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Strict competition enforcement is the way forward –  
also to promote sustainable consumption and  
production

Edith Loozen



European University Institute  
Department of Law

**STRICT COMPETITION ENFORCEMENT IS THE WAY FORWARD –  
ALSO TO PROMOTE SUSTAINABLE CONSUMPTION AND  
PRODUCTION**

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## **Abstract**

This article investigates the purpose and workings of EU competition law and policy. More specifically, it scrutinizes the claim that sustainable consumption and production (SCP) requires flexible rather than strict enforcement of Article 101 TFEU. Proponents of flexible antitrust argue that SCP requires sector-wide private coordination since manufacturers of sustainable products suffer from first mover disadvantage if consumers may opt for cheaper, less sustainable products. Four main policies have been put forward to legitimize flexible antitrust. Building on the constitutional context, a first policy uses a broad welfare standard to balance competition and sustainability under Article 101(3). Based on the more economic approach, a second policy balances both interests under Article 101(3), provided that a net welfare gain is evidenced in quantitative terms. Grounded in the legitimate objective doctrine introduced in *Wouters*, a third policy balances both interests under Article 101(1). Motivated by the useful effect doctrine, a fourth policy aims to circumvent antitrust by allowing the government to declare private sector initiatives generally binding. This article questions all four policies. Based on a coherent integration of principle and practice, it shows that strict competition enforcement is the legitimate and effective way forward to achieve SCP. Problems of under-regulation are to be addressed by the regulatory state and require proper articulation of state policy in order to preclude antitrust accountability.

## **Keywords**

competition enforcement, non-competition interests, constitutional fundamentals, welfare economics, democratic legitimacy

**JEL:** D60, K21, K42, L41, L43, Q01

**Author contact details:**

Edith Loozen

Fernand Braudel Fellow

Law Department

European University Institute

Edith.Loozen@EUI.eu

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## 1. Introduction\*

This article addresses the purpose and workings of EU competition law and policy.<sup>1</sup> How exactly does the protection of competition help to promote welfare? Do the competition rules allow for a balancing of competition and non-competition interests? What does objective competition enforcement actually entail? The test case competition rule is Article 101 TFEU. The test case welfare consideration is “sustainability”, a concept that links environmental protection needs to sustainable consumption and production (SCP). Most people agree that, in order to limit global warming, we must urgently step up SCP. The question however is what kind of antitrust promotes SCP best. Proponents of “green antitrust” claim that strict enforcement of Article 101 TFEU obstructs SCP (where “strict” implies that the protection of competition prevails over the promotion of sustainability). SCP would require sector-wide private coordination because manufacturers of more sustainable products may suffer from first mover disadvantage as long as consumers can opt for cheaper, less sustainable products. In order to achieve SCP, sector-wide coordination therefore needs to be facilitated by a more flexible approach to competition enforcement (where “flexible” implies that the promotion of sustainability may prevail over the protection of competition).<sup>2</sup>

This article challenges the idea of flexible competition enforcement. Basically because the thought of competition agencies and courts balancing competition and non-competition interests in case of conflict does not sit well with their duty to apply the law objectively.<sup>3</sup> The aim of the article, which is obviously not the first to advocate antitrust “simple and pure”,<sup>4</sup> is to break through an ever revolving debate by presenting an enforcement narrative that coherently connects principle and practice. In order to do so, it starts from the premise that legitimate and effective enforcement is to follow logically and coherently from first principles. This means that the constitutional fundamentals of EU competition law are leading

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\* Edith Loozen (PhD), Fernand Braudel senior fellow at the European University Institute, Florence, and a visiting researcher at Erasmus University, Rotterdam (Edith.Loozen@EUI.eu). The author thanks Heike Schweitzer, Marco Bronckers, Jan Kees Winters, Julian Nowag, Peter Drahos and Giorgio Monti for their helpful comments on an earlier draft of this article.

<sup>1</sup> This article focuses on the EU competition rules addressing undertakings, not on the EU competition rules covering aids granted by states.

<sup>2</sup> Ch. Townley, *Article 81 EC and Public Policy* (Hart Publishing, 2009); S. Kingston, “Integrating Environmental Protection and EU Competition Law: Why Competition Isn’t Special”, (2010) ELJ, 780-805; Ch. Townley, “Which goals count in article 101 TFEU?: Public policy and its discontents”, (2011) ECLR, 441-448; A. Gerbrandy and R. Claassen, “Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach”, (2016) Utrecht Law Review, 1-15; J. Nowag, *Environmental Integration in Competition and Free Movement Laws* (OUP, 2016); G. Monti and J. Mulder, “Escaping the Clutches of EU Competition Law”, (2017) EL Rev., 635-656; A. Gerbrandy, “Solving a Sustainability Deficit in European Competition Law”, (2017) World Comp., 539-562. More generally: B. van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU* (Wolters Kluwer, 2012); A. Witt, “Public Policy Goals Under EU Competition Law – Now is the Time to Set the House in Order” (2012) European Competition Journal, 443-470.

<sup>3</sup> This article does not touch on the situation in which the competition and sustainability interest do not conflict.

<sup>4</sup> G. Amato, *Antitrust and the Bounds of Power* (Hart Publishing, 2012). Cf. A. Schaub and R. Dohms, “Das Weissbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag”, (1999) Wirtschaft und Wettbewerb, 1055-1089; C-D. Ehlermann, “The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution” (2000) CML Rev. 537-590; E. Loozen, “Professional ethics and restraints of competition” (2006) EL Rev., 29-48; O. Odudu, *The Boundaries of Competition Law* (OUP, 2006); E. Loozen, *Het begrip mededingingsbeperking zoals neergelegd in artikel 101(1) VWEU: een beslistmodel* (Boom Juridische Uitgevers, 2010); O. Odudu, “The Wider Concerns of Competition Law” (2010) Oxford Journal of Legal Studies, 599-613; H. Hovenkamp, “Antitrust Policy And Inequality Of Wealth” (2017) (Oct) CPI Antitrust Chronicle, 7-13; B. Lyons, “Inequality And Competition Policy” (2017) (Oct) CPI Antitrust Chronicle, 32-37.

rather than the case law of the EU Court of Justice or competition policy as defined by the EU Commission. In order to discuss the main arguments put forward to legitimize flexible antitrust in a continuous setting, the article uses the Dutch sustainability dossier that specifies four flexibility policies.<sup>5,6</sup> Building on the constitutional context of EU competition law, a first policy uses a broad welfare standard to balance competition and sustainability under Article 101(3) TFEU.<sup>7</sup> Based on the more economic approach and endorsed by the Commission, a second policy balances both interests under Article 101(3) TFEU, provided that net welfare gain can be evidenced in quantitative consumer surplus terms (qNWG).<sup>8</sup> Grounded in the *legitimate objective* doctrine introduced in *Wouters*,<sup>9</sup> a third policy also balances both interests but under Article 101(1) TFEU.<sup>10</sup> Motivated by the *useful effect* doctrine, a fourth policy aims to preclude competition enforcement altogether by proposing a new legislative approach that allows the Dutch government to declare sustainability initiatives generally binding.<sup>11</sup>

The article is organized as follows. Section 2 analyzes whether indeed the constitutional context of EU competition law allows for a broad welfare standard and pertaining prioritization of sustainability over competition within Article 101 TFEU. Having identified the constitutional fundamentals of EU antitrust, those fundamentals then provide the basis for analyzing the legitimacy and effectiveness of the other flexibility policies. Section 3 investigates whether the more economic approach can actually serve for competition agencies to use qNWG as a baseline for legal interpretation of the indispensability and residual competition conditions laid down in Article 101(3) TFEU. Section 4 subsequently addresses the workings of the *legitimate objective* doctrine by revisiting *Wouters* and *Meca-Medina*,<sup>12</sup> and by scrutinizing its application in *OTOC* and *CNG*.<sup>13</sup> Section 5 investigates whether the new legislative approach accords with the *useful effect* doctrine, and if not, whether this doctrine needs to be amended to allow for innovative governance structures aiming to achieve SCP.<sup>14</sup> Section 6 wraps up the conclusions of the previous sections.

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<sup>5</sup> Dutch competition law and enforcement practice is fully aligned to EU competition law and enforcement practice. In order to increase readability, this article therefore refers to Article 101 TFEU only, even when referring to exclusively Dutch settings.

<sup>6</sup> For more details on the Dutch story, see Monti and Mulder, op. cit. *supra* note 2.

<sup>7</sup> Minister of Economic Affairs, Policy rule on competition and sustainability 2014 and 2016 (Beleidsregel mededinging en duurzaamheid, *Stcrt.* 2014, 13375; 2016, 52945).

<sup>8</sup> Authority for Consumers & Markets (ACM), Vision document competition and sustainability (Visiedocument mededinging en duurzaamheid), May 2014, <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability> (last visited 13 Dec. 2018).

<sup>9</sup> Case C-309/99 *Wouters and Others*, EU:C:2002:98.

<sup>10</sup> In a Dutch context: F. Amtenbrink and J. van de Gronden, “Economisch recht en het Verdrag van Lissabon I: mededinging en interne markt”, (2008) *SEW*, 323-329; T. Ottervanger, “Maatschappelijk verantwoord concurreren. Mededingingsrecht in een veranderende wereld”, (2010) *Markt & Mededinging*, 93-99; E. Pijnacker Hordijk, “Beoordeling van duurzaamheidsinitiatieven onder het kartelverbod”, (2013) *Markt & Mededinging*, 187-195; A. Gerbrandy, “Duurzaamheidsbelangen in het mededingingsrecht”, (2013) *NTER*, 326-332; A. Gerbrandy, “Toekomstbestendig mededingingsrecht”, (2016) *Markt & Mededinging*, 102-112.

<sup>11</sup> Minister of Economic Affairs, Letter to Parliament, *Kamerstukken II* 2016/17, 30196, 480, 1-6, [https://www.internetconsultatie.nl/ruimte\\_voor\\_duurzaamheidsinitiatieven/details](https://www.internetconsultatie.nl/ruimte_voor_duurzaamheidsinitiatieven/details) (last visited 13 Dec. 2018).

<sup>12</sup> Case C-309/99 *Wouters*; Case C-519/04 P *Meca-Medina and Majcen v Commission*, EU:C:2006:492.

<sup>13</sup> Case C-1/12 *Ordos dos Técnicos Oficiais de Contas (OTOC)*, EU:C:2013:127; and case C-136/12, *Consiglio nazionale dei geologi (CNG)*, EU:C:2013:489.

<sup>14</sup> Monti and Mulder, op. cit. *supra* note 2.

