too big to fail' bank is that the government will rescue it. Therefore, these avoided costs, gains and benefits will materialise in both the post-merger and the counterfactual situation.[952] As a consequence, they are not dependent on whether a takeover is executed and can therefore not be used to outweigh the takeover's anti-competitive effects.

3.3.2. Balancing of state/societal benefits in the SIEC test

In this book the normative position is taken that the benefits *for society* of a private takeover over a state rescue listed in Section 2.3. above must not be included in the

[949] J. Cook & Ch. Kerse, *EC Merger Control*, Sweet & Maxwell, 5th edn., 2009, p. 274.

[950] "*Thus rather than an efficiency defence we may need to consider an inefficiency defence as well.*" I. Kokkoris & R. Olivares-Caminal, *Antitrust Law amidst Financial Crises*, Cambridge University Press, 2010, p. 439.

[951] ACM decision of 30 March 2012, *Case 7149 Rabobank/Friesland Bank*, para. 62.

[952] This was in fact put forward by the OFT in its report on the takeover of HBOS by Lloyds TSB: OFT, *Report to the Secretary of State for Business Enterprise and Regulatory Reform on the Anticipated Acquisition by Lloyds TSB plc of HBOS plc*, 24 October 2008, para. 316.

SIEC test. This is probably also the Commission's position, which follows from its interpretation of the efficiency defence.[953]

This normative position is based on the view that the welfare test in the SIEC test does not allow for the balancing of anti-competitive harm for customers against the welfare benefits for others, e.g. society as a whole. The opposite position, i.e., allowing that the anti-competitive harm for certain customers can be compensated by benefits for other parties, would result in the redistribution of economic wealth from one group of citizens to another.

In this book it is argued that such welfare redistributive decisions must be based on democratically legitimised choices (see also Chapter 4.A.2.3.2.). It is clear that the legislatures of the EU and Dutch merger control regimes have not explicitly chosen to allow the said wealth distribution. Neither have they explicitly given the competition authorities this power.[954] In addition, it would be beyond the scope of the tasks of the ACM to decide whether such wealth distribution is appropriate and it is also very doubtful whether the Commission is well placed to make such a decision (see Chapter 4.A.2.3.3.). Even if the Commission had sufficient democratic legitimacy to allow for this wealth distribution, it has chosen not to interpret the SIEC test in this way (as mentioned above): it chose to use any democratic legitimacy it might have *against* allowing welfare redistributions through mergers. So, without a clear choice of the appropriate, democratically legitimised rule-maker in favour of allowing wealth redistribution, it is here argued that it is best to proceed from the least far-reaching subjective choice and disallow wealth redistribution within Article 2(3) EUMR/41(2) DCA.

The 'commonality rule'. The above normative position should be qualified somewhat. Similarly to the Exemption Possibility, the SIEC test should allow for the inclusion in its welfare balancing exercise of the benefits that are enjoyed by parties that are not customers harmed by the anti-competitive effects of the merger, provided that there is *sufficient commonality* between these parties and the customers harmed by the anti-competitive effects. This 'commonality exception' implies that if certain entities are

[953] "*The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.*" Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 5 February 2004, para. 79 [footnote omitted, underlining added].

[954] It is relevant to appreciate the difference between the legal system regarding agreements and mergers in this context. Unlike agreements, notifiable mergers require prior approval of the authorities before they are valid.

customers in different markets, the anti-competitive harm in one of these markets can be weighed against the benefits in another, as the buyers harmed are also the buyers that benefit (see Chapter 4.A.3.6. for a further discussion of this principle). This is sensible, since due to this commonality, in practice no wealth redistribution occurs. This normative stance taken here is not yet endorsed by the authorities' policies or case law in the context of merger control – to be clear, it has also not been rejected.

The commonality exception may be of relevance with regard to rescue mergers. The rescue of banks with state support is in the end paid for by the taxpayers. A private takeover reducing the amount of state support would therefore benefit taxpayers. So, customers harmed by the anti-competitive effects would also benefit from this reduction of state support as the result of the private takeover, assuming that these customers are tax payers. Consequently, it can be argued that *all* benefits for society can be included in welfare balancing exercise of the SIEC test, if all taxpayers are customers in the market(s) that are affected by the anti-competitive merger. With regard to the banking markets, it could e.g. be argued that all taxpayers use the retail payment system. Therefore, if any merger resulted in higher prices for retail payment services, this anti-competitive harm could be balanced against the cost savings for taxpayers due to the private takeover. On the other hand, if, for example, the merger only resulted in higher prices for SME loans, it would not be in conformity with the commonality principle to balance the benefits for taxpayers that are not SMEs against the anti-competitive harm for SMEs.

It is here argued that the commonality rule should be applied to the greatest extent possible when rescue mergers are assessed. Indeed, this would allow taking into account as many social benefits as possible without leaving any group worse off. These benefits could then be balanced against any anti-competitive harm, whereby it should be recognised that an approval decision by the Commission of ACM can be made conditional upon the (later) implementation of remedies. This approach ensures that economic prosperity is served optimally.

3.4. Balancing in the SIEC test: conclusion

This section started by explaining that the SIEC test includes a counterfactual analysis, meaning that this test requires a comparison of the competitive situations with and without the proposed merger. The counterfactual situation for the emergency takeovers discussed in this chapter is the rescue of an ailing bank by the state, since only 'too big to fail' banks are discussed. This means that the activities of the ailing bank will be continued in any event, either due to the takeover or due to the state's

rescue. Consequently, the costs avoided because a systemic crisis is prevented, any gains in financial stability and benefits due to the continuance of the troubled bank's public functions, should not be included in the assessment of the emergency takeover.

It is crucial to perform the counterfactual analysis appropriately. In practice this does not always happen, as the example of the *Lloyds/HBOS* case shows. Authorities may, e.g., neglect the fact that they will always save a bank that is 'too big to fail' and subsequently clear a certain takeover since there is no other potential buyer or because otherwise the bank would leave the market. The authorities then overestimate the benefits of the continuance of the target bank.

The failing firm defence is not suitable for 'exempting' emergency takeovers from the SIEC test, because such mergers are in general unlikely to meet two of the three criteria of this exemption possibility. An investigation of some bank rescues showed that the failing firm defence was indeed not applied in such rescues, but rather that a standard counterfactual analysis was performed. As the failing firm defence will not be available for emergency takeovers, a regular SIEC test application must be performed.

Regarding the benefits that emergency takeovers may have over state support, it was here concluded that exclusively the benefits that a takeover has *for customers* can be taken into account when applying the SIEC test. This follows from the rationale behind the merger control regime, as evidenced by the substance of the efficiency defence, which is that mergers must only be blocked if they leave customers worse off.

Likewise, it was here also held that in principle the benefits *for the state or society as a whole* cannot be taken into account when applying the SIEC test. From a normative perspective this finding is based on the view that the application of this test should not result in welfare redistribution. In addition, the Commission takes the same view. However, the commonality exception should fully apply. This implies that the benefits that are enjoyed by parties that are not customers harmed by the anti-competitive effects of the merger can be included in the SIEC test, provided that there is sufficient commonality between these parties and the customers harmed by these anti-competitive effects. This approach guarantees that economic prosperity is maintained as much as possible.

So, an important conclusion is that the SIEC test can be used to solve the conflict between financial stability interests and competition interests, but only to the extent that the former interests constitute benefits for customers, which benefits should not

be limited to improvements generated in the affected markets, due to the commonality rule. Considering the limited scope of eligible benefits, it is doubtful whether in practice these benefits will be significant enough to outweigh any anti-competitive harm – but this is a factual question.

4. STANDSTILL REQUIREMENT

4.1. Introduction

When considering whether the SIEC test may constitute a legal solution for the conflict identified in this chapter, it is important to acknowledge that the substantive appraisal exercise is part of a larger procedural regime. Indeed, as the emergency takeovers considered in this chapter fall within the scope of the EU or Dutch concentration control regime, they are subject to the applicable '**standstill requirement**'. The standstill requirement compels awaiting approval by the relevant authority before a merger may be implemented.

In practice, the period between the notification of the merger and an approval decision by the authority may last several weeks or even many months, if a second, in-depth examination phase is required. These standard periods for assessing a concentration may be too long to maintain the financial stability that the rescue merger aims to safeguard. As the Commission remarked regarding the *BNP Paribas/Fortis* case, "*[…] it appears that the suspension obligation could seriously affect the financial interests of the parties, of Fortis customers and moreover may have an impact on the financial system in general.*"[955,956]

Rescue measures are usually effected in a very short period and without prior announcement, as the news that a rescue measure is necessary may affect the trust

[955] Commission (derogation) decision of 27 October 2008, *Case COMP/M 5384 BNP Paribas/Fortis*, para. 40.

[956] See for similar reasoning: Commission decision of 28 September 2008, *Case COMP/M.5363 Santander/Bradford & Bingley assets*, paras. 18-20 [underlining added]: "*(18) In addition, the consequences of a financial failure of B&B, absent the acquisition of the Target by a stable and reputable market player in today's context, would have an impact not only on B&B and the assets being transferred to the Target but also on the stability of financial markets and consequently on third parties, including B&B's customers. Such a risk would be seriously increased if the acquisition does not take place rapidly. The resulting risk for the public would be very significant. (19) The acquisition is also important, as any negative outcome for B&B could also have a knock-on effect for other players in financial markets in the UK and beyond. The same applies to third parties. (20) Delay in the implementation of the transaction due to the standstill obligation imposed by the EC Merger Regulation may cause this disruption to magnify, as without the waiver the UK authorities would not be in a position to close the bid within the time scale required, which would significantly affect consumer confidence.*"

of clients and counterparties of the troubled bank, as well as the investors in this bank. Falling trust will cause these stakeholders to walk away from the bank and this will cause a deterioration of the bank's position, which will make its rescue more costly or may even bring down the bank before the rescue measure has been effected. In other words, speed is of the essence when it comes to rescue measures. An application of the standstill requirement means that there is a period of weeks or months between the moment the news that a rescue is necessary becomes public and the moment the recue merger can be effected; in practice this is problematic. Consequently, the answer to the question whether the SIEC test may form a legal solution for the identified conflict would be rather irrelevant if no exceptions to the standstill requirement were available.

Without prejudice to the above observation, it should be acknowledged that not all emergency takeovers require a very rapid merger control clearance. For example, the Lloyds/HBOS deal that was announced on 18 September 2008 (see Box 6.1.) was notified to the competition authorities in several jurisdictions, received its last approval decision on 22 December 2008,[957] and the actual acquisition of HBOS' shares by Lloyds occurred only on 16 January 2009.[958] So, there was apparently no need for a derogation of the standstill requirement in this case.

Fortunately, for those cases where the urgent implementation of a takeover is crucial, derogations from the standstill requirement are possible. Such derogations allow that the merging parties embark on implementing the concentration before the authority's approval decision is issued, while the transaction remains subject to the substantive appraisal exercise. If the outcome of this exercise results in a prohibition decision, the merging parties may be obliged to dissolve the concentration. The two subsections below discuss to what extent the possibilities in EU and Dutch law for a derogation from the standstill requirement are sufficient for emergency takeovers.

4.2. *Derogation from EU standstill requirement: the legal status quo*

The standstill requirement in the EU concentration control regime is included in Article 7(1) EUMR. Article 7(3) EUMR grants the Commission the power to waive

[957] Spanish competition authority (*Comisión Nacional de la Competencia*, the predecessor of the current authority, i.e. *the Comisión Nacional de los Mercados y la Competencia*) decision of 22 December 2008, *Case C/0120/08 LLOYDS TSB/HBOS*.

[958] The acquisition occurred through the exchange of HBOS shares for Lloyds shares. See: Lloyds TSB, press release of 16 January 2009, *Acquisition Update: Court Confirmation of Reduction of Capital and Scheme Becoming Effective*.

this requirement.[959] Granting a waiver can be done swiftly: e.g., in the *Santander/Bradford&Bingley* case the Commission issued a derogation decision on the same day the waiver request was submitted.[960] Furthermore, a waiver of the standstill requirement may even be granted before the envisaged concentration is officially notified to the Commission.[961] A derogation can also be granted for specific measures only, such as the measures to be taken by the acquiring bank for immediately remedying the weak financial position of the target bank.[962]

The takeover of the Belgium bank-insurer Fortis by the French financial conglomerate BNP Paribas is a good illustration of both a smart derogation of the standstill obligation and how the subsequent, definitive competition assessment may still allow for the taking of measures to mitigate competition concerns.

Box 6.6. *BNP Paribas/Fortis* case

Fortis was one of the three members of the consortium that in 2007 bought and split up the Dutch bank ABN AMRO. This deal appeared to be devastating for Fortis, as paying the high purchase price for ABN AMRO and simultaneously dealing with the problems of the 2008 financial crisis turned out to be impossible in practice. Fortis drifted into a troubled financial situation and therefore the Dutch, Belgian and Luxembourg governments decided they had to rescue the Fortis group in September 2008.[963]

Part of this rescue plan was that the Belgian and Luxembourg governments would first nationalise certain Fortis activities, and then resell these activities to BNP Paribas. The acquisition of the Belgian and Luxembourg activities of Fortis constituted a notifiable concentration within the meaning of the EUMR. On 23 October 2008 BNP Paribas submitted to the Commission a request for a derogation of the standstill requirement, and the Commission granted this derogation by way

[959] Article 7(3) EUMR reads: "*The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.*"

[960] Commission decision of 28 September 2008, *Case COMP/M.5363 Santander/Bradford & Bingley assets*.

[961] E.g., Commission decision of 17 December 2012, *Case COMP/M.6812 SFPI/Dexia*, para. 39.

[962] Commission (derogation) decision of 27 October 2008, *Case COMP/M 5384 BNP Paribas/Fortis*, paras. 40-42.

[963] See e.g. the Guardian on 29 September 2008: *"Fortis: Belgium acts to prevent financial group's collapse"*. <https://www.theguardian.com/money/2008/sep/29/insurance.europeanbanks>

of a decision on 27 October 2008.[964] The notification for approval of the merger was submitted on 29 October 2008 and the Commission issued its approval decision with conditions only a couple of days later on 3 December of the same year.[965]

Derogation. The process of granting of a derogation in this case is especially noteworthy, as it shows how, through a derogation decision, certain financial stability safeguarding implementation measures can be allowed before the approval of the whole merger. In the present case, these measures allowed BNP Paribas to:[966]

- scrutinise the evolution of Fortis' risks (including credit risks, market risks, liquidity risks and operational risks) during the period until the completion of the transaction;
- take, in agreement with Fortis management and the Belgian authorities, all appropriate measures with respect to the management and operations of Fortis that would be required by the financial crisis, including the transfer or restructuring of any structured credit portfolio lines, the transfer of interests or activities or any modification of the share capital of Fortis;
- approve the possible secondment of BNP Paribas employees to Fortis as a temporary measure. These employees might have key positions, in particular, in Fortis' marketplace operations or in support desk services, although not as managers.

Limiting the derogation to those measures that are necessary to ensure the continuance of the target bank and to protect financial stability, limits the effects on competition between the acquiring bank, the target bank and other banks. Although the abovementioned measures could have had a dampening effect on competition between BNP Paribas and Fortis, their competition effects were less than under a complete derogation. A complete derogation would, e.g., also allow the acquiring bank to control the target's direct commercial behaviour, which could mean a greater reduction in competition between the two banks.

Approval decision. The Commission's approval decision is relevant for this book, as it shows that a waiver of the standstill obligation does not imply that a competition concern discovered during the competitive assessment cannot be remedied anymore.

[964] Commission (derogation) decision of 27 October 2008, *Case COMP/M 5384 BNP Paribas/Fortis.*
[965] Commission (approval) decision of 3 December 2008, *Case COMP/M 5384, BNP Paribas/Fortis.*
[966] Commission (derogation) decision of 27 October 2008, *Case COMP/M 5384 BNP Paribas/Fortis,* para. 19.

During the assessment process following the notification of 29 October, the Commission found that the merger could produce unacceptable anti-competitive effects on the Belgian markets for the issuance of credit cards[967] and card-based consumer credit.[968] Consequently, the Commission approved the merger subject to conditions aimed at remedying the competition concerns. These remedies included the divestiture of certain BNP Paribas activities.[969] The earlier given derogation of the standstill requirement did not at all prevent this.

Considering the procedures for the derogation and the approval in this case jointly reveals that the Commission managed to both serve the interests of financial stability by swiftly taking a limited derogation decision and the interest of unfettered competition by demanding remedies to address the discovered anti-competitive consequences of the merger.

The Commission has quite some discretion when deciding to grant a waiver. It has not published a document setting out its policy on granting a derogation, but from its decisional practice the Commission's general approach can be derived. The Commission's assessment of whether allowing a derogation is warranted consists of three steps: (1) an appraisal of the effects of the standstill requirement on the parties to the transaction and third parties, (2) a preliminary investigation into the possible anti-competitive effects, and (3) a balancing exercise which takes into account on the one hand the benefits of waiving the required suspension for the parties concerned and third parties, and on the other hand any anti-competitive effects and possible adverse effects of a derogation for the parties concerned and third parties.[970]

Regarding emergency takeovers, it is relevant that the Commission has accepted the risks that suspending the concentration imply for financial stability for its balancing exercise as an element in favour of granting a derogation.[971] If shoving aside the suspension requirement did not involve threats to competition, a merger safeguarding financial stability might very well benefit from a derogation. However, the emergency takeovers considered in this chapter *do* have significant anti-competitive effects

[967] Commission (approval) decision of 3 December 2008, *Case COMP/M 5384, BNP Paribas/Fortis,* para. 113.

[968] Commission (approval) decision of 3 December 2008, *Case COMP/M 5384, BNP Paribas/Fortis,* para. 129.

[969] Commission (approval) decision of 3 December 2008, *Case COMP/M 5384, BNP Paribas/Fortis,* para. 144 *et seq*.

[970] *Cf.* e.g. the merger decisions cited in this section.

[971] E.g., Commission decision of 28 September 2008, *Case COMP/M.5363 Santander/Bradford & Bingley assets*, para.18; Commission (derogation) decision of 27 October 2008, *Case COMP/M 5384 BNP Paribas/ Fortis*, paras. 32, 40; Commission decision of 17 December 2012, *Case COMP/M.6812 SFPI/ Dexia*, para. 24.

and in such a situation it is uncertain whether the Commission is willing or able to grant a waiver. In general, the Commission does not grant derogations if the envisaged concentration poses a threat to competition.[972] If this were indeed the stance taken by the Commission with regard to bank emergency takeovers, the standstill requirement would not be suspended and such takeovers would not be feasible, which could deny the bank's customers and taxpayers of a net advantageous outcome.

4.3. Derogation from EU standstill requirement: a normative analysis

Considering the benefits a private takeover may have over and above state support only, and the necessity that emergency takeovers are effected within a short period, the Commission should be rather open for granting a derogation for an emergency takeover, even if the merger raises *prima facie* competition concerns. The derogation could be limited to measures needed to ensure that the bank is saved (for examples of such measures see Box 6.6.). These measures would probably not include the joint coordination of the commercial policies of the merging banks, which would result in the most harmful anti-competitive effects, as such coordination before the Commission's approval decision is unlikely to be required to rescue the ailing bank. Limiting the waiver of the standstill requirement to certain measures has the benefit of making it easier, after the Commission has taken its decision, to implement remedies to mitigate the anti-competitive effects of the merger.

