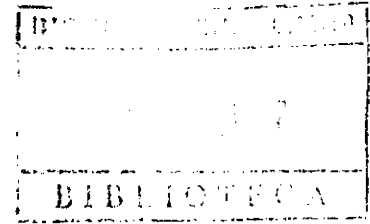


European University Institute  
Law Department

Ulla Bøegh Neergaard



**European Competition Law  
and Anti-Competitive Measures  
by the Member States**

**Towards Legal Principles Ensuring  
the Coherence of Two Levels of Governance**

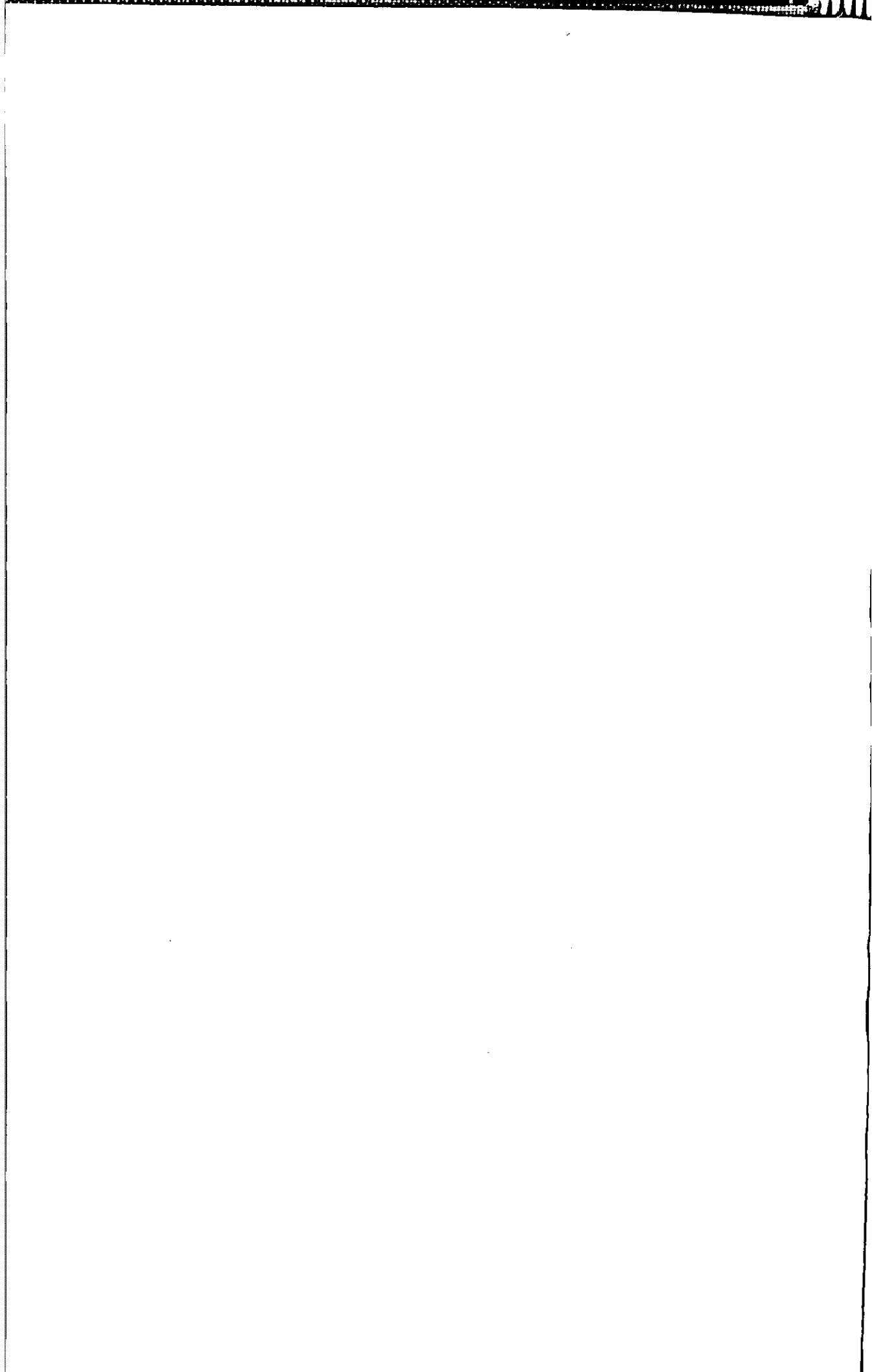
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July 1997

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European University Institute  
Law Department

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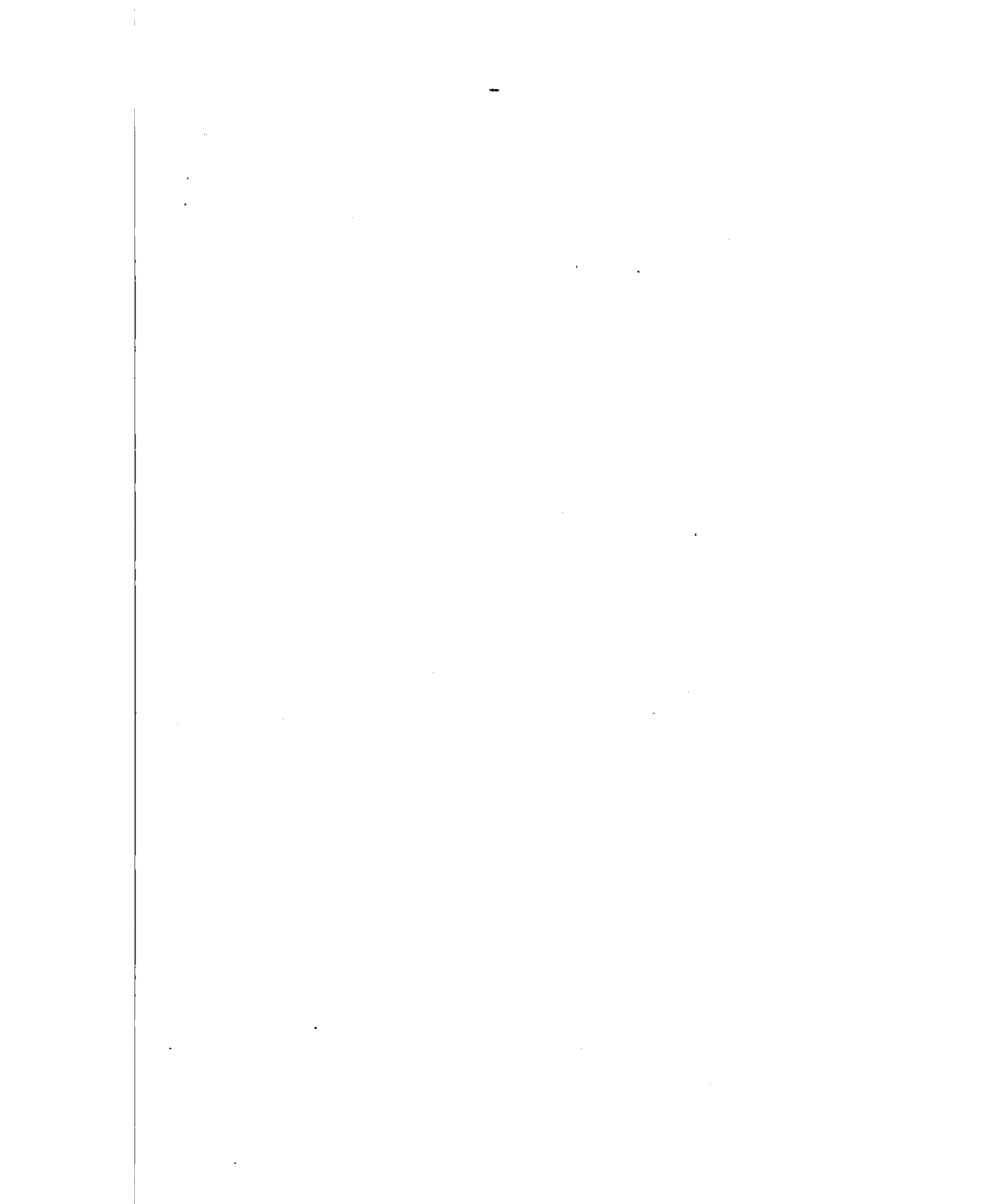
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**Part One**

**Introduction**

The overall subject of this thesis is "European Competition Law and Anti-Competitive State Measures by Member States". This implies that the focus is on national rather than Community, or, one could say, peripheral rather than central, interventions in markets, as broadly understood. The concept therefore includes the entire realm of legislative forms. More particularly, attention is paid to those state measures that have an anti-competitive object or effect. Among the measures of interest here are *e.g.* those that: 1) establish minimum or maximum production quotas; 2) prohibit agents or brokers from transferring commissions, which are normally paid to themselves, to their customers instead; 3) restrict the number of companies entering a market or professionals entering an occupation; or 4) establish resale price maintenance systems including either minimum or maximum prices. Of particular interest are the state measures that are based on pre-existing agreements among private companies or measures which establish committees which permit private companies to make decisions enforced by law. This part aims at further presenting the subject matter of the thesis.

# 1. Introduction

This chapter begins with a further presentation of the subject matter of the thesis. Then, the specific research objective of the thesis is explained. Finally, the overall research plan is outlined.

## 1.1. Presentation of the Subject

In connection with a judgment rendered by the European Court of Justice in Luxembourg in 1993, the Court in a drastic and unprecedented manner,<sup>1)</sup> ordered the reopening of oral hearings.<sup>2)</sup> This order was based primarily on two issues raised during the original hearings that the parties of the main proceedings and the Commission of the European Communities were not capable of answering at that time.<sup>3)</sup>

The order was issued in connection with the *Meng* Case, which concerned the compatibility of elements of German Insurance legislation with competition law at the Community level.<sup>4)</sup> More particularly, in the main proceedings, insurance broker Meng was accused of having transferred his commission, which is normally paid to the broker, to his customers, and thus, of having contravened a prohibition on such action.

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1) According to Bach, Albrecht, "Case C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG; Case C-2/91, Meng; Case C-245/91, OHRA Schadeverzekehringen NV", *Common Market Law Review*, Volume 31, 1994, Number 6, p. 1358.

2) See Case C-2/91, *Criminal proceedings against Wolf W. Meng*, Order of 9 December 1992, which is summarised in the decision of the case itself, Judgment of 17 November 1993, [1993] E.C.R. I-5751.

3) See the *Meng* Order, at Grounds 2 and 4.

4) In the order, the Court also referred to the *Ohra* and *Güterfernverkehr* Cases, see Case C-245/91, *Criminal proceedings against Ohra Schadeverzekehringen NV*, Judgment of 17 November 1993, [1993] E.C.R. I-5851; and Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*, Judgment of 17 November 1993, [1993] E.C.R. I-5801.

The German prohibition is an example of a national measure that regulates the activities of private companies in a manner that clearly limits competition. At the same time, there is reason to believe that the legislation was somehow influenced by anti-competitive agreements between insurance companies. Therefore, it seemed natural for Mr. Meng to claim that the measure was not compatible with competition law at the Community level.

The first issue raised in the Order was whether Article 3(g)<sup>5)</sup>, Article 5(2), and Article 85 EC should, despite the non-existence of agreements between undertakings, be interpreted as prohibiting any state measure that would make such agreements superfluous and would affect competition within the common market; in other words, the first issue was whether anti-competitive state measures should generally be condemned.<sup>6)</sup> The second issue was whether Member States can justify anti-competitive measures on grounds such as those in Article 36 EC or those recognised by the Court in connection with Articles 30 and 59 EC.<sup>7)</sup>

Unfortunately, the European Court of Justice in its final judgment decided to ignore these issues. Their importance, however, has not in the least diminished by this lack of attention. Rather, they are essential to one of the more recent and quite important developments of the European Court of Justice's case law in the field of competition: that of the interaction of Articles 3(g), 5(2) and 85 EC. Indeed, if the first question of the preceding paragraph is answered in the affirmative, then the competence of the Member States in the field of economic regulation is decreased significantly. At the same time, however, an answer to the issues would have provided further guidance for understanding the as yet unsettled development of the European Court of Justice's interpretation of the above-mentioned Treaty provisions. Also, the issues may be considered as symbolising the fact that, despite a relatively extensive number of decisions concerning these Treaty provisions, the doctrine is

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5) Article 3(f) EC was renumbered Article 3(g) EC after the enactment of the Treaty of the European Union, according to Article G, number 3 EUT. There is no difference of principle in the wording of the two provisions. For the sake of convenience, when referring to the provision, the new naming, *i.e.* Article 3(g) EC, will be applied, as well as when dealing with case law dating from before the alteration.

6) See the *Meng* Order, at Ground 2.

7) See the *Meng* Order, Ground 2. Attached to the order was a list of six specific questions, which the parties of the case, the Member States and the Commission were invited to answer, see *ibid.*, at Ground 3. All these questions are considered further throughout the thesis.



still riddled with fundamental inconsistencies and there are therefore serious doubts as to its implications. In order to provide a basic understanding of the doctrine, it is, in simple terms, summarised as follows.

It follows from Article 3(g) EC that the activities of the Community include the establishment of a system ensuring that competition in the common market is not distorted. In contrast to the provisions concerning the free movement of goods, not all distortions of competition between undertakings are prohibited. In fact, Section 1 in the chapter concerning the rules of competition in the Treaty is entitled "*Rules applying to undertakings*", and Article 85 EC explicitly prohibits only, for example, anti-competitive agreements concluded by undertakings, whereas, for example, measures based on anti-competitive agreements that have become altered into law by national governments are not explicitly prohibited by the Treaty provisions. A final important provision which must be mentioned in this context is Article 5(2) EC, which sets out that Member States shall abstain from any measure that might jeopardise the attainment of the objectives of the Treaty.

In recent years, the European Court of Justice has interpreted Articles 3(g), 5(2) and 85 EC together, thereby imposing an obligation on Member States not to adopt measures that might deprive Article 85 EC of its effectiveness or prejudice its full and uniform application. The general principle established by the European Court of Justice was expressed in the *Leclerc* Case in the following words:

*"Whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of legislative nature, which may render ineffective the competition rules applicable to undertakings."* <sup>8)</sup>

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8) See Case 229/83, *Association des Centres distributeurs Édouard Leclerc and Others v. Sàrl 'Au blé vert' and Others*, Judgment of 10 January 1985, [1985] E.C.R. 1, at Ground 14.

This joined interpretation of the provisions in question has by the majority of legal scholars been seen as an attempt to bridge a claimed harmful gap between central competition aims and rules and national anti-competitive measures. The central competition rules are often interpreted as based on the premise that the unrestrained interaction of competitive forces will yield the greatest possible efficiency in the use of economic resources, thereby obtaining the maximum economic welfare. On the other hand, national anti-competitive measures usually hinder competition. For instance, Member States often place price or production controls upon selected businesses in order to correct perceived market failures, such as excessive rivalry. In general, because it is often difficult for companies to raise prices collusively, the economic effect of a national measure will overcome the effect of an ordinary price agreement. This occurs because members and non-members of the cartel are restrained from undercutting the agreed price after an agreement has become law. Accordingly, the general principle is seen as a strengthening of the Community's concern for free competition and a weakening of the Member States' concern for their right to economic intervention. At the same time, this general principle is seen as pointing in the direction of an increased level of centralisation at the cost of local self-determination.

In this thesis the above perception of the doctrine on Articles 3(g), 5(2) and 85 EC is not completely shared. The premise of this thesis is rather that the general principle governing this doctrine, as developed by the European Court of Justice which today much more helpfully leads to an understanding of the issues at stake, should be seen as an attempt to establish a coherence between two levels of governance. The truism of Article 85 EC only being applicable to private companies has in its application together with Articles 3(g) and 5(2) EC transformed its function so that also measures enacted by the Member States are in danger of condemnation. The coherence is not easily established because the tensions between the rules originating from the two different legal systems are not simply solved by the supremacy of the Treaty provisions over national measures. This is because an imprecisely defined area of economic legislative competence has been reserved to the Member States, who after all have not transferred all of their sovereignty to the Community. But the problem is to be seen from the point of view of how law at the level of the Community is to be made compatible without clear rules of distribution of competences between these two legal orders and in this context without any clear hierarchy of the two legal orders. Central to this premise of the thesis is therefore that the European Court of Justice is guided today by the perception

of the issues at stake as a problem of how competition law at the Community level can co-exist with anti-competitive measures of the Member States.

In more particular terms, it is central to this co-existence to find legal principles which can bring about a coherence of the two levels of governance. These legal principles should provide a rationale helpful of answering questions such as the following: a) should Articles 3(g), 5(2) and 85 EC include a condemnation of national measures which are based on companies' pre-existing agreements that according to central competition rules in themselves would be illegal; b) should national measures which are not directly based on pre-existing illegal agreements among companies but which on the contrary can be proved to be based on the companies' lobbyism, be considered as illegal; c) should these provisions condemn national measures which allow companies to make otherwise illegal decisions to be enforced by the law, either through the instrument of illegal agreements or committees; and finally, d) does it logically follow that all such kinds of national legislation, *i.e.* legislation having the same effect as either measures based on pre-existing prohibited agreements or lobbyism or measures allowing for subsequent agreements or committees which delegate the power to hinder competition, should be considered as illegal.

## 1.2. Research Objective

As suggested in the previous description, the doctrine with regard to Articles 3(g), 5(2) and 85 EC operates in a complicated field containing many unresolved issues. To better explore these issues, the following research objective is pursued here:

Which legal principles ensure the coherence of the two levels of governance in the relationship between European competition law and Member States' anti-competitive measures, as expressed by the case law of the European Court of Justice and the American Supreme Court, taking into consideration the legal, political and economic context of this relationship?

The need to search for appropriate legal principles ensuring the coherence of the two levels of governance in the described field is evident in light of the excessive and continuously growing amount of litigation before the European Court of Justice. It should also

be seen in light of the European Court of Justice's method of resolving the actual tensions between the two levels of governance, which has taken on an ad hoc, unprincipled quality, demonstrating a need for improvement. At the same time, legal scholars are frequently in disagreement and little help is therefore found among these.<sup>9)</sup> Furthermore, most importantly to the justification of the research objective is indeed that the interests at stake for both levels of governance are highly vital and fundamental as they have to do with the delimitations of competence within the economic sphere. From the point of view of the Member States, justification of the thesis subject should be seen in particular in the light of their quickly growing general unhappiness with the erosion of state sovereignty. In particular, the different perspective of this thesis, which is much broader and multi-factored than other works in this field, should also justify carrying out this research.<sup>10)</sup>

In the US a similar doctrine as that governing the interaction of Articles 3(g), 5(2) and 85 EC prevails.<sup>11)</sup> A comparison with this *pendant* is made as it may contribute to a greater understanding of the proportions of the problems and insight in weaknesses and strengths involved in each of the systems' models of solution. However, despite this comparison with American law it should be stressed that the emphasis throughout the thesis is on the European situation. Also, the fact that the American doctrine operates within a classic federation, whereas the European doctrine functions within what is commonly

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9) See e.g. Pescatore, Pierre, "Public and Private Aspects of European Community Competition Law", *Fordham International Law Journal*, Volume 10, 1987, Number 3, pp. 373-419 versus Marengo, Giuliano, "Competition Between National Economies and Competition Between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, 1987, Number 3, pp. 420-443.

10) For instance, the doctrine on Articles 3(g), 5(2) and 85 EC is not to be fully understood solely from a narrow competition law perspective. Constitutional law aspects, for example, are at least as important to take into consideration. The doctrine is better fully understood from the perspective of being a part of a larger whole.

11) The American *pendant* is typically referred to as the doctrine on state action or the *Parker* doctrine. The last-mentioned designation originates from the judgment which was responsible for the introduction of the doctrine, namely the *Parker Case*, see Parker, Director of Agriculture, *et al.* v. Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307, [No. 1040], Argued 5 May 1942, Decided 4 January 1943. In principle, and to put it simply, this doctrine views anti-competitive state measures as lawful, outside the scope of the American competition legislation (primarily the Sherman Act).

characterised as a *sui generis* system of governance, implies that the problems naturally will vary.<sup>12)</sup> In other words, one should not expect too much from this comparison.

The thesis will primarily be based on legal analyses, some of which will also have an economic character. As the brief discussion in *Section 1.1.* indicated, anti-competitive state measures may give rise to harmful economic effects, and it is therefore necessary to adopt the discipline of economics as a tool in the process of determining the appropriate coherence of the two legal orders. Application of theories within the field of political science will also prove appropriate, including mainly sub-divisions of the theory of public choice.<sup>13)</sup> In addition, as the subject itself of this thesis is highly political in its character, political aspects will more or less continuously be apparent.<sup>14)</sup> Altogether, the thesis may be characterised as being contextual in its character.

Although many issues are therefore touched upon in this thesis, it is, however, far from being an exhaustive analysis of what by now has become an enormous field of law, both in the Community and the US. The analysis is limited to what has seemed the most fascinating and relevant issues. Below, some of the most obvious delimitations are summarised.

Tensions related to anti-competitive agreements, decisions, and concerted practices between undertakings are the primary focus of this thesis.<sup>15)</sup> The issues related to dominant market position of undertakings are, on the other hand, not directly central to

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12) As to the importance of further general differences and similarities uncovered by a comparison of the two legal systems, see the introduction of *Part Three* concerning *The American Example*.

13) These, however, operate primarily on an economic basis.

14) In particular, the premise of this thesis, as stated above in *Section 1.1.*, is largely inspired from the recently launched perspective of multi-level-governance originating from the field of political science. Among the relevant works in this field could be mentioned Marks, Gary; Hooghe, Liesbet & Blank, Kermit, "European Integration from the 1980s: State-Centric v. Multi-level Governance", *Journal of Common Market Studies*, Volume 34, 1996, Number 3, pp. 341-377; or Pierson, Paul, "The Path to European Integration. A Historical Institutionalist Analysis", *Comparative Political Studies*, Volume 29, Number 2, 1996, pp. 123-163.