## **2. The constitutional fundamentals of EU competition law and policy**

The Dutch sustainability dossier begins with the Policy rule on competition and sustainability (Policy rule) issued by the Minister of Economic Affairs.<sup>15</sup> Considering that sector-wide sustainability coordination raises costs and thus yields anticompetitive effects under Article 101(1) TFEU, the Policy rule instructs the Dutch competition agency (Authority for Consumers and Markets; ACM) to use a broad welfare standard in order to balance competition and sustainability considerations under Article 101(3) TFEU. Broad welfare is defined in Brundtland terms – sustainable development which meets the needs of current generations without compromising the ability of future generations to meet their own needs.<sup>16</sup> The Commission has opposed the Policy rule because it contravenes EU competition policy that is based on a consumer welfare standard in terms of consumer surplus.<sup>17,18</sup> Proponents of flexible antitrust however claim that this focus on economic efficiency constitutes a political choice since Article 3(3) TEU explicitly refers to various socio-economic goals, whilst Article 11 TFEU requires the Commission to balance competition and sustainability when enforcing the competition rules. Also, a binary institutional balance would be outdated given that society is no longer organized along the traditional lines of the public and private domain. Rather than forcing market actors in the straitjacket of consumer surplus and economic efficiency, the better alternative would be a broad welfare standard that leaves market actors sufficient room for “direct consideration of socio-political criteria, such as environmental policy”.<sup>19</sup>

The important question thus is whether the constitutional fundamentals of EU competition law allow for a broad welfare standard and a balancing of competition and sustainability. Constitutional treatises do not generally dissect the institutional balance between the market order as in market competition, the Union as in state and state action, and the Commission as in competition enforcement agency.<sup>20,21</sup> Aiming to contribute to the existing literature, this article considers the relevant constitutional context to not only include Article 3(3) TEU and 11 TFEU, the provisions commonly referred to by flexible antitrust proponents, but also Article 2 TEU and Protocol no 27 on the internal market and competition.<sup>22</sup> These provisions can be separated in two constitutional strands. The first strand contains Article 3(3) TEU that

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<sup>15</sup> Policy rule, cited *supra* note 7.

<sup>16</sup> World Commission on Environment and Development, *Our common future* (OUP, 1987).

<sup>17</sup> D.G. Laitenberger, Letter of 26 February 2016 to SG Camps, Dutch Ministry of Economic Affairs, *Kamerstukken II* 2015/16, 30196, 463.

<sup>18</sup> This article does not focus on the secondary objective of EU competition law – market integration. In practice, this objective is to a large extent compatible with the consumer welfare objective, whilst the exceptions (hard core qualification of some vertical restraints) are not relevant in the context of this paper.

<sup>19</sup> Townley (2009), *op. cit. supra* note 2, at 1 and 62-63. Cf. Amtenbrink and Van den Gronden, *op. cit. supra* note 10; Ottervanger, *op. cit. supra* note 10; Townley (2011), *op. cit. supra* note 2; Gerbrandy (2013, 2016 and 2017), *op. cit. supra* note 2 and 10; Van Rompuy, *op. cit. supra* note 2, at 66 and 226; Nowag, *op. cit. supra* note 2, at 28-29; Kingston, *op. cit. supra* note 2; Monti and Mulder, *op. cit. supra* note 2.

<sup>20</sup> Constitutional treatises generally focus on the balance between the formal EU institutions. See J-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge University Press, 2010); H. von der Groeben, J. Schwarze, A. Hatje, *Europäisches Unionsrecht* (Nomos, 2015); P. Craig and G. de Búrca, *EU Law. Text, Cases and Materials*, 6th ed. (OUP, 2015).

<sup>21</sup> This article refers to the “state” and “state action” rather than the Union and Union action because those notions better articulate the kind of entity and action referred to in the context of this paper. Also, because Article 119 and 120 TFEU on economic policy and Article 151 and 153 TFEU on social policy specify that those objectives also apply to Member States’ policies.

<sup>22</sup> Cf. J. Drexl, “La Constitution Économique Européenne – L’Actualité du Modèle Ordolibéral”, (2011) *Revue Internationale de Droit Économique*, 419-454. Presenting an ordoliberal motivation of the European economic constitution, Drexl includes Protocol No 27 in the constitutional context of the competition rules and welcomes Art. 2 TEU as a valuable contribution because it permits an ordoliberal point of view on individual, political and democratic freedom, at 439-440.

not only specifies the objectives the EU aims to achieve, but also classifies the above institutions in this context. Based on Article 51 TEU, this strand includes Protocol no 27. The second strand contains Article 2 TEU that lists the Union's values amongst which democracy and the rule of law. Though Article 11 TFEU is part of the provisions having general application listed in Title II TFEU and thus completes the objectives of Article 3(3) TEU,<sup>23</sup> it is included in the second strand. The reason is that the values democracy and the rule of law are most relevant to determine the exact competences the competition rules confer on the Commission. The next paragraphs analyze what precisely both strands ordain and how they fit together.

### **2.1. The first constitutional strand: Article 3(3) TEU and Protocol no 27**

Article 3(3) TEU begins with the following text:

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.<sup>24</sup>

Close reading shows that these two sentences form related but separate parts each of which lists different kinds of objectives the Union has to fulfil. The first sentence covers the establishment of an internal market, which, based on Protocol no 27, comes with a “system ensuring that competition is not distorted”. The second sentence specifies the overall aim listed in Article 3(1) TEU in several socio-economic goals. Meanwhile, Article 3(3) TEU also specifies the institutions used to secure those goals – the market, the state and the competition agency. Thus, two aspects can be noted. The market order is listed first without having been assigned a particular (welfare) goal, whilst state action is to secure the socio-economic goals mentioned. Competition enforcement is separated from other state action and annexed to the market order. A welfare economic perspective helps to understand this institutional format.

#### 2.1.1. The institutional balance between market and state action

It is unclear whether the High Contracting Parties knowingly put the establishment of the internal market first. Whilst the internal market had originally been included in Article I-3(2) of the failed Constitutional Treaty (now as amended Art. 3(2) TEU), the mandate of the Intergovernmental Conference that was to redraft the existing treaties specifically required a clearer distinction between the provisions on the internal market and those on the area of freedom, security and justice.<sup>25</sup> As a consequence, the establishment of the internal market was moved to the beginning of Article 3(3) TEU, which makes sense as both market and state action are instruments to increase welfare. In that case, it also makes sense to put the market order first. On the one hand, living in a world of scarce resources means that the promotion of welfare builds on their efficient use. On the other, the market order allocates resources more efficiently than any other method. Hayek has insightfully explained why.<sup>26</sup> Market competition constitutes “decentralized planning by many separate persons” which makes “fuller use” of existing, yet “unorganized knowledge” regarding “each kind of scarce resource”.<sup>27</sup> Key to the effectiveness of

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<sup>23</sup> Von der Groeben and others, op. cit. *supra* note 20, at 71.

<sup>24</sup> Only that part of the text of Article 3(3) TEU is quoted that is relevant for the purposes of this paper.

<sup>25</sup> Piris, op. cit. *supra* note 20, at 36.

<sup>26</sup> F.A. von Hayek, “The Use of Knowledge in Society”, (1945) *American Economic Review*, 519-530. Cf. V. Vanberg, “Consumer welfare, total welfare and economic freedom – on the normative foundations of competition policy”, in Drexel and others (Eds), *Competition Policy and the Economic Approach. Foundations and Limitations* (Edward Elgar, 2011), 44-71.

<sup>27</sup> Hayek, op. cit. *supra* note 26, at 521.

decentralized decision-making is the price mechanism, which enables producers and consumers “to communicate information” that reflects “[the] significance [of each resource] in view of the whole means-end structure”.<sup>28</sup> Thus, “without anyone having to tell them what to do” (i.e., without the state defining upfront the particular welfare goal they have to achieve), the price mechanism induces producers and consumers to “move in the right direction” and promote welfare by using scarce resources most sparingly.<sup>29</sup>

The above however also indicates that the success of the market order as a most efficient allocation system crucially depends on the price mechanism to reflect all relevant information correctly. If not, competition fails to yield most efficient outcomes. This is a first reason for the state to step in and correct the market failure at issue. In case of SCP, the most relevant market failures are negative externalities and market power.<sup>30</sup> “Negative externalities” occur when prices do not reflect all costs of a product. Simple externalities concern few stakeholders who can internalize the externality at issue by concluding additional transactions. But in case of complex externalities, correction by the market fails due to high transaction costs and extensive free riding. The result is under-correction of the externality at issue. “Market power” is a situation in which market actors affect the price mechanism by hampering competition to the extent that they become price makers rather than price takers.<sup>31</sup> A second reason for the state to intervene is that people are not equally equipped in life. Based thereupon, governments may also want to redistribute wealth by reassigning initial endowments in order to increase fairness and social cohesion. Yet once market failures have been addressed and initial endowments have been reset in a socially acceptable way, it is (again) up to the market to maximize welfare by allocating resources most efficiently.<sup>32</sup>

### 2.1.2. The institutional balance between competition enforcement and state regulation

The next issue is why competition surveillance is singled out in Protocol no 27. The formal occasion for this protocol was the French government’s wish to no longer include the wording “where competition is free and undistorted” in the reference to the establishment of an internal market.<sup>33</sup> The idea was to recalibrate the goals of the EU by underscoring that undistorted competition is only a means to increase welfare.<sup>34</sup> The French government had overlooked, however, that Article 3(g) EC already listed the competition rules as a means to increase welfare.<sup>35</sup> Some nonetheless feared that the proposed change would diminish the EU’s commitment to free competition, more specifically the EU’s competence to legislate on competition matters based on Article 308 TEC (now 352 TFEU).<sup>36</sup> Protocol no 27 was added

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<sup>28</sup> Hayek, *op. cit. supra* note 26, at 525.

<sup>29</sup> Hayek, *op. cit. supra* note 26, at 527.

<sup>30</sup> The other market failures are information asymmetry and public goods.

<sup>31</sup> H. Rosen and T. Gayer, *Public Finance* (McGraw-Hill, 2012). Note that market power is not necessarily bad, but triggers an investigation into compensating benefits.

<sup>32</sup> Cf. Piris, *op. cit. supra* note 20, at 73. Piris identifies a twofold role of the state by reference to the social market economy model developed in post-war Germany in which the state, on the one hand, enables the free play of forces on the market by creating the framework for competition to work and, on the other, provides for a complete system of social protection.

<sup>33</sup> Piris, *op. cit. supra* note 20, at 74; Von der Groeben and others, *op. cit. supra* note 20, at 72.

<sup>34</sup> N. Sarkozy, Conférence de presse finale de monsieur Nicolas Sarkozy Président de la République à l’issue du Conseil européen, Bruxelles 23 Juin 2007, Présidence de la République, Services des Archives et de l’Information documentaire. “Sur le fond [...] nous avons obtenu une réorientation majeure des objectifs de l’Union. La concurrence n’est plus un objectif de l’Union ou une fin en soi, mais un moyen au service du marché intérieur”.

<sup>35</sup> Piris, *op. cit. supra* note 20, at 308.