Indeed, it should remain possible for the Commission, should it conclude that the concentration causes unacceptable harm to competition, to remedy this by attaching to its approval decision certain conditions that would lessen the merger's impact on competition. The Commission's approach could then be similar to its state aid policy for banks during the 2008 financial crisis[973] and its subsequent, current policy[974]: allow the implementation of rescue measures so that financial stability is maintained, and address any competition problems later by requiring the rescued banks to divest business units or prohibit certain

[972] Commission decision of 11 February 2011, *Case COMP/M.5969 SC Johnson/Sara Lee*, para. 60.

[973] Commission Communication of 25 October 2008, *The Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis*.

[974] Commission Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis of 30 July 2013, paras. 50, 56. This 2013 policy replaced the Commission's 2008 policy. Pursuant to the 2008 policy, the Commission would swiftly approve (e.g. within 24 hours) all state aid measures to rescue banks, provided that six months later a restructuring plan would be submitted to the Commission for approval. As the financial crisis had largely disappeared in 2013, the Commission took a stricter approach in its 2013 policy: the Commission is still willing to approve aid notifications comprising liquidity guarantees without a restructuring plan, but other types of aid may only be granted if the Commission has also first approved the related restructuring plan, unless exceptional conditions apply.

commercial behaviour. If this approach is available for state aid, it is sensible that it also be available for emergency mergers, as both types of measures face the same conflict of public policy interests: the necessity to protect financial stability and the aim to prevent distortions of competition. Clearly, the anti-competitive effects of state aid differ from those of mergers. The former effects materialise in *all* markets where the rescued bank is active, as in these markets the bank's competitors are denied the 'benefit' of the disappearance of a competitor. A removal of *all* anti-competitive effects is therefore unlikely through post-aid remedies, as it is the very aim of the aid measure to keep the troubled bank alive, which automatically implies the continuance of some anti-competitive effects.[975] The anti-competitive effects of a merger are different, as usually these effects only materialise in certain markets, i.e., where the merging parties' combined market share is high. Such 'isolated' competition concerns may be easier to remedy than state aid anti-competitive effects – it is here acknowledged that 'easier' does not mean 'easy'…

As the *BNP Paribas/Fortis* case shows (see Box 6.6.), the proposed approach is already legally feasible. The finding of possible threats for competition during the derogation decision procedure need not be an obstacle, as the Commission is authorised to grant a waiver even when competition concerns are present;[976] Article 7(3) EUMR merely requires the Commission to "take into account" the threat to competition. Nevertheless, the Commission now has complete discretion when deciding to grant a waiver for the standstill obligation. An unwilling Commission may therefore still put a spike in the wheels of a rescue merger. It would therefore be appropriate if the Commission would explicitly adopt the policy that it will always waive the standstill requirement in case of an emergency takeover, to the extent rescue measures are concerned; this would provide more legal certainty to the parties to an emergency takeover, as well as to supervisors, governments and other stakeholders, regarding the feasibility of a private merger to safeguard financial stability.

4.4. *Derogation from EU standstill requirement: conclusion*

Thus, the application of Article 7(3) EUMR ensures that the standstill requirement need not be a legal obstacle for accepting, as an appropriate solution for the conflict investigated in this chapter, the balancing within the SIEC test of an emergency

[975] Another difference is that in the event of rescue, state aid consumers need not be harmed in the short run, as the continuance of the troubled bank may keep competition unaffected. The anti-competitive effects of a merger differ as consumers may be directly affected by price increases and the like, due to the increase in market power as a result of the merger.

[976] Commission decision of 11 February 2011, *Case COMP/M.5969 SC Johnson/Sara Lee*, para. 59, footnote 9.

takeover's anti-competitive effects against its welfare advantages. Nevertheless, granting a waiver is a discretionary power of the Commission: it is not obliged to grant a waiver for a rescue takeover. Additionally, it appears to be the policy of the Commission not to grant a waiver if the merger is likely to restrict competition. This is here deemed not opportune for emergency takeovers, considering the benefits a private takeover may have for customers. It is recommended that the Commission develop a policy in which it (1) commits itself to providing derogations for emergency takeovers and (2) recognises that the mere risk of the limitation of competition is not a reason for rejecting a waiver request.

4.5. Derogation from Dutch standstill requirement: the legal status quo

Like the EU merger control regime, the Dutch regime has a standstill requirement, too. Compared with its EU counterpart, a relevant difference in the Dutch standstill requirement, apart from the procedural differences discussed below, is that the standstill obligation of the DCA does not apply to private takeovers pursuant to the exercise of a 'resolution power' within the meaning of the BRRD or SRM Regulation (see Box 1.1.). Indeed, the exercise of such a power is not subject to any conditions based on national laws. To private emergency takeovers that are not based on a resolution power, however, the national standstill requirement fully applies and the following discussion remains relevant. As one of the conditions for the exercise of a resolution power is that "*there is no reasonable prospect that any alternative private sector measures*" are available to prevent the bank from failing, it is in fact rather conceivable that a rescue merger (i.e. a private measure) is not the result of the exercise of a resolution power.[977]

For concentrations that must be notified to the ACM pursuant to the DCA, Articles 34 and 41 DCA include the standstill requirement in the first and second phase respectively. Pursuant to Articles 40 and 46 DCA, the ACM can grant derogations from the standstill requirement upon request of the party that submitted a first phase notification or license request respectively. The waiver procedure therefore differs somewhat from its EU counterpart: a waiver request may only be filed if a first phase notification or license request is submitted first or simultaneously. In practice this need not be problematic, since a notification can be prepared in advance, need not be

[977] See Article 32(1)(b) BRRD/18(1)(b) SRM. This does not imply that an emergency takeover can never be the result of the exercise of resolution power; on the contrary, as the 'sale of business' resolution power shows (Article 38 BRRD/24 SRM). The sale of business power could, e.g., be applied if the ailing bank itself is unwilling or incapable of concluding a merger deal and the intervention of the authorities is required to effect such a deal.

completed in detail when first submitted and can be supplemented later. If the ACM decides after its first phase investigation that a license is needed for the merger, the ACM must grant an additional waiver for the second phase of the merger procedure.

With regard to the timing, it is relevant that the ACM can grant a waiver swiftly, even on the same day it is requested.[978] Whether a derogation needs to be granted in the interest of financial stability will most likely, pursuant to a covenant between the ACM and DNB,[979] be discussed beforehand by these two institutions (see below).

In Box 6.7. below, the process of obtaining a waiver in a banking merger is illustrated through a description of the relevant events in the Rabobank/Friesland Bank merger.

Box 6.7. *Rabobank/Friesland Bank* case: summary and analysis of the granted waiver

A rather late victim of the 2008 financial crisis was the Dutch bank Friesland Bank N.V. The bank was not immediately endangered by crisis symptoms such as bank runs or the halt of interbank lending. Rather, the new, more strenuous Basel III capital requirements rules in combination with an overall deterioration of its performance resulted in the conclusion that an independent continued existence was not feasible.[980] Consequently, Friesland Bank explored the possibility of joining another bank, and on 1 April 2012 it became part of the Rabobank.

The acquisition of Friesland Bank by Rabobank had to be notified to the ACM in accordance with the DCA. The two banks notified the concentration on 30 March 2012. The ACM's substantive appraisal resulted in a first phase approval on 27 April 2013.[981] The takeover had to be assessed against the background of the then Dutch banking sector. This sector could be characterised as highly concentrated, dominated by three major banks (Rabobank, ABN AMRO and ING Bank), one medium size bank (SNS Bank) and several smaller banks, including Friesland Bank.[982] At the time, Rabobank was the market leader in several

[978] E.g., ACM decision of 30 March 2012, *Case 7149 Rabobank/Friesland Bank*.

[979] Covenant between the ACM and the DCB regarding concentrations in the financial sector in emergency situations, 22 December 2010, Article 5(1). The preparations of certain concentrations orchestrated by the DCB must be reported to the ACM by the DCB: Article 159(d)(9) FS Act.

[980] Friesland Bank, press release of 2 April 2012, *Friesland Bank Kiest voor Samengaan met Rabobank*. Indeed, at the end of April 2012 Friesland Bank reported a major loss and would have had capital ratios below the legal requirements, had it not been supported by its acquirer Rabobank, see: Friesland Bank, *Annual Report 2011,* pp. 3-4.

[981] ACM decision of 27 April 2013, *Case 7149 Rabobank/Friesland Bank*.

[982] ACM decision of 27 April 2013, *Case 7149 Rabobank/Friesland Bank,* para. 51.

product categories, including the personal accounts, mortgages and savings accounts markets (the market shares were approximately >30%, 30% and 40% respectively), and credit provision for SMEs and agricultural firms (market shares were approximately >30% and 85%).[983] Nevertheless, the ACM did not expect competition problems mainly because of the negligible growth of Rabobank's market share as a consequence of absorbing Friesland Bank.

The two banks notified the concentration together with a request to waive the standstill requirement. The ACM granted the waiver pursuant to Article 40 DCA on the very same day the request was submitted. This may look faster than it was, since it appears that the ACM was already informed by the parties of their intention to merge on or before 15 March 2012.[984] Communication between the merging parties and the ACM before submitting a formal notification – so-called pre-notification contacts – are not uncommon in concentration cases and they provide, among other things, a practical and effective way for ensuring that a derogation can be received swiftly. Indeed, in the present case the ACM used the time before the waiver request to perform a preliminary assessment of the consequences of the envisaged takeover. It probably concluded that no evident competition concerns were to be expected, as it found after its formal investigation, although the ACM's derogation decision does not include any reference to the merger's consequences for competition. The risk of letting the concentration commence before the formal first phase investigation was finished was probably considered to be low. This is not sufficient grounds for granting a waiver, as most concentrations do not create competition risks, but nevertheless the standstill requirement is usually fully applicable. The finding that anti-competitive effects are unlikely does, however, make it easier for the ACM to grant a waiver. As mentioned below, a waiver will only be granted if no irreparable damage is expected (Section 4.6.).

In the present case the ACM had more than two weeks to consider a forthcoming waiver request. If an emergency takeover has to be effected overnight, the ACM will not have such a long period for consideration. This could have an influence on the authority's willingness to grant a derogation.

With regard to the expectation of irreparable damage, the ACM granted a derogation of the suspension requirement after considerations, including

[983] ACM decision of 27 April 2013, *Case 7149 Rabobank/Friesland Bank;* Rabobank, *Annual Report 2012,* p. 40.

[984] This date follows from emails the ACM sent to DNB, which are in the author's files after a request for information based on the Dutch Freedom of Information Act *(Wet openbaarheid van bestuur)*.

consulting DNB.[985] Although DNB's opinion was not published and the ACM did not make public its own complete reasoning behind the derogation decision, it can be derived from the decision that had the takeover not been completed before Friesland Bank announced its disappointing financial results for 2011, there would have been a commotion among Friesland Bank's customers.[986] This would have then led to unacceptable consequences, and therefore a waiver was granted. The nature of the expected unacceptable consequences was not made public, but an obvious candidate would have been bank runs and consequent failure of Friesland Bank.

To conclude, with regard to the ACM's willingness to grant a derogation from the standstill requirement, the *Rabobank/Friesland Bank* case shows that the ACM may accept the likihood of panic among a bank's customers and the accompanying negative consequences, presumably bank runs and a subsequent failure, as a serious reason to justify a derogation. This is in line with the agreements between the ACM and DNB listed in their Rescue Takeover Protocol.

4.6. *Derogation from Dutch standstill requirement: a normative analysis*

Similarly to the Commission, the ACM has discretion when deciding to grant a waiver: Articles 34 and 41 DCA merely stipulate that there must be "*serious reasons*" to justify a waiver. From the legislative history it can only be learned that the derogation possibilities are meant to prevent situations in which the standstill requirement would cause "*irreparable damage to the concentration*."[987] As, in the case of an emergency takeover, the financial situation of the troubled bank would probably deteriorate substantially if the acquisition had to be postponed until the receipt of an approval decision, the takeover would be endangered if no derogation were granted. The concentration might be irreparably damaged. Nevertheless, for the sake of legal certainty it would be appropriate if the ACM would explicitly adopt a policy of always granting a waiver of the standstill requirement in case of an emergency takeover.

So, with regard to the standstill requirement of the DCA, the same conclusion can be drawn as to the standstill requirement of the EUMR: the requirement need not be a legal obstacle to balancing an emergency takeover's anti-competitive effects

[985] ACM decision of 30 March 2012, *Case 7149 Rabobank/Friesland Bank*.
[986] ACM decision of 30 March 2012, *Case 7149 Rabobank/Friesland Bank*, paras. 2, 5.
[987] Parliamentary article, *Kamerstukken II* 1995/96, 24707, No. 3, p. 78.

against its welfare advantages within the SIEC test as an appropriate solution to the conflict discussed in this chapter. Again, uncertainty with regard to this solution for an individual case remains, as the ACM has discretion when deciding to grant a derogation. It is therefore appropriate that this uncertainty be removed by adopting an explicit policy. Admittedly, the authority has already taken some steps to avoid the standstill requirement unduly blocking a rescue merger: it has entered into a covenant with DNB to ensure a good cooperation with this supervisor regarding emergency takeovers.

4.7. Derogation from Dutch standstill requirement: Rescue Takeover Protocol of ACM & DNB

From the moment the ACM was entrusted with the power to investigate bank mergers in 2000, it was clear that conflicts could arise between the ACM and DNB because of the different tasks and interests of the two authorities.[988] Therefore, they concluded a covenant with regard to cooperation regarding concentrations involving troubled banks in December 1999, which was later replaced by an updated version: the Rescue Takeover Protocol of 22 December 2010.[989] The covenant proceeds, without explaining why, from the assumption that a takeover may sometimes be the best solution for an emergency situation in the financial sector. It mainly aims to prevent conflicts that may arise in the event that DNB urges a rescue takeover[990] to avert the threat of a bank failure, while the application of the DCA's rules on concentrations could delay or block such a takeover.

Pursuant to the covenant, the two authorities agree to provide each other as early as possible with relevant information and discuss possible actions so that each authority can take the interests of the other authority into account.[991] This may facilitate granting a waiver of the standstill requirement by the ACM (see below).

[988] Letter of the Ministers of Finance and of Economic Affairs to the Dutch House of Representatives of 10 December 1999; Parliamentary article, *Kamerstukken II* 1999/00, 26965, No. 1.

[989] DNB & ACM (NMa), *Protocol tussen De Nederlandsche Bank N.V. en de Nederlandse Mededingingsautoriteit betreffende concentraties in de financiële sector in noodsituaties*, 2010.

[990] The protocol applies to emergency situations as defined in Article 2 of the Rescue Takeover Protocol, which also include the acquisitions of banks that do not endanger financial stability. Such acquisitions are therefore not 'emergency takeovers' within the definition of this thesis and therefore the term 'rescue takeover' is applied.

[991] E.g., DNB is to inform the ACM about an envisaged rescue takeover as soon as possible, to the extent that DNB considers this appropriate (Article 3(1) of the Rescue Takeover Protocol). If a rescue takeover falls within the scope of the DCA, the ACM will upon request of DNB inform this authority as soon as possible about its preliminary view on any competition concerns and possible remedies (Article 4(1) of the Rescue Takeover Protocol).

Pursuant to the covenant, DNB will take the ACM's view as much as possible into account when considering suitable acquirers for a troubled bank.[992] If discussions between the two authorities do not result in an agreement, the covenant mentions that they can present the case to the Minister of Economic Affairs *with an eye to the Minister's power to trump a second phase prohibition decision of the ACM*.[993] Indeed, the early interference of the Minister in case of unsurmountable conflicts between the ACM and DNB has explicitly been considered: the Minister's power to trump an ACM decision pursuant to Article 47 DCA has been seen as useful for such conflicts, although the necessity to await the full two assessment phases was viewed as problematic (Article 47 DCA is further discussed in Section 6.). The Minister has therefore deemed it appropriate in such a case that he indicate unofficially at a very early stage whether Article 47 DCA could be successfully invoked – even before the official notification of the merger to the ACM.[994] This could give the merging parties, the financial markets and society some assurance that the deal will be approved, although it does not mean full certainty.

To solve the standstill requirement problem, the Rescue Takeover Protocol may be the best option available without an amendment of the DCA. The protocol contributes to the smooth cooperation between the ACM and DNB and may therefore prevent avoidable conflicts. Nevertheless, it does not change the standard legal regime applicable to concentrations: the ACM keeps the full power and discretion to grant a derogation of the standstill requirement or not, and the ACM must still block an emergency takeover if the authority finds that it significantly impedes effective competition in the Netherlands. The commitments of the ACM and DNB included in the covenant are not firm obligations, but rather best efforts obligations to act 'as early as possible' and 'to the extent appropriate'. The covenant does not arrange that the ACM will automatically and immediately provide a waiver of the suspension requirement upon request of DNB or the Minister of Finance. This is unfortunate, as it is clear that sometimes financial stability can only be safeguarded through a fast acquisition of a troubled bank. Uncertainty and possible delay regarding the waiver may in that case render pursuing financial stability interests impracticable.

[992] Article 3(3) of the Rescue Takeover Protocol.

[993] Article 8 of the Rescue Takeover Protocol. This article mentions that DNB and the ACM can present the case together or alone and that they may do this in consultation with the Ministry of Finance. The article also stipulates that DNB and the ACM will discuss coordination of any public announcements.

[994] Letter of the Ministers of Finance and of Economic Affairs to the Dutch House of Representatives of 10 December 1999; Parliamentary article, *Kamerstukken II* 1999/00, 26965, No. 1, p. 3.

4.8. Derogation from Dutch standstill requirement: conclusion

The standstill requirement of the DCA need not be an obstacle to the swift implementation of a rescue merger, as the DCA provides the ACM with the authority to waive this requirement. The ACM can grant a waiver quickly, on the same day that the merger was notified to the authority. Furthermore, there is a cooperation protocol between the ACM and DNB to prevent conflicts between the two authorities with respect to rescue mergers promoted by DNB. This protocol also includes an escalation mechanism: if the two authorities cannot reach agreement on whether the merger should continue, the Minister may express its intention to apply its overriding power pursuant to Article 47 DCA (see Section 6.).

It would be better still if the ACM made it a policy to always waive the standstill requirement in the first and second phase, if, according to DNB, financial stability is at stake, and when the Minister of Economic Affairs has expressed its intention to use its power to approve a merger rejected by the ACM in the second phase.