15) In other words, Article 85 EC, in conjunction with Articles 3(g) and 5(2) EC, is the primary focus, rather than the other provisions of the competition chapter in the Treaty. With respect to the American Sherman Act, it is Section 1 which primarily is under scrutiny.

the analysis.<sup>16)</sup> This also implies, for instance, that short-term economic policy measures such as price controls, which are implemented to reduce inflation are, with few exceptions, not examined here. Also, the issues related to state-owned undertakings, *etc.* are not included in the discussion.<sup>17)</sup> Furthermore, measures directly related to state aid are excluded from this analysis.<sup>18)</sup> Finally, only state restraints as opposed to municipal restraints of competition are of primary interest here.

Some government intervention to protect local industry may infringe upon Article 30 EC, which prohibits quantitative restrictions on imports, including measures that bear more heavily on imports than on domestic production. In certain instances, the prohibition of Article 30 EC is related to the subject of this thesis, and Article 30 EC will accordingly be taken into consideration whenever necessary.<sup>19)</sup> It should be stressed, however, that only state measures in principle devoid of any protectionist aspect are of primary interest here.

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16) In other words, Article 86 EC as well as Section 2 in the Sherman Act are excluded from the direct scope of this thesis. The reason is that the European Court of Justice to a large degree now operates with at least three separate doctrines, one concerning Articles 3(g), 5(2) and 85 EC, another concerning Articles 3(g), 5(2) and 86 EC and finally one concerning Articles 90(1) and 86 EC. For the sake of simplicity, the thesis concentrates on the first of these doctrines. However, the second doctrine is touched upon several times in *Part Two*, and in *Chapter 14*, concerning *Control of Anti-Competitive State Measures Through Article 90 EC*, the third doctrine is analysed to a certain degree. With regard to the American case law, certain cases are included although they relate to abuse of dominant position because they are of significance to the development of the American state action doctrine.

17) *I.e.* the problems connected to Article 90 EC are not involved. Therefore, measures related to public companies and companies vested with exclusive or special rights are not in focus. However, as mentioned in the previous footnote, in *Chapter 14* below concerning *Control of Anti-Competitive State Measures Through Article 90 EC*, the relationship between control of such measures through Articles 3(g), 5 and 85 EC and through Articles 90 and 86 EC respectively is looked upon. With regard to the American state action doctrine, it is however necessary to include certain judgments concerning state-owned companies as well as companies granted special or exclusive rights as the distinction between such companies and private companies in American competition law is not as clearly upheld as in European law, simply because a specific *pendant* to Article 90 EC does not exist in American legislation. Therefore, some of these judgments in the US are of great importance and quite essential in the understanding of the American state action doctrine.

18) In other words, Articles 92-93 EC are not included.

19) Likewise, the conflicts in the United States under the negative Commerce Clause will also be taken into account whenever directly related to the subject matter.

The attention will be devoted exclusively to decisions of the European Court of Justice, and not, for instance, decisions of national courts, the Commission of the European Communities or the European Court of First Instance.<sup>20)</sup>

This thesis will primarily examine the current, as well as recommendable, state of law with regard to regulatory activities of Member States in markets, rather than the activities of companies themselves. Therefore, there is only incidental discussions of *e.g.* liability issues of companies.<sup>21)</sup>

The overall assertion in this thesis is that no ultimate legal principles ensuring the coherence of the two levels of governance in the relationship between European competition law and Member States' anti-competitive measures exist.<sup>22)</sup> This may be explained in light of the multi-level governance perspective describing, among others, the relationship between the Community and the Member States in its present state. It is on the basis of this perspective that one may claim that the present governance structure of the Community provides no stable equilibrium. With the words of Marks, Hooghe & Blank, there is no widely legitimised constitutional framework and there is little consensus on the goals of integration.<sup>23)</sup> Consequently, the allocation of competences between the center and the periphery is ambiguous and contested as the equilibrium may constantly move.<sup>24)</sup> This is certainly also the case in the more particular field of the interaction of Articles 3(g), 5(2) and 85 EC, analysed in this thesis. In the analysis of the European case law, it is found that the equilibrium has constantly changed. Today, the case law is actually so paradoxical that the European Court of Justice formally declares that it is willing to condemn anti-competitive state measures under certain conditions, in actual fact, it is not in the least willing to do so.

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20) Likewise, decisions of the US Supreme Court are considered rather than those of lower instances.

21) In the American case law, liability issues are very often touched upon, so that it is less avoidable in the analysis thereof to exclude this discussion completely.

22) This does not mean, however, that no legal principles are to be found of a certain quality; rather, such principles are just not to be considered as perfect.

23) See Marks, Gary; Hooghe, Liesbet & Blank, Kermit, "European Integration from the 1980s: State-Centric v. Multi-level Governance", *Journal of Common Market Studies*, Volume 34, 1996, Number 3, p. 373.

24) See *ibid.*

Actually, Member States are free to legislate, unless other Treaty provisions or secondary Community legislation should otherwise prohibit this. Therefore, despite the formal point of view taken by the European Court of Justice, giving the impression, when read in its literal sense, of a willingness to limit the legislative competence of Member States in the economic area, the real situation is that the European Court of Justice gives total deference to state authority. By its nature, this state of law signals that the balance might later change as it is not in the least stationary, thereby symbolising a constant struggle between center and periphery, and may move closer to the center from where it actually is now, *i.e.* entirely at the state level. All this means that as there is no consensus of what the Community is and what it ought to be, it is not possible to establish perfect legal principles governing a coherence of the two legal orders, which is demonstrated in the thesis by the analysis of the alternatives to the European Court of Justice's position.

### 1.3. Overall Plan

Besides this introductory part, the thesis consists of four additional parts. *Part Two* is devoted to an examination of the case law of the European Court of Justice with regard to the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC. The sub-objective to be reached in this part is the following:

What legal principles does the European Court of Justice, from an evolutionary perspective, apply in its decisions when reviewing the issue of coherence between central competition law and anti-competitive state measures?

*Part Two* is introduced by a chapter examining the individual application of Articles 3(g), 5(2) and 85-86 EC. Then, a careful analysis of the relevant case law follows. In the concluding chapter of this part, conclusions are drawn as to the evolution of the European doctrine and its scope today. The purpose of *Part Two* is largely to analyse the decisions and the doctrinal difficulties that they produce, as well as to describe the foundations and purpose of the European Court of Justice's standard, in order to establish the need to formulate a better foundation of the standard. Identifying the content of the actual tensions as illustrated in the case law of the European Court of Justice as well as identifying the



Court's method of resolving them, is an important point of departure in understanding the scope of the problems. Especially, such analysis should provide a comprehensive view of the strengths and weaknesses of the solutions suggested by the Court. The way in which the decided equilibrium has constantly changed will be demonstrated.

*Part Three* is concerned with the similar doctrine of the US as an example and the sub-objective of this part should be formulated as what follows:

What legal principles does the US Supreme Court apply in its decisions when reviewing the tensions between the American Sherman Act and anti-competitive state measures, and how is the American doctrine characterised in comparison with the European?

*Part Three* opens with a general description of the framework of American competition law within which the tensions operate. Subsequently, the case law is critically analysed and the final state of the tensions is evidenced. Afterwards, the comparison itself with the European doctrine is made.

The aim of *Part Four* is to search for principles ensuring the coherence of two levels of governance, or, in other words, to present and analyse alternative solutions to the tensions between these levels of governance. Consequently, the sub-objective is as follows:

What principles exist in order to decide which state intervention is covered by Articles 3(g), 5(2) and 85 EC, such principles deriving primarily from constitutional principles and the discipline of economics, as well as from various proposals of scholars in the field, and how are these principles to be evaluated?

*Part Four* is divided into seven chapters, the first of which deals with the paradigm of conflict, viewing the Treaty as an economic constitution. The implications of such a view is that the position towards the doctrine on Articles 3(g), 5(2) and 85 EC is to be read as condemning all kinds of anti-competitive state measures since they are in conflict with the overall aim of economic efficiency. This interpretation permits no compromises.

The second chapter is also related to the paradigm of conflict and the interpretation of the Treaty as an economic constitution. Here, an analysis is made of the position

of several legal scholars who assert that Article 90 EC should be interpreted as condemning all kinds of anti-competitive state measures.

The third chapter in *Part Four* takes its point of departure from a paradigm of accommodation. According to this paradigm, an appropriate accommodation is sought between the central interest in economic efficiency and the Member States' conflicting interest in restraining competition. The kind of accommodation analysed in this chapter is one which focuses on the position that interest group theory of regulation should be applied as the mediating factor in the relationship between center and periphery. Accordingly, measures which are judged as captured by producers should be condemned. In other words, this position is preoccupied with the procedures connected with the measure in question.

The fourth chapter also considers the paradigm of accommodation, this time looking at the position that the decisive mediating factor should be whether or not the measure in question gives control to a financially disinterested and politically accountable actor. Like the position dealt with in the previous chapter, this position is also concerned with the procedures surrounding the measure.

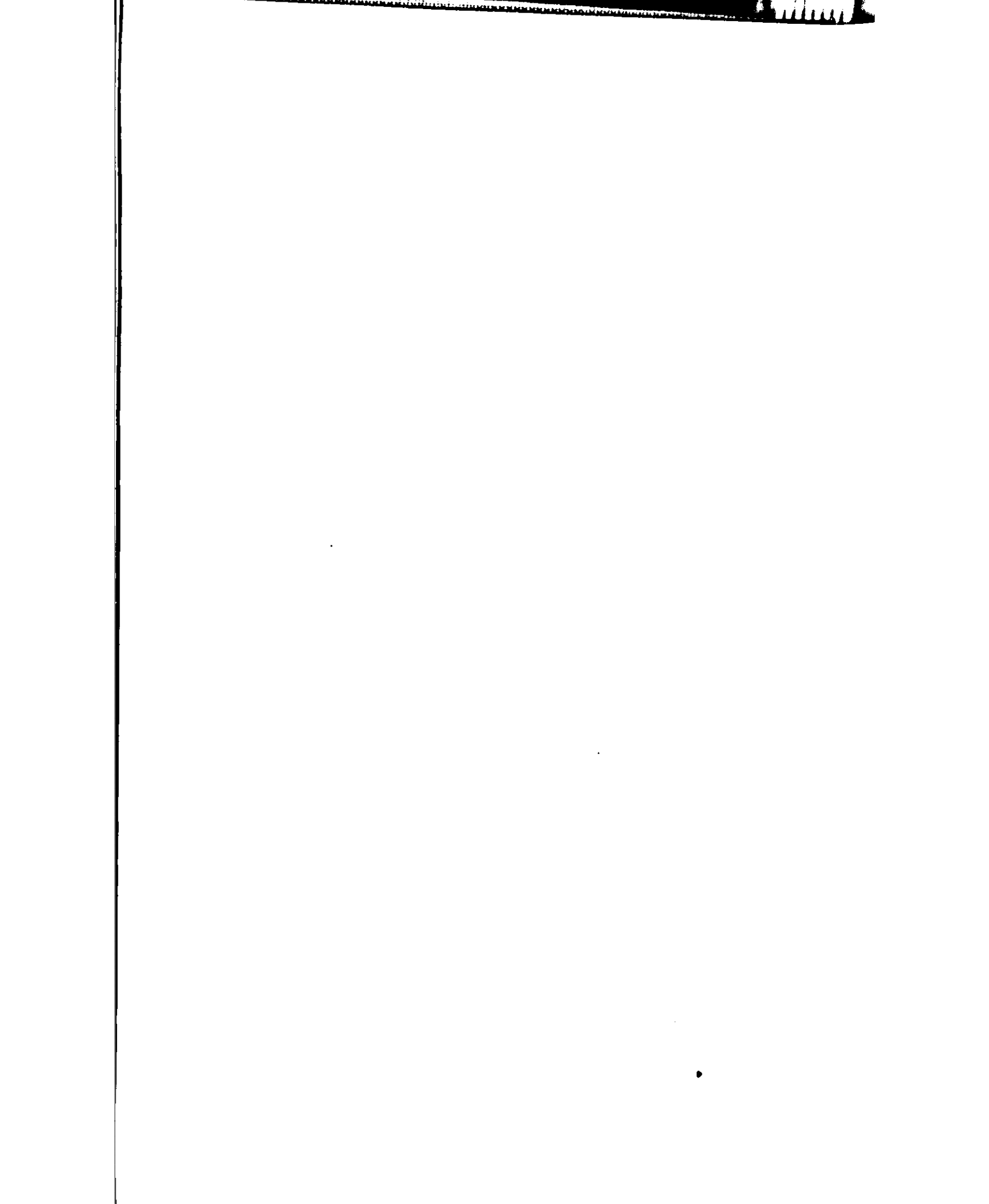
The fifth chapter is based on a paradigm of non-conflict, or, one could say, one of *laissez-faire*, as it looks at the viewpoint which holds that due to the theory of competition between legal orders, Member States should be free to regulate, since the mechanisms of economics under all circumstances in any case will result in the best state of regulation. In this way, the aim of economic efficiency would be achieved without establishing a structure which viewed the relationship between central competition law and national anti-competitive measures as one of conflict.

The sixth chapter deals with a paradigm which could be characterised as that of constitutionalism. Here, such an understanding of the doctrine, *i.e.* that the principles governing the distribution of competences between the Community and the Member States dictate which anti-competitive measures are lawful and which are not, is addressed.

The final chapter of *Part Four* makes a comparative evaluation of the various versions of the doctrine already examined, and relates these to the overall objective as well as to the assertion of the thesis as stated above in *Section 1.2*. At this point, further explanation will be set out as to why ultimate legal principles ensuring the coherence of the two legal orders are not to be found and why the equilibrium of the case law of the European Court of Justice has changed from time to time. This explanation, as stated above, is based

on the perspective of multi-level governance. As an alternative, a helpful, novel vision is presented.

In the last part, *Part Five*, some final remarks are stated.



**Part Two**

**The Evolution of  
the European Doctrine**

The sub-objective to be reached in this part is the following:

What legal principles does the European Court of Justice, from an evolutionary perspective, apply in its decisions when reviewing the issue of coherence between central competition law and anti-competitive state measures?<sup>25)</sup>

The analysis will take on an evolutionary approach. The European Court of Justice's assessment of anti-competitive state measures with regard to Articles 3(g), 5(2) and 85 EC has, generally speaking, evolved gradually. Initially, as will be seen in the analysis of the so-called preliminary cases, the Court almost completely ignored the issues analysed here.<sup>26)</sup> Later, the Court, in the *INNO* Case, introduced a completely new, but not very clear, preliminary version of a general principle governing the interaction of Articles 3(g) and 5(2) with one of the competition provisions.<sup>27)</sup> It then seemed to concentrate on formulating a test for how to more precisely implement this general principle. The first initiative in this direction was taken in *Leclerc* and *Cullet*, and the formulation of a final test seems settled by the *Van Eycke* Case. This body of law appears rather flexible, as one could never predict whether the Court would examine the possibly unlawful measures<sup>28)</sup> or not.<sup>29)</sup> At times,

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- 25) Parts of this analysis have previously been published in: Bøegh Henriksen, Ulla, *Anti-Competitive State Measures in the European Community. An analysis of Decisions of the European Court of Justice*, Copenhagen, 1994.
- 26) See the *Walt Wilhelm*, *Deutsche Grammophon*, *Continental Can*, *Capolongo*, *Geddo*, and *ENCC* Cases. For a full citation of the cases, see the analysis of the case in question below or the *Selected Bibliographical References*.
- 27) For a full citation, see the analysis of the case below or the *Selected Bibliographical References*.
- 28) See the *Buyts*, *Duphar*, *van de Haar*, *Leclerc*, *Cullet*, *Saint-Herblain*, *Gratiot*, *Michel Leclerc*, *Chabaud*, *Piszko*, *Binet*, *Gontier*, *Ferey*, *Chiron*, *Bulk Oil*, *Asjes*, *Lefèvre*, *Vlaamse Reisbureaus*, *Aubert*, *Libraires*, *Van Eycke*, *Ahmed Saeed*, *Alsthom*, *Chapuis*, *Morais*, *Güterfernverkehr*, *Meng*, *Ohra*, *Heukske*, *Delta*, *Peralta*, *van Schaik*, *Leclerc-Siplec*, *Spediporto*, *DIP*, *Esso* and *Sodemare* Cases. For a full citation of the cases, see the analysis of the case in question below or the *Selected Bibliographical References*.

anti-competitive state measures could seem completely unlawful. However, the equilibrium established between center and periphery would constantly swing, today being mainly at the state level, so that Member States in actual fact again must be considered to have the right to enact measures within the economic sphere despite the existence of the doctrine on Articles 3(g), 5(2) and 85 EC. To demonstrate this evolution, and thereby fulfil the above sub-objective, thirty-nine judgments have been chosen for analysis in the following chapters.<sup>30)</sup> They will be analysed in chronological order, as the development of the Court's doctrine can be best understood in this way. The evolution is traced pursuant to the actual outcomes of the cases in relationship to the legal principles applied by the European Court of Justice to mediate between the two levels of governance.

In the final chapter of this part, *Chapter 8*, the results of the analysis will be summed up, and the strengths and weaknesses of the legal principles applied by the European Court of Justice to establish the point of balance between center and periphery will be considered. Initially, however, the provisions themselves, *i.e.* Articles 3(g), 5(2) and 85-86 EC, will be introduced with regard to their individual application.

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29) See the *van Tiggele*, *Roussel*, *Clair* and *ERT* Cases. For a full citation of the cases, see the analysis of the case in question below or the *Selected Bibliographical References*.

30) *I.e.* the cases mentioned in the four previous footnotes, except for the *Saint Herblain*, *Gratiot*, *Michel Leclerc*, *Chabaud*, *Piccolo*, *Binet*, *Gontier*, *Ferey*, and *Chiron* Cases, because these are more or less just reproductions of earlier cases. For a full citation of these cases, see the *Selected Bibliographical References*.

## 2. The Individual Application of Articles 3(g), 5(2) and 85-86 EC Respectively

This chapter has the aim of presenting Articles 3(g), 5(2) and 85 EC further in order to provide a greater understanding of their application. For the sake of providing relevant background knowledge, Article 86 EC is also briefly presented. The presentation focuses on the general as well as the individual, as opposed to the interacting, application of the provisions.

### 2.1. Article 3(g) EC

Article 3 EC is placed in Part One of the Treaty which carries the headline *Principles*. In this part, the aim (Article 1 EC) and the tasks (Article 2 EC) of the European Community are stated. Naturally, these provisions are followed by a provision outlining the most important activities that the Community shall pursue. Sub-paragraph (g) of Article 3 EC concerns competition and provides that the activities of the Community shall include:

*"...the institution of a system ensuring that competition in the internal market is not distorted".*

The activities enumerated in Article 3 EC are in detail regulated in other provisions of the Treaty (the equivalent provisions of sub-paragraph (g) are found in Part Three, Title I, Chapter 1, containing rules on competition, of which Articles 85 and 86 EC are the most essential ones). Consequently, the provision is considered not to have direct effect,<sup>31)</sup> and does not contain separate rights and obligations of the Member States, the citizens and the companies, as these are to be found among other Treaty provisions and

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31) See Blaise, Jean-Bernard, "Respect des articles 85 et 86 du traité par les états membres. Legislation interne relative au prix du livre et au prix de l'essence", *Revue trimestrielle de droit européen*, Volume 21, 1985, Number 1, p. 563.



various legislation enacted by the institutions of the Community.<sup>32)</sup> Furthermore, the provision is so broadly formulated that it lacks the necessary legal precision to be of much practical use.<sup>33)</sup> However, this does not exclude the application of the provision as support of a broader interpretation of many other provisions of the Treaty.<sup>34)</sup>

Although undistorted competition in Article 3 EC is referred to as an *activity* that the Community shall include, it is just as correct to perceive it as an *objective* of the Community. The concept of undistorted competition is nowhere in the Treaty defined, especially not in more economic terms. Many commentators do, however, perceive it as referring to workable competition.<sup>35)</sup> At the same time, there is no doubt that the term has to be understood in relation to other objectives and instruments.

## 2.2. Article 5(2) EC

Article 5 EC is, just like Article 3 EC, situated in Part One of the Treaty concerning *Principles*. The provision reads as follows:

- 1) *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."*

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32) See Gulmann, Claus & Hagel-Sørensen, Karsten, *EU-ret*, Copenhagen, 1995, 3rd edition p. 40.

33) See Schermers, Henry G. & Pearson, Patrick J., "Some Comments on Article 5 of the EEC Treaty", in *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*", Edited by Baur, Jürgen F.; Hopt, Klaus J. & Mailänder, Peter K., Berlin, 1990, p. 1373.

34) See Hagel-Sørensen & Holst-Christensen, Nina, "Traktatens præambel og første del om principperne (art. 1 - 8c)", in *Karnovs EF-Samling*, Edited by Gulmann, Claus; Hagel-Sørensen, Karsten; Boye Jacobsen, Christen & Molde, Jørgen, Copenhagen, 1990, 3. edition, p. 32.

35) See e.g. Zuleeg, Manfred, "Artikel 3", in *Kommentar zum EWG-Vertrag*, Edited by von der Groeben, Hans; Thiesing, Jochen & Ehlermann, Claus-Dieter, Volume 1, Baden-Baden, 1992, 4. edition, p. 113-114.

- 2) "They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

The provision refers to three general obligations for the Member States: 1) the obligation to take all necessary measures; 2) the obligation to facilitate the institutions' achievement of tasks; and 3) the obligation to abstain from measures contrary to realisation of the Treaty's obligations.<sup>36)</sup> As previously indicated, it is only the third obligation which is of pertinence to the present analysis, *i.e.* the second paragraph of Article 5 EC. This obligation is characterised by being a general prohibition against action whereas the two former ones are general duties for action.

Similar to Article 3(g) EC, Article 5(2) EC is considered not to have direct effect and it is, as a point of departure, to be characterised as having been written as an *obiter dictum*,<sup>37)</sup> and consequently without independent legal force. Again, however, this provision is applied as a supportive provision when interpreting other Treaty provisions. In fact, Article 5 EC has grown in significance, and is now often seen as filling up holes of Community law.<sup>38)</sup> The exact extent of the provision's scope is, however, surrounded with uncertainty and great doctrinal disagreement.<sup>39)</sup> It is not possible to find much guidance from the European Court of Justice, as illustrated by the following sentence which has been designated the role of being the European Court of Justice's point of departure when interpreting Article 5(2) EC:<sup>40)</sup>

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36) See Schermers, Henry G. & Pearson, Patrick J., "Some Comments on Article 5 of the EEC Treaty", in *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*", Edited by Baur, Jürgen F.; Hopt, Klaus J. & Mailänder, Peter K., Berlin, 1990, 1. edition, p. 1363.