<sup>36</sup> Piris, *op. cit. supra* note 20, at 308; Von der Groeben and others, *op. cit. supra* note 20, at 72.

to confirm the latter competence.<sup>37</sup> In addition, it also confirms that the internal market comes with a competition surveillance regime.<sup>38</sup>

Yet this little constitutional history fails to explain why it makes sense to separate the correction of market power from the correction of the other market failures. The following reasoning aims to provide a cogent explanation. To begin with, market power fundamentally differs from the other market failures.<sup>39</sup> Externalities, asymmetric information and public goods are the result of sector-specific characteristics and thus require sector-specific solutions. Market power, by contrast, is caused by market actors and potentially undermines the workings of the mechanism that makes each and every market successful – competition. Sector-specific problems are therefore to be corrected by sector-specific regulations that define the market concerned, whilst market power can be addressed by generally applicable rules protecting the competition game. It follows that competition surveillance and state action have different roles in making sure that the market mechanism yields most efficient outcomes. Whereas competition enforcement serves to secure that markets operate efficiently given the regulatory framework, state regulation serves to define this framework well so that the market mechanism is able to yield most efficient outcomes. Efficiency and consumer surplus make the competition rules fit for purpose: these standards connect competition enforcement objectively to the rationale and communication-tool of the market order – most efficient use and the price mechanism.<sup>40</sup> It follows logically that, in order for competition enforcement to be effective, it must be strict.<sup>41</sup>

The above welfare economic perspective on the first constitutional strand shows a binary institutional balance with, on the one hand, the market order and strict competition enforcement, and, on the other, state action. Market actors may pursue any welfare goal based on the expectation that competition and the price mechanism will induce them to maximize welfare by allocating resources most efficiently. Based on efficiency and consumer surplus, strict competition enforcement makes sure they do. State regulation is meant to secure that markets are well-equipped to produce efficient outcomes indeed. One option is to price the externality explicitly and thus incentivize producers and consumers to change their behavior towards SCP.<sup>42</sup> Another option is to increase the minimum standard of a sustainability consideration in a state measure that market actors have to abide by.<sup>43</sup>

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<sup>37</sup> Piris, *op. cit. supra* note 20, at 308; Von der Groeben and others, *op. cit. supra* note 20, at 72.

<sup>38</sup> Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para 20.

<sup>39</sup> Cf. Rosen and Gayer, *op. cit. supra* note 31, at 47, who distinguish between market power and non-existent markets.

<sup>40</sup> On the choice of consumer surplus over total surplus: R. Pittman, “Consumer Surplus as the Appropriate Standard for Antitrust Enforcement”, (2007) *Competition Policy International*, 205; S. Salop, “Question: What is the Real and Proper Antitrust Welfare Standard?”, (2010) *Consumer Law Review*, 337; E. Loozen, “The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelling through the Economic Approach”, (2014) *EL Rev.*, 91-110.

<sup>41</sup> Cf. Lyons, *op. cit. supra* note 4; J. Kwoka, *Reviewing Merger Control. A Comprehensive Plan for Reforming Policy and Practice*, Northeastern University 9 October 2018.

<sup>42</sup> An example is the EU cap-and-trade system that aims to reduce carbon emissions by putting a price on them. Failing a strong enough price signal to incentivize change, the EU Emissions Trading System (ETS) has been largely ineffective. Due to a surplus of emission allowances, the price for polluting eroded to €5/tCO<sub>2</sub>. In order to increase prices and push for less emissions, the Council has therefore approved a reform based on which up to 25% of excess allowances will be bought during 5 years (Press release 92/18, 27 February 2018). J. Stiglitz and N. Stern have reported that the following prices would be appropriate: US\$40-80/tCO<sub>2</sub> by 2020, and US\$50-100/tCO<sub>2</sub> by 2030. In: *Report of the High-Level Commission on Carbon Prices*, 29 May 2017.

<sup>43</sup> Cf. Odudu (2010), *op. cit. supra* note 4, at 609: “whether efficiency should be set aside in order to [...] promote sustainable environment is a question for the legislature.”

## **2.2. The second constitutional strand: Article 2 TEU and 11 TFEU**

Starting point for the investigation of the second constitutional strand is Article 11 TFEU which stipulates that “[e]nvironmental protection requirements must be integrated into the definition of the Union’s policies and activities, in particular with a view to promoting sustainable development”. Formally, Article 11 TFEU applies to competition policy at large as Title II of the TFEU does not exclude the competition rules addressing undertakings and the EU judicature confirmed its applicability in case of Article 101(3) TFEU.<sup>44</sup> Yet formal applicability is insufficient to justify flexible antitrust as Article 7 TFEU points out that the Union’s obligation to “ensure consistency between its policies and activities, taking all of its objectives into account” must be interpreted “in accordance with the principle of conferral of powers”. The latter restriction implies that the integration obligation of Article 11 TFEU cannot extend the powers the competition rules confer on the Commission. As those rules contain open-textured norms, it is necessary to specify further the meaning of the principle of conferral. This is where Article 2 TEU comes in.

The principle of conferral is laid down in Article 5(1) and (2) and 13 TEU which stipulate that the Union and its institutions shall act within the limits of the competences conferred in the Treaties. As such, it focuses on the relation between the Union and the Member States rather than on the relation between the Union and its citizens. Ultimately, however, the principle of conferral builds on the values “rule of law” and “democracy” listed in Article 2 TEU – where reference to the rule of law confirms the Union as a legal order, and reference to democracy (primarily) confirms the Union as a representative democracy.<sup>45</sup> In other words, this principle also expresses that institutions cannot act without legal basis and that regulations lack legitimacy when they lack parliamentary authorization.<sup>46</sup> Based on the broader perspective of Article 2 TEU, the principle of conferral translates effectively in the principle of democratic legitimacy. The latter principle holds that, in a representative democracy, the legislator, in representing the citizens with whom ultimate decision-making authority resides, is the only institution that is democratically legitimized to decide on behalf of society as a whole what interests are to be secured by the use of public power.<sup>47</sup> It is the principle of democratic legitimacy that helps to determine whether the EU competition rules allow competition agencies and courts to balance competition and non-competition interests. As for the delineation between market and state action, it clarifies how the use of two institutions to increase welfare defines the relation between competition and non-competition interests within a competition law context. As for the delineation between competition enforcement and state regulation, it clarifies the limitations of competition surveillance as a public policy instrument.

### 2.2.1. The institutional balance between market and state action revisited

A first point the principle of democratic legitimacy requires us to comprehend is the need to distinguish between “general interests” and “public interests” when using both market and state as instruments to increase welfare. “General interests” are interests that benefit all and can be realized by way of voluntary agreements. “Public interests” are interests that benefit all but require the use of coercion in terms of public power to be realized.<sup>48</sup> This distinction is particularly relevant within a competition law context because it makes two points clear.<sup>49</sup> One is that the market order promotes the general interest because

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<sup>44</sup> Case T-451/08, *Stim v Commission*, EU:T:2013:189, para 103: “cultural diversity is to be borne in mind when considering the four conditions of Article 101(3).”

<sup>45</sup> Von der Groeben and others, op. cit. *supra* note 20, at 66-67.

<sup>46</sup> Von der Groeben and others, op. cit. *supra* note 20, at 54 and 105.

<sup>47</sup> The Netherlands Scientific Council for Government Policy, *Safeguarding the public interest*, Report No. 56 (SDU, 2002). Cf. Vanberg, op. cit. *supra* note 26.

<sup>48</sup> The Netherlands Scientific Council for Government Policy, op. cit. *supra* note 47; C. Teulings, L. Bovenberg and H. van Dalen, *De Calculus van het publieke belang* (Kenniscentrum voor Ordeningsvraagstukken, 2003).

<sup>49</sup> Loozen (2010), op. cit. *supra* note 4.

it thrives on voluntary interaction and is not democratically legitimized to use coercion. Another is that a public interest is inherently embodied in a sovereign state measure as the purpose, scope and manner of safeguarding the interest at issue must have been determined in the legislative process in order for the use of coercion to be democratically legitimate.<sup>50</sup>

The distinction between the market maximizing the general interest and the legislator safeguarding the public interest is important because it determines the relation between competition and sustainability as follows. It confirms that the protection of competition has been defined as a public interest by the competition rules. It also clarifies that the issue of the prevailing interest depends on whether or not the legislator has defined a sustainability consideration as a public interest. If so, the promotion of the sustainability interest prevails, which is ascertained by the fact that the competition rules do not apply to sovereign state measures. If not, the protection of the competition interest prevails in the sense that an anticompetitive agreement that aims to promote sustainability must meet the conditions of Article 101(3) TFEU in order to be legitimate.

The result is that, whilst the competition rules do not prioritize the public competition interest over the public sustainability interest, they do prioritize the public competition interest over the general sustainability interest.

### 2.2.2. The institutional balance between competition enforcement and state regulation revisited

A second point to address is whether the Commission's responsibility for "defining [...] *competition policy* (emphasis added)"<sup>51</sup> nonetheless allows it to balance different political interests like competition and sustainability in case of conflict. Given that competition enforcement is meant to be a-political, this would be an uneasy conclusion to reach.<sup>52</sup> Again, the principle of democratic legitimacy helps out. It confirms the need to distinguish between the law-making and law-enforcement branches of public policy. It also helps to specify what objective competition enforcement actually means.

"Public policy" is a somewhat vague notion that has come to encompass all what the state does.<sup>53</sup> In its relation to law, it is however important to distinguish between law-making and law-enforcement processes in public policy since these processes warrant democratic legitimacy in a different way.<sup>54</sup> Law-making processes typically require political choices to be made. In the context of SCP, for example, the political debate will focus on whether a sustainability consideration is best secured via market competition or via state regulation. It is here that the general or public interest status of a sustainability interest is determined. In the case of law-making, democratic legitimacy is secured by, on the one hand, parliamentary deliberation in the legislative process, and on the other, *limited* judicial review since the making of political choices requires broad discretion.<sup>55</sup> The Commission's competences regarding the

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<sup>50</sup> The Netherlands Scientific Council for Government Policy, op. cit. *supra* note 47.

<sup>51</sup> Case C-344/98, *Masterfoods and HB*, ECLI:EU:C:2000:689, para 46.

<sup>52</sup> H. Schweitzer, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship – The Example of Article 81" in *Economic Theory and Competition Law. ASCOLA Competition Law Series* (Edward Elgar, 2009). Cf. Commission Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 22 March 2017, COM(2017)142 final, Art. 4(2) sub a and b. Here the Commission proposes to ban national government instructions that might politicize EU competition enforcement by national competition agencies.

<sup>53</sup> Th. Lowi, "Law vs. Public Policy: A Critical Exploration", (2003) *Cornell Journal of Law and Public Policy*, 493-501; P. John, *Analysing Public Policy* (Pinter, 2012); J. Anderson, *Public policy-making* (Praeger, 1975).

<sup>54</sup> Lowi, op. cit. *supra* note 53.

<sup>55</sup> Case C-341/95, *Bettati v Safety Hi-Tech*, ECLI:EU:C:1998:353, para 35, 31-53; case C-434/02, *Arnold André*, ECLI:EU:C:2004:800, para 46; case C-491/01, *British American Tobacco (Investments) and Imperial*



definition of competition policy contrast sharply with the law-making branch of public policy. Its main competence is defined as the duty to “ensure *the application of the principles* laid down in Articles 101 and 102” (Article 105(1) TFEU; emphasis added), whilst its participation in the legislative process is of a preparatory or executive nature (Article 103(1) and 105(3) TFEU).<sup>56</sup> In other words, the power of the Commission to define competition policy concerns the enforcement of laws and political choices already made. In this case, democratic legitimacy is secured by the fact that the Commission is squeezed in between, on the one hand, the obligation to execute objectively the task and duties conferred on it by law, and on the other, *full* judicial review.<sup>57,58</sup> This implies that the Commission, when enforcing open-textured competition norms, is not to recalibrate the balance between competition and sustainability as determined in the political decision-making process, but to develop a truly objective law enforcement policy that coherently meets both constitutional fundamentals and administrative governance principles.