5. ARTICLE 21(4) EUMR

5.1. Introduction

The above sections explored the possibility of using the SIEC test for solving the conflict between the merger control regime and the safeguarding of financial stability. In Section 3.3.1. it was set out that the SIEC test (rightfully) allows for the taking into account of certain benefits for bank customers, but not the benefits for the state or society, unless the commonality rule applies, nor those benefits that would also materialise if state intervention occurred. As the benefits for the state cannot be included in the SIEC test, it may be that this test will block a merger that in the end is beneficial for society. It is therefore valid to explore whether there are other reconciliation mechanisms available that *do* allow the inclusion of the benefits for the state. In the context of the EUMR it may be considered whether Article 21(4) EUMR would be an appropriate reconciliation mechanism.

Box 6.8. Article 21(4) EUMR

- Notwithstanding paragraphs 2 and 3 [of Article 21 EUMR], Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.
- Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.
- Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

Article 21(4) EUMR allows, briefly put, EU Member States to protect their national, legitimate interests if a merger is effected. If a concentration falls within the jurisdiction of the EUMR, the EU Member States are not allowed to apply their competition laws to this concentration anymore.[995] This does not mean, however, that the Member States' other laws cannot apply to such a concentration. Article 21(4) EUMR gives Member States the possibility to 'take measures' if concentrations infringe their legitimate interests. Certain types of legitimate interests are listed in this provision and, pursuant to Article 21(4) EUMR, the Member States are in any event allowed to protect these interests. The prudential rules governing the solvency of banks are listed in this provision as a legitimate interest.[996] Since safeguarding the solvency of banks also aims to protect financial stability, it is only logical that the rules and governmental acts governing financial stability are included in this concept of 'prudential rules'.[997] Member States' interests that are not listed in Article 21(4) EUMR may also be protected but the Commission must first check whether this protection is 'legitimate'.

[995] Article 21(3) EUMR.

[996] Prudential rules "*relate in particular to financial services; the application of these rules is normally confined to national bodies for the surveillance of banks, stockbroking firms and insurance companies. They concern, for example, the good repute of individuals, the honesty of transactions and the rules of solvency.*" Commission Notes on Council Regulation (EEC) 4064/89.

[997] E. Carletti & X. Vives, *Regulation and Competition Policy in the Banking Sector*, IESE Occasional Paper OP-159, 2008, p. 12; R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 8th edn., 2015, p. 896.

The next section describes to what extent Article 21(4), as it is currently applied, may be an appropriate reconciliation mechanism. Subsequently, Section 5.3. provides a normative view on this provision.

5.2. Article 21(4) EUMR: the legal *status quo*

It is unclear what exactly it means that the Member States may 'take measures' within the meaning of Article 21(4) EUMR: can they both *block* mergers approved by the Commission, as well as *authorise* mergers that are prohibited by the Commission? That blocking an approved merger is possible, is clear. Whether authorising a prohibited merger is possible, is doubtful. The EU Courts have not yet considered this. Nevertheless, for this book it is relevant to establish whether such an authorisation would be possible, considering the focus on mechanisms that reconcile competition law prohibitions with public interests.

Unsurprisingly, according to Commission Article 21(4) EUMR only gives Member States the possibility to block, *and not to authorise* concentrations that infringe their legitimate interests.[998] The Commission, however, does not substantiate its position. It is relevant that the Commission is not the designated institution to interpret the EUMR. The EU Courts, or perhaps the Council as the legislature of the EUMR, would be the more appropriate entities to interpret this regulation.

Most scholars concur with the Commission's position.[999] However, recently, in light of the severe and extensive consequences of the 2008 financial crisis, some scholars have wondered whether the Commission would maintain its narrow position rejecting a Member State's right to approve anti-competitive mergers if in reality it had been confronted with an anti-competitive emergency takeover.[1000]

Scholars endorsing the Commission's stance may quote the Commission's 'interpretation notes' as the reason for rejecting the position that Article 21(4) EUMR implies an authorisation power, but they do not discuss why the Commission is correct or should be followed. The said interpretation of the Commission was included as an interpretative statement by the Commission in the Council's minutes.[1001] It is not sufficient to merely

[998] Commission Notes on Council Regulation (EEC) 4064/89.

[999] See e.g.: I. Kokkoris & H. Shelanski, *EU Merger Control - A Legal and Economic Analysis*, Oxford University Press, 2014, p. 160, footnote 23; D. Chalmers *et al.*, *European Union Law*, Cambridge University Press, 3rd edn., 2014, p. 18 (*Chapter 24: Merger Policy* - online chapter). <http://www.cambridge.org/download_file/853384>

[1000] C. Baudenbacher & F. Bremer, *European State Aid and Merger Control in the Financial Crisis*, Journal of European Competition Law & Practice, Vol. 1, No. 4, 2010, p. 282.

[1001] Commission Notes on Council Regulation (EEC) 4064/89.

refer to a declaration or a statement in the Council's minutes to substantiate a certain interpretation of an EU law. The EU Courts rarely rely on such statements to choose a certain interpretation. Indeed, it is "*settled case-law that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision.*"[1002]

So, with regard to the legal *status quo* of the possibility, pursuant to 21(4) EUMR, for Member States to push through mergers that are blocked by the Commission, this possibility currently seems not to exist, since the Commission rejects it. However, the Commission does not have the definitive power to interpret EU law. This is the role of the ECJ, and this court has not yet considered the question.[1003] It is here held that Article 21(4) can be construed to include such a power to push through mergers, since the wording that "*the Member States may take appropriate measures*" does not preclude this. Such an interpretation would therefore not be *contra legem*.

5.3. Article 21(4) EUMR: a normative view

So, the question remains whether the Commission was right to conclude that Article 21(4) EUMR does not give Member States the power to authorise mergers that were prohibited by the Commission. The following sections include a normative view on the most appropriate application of Article 21(4).

5.3.1. Assessment of the mainstream interpretation of Article 21(4) EUMR

This section provides arguments pro and contra the Commission's assertion that Article 21(4) EUMR does not include an authorisation power for Member States.

Arguments in favour of an authorisation power

- An argument against the position that Article 21(4) EUMR only allows Member States to *block* approved concentrations is that the wording of this provision does not exclusively mention a blocking power but refers to the broader concept of

[1002] ECJ judgment of 17 April 2008, *Case C-404/06 Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, para. 32. See also: ECJ judgment of 26 February 1991, *Case C-292/89 The Queen v, Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, para 18; ECJ judgment of 13 February 1996, *Case C-197/94 Société Bautiaa v. Directeur des Services Fiscaux des Landes*, para 51.

[1003] Jones & Sufrin consider it a possibility: A. Jones & B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edn., 2014, p. 1165.

'taking measures'. If this article were meant to provide only for a blocking power it is plausible that the article's wording would have indicated just that.

- Furthermore, it would be rather inconsequent if the Member States' legitimate interests could only be protected if a concentration is *approved* by the Commission. Clearly, such interests are in principle also worth protecting if a concentration is anti-competitive and blocked. If Article 21(4) EUMR did not include an authorisation power, this would mean that in the context of concentration control, competition interests would always take priority over non-competition interests.[1004]
- Another argument in favour of an authorisation power is that from a legal systematic point of view the existence of Article 21(4) seems needless if this provision only implied a blocking possibility for mergers that do not violate the EUMR's substantive appraisal test. Clearly, the existence of a competition law test, i.e. the SIEC test, does not rule out that laws governing other policy areas may also include certain tests for approving or blocking mergers.[1005] However, a rationale for this provision could be the *de facto* limitation of the possibilities of Member States to invoke all kinds of national laws to block mergers, through which the Member States could effectively undermine the EUMR's one-stop-shop approach.[1006]

Arguments against an authorisation power

- An argument in favour of limiting Article 21(4) EUMR to a blocking power for Member States is that a Commission prohibition decision has the effect that a concentration must not be implemented, and therefore a Member State's authorisation decision pushing through the merger would by definition be contradictory to the Commission's prohibition decision. In contrast, a Commission approval decision does not mean that a concentration *must* be implemented, and the result of a

[1004] Although this could indeed have been the Council's intention, there are in fact no indications that it wanted to take this far-reaching stance. Quite the contrary: if anything, the wording of Article 21(4) EUMR indicates that the Member States' legitimate interests, at least the legitimate interests listed in this provision, take priority over competition law. In general, EU law does not by definition prioritise competition interests above other policy interests.

[1005] E.g., if an agreement is not prohibited by the Cartel Prohibition it may nevertheless be prohibited by laws covering other policies such as security, public health or financial regulatory interests. It is rather obvious that other rules may still ban agreements on other than competition grounds.

[1006] Indeed, Article 21(4) EUMR limits the possibilities of other national laws to regulate mergers on non-competition grounds, as the protection of non-listed interests is subject to a check by the Commission. Machado Borges finds that the main effect of Article 21(4) EUMR is a clarification of the scope of the Commission's authority to review mergers based on competition grounds by an express prohibition of national measures that take into account competition criteria. This view is here considered to be unconvincing, since Article 21(3) EUMR already explicitly prohibits the application of national competition laws to concentrations that fall within the jurisdiction of the EUMR. See: G. Machado Borges, *Scrutiny: The Legitimate Interests of Member States in EC Merger Law, European Public Law*, Vol. 9, Iss. 3, 2003, p. 356.

Member State's blocking decision is therefore not by definition contradictory to the result of a Commission's approval decision. So, the authorisation power and the blocking power for a Member State are not just two sides of the same coin.

- Further to the previous argument, it could be argued that if the Council had intended to introduce the far-reaching possibility that a Commission's prohibition decision could simply be set aside, it would have been more explicit about this. Indeed, the EUMR does not set out a procedure for the application of Article 21(4) EUMR with regard to compelling concentrations by the Member States. However, this is not unique, nor insurmountable. There are other examples of EU law procedures that were not set out in legislation, but that were gradually developed through application in practice and case law.[1007] So, the lack of a predetermined procedure should not be a reason to dismiss the possibility that Article 21(4) EUMR allows Member States to compel anti-competitive mergers in the interest of financial stability.
- Finally, another argument in favour of the mainstream consensus is that if it were allowed for a Member State to compel a bank merger, this could limit competition in other EU markets where these banks are active. It can be argued that it is against the spirit of the wider EU project that one Member State unilaterally takes measures that harm competition in other Member States and that therefore Article 21(4) EUMR should not make this possible. However, it can be expected that if an emergency takeover results in significant anti-competitive effects in more states, the acquired bank has a substantial market position in each state. It is then also likely that the failure of this bank would also endanger financial stability in these states and most likely they would therefore also favour this merger.[1008]

It is submitted that none of the arguments pro or contra carries so much weight that there is an unequivocal answer to the question of the substance of Article 21(4) EUMR. It therefore seems conceivable that the ECJ would take another position than the Commission and interpret this provision as also allowing Member States to force through mergers that are blocked by the Commission. In the next section it is discussed whether the ECJ *should* indeed adopt this interpretation.

[1007] See, e.g., with regard to the development of EU state aid procedures: P.J. Slot, *Procedural Aspects of State Aids: the Guardian of Competition versus the Subsidy Villains?*, Common Market Law Review, Vol. 27, Iss. 4, 1990, pp. 741-760.

[1008] In addition, because of the linkages between banks across the EU and the globe, the contagion of difficulties in the banking sector may not be stopped by country border; the failure of Lehman Brothers and its consequences has clearly proven this. Consequently, Member States, and bank customers and citizens across the EU, may benefit if another Member State rescues a faltering bank.

5.3.2. *A normative view on the most appropriate application of Article 21(4) EUMR*

The benefit of Article 21(4) EUMR over the SIEC test is that the former is not limited to offsetting benefits for harmed *bank customers* only. Article 21(4) enables a Member State to take into account the benefits for the *whole society* of a private takeover vis à vis a pure state solution. This provision, however, also has some downsides.

First, Article 21(4) is a rather blunt instrument: through the application of this rule all competition concerns can just be trumped. If the SIEC test is applied, the Commission's approval decision may be contingent on certain remedies. If a Member State were to invoke Article 21(4) EUMR to authorise a merger, there would be no obligation for the Member State to mitigate any anti-competitive effects, nor would the Commission have the power to impose this. The application of Article 21(4) EUMR would solve the conflict through simple hierarchy: the financial stability interests would just override any competition concerns. This is unfortunate, as both the anti-competitive effects and financial stability interests can in principle be reflected in economic prosperity terms. This implies that a *computation* of the economic prosperity outcome, rather than exclusion, is a more appropriate method to determine the best solution for optimally serving the overarching goal of economic prosperity. It may, however, be questioned whether anti-competitive effects will ever outweigh financial stability concerns.[1009] In addition, in principle there is no reason, from a legitimacy perspective, why a state should exercise a computation exercise when applying Article 21(4) EUMR. Indeed, the state may decide that welfare redistribution is warranted and could therefore determine that certain bank customers' welfare is to be sacrificed for other citizens' welfare. An important qualification to this legitimacy argument should be made: it only applies to states to the extent that welfare redistributions in their own jurisdictions are concerned (see below).

Secondly, there is currently no legal mechanism that deprives a prohibition decision by the Commission of its effect. One may argue that the availability of an authorisation power in Article 21(4) EUMR would automatically also mean that a Member State's

[1009] Since the benefits of avoiding a financial crisis are so large: "*(…) financial crises are destructive of confidence in the financial system and this confidence is a prerequisite for the provision of credit and a properly functioning economy. A financial crisis thus becomes a broader economic crisis, and so government debt tends to explode in its wake. Increased government debt can, in turn, create political pressure to institute austerity measures with resulting broad social hardship. Even without the implementation of austerity measures, the social costs that flow from financial crises are devastating – the aftermath of financial crises is usually characterized by significant declines in employment and increases in poverty that can ultimately impact health and safety.*" H.J. Allen, *A New Philosophy for Financial Stability Regulation*, Loyola University Chicago Law Journal, Vol. 45, 2013, pp. 187-188.

authorisation decision makes the Commission's prohibition decision void. Otherwise this power would make no sense. This is a reasonable argument, but there should be more legal certainty for undertakings on this point.

So, Article 21(4) EUMR would be a more effective and solid solution framework if coupled with an adequate procedure that (1) would allow for the remedying of competition concerns, and (2) would also ensure that a Member State decision that forces through a merger deprives a prohibition decision by the Commission of its legal effect:

- The first condition implies that society's welfare can be maximised through capturing the short-term benefits of maintaining financial stability as well as the long-term benefits of competition, when financial stability is no longer at stake. This can be procured with a two-stage procedure, resembling the crisis state aid procedure for banks: first, the merger is authorised and financial stability is maintained; secondly, the merged entity is required to implement certain remedies to solve competition issues in the medium and long term. These remedies would be especially relevant for mitigating anti-competitive effects on markets outside the authorising Member State. The decision of one Member State to save its financial stability should not unduly disadvantage other Member States' welfare through creating non-competitive markets in those states.
- The second condition removes the legal difficulties of reconciling the binding legal effects of a Commission decision and the power of an EU Member State to force through a merger.

To conclude, in this book the normative stance is taken that Article 21(4) EUMR is an adequate framework to solve the conflict between the merger control regime and the safeguarding of financial stability, provided it is accompanied with procedures that (1) would allow for the remedying of competition concerns and (2) would also ensure that a Member State decision can obviate the legal effect of a Commission's prohibition decision.

5.4. Article 21(4) EUMR: conclusion

This section assessed whether Article 21(4) EUMR can currently be used to solve conflicts between the wish to preserve financial stability through an emergency takeover and the application of the EUMR, and whether this provision should be considered a suitable reconciliation mechanism. With regard to the legal *status quo*, the mainstream consensus is that Article 21(4) EUMR does not allow Member States to force through an emergency takeover.

It is here asserted that Article 21(4) EUMR should include an authorisation power for Member States, because this provision should be considered an appropriate reconciliation mechanism, provided that procedures are introduced that (1) would allow for the remedying of competition concerns and (2) would ensure that a Member State decision can deprive a Commission prohibition decision of legal effect. If these procedures are well designed and implemented, Article 21(4) EUMR may be better suited to realise optimal welfare outcomes than the SIEC test, and it could allow for speedier decision-making and more legal certainty.

6. ARTICLE 47 DCA

6.1. Introduction

It was mentioned above that the Dutch concentration control regime provides for a specific rule that *prima facie* may be useful to solve the conflict between the DCA and financial regulatory interests arising in the event of an emergency takeover. Article 47 of the DCA grants the Dutch Minister of Economic Affairs the possibility to approve a concentration that was prohibited by the ACM. Such an approval can be based on the wish to protect various economic and non-economic interests. This section explores whether Article 47 is indeed useful to solve the above-mentioned conflict.

Box 6.9. Article 47 DCA

(1) After the Board [of the ACM] has refused a license for the implementation of a concentration and following an application requesting such, the Minister [of Economic Affairs] may decide that the license shall be granted if, in the Minister's opinion, this is necessary for important reasons in the public interest, which outweigh the expected impediment to competition.
(2) An application, as referred to in paragraph (1), may be submitted up to four weeks after the Board's decision to refuse a license has become irrevocable.
(3) If an application, as referred to in paragraph (1), is made, the consideration of administrative and judicial appeals against the Board's decision shall be suspended until an irrevocable decision is issued on the said application.

6.2. Article 47 DCA: the legal *status quo*

Article 47 DCA can be used to supercede a decision of the ACM to prohibit the acquisition of a troubled bank in the interest of financial stability. The Minister may balance the harm of the anti-competitive effects against the benefits of protecting financial stability, and decide what is best for society. Although Article 47 DCA has never been applied to set aside a decision of the ACM since the introduction of the DCA in 1998, it is here submitted that the Minister would most likely be willing to employ the power this provision grants him to safeguard the financial stability in the Netherlands. Indeed, the Ministers of Finance and Economic Affairs have expressly considered the use of Article 47 DCA in the event of emergency takeovers.[1010] The decision to apply this provision to such takeovers would most likely be taken together with the Minister of Finance, the Prime Minister and/or the supervisors of ECB and DNB; if the Minister of Finance argued that the emergency takeover was required to safeguard financial stability, the Minister of Economic Affairs would most likely authorise this merger.

The Minister can probably grant a license with conditions, so that any competition concerns could be remedied. This means that an important drawback of Article 21(4) EUMR does not apply to Article 47 DCA: the application of this latter article allows the reconciliation of short-term financial stability interests with long-term competition benefits. Article 47 DCA does not explicitly mention the possibility of such a conditional license. However, the wording of the provision giving the ACM the power to attach conditions to a license (Article 41(4) DCA) and the system of the DCA in this respect seem to allow such a power for the Minister, too. Furthermore, it is here regarded as sensible that the Minister have the power to attach conditions to a license decision in the same way the ACM is allowed to do.

6.3. Article 47 DCA: a normative view

In substance, Article 47 DCA resembles Article 21(4) EUMR, as both provisions give the government the unconditional power to prioritise financial stability over competition interests. The benefits in substance of Article 21(4) are therefore also benefits in substance of Article 47: the benefits for society as a whole can be taken into account, as well as the possibility to make legitimised welfare redistributions.

[1010] Letter of the Ministers of Finance and of Economic Affairs to the Dutch House of Representatives of 10 December 1999; Parliamentary article, *Kamerstukken II* 1999/00, 26965, No. 1, p. 3.