37) See *ibid.*, at pp. 1359 and 1363.

38) See Due, Ole, "Article 5 du Traité CEE. Une disposition de caractère fédéral?", in *Collected Courses of the Academy of European Law*", Florence, 1991, Volume 2, Book 1, p. 35; and Prechal, Sacha, "Case C-374/89, Commission v. Belgium, Judgment of the Court of 19 February 1991, not yet reported", *Common Market Law Review*, Volume 29, 1992, pp. 371-179.

39) See Constantinesco, Vlad, "L'article 5 CEE, de la bonne foi à la loyauté communautaire", in *Liber Amicorum Pierre Pescatore*, 1987, Baden-Baden, p. 99.

40) See *ibid.*, at p. 110.

*"This provision lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme."* <sup>41)</sup>

This sentence perfectly illustrates the opposite meanings attributed to Article 5 EC: either a strict interpretation only giving the provision life whenever interacting with other Treaty provisions (understood from the first part of the sentence); or a wide interpretation allowing for an understanding of the provision that is derived from general principles, directly or indirectly, appearing in the Treaty or secondary legislation (understood from the second part of the sentence). Because Article 5(2) EC has the potential of a wide scope, it is important to note that its content should depend on provisions elsewhere in the Treaty or arising from Community measures.<sup>42)</sup> Otherwise, measures that in themselves could be in conformity with the Treaty would be illegal if at the same time they jeopardised the attainment of Community objectives.<sup>43)</sup> More recent case law confirms a reading of Article 5 EC as dependent on other provisions of the Treaty. For instance, in the *Banchero* Case, it is stated that:

*"Article 5 requires Member States to carry out their obligations under Community law in good faith. It is, however, settled case-law that this provision cannot be applied independently when the situation concerned is governed by a specific provision of the Treaty."* <sup>44)</sup>

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41) See the *Deutsche Grammophon Case*, Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, Judgment of 8 June 1971, [1971] E.C.R. 497.

42) See Temple Lang, John, "Community Constitutional Law: Article 5 EEC Treaty", *Common Market Law Review*, Volume 27, 1990, Number 4, p. 646.

43) See Schermers, Henry G. & Pearson, Patrick J., "Some Comments on Article 5 of the EEC Treaty", in *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*", Edited by Baur, Jürgen F.; Hopt, Klaus J. & Mailänder, Peter K., Berlin, 1990, pp. 1372-1373.

44) See Case C-387/93, *Criminal proceedings against Giorgio Domingo Banchero*, Judgment of 14 December 1995, [1995] E.C.R. I-4683, at Ground 17.

The alleged connection between Articles 3(g) EC and 5(2) EC is, of course, that the objectives referred to in the latter provision are, among others, to be found in the former provision. To exemplify this, one could simply substitute *the objectives of this Treaty* in Article 5(2) EC with the wording of Article 3(g) EC. The provision would then read as follows: *They shall abstain from any measure which could jeopardize the attainment of the institution of a system ensuring that competition in the internal market is not distorted.*

### 2.3. Articles 85-86 EC

Of interest to private companies, the two most significant competition provisions are Articles 85 and 86 EC, which are found in Part Three, Title I, Chapter 1, containing rules on competition. As the field of competition represents one of the cornerstones of Community law and secondary legislation, and in particular as the amount of decisions of the Commission and the judgments of the European Court of Justice is endless, the following only serves the purpose of briefly introducing the provisions.

Articles 85(1), 85(2) and 86 EC have direct effect in the Member States.<sup>45)</sup> Both provisions are based on the principle of prohibition as opposed to that of control. They are formulated in general terms, but are specified in various secondary legislation. Infringement is sanctioned with considerable fines or, more simply, with an order to stop the unlawful activity.

Article 85 EC concerns the prohibition of cartels. In particular, it prohibits as incompatible with the common market:

*"...all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market".<sup>46)</sup>*

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45) See *inter alia* Case 127/73, *Belgische Radio en Televisie and Societ e belge des auteurs, compositeurs et  diteurs v. SV SABAM and NV Fonior*, Judgment of 30 January 1974, [1974] E.C.R. 51, at Ground 16.

46) See Article 85(1) EC.

Accordingly, four conditions have to be fulfilled at the same time, namely 1) an existence of agreements, decisions or concerted practices; 2) the execution of the unlawful conduct by undertakings or associations of undertakings; 3) an effect on trade between Member States; and 4) an object or effect of the activity that prevents, restricts or distorts competition.

The first condition, *i.e.* the existence of agreements, *etc.*, is wide. For example, the agreements do not have to be legally binding, nor in writing, and might even take form as an implied declaration of intention. This broad interpretation of the rule is in particular supported by the fact that concerted practices are also included in the wording of the provision. This concept, however, has to be distinguished from that of parallel behavior.

The concept of undertakings or associations of undertakings (the second condition), is equally broadly understood. It includes private companies as well as, in principle, publicly owned companies or companies granted special or exclusive rights. One criterion is that it is possible to impose fines on the companies in question. All kinds of production is included, *i.e.* both tangible products as well as services. Also, companies situated outside the Community may be included. On the other hand, agreements between parent companies and subsidiaries are not included.

The purpose of the third condition, *i.e.* that of an effect on trade between Member States, is to distinguish Community law from national law.<sup>47)</sup> Again, a broad understanding prevails, as it is not necessary that an effect actually has occurred. As long as the effect is probable, however marginally, the condition is fulfilled.

The final condition concerns the economic effect of the conduct on the market. Due to the wording "*object*", an actual effect does not have to be proved, at least not with respect to agreements. It is, however, more questionable whether a concerted practice can be classified as existing if no effect on the market is observed. Article 85(1) EC itself enumerates, however not exhaustively, the most classic types of prohibited conduct, namely those which:

"(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

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47) See Chapter 18 below concerning *Distribution of Competences*.

*(b) limit or control production, markets, technical development, or investment;*

*(c) share markets or sources of supply;*

*(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(e) make the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. "*

According to Article 85(2) EC, unlawful agreements, or unlawful parts thereof, prohibited by Article 85(1) EC are automatically void:

*"Any agreements or decisions prohibited pursuant to this Article shall be automatically void."*

Finally, according to the third paragraph of Article 85 EC, it is possible for companies to obtain an exemption from the first paragraph:

*"The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

*- any agreement or category of agreements between undertakings;*

*- any decision or category of decisions by associations of undertakings;*

*- any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

*(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*

*(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."*

Only the Commission has the competence to grant exemptions and only based on prior applications from the companies. The more specific conditions for exemption are stated in Regulation 17/62. In addition, certain categories are automatically exempted according to specific regulations - examples of such are agreements of franchising and exclusive distribution.

Article 86 EC regulates another essential field of competition, namely that of monopolies. Accordingly, abuse of dominant position is prohibited:

*"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."*<sup>48)</sup>

It is understood from the provision that abuse by monopolies (one company) as well as oligopolies (several companies) is included in its scope. Publicly owned companies and companies granted special or exclusive rights are, in principle, regulated by Article 86 EC. In deciding whether dominance exists, it is first and foremost important to define the geographical market of the relevant product and the company's or companies' share in it as opposed to the competitors'. Also, the criterion of degree of substitution of the product in question with other products is an important indicator of dominance.

It is furthermore understood, that the condition prevails that there is an effect of trade between Member States.

It is finally clear, that dominance in itself is not prohibited - it is only the abuse of such which is dangerous. Article 86(2) EC enumerates examples of such abuse, namely such which consists in:

*"(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

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48) See Article 86(1) EC.

*(b) limiting production, markets or technical development to the prejudice of consumers;*

*(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

On this background, it should be understood that the alleged connection between Article 85 EC and Articles 3(g) and 5(2) EC is, put simply, that the former provision constitutes the elaboration of Article 3(g) EC, which, as indicated above, constitutes one of the aims referred to in Article 5(2) EC. The more exact connection between the three provisions will now be examined below based on the decisions of the European Court of Justice.



### 3. Towards the Formulation of a General Principle

Six so-called preliminary judgments, which directly or indirectly discuss the compatibility of anti-competitive state measures and the competition provisions of the Treaty, are briefly discussed below in order to describe the early position of the Court regarding this issue. Then the *INNO* Case is discussed, as the Court here for the first time took the opportunity to substantiate, in a serious manner, the interrelationship of Articles 3(g), 5(2) and one of the competition provisions of the Treaty (Article 86 EC). Finally, five cases following *INNO* have been selected for analysis, as these, despite that case, disregard the position taken therein. In conjunction, the cases analysed in this chapter point in the direction that the Court, in the early days of its case law, did only read the three provisions as not interacting in the manner in which it would later regard them as so doing. In other words, it took a strict minimalist point of view in this field.

#### 3.1. Six Preliminary Judgments

The first of the cases to be dealt with here, *Walt Wilhelm*, can be seen as representing a very initial step towards the formulation of a general principle governing the interaction of Articles 3(g), 5(2) and 85 EC. The other preliminary cases are primarily of significance here because they demonstrate that the Court originally did not find such a connection between these provisions: with the result that state measures were not in danger of condemnation.

The *Walt Wilhelm* Case was decided already in 1969.<sup>49)</sup> In this case no national law was challenged directly, but it is of particular relevance to the present analysis in that the Court established the principle which would become the "grandmother" of the principles governing the interaction among Articles 3(g), 5(2) and 85 EC.<sup>50)</sup> This was the principle that Member States must neither introduce nor retain measures capable of prejudicing the

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49) See Case 14/68. *Walt Wilhelm and Others v. Bundeskartellamt*, Judgment of 13 February 1969, [1969] E.C.R. I.

50) This was, *inter alia*, referred to in the *Leclerc* Case.

practical effectiveness of the Treaty<sup>51)</sup> or its full and uniform application.<sup>52)</sup> These principles were stated in the context of deciding the relationship between competition law at the Community level and competition law at the state level, *i.e.* the more traditional relationship between these two levels of competition law.<sup>53)</sup>

In the *Deutsche Grammophon* Case the Court avoided interpreting Article 5 EC in relation to Article 85 EC, apparently because it found that the exercise of an exclusive right did not exhibit elements of contract or concerted practice referred to in Article 85(1) EC.<sup>54)</sup> Instead, it was of importance to take into consideration other provisions of the Treaty, in particular those regarding free movement of goods. In other words, the Court took a completely minimalist approach as it rejected a possible application of these provisions to a national measure.<sup>55) 56)</sup>

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51) See the *Walt Wilhelm* Case, at Ground 6.

52) See *ibid.*, at Ground 9.

53) In the main action, the companies, which produced coal-tar dyes and mineral colours, had met from time to time with representatives of French, English and Swiss companies to establish uniform prices. This eventually led to several customers filing complaints with the *Bundeskartellamt*, which found that the agreement among the producers was contrary to the German Law against Restraint of Competition. The companies responded by appealing to the appropriate court, *i.e.* the *Kammergericht*. The companies denied that there was any agreement among them and they attacked the *Bundeskartellamt's* application of the German cartel law to the same conduct which was then also being investigated by the Commission pursuant to Community law.

54) See Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, Judgment of 8 June 1971, [1971] E.C.R. 497, at Ground 7.

55) The facts of the case were, in essence, that *Deutsche Grammophon Gesellschaft mbH* (hereinafter referred to as 'DG') was a producer of records. One of its distributors was *Metro-SB-Großmärkte GmbH* (hereinafter referred to as 'Metro'), situated in Hamburg. Because Metro did not adhere to DG's price schedule, DG terminated its business relations with Metro at the end of October 1969. Despite this, in the beginning of 1970 Metro succeeded in obtaining, through a Hamburg wholesaler, records with the Polydor trade-mark, and which DG had manufactured in Germany. These records had been supplied by DG to its Paris subsidiary. Metro sold these records to consumers at a price below that fixed by DG for the area of Germany. An examination of whether the German copyright law was compatible with the Treaty became necessary when DG sought to prohibit sales by Metro. This law permitted companies to rely on their exclusive right of distribution to prohibit parallel imports.

56) Others have interpreted this judgment in a complete opposite direction as they see it as the Court signaling to litigants and others that the Court might recognize that the deficiency of the EC Treaty instruments in addressing actions of governments could be

In contrast to the two previous cases, the *Continental Can Case* did not in any respect concern the compatibility of national legislation with the competition provisions.<sup>57)</sup> Yet the case is important because the Court used it to thoroughly explain the coherence of Article 86 and Article 3(g) EC, with the result of possibly including mergers within the scope of the former provision.<sup>58)</sup> In more specific terms, the Court held that the stated purpose of Article 3(g) EC was decisive,<sup>59)</sup> and that because this provision provides for the institution of a system ensuring that competition in the Common Market is not distorted, it requires all the more that competition must not be eliminated.<sup>60)</sup> On the basis of its interpretation of Article 3(g) in relation to Article 86 EC, the Court held that violation of Article 86 EC may occur if a company with a dominant market position strengthens this position such as to attain a degree of dominance which substantially fetters competition, *i.e.* such that only companies whose behavior is dependent upon the dominant company remain in the market.<sup>61)</sup> In sum, the case is of significance to the present analysis because it demonstrates

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rectified by the establishment of an independent norm emerging from a broad interpretation of Articles 3(g) and 5(2) EC, see *e.g.* Waelbroeck, Michel, "Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE", in *Du droit international au droit de l'intégration - Liber Amicorum Pierre Pescatore*, Edited by Capotorti, F.; Ehlermann, C.-D.; Frowein, J.; Jacobs, F.; Joliet, R.; Koopmanns, T. & Kovar, R., Baden-Baden, 1987, p. 787.

- 57) See Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities*, Judgment of 21 February 1973, [1973] E.C.R. 215.
- 58) The case was begun by an action brought to the European Court of Justice in 1972 seeking the annulment of the Commission's decision of 9 December 1971. In the contested decision the Commission had found that Continental Can Company Inc. (hereinafter referred to as 'Continental Can') had violated Article 86 EC by acquiring, through the Europemballage Corporation (hereinafter referred to as 'Europemballage'), approximately 80% of the shares and convertible debentures of Thomassen & Drijver-Verbliva N.V. *Inter alia*, the applicants maintained that the Commission was trying to grant itself new authority to control mergers of companies, and was thereby exceeding its powers. The applicants asserted that the Commission's decision was based on an erroneous interpretation of Article 86 EC.
- 59) See *ibid.*, at Ground 23.
- 60) See *ibid.*, at Ground 24.
- 61) See *ibid.*, at Ground 26. Nevertheless, the contested decision was annulled because the Commission had not made sufficiently clear the facts and the reasoning on which its

how the application of the competition provisions may be expounded upon and, in particular, that the provisions should be interpreted in light of the aims of the Treaty. Having reached this point, the Court's later step, interpreting the competition provisions to include prohibition of national anti-competitive measures, does not seem so great.

Four months after delivering its decision in the *Continental Can Case*, the Court, as in the *Deutsche Grammophon Case*, avoided a question brought by a national court regarding whether a national law could be held to violate Article 86 EC.<sup>62)</sup> The Court did this in the *Capolongo Case*, in which it was asked whether the imposition of a duty on the import of products from other Member States, the revenue of which was used to finance the activities of an agency governed by public law, could constitute an infringement of Article 86 EC. In this connection, Advocate General Roemer had expressed the opinion that Article 86 EC applies only to business conduct, not to a state measure establishing a tax for the benefit of a dominant firm. However, as mentioned above, the question remained unanswered by the Court itself.

In the *Geddo Case*, the issue of the compatibility of national legislation was once again raised.<sup>63)</sup> The numerous questions referred to the European Court of Justice pursuant to Article 177 EC concerned a charge levied on purchases of paddy rice. The revenue of this charge was used for the benefit of a public entity which carried out activities involving research, technical aid and publicity for the purpose of increasing rice consumption. The Court was *inter alia* asked whether the imposition of such a charge and the particular use thereof could constitute an abuse of a dominant position within the meaning of Article 86 EC. The Court replied that Article 86 EC does not apply to a charge imposed for the purpose of financing national assistance programs and hence once again overtly took a minimalist attitude towards this question.<sup>64)</sup> It should be noted that the national legislation in question was only analysed in relation to Article 86 EC, and therefore not in relation to Article 5 EC. This may

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decision had been based.

62) See Case 71/72, *Carmine Capolongo v. Azienda Agricola Maya*, Judgment of 19 June 1973, [1973] E.C.R. 611.

63) See Case 2/73, *Riseria Luigi Geddo v. Ente Nazionale Risi*, Judgment of 12 July 1973, [1973] E.C.R. 865.

64) See *ibid.*, at Ground 9.

partially explain why the Court failed to apply Article 86 EC (or 85 EC) as extensively as it later would.

The national legislation at issue in the last of these selected preliminary cases, the *ENCC* Case, concerned the establishment of the public agency ENTE and its collection, as well as subsequent redistribution, of duties on paper products originating from other Member States.<sup>65)</sup> The Court was, *inter alia*, asked to decide whether the redistribution to national companies infringed the rules on competition laid down in Articles 85 and 86 EC. The Court held that Articles 85 and 86 EC were only applicable to undertakings' activities.<sup>66)</sup> Apparently, this position may be explainable from the Court's simultaneous observation that ENTE was to be considered as an institution of a public nature to which Articles 85 and 86 EC were not considered applicable.<sup>67)</sup> Again, Article 5 EC was not considered at all.

In sum, the discussion of the preliminary judgments demonstrates that the Court was, at this very early stage, only ready either to completely ignore the issues at stake or to take into account only a minimalist approach in the interpretation of Articles 3(g), 5(2) and the competition provisions, such that the mentioned provisions only were considered as applicable to companies' activities and not to state measures. However, it appeared that the Court at times had not made up its mind as to which direction to go as it did give some weight to the interaction in the *Walt Wilhelm* Case and at the same time was ready to give Article 86 EC an expounded application on the basis of Article 3(g) EC in the *Continental Can* Case.

### 3.2. The Introduction of a General Principle in the *INNO* Case

It was not until the *INNO* Case of 1977, which concerned Belgian legislation fixing binding retail prices on tobacco, that the Court established a preliminary version of a general principle governing the interrelationship of Articles 3(g), 5(2) and one of the

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65) See Case 94/74, *Industria Gomma Articoli Vari, IGAV v. Ente Nazionale per la Cellulosa e per la Carta, ENCC*, Judgment of 18 June 1975, [1975] E.C.R. 699.

66) See *ibid.*, at Grounds 33/34 and 37.

67) See *ibid.*, at Ground 35.

competition provisions of the Treaty (Article 86 EC).<sup>68)</sup> A nine-judge panel of the Court established in this case, therefore, the basis of all future case law developments in this field; accordingly, the case is analysed in detail below.

### 3.2.1. The Facts

The case was referred to the Court pursuant to Article 177 EC and concerned four questions from the Belgian Hof van Cassatie. These questions were raised in proceedings between the Belgian supermarket chain GB-INNO-BM (hereinafter referred to as 'INNO') and the association of tobacco retailers, Vereniging van de Kleinhandelaars in Tabak (hereinafter referred to as 'ATAB'). ATAB brought the action against INNO to stop INNO from selling cigarettes at a price lower than that stated on so-called tax labels.

In Belgium, tobacco was subject to an *ad valorem* excise duty, which was calculated based on the retail selling price including VAT. The procedure was for the manufacturer or importer to set the basic price of the tobacco product, then purchase tax labels and affix one label to each product before it was sent to the retailer. When buying the tax labels, the manufacturer or importer paid, at this one time, two charges, *i.e.* excise duty and VAT. The tax label stated the retail selling price and retailers were prohibited from selling the tobacco product for a price other than that appearing on the label. This system was established, among others, pursuant to Article 58 of the Belgian Value-Added Tax Code of 3 July 1969.

The question of significance to the present analysis was very long, but may be abridged into the issue of whether the above measure was in conformity with Articles 3(g), 5(2) and 86 EC.

### 3.2.2. The Position of the Court

After having remarked that,

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68) See Case 13/77, *NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak (ATAB)*, Judgment of 16 November 1977, [1977] E.C.R. 2115.

*"In the present state of Community law, it is for each Member State to choose its own method of fiscal control over manufactured tobacco on sale in its territory"<sup>69)</sup>,*

the Court went on to make certain general observations. These include the importance for Member States of tobacco taxes as a source of revenue, the policy considerations supporting the prohibition on charging a price other than the retail selling price, and the fact that retailers are not free to determine their own prices.

In its analysis of the question, the Court, rather peculiarly, began by restating the *Dassonville* standard,<sup>70)</sup> which is used to determine whether the laws of Member States violate Article 30 EC.<sup>71)</sup>

Without further explanation, the Court went on to analyse the provisions referred to in the question. The Court first announced that the general policy objective of Article 3(g) is made specific in the Treaty's competition provisions, including Article 86 EC.<sup>72)</sup> The Court then reproduced the content of Article 5(2) EC.<sup>73)</sup>

Of particular interest is the Court's interpretation of Article 86 EC, which represents a preliminary version of what in *Leclerc* would become the general principle governing the interaction of Articles 3(g), 5(2) and the competition provisions of the Treaty:

*"Accordingly, while it is true that Article 86 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness"<sup>74)</sup>. Thus Article 90 provides that, in the case of public undertakings to which Member States grant special or exclusive rights, Member States shall*

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69) See *ibid.*, at Ground 14.

70) See Case 8/74, *Procureur du Roi v. Benoit and Dassonville*, Judgment of 11 July 1974, [1974] E.C.R. 837, at Ground 5.

71) See the *INNO* Case, at Ground 28.

72) See *ibid.*, at Ground 29.

73) See *ibid.*, at Ground 30.

74) See *ibid.*, at Ground 31.