Next, the principle of democratic legitimacy helps to pinpoint three defining characteristics of objective competition enforcement. Legitimacy implies that competition enforcement must be confined to efficiency and consumer surplus as these are the standards that connect objectively to the political choices made. Legitimacy also implies that the colloquial understanding of the cartel prohibition as a balancing mechanism must be limited to the so-called balancing of costs established under Article 101(1) TFEU against compensatory benefits established under Article 101(3) TFEU. For, if competition enforcement is to stay away from political decision-making, either paragraph is precluded from conferring a balancing competence in its own right. Instead, both costs and benefits are to be evidenced according to the mode of analysis provided by the relevant paragraph.<sup>59</sup> To conclude, legitimacy implies strict enforcement. For when the evidentiary requirements of Article 101(3) TFEU serve to distinguish objectively between justified and unjustified expectation of compensation, it follows logically that agreements that do not meet each of those requirements cannot be expected to yield benefits that compensate for the welfare costs established under Article 101(1) TFEU (more on this in Section 3).

It follows that, when specified in terms of democratic legitimacy, the principle of conferral renders obsolete the formal applicability of Article 11 TFEU to the competition rules addressing undertakings.<sup>60</sup> EU competition law constitutes single purpose law that prioritizes the public competition interest over the general sustainability interest,<sup>61</sup> whilst the task to define competition policy does not include a power

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*Tobacco*, ECLI:EU:C:2002:741, para 123; A.G. Geelhoed in Case C-161/04, *Austria v Parliament and Council*, EU:C:2006:66, para 39-40, 50.

<sup>56</sup> Even when the Council and the European Parliament legislate, they are expected to *give effect to principles* laid down in Article 101 and 102 TFEU (Article 103 TFEU) or, when those rules prove insufficient to warrant one of the objectives of the Treaty (in this case the establishment of an internal market that serves to yield most efficient use of scarce resources, EL), stay within *the framework of the policies defined in the Treaties* (Article 352 TFEU). Cf. Von der Groeben and others, op. cit. *supra* note 20, at 871; Craig and De Búrca, op. cit. *supra* note 20, at 92.

<sup>57</sup> Case C-67/13 P, *Groupement des cartes bancaires (CB) v Commission*, EU:C:2014:2204, para 44-46. The applicability of the manifest error standard is not motivated by limited accountability but by the nature of economic assessments. See: Loozen, op. cit. *supra* note 40.

<sup>58</sup> Note that the qualification of competition policy as law-enforcement policy does not make it less important from a public order point of view. Cf. case C-126/97, *Eco Swiss* in which the ECJ stated that Article [101 TFEU] constitutes “a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [Union] and, in particular, for the functioning of the internal market” (ECLI:EU:C:1999:269, para 36). Cf. case C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465, para 20.

<sup>59</sup> Likewise in a US context, H. Hovenkamp, “The Rule of Reason”, (2018) *Florida Law Review*, 81.

<sup>60</sup> Cf. A.G. Kokott who has underlined that Art. 11 TFEU only applies when the Union legislates (case C-197/08, *Commission v France*, EU:C:2009:646, para 36; Odudu (2010), op. cit. *supra* note 4).

<sup>61</sup> Competition policy thus abides the Tinbergen Rule, which holds that, in order to be effective, a public policy instrument should only aim to secure one goal. In: J. Tinbergen, *On the Theory of Economic Policy* (North Holland, 1952).

to balance competition and sustainability. Instead, objective enforcement means strict enforcement on the basis of evidence of inefficient use established according to the relevant legal framework.

### 2.3. Conclusion on the first flexible enforcement policy

The first flexibility policy misreads the constitutional fundamentals of the EU competition rules. These rules are not meant to be used as a “third way” that allows market actors to define the public interest. By contrast, they serve to neutrally delineate the competences market and state have to increase welfare. Whereas market actors are to address inefficient situations until correction results in coercion in terms of market power, the state is to address inefficient situations that can only be corrected with coercion and thus require recourse to public power. Article 3(3) TEU and Protocol no 27 allow market actors to pursue any welfare goal they choose, provided they do not hamper the efficient workings of market competition given the regulatory framework. Efficiency and consumer surplus do not represent a political choice, but connect the competition rules objectively to the rationale and the workings of the market order – most efficient use and the price mechanism. In order to be effective, competition enforcement should be strict as market competition is the very mechanism that pushes market actors towards SCP. Article 2 TEU and 11 TFEU concur with these findings. EU competition law prioritizes the public competition interest over the general sustainability interest. The Commission has not been empowered to balance competition and sustainability – neither under Article 101(1) nor under (3) TFEU. In order to be legitimate, competition enforcement should be strict as it is the legal framework that determines how to evidence inefficient use objectively. The Commission thus rightly informed the Dutch government that competition enforcement “cannot substitute for the absence of [...] regulation”.<sup>62</sup>

### 3. The constitutional limits of the more economic approach

Though published jointly, the Vision document on competition and sustainability issued by ACM adjusts the Policy rule crucially by replacing the broad welfare standard by the consumer surplus standard.<sup>63</sup> Steppingstone for this second flexibility policy is the more economic approach that would allow sector-wide private coordination to be excepted under Article 101(3) TFEU, provided that quantitative cost-benefit analysis evidences net welfare gain. This policy builds on two presumptions. qNWG would preclude political decision-making since negative and positive welfare effects of sector-wide sustainability coordination are objectively accommodated within the consumer surplus standard.<sup>64</sup> Second, accommodation of first mover disadvantage and partial foreclosure would accord with the indispensability and residual competition condition of Article 101(3) TFEU.<sup>65</sup> (“First mover disadvantage” has been defined in the opening paragraph of this article. “Partial foreclosure” implies that the restriction of competition on sustainability can be compensated by competition on other parameters. The indispensability and residual competition conditions are hereafter referred to as the “competition conditions”.)

qNWG enforcement policy traces back to the Commission decision in *CECED* that concerned a sector-wide agreement banning least energy-efficient washing machines.<sup>66</sup> Though increasing prices, the agreement was exempted because it would also bring compensatory benefits. In order to enable producers to improve upon under-correction of negative externalities by preventing free riding in an under-regulated economy, first mover disadvantage and partial foreclosure were accommodated under

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<sup>62</sup> D.G. Laitenberger, op. cit. *supra* note 17.

<sup>63</sup> Vision document, cited *supra* note 8.

<sup>64</sup> H. Don (Board-member ACM), “Toepassing van het ACM-visiedocument Mededinging en Duurzaamheid”, *Presentation Vereniging van Mededingingsrecht*, 11 June 2015; D.G. Laitenberger, op. cit. *supra* note 17.

<sup>65</sup> Vision document, cited *supra* note 8, para 2.6 and 3.4.5.

<sup>66</sup> Case IV.F.1/36.718 *CECED*, O.J. 2000, L 187/47.

the competition conditions.<sup>67</sup> Having confirmed the *CECED*-approach in the 2011 Guidelines on horizontal cooperation agreements,<sup>68</sup> the Commission reconfirmed this approach through its support of ACM's qNWG enforcement policy.<sup>69</sup>

Current practice thus holds that evidence of qNWG may serve as a baseline for legal interpretation of Article 101(3) TFEU. Apparently, the principle that non-competition interests may only be taken into account "to the extent that they can be subsumed under the four conditions of Article [101(3)]" is to be interpreted less strict after all.<sup>70</sup> To judge whether this makes for sound competition enforcement, two issues will be analyzed. Whether constitutional enforcement fundamentals allow the more economic approach to be translated in a qNWG enforcement policy. Second, whether first mover disadvantage and partial foreclosure meet the competition conditions of Article 101(3) TFEU.

### **3.1. qNWG enforcement policy and the constitutional limits of the more economic approach**

How does qNWG work as an enforcement policy? qNWG monetizes the positive welfare effects expected to result from the correction of non-priced negative externalities and calculates whether they offset the pertaining expected negative welfare effects in terms of price increase resulting from sector-wide coordination. Dependent on net outcome, an agreement may or may not be excepted from the cartel prohibition. So far, ACM based two (informal) decisions on this approach – *Coal-Fired Power Plants* and *Chicken of Tomorrow*.<sup>71</sup> The first case concerned the closure of five old coal-fired power plants agreed between Dutch energy producers. Here, the emission reductions of SO<sub>2</sub>, NO<sub>2</sub> and particulate matters were monetized on the basis of shadow prices and avoided damage costs.<sup>72</sup> The second case concerned the introduction of a higher environmental and animal welfare standard for chicken breast agreed between broiler farmers, meat processors and supermarkets. Here, the environmental and animal welfare benefits were monetized on the basis of a willingness-to-pay analysis. ACM stopped both agreements because they were estimated to result in net welfare loss.

The above shows that qNWG enforcement policy builds on (estimated) quantitative outcome. Thus, it presumes that welfare maximization (this time in terms of consumer surplus) has become the direct goal of the competition rules as a result of the more economic approach. This presumption is incorrect. Simply because it overlooks that competition enforcement still has to abide by the constitutional fundamentals of EU competition law. As explained earlier, those fundamentals provide for the competition regime to protect the mechanism that spurs market actors to maximize welfare – competition. Accordingly, the ECJ time and again underscores the importance of protecting competition in itself. For example, when observing that those rules cover "not only [market behavior] that directly cause[s] harm to consumers but also [market behavior] that cause[s] harm through their impact on

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<sup>67</sup> Case IV.F.1/36.718 *CECED*, para 58-66.

<sup>68</sup> Commission Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements, O.J. 2011, C 11/1, para 329.

<sup>69</sup> D.G. Laitenberger, op. cit. *supra* note 17.

<sup>70</sup> Commission Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004, C 101/97, para 42.

<sup>71</sup> ACM, Analysis by ACM of the "Planned Agreement on Closing Down Coal-Fired Power Plants From the 1980s as Part of the SER Energy Accord," 26 September 2013, <http://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord> (last visited 13 Dec. 2018); and, ACM, Assessment of the sustainability agreements "Chicken of Tomorrow", ACM/DM/2014/206028, January 2015, <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow> (last visited 13 Dec. 2018).

<sup>72</sup> For a more detailed account of the workings of qNWG in this case: E. Kloosterhuis and M. Mulder, "Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants", (2015) *Journal of Competition Law & Economics*, 1-26.

competition”.<sup>73</sup> This, however, implies that, even though competition is only a means to increase welfare, the protection thereof is a goal in itself within the context of competition enforcement. This also implies that welfare maximization is not a direct but an indirect goal of the competition rules.