So, from a substantive perspective Article 47 DCA could form a solution framework for the abovementioned conflict, provided the emergency takeover falls exclusively within the scope of the DCA. A procedural issue might be that a standstill requirement applies in the first and second phase of the merger procedure. The ACM would need to waive this requirement so that the emergency takeover could be implemented before the assessments of the notification and license phases are completed.[1011] This is also an issue with regard to the SIEC test; a reconciliation framework and possible solutions were already discussed in Section 3.3.[1012]

The merger control regimes of other countries, including other EU Member States, could cause problems. It might be problematic that a merger outside the scope of the EUMR is subject to the competition laws of the various EU Member States. Depending on the activities of the merging parties and the merger control regimes of the individual states, a rescue merger might need more approvals than only the ACM's approval. So, even if an adequate legal framework were in place for considering a rescue merger within the scope of the DCA, such a concentration might still be prohibited due to the application of other states' laws. As an example, the Lloyds/HBOS merger did not fall within the scope of the EUMR, and the despite the circumvention of the UK merger control regime, this deal had to be notified in at least five other countries – four of them EU Member States. This is not the case for mergers within the scope of the EUMR to the extent that EEA Member States are concerned, as these states may not apply their national competition laws to these mergers.[1013]

However, this issue of multiple relevant merger control jurisdictions can never be completely addressed, as a national legislature is not able to prevent other countries from adopting their own laws. Even the applicability of the EUMR does not prevent non-EEA Member States from applying their merger control laws to a rescue merger. Pursuant to these laws these mergers may be prohibited. If a rescue merger is likely to result in unacceptable anti-competitive effects in a non-EEA Member State and this country prohibited the merger for that reason, practical solutions could be feasible. For example, the merger could be implemented while the businesses of the two merging banks are held separate in the country at issue, allowing for a competition remedy for the markets at issue. Nevertheless, the concerned country would have to allow such a practical solution to make it work.

[1011] It is noted again that if a merger is the result of the exercise of a resolution power within the meaning of the BRRD or SRM (see Box 6.2. above), the DCA merger control regime does not apply.

[1012] It is worth mentioning that the ACM can waive the standstill obligation until its prohibition decision is final (in Dutch: *onherroepelijk*). This means that if the waiver is adequately granted, the merging parties would not violate the standstill requirement when they appeal the ACM's prohibition decision (which prevents this decision from becoming final) and they could simultaneously apply for an exception decision from the Minister.

[1013] Article 21(3) EUMR.

6.4. Article 47 DCA: conclusion

Article 47 DCA gives the Minister the power to override a decision of the ACM not to grant a license for a merger. So, this provision can be used to force through rescue mergers that were blocked by the ACM. The advantage of Article 47 DCA as a reconciliation mechanism over the SIEC test is that Article 47 makes it possible to take all benefits for society into account when deciding whether an emergency takeover should continue. The standstill requirement in the first and second phase of the substantive appraisal procedure of the ACM could form a procedural obstacle, but there are good solutions available to tackle this.

7. MERGER CONTROL REGIME: CONCLUSION

This chapter examined the available reconciliation mechanisms in the EU and Dutch merger control regimes. Three mechanisms were identified and considered: (1) the balancing of financial stability interests in the SIEC test, (2) the application of Article 21(4) EUMR by a EU Member State to set aside the SIEC test and (3) the application of Article 47 DCA by the Dutch Minister of Economic Affairs to override a decision of the ACM not to grant a license for an emergency takeover. With regard to all three mechanisms a description of the legal *status quo* was given, as well as a normative view.

Balancing in the SIEC test. The assessment of the SIEC test started with the finding of Chapter 2.5. that this test implies an economic welfare test: its objective is to verify whether a merger would reduce economic welfare. When the SIEC test is applied, in fact a counterfactual assessment is made: through a prospective analysis the post-merger competition situation is compared with the situation without the merger. The test is whether *buyers* affected by the anti-competitive effects of a merger are in the end better off with the merger than without. Advantages for society are in principle not taken into account, although the commonality rule may indirectly effect this anyway. In accordance with this rule, benefits for society are eligible for balancing in the SIEC test to the extent that these benefits generated in non-affected markets land with the persons that are also buyers in the affected markets.

Considering the counterfactual analysis that is made, it is relevant to appreciate the counterfactual situation that would exist in case of rescue mergers. These mergers aim to save banks deemed 'too big to fail'. Such banks are here defined as banks that the government would never let fail due to their significance for financial stability and the essential services they perform for society. Consequently, the counterfactual situa-

tion in an emergency takeover is that the state rescues the ailing bank with state support. This implies that the specific benefits of a maintained financial system cannot be taken into account when assessing the post-merger situation, as these benefits would also arise in the counterfactual situation. Types of benefits for buyers that could be generated by the merger and not by state support are: a lower bail-in amount and the prevention of higher prices due to the levying of resolution taxes on the surviving banks. Due to the commonality rule, several social benefits that could be taken into account are: the change to a more effective business model at the troubled bank, cost savings for the state due to the advantage of the better capital position of the acquiring bank, and the avoidance of out-of-pocket expenses to save a the ailing bank.

Balancing in the SIEC test was deemed an appropriate reconciliation mechanism since it ensures that economic prosperity is maintained as much as possible, provided that the commonality rule is extensively applied. The standstill requirement could be a procedural obstacle for an effective application of balancing in the SIEC test as a reconciliation mechanism. However, practice has shown this need not be the case. Nevertheless, it would be advantageous for legal certainty reasons if the authorities would make a policy which ensures that they waive the standstill requirement in the event of emergency takeovers.

The failing firm defence was found not to be of relevance for rescue mergers, as 'too big to fail' banks by definition do not go bankrupt.

Article 21(4) EUMR. With regard to the legal *status quo* of Article 21(2) EUMR, the mainstream consensus is that this provision does not allow Member States to force through an emergency takeover. It was concluded, however, that there are also good reasons to endorse the opposite interpretation. Furthermore, it was concluded that Article 21(4) EUMR should indeed include an authorisation power for Member States. This provision is an appropriate reconciliation mechanism, provided that procedures are introduced that (1) would allow for the remedying of competition concerns, and (2) would ensure that a Member State decision can deprive the Commission's prohibition decision of its legal effect. The first element remedies the fact that Article 21(4) is a rather blunt instrument and does not imply a balancing of welfare increasing and reducing effects, nor does it allow the remedying of long-term competition concerns after financial stability is saved. The second element ensures legal certainty for undertakings that are confronted with both a prohibition decision of the Commission and an authorisation decision of the Member State.

Article 47 DCA. Article 47 DCA was found to be an appropriate reconciliation mechanism, too. However, it can only be used once the ACM has found that the SIEC test is failed. The standstill requirement in the first and second phase of the substantive appraisal procedure of the ACM could form a procedural obstacle, but there are good solutions available to tackle this.

7. CONCLUSION

1. INTRODUCTION TO THE FINAL CHAPTER

This final chapter has three parts:

- In Part A., the storyline of this treatise is posed, presenting concisely what this book aims to achieve, what has been done to accomplish this and what the findings of this study are. The storyline makes it easier to grasp the key reasoning of this book.
- Part B. presents the conclusions of the previous chapters.
- Part C. brings all the conclusions of the study together and gives answers to the two research questions. It also includes recommendations for a better application of competition law.

PART A. THE STORYLINE OF THE BOOK

A.1. Research questions

The subject of this book is the conflict between competition law and public interests, especially regarding banking regulatory interests. Such conflicts may arise if a measure, e.g. an agreement or merger, that serves a banking regulatory interest, infringes the Cartel Prohibition or the SIEC test. Blocking this measure may not be in the interest of society. The furtherance of the public interest may be more valuable for society than the protection of competition that competition law offers. In such cases society may prefer the trumping of the competition law prohibitions.

So, it is in the interest of society that adequate mechanisms exist that allow for solutions that maximise society's good, for conflicts between competition law and public interests. The first research question of this book is whether such reconciliation mechanisms exist. To answer this question, an overview and analysis of EU and Dutch legislation and case law was made and presented, which included the decisional practice and guidance of the Commission and ACM. This exercise is descriptive in nature, as it aims to describe the legal *status quo*, as opposed to appraising it.

In addition, this book answers the question of whether the manners of application of the available reconciliation mechanisms produce the best solutions if society's interests take precedence, and if they do not, how the law should be changed to

achieve this. Answering this question requires an appraisal of the law, i.e., it implies offering a normative view on the law.

To answer the second research question, first an opinion must be given on what constitutes the optimal way to solve conflicts between public policies. The answer to this underlying question follows from several normative principles discussed in this treatise.

A.2. Normative principle 1: one overarching goal allows balancing between public interests

An essential principle in this book is that if two public policies share a sufficiently concrete overarching goal, a clash between these policies can be solved by accepting the solution that serves this overarching goal best. The overarching goal must be 'sufficiently concrete', as otherwise it cannot be verified whether a measure furthers or undermines this goal. For example, the policy objective to 'increase citizens' *well-being*' is probably not specific enough to function as an overarching goal in conflict solving, because it would not be feasible to verify whether a certain action increases or decreases citizens' well-being. On the other hand, if different policies all aimed to 'increase consumers' *wealth*', it may very well be feasible to establish which policy measure maximises consumers' wealth, since wealth can be measured in money.

A.3. Normative principle 2: reconciling public interests without one overarching goal implies a political choice

If, however, two public policies do *not* share a sufficiently concrete overarching goal, a clash between these policies cannot be solved by reference to such a goal. This means that if a particular measure advances one goal but undermines another, a choice must be made as to which goal is prioritised. Such a choice cannot be made on objective grounds, because it cannot be argued without a subjective opinion that one public policy goal is more valuable than another. A choice of this nature is inherently political. If both public policy goals are set by the legislature, only the legislature can determine which goal is more important, and to what extent. In turn, private parties are not well placed to make choices between public policy goals, because they do not have the democratic legitimacy to do so. Consequently, another main principle of this book is that if public policies do not share a sufficiently concrete overarching goal, a clash between these policies may only be solved by a decision-maker with sufficient democratic legitimacy. Citizens, including undertakings, do not have this legitimacy,

unless it is explicitly transferred to them together with sufficient guidance on how to solve these clashes.

A.4. Normative principle 3: a norm may not prevent the accomplishment of its underlying goal

Applying the above-outlined Normative Principle 1 may lead to overriding a particular policy and to the trumping of this policy's norms, if furthering another policy would better serve the overarching goal of both. Overriding a norm set by the government is here considered appropriate, since it can be assumed that it was the government's intention to further the overarching goal. Indeed, in such a situation the norm *should* be set aside: it is here deemed inappropriate for a norm to frustrate a measure that advances the norm's goal.

Nevertheless, it is acknowledged that citizens cannot simply apply this principle and trump any statutory rule when they think this would better serve the rule's underlying objective. In general, only if the law provides for an exception mechanism is disregarding the law allowed. So, considering the substantive competition law prohibitions, the availability of adequate legal reconciliation mechanisms to deal with an anti-competitive measure that advances a public policy goal, is indispensable for implementing this principle in practice. Such a reconciliation mechanism should enable private parties to set aside a competition law prohibition if their measures further competition law's underlying goal(s).

A.5. Application to competition law and banking regulatory interests

The first two principles discussed can only be applied to clashes between competition law and other public policies if the underlying goal(s) of competition law and the other policies are known. Considering the focus of this book on banking regulatory measures, this means that the underlying goal(s) of competition law and banking regulation should be established. If these goals are in the end the same, there should be a legal exception for banking regulatory measures that infringe competition law norms but that also overall advance the shared goal. This would allow for the clash of policies to be solved in society's best interest, as the outcome could be that pursuing the banking regulatory interest serves society better – the opposite could of course also be true.

A.6. The goals of banking regulation

If the normative principles presented above should be applied to banking regulatory measures, it is necessary to establish the goals of banking regulation. This study shows that the rationales for banking regulation can be grouped into two categories: those aiming at solving a market failure (i.e. Efficiency Justifications), and those having other objectives (i.e. Non-economic Justifications). A measure aiming to solve a market failure aims to increase societal economic welfare. Examples of banking regulatory objectives based on an Efficiency Justification are the prevention of bank failures, the solving of information problems for consumers and the reduction of the operational risks of payment systems. The other group of banking regulatory goals, i.e. the Non-economic Justifications, does not aim to enhance economic welfare. Examples of objectives with a Non-economic Justification are the protection of consumers against overindebtedness, combatting terrorism and the financial inclusion of citizens.

A.7. The goals of competition law

The discussion of the goals of competition law in this treatise includes both a normative assessment, and a description of the views of the EU and Dutch legislatures, courts and competition authorities. The normative view on the competition law goals is a necessary base for building a normative reconciliation framework. The description of the legal *status quo* of these goals clarifies whether the application of the developed normative framework requires a change in the current manner of application of the available reconciliation mechanisms.

The analysis of competition law's goals covers two related goals: (1) the furtherance of economic prosperity and (2) the protection of market rivalry. Economic theory explains why competition between sellers can maximise economic prosperity, or in technical terms: economic welfare. First, competition ensures that prices are kept low and that all interested buyers are able to purchase the product they want, provided they can afford the competitive price (i.e., competition maximises allocative efficiency). Secondly, competition incentivises sellers to minimise production costs, so that prices can be lowered and more interested buyers can afford to buy the product (i.e., competition maximises productive efficiency). Thirdly, competition spurs innovation and innovation is commonly regarded the biggest driver of economic prosperity (i.e., competition promotes dynamic efficiency).

Competition as a process, or market rivalry, is also a goal of competition law. Indeed, competition law is not 'economic welfare law': it aims to protect market rivalry, not just any welfare-enhancing conduct.

Although the pursuit of economic prosperity for society and protecting market rivalry are often concurrent goals, this is not always the case. A restriction of market rivalry may result in more economic welfare, while not each welfare-reducing action is a restriction of the competitive process. The question therefore arises as to which of the two goals is the more important one. In this book it is held that furthering economic welfare should be the primary goal of competition law. Market rivalry is an important subordinate goal, due to its welfare-increasing features, but in the end it is not considered plausible that society would prefer to forgo economic prosperity in exchange for more rivalry on the markets. This hierarchy between the two goals is also reflected in the Dutch legal *status quo*. The Commission accepts it, too. The ECJ, however, has never indicated that there is such a hierarchy between these two policy objectives.

It is also considered whether the creation of one uniform EU market, i.e. the single market imperative, should be an EU competition law goal. The position taken in this book is that this should not be a goal, because it is ineffective for a single norm to serve two different goals. Indeed, in practice situations have arisen where agreements increased welfare but also affected the creation of the single market. This is problematic. So, a norm should only serve one goal in conformity with the Tinbergen principle. The current status of EU law is clearly different: the single market imperative is an important goal of competition law and probably is not placed lower in the hierarchy than the goal of economic welfare.

A.8. Criteria for reconciling public interests with competition law

The conclusion of the normative analysis of the goals of competition law is that conflicts with other public policies that pursue society's economic prosperity can be solved with reference to its overarching goal. In principle, an economic welfare calculus would reveal whether an anti-competitive measure increases or decreases economic welfare. However, the available reconciliation mechanisms do not constitute such a simple calculus alone, but include additional conditions. This mere calculational approach would therefore not be suitable for all situations. For example, paternalistic interventions and measures internalising negative externalities aimed at advancing economic prosperity could be unsuitable for the reconciliation mechanisms as these acts are liable to lower consumer surplus. Lowering consumer surplus is problematic in, e.g., the Exemption Possibility.

Considering the normative principles set out above, the normative assessment of the goals of competition law and the analysis of banking regulatory goals, it can

be concluded that, in principle, the effects of *banking regulatory measures with an Efficiency Justification*, i.e. economic welfare effects, must be balanced against any economic welfare harm that these measures cause due to their restriction of competition. The effects of a measure based on Non-economic Justifications must also be balanced against any economic welfare reduction that this measure causes due to competition restriction, to the extent that its effects can be translated into economic welfare. This can present a challenge, as the increase of welfare is not the aim of such a measure. Nevertheless, if such a translation is possible, this balancing approach ensures that competition law does not block measures that are, in the end, economic welfare enhancing.

It can also be concluded that the effects of an anti-competitive measure serving a banking regulatory interest that cannot be translated into economic welfare, cannot be balanced against an overarching goal shared with competition law. Consequently, two different public interests clash. Since these interests may not be balanced against each other by private parties, in such a case, the government should prioritise between the two goals.

A.9. Mechanisms for reconciling public interests with competition law

The above exposition provides the yardstick for designing and testing solution frameworks for reconciling competition law and measures serving other public interests. This yardstick is used to answer the research questions.

The research questions are applied to two competition law prohibitions that are most likely to give rise to the conflicts at issue: (1) the Cartel Prohibition and (2) the substantive test of the EUMR, i.e. the SIEC test. For each prohibition it is assessed whether the available solution mechanisms can be applied in conformity with the normative principles of this book, and whether this is indeed already done.

In the context of the Cartel Prohibition there are currently three legal methods for reconciling public interests with the interests protected by this prohibition: (1) the Exemption Possibility of Articles 101(3) TFEU and 6(3) DCA, (2) the Service of General Economic Interest exemption of Article 106(2) TEU and Article 11 DCA, and (3) the 'legitimate objective' ancillarity doctrine based on the *Wouters* judgment of the ECJ.

A.10. The Exemption Possibility as a reconciliation mechanism

The Exemption Possibility exempts undertakings' agreements from the Cartel Prohibition if, in sum, the agreement has more benefits for the customers of these undertakings than disadvantages. This provision only applies if four conditions are met. It is argued that these four conditions can be interpreted in such a way as to ensure conformity with the normative principles; such an interpretation is referred to as the Exemption Analytical Framework. The legal *status quo* of the four conditions differs in some respects from the Exemption Analytical Framework. Briefly put, the normative view is that the Exemption Possibility is an appropriate reconciliation mechanism for public interest effects that can be translated into economic welfare terms.

The main normative findings of this book with regard to the Exemption Possibility are that all effects of which it can be convincingly established that they increase economic welfare, i.e. Economic Benefits, should be taken into account when applying the Exemption Possibility. All other effects, i.e. the Non-economic Benefits, may not be taken into account. The legal *status quo* of this premise is largely in line with the Exemption Analytical Framework. The most significant difference is that the EU Courts may also consider Non-economic Benefits to be eligible, although it can be doubted whether this approach based on older judgments will still be followed after the abolition of the notification system of Article 101(3) TFEU.

Furthermore, it was argued that the Exemption Possibility should only apply if the current and future buyers in the affected market are fully compensated for any anti-competitive harm. The question of who should be compensated and by how much is a political one, and the aforementioned approach is deemed to best reflect the legislatures' choices. The legal *status quo* seems to imply the same approach, although a recent judgment of the ECJ may have opened the door for including benefits for non-affected buyers in the Exemption Possibility.