*neither enact nor maintain in force any measure contrary inter alia to the rules provided for in Articles 85 to 94<sup>75)</sup>. Likewise, Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty<sup>76)</sup>. At all events, Article 86 prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision. " 77)*

The Court's analogy to Article 90 EC was as abrupt as its restatement of the *Dassonville* standard. Article 90 EC provides that the measures of Member States, when connected to public companies and companies granted special or exclusive rights, are contrary to the competition provisions.<sup>78)</sup>

This ruling did not explicitly state whether the Belgian legislation was contrary to Articles 3(g), 5(2) and 86 EC, but it stressed that the Belgian Court would have to take several provisions into consideration, *i.e.* Articles 3(g), 5, 30, 34, and 85-94 EC.<sup>79)</sup>

### 3.2.3. Commentary

As suggested above, although the Court, in comparison to the preliminary judgments, laid down a foundation for the law by stating the preliminary version of a general principle regarding the interrelationship of Articles 3(g), 5(2) and 86 EC, it also left some issues unresolved.

The preliminary version of a general principle to be derived from Ground 31 of the decision is that Member States are obliged to avoid adopting or maintaining in force any measure which could deprive Article 86 EC of its effectiveness. This principle originates

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75) See *ibid.*, at Ground 32.

76) See *ibid.*, at Ground 33.

77) See *ibid.*, at Ground 34.

78) See *ibid.*, at Ground 32.

79) See *ibid.*, at Ground 36.



from the *Walt Wilhelm Case*.<sup>80)</sup> The primary distinction between that case and this one is that in the present case a national law was clearly challenged; it is for this reason that, given the scope of this analysis, the *INNO Case* should be studied with greater interest than the *Walt Wilhelm Case*.

This early version of a general principle can be read as establishing a limit on state action.<sup>81)</sup> The Court also reproduced Article 90 EC.<sup>82)</sup> Due to the use in Ground 33 of the word "likewise", it is probable that the purpose of this sentence is to provide support for a progressively broad interpretation of the competition provisions.<sup>83)</sup> In the words of Verstrynge, Article 90 EC may therefore be used to give extra strength to Article 5 EC obligations when the specific conditions of Article 90 EC are met.<sup>84)</sup>

Another issue is the role of the *Dassonville* standard in Ground 28, and of Ground 35<sup>85)</sup> regarding Articles 30 and 34 EC. Just like the sentence about Article 90 EC, the referral to trade barriers comes rather abruptly in the decision. Hoffman suggests that Ground 35 was inserted due to the recognition of Article 30 EC as the "bright line" dividing the Member States' economic policies and the Community policy of integrating the common market. Hoffman argues that the Member States did not surrender the power to regulate their own economies, but rather that such power is explicitly limited by Article 30 to the extent

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80) See *Section 3.1., supra*, where this principle was called "the grandmother" of the principles governing the interaction of the provisions examined herein.

81) Marengo, Giuliano, has a completely opposing and rather restrictive interpretation, see e.g. "Le Traité CEE interdit-il aux Etats Membres de restreindre la concurrence?", *Cahiers de Droit Européen*, Volume 22, 1986, Number 1, p. 304, or "Mesures étatiques et liberté de concurrence", *revue trimestrielle de droit européen*, Volume 20, 1984, Number 1, p. 531.

82) See the *INNO Case*, Ground 32. Also see *Chapter 14 concerning Control of Anti-Competitive State Measures Through Article 90 EC*.

83) The text of Ground 33 is quoted above.

84) See Verstrynge, Jean-François, "The Obligations of Member States as Regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1989, p. 17-25.

85) This Ground provides: "In any case, a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34, which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect."

that its exercise interferes with the free movement of goods across State borders.<sup>86)</sup> In view of the later *Leclerc Case*<sup>87)</sup> and the observation of the Court in Ground 14 that it is for each Member State to choose its own method of fiscal control, a possible interpretation in line with Hoffman's is to understand this passage as meaning that national legislation containing anti-competitive elements would be acceptable if the appropriate legislative competence is held by the Member State, unless the legislation is contrary to Article 30 EC.

The Court primarily analyses Article 86 EC. However, Ground 33 includes Article 85 EC among the provisions from which Member States may not protect companies.<sup>88)</sup> There is reason to believe that this ruling is applicable to Article 85 EC as well.<sup>89)</sup>

The Court does not deal with Articles 85 and 86 EC simultaneously because the Belgian court only raised issues regarding Article 86 EC. According to the Belgian court, the abuse of a dominant market position occurred "*because the manufacturers and importers of manufactured tobacco can oblige the retailers in a Member State to comply with the selling prices to the consumers fixed by the former*".<sup>90)</sup> One might wonder, however, why this national court did not refer to Article 85 EC. In fact, this would seem more obvious, because sub-paragraph a) in this provision explicitly prohibits activities which directly or indirectly determine purchase or selling prices.<sup>91)</sup> The origin of the challenged Article 58 of the Belgian Value-Added Tax Code was, as claimed by INNO, the agreements of the large tobacco producers which precluded distributive companies from granting discounts on the sale

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86) See Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, p. 13, Footnote 13.

87) See *Chapter 6 concerning Towards the Formulation of a Test for Application of the General Principle*, where an analysis of this case is performed.

88) The text of Ground 33 is quoted above.

89) In this, Ehrlicke, Urteil, agrees, see "Staatliche Regulierungen und EG-Wettbewerbsrecht. Die neueste Entwicklung - das 'Van Eycke'-Urteil des EuGH von 21. september 1988", *Wirtschaft und Wettbewerb*, Volume 41, 1991, p. 184, Footnote 13.

90) See the *INNO Case*, at Ground 24.

91) See *Section 3.3.* below concerning a similar legislation in the *van de Haar Case*.

of cigarettes.<sup>92)</sup> The most plausible explanation for the national court's failure to refer to Article 85 EC is the widespread ignorance of Community law.<sup>93)</sup>

Aside from the issue of the origin of the challenged Article 58, there remains a national statute, serving a very important fiscal policy goal, which must be analysed. By determining the maximum price, the public authorities are in a good position to collect the taxes connected to the sale of tobacco products. In this respect, the measure appears to further a valid policy objective which, in addition, may be seen as concerning a competence belonging to the Member State. However, the apparent policy objectives behind the setting of minimum prices, are to protect small retailers against bigger rivals by eliminating price competition, and perhaps also to protect the general health of the population. According to a strict market philosophy, these are not legitimate policy objectives. Nevertheless, again taking into consideration the fact that the appropriate competence is most likely that of the Member States, the legislation should in this light be allowed to stand. It should be added, however, that this determination of the true policy objectives of national legislation is fraught with difficulties because it is possible for a Member State to hide an attempt to protect a cartel behind an acceptable objective and make the legislation appear to be included within a Member State's area of competence.<sup>94)</sup>

In sum, the Court, with this case, left the door open for further developments of a doctrine in the analysed field. However, in the cases immediately to follow *INNO*, this door was to be closed again, at least for a while.

### 3.3. Disregardance of the General Principle in the Cases Following *INNO*

It was not until the Court delivered the *Leclerc* Judgment in 1985 that the Court stated unequivocally that it would further develop the principle of the 1977 *INNO* Case. In

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92) See the *INNO* Case, p. 2121.

93) Gyselen comments in this connection in quite direct terms that it was an error of the Court to examine the question from an Article 86 angle. See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC65.

94) See Chapter 18 below concerning *Distribution of Competences*.

the intervening years, the *INNO* approach was generally ignored, and the impression developed that it would be an isolated case. *Inter alia*, this impression was supported by the fact that the Court dismissed questions from referring national courts asking whether Articles 5 and 85 EC, when interpreted together, prohibit Member States from applying certain anti-competitive state measures. To understand this unusual development, five selected interim cases, all concerning national price regulations, are examined below.

The first case to be analysed is the *van Tiggele* Case, which had many similarities to the *INNO* Case.<sup>95)</sup> The main similarity was the fact that the national legislation at stake in *van Tiggele* also concerned a price regulation; the purpose of this regulation was to avoid ruinous price competition between small and large distributors. Another similarity was the history of the challenged legislation. Dutch manufacturers of Holland's gin and "vieux" (a cognac-flavoured drink) had long been applying, by mutual agreement, a system of resale price maintenance, which distributors were required to observe. An important difference between the cases, however, was that the legislation here established only a system of minimum retail prices. In addition, there was apparently no tax aspect in *van Tiggele*. Despite the fundamental similarities of the facts, the two cases were determined rather differently by the Court. During the proceedings, the Court was requested to deliver a preliminary ruling on two questions concerning Articles 30 and 92 EC. *Inter alia*, the Court found that the minimum retail price legislation violated Article 30 EC because it could have an adverse effect on the marketing of imported products. Peculiarly, despite the obvious similarities to the *INNO* Case and the history of the legislation regarding anti-competitive agreements, the Court did not consider the compatibility of the national legislation with Articles 3(g), 5 and 85 or 86 EC. The primary reason why the Court did this is probably because the referring Court had chosen not to ask this question. Nevertheless, the Commission<sup>96)</sup> had made observations on this matter, and the Advocate-General<sup>97)</sup> had commented upon those observations. The Court therefore had ample excuse to address the question. The Court may have decided not to address the issue because the legislation had already been found

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95) See Case 82/77, *Openbaar Ministerie of the Kingdom of the Netherlands v. Jacobus Philippus van Tiggele*, Judgment of 24 January 1978, [1978] E.C.R. 25.

96) See *ibid.*, at p. 35.

97) See *ibid.*, at pp. 46-49.

incompatible with Article 30 EC. Therefore, the case can not necessarily be interpreted as a signal that the Court had abandoned the *INNO* approach.

In the *Buys* Case, by contrast, despite the fact that the referring French court had asked the crucial question of whether Articles 5 and 85 EC, when interpreted together, prohibit Member States from applying national legislation which freezes prices, the Court did give the impression of having taken one step backwards, abandoning the *INNO* approach completely.<sup>98)</sup> The Court replied in the negative to the question that the national court put forward concerning Articles 5 and 85 EC. In the Court's decision, it first cited Articles 5 and 85 EC, and then reasoned that, having regard to the material sphere of Article 85's application, national rules freezing the prices of products subject to Community legislation, which cannot be regarded as an agreement between undertakings, a decision by an association of undertakings or a concerted practice are therefore not covered by the terms of Article 85.<sup>99)</sup> This case should, therefore, be understood as re-launching the minimalist approach so that Articles 5 and 85 EC are each given restricted application.<sup>100)</sup>

The *Roussel* Case is yet another example of the Court avoiding answering a question concerning the interpretation of Articles 3(g) and 5 in conjunction with Articles 85 and 86 EC.<sup>101)</sup> The reason for this could be that the Court ruled that the challenged provisions were contrary to Article 30 EC. It should be understood that the provisions at issue were designed to reduce the high prices charged on the Dutch market for imported medicines. The provisions sought to do this by prohibiting the sale of an imported medicine at a price higher than the manufacturer's basic price last charged in the country of origin before a stipulated date. Like the *Buys* Case, the contested price system involved in this action also

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98) See Case 5/79, *Procureur Général v. Hans Buys, Hans Pesch, Yves Dullieux and Denkvit France S.à.r.l.*, Judgment of 18 October 1979, [1979] E.C.R. 3203.

99) See *ibid.*, at Ground 30.

100) See e.g. Galmot, Yves & Biancarelli, Jacques, "Les réglementations nationales en matière de prix au regard du droit communautaire", *revue trimestrielle de droit européen*, Volume 21, 1985, Number 1, p. 293, and Paulis, Emil, "Les Etats peuvent-ils enfreindre les articles 85 et 86 du Traité C.E.E.?", *Journal des Tribunaux*, Volume 104, 1985, Number 5332, p. 211.

101) See Case 181/82, *Roussel Laboratoria BV and Others v. The Netherlands*, Judgment of 29 November 1983, [1983] E.C.R. 3849, at Ground 26.

lacked private anti-competitive restraints; it was a price freeze with a regulatory character, but with a discriminating impact.

The minimalist approach of the *Byys* Case was also applied in the *Duphar* Case, although much more tersely.<sup>102)</sup> The Court emphasised that Articles 85 and 86 EC form part of the competition rules "applicable to undertakings", and that these are not relevant when determining whether the legislation of the type at issue in the main proceedings is in conformity with Community law.<sup>103)</sup> It should be added that the contested legislation concerned only very indirectly the price fixing of pharmaceutical products.

The final case among the five selected interim cases is the *van de Haar* Case.<sup>104)</sup> This case was similar to the *INNO* Case. The Court was asked, *inter alia*, whether a provision of the national tobacco excise code was compatible with Article 5 in conjunction with one of the competition provisions, in this case Article 85 rather than Article 86 EC. The Dutch Tobacco Excise Code prohibited the sale of tobacco products, other than to retailers, at a price lower than that appearing on the excise label on the tobacco product. The Code therefore set only a minimum price, and it did this for the purpose of protecting small retailers from competition. *Kaveka de Meern BV* was charged in the main proceedings with having violated the code by offering tobacco products for sale to persons other than retailers at prices lower than those appearing on the excise labels. When analysing the Code, the Court was as ambiguous as ever. The Court's decision contained at the same time elements of the *INNO* approach:

*"Whilst it is true that Member States may not enact measures enabling private undertakings to escape the constraints imposed by Article 85 of the Treaty,"*<sup>105)</sup>

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102) See Case 238/82, *Duphar BV and Others v. The Netherlands State*, Judgment of 7 February 1984, [1984] E.C.R. 523.

103) See *ibid.*, at Ground 30.

104) See Joined Cases 177 and 178/82, *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV*, Judgment of 5 April 1984, [1984] E.C.R. 1797.

105) See *ibid.*, at Ground 24.

and the minimalist approach of the *Buy's* Case:

*"the provisions of that article belong to the rules on competition 'applying to undertakings' and are thus intended to govern the conduct of private undertakings in the common market. They are therefore not relevant to the question whether legislation such as that involved in the cases before the national court is compatible with community law."*<sup>106)</sup>

Regarding this paradoxical reasoning, Waelbroeck, ironically, but also very incisively, remarked that it was surprising to notice how the Court, in its analysis of legislation identical to that of the *INNO* Case, re-launched the approach adopted in that case but nevertheless arrived at a diametrically opposite result.<sup>107)</sup> Marengo, on the other hand, prefers the minimalist approach, and therefore does not criticise the Court's reasoning; instead he asserts that the Court's reasoning should be endorsed without reservation.<sup>108)</sup> As the facts of this case were almost identical to those of the *INNO* Case, the Court could therefore hardly ignore the approach of that case. This must be the explanation for the Court's peculiar reasoning, although it must also be said that the Court most likely preferred the minimalist approach.

In sum, an examination of these five interim cases provides little guidance as to the extent of Member States' obligations pursuant to Articles 3(g), 5(2) and 85 EC. They do in conjunction with the other cases dealt with in this chapter signal a situation of uncertainty as to what direction the Court wanted to take in this field. It could, however, be said that in the *van de Haar* Case the Court again left the door open for further development of the doctrine; an opportunity which the Court was about to take advantage of in the following *Leclerc* Case.

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106) See *ibid.*, at Ground 24.

107) See Waelbroeck, Michel, "Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE", in *Du droit international au droit de l'intégration - Liber Amicorum Pierre Pescatore*, Edited by Capotorti, F.; Ehlermann, C.-D.; Frowein, J.; Jacobs, F.; Joliet, R.; Koopmanns, T. & Kovar, R., Baden-Baden, 1987, p. 790.

108) See Marengo, Giuliano, "Mesures étatiques et liberté de concurrence", *revue trimestrielle de droit européen*, Volume 20, 1984, Number 1, p. 534.

## 4. Towards the Formulation of a Test for Application of the General Principle

Now arrives an interesting phase in the evolution of the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC as the Court, after *Leclerc*, having given great weight to the general principle governing those provisions, strives to formulate a test which can be applied to examine the existence of an infringement thereof. The first steps in this direction are taken in the *Leclerc* and *Cullet* Cases. Thereafter follows a long sequence of cases, *Clair*, *Bulk Oil*, *Asjes*, *Lèfevre*, *Vlaamse Reisbureaus*, *Aubert*, and *Libraires*, in which the Court seems uncertain as to which final decision to make in this regard. Sometimes the Court would apply and sometimes disapply the test primarily presented in the *Leclerc* Case. Then, in *Van Eycke*, a formal test is presented, which continuously thereafter is the one preferred. To demonstrate this development, all the mentioned cases are presented and analysed further in the following sections.

### 4.1. The Introduction of a Test in *Leclerc* and *Cullet*

In this section, the two cases *Leclerc* and *Cullet* will be analysed in detail as they are of importance to the development of a test to be applied in the determination of whether an infringement of the doctrine has taken place.

A full nine-judge panel of the Court delivered the *Leclerc* decision.<sup>109)</sup> Commentators have paid considerable attention to this case. In fact, it was this case that raised serious interest in the issues under discussion here, which were perceived as being of great theoretical importance. Today, it is probably the most frequently cited case regarding the interaction of Articles 3(g), 5 and 85 EC. The case was based on the many actions against the *Leclerc* supermarket group in France at the end of 1983. These were initiated due to the group's

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109) See Case 229/83, *Association des Centres distributeurs Édouard Leclerc and Others v. Sàrl 'Au blé vert' and Others*, Judgment of 10 January 1985, [1985] E.C.R. 1. Also see the *Saint-Herblain Case* (i.e. Case 299/83, *SA Saint-Herblain distribution, Centre distributeur Leclerc and Others v. Syndicat des libraires de Loire-Océan*, Judgment of 11 July 1985, [1985] E.C.R. 2515), where the Court found that the questions from the national Court had to be answered in the same way as in the *Leclerc Case*.



frequent violation of French price regulations. The proceeding that led to the case at interest here was brought because Leclerc violated a French statute which set the price of books. In some cases the lower courts found in favour of Leclerc, but in other cases Leclerc was either found liable or a preliminary question was directed to the European Court of Justice.<sup>110)</sup> The latter was the situation of this case. The case was referred to the European Court of Justice pursuant to Article 177 EC, by the Court of Appeal in Poitiers, France. The question involved in this matter was raised in proceedings between, on the one hand, both the Association des Centres distributeurs Édouard Leclerc (hereinafter referred to as 'Leclerc') and Thouars distribution, part of the Leclerc Group, and, on the other hand, several booksellers in Thouars and the Union syndicale des libraires de France.

Leclerc was a group of retail outlets which had established the policy of offering the lowest possible prices, even in defiance of official price regulations. Therefore, it was not surprising that Thouars distribution, like other distributors in the Leclerc group, violated French legislation concerning the price fixing of books. Thouars distribution charged prices which were lower than the required "minimum price". The relevant legislation is often referred to as the *Loi Lang*.<sup>111)</sup>

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110) See Blaise, Jean-Bernard, "Respect des articles 85 et 86 du traité par les États membres. Législation interne relative au prix du livre et au prix de l'essence", *revue trimestrielle de droit européen*, Volume 21, 1985, Number 1, p. 561,

111) The *Loi Lang* contained the following provisions (see the *Leclerc Case*, p. 18): "All publishers or importers of books are required to fix a retail selling price for the books that they publish or import; Retailers must sell at an effective retail selling price of between 95% and 100% of the price fixed by the publisher or the importer; that rule does not apply in respect of associations which facilitate the purchase of school books, or to books purchased by the State, local authorities, educational establishments or vocational training or research institutions, trade unions, works councils or libraries open to the public; Retailers may sell at prices lower than those fixed in accordance with that rule books published or imported more than two years previously, the last delivery of which took place more than six months previously; If a book is published with a view to being distributed by sales on a commission basis, subscription or mail order more than nine months after the first edition was put on the market, the price may be fixed by the publisher at his own discretion; otherwise the price must be fixed at a level no lower than that of the first edition; Where books published in France are reimported, the retail selling price fixed by the importer is to be no lower than that fixed by the publisher." Decree No 81-1068 of 3 December 1981, which was adopted to implement the *Loi Lang*, further provides that the principal distributor of the imported books shall be deemed, for purposes of that legislation, to be the importer. Such a distributor must comply with Article 8 of the Law of 21 June 1943; namely, that a complete copy of the book in question be deposited with the Ministry of the Interior.

It was necessary for the Court to determine whether the above provisions were compatible with the Treaty because booksellers sought to prohibit Leclerc from selling books at prices below those permitted by the *Loi Lang*. The Court reformulated the referred question as it decided that the core problem was the compatibility of the *Loi Lang* with Article 85 *et seq.* and Article 30 *et seq.* EC.<sup>112)</sup> After summarising the arguments of the parties and Article 85 EC, the Court restated its previous minimalist approach, and then combined and developed the principle it first stated in the *Walt Wilhelm* and *INNO* Cases. The Court said that:

*"Whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of legislative nature, which may render ineffective the competition rules applicable to undertakings..."*<sup>113)</sup>

This principle shall hereinafter be referred to as "the general principle".

From the following Ground, it should be understood that this principle led to the creation of a two-prong test, as the Court first pointed out:

*"...legislation of the type at issue does not require agreements to be concluded between publishers and retailers or other behavior of the sort contemplated by Article 85(1) of the Treaty".*<sup>114)</sup>

Second, the Court went on to examine whether:

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112) See *ibid.*, at Grounds 8 and 9.

113) See *ibid.*, at Ground 14.

114) See *ibid.*, at Ground 15.

*"...national legislation which renders corporate behaviour of the type prohibited by Article 85(1) superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of Article 85 and is therefore contrary to the second paragraph of Article 5 of the Treaty. "* 115)

In its decision the Court did not directly answer its own question. It ignored the point, raised by the French government, that the legislation served the purpose of protecting the book market, and it declined to respond to the objection of the Commission to the utility and desirability of special national rules for books. Instead, the Court focused on the fact that there was no common policy for the book industry. The Court concluded:<sup>116)</sup>

*"It is thus apparent that the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. It follows that, as Community law stands, Member States' obligations under Article 5 of the EEC Treaty, in conjunction with Articles 3(f) and 85, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books, provided that such legislation is consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods. "*

The Court then analysed those provisions concerning the free movement of goods. It concluded that the French legislation violated Article 30 EC in respect of the price fixing provisions of imported and re-imported books.