This misunderstanding regarding the interplay between protecting competition and promoting welfare has led to two further misunderstandings. qNWG enforcement policy overlooks that the competition rules serve to protect “competition on the merits” and “consumer sovereignty” in order for the market order to work as an “invisible hand”. As explained by Vanberg, the first concept reflects “the ideal of a market order framed by rules that aim at making producers responsive to consumer interest”, while the second concept underlines that “consumer preferences are the ultimate controlling force in the process of competition”.<sup>74</sup> Thus, for competition enforcement to protect effectively the efficient workings of the market mechanism, competition agencies should acknowledge two essential conditions. First, that competition on the merits builds on first mover advantage and new entry to secure producer responsiveness to consumer interest. More specifically, first mover advantage rewards producers that push for better quality and innovation, after which new entry allows prices to fall in the longer term. Second, that consumer sovereignty builds on consumer choice. Together, both concepts necessitate a competition policy that allows individual consumers to guard their individual consumer surplus and self-assess whether the value added is worth the price increase rather than competition agencies deciding on their behalf.

qNWG enforcement policy also overlooks that the more economic approach cannot possibly recalibrate the mode of cost-benefit analysis provided by the relevant legal framework. Given the constitutional mandate discussed earlier, it appears that this approach rather serves for the Commission and its national counterparts to translate open-textured competition norms in a coherent set of evidentiary requirements.<sup>75</sup> If the translation is done properly, the more economic approach then develops into a functional approach that systematically connects the separate evidentiary requirements of the legal framework to the rationale and workings of the market mechanism.<sup>76</sup> Also important in this functional interpretation of the more economic approach is that each individual requirement serves to gather complementary information as to what extent specific market behavior affects the efficient workings of market competition, while together they gather all information necessary. This functional approach moves competition enforcement forward in two crucial ways. It warrants objective enforcement as the allocation of specific evidence to separate requirements prevents a balancing of costs and benefits other than foreseen by the legislator. It also warrants effective enforcement as together all requirements secure that private coordination will actually promote welfare – in this case SCP. Again, it turns out that legitimate enforcement implies strict enforcement – if not all evidentiary requirements are met, private coordination cannot be expected to promote SCP.

### **3.2. First mover disadvantage and partial foreclosure under the competition conditions**

The question has thus become whether accommodation of first mover disadvantage and partial foreclosure concur with the indispensability and residual competition conditions of Article 101(3) TFEU when functionally interpreted. The indispensability condition protects consumers against overcharges

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<sup>73</sup> Case C-209/10, *Post Danmark*, EU:C:2012:172, para 20. Cf. cases C-6/72, *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22, para 26; C-8/08, *T-Mobile Netherlands and Others*, EU:C:2009:343, para 38; C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, para 176; case C-52/09, *Konkurrensverket v TelioSonera Sverige*, para 24.

<sup>74</sup> Vanberg, *op. cit. supra* note 26, at 56.

<sup>75</sup> E.g. Odudu (2006), *op. cit. supra* note 4; Loozen (2010), *op. cit. supra* note 4, Vanberg, *op. cit. supra* note 26; J. Wright and D. Ginsburg, “The Goals of Antitrust: Welfare Trumps Choice”, (2013) *Fordham Law Review*, 2405-2423.

<sup>76</sup> Loozen (2010), *op. cit. supra* note 4.

resulting from restrictions of competition that are not necessary to achieve the consumer welfare benefits established under the first two conditions of Article 101(3) TFEU.<sup>77</sup> The residual competition condition protects rivalry and the competitive process.<sup>78</sup>

Accommodation of first mover disadvantage under the indispensability condition is based on the argument that this phenomenon may preclude producers from investing in sustainability. But, whilst it is true that the private coordination mechanism may hamper in case of complex external effects as a result of free riding, it is also true that producers may typically find themselves in a prisoner's dilemma and simply want to avoid competition.<sup>79</sup> The urge to avoid competition becomes particularly urgent when producers have become last movers trying to catch up with the real first movers. Actually, both Dutch cases concern last mover situations. The agreement in *Coal-Fired Power Plants* was meant to facilitate the closure of *ancient* power plants. The agreement in *Chicken of Tomorrow* helped broiler farmers to catch up with competitors already offering better quality chicken breast.<sup>80</sup> If anything, these cases show that claims of first mover disadvantage call for vigilance. Accommodation of first mover disadvantage under the indispensability condition accomplishes the opposite, however. The reason is that it mixes up the investigations of the first and third condition of Article 101(3) TFEU. The benefit condition serves to establish that an agreement is able to correct a negative externality (and thus promote welfare). The indispensability condition serves to establish that there is no lesser restrictive alternative to correct the externality. More specifically, the latter analysis investigates the necessity of an agreement compared to another, less restrictive agreement.<sup>81</sup> Whilst duplicating an analysis that has already been done (whether sector-wide coordination is able to correct a negative externality has already been covered under the benefit condition), the accommodation of first mover disadvantage broadens the scope of the indispensability condition from relative to absolute necessity. The result is that the indispensability condition no longer effectively protects competition on the merits and the consumer is to pay for unnecessary overcharges. A case in point is *CECED*, where the alleged benefits could also have been realized through the introduction of a non-restrictive quality label combined with an effective ad campaign.<sup>82</sup>

Accommodation of partial foreclosure under the residual competition condition is a consistent feature of current law enforcement.<sup>83</sup> Sector-wide private coordination of a specific competition parameter is condoned as long as it does “not touch on other competition factors”<sup>84</sup> and “competition will still take place for other product characteristics”.<sup>85</sup> The reason for this permissive attitude may well be that these agreements do not restrict rivalry and innovation above a newly established minimum sustainability threshold. All the same, accommodation of partial foreclosure does not meet the requirements of functional interpretation. Partial foreclosure obstructs consumer sovereignty and allows competition

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<sup>77</sup> Guidelines on Article 81(3), cited *supra* note 70, para 73 and 75.

<sup>78</sup> Guidelines on Article 81(3), cited *supra* note 70, para 105.

<sup>79</sup> E. van Damme, “Goede marktwerking en overige publieke belangen”, (2017) *Markt & Mededinging*, 5-17, at 15.

<sup>80</sup> *Chicken of Tomorrow*, cited *supra* note 71, at 7.

<sup>81</sup> Guidelines on Article 81(3): “the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies” (para 73), in the sense “that there are no other economically practicable and less restrictive means of achieving the efficiencies” (para 75).

<sup>82</sup> Loozen (2010), *op. cit. supra* note 4, at 32; H. Schweitzer, “Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Lichte der Querschnittsklauseln, Politischer Einfluss auf Wettbewerbsentscheidungen”, *Wissenschaftliches Symposium anlässlich des 40-jährigen Bestehens der Monopolkommission am 11. September 2014 in der Rheinischen Friedrich-Wilhelms-Universität Bonn*, at 32.

<sup>83</sup> Note that the General Court likewise condoned sector-wide coordination by football player's agents under Article 101(3) TFEU. See case T-193/02, *Piau v Commission*, EU:T:2005:22.

<sup>84</sup> Case IV.F.1/36.718 *CECED*, cited *supra* note 66, para 65-66.

<sup>85</sup> Guidelines on horizontal cooperation agreements, cited *supra* note 68, para 329.

enforcement to substitute for the absence of regulation. Given that the cartel prohibition serves to filter out private corrections of negative externalities that require coercion, it falls upon the residual competition condition to not only warrant dynamic efficiency as in ongoing innovation, but also safeguard democratically legitimized consumer choice within the market conditions set by the regulatory state. The latter requires a strict interpretation of the last condition of Article 101(3) TFEU based on which the effects on residual competition should be investigated *per individual competition parameter*.

It follows that neither first mover disadvantage nor partial foreclosure meet the competition conditions of Article 101(3) TFEU when functionally interpreted. Recalibrating the evidentiary framework, they cause the cartel prohibition to move away from its primary objective – protect against cartelization.

### 3.3. Conclusion on the second flexible enforcement policy

The second flexibility policy misses out on the constitutional limits of the more economic approach. qNWG enforcement policy overlooks that the goal of the competition rules is not to promote welfare directly, but to effectively protect competition in order for the market mechanism to promote welfare by yielding most efficient outcomes given the regulatory context. It also overlooks that the more economic approach cannot recalibrate the mode of cost-benefit analysis provided by the relevant legal framework, but serves to effectively connect the art of competition law enforcement to the efficient workings of a market order that is based on competition on the merits and consumer sovereignty. It may do so by translating open-textured legal norms in a coherent set of functional evidentiary requirements. The result is that qNWG enforcement policy is neither legitimate nor effective. It is not legitimate because recalibrating the legal framework in both conceptual and evidentiary terms makes for political decision-making *per se*. Albeit in a consumer surplus context, qNWG does exactly what the Commission criticized the Policy rule for – using competition enforcement policy to substitute for the absence of regulation.<sup>86</sup> It is not effective because accommodation of first mover disadvantage and partial foreclosure frustrates the competition conditions to fulfil their proper role.<sup>87</sup> Whilst first mover disadvantage may well not be real, consumers have to pay the cartel overcharge. If first mover disadvantage is real, the state is in a better position to regulate effectively. Given that the purpose of protecting competition is to push the market to engage in SCP, it would be most helpful if the Commission would revise current practice.

## 4. The constitutional limits of the legitimate objective doctrine

Disappointed by the results of qNWG enforcement policy under Article 101(3) TFEU, scholars have suggested to extend flexible enforcement to Article 101(1) TFEU.<sup>88</sup> Steppingstone for this third policy is the *legitimate objective* doctrine introduced in *Wouters* in which sector-wide private coordination by the Bar of the Netherlands (Bar) did not qualify as a “restriction of competition” because it was “necessary and proportionate” to ensure the implementation of a “legitimate objective”.<sup>89</sup> Inspired by internal market law, the ECJ would have allowed the Bar to balance competition and non-competition

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<sup>86</sup> D.G. Laitenberger, op. cit. *supra* note 17.

<sup>87</sup> Cf. M.P. Schinkel and L. Toth, “Balancing the Public Interest-Defense in Cartel Offenses”, Amsterdam Center for Law & Economics Working Paper No. 2016-01. They argue that the underlying expectation of qNWG enforcement policy, which is that sector-wide coordination may yield net welfare gain indeed, is misplaced when applying the Commission’s instructions on consumer share.

<sup>88</sup> Pijnacker Hordijk, op. cit. *supra* note 10; Gerbrandy and Claassen, op. cit. *supra* note 2; Monti and Mulder, op. cit. *supra* note 2.

<sup>89</sup> Case C-309/99, *Wouters*, para 97-110.

interests under Article 101(1) TFEU.<sup>90</sup> Subsequent case law in *Meca-Medina*, *OTO*C and *CNG* would have confirmed this reading of *Wouters*.

The pressing issue is whether the above account of the *legitimate objective* doctrine is correct. This requires three analyses. Whether *Wouters* actually contains a balancing act allowing for a flexible interpretation of a “restriction of competition”. Second, whether *Meca-Medina* is in line with its predecessor and constitutional fundamentals. Third, whether *OTO*C and *CNG* confirm a flexible reading of the *legitimate objective* doctrine indeed.<sup>91</sup>

#### **4.1. *Wouters* up close**

*Wouters* concerned a situation of delegated regulatory power. Mandated by Dutch law, the Bar had issued the Regulation on Joint Professional Activity (JPA-Regulation) that prohibited members of the Bar to “assume or maintain any obligations” that might jeopardize the proper practice of the legal profession as defined in “essential rules adopted for that purpose”.<sup>92</sup> Based upon the JPA-Regulation, lawyers were prohibited to form structural partnerships with accountants.<sup>93</sup> Notwithstanding the public mandate, the ECJ held the Bar accountable under the competition rules because this organization constitutes an association of undertakings and the JPA-Regulation is attributable to the Bar alone.<sup>94</sup> Yet, even though the JPA-Regulation triggered anticompetitive effects, it was held not to infringe upon Article 101(1) TFEU because it was “necessary for the proper practice of the legal profession, as organized in the Member State concerned”.<sup>95</sup> The next paragraphs set out to clarify that the ECJ did not bestow any balancing power upon the Bar (nor upon competition agencies or the judiciary for that matter).