A.11. Article 106(2) TFEU as a reconciliation mechanism

Article 106(2) TFEU provides an exemption from, among other rules, the TFEU competition provisions to undertakings that are entrusted by the state to render an SGEI, provided that these rules would otherwise obstruct the provision of this SGEI. This rule aims to balance the wish of the EU Member States to use undertakings to implement certain public policies, with the benefits that compliance with the

competition rules may generate (Article 11 DCA has a similar function in the context of the DCA). As the Cartel Prohibition does not block any agreement if the Exemption Possibility applies, Article 106(2) TFEU is only relevant for conflicts between public policy goals which are not exempted through the application of the Exemption Possibility.

The position in this book is that the reconciliation mechanism of Article 106(2) TFEU is functional and appropriate, although some adjustments in its application are called for. Currently, the room for application of Article 106(2) TFEU to self-regulation of banks is probably limited in practice. First, the subject of this self-regulation needs to be an SGEI and many banking services are probably not SGEIs. In addition, this rule only applies if banks are entrusted with the task to render a certain service. This is problematic because, although most banking services are heavily regulated, banks are rarely *required* to render a particular service. Nevertheless, with an adjusted interpretation of Article 106(2), in accordance with the proposals in this book, and through adequate use by the government, this provision may turn out to be an effective reconciliation mechanism for bank self-regulation.

A.12. The legitimate objective ancillarity doctrine as a reconciliation mechanism

The legitimate objective ancillarity doctrine is a judge-made exception regime for competition restrictions that serve a 'legitimate objective'. Such restrictions are not caught by the Cartel Prohibition if the restriction is proportionate. The scope of the legitimate objective ancillarity doctrine is unclear and its rationale is not obvious. In this book the position is taken that this doctrine should be abandoned. First of all, this doctrine allows that private parties can prioritise between competition interest and other public interests, which is contrary to the normative principles of this book. In addition, the application of this doctrine to Economic Benefits would render the Exemption Possibility obsolete, which is deemed inappropriate.

A.13. Reconciliation of merger control regimes within the SIEC test

With regard to the SIEC tests of the EU merger regulation and the DCA, the case of rescue mergers for 'too big to fail' banks is assessed. Rescue mergers, meaning that one bank acquires another, ailing bank, are deemed to contribute to financial stability. A main finding in this context is that the balancing of Economic Benefits for affected customers within the SIEC test is viable and appropriate. It is concluded that the SIEC test should not block mergers that increase the economic welfare of

customers affected by the anti-competitive effects of the merger, while this test should reject all other mergers. A practical difficulty for applying the SIEC test and regular merger procedures to rescue mergers may be that a standstill requirement applies. This means that a rescue merger cannot be implemented until the authority has given its approval. However, there are effective means conceivable to remedy this issue: the authorities could, e.g., make a specific policy for the swift granting of derogations of the standstill requirement. The 'failing firm defence' is considered to be neither useful nor opportune, as by definition the state will never let a 'too big to fail bank' go bankrupt.

With regard to Article 21(4) EUMR, which allows EU Member States to block, for legitimate non-competition reasons, a takeover that was approved by the Commission, it was deemed questionable whether the legal *status quo* of this provision allows the Member States to push through mergers that were rejected by the Commission. However, the normative view on Article 21(4) EUMR is that the Member States should have this power. This provision is then in principle an appropriate reconciliation mechanism, with added value with regard to balancing within the SIEC test. This provision allows that welfare gains for society are taken into account and it requires that the state decides whether these gains take priority over welfare losses for the affected bank customers. Applying this rule is, however, a rather blunt mechanism. It is recommended to apply the provision in two stages, whereby the merged entity is required to implement certain remedies to solve competition issues in the medium and long term.

Pursuant to Article 47 DCA, the Dutch Minister of Economic Affairs may authorise a merger that was prohibited by the ACM after the second investigation phase. The Minister may attach remedies to his authorisation, so that competition issues can be properly addressed. This mechanism is deemed opportune from a normative perspective, for the same reasons mentioned in the context of Article 21(4) EUMR. There are some practical drawbacks that come with this solution mechanism, but they need not be insurmountable.

PART B. SUMMARY OF THE CHAPTERS

In Part B. summaries of the main chapters of this book are presented. For readability purposes the schematic overviews of the justifications for banking regulation, the Exemption Analytical Framework and the Article 106(2) Analytical Framework are displayed once more. No summaries of Chapters 1. (Introduction) and 5. (Case Studies) are given, as due the nature of these chapters summarising them would have little meaning.

B.1. Goals of competition law

The focus of Chapter 2. was on the goals of EU and Dutch competition law. With regard to the rationale for competition law, it was explained in this chapter that economic theory substantiates that competition allows for an optimal allocation of resources to the production of various goods and services. Competition also forces undertakings to operate cost efficiently, because firms with prices that are too high are outcompeted. Finally, competition spurs innovation, and innovation increases society's material wealth. These three summarised arguments form the rationale for safeguarding and promoting market rivalry: competition increases economic prosperity.

It was concluded that the furtherance of economic wealth is a goal of EU competition law. Furthermore, the theory of economic welfare arguably can demonstrate that maximising economic welfare means that economic wealth is maximised. Nevertheless, even if competition law has as its goal to maximise economic prosperity, it would be a too limited view to consider EU competition law only as a tool to remedy market power. Indeed, EU competition law not only aims to prevent 'anti-competitive' prices on existing markets, but it also strives to safeguard innovation.

Like maximising economic prosperity, market rivalry is a goal of EU competition law. This follows from a textual interpretation of Article 101 TFEU and from the structure of this provision. It can also be substantiated by economic theory, as theory explains how market rivalry can create efficient markets. It is also deemed to be an incentive for innovation. In other words, competition can be a means to increase economic prosperity. The Commission indeed applies this means-to-an-end-approach. The ECJ, however, seems to have set the protection of 'competition as such' on equal footing with the protection of the interests of buyers.

In conformity with the Tinbergen principle, it is deemed inappropriate that one rule – e.g., the EU Cartel Prohibition – serves two goals of equal ranking. Considering the two goals maximising economic welfare and the protection of market rivalry, it was argued that it would be unlikely that it was the Treaties legislature's intention that economic prosperity would have to be sacrificed for maintaining market rivalry. Therefore, the normative view on the goals of EU antitrust law is that economic prosperity should take priority over market rivalry. This conclusion does not mean that the market rivalry is unimportant for competition law or for society. Market rivalry generally increases the efficiency of markets and it is a key driver for innovation.

The single market imperative is also a goal of EU competition law. It is not certain whether it is currently treated by the EU Courts and Commission as less or more

important than the goal of economic prosperity or market rivalry. In any event, the normative position taken in this book is that the single market imperative should not function as a goal for EU antitrust law, because this can conflict with pursuing the goal of maximising economic prosperity. The latter is considered to be the more appropriate goal of EU antitrust law, particularly because these rules are not well suited to banning actions that frustrate the single market imperative.

With a view to the Exemption Analytical Framework to be explained in Chapter 4., in Chapter 2. a substantive test for the Cartel Prohibition was proposed. It was argued that although it is the Cartel Prohibition's ultimate goal to further economic prosperity, not every agreement resulting in an economic welfare loss should be prohibited by Article 101 TFEU: it should be necessary that this agreement limits market rivalry, too. However, a restriction of rivalry is not equal to a reduction in economic welfare. A restriction of market rivalry should therefore not be a sufficient condition for a violation of the Cartel Prohibition. Consequently, it was concluded that the Cartel Prohibition's test should consist of two screens. This provision should only prohibit agreements that (1) limit market rivalry and (2) reduce a certain dimension of economic welfare. A 'dimension of economic welfare' refers to the components that form economic welfare, i.e. allocative efficiency, productive efficiency and dynamic efficiency.

It was found that the goal of the EUMR is to maximise economic welfare, through the blocking of mergers that dampen market rivalry and decrease economic welfare. In other words, the furtherance of economic welfare is the ultimate goal, while protecting market rivalry is a subordinate goal. This finding is equal to the conclusion with regard to EU antitrust law. The conclusion on the goals of the EUMR is mainly based on the availability of the efficiency defence. Through the introduction and interpretation of this doctrine, the Council and the Commission have clarified that the EUMR's aim is to maintain economic welfare by blocking mergers that create or enhance market power or stifle innovation, and not to safeguard the competitive process as such.

In this book the normative stance is taken that the substantive test of the EU merger regime consists of two screens: (1) a market rivalry screen, and (2) an economic welfare screen. A merger has to go through both screens to be blocked: if the concentration does not limit market rivalry, it is allowed; if the merger on balance does not reduce economic welfare, it is allowed. In practice, the application of the SIEC test's welfare screen would be similar to the application of the welfare tests of the Cartel Prohibition and the Exemption Possibility: first, a reduction of economic welfare in one dimension, usually allocative efficiency, would be established and

subsequently it would be verified whether an economic welfare increase in another dimension outweighs the welfare reduction.

With regard to Dutch competition law, it was asserted that the DCA's goals and accompanying hierarchy as presented in this act's legislative history should indeed be accepted as the appropriate goals of Dutch competition law: maximising economic prosperity is the ultimate goal, while market rivalry is an important intermediate objective. This normative view is based on the same considerations as those for EU competition law. It is also sensible to equate the DCA's goals with those of EU competition law: it is the legislature's intention that the DCA's substantive rules closely follow the EU's substantive provisions, and since the underlying goals are crucial for the content of the norms in competition law, it is only logical that the DCA aims to achieve the same goals as EU competition law. So, although the DCA is a national law, and the Dutch legislature was initially free to choose substantive anti-cartel rules that deviated from the EU's competition rules, it chose not to do so. An additional reason for an equal application of the two provisions is that creating a deviating national competition regime would make it more difficult to predict for undertakings whether their measures will be allowed, since two different cartel prohibitions would require two different analyses. As the EU and Dutch Cartel Prohibition serve the same goals, this would create confusion. Nevertheless, there is one EU competition law goal that beforehand can be deemed not to be relevant for the DCA: the single market imperative.

As the goals of Dutch competition law are similar to those of EU competition law, the normative view on the substantive tests of the Dutch antitrust and merger control norms is equal to that on the corresponding the EU rules.

B.2. Goals of banking regulation

In Chapter 3. the goals of banking regulation were discussed. The regulation of markets by governments occurs with certain objectives, such as the mitigation of market failures or the accomplishment of fairness goals. Although regulation may be an effective means to achieve these objectives, this does not automatically mean that regulation should be introduced. As regulation also implies costs, e.g. supervision and compliance costs, and interferes with the principle of free markets, regulation is usually only introduced if its benefits are higher than its costs. Chapter 3. therefore also explained the importance of banks for society, so that it can be understood why governments regulate the banking sector so heavily.

One reason why governments attach great importance to the manner in which banks operate in the first place, is the significance of banks for society. This significance flows from two banking activities. First, banks operate as intermediaries between depositors and borrowers: they facilitate the provision of credit by those who have a surplus of money to those who are short of funds. This process is crucial for the economy and therefore for society. Secondly, banks play an indispensable role in payment systems. Payment systems, both cash and non-cash, are vital for society as they make possible the use of money for executing transactions.

If the banking sector does not adequately perform its two crucial roles, the costs for society are expected to be huge. There are, however, various market failures that endanger the good functioning of banks. In addition, policymakers may deem that in an unregulated environment banks do not sufficiently maintain the government's social or ethical goals. To address these concerns, policymakers have introduced banking regulation on a grand scale.

Chapter 3. identified the rationales for banking regulation, which explain why policymakers have introduced, or will introduce, rules to regulate banks and their activities. The analysis showed that there are a wide variety of justifications for banking regulation. These justifications are different from the rationales of competition law (see Chapter 2.). It can therefore be concluded that genuine conflicts between competition law and rules implementing banking policy may arise.

The various justifications for banking regulation were divided in two main categories: Efficiency Justifications and Non-economic Justifications. Rules based on Efficiency Justifications aim to remedy market failures. All other justifications are dubbed Non-economic Justifications. This division is significant for this book, as it was argued in the Chapters 4. and 6. that conflicts between competition law and rules based on Efficiency Justifications can often be solved through the Exemption Possibility. This provision, however, is usually unsuited for solving conflicts between the Cartel Prohibition and rules based on Non-economic Justifications.

Table 7.1. Schematic overview of the rationales for banking regulation

Rationale	Efficiency Justification	Non-economic Justification
Prudential Regulation		
Banks' inherent instability, higher chance of failing (bank runs)	•	
Remedying systemic risk	•	
Protecting bank customers from the grave consequences of a bank failure		•
Business Conduct Regulation		
Consumer protection – Information issues	•	
Consumer protection – Uncertain future performance of banks	•	
Consumer protection – Protecting consumers from overindebtedness		•
Consumer protection – Limiting consumers' choice (ban on 'deceptive' products)		•
Combat crime – Deprivation of criminal profits; anti-terrorism; maintaining international peace		•
Combat crime – Maintain financial stability	•	
Payment System Regulation		
Operational risk	•	
Efficiency	•	
Financial inclusion		•
Protection of privacy		•

B.3. Reconciliation mechanisms for the Cartel Prohibition

Chapter 4. discussed the legal reconciliation mechanisms for undertakings' measures that generate public interest benefits but that also violate the Cartel Prohibition. In Part A. the Exemption Possibility was discussed, Part B. covered Article 106(2) TFEU and Part C. dealt with the legitimate objective ancillarity regime.

In Part A. it was considered to what extent Articles 101(3) TFEU and 6(3) DCA are feasible legal means for reconciling undertakings' anti-competitive measures that generate public interest benefits, with the Cartel Prohibition. An analysis of

the legal *status quo* showed that the Exemption Possibility can indeed be used as a reconciliation mechanism. Unfortunately, the EU Courts and competition authorities have not developed a clear definition of which public interest benefits can be reconciled with anti-competitive effects in the Exemption Possibility.

The normative views of this book on the four conditions of the Exemption Possibility led to the formulation of the Exemption Analytical Framework (see also the box below):

- With regard to the First Condition of the Exemption Possibility, it was discussed how the Exemption Possibility should be applied in order to achieve the best results for society. It was argued that all benefits of an agreement that present an increase in economic welfare, i.e. all Economic Benefits, should be eligible for balancing against the welfare decreases of any anti-competitive effects. It was also held that the translation of the benefit into monetised economic welfare terms must be based on sound facts and convincing methods. Next, it was concluded that the Exemption Possibility is not an appropriate mechanism to balance non-economic welfare effects, i.e. Non-economic Benefits, against anti-competitive effects. Indeed, this would require a subjective decision on whether the economic welfare of buyers can be exchanged for the pursuit of other interests or values, and to what extent. Since such decisions are political in nature, they should be made by politicians with democratic legitimacy and not by undertakings.
- In the context of the Second Condition it was argued that a competition restriction should only benefit from the Exemption Possibility if it at least fully compensates any anti-competitive harm, in conformity with the legislatures' choices. The compensation should land with those who are harmed by the anti-competitive effects, since otherwise the application of the Exemption Possibility would result in a welfare redistribution between different groups of buyers, which was not envisaged by the government. The compensation may also benefit future buyers, because it would be detrimental to society's economic prosperity if the fruits of future innovation were limited. This would then imply a wealth redistribution from current buyers to future buyers, but this is a legitimate redistribution as it is in conformity with the legislatures' intentions.
- Considering the goal of the Cartel Prohibition, i.e. the furtherance of economic prosperity, it was held that the Third Condition of the Exemption Possibility should merely require a 'suitability test', and not the 'no-less-restrictive-alternative' test of the legal *status quo*. A 'no-less-restrictive-alternative test' is not sensible, as insisting on a less restrictive measure may deprive colluding undertakings of their incentive to agree upon the restrictive agreement and, consequently, a welfare increase could be abandoned. This result would be contrary to the Cartel

Prohibition's goal.

- It was acknowledged that innovation is crucial for society's economic prosperity but that the benefits of innovation are hard to determine in the present. This led to the conclusion that it is sensible to prescribe that a restriction must never block innovation on a key product feature beyond the short term. This is the Fourth Condition's role in the Exemption Analytical Framework. This rule ensures that innovation may keep contributing to society's prosperity, even though at the moment the competition restriction is agreed upon the innovation benefits are unpredictable.

In Part B. it was analysed to what extent Article 106(2) TFEU, as well as Article 11 DCA, is an appropriate reconciliation mechanism. Article 106(2) TFEU is a provision that aims to reconcile the Treaties' rules, especially those on competition and the 'four freedoms' articles, and the Member States' legitimate wish to deploy undertakings to procure their public policies.

Article 106(2) TFEU has five conditions that must be fulfilled for a successful application of this provision: (1) the SGEI condition, (2) the entrustment condition, (3) the obstruction condition, (4) the undertaking condition and (5) the Union trade condition. In theory, there is no reason why, with the support of the government, certain bank self-regulation could not fulfil these conditions. In practice, however, there seems to be only a very limited number of bank self-regulation cases suitable for Article 106(2) TFEU, partly because banks are seldom officially obliged by the government to provide certain services.

The normative view taken here is that it is sensible that Member States may sometimes see the need to trump competition law in the society's interest. The required involvement of the state through the entrustment condition ensures that the subordination of competition law has sufficient democratic legitimacy. However, currently an entrustment act does not need to include a specific consideration regarding the subordination of competition law. It was proposed that these acts should include such a consideration, so that a real balancing exercise is made and the state's preference for the provision of the SGEI over the protection of competition is made clear. If such a balancing exercise is undertaken by the state, it is sufficient that the applicable proportionality test be merely a permissive 'manifestly-disproportionate check' and not a stringent no-less-restrictive-alternative test. Finally, it is here asserted that Article 106(2) TFEU should also be available for governments to ensure that undertakings engage in anti-competitive self-regulation to prevent the offering of objectionable activities. This means that this provision should not be limited to the *offering* of services, but also to the *avoidance* of offering services.

Part C. covered the legitimate objective ancillarity doctrine based on the *Wouters* case. It was concluded that for banking regulatory interests there is a reasonable possibility that the legitimate objective ancillarity doctrine may in practice function as reconciliation mechanism. It may be that a 'public law basis' is required, but that need not be an obstacle. Although the group of banks agreeing upon self-regulation would most likely not have a public law status, the regulatory interests themselves could be within the realm of a provision of statutory banking regulation or be endorsed by a supervisor. This might then cater to the public law basis requirement.

It has been asserted that the legitimate objective ancillarity doctrine is a welcome addition to competition law, as it supposedly allows for the unfettered deployment of undertakings by governments, if desired, for the state's internal institutional governance. This stance was rejected. It was held that the legitimate objective ancillarity doctrine violates a fundamental constitutional pillar of democratic societies, since pursuant to this doctrine private parties receive power to prioritise public policies. An express governmental statement prioritising the legitimate objective over competition interests would be necessary to solve this constitutional issue. For such cases, however, there is already a statutory exemption possibility: Articles 106(2) TFEU and 11 DCA (as interpreted pursuant to the normative view in this book). Furthermore, it was concluded that there is no need for the legitimate objective ancillarity doctrine for those undertakings that exercise state prerogatives, since these activities fall outside the scope of the Cartel Prohibition anyway. Finally, it was submitted that with regard to Economic Benefits, it would be inappropriate to apply the legitimate objective ancillarity doctrine, because the Exemption Possibility is especially designed for considering such benefits.