In contrast to the minimalist approach which the Court had taken in the *van de Haar Case*<sup>117)</sup> only one year earlier, in this case the Court, quite unexpectedly, as observed above, gave great weight to the interaction of Articles 3(g), 5(2), and 85 EC. This was only

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115) See *ibid.*, at Ground 15.

116) See *ibid.*, at Ground 20.

117) The minimalist approach had appeared in the *Geddo*, *ENCC*, and *Buys* Cases as well.

of a half-hearted attempt however, for the Court left much doubt regarding the motivation behind its reasoning.

In this case, the Court developed a two-prong test. The first prong probably can be traced back to the *Buys* Case. Applying this first prong, which regards whether the national measure requires violations of Article 85 EC in the traditional manner, the Court, without any preliminary discussion, simply determined that there existed no cartel between publishers and retailers which would violate Article 85 EC.

The fact that the Court developed the second prong of the test, which relates to national law's possible hindrance of the effectiveness of Article 85 EC, leads several scholars to suspect that the Court did not want to limit the scope of Articles 3(g), 5 and 85 EC merely to situations involving traditional violations of Article 85 EC.<sup>118)</sup> The introduction of the second prong is therefore a certain indication of the Court's willingness to extend the scope of the three Articles. It is however surprising that the Court in the end did not apply its new reasoning. The explanations behind the unanswered question (in Ground 15) are inconsistent. One author believes that the question was never answered, but that the open question and sudden change of focus gives the strong impression that there was an earlier draft of the judgment which provided an analysis of the question and lead to the answer "yes".<sup>119)</sup> Another author simply declares that, despite the fact that the response should be evident from the decision, the Court preferred not to answer the question.<sup>120)</sup> Contrary to these views, Joliet, who was also among the judges ruling on the case, argues that the Court did not leave this question open or unanswered.<sup>121)</sup> Rather, Joliet stresses, the reasoning concerning the

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118) Concerning this efficiency criterion, also see *Chapter 13* below concerning *The Treaty as an Economic Constitution*.

119) See Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, p. 17.

120) See Waelbroeck, Michel, "Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE", in *Du droit international au droit de l'intégration - Liber Amicorum Pierre Pescatore*, Edited by Caportorti, F.; Ehlermann, C.-D.; Frowein, J.; Jacobs, F.; Joliet, R.; Koopmanns, T. & Kovar, R., Baden-Baden, 1987, p. 792.

121) See Joliet, René, "National Anti-competitive Legislation and Community Law", *Fordham International Law Journal*, Volume 12, 1989, Number 2, p. 172. The former President of the Court is in agreement with this; see DUE, OLE: "Supplement 1978-84 til EF-Karnov",

specific circumstances of the case suggests that the Court considered the *Loi Lang* contrary, in principle, to the Member States' obligations which derive from Articles 3(g), 5, and 85 EC. However, it seems to be an exaggeration to say that the Court literally answered its question; on the other hand, it must be admitted that the logical conclusion of the Court's decision is that the Court intended to answer its own question in the affirmative.<sup>122)</sup> As a more or less isolated voice, Marengo has been the main commentator criticising the second prong of the test. Marengo believes that it is possible to maintain that any coercive regulation, because it has effects comparable to those of a restrictive agreement, renders such an agreement superfluous. Marengo consequently believes that due to the second prong of the test Member States will no longer be able to enact anti-competitive legislation, and will therefore no longer be able to regulate their economies.<sup>123)</sup>

It is, however, important to note that the Court took into account a second test, *i. e.*, the Community's balance of competences. The Court therefore determined whether it is the Member State or the Community which had the power to legislate in the field in question.<sup>124)</sup> Given the importance of the second test, it is important to determine what is appropriate competition policy. The Court paid particular attention to the fact that the Commission had not completed its investigation of all the systems and practices at issue, and, further, the Commission had not yet decided upon the manner in which it would exercise, in this area, the powers which the Treaty and Regulation No. 17 of 30 October 1962 conferred on the Commission. In addition, the Commission had not submitted any proposal to the Council, nor had it initiated any proceedings under Article 85 EC to prohibit national systems from fixing book prices.<sup>125)</sup> It appears that in situations such as the one in this case, in

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*Juristen/djof*, Volume 67, 1985, Number 7, p. 266.

122) Also see the discussion of the *Libraires* Case, below, in which the Court's own interpretation of the *Leclerc* Case supports this reasoning.

123) See Marengo, Giuliano, "Competition Between National Economies and Competition Between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, 1987, Number 3, p. 439.

124) See *Chapter 18* below concerning *Distribution of Competences*. Here, it is argued that the competence in question was a shared one. Because there was no common policy in the field in question, the competence was not yet occupied by the EU and the competence was therefore to be viewed as still left at the Member State level.

125) See the *Leclerc* Case, Ground 18.

which the Commission enforced no clear common policy, it is not difficult to find that such a policy does not exist. However, the Court did not provide guidance for less obvious situations.

There still remains the claim that the *Loi Lang* is justified because it aims to protect books, which are an instrument of culture.<sup>126)</sup> In essence, this argument is that unfettered retail price competition would lower the diversity and cultural level of publishing. Although this is a justifiable policy objective, the Court did not consider it to be relevant. Undoubtedly, the Court preferred to avoid a discussion as to whether price competition in the book sector is in consumers' interest, or alternatively, whether revenues from "best sellers" should subsidise the sale of the more expensive books preferred by a minority of readers. With regard to a test on the distribution of competences, one should expect culture to be a relevant issue. The role of culture in relationship to competition was, however, strongly left unanswered by the Court. Another interpretation could be that the issue of culture completely was left out of the question, so that competition is always viewed as "stronger" than culture. Such a question is indeed difficult to answer.

In summary, the Court's reasoning could have been clearer. On the other hand, many have viewed the decision favourably because it delivered further guidance as to the interaction of Articles 3(g), 5, and 85 EC.

Only a few weeks after handing down its judgment in the *Leclerc* Case, the Court delivered its judgment in the *Cullet* Case.<sup>127)</sup> This case was decided only by the Fifth

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126) This was one of the French government's claims, according to Ground 16 of the *Leclerc* Case.

127) See Case 231/83, *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc Toulouse and Centre Leclerc Saint-Orens-de-Gameville*, Judgment of 29 January 1985, [1985] E.C.R. 305. Also see the *Gratiot* (Case 11/84, *Procureur de la République v. Christian Gratiot*, Judgment of 25 September 1985, [1985] E.C.R. 2907), *Michel Leclerc* (Case 34/84, *Procureur de la République v. Michel Leclerc*, Judgment of 25 September 1985, [1985] E.C.R. 2915), *Chabaud* (Joined Cases 79 and 80/84, *Procureur de la République v. Claude Chabaud and Jean-Louis Rémy*, Judgment of 25 September 1985, [1985] E.C.R. 2953), *Piszko* (Joined Cases 114 and 115/84, *SA Établissements Piszko and Others v. SA Dammarie Distribution 'Centre Leclerc' and SA Carrefour Supermarché*, Judgment of 25 September 1985, [1985] E.C.R. 2961), *Binet* (Case 149/84, *Procureur de la République and Direction interdépartementale de la concurrence et de la consommation v. Jacques Binet and Others*, Judgment of 25 September 1985, [1985] E.C.R. 2969), *Gontier* (Case 201/84, *Procureur de la République v. Jean-Pierre Gontier*, Judgment of 25 September 1985, [1985] E.C.R. 2977), *Ferey* (Case 215/84, *Procureur de la République v. Marie-Hélène Ferey, née Héricotte*, Judgment of 25 September 1985,

Chamber. It also had its roots in the many procedures brought against the Leclerc supermarket chain in France. This time, national legislation fixing minimum prices for fuel was at issue. The Court's reasoning in this case was in many ways similar to that of the *Leclerc* Case, but the Court here provided a clearer explanation of its thinking in this area.

This case was also referred to the Court pursuant to Article 177 EC. In this case, the question came from the Commercial Court of Toulouse, France. The parties in the main proceedings were, on the one hand, Henri Cullet and the *Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers*, and, on the other hand, Sodinord SA and Sodirev SA. Sodinord SA and Sodirev SA were members of the Leclerc group and were operating supermarkets which had adjoining petrol stations. Consistent with the chain's commercial policy of low prices, the two distributors sold fuel at prices lower than the permitted minimum.

The relatively complicated French legislation regarding prices was designed to both assure the supply of fuel throughout France and protect small petrol stations from larger competitors. The legislation created different price classes. Firstly, there was the wholesale selling price of petroleum products, and this was called the "ex-refinery price". Although refineries and importers were in theory allowed to freely determine this price, in practice this was the same as the "ceiling price", which the appropriate authorities set every month.<sup>128)</sup>

Secondly, there was the "maximum retail selling price" and the "minimum retail selling price". The former was the "ex-refinery price" increased by a certain amount fixed by law. The latter - *i.e.* the violated - price was determined monthly for each of France's

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[1985] E.C.R. 2993) and *Chiron* (Joined Cases 271 to 274/84 and 6 and 7/85, *Procureur de la République and directeur départemental de la concurrence et de la consommation v. J. Chiron and Others*, Judgment of 6 February 1986, [1986] E.C.R. 529) Cases, in which the Court found that the questions from the national courts had to be answered in the same way as in the *Cullet* Case.

128) More details of this price fixing are found in Ground 5 of the decision, in which it is explained that the authorities would fix the ceiling price by taking into account, on the one hand, the cost price of French refineries calculated on the basis of crude oil prices, the rate of the dollar, and maritime freight and refining costs assessed at a flat rate on the basis of statistical data, and, on the other hand, the rates recorded on the European markets. The rules provided that the European rates were used to determine the ceiling price in so far as they were no more than 8% above or below the French refineries' cost price; if, on the other hand, the European rates moved outside the so-called 'tunnel' constituted by the divergence of 8% from the French refineries' cost price, it was that price which was to determine the ceiling price.

geographical price areas. It was determined by subtracting from the "maximum retail selling price" a fixed maximum discount, which was based on ex-refinery prices of French refineries in the preceding month.

The Court interpreted the question from the national court as asking whether the challenged national legislation complied with the principles and objectives of the Treaty and with those provisions of the Treaty concerned with detailed implementation of these principles and objectives, *i.e.*, *inter alia*, Article 85 *et seq.* EC.<sup>129)</sup> In its decision, the Court first repeated, almost verbatim, the general principle it had developed in the *Leclerc* Case.<sup>130)</sup> Regarding the first prong of the first *Leclerc* test, which regards whether the national measure violates Article 85 EC in the traditional manner, the Court found that:

*"... rules such as those concerned in this case are not intended to compel suppliers and retailers to conclude agreements or to take any other action of the kind referred to in Article 85(1) of the Treaty."* <sup>131)</sup>

Further, the Court answered the second prong of the first *Leclerc* test, which relates to the national law's possible hindrance of the effectiveness of the competition provisions, in the negative:

*"The mere fact that the ex-refinery price fixed by the supplier - which, moreover, may not exceed the ceiling price fixed by the competent authorities - is one of the factors taken into account in fixing the retail selling price does not prevent rules such as those concerned here from being State rules and is not capable of depriving the rules on competition applicable to undertakings of their effectiveness."* <sup>132)</sup>

The Court did not find it necessary to apply the second *Leclerc* test, which concerns competence, but the Court hastened to conclude that:

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129) See the *Cullet* Case, at Grounds 10-11.

130) See *ibid.*, at Ground 16.

131) See *ibid.*, at Ground 17.

132) See *ibid.*, at Ground 17.



*"It follows that Article 5, in conjunction with Articles 3(f) and 85 of the Treaty, does not prohibit the Member States from regulating, in the manner laid down by the rules contested in the main proceedings, the fixing of the retail selling price of goods."*<sup>133)</sup>

The Court's application of its two-prong *Leclerc* test was much clearer in this case than it was in the *Leclerc* Case. It is now clear that the Court does not view the French legislation as contrary to Articles 3(g), 5(2) and 85 EC. As in the *Leclerc* Case, the Court did not find a traditional infringement of Article 85 EC, and it therefore concluded that there was no violation of the first prong of the two-prong *Leclerc* test. More significantly, and in contrast to *Leclerc*, the Court also concluded that there was no violation of the second prong of its two-prong *Leclerc* test. The Court held that the French legislation did not deprive the competition provisions of their effectiveness.

In both cases, a dominant role in the application of the second prong of the two-prong *Leclerc* test was played by what could be called "the delegation criterion" pursuant to which the Court had to determine how much power the public authorities had delegated to the undertakings. In the present case the Court found that:

*"[the rules] entrust responsibility for fixing prices to the public authorities, which for that purpose consider various factors of a different kind"*<sup>134)</sup>

In contrast, the Court ruled in *Leclerc* that:

*"[the legislation] imposes on publishers and importers a statutory obligation to fix retail prices unilaterally"*<sup>135)</sup>

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133) See *ibid.*, at Ground 18. The Court then considered the rules in the light of the provisions on free movement of goods and stated that Article 30 EC had been infringed, see the *Cullet* Case, at Ground 34.

134) See *ibid.*, at Ground 17.

135) See the *Leclerc* Case, at Ground 15.

In all probability, this delegation criterion stems from the Opinion of Advocate-General Darmon in the *Leclerc* Case, which moreover, was supported by Advocate-General Verloren van Themaat in *Cullet*. Darmon used the term "a semi-public price maintenance system", in which prices were only partially fixed by law.<sup>136)</sup> Verloren van Themaat added that such a system allows, or even prescribes, commercial practices governed by private law which distort competition and therefore are prohibited by Articles 85 and 86 EC.<sup>137)</sup> In contrast to a semi-public price maintenance system would be a price fixing system governed solely by public law and therefore not in violation of the competition provisions.<sup>138)</sup> In other words, as the passages quoted above indicate, it would be contrary to the Treaty for the public authorities to partially delegate to undertakings their competence to fix prices. On the other hand, if the public authorities fix prices completely, then the price fixing is allowed.

The delegation criterion has the advantage of being relatively easy to apply, thereby increasing legal certainty. The original problem of controlling anti-competitive state measures is, however, not completely solved. Paradoxically, the greater the degree of regulation by the public authorities, the less the free market determines the price. And allowing the free market to set prices is in fact one of the objectives of the competition provisions. Therefore, of course the Court would nullify national laws which set prices in the same manner that a cartel would. On the other hand, many national laws which hinder the operation of the free market will nevertheless be allowed. As Joliet says: "...the only possible answer is that the effect on competition is not the criterion adopted by the Court".<sup>139)</sup> In effect, the fuel legislation which is the subject of the present case could satisfy the criterion, while the much less anti-competitive *Loi Lang* could not.

Another criticism is that the delegation criterion is artificial because public authorities would normally prefer public price fixing to delegated price fixing, but would only have the

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136) See the *Leclerc* Case, p. 5.

137) See the *Cullet* Case, p. 309.

138) Regarding this distinction, see also Dubouis, Louis, "La France face à l'Europe du livre et de l'essence", *revue française de droit administratif*, Volume 20, 1985, Number 1, pp. 292-293; or Paulis, Emil, "Les États peuvent-ils enfreindre les articles 85 et 86 du Traité C.E.E.?", *Journal des Tribunaux*, Volume 104, 1985, Number 5332, p. 214.

139) See Joliet, René, "National Anti-competitive Legislation and Community Law", *Fordham International Law Journal*, Volume 12, 1989, Number 2, p. 174.

choice if the products in question were homogenous (such as fuel). Delegated price fixing would only be necessary if the products were heterogenous (such as books).<sup>140)</sup> Therefore, the criterion remains somewhat arbitrary.

In the words of Pappalardo, the doctrine regarding the interaction among Articles 3(g), 5(2) and the competition provisions of the Treaty is to be observed in *Leclerc* and *Cullet* as still being in an early stage of development, and the present cases most likely do not provide the final answer to a very delicate and complicated problem.<sup>141)</sup> However, a two-prong test has now at least been established, and this is to many an improvement from the time when no guidance at all existed to the interaction of Articles 3(g), 5(2) and 85 EC.

## 4.2. Development of the Test

In the seven cases examined below, one may observe the manner in which the Court, after *Leclerc* and *Cullet*, applied or changed its new test.

### 4.2.1. The *Clair* Case

The first case to be analysed is the *Clair* Case, which the Court handed down only one day after the *Cullet* Judgment.<sup>142)</sup> This case was different from most of the cases examined here because the national court in its decision did not refer to the doctrine of the interaction of Articles 3(g), 5(2) and the competition provisions of the Treaty, and the Court neither addressed the question itself nor referred to the doctrine on its own initiative. The case is nevertheless of interest because the Court did analyse an agreement which it found,

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140) See e.g. Korah, Valentine, *An Introductory Guide to EEC Competition Law and Practice*, 1990, Oxford, 4. edition, p. 48 and Gyselen, Luc, "State Action and the Effectiveness of the EEC Treaty's Competition Provisions", *Common Market Law Review*, Volume 26, 1989, p. 44.

141) See Pappalardo, Aurelio, "Der Europäische Gerichtshof auf der Suche nach einem Kriterium für die Anwendung der Wettbewerbsregeln auf staatliche Maßnahmen", in *Eine Ordnungspolitik für Europa - Festschrift für Hans von der Groeben zu seinem 80. Geburtstag*, Edited by Mestmäcker, Ernst-Joachim; Möller, Hans & Schwarz, Hans-Peter, Baden-Baden, 1987, p. 314.

142) See Case 123/83, *Bureau national interprofessionnel du cognac v. Guy Clair*, Judgment of 30 January 1985, [1985] E.C.R. 391.

despite the existence of state action, contrary to the competition provisions. The contested measure concerned the fixing of minimum prices for, among other things, cognac.

The parties in the main action were BNIC against Guy Clair. The latter, who was the director of *Établissements Clair et Cie*, had bought cognac from various wine-growers at prices lower than those allowed pursuant to an agreement, negotiated within the framework of BNIC. Consequently, BNIC brought an action seeking to annul these contracts. BNIC was a trade organisation for the wine and cognac industry, and was set up by ministerial orders. Except for the Chairman and Government Commissioner, all of its members were representatives of various trade organisations. Based on proposals from the organisations, the Minister for Agriculture appointed all members. The members could generally be described as belonging to one of two groups, one consisting of dealers and the other of wine-growers. Pursuant to a law of 1 July 1975, these two groups concluded an agreement on 7 November 1980, which *inter alia*, fixed a minimum price of wines for distillation, the price of potable spirits distilled through 1980, and a minimum price for cognac. Representatives of the two groups and the chairman of BNIC all signed the agreement. In addition, after approval by the Government, it was subsequently made generally binding by an Order issued on 27 November 1980.

The Court essentially reformulated the question from the referring national court in order to examine whether the BNIC agreement fell within the scope of Article 85(1) EC. In its answer to this question the Court considered many issues. Of particular interest here<sup>143)</sup> is the Court's response to BNIC's claim that agreements concluded within it were not binding and that its role was solely to advise the central public authorities, who alone might make the said agreements binding by means of ministerial orders.<sup>144)</sup>

*"It must be pointed out in that respect that for the purposes of Article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on*

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143) Also, see the *Clair Case*, at Grounds 17, 19 and 20.

144) See *ibid.*, at Ground 21.

*all traders on the market in question, is intended to distort competition on that market.*<sup>145)</sup> ...[T]he adoption of a measure by a public authority making an agreement binding on all the traders concerned, even if they were not parties to the agreement, cannot remove the agreement from the scope of Article 85(1). "<sup>146)</sup>

The Court concluded that the agreement violated Article 85(1) EC.

The present case is in many ways unique; first, and most importantly, the Court very clearly, and without hesitation, stated that the fact that the government may have encouraged certain actions was not a defence in an Article 85 action. Further, and more particularly, a majority of commentators, including some less progressive ones, have written approvingly of the ruling.<sup>147)</sup> On the other hand, the Court's reasoning does not fit into any of the patterns of the Court's previous decisions.<sup>148)</sup> As mentioned above, the Court did not approach this case as one involving the doctrine of the interaction of Articles 3(g), 5(2) and 85 EC. This was primarily because the questions from the national court concerned an agreement, and not national legislation. Potential liability therefore rested on the undertakings rather than on the public authorities. The agreement evidently violated Article 85 EC, and the only true difficulty concerned the fact that the violation was prompted by state regulation. The Court nevertheless answered plainly that state enforcement did not mean that the violation ceased to exist. In other words, the state measure did not protect the undertakings from being found liable. The *Clair* Decision would have been more balanced if the state measure itself had also been analysed. When considering the probable outcome of such an analysis, it is

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145) See *ibid.*, at Ground 22.

146) See *ibid.*, at Ground 23.

147) See e.g. Marengo, Giuliano, "Competition Between National Economies and Competition Between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, Spring 1987, Number 3, p. 436, where it is written that "Judge Pescatore does not advance any specific criticism of this judgment. Nor does any criticism follow from this article". Only one author is seriously critical, namely Focsaneanu, Lazar, "Réglementations nationales de prix et droit communautaire", *Revue du Marché Commun*, Volume 29, 1986, Number 301, p. 537, who describes the reply of the Court as erroneous and as revealing a total ignorance of French administrative law.

148) Galmot, Yves & Biancarelli, Jacques, "Les réglementations nationales en matière de prix au regard du droit communautaire", *revue trimestrielle de droit européen*, Volume 21, 1985, Number 1, p. 307, remark in this concern that the case represents "the grey zone".

helpful to relate the case to the delegation criterion, established in the *Leclerc* and the *Cullet* Cases, concerning the degree of power delegated by the public authorities to the undertakings. The system at issue in the present case could be described as semi-public, as it was characteristic that the prices were unilaterally fixed by the undertakings and were thereafter enforced by law. Applying this delegation criterion to the system in the present case leads to the conclusion that the state measure is contrary to the competition provisions when interpreted in conjunction with Articles 3(g) and 5(2) EC. Therefore, the probable outcome would be that the state measure itself would be contrary to Articles 3(g), 5(2) and Article 85 EC. It should be added that in contrast to the *Clair* Case, in the *Aubert* Case, the Court approximately three years later met the challenge of analysing the state measure at issue rather than merely the related agreement and found that it was contrary to Member States' obligations pursuant to Article 5 when interpreted together with Articles 3(g) and 85 EC.<sup>149)</sup>

#### 4.2.2. The *Bulk Oil* Case

In the *Bulk Oil* judgment, a seven member panel of the Court considered to which degree Articles 3(g), 5(2) and 85 EC are applicable to national policies restricting export of crude oil to non-member countries.<sup>150)</sup> The contested measure was in fact a United Kingdom policy which had never been incorporated into legislation or into any other kind of legal measure. It was contrary to this policy to export oil originating from the United Kingdom to countries other than the Member States of the Community, Member States of the International Energy Agency and Finland. According to a contract concluded in 1981, the company Sun had agreed to sell to another company, Bulk, a large quantity of crude oil under the condition that this crude oil was not to be sold to countries other than those approved of according to United Kingdom policy. As Sun discovered that Bulk, despite the destination clause of the contract, intended to sell the crude oil to Israel, a country unacceptable to United Kingdom policy, Sun refused to deliver the product. The dispute arising from this

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149) See the *Aubert* Case, *infra*. The reasoning of this case was, however, different.