Most important is that the ECJ applied a two-stage method of analysis.<sup>96</sup> A first stage covers the part of the regulatory exercise attributed to the state – the essential rules governing the legal profession and those governing the accountancy profession.<sup>97</sup> A second stage covers the part of the regulatory exercise attributed to the Bar – the (enforcement of the) JPA-Regulation.<sup>98</sup> At the first stage, the ECJ considered three points. Member States are in principle free to regulate the exercise of the legal profession in its territory.<sup>99</sup> Second, “[t]he current approach of the Netherlands” is that the proper practice of the legal profession is defined by three essential rules: the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.<sup>100</sup> Third, those essential rules differ substantially from the essential rules defining

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<sup>90</sup> Amtenbrink and Van den Gronden, op. cit. *supra* note 10; Pijnacker Hordijk, op. cit. *supra* note 10; Gerbrandy (2013 and 2016), op. cit. *supra* note 10; Monti and Mulder, op. cit. *supra* note 2, Van Rompuy, op. cit. *supra* note 2, at 240-244; Witt, op. cit. *supra* note 2, at 29.

<sup>91</sup> Pijnacker Hordijk, op. cit. *supra* note 10; Julian Nowag, “Wouters, When the Condemned Live Longer: A Comment on *OTO*C and *CNG*”, (2015) ECLR; Monti and Mulder, op. cit. *supra* note 2.

<sup>92</sup> Case C-309/99, *Wouters*, para 9, 15 and 100.

<sup>93</sup> Case C-309/99, *Wouters*, para 16-29.

<sup>94</sup> Case C-309/99, *Wouters*, para 54-71.

<sup>95</sup> Case C-309/99, *Wouters*, para 110.

<sup>96</sup> Loozen (2006 and 2010), op. cit. *supra* note 4. Also critical of a flexible interpretation of *Wouters*: Ch. Janssen and E. Kloosterhuis, “The *Wouters* case law, special for a different reason?”, (2017) ECLR, 335-339.

<sup>97</sup> Case C-309/99, *Wouters*, para 98-104.

<sup>98</sup> Case C-309/99, *Wouters*, para 105-110.

<sup>99</sup> Case C-309/99, *Wouters*, para 99.

<sup>100</sup> Case C-309/99, *Wouters*, para 100. Similar references attributing the essential rules to the state are “the prevailing perceptions of the profession in that State” (para 105) and “the proper practice of the legal profession, as [it is] organised in the Member State concerned” (para 107 and 110). Note that the attribution to

the accountancy profession in the Netherlands.<sup>101</sup> Since the reference to internal market law relates to the regulatory exercise attributed to the state, it cannot serve to evidence conferral of balancing power upon the Bar.

At the second stage, the ECJ concluded that the anticompetitive effects inherent to the JPA-Regulation are not originally caused by the Bar. Translating the ancillarity doctrine introduced in *Remia* to a public interest setting,<sup>102</sup> the ECJ did not submit the JPA-Regulation to a competition analysis, but to a necessity analysis relative to the essential rules governing the legal profession. This analysis served to establish whether the JPA-Regulation is indispensable to ensure that lawyers comply with the essential rules already in place (in which case the anticompetitive effects have not been caused by the Bar) or adds an additional anticompetitive layer (in which case there would be further anticompetitive effects that do stem from the Bar). The JPA-Regulation qualified within the first category. Given the non-match between the two sets of essential rules applicable to lawyers and accountants, the regulation only specifies the essential rules governing the legal profession.

The above leads to the following conclusion on *Wouters*. As a matter of fact, the ECJ used an ancillarity analysis to scrutinize the legitimacy of the restrictive effects resulting from the JPA-Regulation. In doing so, it did *not* bestow any balancing power upon the Bar. Instead, it combined a straightforward application of the state action doctrine (based on which the JPA-Regulation was attributed to the Bar) with a functional interpretation of a “restriction of competition” (the JPA-Regulation did not yield anticompetitive effects other than those already caused by the essential rules governing the legal profession).

#### 4.2. *Meca-Medina vs Wouters*

*Meca-Medina* did not concern a situation of delegated regulatory power. Nonetheless, the ECJ applied the legitimate objective doctrine to the anti-doping rules issued by the IOC and implemented by FINA. Two findings are key. First, that anti-doping rules may produce anticompetitive effects because they “may result in an athlete’s unwarranted exclusion from sporting events, [...]”.<sup>103</sup> Second, that those rules are not prohibited by Article 101(1) TFEU if “the restrictions [...] imposed [are] limited to what is necessary to ensure the proper conduct of competitive sport [...]”.<sup>104</sup> But is the ECJ right to presume that anti-doping rules may produce anticompetitive effects, and does the method of analysis applied in *Meca-Medina* concur with the one applied in *Wouters*?

To begin with, anti-doping rules are not likely to produce anticompetitive effects. By assuring athletes that their opponents compete fairly, anti-doping rules facilitate sports competition rather than restricting downstream market competition. In a similar vein, the General Court and Advocate General Léger had concluded earlier that anti-doping rules qualify as “purely sporting rules”.<sup>105</sup> The risk of unwarranted exclusion does not make this any different because penalties are subject to appeal to the Court of Arbitration for Sport (CAS).<sup>106</sup> According to the German Supreme Court, the CAS’ rules of procedure

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the state is not watertight since the essential rules are only part of the Advocatenwet as from 2015. The attribution is nonetheless comprehensible given that the essential rules reflect the legal traditions common to the Member States and the Union, as recognized in earlier case law (case C-155/79, *AMES*, EU:C:1982:157, para 24).

<sup>101</sup> Case C-309/99, *Wouters* para 102-104.

<sup>102</sup> Case C-42/84, *Remia v Commission*, EU:C:1985:327; case C-382/12 P, *MasterCard a.o./Commission*, EU:C:2014:2201. Cf. R. Whish and D. Bailey, *Competition Law*, 7<sup>th</sup> ed. (OUP, 2015), at 138.

<sup>103</sup> Case C-519/04 P, *Meca-Medina*, para 47-49.

<sup>104</sup> Case C-519/04 P, *Meca-Medina*, para 47.

<sup>105</sup> Case T-313/02, *Meca-Medina and Majcen*, EU:T:2004:282; A.G. Léger in case C-519/04 P, *Meca-Medina and Majcen*, EU:C:2006:201.

<sup>106</sup> Case C-519/04 P, *Meca-Medina*, para 5-6.



“contain adequate guarantees for safeguarding the rights of athletes”, amongst others because “its arbitration awards are subject to review by the Swiss Federal Court”.<sup>107</sup> It is telling that the athletes had chosen not to appeal the CAS award to the Swiss Federal Court.<sup>108</sup>

Also, the method of analysis applied in *Meca-Medina* differs from the one applied in *Wouters*. Crucial to the *Wouters* ancillarity analysis is that it builds on the combination of delegated regulatory power and a legitimate objective that consists of essential rules having public interest status. The Bar has a public mandate to regulate the profession – which yields antitrust immunity for sector-wide private coordination as such. In addition, the JPA-Regulation specifies the essential rules attributed to the state – which makes it possible to submit this regulation to an objective necessity analysis in relation to those rules. *Meca-Medina* lacks a similar context. The IOC does not enjoy a public mandate,<sup>109</sup> nor do the anti-doping rules specify publicly defined principles of “good sportsmanship”.

The result is unfortunate. On the one hand, recourse to the legitimate objective doctrine is unnecessary because anti-doping rules do not restrict competition. On the other, *Meca-Medina* widens the *legitimate objective* doctrine introduced in *Wouters* in order to reconcile those rules with the cartel prohibition. Allowing a balancing of competition and non-competition interests under Article 101(1) TFEU not only contrasts sharply with constitutional fundamentals, but also with consistent case law based on which the promotion of welfare by restrictive agreements can only be legitimized by fulfilling the conditions of Article 101(3) TFEU.<sup>110</sup>

#### 4.3. *Meca-Medina* in practice

A last point to consider is how the *Meca-Medina* widening of the *legitimate objective* doctrine works out in later case law – *OTO*C and *CNG*.

*OTO*C concerned the Order of Chartered Accountants that holds a public mandate to “promote continued training” and “plan, organize and provide compulsory training schemes” for chartered accountants in Portugal.<sup>111</sup> Based thereupon, *OTO*C issued the Training Credit Regulation (TC-Regulation) aimed at securing the quality of services provided by its members.<sup>112</sup> Starting point for the application of the *legitimate objective* doctrine is that the TC-Regulation artificially segments the market of compulsory training for chartered accountants (a third of which is reserved to *OTO*C), while imposing discriminatory conditions on the remaining segment of that market to the detriment of *OTO*C’s competitors.<sup>113</sup> Acknowledging that the TC-Regulation contributes to the quality of the services offered by chartered accountants, the ECJ nonetheless holds those restrictions to go beyond what is necessary to warrant that objective.<sup>114</sup> The reservation of training sessions to *OTO*C eliminate competition on a substantial part of the relevant market, and the discriminatory conditions for access to the market are not indispensable

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<sup>107</sup> Bundesgerichtshof, case KZR 6/15, *Pechstein v International Skating Union*, DE:BGH:2016:070616UKZR6.15.0

<sup>108</sup> Case C-519/04 P, *Meca-Medina*, para 14.

<sup>109</sup> Cf. Schweitzer, op. cit. *supra* note 82.

<sup>110</sup> Case C-136/86, *BNIC v Aubert*, EU:C:1987:524; joined cases C-238/99 P, C-244/99 P, C-247/99 P, C-250/99 P – C-252/99 P and C-254/99 P, *Limburgse Vinylmaatschappij and Others v Commission*, EU:C:2002:582; case T-29/92, *SPO and Others v Commission*, EU:T:1995:34; joined cases T-49/02 – T-51/02, *Brasserie nationale v Commission*, EU:T:2005:298; joined cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, EU:T: 2003:342; case C-209/07, *Beef Industry Development and Barry Brothers*, EU:C:2008:643.

<sup>111</sup> Case C-1/12, *OTO*C, para 4.

<sup>112</sup> Case C-1/12, *OTO*C, para 2.

<sup>113</sup> Case C-1/12, *OTO*C, para 62.

<sup>114</sup> Case C-1/12, *OTO*C, para 96 and 100.

as the quality of those services could have been safeguarded by a less restrictive alternative. Unlike *Wouters*, this motivation does not reflect an ancillarity analysis under Article 101(1) TFEU, but a competition analysis under the last two conditions of Article 101(3) TFEU.<sup>115</sup> The reason for “borrowing” the Article 101(3) investigations is obvious. It is impossible to conduct an ancillarity analysis under Article 101(1) TFEU when a publicly defined reference point to investigate the objective necessity of the TC-Regulation, is lacking.