The combined conclusions of Parts A., B. and C. resulted in the following process for determining the appropriate reconciliation mechanism:

(1) If the agreement's effects constitute Non-economic Benefits, i.e., the First Condition is not fulfilled → Article 106(2) TFEU or governmental legislation (see Section C.4. below).
(2) If the agreement's effects constitute Economic Benefits that outweigh the affected buyers anti-competitive harm, and the Third and Fourth Conditions are fulfilled → Exemption Possibility.
(3) If the agreement's effects constitute Economic Benefits that do *not* outweigh the affected buyers anti-competitive harm, i.e., the Second Condition is not fulfilled → Article 106(2) TFEU or governmental legislation.
(4) If the agreement's effects constitute Economic Benefits that outweigh the affected buyers anti-competitive harm, but the Third or Fourth Condition is *not* fulfilled

→ Article 106(2) TFEU or governmental legislation.

(5) Exemption Possibility not available for the competition restriction, but an entrustment act including a specific consideration regarding the subordination of competition law is provided → Article 106(2) TFEU.

(6) Exemption Possibility and Article 106(2) TFEU not available for the competition restriction → governmental legislation.

(7) The legitimate objective ancillarity doctrine should not be applied.

So, although the Exemption Possibility and Articles 106(2) TFEU and 11 DCA can function as a legal mechanism to trump the Cartel Prohibition, there will still be competition restrictions that cannot be excepted based on either mechanism. If it would nevertheless be beneficial for society to set aside the Cartel Prohibition for such agreements, appropriate alternative solutions should be applied (see Section C.4. below).

Table 7.2. The Exemption Analytical Framework

First Condition in the Exemption Analytical Framework First Condition: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. <u>Exemption Analytical Framework</u>: • All effects that can be convincingly translated into monetary economic welfare terms (i.e. Economic Benefits) fall within the scope of the First Condition. • All effects that cannot be convincingly translated into monetary economic welfare terms (i.e. Non-economic Benefits) fall outside the scope of the First Condition. • Paternalistic benefits cannot be considered.
Second Condition in the Exemption Analytical Framework Second Condition: the agreement must allow customers a fair share of the resulting benefits.

Exemption Analytical Framework:

- Whether the agreement's benefits are sufficiently beneficial depends on the effects for all buyers, as a group, implying that each buyer's welfare has equal value.
- The group of buyers to be considered consists of the buyers in affected markets, including future buyers. Buyers in non-affected markets must not be considered, unless these buyers are the same persons/entities as the buyers in the affected market.
- Benefits for society must not be considered, in conformity with the legislature's position.
- The beneficiaries receive a fair share of the agreement's benefits only if they are at least compensated for the anti-competitive harm done to them.

Third Condition in the Exemption Analytical Framework
Third Condition: the competition restriction must be indispensable to the attainment of the benefits.

Exemption Analytical Framework:

- The applicable test is only whether the competition restriction is *suitable* for producing the claimed benefits within the meaning of the First Condition. The 'no-less-restrictive-alternatives' test is not required.

Fourth Condition in the Exemption Analytical Framework
Fourth Condition: the agreement may not eliminate a substantial part of competition in the market.

Exemption Analytical Framework:

- The restriction must not eliminate innovation on a key product feature beyond the short term.

Table 7.3. The Article 106(2) Analytical Framework

SGEI condition in the Article 106(2) Analytical Framework SGEI condition: a service of general economic interest must be at stake. Article 106(2) Analytical Framework: • The rationale for using Article 106(2) TFEU must be an Efficiency Justification or Non-economic Justification, which distinguishes the SGEI from ordinary economic services. • The withholding of the provision of certain services may also be the subject of Article 106(2).
Entrustment condition in the Article 106(2) Analytical Framework Entrustment condition: public authorities must have 'entrusted' the task of rendering this service to an undertaking. Article 106(2) Analytical Framework: • The entrustment act of the government must include its view that remedying the Efficiency Justification or Non-economic Justification is more important than safeguarding competition. • It is not a requirement that the service provider make its service available to all interested buyers.
Obstruction condition in the Article 106(2) Analytical Framework Obstruction condition: an exemption is necessary, because otherwise the service cannot be provided due to the 'obstruction as the result the application of EU (competition) rules' Article 106(2) Analytical Framework: • The application of Article 106(2) TFEU is subject to a 'manifestly-disproportionate check'.
Undertaking condition in the Article 106(2) Analytical Framework Undertaking condition: the service provider must be 'an undertaking'.
Union trade condition in the Article 106(2) Analytical Framework Union trade condition: 'trade must not be affected to such an extent as would be contrary to the interests of the Union' due to the trumping of the EU (competition) rules.

B.4. Reconciliation mechanisms for the merger control regime

Chapter 6. examined the available reconciliation mechanisms in the EU and Dutch merger control regimes. Three mechanisms were identified and considered: (1) the balancing of financial stability interests in the SIEC test, (2) the application of Article 21(4) EUMR by a EU Member State to set aside the SIEC test and (3) the application of Article 47 DCA by the Dutch Minister of Economic Affairs to override a decision of the ACM not to grant a license for an emergency takeover. With regard to all three mechanisms a description of the legal *status quo* was given, as well as a normative view.

The assessment of the SIEC test started with the finding of Chapter 2. that this test implies an economic welfare test: its objective is to verify whether a merger would reduce economic welfare. When the SIEC test is applied, in fact a counterfactual assessment is made: through a prospective analysis the post-merger competition situation is compared with the situation without the merger. The test is whether *buyers* affected by the anti-competitive effects of a merger are in the end better off with the merger than without. Advantages for society are in principle not taken into account, although the commonality rule may indirectly effect this anyway. In accordance with this rule, benefits for society are eligible for balancing in the SIEC test to the extent that these benefits generated in non-affected markets land with the persons that are also buyers in the affected markets.

Considering the counterfactual analysis that is made, it is relevant to appreciate the counterfactual situation that would exist in case of rescue mergers. These mergers aim to save banks deemed to be 'too big to fail'. These banks are here defined as banks that the government would never let fail, due to their significance for financial stability and the essential tasks they perform for society. Consequently, the counterfactual situation in an emergency takeover is that the state rescues the ailing bank with state support. This implies that the specific benefits of a maintained financial system cannot be taken into account when assessing the post-merger situation, as these benefits would also arise in the counterfactual situation. Types of benefits for buyers that could be generated by the merger and not by state support are: a lower bail-in amount and the prevention of higher prices due to the levying of resolution taxes on the surviving banks. Due to the commonality rule, several benefits for society that could be taken into account are: the change to a more effective change of the business model at the troubled bank, and cost saving for the state due to the advantage of the better capital position of the acquiring bank and the avoidance of out-of-pocket expenses to save the ailing bank.

Balancing in the SIEC test was deemed an appropriate reconciliation mechanism since it ensures that economic prosperity is maintained as much as possible, provided that the commonality rule is extensively applied. The standstill requirement could be a procedural obstacle for an effective application of balancing in the SIEC test as a solution method. However, practice has shown this need not be the case. Nevertheless, it would be advantageous for legal certainty reasons if the authorities would make a policy which ensures that they waive the standstill requirement in the event of emergency takeovers.

The failing firm defence was found not to be of relevance for rescue mergers, as 'too big to fail' banks by definition do not go bankrupt.

With regard to the legal *status quo* of Article 21(4) EUMR, the mainstream consensus is that this provision does not allow Member States to force through an emergency takeover. It was concluded, however, that there are also good reasons to endorse the opposite interpretation. Furthermore, it was concluded that Article 21(4) EUMR should indeed include an authorisation power for Member States. This provision is an appropriate reconciliation mechanism, provided that procedures are introduced that (1) would allow for the remedying of competition concerns and (2) would ensure that a Member State decision can deprive the Commission's prohibition decision of its legal effect. The first element remedies the fact that Article 21(4) is a rather blunt instrument and does not imply a balancing of welfare increasing and reducing effects, nor does it allow the remedying of long-term competition concerns after financial stability is saved. The second element ensures legal certainty for undertakings that are confronted with both a prohibition decision of the Commission and an authorisation decision of the Member State.

Article 47 DCA was found to be an appropriate reconciliation mechanism, too. The standstill requirements in the first and second phase of the substantive appraisal procedure of the ACM could form a procedural obstacle, but there are good solutions available to tackle this.

PART C. FINAL CONCLUSIONS AND RECOMMENDATIONS

C.1. Introduction

In Part B. the conclusions of the different steps of this study were presented. In Part C. the two research questions of this book are explicitly answered. In addition,

building on these findings and normative foundations, a set of recommendations for the legislatures, courts, competition authorities and undertakings is provided, so that reconciling competition law and the public interest can be done in a manner that better serves society's good. This treatise ends with some final thoughts.

C.2. Answers to the research questions

This book aims to answer two research questions, and each question is separately dealt with below.

First research question. Which legal reconciliation mechanisms are available for undertakings' measures that generate public interest benefits, but that are also within the scope of a substantive competition law prohibition?

The answer this research question is, to the extent the Cartel Prohibition is concerned, that pursuant to the legal *status quo,* for conflicts between this prohibition and agreements that advance the public interest, the Exemption Possibility and the legitimate objective ancillarity doctrine are practicable reconciliation mechanisms. There are uncertainties with regard to the scope of both mechanisms, but not to the extent that their use for reconciliation is rendered implausible. Indeed, regarding the banking sector there are various examples of where the Exemption Possibility played its role as a reconciliation mechanism for conflicts between the Cartel Prohibition and agreements furthering banking regulatory interests. No such examples exist for the legitimate objective ancillarity doctrine yet, but few examples of a successful application of this doctrine exist in general. Nevertheless, the case law indicates that for agreements pursuing banking regulatory interests, which have sufficient support from the government or the law, the legitimate objective ancillarity doctrine is a feasible reconciliation mechanism. In contrast, Articles 106(2) TFEU and 11 DCA, to the extent bank self-regulation is concerned, are less likely to function as a practicable solution mechanism. Especially the definition of an 'SGEI' under the current status of the law excludes typical forms of self-regulation.

To the extent the EU SIEC test is concerned, the legal *status quo* may have a reconciliation gap. In theory, balancing within the SIEC test is an option, but it is doubtful whether an emergency takeover can generate sufficient merger-specific benefits to outbalance any anti-competitive effects. It was also concluded that the failing firm defence doctrine as developed by the Commission cannot be applied to emergency takeovers. Finally, Article 21(4) EUMR would probably not allow Member States to authorise mergers that were blocked by the Commission. With regard to the Dutch SIEC test, the above finding on

balancing within the SIEC test applies, too. However, for mergers falling within the scope of the Dutch merger control regime Article 47 DCA, provided that certain procedural issues are taken care of, it can be a practicable reconciliation mechanism.

Second research question. If society's interests take precedence, is the manner in which the legal reconciliation mechanisms are currently applied the most appropriate manner; and if not, how should the law be applied to achieve the best results for society?

The answer to the second question is that, proceeding from the normative principles set out in this book, the Exemption Possibility and Articles 106(2) TFEU and 11 DCA are appropriate reconciliation mechanisms for conflicts between the Cartel Prohibition and agreements that further public interests. Regarding the Exemption Possibility, a key finding was that all benefits of an agreement that present an increase in economic welfare should be eligible for balancing against anti-competitive effects. It was also held that the Exemption Possibility is not an appropriate mechanism to balance non-economic welfare effects against anti-competitive effects. Indeed, this would require a subjective decision on whether the economic welfare of buyers can be exchanged for the pursuit of other interests or values, and to what extent. Since such decisions are political ones, these should be made by politicians and not by undertakings. Furthermore, it was found that paternalistic benefits and economic welfare increases due to the internalisation of negative externalities should usually not be eligible to outweigh anti-competitive harm.

With regard to Articles 106(2) TFEU and 11 DCA it was deemed wise that Member States have the opportunity to trump competition law in society's interest. The required involvement of the state through the entrustment condition ensures that the subordination of competition law has sufficient democratic legitimacy. Nevertheless, some changes in the way these provisions are currently applied are needed to make them useful for reconciling self-regulation with competition law.

The legitimate objective ancillarity doctrine was held not to be an appropriate reconciliation mechanism. The two main reasons for this conclusion are the application of this doctrine (1) would allow private parties to prioritise public interests over econcomic prosperity protected by law, which is contrary to the democratic legitimacy rule developed in Chapter 4., and (2) would render the Exemption Possibility obsolete if agreements with Economic Benefits would be exempted, which is deemed to be unwarranted.

For emergency takeovers that conflict with the EU and Dutch SIEC tests, balancing within the SIEC test was found to be appropriate to the extent merger-specific benefits are concerned. Article 47 DCA was also found to be appropriate in the context of the Dutch merger control regime. With regard to the EU regime, the normative view here is that

Article 21(4) EUMR should be interpreted as allowing EU Member States to empower mergers that fail the SIEC test. To prevent that unnecessary damage to competition and economic prosperity is done, a procedure should be developed which would require competition remedies for the medium and long term.

To conclude, it appears that there are several functional and appropriate solution mechanisms to reconcile competition law prohibitions and other public interests. The tables below present the findings of this study.

Table 7.4. Schematic overview of conclusions Chapter 4.

Cartel Prohibition		
Reconciliation Mechanism	**Appropriate: Yes/No**	**Practicable: Yes/No**
Exemption Possibility	Yes	Yes
Articles 106(2) TFEU & 11 DCA	Yes	No
Legitimate objective ancillarity doctrine	No	Yes

Table 7.5. Schematic overview of conclusions Chapter 6.

SIEC test in merger control regimes		
Reconciliation Mechanism	**Appropriate: Yes/No**	**Practicable: Yes/No**
Balancing within SIEC test	Yes	No
Failing firm defence	No	No
Article 21(4) EUMR	Yes	No
Article 47 DCA	Yes	Yes

C.3. A reconciliation gap?

It follows from the above findings that the Exemption Possibility and Article 106(2) TFEU together, if applied in conformity with the normative principles of this book, may cover a wide range of pieces of bank self-regulation. The only form of self-regulation that is not covered, is when an agreement does not comply with the four conditions of the Exemption Possibility and the bank must regulate an activity that is not an SGEI. Competition law does not offer an appropriate reconciliation mechanism for these cases.

So what about these 'irreconcilable' cases? Will the Cartel Prohibition always block the agreements in such cases, even if they would advance society's good? Not necessarily: governmental legislation remains an option.[1014] Government legislation does not constitute an economic activity and it is therefore not covered by the Cartel Prohibition. A governmental rule could therefore oblige banks to serve a public interest even if this limits competition, provided that this rule does not incorporate the content of an existing agreement between undertakings nor encourages or requires the conclusion of such an agreement.[1015]

The normative position in this book is that it is appropriate to solve the clash of public interests in irreconcilable cases via governmental regulation. In such cases economic prosperity is reduced or at least unfairly distributed, or Non-economic Benefits are at stake, as otherwise the Exemption Possibility would have applied. For such cases it is legitimate that the government decides whether the furtherance of the public interests is worth the economic welfare consequences. The term 'government regulation' does not only refer to EU legislative acts or acts of national legislatures. Other governmental measures with less prolonged legislative procedures may be feasible, provided that the democratic legitimacy of the measures is sufficient: on a national level, the decision or policy of a Minister may be adequate.

That Article 106(2) TFEU is not available for irreconcilable cases and therefore requires that specific governmental regulation is introduced need not be a significant problem. A downside of the unavailability of Article 106(2) TFEU is that self-regulation and its concomitant advantages is not available. Indeed, without Article 106(2) TFEU the Cartel Prohibition would still have a blocking effect, even if governmental regulation would compel the concluding of the anti-competitive self-regulation.[1016]

Admittedly, certain benefits of self-regulation may completely or in part be lost if government regulation is required. Nevertheless, the advantages of self-regulation are not entirely unattainable for governmental regulation: through smart regulation

[1014] Another, similar option suggested by Wesseling is that the government order the anti-competitive self-regulation to be generally binding. Consequently, all undertakings would be obliged by law to comply with the self-regulation. From a normative perspective this would be an acceptable solution. In fact, it resembles pure governmental legislating. However, a practical issue is that this is not allowed for the Member States pursuant to EU case law (see the *BNIC/Aubert* case) if the EU Cartel Prohibition would apply to the self-regulation, and this would therefore not help undertakings (pursuant to the *CIF* case, see Chapter Box 4.6.). ECJ judgment of 3 December 1987, *Case 136/86 Bureau national interprofessionnel du cognac v. Yves Aubert (BNIC/Aubert case)*, paras. 23-24. See also: R. Wesseling, *'Polder-Plus'-model: Oplossing 'Kip van Morgen' Ligt niet bij ACM maar bij Minister*, Markt & Mededinging, Iss. 6, 2015, pp. 220-221.

[1015] See e.g.: ECJ judgment of 21 September 1988, *Case 267/86 Pascal Van Eycke v. ASPA NV*, para. 16. See Chapter 4.B.3.

[1016] See Box 4.6. for an explanation on the CIF case.

techniques, governmental regulation can be made flexible, and by holding consultations prior to the drafting of the regulation, the rule-maker can benefit from the industry's expertise. Furthermore, competition authorities can be instrumental in finding the appropriate solution to the clash between competition and other public interests. Indeed, one of the key roles that such authorities have is to function as an advisor to political decision makers, as well as to the market and the general public for that matter.[1017] In this regard, the ACM has explicitly mentioned in its strategy statement that the "*ACM takes part in the public debate. We spread our knowledge about those areas with which our oversight is concerned, for example, through questions regarding industrial organisation.*"[1018] Clearly, competition authorities are excellently placed to determine the nature and size of the economic welfare effects of any anti-competitive effects. Most likely they can also contribute meaningfully to establishing the nature and size of the economic welfare effects of other market failures. Consequently, competition authorities could inform the relevant politicians on the economic welfare costs of a regulatory measure. Such a welfare cost-benefit analysis can then help these politicians to make a well-founded decision on whether they want to foster a non-competition interest that (also) has beneficial consequences other than economic welfare effects. So, it could be worthwhile to enhance certain legislative procedures, so that legislating can be done more quickly and with extensive input from stakeholders. This would close the gap between self-regulation and governmental legislation.

In this context it is laudable that the Minister of Economic Affairs has announced that he is investigating the possibilities, as well as the advantages and disadvantages, of a statutory framework for facilitating undertakings' sustainability initiatives by making such agreements generally applicable by law.[1019] As such legislation is not covered by the Cartel Prohibition, this framework could be a useful tool to close the 'reconciliation gap', provided it would allow for the maintenance of the benefits of self-regulation. Clearly, there are limitations to such an approach, pursuant to the *BNIC/Aubert* case (see footnote 1014),[1020] but the introduction of more political decision-making with regard to the balancing of anti-competitive effects against Non-economic Benefits, if of sufficient interest for society, is here considered to be a positive development.

[1017] A. Ottow, *Market and Competition Authorities, Good Agency Principles*, Oxford University Press, 2015, p. 26.

[1018] ACM, *Strategy Document*, 2013, p. 9.