150) See Case 174/84, *Bulk Oil (Zug) AG v. Sun International Limited and Sun Oil Trading Company*, Judgment of 18 February 1986, [1986] E.C.R. 559.

situation was referred to arbitration and subsequently appealed by Bulk to the High Court of Justice. This court referred several questions to the European Court of Justice, among which one led the Court to examine whether the policy was contrary to Article 85 EC.

It appears that the Court was inspired to take the interaction of Articles 3(g), 5(2) and 85 into consideration based on a claim made by Bulk in this regard, in other words, not based on a question raised by the referring court.<sup>151)</sup> The Court did not consider whether illegal agreements and concerted practices actually resulted from the policy, but instead decided that:

*"As has just been stated, a measure such as that in question which is specifically directed at exports of oil to a non-member country is not in itself likely to restrict or distort competition within the common market. It cannot therefore affect trade within the Community and infringe Articles 3(f), 5 and 85 of the Treaty."*<sup>152)</sup>

Consequently, the Court found that Article 85 EC, upon its true construction, does not prevent a Member State from adopting a policy restricting or prohibiting exports of oil to non-member countries<sup>153)</sup>. It should therefore be understood that the judgment is not informative as to an application of the general principle governing the interaction of Articles 3(g), 5(2) and 85 EC itself. Rather, what may be gained from the judgment is firstly the understanding that national policies, even unwritten, are likely to be included in the concept of national measures to be evaluated according to this general principle. Secondly, the general principle is likely not to be applicable to measures concerned with exports to non-member countries, if trade within the Community cannot be affected.

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151) See *ibid.*, at Ground 43. The argument of Bulk was the following: "...[T]he agreements and concerted practices which resulted from the United Kingdom policy, in particular the insertion of a destination clause in all contracts, were agreements between undertakings which were intended to restrict or distort competition within the Common Market and which affected trade between Member States. The United Kingdom policy thus authorizes and even requires oil companies to infringe Article 85 of the Treaty, contrary to Articles 3(f), 5 and 85 of the Treaty."

152) See *ibid.*, at Ground 44.

153) See *ibid.*, at Ground 45.

### 4.2.3. The *Asjes* Case

The third case to be analysed here, *Asjes*, was decided a little more than a year after the *Clair* Judgment and only shortly after the *Bulk Oil* Judgment.<sup>154)</sup> The *Asjes* Case was similar to many others in that in its question to the Court the referring national court did not specifically refer to Article 3(g), Article 5(2) or to the competition provisions of the Treaty. The Court itself reformulated the question to include these provisions. The measure in this matter concerned the minimum price of airline tickets.

The case had developed from several criminal proceedings against executives of airlines and travel agencies, who were charged with having sold airline tickets at prices lower than those approved by the Minister for Civil Aviation, and thereby violating the French Civil Aviation Code. The *tribunal de police de Paris*, before which the case came, found that the French legislation violated Article 85 EC by making provision for concerted action between airlines. The national court therefore referred the matter to the Court asking whether the legislation was in conformity with Community law.

For technical reasons related to the special circumstances of the air transport industry, the Court's decision was rather long. It first had to consider sub-issues such as whether international agreements concerning civil aviation prevented the Court from examining the question, the applicability of the competition rules to the air transport industry, and the consequences of the absence of rules implementing Articles 85 and 86 in respect of the air transport industry. With regard to the core of the Court's reformulated question, *i.e.* whether and to what extent it is contrary to the Member States' obligations pursuant to Article 5 in conjunction with Articles 3(g) and 85 EC, to enforce the challenged air tariffs, the Court began its decision by reaffirming the well-established general principle, originating from the *Walt Wilhelm* and *INNO* Cases.<sup>155)</sup> Then, the Court introduced a new sentence:

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154) See Joined Cases 209 to 213/84, *Ministère public v. Lucas Asjes and Others; Andrew Gray and Others; Jacques Maillot and Others; and Léo Ludwig and Others*, Judgment of 30 April 1986, [1986] E.C.R. 1425.

155) See *ibid.*, at Ground 71.



*"Such would be the case, in particular, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof."* <sup>156)</sup>

After having evaluated the arguments of the parties in this regard, the Court concluded that:

*"...it is contrary to the obligations of the Member States under Article 5 of the EEC Treaty, read in conjunction with Article 3(f) and Article 85, in particular paragraph (1), of that Treaty, to approve air tariffs and thus to reinforce the effects thereof, where, in the absence of any rules adopted by the Council in pursuance of Article 87, it has been found in accordance with the forms and procedures laid down in Article 88 or Article 89(2) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85."* <sup>157)</sup>

This last part of the Court's conclusion requires a brief explanation. The Court meant to say that it was (pursuant to Article 88 EC) left to a national authority, other than *inter alia* the *tribunal de Police de Paris*, or to the Commission (pursuant to Article 89(2) EC), and not to the European Court itself, to make the appropriate determination. The Court reasoned that the Council of the European Communities, by virtue of Article 87(1) EC, had failed to adopt any regulations implementing the competition provisions in the air transport industry. Consequently, Article 88 and 89 EC continued to apply. Only if the competent national authority, or the Commission, found that the air tariffs were a result of a concerted action contrary to Article 85 EC, would the Court provide some guidance as to the consequences thereof. The Court noted that the appropriate test should be whether the approval of the air tariffs reinforced the effects of a concerted action.

Several comments can be made about this case. First, the question, as interpreted by the Court, implies that the doctrine of the interaction of Articles 3(g), 5(2) and 85 EC must

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156) See *ibid.*, at Ground 72.

157) See *ibid.*, at Ground 77.

now be considered as firmly established. Hoffman goes even further: he understood the Court's formulation of the question as assuming that the approved tariffs were illegal pursuant to Article 85 EC.<sup>158)</sup> After examining the final conclusion of the Court, however, it is not completely clear that the Court made this assumption.

Second, it is interesting to compare this decision with the Court's previous decisions. First, the general principle of Ground 71, while not identical to any previously announced formulations of the general principle, is most similar to that of *INNO*.<sup>159)</sup>

Another relevant comparison to previous decisions regards the new sentence found in Ground 72<sup>160)</sup>. This may be traced back to the last part of the general principle as expressed in *Leclerc*,<sup>161)</sup> and may simply be understood as a more detailed expression of the general principle. On the other hand, the last phrase, concerning the reinforcement of the effects of undertakings' agreements, decisions or concerted practices, is new. This phrase may be understood to apply only to situations in which undertakings enter agreements, *etc.*, independently of national authorities, and in which the authorities subsequently formally lend support to the agreements. This can be said to have been the situation in *e.g. Clair*. The Court also applied this formulation in its final conclusion, when it referred to the approval of the air tariffs as reinforcing the effects of the concerted action.

More strikingly, when the *Asjes* Case is compared to previous decisions, it can be noted that the Court left out of its decision many elements which it had included in earlier cases. By a stretch of the imagination, the first prong of the two-prong *Leclerc* test could be said to have been included in the present case. The Court, however, left out of its decision the second prong of the two-prong *Leclerc* test (the efficiency criterion), and it also left out the delegation criterion concerning the degree to which power had been delegated from public authorities to undertakings. The explanation for this may simply be that the Court believed

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158) See Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, p. 19.

159) The general principle in the *INNO* Case is quoted above, see *Chapter 3*.

160) Ground 72 is quoted above.

161) The general principle of the *Leclerc* Case is quoted above, see *Chapter 4*.

that pursuant to the first prong the national measure would be annulled, and it was therefore not necessary to apply the other parts of the test.

Also when compared to previous cases, it should be remarked with regard to the second test concerning competence, and established in *Leclerc*, that one scholar correctly observed that the Court's conclusion that the doctrine would only apply if there existed a decision by the Commission or competent national authority was consistent with the *Leclerc* case. In *Leclerc* the Court reached a similar conclusion regarding the absence of Commission policy regarding the fixing of book prices (the competence criterion).<sup>162)</sup>

Third, if the national authority or the Commission were to make a determination regarding the measure, each should conclude that the tariffs resulted from an agreement which violated Article 85 EC, and, further, that the approval of the tariffs reinforced the effects of a price fixing agreement.<sup>163)</sup>

As a final comment, it should be pointed out that although the *Asjes* Case was disappointing because it was written in general terms and ignored the law of previous decisions, it is nevertheless interesting that it established, in the words of *van der Esch*, that a Member State can no longer legitimately build a house of state intervention on a cartel basement.<sup>164)</sup> As will be shown in the *Vlaamse Reisbureaus* Case below, *Asjes* in fact represented the Court's first step towards the introduction of a new two-prong test. Before analysing the *Vlaamse Reisbureaus* Case, the *Lefevre* Case shall be briefly analysed.

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162) See Slot, Piet Jan, "The Application of Articles 3(f), 5 and 85 to 94 EEC", *European Law Review*, Volume 12, 1987, Number 3, p. 185. In agreement with this is Kuýper, Pieter Jan, "Joined Cases 209 to 213/84, Ministère Public (Public Prosecutor) v. Lucas Asjes et al., Andrew Gray et al., Jacques Maillot et al. and Leo Ludwig et al. Preliminary Ruling of 30 April 1986 requested by the Tribunal de Police, Paris (not yet reported) on the interpretation of Article 84(2) and Article 85 et seq. of the EEC Treaty", *Common Market Law Review*, Volume 23, 1986, p. 677.

163) See Gyselen, Luc, "State Action and the Effectiveness of the EEC Treaty's Competition Provisions", *Common Market Law Review*, Volume 26, 1989, p. 46, agrees to this and in fact the Court itself expresses, it seems, the same opinion in Ground 3 of the *Asjes* Decision.

164) See Van der Esch, Bastiaan, in Panel Discussion, "Anticompetitive State Measures in the EEC and EEC Competition Policy and Enforcement", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1989, p. 19-6.

#### 4.2.4. The *Lèfevre* Case

In the *Lèfevre* Case, the Court, without performing a thorough examination, rejected a claim that Articles 3(g) and 85 EC applied to French legislation concerning maximum retail prices of meat.<sup>165)</sup> In the main action a retail butcher, Régis Lefèvre, was prosecuted for having charged higher prices on beef and veal than those fixed by French Ministerial Orders.

In regard to a question from the referring court concerning the compatibility of this measure with Articles 3(g) and 85 EC, the Court simply stated:

*"As regards the application of Article 3(f) and Article 85 of the EEC Treaty to price rules such as those referred to by the national court, it must also be observed that the purpose of such rules is not to compel traders to conclude agreements or to take any other action of the kind prohibited by Article 85(1) of the EEC Treaty but to entrust responsibility in pricing matters to the public authorities. As the Court has already ruled in ...[the Cullet Case]..., Article 3(f) and Article 85 do not prohibit the adoption by Member States of such national rules providing for retail sale prices to be fixed by the public authorities"*<sup>166)</sup>

The case gives rise to only a few observations. Firstly, it should be noted that the Court, in contrast to its normal practice, curiously did not restate the general principle. Secondly, the Court based its ruling on two criteria: whether the contested legislation compelled traders to enter cartels, and whether it entrusted responsibility for pricing to the public authorities. Both criteria can be traced back to the *Leclerc* Case. The first criterion corresponds to the first prong of the two-prong test of that case. The second criterion corresponds to that which above was referred to as the delegation criterion regarding the degree to which power had been delegated to the undertakings from the public authorities. Finally, the Court appears to have applied the criteria correctly. The legislation nevertheless had anti-competitive effects. This shows, once again, that the Court does not seem to put much emphasis on this criterion.

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165) See Case 188/86, *Ministère public v. Régis Lefèvre*, Judgment of 2 July 1987, [1987] E.C.R. 2963

166) See *ibid.*, at Ground 7.

#### 4.2.5. The *Vlaamse Reisbureaus* Case

The Court's decision in the *Vlaamse Reisebureaus* Case was much clearer than was, for example, the *Asjes* Case.<sup>167)</sup> For once, the Court's decision was very systematic and informative. The measure at stake was a prohibition against the transfer of travel agent commissions to customers. In the main action, the Vereniging accused the Sociale Dienst, while acting as travel agent for public service employees, of granting rebates to its customers who booked tours organised by tour operators. In fact, the rebate was the commission normally paid to travel agents.<sup>168)</sup>

The Court interpreted one of the questions from the referring court as requiring it to ascertain whether the measure was incompatible with the obligations of the Member States pursuant to Article 5 EC, in conjunction with Articles 3(g) and 85 EC.<sup>169)</sup> The Court began its decision by restating the general principle of the *Asjes* Case. The Court then also repeated the so-called new sentence also originating from that case. More interestingly, the Court established a new two-prong test, in which the first prong was a determination of:

*"...whether the documents before the Court disclose the existence of agreements, decisions or concerted practices of the kind in the area of activities concerned by the question referred"* <sup>170)</sup>

and if so, the second prong was a determination of:

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167) See Case 311/85, *VZW Vereniging van Vlaamse Reisebureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Judgment of 1 October 1987, [1987] E.C.R. 3801.

168) Among the relevant pieces of national legislation were the following: Article 22 of the Royal Decree of 30 June 1966, which, in essence, stated that the travel agents had the obligation to charge the prices and fares agreed upon or required by law, and may not share the commissions with clients; Article 5(2) of the Law of 21 April 1965 regarding the activities of travel agents pursuant to which the Royal Decree of 30 June 1966 was adopted; and Article 54 of the Law of 14 July 1971 on commercial practices, which prohibited unfair commercial practices and to which Article 22 of the Royal Decree of 30 June 1966 implicitly referred.

169) See *ibid.*, at Ground 9.

170) See *ibid.*, at Ground 11.

*"...whether provisions such as the Belgian provisions at issue are intended to reinforce the effects of such agreements, decisions or concerted practices, or have that effect."* <sup>171)</sup>

With regard to the first prong, the Court found that with regard to the activities of travel agents there was a system of agreements both between travel agents themselves and between agents and tour operators intended to oblige agents to observe the prices for travel set by tour operators, and having that effect. Furthermore, the Court held that the agreements had the object and effect of restricting competition between travel agents.<sup>172)</sup> As an additional analysis to the first prong, the Court also examined whether the agreements could affect trade between Member States. The Court concluded that such trade could be affected.<sup>173)</sup> The second prong of the test was to determine whether the provisions at issue reinforced the effects of agreements between travel agents and tour operators.<sup>174)</sup> The Court held that they did indeed. The Court concluded:

*"...legislative provisions or regulations of a Member State requiring travel agents to observe the prices and tariffs for travel set by tour operators, prohibiting them from sharing the commission paid in respect of the sale of such travel with their clients or granting rebates to their clients and regarding such acts as contrary to fair commercial practice are incompatible with the obligations of the Member States pursuant to Article 5, in conjunction with Articles 3(f) and 85, of the EEC Treaty, where the object or effect of such national provisions is to reinforce the effects of agreements, decisions or concerted practices which are contrary to Article 85."*  
<sup>175)</sup>

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171) See *ibid.*, at Ground 11.

172) See *ibid.*, at Ground 17.

173) See *ibid.*, at Ground 18.

174) This may be read implicitly from Ground 23 of the *Vlaamse Reisbureaus* Case.

175) See the *Vlaamse Reisbureaus* Case, at Ground 24.

Generally speaking, the case is significant as being the first one where the contested state measure was unambiguously found to be contrary to Articles 3(g), 5 and 85 EC.<sup>176)</sup> In addition, the case is notable because it established the new two-prong test.

The first prong in this test is strongly analogous to the first prong of the two-prong *Leclerc* test. The second prong can clearly be traced back to the *Asjes Case*. The first prong implemented a "simple" proof examination. Of greater interest here are the three criteria the Court applied in the second prong of the test, to determine whether the state measure reinforced the effects of agreements between travel agents and tour operators.<sup>177)</sup> The first of these criteria was whether an originally contractual prohibition was transformed into a permanent legislative restriction which the parties could no longer alter. The second was whether the legislation contained legal remedies allowing cartel members to force uncooperative firms to comply with the rules. Finally, the third criterion was whether other sanctions existed which could effectively force uncooperative firms to comply with the rules of commercial practice.

It should be added as a final point that certain scholars have given the judgment a wide interpretation. For instance, Joliet has noted, that the Court in its ruling applied rather general terms such as "legislative provisions or regulations" of a Member State that "reinforce the effects of agreements, decisions or concerted practices which are contrary to Article 85", and that the impact of this case must thereby be interpreted as being very broad. Thus, the Court may disapprove of any state measure which incorporates anti-competitive terms of any agreement.<sup>178)</sup>

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176) In the *Clair Case*, government encouragement was found not to be a defence in Article 85 EC actions, but the Court made no reference to Articles 3(f) and 5(2) EC.

177) See the *Vlaamse Reisbureaus Case*, at Ground 23.

178) See Joliet, René, "National Anti-competitive Legislation and Community Law", *Fordham International Law Journal*, Volume 12, 1989, Number 2, p. 186-187.

#### 4.2.6. The *Aubert* Case

Two months after the Court decided *Vlaamse Reisbureaus*, the Court handed down its decision in the *Aubert* Case.<sup>179)</sup> The facts of *Aubert* and *Clair* are very similar; among other things, they both concerned cognac production in France. In contrast to *Clair*, the Court in *Aubert*, met the challenge of analysing the state measure at issue rather than merely the related agreement. As in *Clair*, one of the parties in the main action was BNIC, whereas the other party was the wine-grower, Yves Aubert.<sup>180)</sup> Within the framework of BNIC, a production quota system had been agreed upon, and this agreement was subsequently made binding by Ministerial Order of 2 January 1980, adopted pursuant to Law No 75-600. Yves Aubert exceeded his quota and BNIC consequently sought to levy the appropriate penalty on Yves Aubert.

The Court reframed the questions from the referring court to ask whether the BNIC production quota agreement violated Article 85(1) EC, and, further, whether the Ministerial Order which made the anti-competitive agreement generally binding was contrary to Article 5 when interpreted together with Articles 3(g) and 85 EC.<sup>181)</sup>

Regarding the BNIC agreement, the Court formulated and applied a test very similar to the first prong in the two-prong test of *Vlaamse Reisbureaus*, the only difference being that this time the Court expressly examined whether trade between Member States was affected.<sup>182)</sup> The Court found that the agreement restricted competition because it penalised increases in production. It therefore tended to preserve the existing market situation - it made it more difficult for a producer to improve his competitive position in the market<sup>183)</sup>. Likewise, the Court stated that the agreement was capable of affecting trade between Member States.<sup>184)</sup>

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179) See Case 136/86, Bureau national interprofessionnel du cognac v. Yves Aubert, Judgment of 3 December 1987, [1987] E.C.R. 4789.

180) For further information of the organization of BNIC and of the relevant legislation, see the analysis of the *Clair* Case above under *Section 4.2.1.*

181) See *ibid.*, at Ground 11.

182) See *ibid.*, at Ground 16.

183) See *ibid.*, at Ground 17.

184) See *ibid.*, at Ground 18.



To analyse the Ministerial Order, the Court first set up the general principle.<sup>185)</sup> Then, in accordance to the second prong of the two-prong test of *Vlaamse Reisbureaus*, the Court added:

*"That is the case in particular when a Member State, by means of an order making them generally binding, reinforces the effects of agreements which are contrary to Article 85."*<sup>186)</sup>

The Court then concluded that, by making an agreement contrary to Article 85 generally binding, the Ministerial Order was contrary to Member States' obligations pursuant to Article 5 EC when interpreted together with Articles 3(g) and 85 EC.<sup>187)</sup>

This case firmly established the two-prong *Vlaamse Reisbureaus* test. Characteristically, the Court answered the question in a less detailed manner than it did in *Vlaamse Reisbureaus*, and the case is therefore less informative than it might otherwise have been.

Because the first prong applied in *Aubert* is so similar to that of *Clair*, the observations about this prong made in the discussion of *Clair, supra*, apply equally as well to this case. Regarding the second prong, the Court emphasised the generally binding character of the agreement, which is similar to the first criterion the Court applied in *Vlaamse Reisbureaus* as part of the second prong. The other two criteria from the second prong in *Vlaamse Reisbureaus*, concerning sanctions, were not referred to in this case. Had the Court applied these criteria, it would have found that, due to the levies, sanctions, which could effectively force uncooperative firms to comply with the rules, could be said to exist. It is worth noting that both Joliet and Gyselen consider the fact that the Order made the agreement binding was the decisive factor. Otherwise, they reason, the agreement could not have been effectively

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185) See *ibid.*, at Ground 23.

186) See *ibid.*, at Ground 24.

187) See *ibid.*, at Ground 25.

implemented, as it would be pointless for undertakings to commit themselves to the rigours of a quota cartel if third-party competitors remained free to produce as they wish.<sup>188)</sup>

What is new in this case is the Court's referral to Article 85(3) EC.<sup>189)</sup> The Court did this in response to BNIC's claim that the national provisions did not violate Article 85(1) because they were adopted to compensate for declining sales and overproduction. The Court replied that declining sales or overproduction provide undertakings with no more than the basis for an application to the Commission pursuant to Article 85(3) EC. The Court thereby indicated that in many respects the conflict between anti-competitive state measures and EC competition law could be resolved by granting undertakings an exemption pursuant to Article 85(3) EC, and perhaps even to Member States.