*CNG* concerned the National Association of Geologists that holds a public mandate to warrant the proper practice of the geologist profession in Italy.<sup>116</sup> Although the public mandate used to include the power to determine fees, all laws and regulations imposing compulsory fixed or minimum fee scales for the liberal professions had been repealed in 2006, whilst provisions relating to professional ethics, agreements and self-regulation codes had to be amended.<sup>117</sup> *CNG* nonetheless continued the operation of a Code of Conduct (Code) based on which fees set below a certain level may be penalized on grounds of breach of “dignity of the profession”,<sup>118</sup> a notion that was borrowed from Article 2233 of the Italian Civil Code.<sup>119</sup> Bypassing the *legitimate objective* doctrine, the Italian competition agency had held the Code to be anticompetitive.<sup>120</sup> Considering that all fixed and minimum tariffs had been repealed, the classification of the fee scale as a legitimate reference criterion for remuneration was held to encourage geologists to set their fees accordingly, whilst the obligation to determine fees in accordance with general standards like “dignity of the profession” was held to strengthen the compulsory perception of the fee scale. However, the ECJ reasoned differently. Although a rule penalizing fees below a certain level was held to restrict competition,<sup>121</sup> it also found that “dignity of the profession” may be a legitimate factor to determine professional remuneration because this may be necessary to ensure the quality of geologists’ services.<sup>122</sup> Following which the ECJ referred the case back to the national court as it was unable to apply the necessity test because “dignity of the profession” is only one of several relevant remuneration criteria closely linked to the quality of geologists’ work.<sup>123</sup> This referral surprises and actually shows the weakness of the *Meca-Medina* widening of the *legitimate objective* doctrine. One might ask how possibly could the national court be in a better position to apply the necessity test given that a publicly defined reference point is missing and the national legislator has repealed resp. annulled this type of restrictions.<sup>124</sup>

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<sup>115</sup> Case C-1/12, *OTO*, para 97-99. The ECJ confirms this similarity in para 103.

<sup>116</sup> Case C-136/12, *CNG*, para 5 and 6.

<sup>117</sup> Case C-136/12, *CNG*, para 7.

<sup>118</sup> Case C-136/12, *CNG*, para 9 and 38.

<sup>119</sup> Case C-136/12, *CNG*, para 8. Article 2233 of the Italian Civil Code concerns the intellectual professions and holds that “[i]f the fees have not been agreed by the parties and cannot be determined by reference to fee scales or custom and practice, they should be determined by the court, after the opinion of the professional association to which the professional belongs has been obtained. In any event, the amount of remuneration must be commensurate with the scale of the work performed and the dignity of the profession.”

<sup>120</sup> Case C-136/12, *CNG*, para 11 and 12.

<sup>121</sup> Case C-136/12, *CNG*, para 52.

<sup>122</sup> Case C-136/12, *CNG*, para 53.

<sup>123</sup> Case C-136/12, *CNG*, para 54 and 55. Other criteria are the scale and difficulty of the task to be performed, technical knowledge and the commitment required.

<sup>124</sup> The Consiglio di Stato has held that deontological rules based on which the guarantee of quality of professional services corresponds with the remuneration of professional dignity restricts competition and cannot be considered necessary to ensure a legitimate objective that concurs with the protection of the consumer. Il Consiglio di Stato, Autorità Garante della Concorrenza e del Mercato contro Consiglio Nazionale dei Geologi, N. 00238/2015REG.PROV.COLL., N. 04710/2011 REG.RIC, N. 04584/2011 REG.RIC.

The above cases show that the *Meca-Medina* version of the *legitimate objective* doctrine does not work out in practice.<sup>125</sup> Most importantly because it is impossible to conduct an ancillarity test if a publicly defined objective is lacking. In *OTOOC*, the ECJ thus resorted to competition analyses that are conducted generally under the competition conditions of Article 101(3) TFEU. In *CNG*, the ECJ simply referred the case back to the national court.

#### **4.4. Conclusion on the third flexible enforcement policy**

The third flexibility policy misunderstands the constitutional limits of the *legitimate objective* doctrine. Close reading shows that *Wouters* does not actually deviate from first principles and strict enforcement, but combines a straightforward use of the state action doctrine with a functional interpretation of a “restriction of competition”. *Meca-Medina* on the other hand does operate a balancing exercise under Article 101(1) TFEU. The added value thereof is not self-evident when compared to the analyses already in place. The ancillarity analysis under 101(1) TFEU requires an agreement to be based on a public mandate and concur with a publicly defined welfare objective in order for society to trust that it does not yield additional costs. The efficiency analysis under 101(3) TFEU checks upon a self-selected welfare objective and thus requires an agreement to fulfil the welfare and competition conditions in order for society to trust that the benefits of an agreement outweigh its costs. On the one hand, *Meca-Medina* does not seem to cause much harm. Anti-doping rules are not likely to restrict competition anyway, while *OTOOC* and *CNG* seem to confirm that a widened legitimate objective doctrine does not work out in practice. On the other hand, *Meca-Medina* does obscure the purpose and workings of EU competition law and motivates the broad welfare and balancing propositions discussed earlier and to be discussed in the next paragraph. It would therefore be most welcome if the ECJ would explicitly return to the *legitimate objective* doctrine in its original and constitutionally correct setting.

### **5. The constitutional limits of the useful effect doctrine**

Following the Commission’s opposition to the Policy rule, the Dutch government has devised a fourth policy that will preclude competition enforcement altogether in order for the market to promote SCP. A new legislative approach will enable the government to declare private sustainability initiatives generally binding. This proposal aims to kill three birds with one stone.<sup>126</sup> “Green coalitions” that enjoy “broad societal support” may overcome first mover disadvantage. The responsibility for prioritizing sustainability over competition will shift from the competition agency to the government. Meanwhile, sustainability will be maximized as the new legislative approach makes utmost use of the innovative power of civil society. Steppingstone is the *useful effect* doctrine that specifies the loyalty obligation of Member States under Article 4(3) TEU in the context of the competition rules. The new legislative approach would comply with this doctrine since declaratory regulations will follow on private initiatives, not on coordinated conduct. Alternatively, the *useful effect* doctrine would not apply in the first place since declaratory regulations will constitute sovereign state measures that set aside the competition rules in their own right. Less optimistic on compliance with the *useful effect* doctrine, scholars have put forward that this doctrine is in need of repair. Because the delegation prong focuses on procedural responsibility, it would obstruct “innovative non-State structures of governance”, while lagging behind the more substantive approach of the *legitimate objective* doctrine.<sup>127</sup>

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<sup>125</sup> Another, but less instructive example is Joined Cases C-427/16 and C-428/16 *CHEZ Elektro Bulgaria*, ECLI:EU:C:2017:890. This case concerns national legislation that prohibits lawyers and clients to agree on remuneration below a minimum amount to be set by a lawyers’ professional organization. Bringing up the legitimate objective doctrine, the ECJ referred the case back to the national court because it could not apply the doctrine on the basis of the file before it.

<sup>126</sup> Minister of Economic Affairs, cited *supra* note 11, at 3.

<sup>127</sup> Monti and Mulder, op. cit. *supra* note 2, at 656.

Again, the issue is whether the above arguments are correct. Is absence of anticompetitive private coordination sufficient to warrant the useful effect of the competition rules? Does parliamentary involvement secure the sovereignty of declaratory regulations indeed? If not, is the *useful effect* doctrine in need of repair in order to promote SCP?

### 5.1. The two prongs of the useful effect doctrine

The *useful effect* doctrine constitutes a specific branch of the EU state action doctrine that serves to prevent Member States from enacting state measures that enable undertakings to escape antitrust accountability.<sup>128</sup> Ever since *Reiff*,<sup>129</sup> case law consistently holds that this doctrine operates two separate prongs.<sup>130</sup> Focusing on the presence of anticompetitive coordination, the first prong prohibits Member States to require or favor the adoption of agreements contrary to the cartel prohibition, or to reinforce their anticompetitive effects. Focusing on the exercise of regulatory authority, the second prong prohibits Member States to deprive legislation of its official character by delegating to private traders the responsibility for taking decisions affecting the economic sphere. The rationale for a separate second prong is obvious. As the first is easy to circumvent, it is critical to have an additional test that identifies proper state action by ascertaining that the legislator has been responsible for displacing “the competition rules with an alternative scheme”.<sup>131,132</sup>

It follows that the absence of anticompetitive private coordination is insufficient to warrant *useful effect*. The question thus becomes whether the new legislative approach meets the requirements for absence of delegation that follow from landmark cases on national regulation on the fixing of tariffs in the transport sector (*Reiff*, *Delta Schiffahrt- und Speditionsgesellschaft* and *Centro Servizi Spediporto*), and on access to the legal profession and the determination of a scale for determining legal fees and emoluments (*Arduino*, *Mauri* and *Cipolla*). All those cases operate a twofold requirement for a regulatory measure to qualify as proper state action: The state must have both originator and concluder responsibility. “Originator responsibility” reflects the fact that all state measures in those cases originated with the legislator who had defined the main elements (objectives, method and criteria) that were to be specified in the subsequent regulatory exercise involving market actors.<sup>133</sup> “Concluder responsibility” reflects the fact that all state measures were signed off by the state who verified the input of market actors in light

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<sup>128</sup> Case C-13/77, *INNO/ATAB*, EU:C:1977:185.

<sup>129</sup> Case C-185/91, *Bundesanstalt für den Güterfernverkehr v Reiff*, EU:C:1993:886. Actually, *Reiff* confirmed that delegation constituted a separate prong as had been indicated already in case C-267/86, *Van Eycke/ASPA*, EU:C:1988:427. On the two prongs of the *useful effect* doctrine: Harm Schepel, “Delegation of Regulatory Powers to Private Parties under EC Competition Law Towards a Procedural Public Interest Test”, (2002) *CML Rev.*, 31-51.

<sup>130</sup> Case C-153/93, *Germany v Delta Schiffahrt- und Speditionsgesellschaft*, EU:C:1994:240; case C-96/94, *Centro Servizi Spediporto v Spedizioni Maritima del Golfo*, EU:C:1995:308; case C-35/99, *Arduino*, EU:C:2002:389; case C-250/03, *Mauri*, EU:C:2005:96; joined cases C-94/04 and C-202/04, *Cipolla and Others*, EU:C:2006:758.

<sup>131</sup> Case C-185/91, *Reiff*, para 15-23; case C-153/93, *Delta Schiffahrt- und Speditionsgesellschaft*, para 15-22; case C-96/94, *Centro Servizi Spediporto*, para 22-30; case C-35/99, *Arduino*, para 36-43; case C-250/03, *Mauri*, para 30-38; joined cases C-94/04 and C-202/04, *Cipolla*, para 47-53.

<sup>132</sup> Daniel Crane, “Judicial review of anticompetitive state action: two models in comparative perspective”, (2013) *Journal of Antitrust Enforcement*, 418-436, at 421.