[1019] Letter of 23 June 2016 by the the Dutch Minister of Economic Affairs (with regard to the consultation of the Policy Guidelines Competition and Sustainability), DGETM-MC/16071609, pp. 3-4.

[1020] ECJ judgment of 3 December 1987, *Case 136/86 Bureau national interprofessionnel du cognac v. Yves Aubert (BNIC/Aubert case)*, paras. 23-24.

For politicians self-regulation may have a specific advantage: it does not require them to take a stance. By letting the market decide on the content of the rules, intricate and politically sensitive choices between public interests can be avoided. If this were indeed a reason for the government to prefer self-regulation, it is here rejected. There is no need for lazy or fearful legislators. If competition law would rightfully prevent the furtherance of public interests and if this is regretted by the politicians, the appropriate reply is to act and legislate – not to blame competition law and request it be applied differently.

C.4. Recommendations

This study has yielded several ideas for an improved interpretation and application of the law. These ideas are presented below.

C.4.1. No restrictions on competition, an ambiguous norm

This book addresses measures that violate the Cartel Prohibition or SIEC test. But when does a measure violate these prohibitions? It is crucial to know whether competition law is violated, as *not* infringing competition law would of course remove the competition law boundaries for pursuing public policy interests through private measures. Furthermore, it is in general important to know, with a view to legal certainty, when competition law is infringed, because the fines for infringing competition law can be very high.

The EU Treaties and DCA do not contain a useful definition of 'a restriction of competition' or a test for determining whether the Cartel Prohibition has been violated or the SIEC test failed, nor has the case law of the courts or decisional practice of the competition authorities provided genuinely informational definitions.[1021] This book proposed feasible tests for the Cartel Prohibition and SIEC test in Chapter 2. These tests were based on the goals of competition law, as determined in the analysis of this study. Briefly put, the Cartel Prohibition should only prohibit agreements that (1) limit market rivalry and (2) reduce a certain dimension of economic welfare. A 'dimension of economic welfare' refers to the three components that form economic welfare, i.e. allocative efficiency, productive efficiency and dynamic efficiency. Likewise, the

[1021] Ch. Townley, *Article 81 EC and Public Policy*, Hart Publishing, 2009, p. 206; R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford University Press, 2011, p. 12.

substantive test of the merger regime would consist of two screens: (1) a market rivalry screen and (2) an economic welfare screen: if the concentration does not limit market rivalry, and does on balance not reduce economic welfare, it is allowed. These tests aim to ensure that actions that further the goal(s) of the Cartel Prohibition and SIEC test are not blocked by these two prohibitions. Nevertheless, even if one does not endorse the findings of this analysis or the specific tests, it remains important that the substance of the Cartel Prohibition or SIEC test is better spelled out by the legislatures or courts.

Recommendation 1. So, it is here argued that the Treaties legislature or the EU Courts[1022] should develop clear and operational tests for the Cartel Prohibition and SIEC test, which tests should follow from these provisions' goals. The Cartel Prohibition test should also take the Exemption Possibility into account, implying that the function and application of this latter provision should fit properly with the substance of the Cartel Prohibition. The tests proposed in this book are considered to be examples of such workable tests.

C.4.2. Public interests: what type of benefits?

If undertakings intend to conclude agreements to foster certain public interests, they almost inevitably have to assess whether the Cartel Prohibition applies, and if so, whether the Exemption Possibility applies. With a view to the application of the Exemption Possibility, it is relevant that undertakings clearly express the nature of the benefits that they envisage procuring. As explained above, all Economic Benefits should be included in the Exemption Possibility and no Non-economic Benefits should be included. Identifying the nature of the benefits in an agreement allows undertakings to determine whether these benefits could be used to outweigh any anti-competitive harm done by the agreement.

Special attention should be paid to paternalistic measures. Such measures could increase society's economic welfare. However, they do not increase consumer surplus, because paternalistic measures tend to go contrary to consumers' preferences. It may, however, be argued that such measures increase consumers' welfare if consumers are not the best judges of what satisfies them. In this book this argument is not rejected nor accepted, as it suffices, for determining the scope of the Exemption Possibility,

[1022] As the Dutch legislature and courts would most likely follow any substantive change on the EU level and would also not amend the substance of the Cartel Prohibition and SIEC test if no change on the EU level occurred, this recommendation is addressed to the Treaties legislature and EU Courts only.

to establish that the decision that paternalistic measures carry more value than a statutorily protected policy goal, should only be taken by the government and not by private parties.

***Recommendation* 2.** When performing a self-assessment for the purpose of the Exemption Possibility, undertakings should identify whether their agreements' benefits constitute Economic Benefits. They should also verify whether the benefits have a paternalistic nature, as such benefits should not be included in determining the Exemption Possibility.

C.4.3. Balancing anti-competitive harm and benefits: balancing for whom?

With regard to the requirement that a restriction's benefits must outweigh its anti-competitive harm, it was explained that this is primarily a political choice. Indeed, this decision concerns the distribution of welfare: the anti-competitive harm means a welfare reduction for buyers, and the question is to whom any welfare gains must accrue and in what amount. Considering the political nature of this question, it is best answered by the legislature. Without a clear stance of the legislature, the courts will have to answer this political question – which is uncalled for due to their lack of democratic legitimacy to do so (see Chapter 4.A.2.3.4.). On a national level the Dutch Minister of Economic Affairs seems to have clearly expressed the political choice,[1023] but on an EU level this has not yet happened. Nevertheless, it was deemed likely that it is both the EU and Dutch legislatures' choice that the Second Condition of the Exemption Possibility ensures that those affected by the anti-competitive harm are fully compensated.

In this context, measures that ensure that the negative consequences or societal costs of the consumption of a product are borne by the sellers and buyers of this product, i.e., measures that internalise negative externalities, deserve specific consideration. These measures cause the genuine costs of the product to be reflected in the product's price, which results in an aggregate economic welfare improvement of the sellers, buyers and those previously affected by the negative externality.[1024] Indeed, the internalisation of negative externalities increases allocative efficiency across the economy's markets. However, although overall society benefits from such internalisation measures, the economic welfare of the buyers affected by the competition restriction is reduced.

[1023] See e.g.: Dutch Minister of Economic Affairs, *Beleidsregel Mededinging en Duurzaamheid*, 2014.

[1024] R. Pindyck & D. Rubinfeld, *Microeconomics*, Pearson, 8th edn., 2012, pp. 662-663. Ch. R. Leslie, *Achieving Efficiency through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 Cal. L. Rev. 243, 1993, pp. 269 *et seq*.

In fact, internalising negative externalities resembles welfare redistribution.[1025] Considering the political choice that those who are harmed by a competition restriction must be fully compensated, the societal welfare increase due to measures internalising negative externalities should not be eligible for inclusion in the balancing exercise of the Exemption Possibility.

Recommendation 3. Considering the above, it is here asserted that the Treaties legislature, as the architect of Article 101 TFEU, should clearly express its stance on who should enjoy the agreement's benefits and in what amount. Specific consideration should be paid to societal welfare increases due to measures internalising negative externalities, since these in principle do not benefit those harmed by the anti-competitive effects of the agreement.

C.4.4. Prioritising public policies: let the politicians decide

Pursuant to article 106(2) TFEU (and Article 11 DCA[1026]), the rules of the EU Treaties, including the Cartel Prohibition, may be ignored if this is required for undertakings to perform an SGEI, the provision of which was entrusted to them by the Member State. So, this reconciliation mechanism can only be applied if the government has decided that the SGEI must be provided. Due to the state involvement, it may be argued that the trumping of competition law is always justified, as it is up to the state to prioritise the goals of competition law and other public policy goals. This argument is valid if such a prioritisation choice has indeed been made. However, when the government entrusts undertakings with the task of performing an SGEI, it may not have considered beforehand whether it deems the performance of this service more important than the protection of competition. Considering that Article 106(2) TFEU can also be invoked directly by the undertaking concerned, the risk is that this provision could be used to circumvent the Cartel Prohibition even if the Member State did not intend to subordinate competition policy. It is therefore proposed that Article 106(2) TFEU only be used to set aside the Cartel Prohibition if the state explicitly endorses this.

Recommendation 4. Since subordinating competition law for the benefit of other public interests is in essence a political deed, which requires a genuine political choice, it is argued that Article 106(2) TFEU should be interpreted as only allowing the

[1025] R.H. Bork, *The Antitrust Paradox: a Policy at War with Itself*, The Free Press, 1978, 1993 edn., pp. 114-115.
[1026] References to Article 106(2) TFEU are meant to refer to Article 11 DCA, too.

setting aside of the Cartel Prohibition if the state has explicitly decided that the public interests at issue are more valuable than competition and the economic prosperity at stake.

C.4.5. SGEI definition unnecessarily limits function of Article 106(2) TFEU

Article 106(2) TFEU can only be effective if the bank *must* in principle render the SGEI to anyone interested. For banks, however, there is rarely a requirement to provide a certain service. Banking regulation merely stipulates that if a bank provides a certain service, it must do so in accordance with specific conditions. The requirement to deliver an SGEI is uncalled for, if Article 106(2) TFEU is meant to function as a complete reconciliation mechanism for the Member States that wish to use undertakings to accomplish their public policies. It should be up to the Member States to decide which level of market coverage they consider sufficient. In addition, Article 106(2) TFEU seems to be limited to cases in which a certain performance or act is required, while the mere *non-performance* is not covered. This also hinders this provision from functioning as a complete reconciliation mechanism, because it may be that Member States wish that a public policy for SGEIs be specified through self-regulation which includes prohibitions from providing an SGEI if the self-regulation's conditions are not complied with. So, it would be opportune to broaden the scope of this article to activities needed to effect SGEI prohibitions.

Recommendation 5. If Article 106(2) TFEU is to properly function as a reconciliation mechanism which allows the Member States to make use of undertakings when implementing their public policies, the interpretation of the scope of an SGEI (1) should not require that the service provider is in principle obliged to offer the service to everyone interested, and (2) should include the conditional provision of services, meaning that certain services can only be provided in conformity with principles identified by the state.

C.4.6. The Wouters judgment: a regrettable anomaly

It was set out above that the legitimate objective ancillarity doctrine, based upon the *Wouters* doctrine, is not an appropriate way to reconcile public interests and the Cartel Prohibition. The normative view here is that the rationale and application of this doctrine are hard to grasp, too hard. In addition, the doctrine unnecessarily blurs the division between the responsibilities and powers of political bodies and the roles of undertakings.

Recommendation 6. Considering the inappropriateness of the legitimate objective ancillarity doctrine, it is here recommend that this doctrine is no longer applied.

C.4.7. The SIEC test will not rescue emergency takeovers

Bank emergency takeovers are mergers between banks aimed at rescuing one or more ailing banks, in the interest of financial stability. In this study, cases were considered where a competition authority does not accept the merger, while the government or financial supervisor favours this concentration for public interest reasons. The counterfactual situation for emergency takeovers of 'too big to fail banks' is that the state rescues the ailing bank through nationalisation or direct state support. When assessing whether the merger's economic welfare increases may outweigh any anti-competitive harm, only those increases that are not also realised in the counterfactual situation should be taken into account. In general, these merger-specific benefits can be grouped into two categories: improvements that land with the bank customers in the affected markets, and all other improvements. Considering the substance of the SIEC test combined with the so-called efficiency defence, implying that the SIEC test is a consumer welfare test, the benefits for society or unaffected customers cannot be taken into account when this test is used as a reconciliation mechanism.

It follows from the above reasoning that the application of the SIEC test to rescue mergers will only allow a limited category of merger benefits to be taken into account when applying the efficiency defence, making the SIEC test an unlikely candidate for safeguarding anti-competitive emergency takeovers. If this is contrary to society's good, the law should provide for alternative reconciliation mechanisms (two such mechanisms are discussed below).

Recommendation 7. If emergency takeovers are deemed to be useful tools for mitigating systemic risk and if it should be possible to implement such takeovers that significantly impede competition, it is essential that the legislature provide for and/or maintain adequate legal mechanisms to realise this, because the mere application of the SIEC test is unlikely to preserve these takeovers.

C.4.8. Is it certain that an emergency takeover can be implemented promptly?

Although the SIEC test may not be an adequate reconciliation mechanism in practice, if it is intended to be used, the merger control procedural rules should not prevent this. A regular merger assessment procedure would require that a notified concentration

is 'frozen' until clearance is granted, i.e., the deal may not be implemented until the authority has approved the merger. Considering the time that the Commission and ACM need for appraising a notified merger, several weeks or even months, this standstill requirement is an insuperable obstacle for emergency takeovers. Indeed, it could be necessary to implement an emergency takeover within days for it to be effective. The authorities have the possibility to waive the standstill requirement, but they have quite some discretion in this respect. In addition, the current Commission policy seems to be that such a waiver is not granted if the merger could have anti-competitive effects, which means that such a waiver will not be available for anti-competitive rescue mergers falling within the scope of the EUMR. It is here recommended that these issues be addressed through policies of the authorities.

Recommendation 8. In order to prevent the standstill requirement from blocking the prompt implementation of emergency takeovers, the Commission and ACM should develop policies in which they explicitly state that they will grant a derogation from the standstill requirement if a rescue merger is at stake, even if such a merger may have anti-competitive effects.

C.4.9. Article 21(4) EUMR should allow both blocking and empowering a merger

The question is whether there are currently reconciliation mechanisms available if the government sees a need to circumvent the EU or Dutch SIEC test. Due to the primacy of EU law, Member States that want to trump the EU SIEC test cannot achieve this via a national measure. This is only allowed if EU law itself provides an exemption possibility. Article 21(4) EUMR allows EU Member States, for prudential supervision reasons, to *block* mergers that have passed the SIEC test. Currently, however, this provision does probably not empower the states to surpass the SIEC test for mergers that serve prudential regulatory interests. This means that a reconciliation gap exists for mergers that harm economic prosperity, at least for the affected customers, but that are nonetheless advantageous for society in the end.

In this book the normative view is taken that Article 21(4) EUMR should also allow Member States to set aside the SIEC test if a merger is beneficial for financial stability reasons. Preferably the state should ensure that the prudential interests are served sufficiently while keeping any competition harm as small as possible. This can be achieved by introducing a two-phase authorisation process: first, the state would compel the merger, override the EU SIEC test and authorise the deal under conditions, and secondly, enforce the condition that the merged entity be required to remedy any anti-competitive harm in the medium and long term as much as possible.

Recommendation 9. There should be a legal mechanism that allows Member States to trump the EU merger control regime if implementing an anti-competitive emergency takeover would be in society's interest. Therefore, Article 21(4) EUMR should be amended to make it explicit that this provision also allows Member States to set aside the SIEC test if a merger is beneficial for reasons of financial stability. It is recommendable to prescribe a procedure that ensures the capturing of both short-term financial stability benefits, as well as longer-term competition advantages.

C.5. Final thoughts

This book proposes several ways in which the advancement of the public interest can be reconciled with competition law. The discourse on how to treat public interests within the context of competition law has gone on for decades now. Undoubtedly it will continue for at least another decade, and probably even longer. It is of course unrealistic to suppose that the conclusions and recommendations of this book will be universally accepted and implemented. This is not problematic at all, as this is how jurisprudence develops. After all, the story of this book was also built on the work of many scholars. If anything, the author hopes that this study challenges others to explicitly agree or disagree with his conclusions, furthering the scholarly discussion and decision-making in practice, for an ever better application of competition law.

SUMMARY IN DUTCH
SAMENVATTING IN HET NEDERLANDS

Inleiding

Deze samenvatting in het Nederlands omvat de belangrijkste analyses en conclusies van dit onderzoek. Dit boek heeft als onderwerp conflicten tussen enerzijds het Europese en Nederlandse mededingingsrecht en anderzijds handelingen van ondernemingen die (ook) tot doel hebben publieke belangen te dienen. Hoewel het onderzoek in principe betrekking heeft op publieke belangen op alle beleidsterreinen, ligt de focus op publieke belangen in de bankensector.

Bovengenoemde conflicten kunnen bijvoorbeeld ontstaan wanneer banken overgaan tot zelfregulering om een consumentenbelang te dienen (zoals het vergroten van de vergelijkbaarheid van producten) en deze zelfregulering een mededingingsbeperking is in de zin van artikel 101(1) Verdrag betreffende de werking van de Europese Unie (**VWEU**) en/of artikel 6(1) Mededingingswet (**Mw**). Of wanneer een bank een andere bank overneemt omdat deze laatste op omvallen staat, maar deze overname wel leidt tot een concurrentieverslechtering die gewoonlijk in strijd is met de concentratie-controleregels van de EU Verordening 139/2004 of de Mw. Het is niet altijd in het belang van de maatschappij dat het mededingingsrecht dergelijke ondernemingshandelingen tegenhoudt. Het kan voor de maatschappij namelijk belangrijker zijn dat wordt bijgedragen aan een publiek belang, dan dat de concurrentie beschermd wordt. Kortom, het is essentieel dat er goede juridische mechanismes zijn die de genoemde conflicten kunnen oplossen op een manier die de belangen van de maatschappij het beste dient. Die mechanismes worden in dit boek '**verzoeningsmechanismes**' genoemd.

Deze studie beantwoordt twee onderzoeksvragen:

(1) Welke juridische mechanismes zijn er om mededingingsrechtelijke verboden te verzoenen met handelingen van ondernemingen die tot doel hebben publieke belangen te dienen, maar die ook binnen de werkingssfeer van deze verboden vallen?
(2) Is de wijze waarop de verzoeningsmechanismes worden toegepast de beste manier om de belangen van de maatschappij te dienen? En zo nee, hoe zouden deze mechanismes dan moeten worden toegepast, zodat de belangen van de maatschappij het beste worden gediend?

De verdere indeling van deze samenvatting is als volgt. Eerst worden drie normatieve uitgangspunten beschreven die centraal staan in de oplossingskaders die in dit boek zijn uitgewerkt. Omdat de doelen van regelgeving en beleid in dit onderzoek belangrijk zijn voor het oplossen van conflicten, worden daarna de doelen van het mededingingsrecht en bankenregulering uiteengezet. Daarna komen de verzoeningsmechanismes in het kader van het kartelverbod en het concentratiecontrole-regime aan bod. Vervolgens wordt uitgelegd in welke gevallen toch specifieke overheidsregelgeving voor verzoening moet zorgen tussen het mededingingsrecht en het behartigen van een publiek belang. Ten slotte worden de conclusies van dit onderzoek schematisch weergegeven.

Uitgangspunt 1: één gezamenlijk hoofddoel bij belangenweging

Het is één van de normatieve principes van dit onderzoek dat conflicten tussen verschillende belangen die een gezamenlijk hoofddoel hebben, kunnen worden opgelost door te kiezen voor de oplossing die dit achterliggende hoofddoel het beste dient. Beide belangen kunnen dan in feite vertaald worden in één en dezelfde eenheid. Het overkoepelende doel moet dan wel voldoende concreet zijn om vertaald te kunnen worden in een meetbare of te vergelijken eenheid. Zo is 'consumenten*welzijn*' waarschijnlijk niet goed te vertalen in één eenheid, omdat het zo veel aspecten kent. 'Consumenten*welvaart*' daarentegen kan in principe vertaald worden in geldeenheden. Daardoor kan het concept consumentenwelvaart concreet genoeg gemaakt worden om als overkoepelend doel te dienen bij een belangenafweging.