The Court again left elements of previous decisions out of this decision. For example, the Court did not mention the competence test or the delegation criterion concerning the degree of power delegated to undertakings by the public authorities. This could be interpreted as reflecting the fact that either the Court had decided that these factors were now generally irrelevant or simply that these factors were not relevant to this case.

#### 4.2.7. The *Libraires* Case

Just as the facts of the *Aubert* Case were factually very similar to those of the *Clair* Case, so the present case, which is the last one to be dealt with in this section, is in many respects similar to the *Leclerc* Case.<sup>190)</sup> As in the *Leclerc* Case, in this case the contested legislation was the French book retail price maintenance system. In the main proceedings, Syndicat des libraires de Normandie sought to enjoin a member of the Leclerc chain, l'Aigle

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188) See Joliet, René, "National Anti-competitive Legislation and Community Law, *Fordham International Law Journal*, Volume 12, 1989, Number 2, p. 177; or Gyselen, Luc, "State Action and the Effectiveness of the EEC Treaty's Competition Provisions", *Common Market Law Review*, Volume 26, 1989, p. 48.

189) See the *Aubert* Case, at Ground 21.

190) See Case 254/87, *Syndicat des libraires de Normandie v. L'Aigle distribution SA*, Judgment of 14 July 1988, [1988] E.C.R. 4457.

distribution SA, from selling books at prices lower than those authorised by Article 1 of the *Loi Lang*.<sup>191)</sup>

A sixth, new paragraph had been added to Article 1 of the *Loi Lang* in response to the *Leclerc* Decision. The new paragraph provided that the terms of the fifth paragraph, relating to importers' obligations regarding retail prices:

*"...are not applicable to books imported from a Member State of the European Economic Community unless it is established, in particular by the fact that the books have not actually been marketed in that State, that the object of the operation was to exclude the sale to the public from the provision of the fourth paragraph of this article."*<sup>192)</sup>

The referring court justified its second referral of the *Loi Lang* on its finding that the amended *Loi Lang* restored to certain undertakings complete freedom to fix book prices, permitted the creation of price agreements, and permitted the establishment of captive distribution networks. The referral was also justified on the ground that the Court's previous decisions in this area had not included the possible impact of Article 86 EC.

The Court reinterpreted the referred questions as asking whether the introduction, or maintenance, of the national rules violated Member States' obligations pursuant to Article 5(2) EC, because, by either facilitating the establishment of captive distribution networks, or by allowing an undertaking to abuse a dominant market position, they were capable of depriving Articles 85 and 86 EC of their effectiveness. In its judgment, the Court first restated the general principle, and included herein a part prohibiting the reinforcement of the effect of agreements. Then followed a long interpretation of the *Leclerc* Case, and the application thereof to the questions at issue, in essence establishing that the national legislation did not violate Article 5 EC in conjunction with Articles 3(g) and 85 EC. The Court also found that the legislation did not violate Article 86 EC.

It is possible to interpret the Court's summary of its reasoning in the *Leclerc* Case as abandoning the second prong of the first test of that case. This prong concerned the

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191) See Chapter 4 above concerning the particularities of this legislation.

192) See the *Libraires* Case, at Ground 4.

harmful effects of national legislation on the competition provisions' effectiveness (the efficiency criterion). It must be emphasised, however, that the effectiveness issue is still included within the general principle. On the other hand, none of the judgments since *Leclerc* and *Cullet* referred to this second prong. This could be an indication that the Court has abandoned it. The scope of Articles 3(g), 5(2) and 85 EC would then be restricted again, and legislation not involving, for example, cartel-like arrangements or other arrangements not involving semi-public price fixing systems but nevertheless having very harmful economic effects, would not violate Articles 3(g), 5(2) and 85 EC. It should also be noted that the Court referred to the competence test, which so far had only been applied in *Leclerc* and *Asjes*, during its discussion of the *Leclerc* Case; accordingly, this test should not be considered as being completely abandoned. In other respects, the Court's reasoning was clear, as it was largely based on the findings of the *Leclerc* Case, which may explain why only a three-judge panel decided the case.

#### 4.3. Establishment of a Three-Prong Test in the *Van Eycke* Case

A few months after the Court had handed down its decision in *Libraires*, a nine-judge panel of the Court again ruled on the interaction of Articles 3(g), 5(2) and 85 EC. In this case, the *Van Eycke* Case, the Court pulled together many of the unresolved issues from previous decisions and established a new test, now consisting of three prongs.<sup>193)</sup> The contested Belgian measure concerned maximum interest rates.

##### 4.3.1. The Facts

The Belgian Vredegerecht for the Canton of Beveren referred the case to the Court pursuant to Article 177 EC. The parties to the dispute were Mr. Van Eycke and the financial institution ASPA NV. Mr. Van Eycke initiated the proceedings after going to the bank, in response to an advertisement offering very attractive interest rates, and seeking to open an account bearing these high rates. When ASPA informed Mr. Van Eycke that, due to a new

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193) See Case 267/86, *Pascal Van Eycke v. ASPA NV*, Judgment of 21 September 1988, [1988] E.C.R. 4769.

Royal Decree of 13 March 1986, those terms could no longer be offered, Mr. Van Eycke decided to bring an action against ASPA. In his action Mr. Van Eycke claimed that because the Decree was contrary to Article 85 *et seq.* ASPA could not rely on the Decree.

The contested Decree owed its origins to the Belgian Income Tax Code, which, by providing a tax exemption for interest earned from savings deposits, sought to encourage savings. This caused high savings deposits interest rates and a Royal Decree and a recommendation were therefore adopted for the purpose of easing the vigorous competition which had led to the high interest rates. Accordingly, various financial institutions entered into a self-regulatory agreement on 30 December 1985 which set a maximum interest rate for savings deposits. However, this agreement was insufficient and the contested Royal Decree of 13 March 1986 was therefore adopted. This Decree fixed a maximum basic interest rate, and a rate of fidelity.

The questions referred to the Court were rather long and complicated. The Court therefore reinterpreted them. Among the questions, one concerned the compatibility of the measure with Articles 3(g), 5(2) and 85 EC, and is therefore of relevance here.<sup>194)</sup>

#### 4.3.2. The Position of the Court

The Court began its reply by reaffirming the general principle. The Court once again slightly altered its description of the principle, this time by dropping the phrase regarding "reinforcement". The Court also referred to Articles 85 and 86 EC as "*per se*" concerning only the conduct of undertakings.<sup>195)</sup> The Court then developed a three-prong test, according to which national legislation would be annulled if a Member State were:

- (1) *"...to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or"*
- (2) *"to reinforce their effects, or"*

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194) See the *Van Eycke* Case, Ground 15. One difference between the national court's question and the reframed one is that in the latter, Article 5 EC was explicitly referred to.

195) See *ibid.*, at Ground 16.

- (3) *"to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere."* 196)

Applying the first prong of the test to the national legislation at issue, the Court found, on the one hand, that agreements designed to restrict price competition existed before the adoption of the contested Decree, but, on the other hand, that it was not apparent that the Decree was intended to require or favour the adoption of new restrictive agreements or the implementation of new practices.<sup>197)</sup>

The Court therefore went on to apply the second prong of the test. The Court first noted that the legislation would be regarded as intended to reinforce the effects of pre-existing agreements:

*"...only if it incorporates either wholly or in part the terms of agreements concluded between undertakings and requires or encourages compliance on the part of those undertakings"* 198)

and consequently found that:

*"...although the prospect of losing the entire benefit of the preferential tax treatment for savings deposits constitutes a significant inducement to comply with the legislation in question, it is not apparent from any of the findings made by the national court in its judgment that such legislation merely confirmed both the method of restricting the yield on deposits and the level of maximum rates adopted under pre-existing agreements, decisions or practices."* 199)

Nevertheless, the Court authorised the national court to investigate the matter further.

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196) See *ibid.*, at Ground 16.

197) See *ibid.*, at Ground 17.

198) See *ibid.*, at Ground 18.

199) See *ibid.*, at Ground 18.

Finally, the Court applied the third prong of the test. The Court found that the circumstances of this case did not deprive the legislation of its official character. The Court argued that:

*"...it is apparent from the legislation in question that the authorities reserved to themselves the power to fix the maximum rates of interest on savings deposits and did not delegate that responsibility to any private trader."*<sup>200)</sup>

In conclusion, the legislation was found compatible with Articles 3(g), 5 and 85 EC.

#### 4.3.3. Commentary

One scholar has referred to this as a landmark case, particularly due to the third prong of the test it established, which he considered to be new.<sup>201)</sup> However, a comparison with earlier case law will demonstrate that this case did not in fact represent such a significant development, despite the assertion of Hoffman. The first prong of the test is now well-known and corresponds to the first prong in the *Leclerc* two-prong test. The second prong of the present *Van Eycke* test, concerning whether the contested national legislation was intended to reinforce the effects of agreements, was introduced in *Asjes* and further developed in *e.g. Vlaamse Reisbureaus* and *Aubert*. The third prong of the test concerning delegation of power, can clearly be traced back to *Leclerc*, and this part of the test was also applied in *Cullet* and *Libraires*. It can therefore be concluded that *Van Eycke* did not truly represent the substantial development some have claimed. The third prong of the *Van Eycke* test, which in particular was claimed to be new, originated in *Leclerc* and *Cullet*, where it was referred to as the delegation criterion. It is therefore more accurate to describe this prong of the test, as Gyselen does, as a "restatement",<sup>202)</sup> rather than new, as Hoffman does. It is nevertheless

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200) See *ibid.*, at Ground 19.

201) See Hoffman, Alan B., "Anti-competitive State Legislation Condemned under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, p. 22.

202) See Gyselen, Luc, "State Action and the Effectiveness of the EEC Treaty's Competition Provisions", *Common Market Law Review*, Volume 26, 1989, p. 54.

a landmark case in the respect that the actual wording of the test as formulated in this case was to be consistently applied by the Court in subsequent decisions.

The dominating difference between the first and the second prong is that, with regard to the time of enactment of the measure, the first focuses on new agreements and the second on pre-existing agreements. Accordingly, the Court found that there were no new but only pre-existing agreements. In other words, with regard to the first prong of the *Van Eycke* test, the Court found that the Member State had not required or favoured the adoption of an agreement, *etc.*, contrary to Article 85. In connection with the second prong, the Court decided that the national legislation would be found to have reinforced anti-competitive effects of private agreement if such legislation, *inter alia*, incorporated the agreement. This criterion is in fact very logical and appropriate and the Court should apply this criterion before it determines whether the national legislation reinforces effects of a private agreement. It is difficult to see how legislation can reinforce an agreement if the legislation does not contain, in whole or in part, the terms of that agreement. There must be a connection between the agreement and the allegedly reinforcing national legislation. It was such connection which the Court was not completely sure existed, *i.e.* that the Decree at issue in *Van Eycke* had a reinforcing effect. Ehrlicke offers a persuasive explanation of why this doubt is justified<sup>203)</sup>. He believes that the intent of the agreement was reinforced because there was a pre-existing agreement, which effect was re-inforced by the measure. No doubt, the agreement and the Decree were pursuing exactly the same objects, *i.e.* lower interest rates, and in fact both contained the similar specific terms, *i.e.* an explicit maximum interest rate. In other words, some kind of link existed between the agreement and the contested Decree.

In summary, the Court reached its conclusion in *Van Eycke* in a somewhat questionable manner. Nevertheless, the decision is a helpful development in this area because it brings together into one test disparate parts of many previous decisions. The case therefore provides a more complete understanding of the logical relationship between these previous decisions.

In conclusion, the cases examined in this chapter represent a further development of the test originally introduced in *Leclerc*. However, the dominating test was given quite a new

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203) See Ehrlicke, Ulrich, "Staatliche Regulierungen und EG-Wettbewerbsrecht. Die neueste Entwicklung - das 'Van Eycke'-Urteil des EuGH vom 21. September 1993", *Wirtschaft und Wettbewerb*, Volume 41, 1991, pp. 187-188.



form through the cases to follow *Leclerc*. In the light of subsequent case law, particular emphasis should be placed on the formulation in *Van Eycke* of the applicable test.

## 5. Application of the *Van Eycke* Test

The following five cases, *i.e.* *Ahmed Saeed*, *Alsthom*, *Chapuis*, *ERT* and *Morais*, represent the Court's case law decided in the period between the *Van Eycke* Case and the striking retreat effected in the "November" Cases: *Güterfernverkehr*, *Meng*, and *Ohra* Cases. Among these cases it was only in *Ahmed Saeed* that a measure was condemned as contrary to the doctrine.

### 5.1. The *Ahmed Saeed* Case

The first case, *Ahmed Saeed*, like *Asjes*, concerned prices of airline tickets.<sup>204)</sup> The case was decided in plenum; this indicated not only the case's political importance, but also its high degree of complexity. The parties in the main proceedings were an association, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, against the two travel agencies, *Ahmed Saeed Flugreisen* and *Silver Line Reisebüro GmbH*. The agencies specialised in obtaining inexpensive airline tickets which were issued in a currency other than the German "marks". The flight of such tickets would, according to the ticket, begin in the state in which the ticket was issued, but the ticket purchasers would instead board the airplane during an intermediate stop at a German airport. However, the travel agencies were sued for selling these tickets at a tariff below that approved by the competent federal minister, pursuant to the *Luftverkehrsgesetz*, and also for engaging in unfair competition.

The first two questions of the national court concerned the compatibility of the companies' activities, whereas the third question concerned the compatibility of the Member States' activities. The reasoning of the Court was primarily based on technical considerations applicable solely to the air transport industry. This reasoning was long and intricate and, need not be analysed here. A few points are, however, worth discussing. First, after *Asjes*, the Council as well as the Commission had adopted new rules implementing the competition provisions of the Treaty in respect of the air transport sector. The Court therefore held that

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193) See Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, Judgment of 11 April 1989, [1989] E.C.R. 803.

the agreements referred to by the national court in the preliminary questions must be analysed in the light of these rules.<sup>205)</sup> Second, the Court found that both bilateral and multilateral agreements were automatically void pursuant to Article 85(2) EC.<sup>206)</sup> Third, the Court further held that the application of tariffs for scheduled flights on the basis of bilateral or multilateral agreements may, in certain circumstances, constitute an abuse of a dominant position on the market in question, in particular where an undertaking in a dominant position has succeeded in imposing on other carriers the application of excessively high or excessively low tariffs or the exclusive application of only one tariff on a given route.<sup>207)</sup> Finally, the Court restated the general principle and referred to *Vlaamse Reisbureaus*.<sup>208)</sup> Immediately after this statement, the Court went on to declare that:

*"It must be concluded as a result that the approval by the aeronautical authorities of tariff agreements contrary to Article 85(1) is not compatible with Community law and in particular with Article 5 of the Treaty. It also follows that the aeronautical authorities must refrain from taking any measure which might be construed as encouraging airlines to conclude tariff agreements contrary to the Treaty."* <sup>209)</sup>

The Court then went on to examine how Article 90 EC could be applied.<sup>210)</sup>

Considering the very sophisticated system for analysing state action which had been developed over several years, and which had culminated in the *Van Eycke* Decision only half a year earlier, it is surprising that the Court in the present case, *Ahmed Saeed*, once again chose not to apply the doctrine in the same way that it had in any previous decision. According to Hoffman, the Court in this case simply applied the principles developed in *Asjes*, *Vlaamse Reisbureaus* and *Aubert*; the case does not represent a major advance in the

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205) See *ibid.*, at Ground 18.

206) See *ibid.*, at Ground 29.

197) See *ibid.*, at Ground 46.

208) See *ibid.*, at Ground 48.

209) See *ibid.*, at Ground 49.

210) See Chapter 14 below concerning *Contr.\* of Anti-Competitive State Measures Through Article 90 EC*.

development of the law of Article 5(2) EC.<sup>211)</sup> This is probably due to the special characteristics of the air transport industry. This case should therefore not be given too much weight in this regard. The case is noteworthy, however, because the Court did apply the general principle and, in addition, it was willing to declare that the authorities' approval of tariff agreements contrary to Article 85 EC violated Article 5 EC.

## 5.2. The *Alsthom* Case

The parties in the main proceedings in the Court's next decision in this area, *Alsthom*, were Alsthom, Sulzer and Sulzer's insurer. Alsthom initiated the action after Sulzer supplied to it defective ship engines. Alsthom sought from the *Tribunal de commerce* an order *inter alia* requiring Sulzer to pay the entire cost of repairs. At the same time, Sulzer served a third-party notice on its insurer, seeking indemnity for any judgment which may be entered in favour of Alsthom. The contested French case law concerned the interpretation of Article 1643 of the French Civil Code, which provides:

*"The vendor shall be liable for any latent defects, even if he is unaware of those defects, unless he stipulates that he shall not be liable."* <sup>212)</sup>

French courts have interpreted this provision rather strictly. They have understood it as raising an irrebutable presumption that a manufacturer or trader is aware of defects in the goods it has sold. Only the appropriate term in contracts between merchants in the same specialised field can shield a party from liability pursuant to this provision.

The question from the French Tribunal de commerce in Paris was whether this case law was prohibited pursuant to *inter alia* Article 3(g) and 85 EC. Regarding these provisions, the Court first explained the connection between them.<sup>213)</sup> It then reaffirmed the general

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211) See Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, p. 21.

212) See *ibid.*, at Ground 3.

213) See *ibid.*, at Ground 10.

principle,<sup>214)</sup> and then it added that Member States' duty not to adopt or to maintain in force any measure which could deprive Articles 85 and 86 EC of their effectiveness would be violated:

*"...if national case-law were to favour the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or to reinforce their effects."*<sup>215)</sup>

Although the Court answered the question in the negative, the Court furthermore found that:

*"With regard to this case, it must be stated that the irrefutable presumption that a trader is aware of any defects in the goods sold, to which the national court refers, has been developed in the case-law for reasons connected with the protection of buyers and is unlikely to favour or facilitate the adoption of agreements contrary to Article 85."*<sup>216)</sup>

This case was different from the previously examined ones because here the Court was not concerned with whether national legislation violated Articles 3(g), 5 and 85 EC. The Court was instead concerned with whether the judicial authorities of a Member State had developed case law which violated these provisions. In fact, the case represents an expansion of the application of the doctrine to also include case law. This is a natural development. It should be noted that the Court only applied the first two of the three-prong *Van Eycke* test. It especially focused in its decision on the first prong, *i.e.* whether the case law favoured the adoption of agreements contrary to Article 85 EC. Considering the *Alsthom* Case further, it is clear that the contested case law regards a subject very different from what is normally considered within the scope of the competition provisions. In addition, it deals with some

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214) See *ibid.*, at Ground 11.

215) See *ibid.*, at Ground 11.

216) See *ibid.*, at Ground 12.

fundamental aspects of contract law, and this has traditionally been considered to be, to a large extent, exclusively a matter for Member States.<sup>217)</sup>

### 5.3. The *Chapuis* Case

Despite *Ahmed Saeed*, in particular, the Court in the third case dealt with in this chapter, *Chapuis*, returned to its *Van Eycke* method of analysis.<sup>218)</sup> At issue was Belgian shop closing legislation. In criminal proceedings, the director of Trafitex S.A., Mr. André Marchandise, and an employee of that company, Mr. Jean-Marie Chapuis, were prosecuted for having employed several workers on Sundays after 12:00 p.m. in a retail shop in violation of the Belgian *Loi sur le Travail* of 16 March 1971.

*Inter alia*, the Court reframed the question from the Belgian court to whether the national legislation was compatible with the obligations imposed on Member States by Articles 3(g), 5(2) and 85 EC.<sup>219)</sup> The Court first restated the general principle and then the three-prong test exactly as that test was written in *Van Eycke*.<sup>220)</sup> Thereafter, the Court simply declared that:

*"In the present case there is no evidence before the Court to support the conclusion that the legislation at issue seeks to reinforce the effects of pre-existing agreements, decisions or concerted practices. Moreover, no aspect of the legislation is liable to deprive it of its official character."*<sup>221)</sup>

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217) Also see Joerges, Christian, "The Process of European Integration and the 'Denationalization' of Private Law", in *New Directions in Business Law Research*, Edited by Dahl, Børge & Nielsen, Ruth, Copenhagen, 1996, p. 89, who states in this regard that "...the primary competence of Member States for the development of contract law has to be acknowledged, because the legitimacy of private law provisions rests primarily on the national context. On the other hand, it is a legitimate objective of the European Community to facilitate contractual transactions within the internal market."

218) See Case C-332/89, *Criminal Proceedings against André Marchandise, Jean-Marie Chapuis and Trafitex S.A.*, Judgment of 28 February 1991, [1991] E.C.R. I-1027.

219) See *ibid.*, at Ground 21.

220) See *ibid.*, at Ground 22.

221) See *ibid.*, at Ground 23.

This case requires but a few comments. First, it should be noted that this case firmly established the *Van Eycke* three-prong test. Second, and quite interestingly, this judgment seems to imply that the third prong of the test can be applied independently, *i.e.* not simultaneously, of the first two prongs. This conclusion is reached due to the use of the wording "moreover". This implies that even if no pre-existing agreements, decisions or concerted practices is found, national legislation may be found to violate the Treaty provisions in question if such legislation delegates the authority to make certain decisions. This conclusion, while not clearly reached in *Van Eycke*, is nevertheless consistent with *Leclerc*.

#### 5.4. The *ERT* Case

In the *ERT* Case, the Court avoided addressing a question from the referring court concerning a national measure's prevention, restriction or distortion of competition in light of the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC.<sup>222)</sup> The contested measure related to a television monopoly. The question involved in this matter arose in proceedings between the Greek television and radio company, ERT, and both the municipal television station, DEP, and the mayor of Thessaloniki.

ERT was a company granted exclusive rights by law to carry out its activities, whereas DEP was a television station performing activities falling within ERT's exclusive rights. The mayor had supported the activities of DEP. The proceedings were initiated by ERT in order to stop DEP's activities. In this context the national court referred as many as ten questions to the Court for a preliminary ruling.<sup>223)</sup> Among these, one was understood by the Court as seeking to ascertain whether Articles 3(g) and 85 EC precluded the grant by the State of exclusive rights in the field of competition.<sup>224)</sup>

In its answer, the Court was preoccupied with the non-existence of any agreements:

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222) See Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, Judgment of 18 June 1991, [1991] E.C.R. I-2925.