<sup>133</sup> Case C-185/91, *Reiff*, para 3-5 and 21; case C-153/93, *Delta Schiffahrt- und Speditionsgesellschaft*, para 3-8 and 20; case C-96/94, *Centro Servizi Spediporto*, para 3-8; case C-35/99, *Arduino*, para 3-9; case C-250/03, *Mauri*, para 4; joined cases C-94/04 and C-202/04, *Cipolla*, para 3-6.

of the main elements set earlier by the legislator.<sup>134</sup> In other words, a regulatory measure based on market involvement only qualifies as sovereign state action if it starts out as state legislation, while not losing its character of state legislation along the way.<sup>135</sup> Thus, the *useful effect* doctrine corresponds with the US state action doctrine that limits antitrust immunity to those situations where the state has “clearly articulated and affirmatively expressed” state policy, and subsequent market involvement is “actively supervised” by the state itself.<sup>136</sup>

It appears that the new legislative approach does not meet the above requirements. Defining sustainability only in broad Brundtland-terms, the draft-statute fails to articulate the main elements private sector initiatives are to specify. Absent originator responsibility, the Ministers concerned cannot even start to take concluder responsibility as they lack a reference framework to verify the appropriateness and proportionality of the initiatives submitted.<sup>137</sup>

## **5.2. Do declaratory regulations constitute sovereign state measures?**

Aiming to escape the applicability of the *useful effect* doctrine, the Dutch government alternatively argues that this doctrine does not apply in the first place. For, albeit upon the initiative of market actors (or other stakeholders), it will be the Ministers, *having heard parliament*, who will ultimately decide whether to follow up on a petition for a declaratory regulation.<sup>138</sup> This would imply that the main elements of state policy will be determined in the political decision-making process as a result which declaratory regulations yield sovereign state measures that set aside the public competition interest in a democratically legitimate manner.<sup>139</sup> However, in representative democracies like the EU Member States, democratic legitimacy and sovereignty crucially depend on state measures being determined in a deliberative process in which *all* citizens are represented. In other words, for declaratory regulations to constitute sovereign state measures, they must be based on *full parliamentary involvement* according to Dutch rule-making standards. So, the question is whether declaratory regulations meet this requirement.

According to the draft-statute, parliamentary involvement will take place based on a so-called verification procedure.<sup>140</sup> Whereas the scope of parliamentary involvement may vary from a simple exchange of views to no involvement at all, verification procedures are meant to be applied in situations where the Dutch legislator delegates regulatory power to a lower rule-maker (in this case the government and/or the Ministers concerned).<sup>141</sup> Though based on no or limited parliamentary involvement, these procedures do not weaken democratic legitimacy generally as they only serve to verify whether the

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<sup>134</sup> Case C-185/91, *Reiff*, para 22; case C-153/93, *Delta Schiffahrt- und Speditionsgesellschaft*, para 21; case C-96/94, *Centro Servizi Spediporto*, para 23 and 27-28; case C-35/99, *Arduino*, para 41; case C-250/03, *Mauri*, para 32-36; joined cases C-94/04 and C-202/04, *Cipolla*, para 49-52.

<sup>135</sup> Cf. Monti and Mulder, op. cit. *supra* note 2, at 652.

<sup>136</sup> *California Retail Liquor Dealers Ass'n v. Midcal Aluminium, Inc.*, 445 U.S. 389, 410 (1978).

<sup>137</sup> This conclusion is strengthened by the fact that initiators are required to submit evidence of sector support which increases the likelihood of horizontal coordination. Also, if the government introduces changes to the original initiative, additional initiator approval is required. Clearly, “initiatives” carry more weight than their title suggests.

<sup>138</sup> Minister of Economic Affairs, Explanatory notes to the legislative proposal, cited *supra* note 11, para 4.2. In addition, ACM will advise on the effect-analyses petitioners have to submit on sustainability, price and other consumer considerations.

<sup>139</sup> Minister of Economic Affairs, Letter to Parliament, cited *supra* note 11.

<sup>140</sup> Minister of Economic Affairs, Legislative proposal, cited *supra* note 11, Art. 7.

<sup>141</sup> Notice from the Prime-Minister, *Instructions for rule-making* (Circulaire van de Minister-President van 18 november 1992), Instruction 2.35, <https://wetten.overheid.nl/BWBR0005730/2018-01-01> (last visited 13 Dec. 2018). The draft-Statute is based on one of four delegation methods – controlled delegation (Instruction 2.36).

lower rule-maker adheres to the main elements of state policy as defined by the legislator in the preceding statute.<sup>142</sup> Key to the new legislative approach, however, is that, as noted earlier, the draft-statute does not define any such main elements at all.<sup>143</sup> This means that, absent full “originator” parliamentary involvement, declaratory regulations are based on no or limited “concluder” parliamentary involvement. Lacking democratic legitimacy, they will thus fail to constitute sovereign state measures.

The result is that the *useful effect* doctrine will apply after all. Given that this doctrine extends to national competition agencies that have a duty to disapply national legislation contravening EU competition law,<sup>144</sup> “green coalitions” should therefore not trust to escape antitrust accountability.<sup>145</sup>

### 5.3. *Is the useful effect doctrine in need of repair?*

Lack of sovereignty brings us to the scholarly proposition that the *useful effect* doctrine needs to be updated. Schepel submitted earlier that, by focusing on procedural responsibility rather than substantive outcome, the delegation test erroneously overlooks that the “appropriate demand is for “public-regarding” regulation, not for public regulation”.<sup>146</sup> In the same vein, Monti and Mulder recently proposed the ECJ to follow the lead of the *legitimate objective* doctrine and move away from “conventional state centred understandings of *dominium* and *imperium*”, and develop “basic conditions for input and output legitimacy within new governance processes”.<sup>147</sup> This proposition builds on several misunderstandings.

First, the delegation prong of the *useful effect* doctrine rightly focuses on procedural responsibility/input legitimacy of a regulatory measure because it only serves to determine which mechanism must be used to check on substantive outcome/output legitimacy – the free movement or the competition rules. Second, *Wouters* does not evidence any shortcomings of a conventional understanding of *dominium* and *imperium*. By contrast, the ECJ appears to have underlined the timeless validity thereof when observing that Member States are free to opt for state or for market action, provided that either action option

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<sup>142</sup> Ibid. Most relevant in this context are the following instructions. Instruction 2.19 provides that, in case of delegation of regulatory power to a lower rule-maker, the delegating statute contains at least the main elements of the measure concerned. Instruction 2.23 stipulates that the delegating statute limits the extent of regulatory power delegated in specific and precise terms. Instruction 2.24 stipulates that delegation of regulatory power to a minister is limited to administrative rules, the specification of details, rules that require frequent updates, and rules that may have to be issued urgently. The explanation by Instruction 2.35 provides that the reason for limited parliamentary involvement in situations of delegated regulatory power is to prevent a repetition of the preceding political decision-making process.

<sup>143</sup> Note that the list of “subject-matters”, yet to be specified by the government in general regulatory measures, is also unlikely to provide democratic legitimacy as parliament will *not* be involved.

<sup>144</sup> Case C-198/01, *CIF*, EU:C:2003:430.

<sup>145</sup> Note that ACM has issued new enforcement guidelines for sustainability agreements (*Duurzaamheid en concurrentie. Uitgangspunten toezicht ACM op duurzaamheidsafspraken*), 2 December 2016, <https://www.acm.nl/nl/publicaties/publicatie/16673/ACM-stelt-uitgangspunten-vast-voor-toezicht-duurzaamheidsafspraken-en-mededinging> (last visited 13 Dec. 2018). The main principle of the new guidelines is that the cartel prohibition will not be enforced if (sector-wide) sustainability agreements are supported by the government and by organizations representing citizens and business. Thus, it is not self-evident that the competition agency will warrant the useful effect of the competition rules.

<sup>146</sup> Schepel, op. cit. *supra* note 129, at 49.

<sup>147</sup> Monti and Mulder, op. cit. *supra* note 2, at 656. Based on the reference note 93, *dominium* and *imperium* should be understood to reflect the realm of private interests versus the realm of public interests. “Input legitimacy” refers to the legitimacy of the procedure by which the public interest is defended, while “output legitimacy” refers to the legitimacy of the result (at 652).

triggers accountability under the free movement or the competition rules.<sup>148</sup> Third, the *legitimate objective* doctrine as originally applied in *Wouters* does not apply a more substantive approach but again focuses on procedural responsibility/input legitimacy. On the one hand, the *legitimate objective* doctrine builds on originator state responsibility in terms of public mandate and publicly defined objective in order to preclude private accountability for anticompetitive effects for which the state is actually responsible. On the other hand, this doctrine uses the ancillarity test, which, failing to conclude state responsibility for subsequent regulation specified by market actors, serves to establish whether the state or the market is responsible for the anticompetitive effects of such regulation.

It follows that strict adherence to the *useful effect* doctrine does not improperly hamper “innovative non-State structures of governance”. If anything, the above discussion shows that there is a need for the ECJ to clarify the *legitimate objective* doctrine in order for it to serve its constitutional purpose in a functional manner and to avoid further confusion.

#### **5.4. Conclusion on the fourth flexible enforcement policy**

The fourth flexibility policy misreads the purpose and workings of the *useful effect* doctrine. In line with a binary institutional balance, this doctrine warrants that regulatory measures only escape antitrust accountability if based on proper state action. The new legislative approach will not yield proper state action. On the one hand, the delegating statute fails to define the main elements of state policy as a result of which declaratory regulations lack originator state responsibility. On the other hand, limited parliamentary involvement in the determination of declaratory regulations precludes sovereignty. This outcome does not signal a need to change the *useful effect* doctrine. A focus on procedural responsibility does not obstruct innovative governance structures, but only warrants that those structures are not used to improperly escape antitrust accountability which after all serves to protect the general (sustainability) interest.

## **6. Conclusion**

The above analysis shows that strict competition enforcement is the way forward, also to promote SCP. It turns out that none of the flexible enforcement policies meets the constitutional fundamentals of EU competition law. Those fundamentals do not allow a broad welfare standard, but mandate a consumer surplus standard to check on most efficient use. Nor do they allow for a balancing of competition and non-competition interests like sustainability. Instead, they mandate the prioritization of the public competition interest over the general sustainability interest and objective law enforcement. In order to be effective, competition enforcement should be strict as market competition is the mechanism that pushes the market to engage in SCP and maximize sustainability. In order to be legitimate, competition enforcement should be strict as each of the evidentiary requirements of the cost-benefit analysis provided by Article 101(1) and (3) TFEU is functional to secure that market action actually maximizes sustainability. Problems of under-regulation are to be addressed by the regulatory state and require proper articulation of state policy in order to preclude antitrust accountability. In short, the cartel prohibition provides a straightforward accountability mechanism that serves to protect rather than hamper SCP. In order to use it properly, current practice needs to be amended. The Commission should consider to explicitly reject *CECED* and *qNWG* enforcement policy and clarify the purpose and workings of the competition conditions of Article 101(3) TFEU. The ECJ should consider to correct the *Meca-Medina* widening of the legitimate objective doctrine introduced in *Wouters*.

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<sup>148</sup> Case 309/99, *Wouters*, para 67-69.