Uitgangspunt 2: geen gezamenlijk hoofddoel vereist politiek oordeel

Als twee belangen geen concreet achterliggend hoofddoel delen, dan kan een conflict tussen deze twee belangen ook niet opgelost worden door naar het effect op een achterliggend doel te kijken. Voor iedere oplossing zullen dan wel de effecten op meerdere doelen weergegeven kunnen worden. Dan rijst vervolgens de vraag welke oplossing het beste is voor de maatschappij. De keuze voor een oplossing vereist in dit geval dat men een hiërarchie tussen de doelen of publieke belangen vaststelt.

In dit onderzoek geldt het normatieve principe dat het maken van keuzes tussen publieke belangen, subjectieve, politieke beslissingen zijn. Er zijn namelijk geen objectieve gronden waarop een dergelijke keuze gemaakt kan worden. Dit betekent dat bij een conflict tussen publieke belangen die door de wetgever zijn vastgesteld, het ook aan de wetgever is om vast te stellen welk belang belangrijker is. In zo'n geval zijn private partijen (burgers, ondernemingen) niet geschikt om deze keuze te maken.

Private partijen hebben niet de democratische legitimiteit om te bepalen welke van de publieke belangen die zijn vastgesteld door de wetgever, voorrang hebben boven andere. Tenzij de wetgever de bevoegdheid om deze keuze te maken aan de private partij heeft overgedragen en heeft geïnstrueerd over de waarde van de verschillende belangen.

Uitgangspunt 3: een norm moet zijn hoofddoel dienen

Wanneer bij conflicterende publieke belangen een verzoening gekozen wordt op basis van het optimaliseren van het hoofddoel, dan kan dit tot gevolg hebben dat een juridische norm opzij gezet moet worden om deze oplossing mogelijk te maken. In dit boek wordt het als passend beschouwd wanneer in dit geval de wetgever een bestaande wettelijke norm opzij zet. De wetgever zal namelijk hebben gewild dat de wettelijke norm bijdraagt aan het overkoepelende hoofddoel. Sterker nog, in dit boek geldt het normatieve principe dat een norm zijn achterliggende hoofddoel niet mag ondermijnen. De wetgever zou in dit geval dus zelf de norm opzij moeten zetten, zodat de beste oplossing gekozen kan worden.

Private partijen kunnen natuurlijk niet zo maar een juridische norm negeren. Zij mogen dit alleen als het recht in een uitzondering van deze norm voorziet. Dus wanneer mededingingsrechtelijke verboden handelingen verbieden die publieke belangen dienen, dan kunnen ondernemingen deze verboden alleen opzij zetten als de juiste uitzonderingsmogelijkheden voor handen zijn. Dit onderstreept het belang van dergelijke uitzonderingsmogelijkheden (of 'verzoeningsmechanismes'). Zonder dergelijke verzoeningsmechanismes kunnen private partijen niet de oplossing bewerkstelligen die het beste is voor de maatschappij. Bij ieder conflict zal dan dus overheidsingrijpen nodig zijn om de optimale oplossing te bewerkstelligen.

Normatief oplossingskader

Zoals uiteengezet, geldt voor het normatieve deel van dit onderzoek dat conflicten tussen belangen of normen opgelost zouden kunnen worden aan de hand van hun achterliggende hoofddoel. Daarom worden in dit boek de doelen van het mededingingsrecht en van bankenregulering vastgesteld. Wat betreft bankenregulering beschrijft het onderzoek slechts de doelen, dus zonder een oordeel te vellen over wat de doelen zouden moeten zijn (d.w.z. een descriptieve analyse). De doelen van het mededingingsrecht worden beschreven aan de hand van de geldende beleids- en rechtsbronnen, maar dit boek bevat ook een normatieve visie op deze doelen. Deze

normatieve visie op de doelen van het mededingingsrecht is vervolgens een bouwsteen voor de oplossingskaders die in dit boek zijn uitgewerkt. Deze oplossingskaders behelzen bepaalde benaderingen, die normatieve uitgangspunten hebben, om de verzoeningsmechanismes toe te passen.

Doelen van het mededingingsrecht

In Nederland en de EU heeft het mededingingsrecht in ieder geval (ook) tot doel de economische welvaart te behoeden en te vergroten. Op basis van economische theorie kan beredeneerd worden waarom concurrentie de welvaart vergroot. Ten eerste zorgt concurrentie er voor dat prijzen niet onnodig hoog zijn en dat daardoor zo veel mogelijk geïnteresseerde kopers een product kunnen kopen (d.w.z. mededinging zorgt voor allocatieve efficiëntie). Ten tweede prikkelt concurrentie verkopers om hun prijzen, en dus ook productiekosten, zo laag mogelijk te houden (d.w.z. mededinging zorgt voor productie-efficiëntie). Ten derde stimuleert concurrentie verkopers om te innoveren en innovatie wordt gewoonlijk gezien als de grootste kracht achter welvaartstoename. Mededingingsrecht is echter geen algemeen 'welvaartstoename-recht'. Het mededingingsrecht probeert de welvaart te behoeden en te vergroten door middel van het beschermen van de concurrentie op markten. Mededingingsrecht richt zich dus op het behoud van het concurrentieproces.

In dit boek wordt, vanuit een normatief standpunt, onderschreven dat het behoud van economische welvaart en van het concurrentieproces doelen van het mededingingsrecht zouden moeten zijn. Bij het formuleren van de normatieve oplossingskaders gebaseerd op het achterliggende hoofddoel, is het cruciaal vast te stellen welk van de twee belangrijker is. In dit onderzoek wordt de welvaartsvergroting als het belangrijkere doel aangemerkt. De Nederlandse wetgever, ACM en EU Commissie zien dit ook zo. Het EU Hof van Justitie (**EU HvJ**) heeft echter een dergelijke hiërarchie nog niet vastgesteld.

De EU Commissie en het EU HvJ hebben de 'totstandkoming van één gemeenschappelijke Europese markt' ook als doel van het EU mededingingsrecht aangemerkt. In deze studie wordt echter het standpunt ingenomen dat het mededingingsrecht dit 'gemeenschappelijke-markt-streven' niet als doel zou moeten hebben. Allereerst kan uit de tekst van de mededingingsrechtelijke verboden afgeleid worden dat deze hiervoor niet bedoeld zijn. Bovendien is het ineffectief om met één norm twee verschillende doelen na te streven, omdat deze doelen met elkaar kunnen conflicteren (dit wordt het 'Tinbergen-principe' genoemd). In de praktijk blijkt inderdaad dat welvaartsvergroting en het gemeenschappelijk-markt-streven elkaar kunnen bijten.

Doelen van bankenregulering

Uit de analyse van dit boek blijkt dat de redenen voor bankenregulering in twee categorieën onderscheiden kunnen worden: (1) het oplossen van marktfalen (d.w.z. efficiëntieredenen), en (2) overige redenen (d.w.z. niet-economische redenen). Wanneer een marktfalen wordt opgelost, vergroot dat de economische welvaart van de maatschappij. Efficiëntieredenen zijn dus gericht op welvaartsvergroting. Voorbeelden van doelen van op bankenregulering gebaseerde efficiëntieredenen zijn het voorkomen van bankfaillissementen, het oplossen van informatieproblemen voor bankklanten en het reduceren van het operationeel risico voor betaalsystemen. Niet-economische redenen zijn niet gericht op het vergroten van de economische welvaart, maar hebben andere doelen. Voorbeelden van doelen gebaseerd op niet-economische redenen zijn het voorkomen van overkreditering van consumenten en het vergroten van de toegankelijkheid van bankdiensten voor achtergestelde groepen (voor zo ver het de sociale en morele componenten betreft), en terrorismebestrijding.

Kartelverbod: drie verzoeningsmechanismes voor publieke belangen

Dit boek bespreekt de drie mechanismes die gewoonlijk gezien worden als de manieren waarop het dienen van publieke belangen verzoend kan worden met de verboden van de artikelen 101(1) VWEU en 6(1) Mw (**het kartelverbod**): (1) de efficiëntie-uitzonderingsregel van de artikelen 101(3) VWEU en 6(3) Mw (**de efficiëntie-uitzondering**); (2) de uitzondering voor diensten van algemeen economisch belang (**DAEB**) uit de artikelen 106(2) VWEU en 11 Mw (**de DAEB-uitzondering**); en (3) de uitzonderingsregel voor inherente nevenrestrictie bij het streven naar legitieme doelen, gebaseerd op de *Wouters*-uitspraak van het EU HvJ (**de *Wouters*-doctrine-uitzondering**).

Kartelverbod: de efficiëntie-uitzondering

De efficiëntie-uitzondering bewerkstelligt, kort gezegd, dat concurrentiebeperkingen niet worden tegengehouden door het kartelverbod als zij voor de afnemers meer voordelen opleveren dan nadelen. Deze uitzondering is alleen van toepassing wanneer aan vier voorwaarden is voldaan. In dit boek worden alle vier deze voorwaarden normatief beoordeeld.

Een van de belangrijkste normatieve bevindingen heeft betrekking op de reikwijdte van de eerste voorwaarde, namelijk op de aard van de voordelen die afgewogen kunnen

worden tegen de concurrentieschade. In dit boek wordt enerzijds beargumenteerd dat alle voordelen die op solide wijze vertaald kunnen worden in economische welvaart, binnen de reikwijdte van de eerste voorwaarden zouden moeten vallen. Immers, het kartelverbod heeft als doel het vergoten van economische welvaart en dus kunnen met economische welvaart als achterliggend hoofddoel de conflicten worden opgelost. Anderzijds zouden voordelen die niet op solide wijze vertaald kunnen worden in economische welvaart, ook niet binnen de reikwijdte van de eerste voorwaarde mogen vallen. Er moet dan namelijk een afweging tussen welvaart en een ander publiek belang gemaakt worden. Dat is een politieke keuze die alleen partijen met voldoende democratische legitimiteit zouden mogen maken – ondernemingen dus niet.

Een andere belangrijke normatieve bevinding is dat de categorie personen die moet profiteren van de voordelen die opwegen tegen de concurrentieschade, moet worden vastgesteld door de wetgever. Hierbij speelt met name de vraag in hoeverre voordelen die ten goede komen aan personen die niet geraakt worden door de concurrentieschade (d.w.z. niet-afnemers), wél de mededingingsnadelen kunnen opheffen. Het gaat hier weer om een politieke keuze, omdat er in feite besloten moet worden of er welvaart van afnemers gedistribueerd mag worden naar anderen. Zonder aanwijzingen van de wetgever zouden ondernemingen niet tot welvaartsherverdeling mogen overgaan, omdat het in dit geval om welvaart gaat die wettelijk beschermd is door het kartelverbod.

Kortom, de efficiëntie-uitzondering kan een goed verzoeningsmechanisme zijn, mits haar vier voorwaarden worden toegepast overeenkomstig het normatieve oplossingskader voor dit mechanisme.

Kartelverbod: de DAEB-uitzondering

Voor ondernemingen die belast zijn met het verrichten van een dienst van algemeen economisch belang voorziet Artikel 106(2) VWEU in een uitzondering van onder meer het EU kartelverbod, mits het kartelverbod het verrichten van deze dienst anders zou verhinderen. Kort gezegd, beoogt deze regel meer mogelijkheden te scheppen voor overheden om gebruik te maken van ondernemingen bij het uitvoeren publiek beleid. Artikel 11 Mw heeft een gelijkaardige werking met betrekking tot het Nederlandse kartelverbod.

De normatieve visie in dit onderzoek is dat artikel 106(2) VWEU (en artikel 11 Mw) een geschikt verzoeningsmechanisme is, mits de toepassing van dit artikel op een aantal punten wordt gewijzigd ten opzichte van de huidige toepassing. Allereerst

zou de definitie van een DAEB ook moeten worden uitgebreid naar bankdiensten, wat zeker gezien de hoge mate van regulering en het belang voor de maatschappij van enkele diensten (zoals spaar- en betaaldiensten) te rechtvaardigen is. Bovendien zou de DAEB-uitzondering niet alleen moeten gelden voor een *(overheids)opdracht* tot levering, maar ook voor een *(overheids)verbod* tot levering. Met andere woorden, ook ondernemingshandelen dat gericht is op het effectueren van een verbod om diensten op een bepaalde wijze te leveren, zou van de DAEB-uitzondering moeten kunnen profiteren. Ten slotte zou het geen voorwaarde moeten zijn dat ondernemingen verplicht zijn om de DAEB te leveren aan iedere geïnteresseerde klant. Overheden zouden zelf moeten kunnen bepalen of dit nodig is of niet. Wel zou het een voorwaarde moeten zijn dat de overheid expliciet aangeeft dat het verrichten van de DAEB belangrijker is dan naleving van het kartelverbod. Dit verleent dan de benodigde democratische legitimiteit aan de beslissing het kartelverbod te passeren.

Kartelverbod: de *Wouters*-doctrine-uitzondering

De *Wouters*-doctrine-uitzondering is een uitzondering die door het EU HvJ is ontwikkeld. Op basis van deze doctrine vallen mededingingsbeperkingen buiten het kartelverbod indien zij een legitiem doel dienen en proportioneel zijn. Deze doctrine is niet uitgekristalliseerd en de juiste toepassing ervan is onzeker. In deze studie wordt om twee redenen betoogd dat de *Wouters*-doctrine-uitzondering geen geschikt verzoeningsmechanisme is. Allereerst kunnen op basis van deze doctrine ondernemingen besluiten dat een bepaald 'legitiem doel' belangrijker is dan de welvaart beschermd door het kartelverbod. Aangezien dit een politieke keuze is, zou deze gemaakt moeten worden door een democratisch gelegitimeerde partij. Daarnaast kunnen op basis van de *Wouters*-doctrine ook economische voordelen afgewogen worden tegen concurrentieschade en dit zou de efficiëntie-uitzondering grotendeels maken. Vanuit een juridisch-systematisch oogpunt is dit ongewenst.

Concentratiecontrole: het verbod op belemmering van de mededinging

Gezien de focus van dit boek heeft de analyse van het concentratiecontrole-regime met name betrekking op reddingsovernames van een kwakkelende *too big to fail* bank door een andere bank. Het Nederlandse en EU-concentratiecontrole-regime bevat een verbod op het tot stand brengen van een fusie of overname die tot gevolg heeft dat de mededinging op respectievelijke de Nederlandse of EU-markt significant wordt belemmerd. Deze 'belemmeringstest' wordt zo toegepast dat economische welvaartsvoordelen voor benadeelde afnemers een concurrentiebelemmering kunnen opheffen. Dat wordt in dit onderzoek ook als passend beschouwd. Een belangrijke kanttekening is wel dat de

zogenoemde *counterfactual* situatie bij een op omvallen staande *too big to fail* bank, een redding door de overheid is. Dus de voordelen van het voorkomen van een financiële crisis door de reddingsovername zijn niet afhankelijk van de overname en kunnen dan ook niet afgewogen worden tegen de mededingingsbelemmering. Verder is een conclusie van dit onderzoek dat de zogenoemde *failing firm defence* niet relevant is bij een overname van een kwakkelende *too big to fail* bank, omdat dit type bank per definitie niet omvalt.

Concentratiecontrole: uitzonderingen voor publieke belangen

Omdat bij reddingsovernames van banken wellicht niet alle voordelen die de overheid relevant acht kunnen worden meegenomen in de afweging binnen de belemmeringstest, is het nuttig om ook twee uitzonderingsregels te onderzoeken die specifiek bedoeld zijn om het concentratiecontrole-regime af te stemmen op overheidsbeleid.

Allereerst is relevant dat artikel 21(4) van de EU Concentratiecontrole-verordening de EU Lidstaten de mogelijkheid biedt om omwille van prudentieeltoezicht-redenen bankovernames tegen te houden, die de EU Commissie had goedgekeurd op basis van het EU concentratiecontrole-regime. Echter, de huidige toepassing van dit artikel lijkt het niet toe te staan dat de Lidstaten omwille van redenen van prudentieel toezicht het EU-concentratieregime opzij kunnen zetten om zo reddingsovernames mogelijk te maken. In dit boek wordt de normatieve stelling ingenomen dat de EU Lidstaten dit wel zouden moeten mogen. Dit zou dan wel via een twee-fase procedure moeten gaan. In de eerste fase wordt dan de overname goedgekeurd onder voorwaarden en in de tweede fase worden de concurrentiebeperkende gevolgen zo veel mogelijk ongedaan gemaakt door middel van remedies (analoog aan de staatssteunbenadering bij bankreddingen).

Daarnaast biedt artikel 47 Mw de Minister van Economische Zaken de mogelijkheid om een concentratie toe te staan ondanks de weigering van een vergunning door de ACM. Dit wordt in dit boek als een passend verzoeningsmechanisme beschouwd. Er kunnen zich wel procedurele obstakels voordoen – als gevolg van de zogenoemde *standstill* verplichting – maar deze zouden goed opgelost kunnen worden.

Ontoereikende verzoeningsmechanismes?

Wanneer de besproken verzoeningsmechanismes worden toegepast conform de normatieve kaders van dit onderzoek, dan kunnen zeer veel ondernemingshandelingen die publieke belangen nastreven verzoend worden met het mededingingsrecht.

Echter, voor concurrentierestricties die niet nodig zijn voor een DAEB-levering en ook niet voldoen aan de vier voorwaarden van de efficiëntie-uitzondering, biedt het mededingingsrecht geen geschikte verzoeningsmechanismes. Alleen een overheidsmaatregel kan die restricties vrijwaren van het kartelverbod. Een nadeel hiervan is dat een overheidsregeling bepaalde positieve eigenschappen van zelfregulering kan ontberen, zoals snelle totstandkoming en wijzigingsmogelijkheden en ook de betrokkenheid van praktijkexperts. Echter, het moet mogelijk zijn om snellere besluitvormingsprocedures voor de overheid te hanteren. Bovendien kan via consultaties en pro-actieve raadpleging van mededingingsautoriteiten, verkopers, afnemers en andere belanghebbenden, goede informatie verzameld worden om regelgeving te maken die goed aansluit bij de praktijk.

Conclusies

Hieronder zijn de conclusies van dit onderzoek zeer beknopt, schematisch weergegeven.

Kartelverbod		
Verzoeningsmechanisme	**Passend: Ja/Nee**	**Rechtspraktijk: Ja/Nee**
Efficiëntie-uitzondering	Ja	Ja
DAEB-uitzondering	Ja	Nee
Wouters-doctrine-uitzondering	Nee	Ja

Belemmeringstest in concentratiecontrole-regime		
Verzoeningsmechanisme	**Passend: Ja/Nee**	**Toepasbaar in rechtspraktijk: Ja/Nee**
Afweging binnen de belemmeringstest	Ja	Nee
Failing firm defence	Nee	Nee
Artikel 21(4) EU CoCo-Verordening	Ja	Nee
Artikel 47 Mw	Ja	Ja

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