223) With regard to those questions, concerned with the application of Articles 86 EC read in conjunction with Article 90 EC, see *Chapter 14 concerning Control of Anti-Competitive State Measures Through Article 90 EC*.

224) See *ibid.*, at Ground 8.

*"As regards Article 85, it is sufficient to observe that it applies, according to its own terms, to agreements 'between undertakings'. There is nothing in the judgment making the reference to suggest the existence of any agreement between undertakings. There is therefore no need to interpret that provision."* <sup>225)</sup>

It should be added that the Court later on its decision stated the general principle.<sup>226)</sup>

Although the national court in its question did not include Article 5(2) EC, in the context of the present analysis it clearly appears that what the referring court had in mind was whether the anti-competitive effects of the national measure made it contrary to the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC. This is also the impression to be gained from the views presented by DEP, the mayor and the Commission as stated in the Report for the Hearing.<sup>227)</sup> Nevertheless, this reading was not taken up by the Court itself. The Court's focus on the non-existence of agreements may be understood as a minimalist approach and as an unwillingness to read the doctrine as generally condemning national measures with anti-competitive effects. This unwillingness is particularly understanding when taking into consideration the fact that a legal monopoly was involved.

## 5.5. The *Morais* Case

In the *Morais* Case,<sup>228)</sup> which is the last case to be analysed here in this chapter, the Court gave significant weight to the more traditional criteria of Article 85 EC such as whether trade between Member States was affected.<sup>229)</sup> The case arose from criminal proceedings against Mr. *Morais*, who was charged with having violated a Portuguese legislative prohibition on giving driving lessons on highways situated in municipalities other

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225) See *ibid.*, at Ground 29.

226) See *ibid.*, at Ground 35.

227) See *ibid.*, at pp. I-2935 - I-2936.

228) See Case C-60/91, *José António Batista Morais*, Judgment of 19 March 1992, n.y.r.

229) This criterion was also applied in *Vlaamse Reisbureaus* and *Aubert*.



than the one in which the driving school itself is located. Mr. Morais claimed that this legislation violated Community law. The national court referred the case to the Court pursuant to Article 177 EC and, *inter alia*, asked whether the contested national legislation was contrary to Article 85 EC.<sup>230)</sup>

The Court again first restated the general principle. This time, however, the Court did not include in its recitation the passage emphasising that the rules on competition are concerned only with the conduct of undertakings. The Court also did not refer to Article 3(g) EC.<sup>231)</sup> The Court determined that the measure at issue did not affect trade between Member States,<sup>232)</sup> and it did not hinder new national or foreign competitors' access to the market.<sup>233)</sup> Therefore, further analysis was not found necessary. Based on this reasoning, the Court held that the measure did not violate Article 85 EC.<sup>234)</sup>

The contested national legislation contained some anti-competitive elements, and could therefore be said to detract from the effectiveness of Article 85 EC. On the other hand, the legislation was probably not enacted for the purpose of promoting anti-competitive measures, nor does it have any direct connection to the activities described in Article 85 EC, such as agreements between undertakings. Consequently, it would have been interesting if the Court had applied *e.g.* the *Van Eycke* three-prong test or, even more interestingly, had applied, or explicitly declined to apply, the second prong of the *Leclerc* Case, concerning the deprivation of the competition provisions' effectiveness. Instead, the Court avoided applying any of the previous tests. The Court therefore avoided saying in explicit terms whether it considers anti-competitive measures, which are not based on *e.g.* pre-existing agreements, as contrary to Articles 3(g), 5(2), and 85 EC. In other words, the Court provided no guidance as to how far the doctrine reaches today.

To sum up, the main feature of these five cases decided in the period between the *Van Eycke* Case of 1988 and the three "November" Cases of 1993, is their confirmation of

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230) See *ibid.*, at Ground 4.

231) See *ibid.*, at Ground 11.

232) See *ibid.*, at Ground 12.

233) See *ibid.*, at Ground 13.

234) See *ibid.*, at Ground 14.

the *Van Eycke* test. Of special interest is the condemnation of a national measure in one of these cases, namely in *Ahmed Saeed*. In contrast to the other cases analysed in this chapter, *Ahmed Saeed* did involve unlawful agreements, which were approved of by public authorities. The other cases seem to confirm that the Court is not willing to condemn legislation only due to their anti-competitive nature.

## 6. A Withdrawal From the European Court of Justice?

On the very same day, 17 November 1993, the Court delivered three judgments concerning the interaction of Articles 3(g), 5(2) and 85 EC. The cases in question were *Güterfernverkehr*, *Meng* and *Ohra*. These cases were all handed down by either an eleven-member panel or by all thirteen judges, indicative of their great importance.<sup>235)</sup>

Contrary to most expectations, in all three cases, the Court found the contested state measures to be in accordance with the Treaty provisions. The expectations of the outcomes to the cases may be understood given that at an earlier stage of the cases, the Court had ordered the reopening of oral hearings because two central issues of great importance to the doctrine were raised during the original hearings, and the parties to the cases needed more time to answer. Therefore, it was expected that the Court in the cases at hand would at least provide further guidance for understanding the doctrine. Unfortunately, in the end, the Court in these judgments ignored the issues it had raised itself.

It is also characteristic for the cases to be viewed as elements, together with, most significantly, a case altering the application of the Article 30 EC doctrine,<sup>236)</sup> of the Court's "November Revolution" which, *inter alia*, implies a departure by the Court from the doctrine of *effet utile* of Community law.<sup>237)</sup> Regarding the cases at hand, this means that they are viewed as being a retreat from some, if not all, of the previous cases with respect to state action. The following analysis will put special emphasis on the differences and similarities with previous case law.

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235) *Güterfernverkehr* and *Meng* were delivered by eleven judges, whereas *Ohra* by thirteen judges.

236) See the *Keck* Case, Joined Cases C-267 and C-268/91, *Bernard Keck and Daniel Mithouard*, Judgment of 24 November 1994, [1993] E.C.R. I-6097.

237) See Reich, Norbert, "The 'November Revolution' of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited", *Common Market Law Review*, Volume 31, Number 3, 1994, p. 465.

## 6.1. The *Güterfernverkehr* Case

The measure at stake in the *Güterfernverkehr* Case concerned price fixing through tariff boards of road transport of goods, in many ways similar to the facts of the *Clair* Case.<sup>238)</sup> Nevertheless, the outcome of the judgments was opposite.

### 6.1.1. The Facts

The parties to the dispute were the Bundesanstalt für den Güterfernverkehr (hereinafter referred to as 'Bundesanstalt') and Gebrüder Reiff GmbH KG (hereinafter referred to as 'Reiff').

The contested state measure was the German *Güterkraftverkehrsgesetz* (Law on the carriage of goods by road) which governs the road transport of goods in Germany. The aim of the law was according to its Article 7 to ensure an economically reasonable distribution of tasks between the transport means. The way to achieve this aim was the fixing of tariffs through tariff boards. The members of the boards were tariff experts from the relevant branches of the sector. These would initially be proposed to the Federal Minister for Transport by undertakings or associations of undertakings from the sector and subsequently be appointed by that Minister. Although the members were proposed by undertakings or associations of undertakings, the law expressly stated that the members should carry out their duties on an honorary basis and must not be bound by orders or instructions from the undertakings or associations which proposed them.

If the Federal Minister for Transport agreed with the decisions of the tariff boards, the tariffs were published by ministerial order and were made binding on all parties.

The Bundesanstalt, which was the public authority administering the law, initiated the proceedings against Reiff when it experienced that Reiff as a customer had paid a price lower than the tariff. The Bundesanstalt was, on behalf of the invoicing company, claiming payment of the difference between the tariff and the actually paid price.

The national court referred one preliminary question to the Court, in principle asking whether Articles 3(g), 5(2) and 85 EC precluded the national law.

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238) See Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*, Judgment of 17 November 1993, [1993] E.C.R. I-5801.

### 6.1.2. The Position of the Court

The Court began its decision by reaffirming the well-established general principle about not depriving Articles 85 and 86 EC their effectiveness.<sup>239)</sup> It then restated the *Van Eycke* three prong test. Concerning the first prong of the test, *i.e.* whether the contested law led to the inference of an agreement within the meaning of Article 85 EC, the Court put emphasis on the fact that the tariff experts according to the law were not bound by orders or instructions from undertakings or associations of undertakings which had proposed them to the Federal Minister for Transport<sup>240)</sup> and that the members, in addition, were obliged to fix the tariffs in accordance with interests other than the undertakings', such as the interests of economically weak regions and the sector of agriculture.<sup>241)</sup> Consequently, the Court found that the members of the tariff boards could not be regarded as representatives of undertakings from the sector concerned and therefore were not to be regarded as concluding price agreements contrary to Article 85 EC.<sup>242)</sup>

Thereupon, the Court ignored the second prong of the test and instead went on to apply the third. It found that the public authorities had not delegated their powers in relation to the fixing of tariffs to private economic operators. This was especially based on the finding that the Federal Minister for Transport had the competence to take part in the meetings of the tariff boards and to fix the tariffs himself in agreement with the Federal Minister for the Economy, in substitution of the tariff board's if he considered those tariffs not compatible with the public interest.<sup>243)</sup>

Based on these considerations, the Court concluded that the contested national law was not contrary to Articles 3(g), 5(2) and 85 EC.

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239) See *ibid.*, at Ground 11.

240) See *ibid.*, at Ground 17.

241) See *ibid.*, at Ground 18.

242) See *ibid.*, at Ground 17.

243) See *ibid.*, at Ground 22.

## 6.1. The *Güterfernverkehr* Case

The measure at stake in the *Güterfernverkehr* Case concerned price fixing through tariff boards of road transport of goods, in many ways similar to the facts of the *Clair* Case.<sup>238)</sup> Nevertheless, the outcome of the judgments was opposite.

### 6.1.1. The Facts

The parties to the dispute were the Bundesanstalt für den Güterfernverkehr (hereinafter referred to as 'Bundesanstalt') and Gebrüder Reiff GmbH KG (hereinafter referred to as 'Reiff').

The contested state measure was the German *Güterkraftverkehrsgesetz* (Law on the carriage of goods by road) which governs the road transport of goods in Germany. The aim of the law was according to its Article 7 to ensure an economically reasonable distribution of tasks between the transport means. The way to achieve this aim was the fixing of tariffs through tariff boards. The members of the boards were tariff experts from the relevant branches of the sector. These would initially be proposed to the Federal Minister for Transport by undertakings or associations of undertakings from the sector and subsequently be appointed by that Minister. Although the members were proposed by undertakings or associations of undertakings, the law expressly stated that the members should carry out their duties on an honorary basis and must not be bound by orders or instructions from the undertakings or associations which proposed them.

If the Federal Minister for Transport agreed with the decisions of the tariff boards, the tariffs were published by ministerial order and were made binding on all parties.

The Bundesanstalt, which was the public authority administering the law, initiated the proceedings against Reiff when it experienced that Reiff as a customer had paid a price lower than the tariff. The Bundesanstalt was, on behalf of the invoicing company, claiming payment of the difference between the tariff and the actually paid price.

The national court referred one preliminary question to the Court, in principle asking whether Articles 3(g), 5(2) and 85 EC precluded the national law.

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238) See Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*, Judgment of 17 November 1993, [1993] E.C.R. I-5801.

### 6.1.2. The Position of the Court

The Court began its decision by reaffirming the well-established general principle about not depriving Articles 85 and 86 EC their effectiveness.<sup>239)</sup> It then restated the *Van Eycke* three prong test. Concerning the first prong of the test, *i.e.* whether the contested law led to the inference of an agreement within the meaning of Article 85 EC, the Court put emphasis on the fact that the tariff experts according to the law were not bound by orders or instructions from undertakings or associations of undertakings which had proposed them to the Federal Minister for Transport<sup>240)</sup> and that the members, in addition, were obliged to fix the tariffs in accordance with interests other than the undertakings', such as the interests of economically weak regions and the sector of agriculture.<sup>241)</sup> Consequently, the Court found that the members of the tariff boards could not be regarded as representatives of undertakings from the sector concerned and therefore were not to be regarded as concluding price agreements contrary to Article 85 EC.<sup>242)</sup>

Thereupon, the Court ignored the second prong of the test and instead went on to apply the third. It found that the public authorities had not delegated their powers in relation to the fixing of tariffs to private economic operators. This was especially based on the finding that the Federal Minister for Transport had the competence to take part in the meetings of the tariff boards and to fix the tariffs himself in agreement with the Federal Minister for the Economy, in substitution of the tariff board's if he considered those tariffs not compatible with the public interest.<sup>243)</sup>

Based on these considerations, the Court concluded that the contested national law was not contrary to Articles 3(g), 5(2) and 85 EC.

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239) See *ibid.*, at Ground 11.

240) See *ibid.*, at Ground 17.

241) See *ibid.*, at Ground 18.

242) See *ibid.*, at Ground 17.

243) See *ibid.*, at Ground 22.

### 6.1.3. Commentary

As pointed out in the introduction to the present case, the facts contained many similarities to those of the *Clair* Case. These can be listed as:

- a) the literal aim of the organisations was price fixing in accordance with the public interest;<sup>244)</sup>
- b) the real aim of the organisations was probably price fixing in accordance with the interest of the market participants;<sup>245)</sup>
- c) the prices agreed upon by the members of the organisations were subsequently made generally binding by law;<sup>246)</sup>
- d) the responsible minister could reject approval of the proposed prices;<sup>247)</sup> and
- e) the members of the organisations were proposed to the responsible minister by undertakings or associations of undertakings from the sector in question and subsequently appointed by that minister.<sup>248)</sup>

The sole major difference is that:

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- 244) In the *Clair* Case, this information is given on p. 403 of the judgment, whereas in the *Güterfernverkehr* Case it is found in Grounds 6 and 22.
  - 245) This statement is made according to a general assessment. Also see e.g. Bach, Albrecht, "Case C-185/91, Bundesanstalt für Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG; Case C-2/92, Meng; Case C-245/91, OHRA Schadeverzekeringen NV", *Common Market Law Review*, Volume 31, Number 6, p. 1361.
  - 246) In the *Clair* Case, see Ground 8. In the *Güterfernverkehr* Case, see Ground 6.
  - 247) In the *Clair* Case, this information is given on p. 408 of the judgment, whereas it is found in Ground 6 in the *Güterfernverkehr* Case.
  - 248) In the *Clair* Case, see Ground 3. In the *Güterfernverkehr* Case, see Ground 4.



f) in the *Güterfernverkehr* Case only, according to the law, the members of the organisations were to carry out their duties on an honorary basis and could not be bound by orders or instructions from their undertakings or associations.<sup>249)</sup>

With regard to the position of the Court in the two cases there exists many differences. First of all, it is important to notice that in the *Clair* Case the approach was an assessment within the framework of Article 85 EC<sup>250)</sup>, whereas in the *Güterfernverkehr* Case the applied approach was an assessment within the framework of the doctrine of the interaction of Articles 3(g), 5(2) and 85 EC, *i.e.* the *Van Eycke* test.

Secondly, the applied criteria varied. In the *Clair* Case, the Court applied a so-called traditional Article 85 test, thereby finding the existence of an agreement between undertakings or associations of undertakings with the object to distort competition, and additionally applied what can be named a "negative" test.<sup>251)</sup> In the *Güterfernverkehr* Case, the Court applied the three prong test from the *Van Eycke* Case and mainly considered the first and third prong of that test, *i.e.* whether the state measure required or favoured the adoption of agreements contrary to Article 85 EC, or was deprived of its official character as a result of delegating to private traders the responsibility for taking decisions which affected the economic sphere.

Thirdly, the conclusions of the Court were completely opposite. In the *Clair* Case, the price fixing was not acceptable whereas in the *Güterfernverkehr* Case it was.

These comparisons naturally lead to the observation that - due to the only factual difference - it is now decisive for the Court that the members of price fixing organisations according to the law shall carry out their duties on an honorary basis and must not be bound

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249) See Ground 4 in the *Güterfernverkehr* Case.

250) Although the assessment in *Clair* followed the framework of Article 85 EC, the measure itself was in *Aubert*, as mentioned previously, analysed pursuant to the two-prong test of *Vlaamse Reisbureaus* (leaving out the delegation criterion). Also, in *Aubert*, the measure was condemned. *Clair* is in this analysis read in context with *Aubert*.

251) The "negative" test showed that the agreement was not removed from the scope of Article 85 EC despite the fact that the agreement was made under the aegis of BNIC, which in France constitutes an institution of public law; the members of BNIC were all appointed by the Minister of Agriculture. The agreement was made binding by means of ministerial orders and it was signed by a director or chairman.

by orders or instructions from the undertakings or associations of undertakings that proposed their appointment.

This decisive criterion might have been inspired from the American state action doctrine. In a recent article, Elhauge suggests that the approach underlying the US Supreme Court's doctrine is that financially interested actors can not be trusted to decide which restrictions on competition advance the public interest, whereas financially disinterested, politically accountable actors can be so trusted.<sup>252)</sup> In the *Güterfernverkehr* Case, it can be noticed that the Court, for instance, applied the expression 'the public interest'<sup>253)</sup> and 'independent experts'.<sup>254)</sup> Nevertheless, if the Court had had this approach in mind, it is questionable whether it had applied it in a correct manner. The reason is that the members of the organisations can be described, only with difficulty, as being completely 'financially disinterested actors'. In other words, it is difficult to escape the thought that the members were in reality often fixing prices in accordance with the interests of the undertakings that had appointed the members.

Under all circumstances, when taking into consideration the Court's own test, the opposite outcomes of the two compared cases do not appear so completely justified since it appears that the price fixing in both cases are close to that of a price cartel and that the economic effect of the two systems are similar.<sup>255)</sup> However, an additional explanation to the outcome of the *Güterfernverkehr* Case - and of the contemporary *Meng* and *Ohra* Cases - may be found within a new tendency of the Court to limit its own integrational speed after

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252) See Elhauge, Einer Richard, "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, pp. 668-747. Also see *Chapter 16* below concerning *Focus on Financially Disinterested, Politically Accountable Actors*, where this approach is further examined.

253) See the *Güterfernverkehr* Case, at Ground 22.

254) See the final conclusion of the Court.

255) Also see the *Asjes* and *Ahmed Saeed* Cases, in which the subsequent binding force given to the organizations' price fixing was found contrary to the Treaty. For a very strong critique of the outcome of the *Güterfernverkehr* Case, see Bach, Albrecht, "Case C-185/91, Bundesanstalt für Güterfernverkehr v. Gebroder Reiff GmbH & Co. KG; Case C-2/92, Meng; Case C-245/91, OHRA Schadeverzekeringen NV", *Common Market Law Review*, Volume 31, Number 6, pp. 1366-1369.

the apparently decreased popularity of the Community which became clear with the referenda following the Maastricht Treaty.<sup>256)</sup>

## 6.2. The *Meng* Case

The pattern of solution in the *Meng* Case follows that of the *Güterfernverkehr* Case to a very large degree as it was also based on the *Van Eycke* test.<sup>257)</sup> However, the contested measure was not connected with ordinary price fixing arrangements, but rather with a prohibition on brokers transferring their commissions, which are normally paid to themselves, to their customers.

### 6.2.1. The Facts

The *Kammergericht Berlin* referred the case to the Court pursuant to Article 177 EC. The case arose from criminal proceedings against Mr. Meng, who was charged with having violated the German legislative prohibition on insurance brokers paying to their clients the commission which had been paid to themselves by the insurance company.

The relevant legislation was manifold. As the action only concerned sickness insurance, accident insurance and legal protection, here shall be mentioned only the *Anordnung über das Verbot der Gewährung von Sondervergütungen und des Abschlusses von Begünstigungsverträgen in der Krankenversicherung* of 5 June 1934 and *Verordnung über das Verbot von Sondervergütungen und Begünstigungsverträgen in der Schadenversicherung* of 17 August 1982. These two measures contained the prohibition itself, whereas the statement

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256) Also see van der Esch, Bastian, "Loyauté fédérale et subsidiarité a propos des arrêts du 17 novembre 1993 dans les affaires C-2/91 (*Meng*), C-245/91 (*Ohra*) et C-185/91 (*Reiff*)", *Cahiers de droit Européen*, Volume 30, 1994, Numbers 5-6, p. 541, who states several additional reasons for the new attitude of the Court with regard to the application of the doctrine; or Friedbacher, Todd J., "Motive Unmasked. The European Court of Justice, the Free Movement of Goods, and the Search for Legitimacy", *European Law Journal*, Volume 2, 1996, Number 3, pp. 245-246, who sees the new development in relationship to the parallel new development within the Article 30 case law and points out that they echo the Court's attempts to relegitimize itself and thereby allow a more peaceful coexistence between the two levels of governance.

257) See Case C-2/91, *Criminal proceedings against Wolf W. Meng*, Judgment of 17 November 1993, [1993] E.C.R. I-5751.

of penalty, *i.e.* punishment with a fine, was found in the *Gesetz über die Beaufsichtigung der Versicherungsunternehmen* of 12 May 1901, as changed by the law of 13 October 1983.

Mr. Meng was carrying on the business of advising on contracts of insurance. In March 1987 and July 1988, he transferred his commission to his customers on six occasions, thereby contravening the German prohibition.

As Mr. Meng, in conformity with the mentioned legislation, was punished with a fine according to a judgment from *Amtsgericht Tiergarten*, he appealed to *Kammergericht Berlin*, claiming that this legislation was contrary to Articles 3(g), 5(2) and 85 EC. *Kammergericht Berlin* found it appropriate to refer a question to the Court asking whether the contested measures were incompatible with Articles 3(g), 5(2) and 85 EC, and therefore unenforceable.<sup>258)</sup>

#### 6.2.2. The Position of the Court

The Court initially stated the general principle and the *Van Eycke* test.<sup>259)</sup> Then, very systematically, it considered the first prong, concerning whether a Member State has required or favoured the adoption of agreements, decisions or concerted practices contrary to Article 85 EC. The answer to this was in the negative as:

*"...the German rules on insurance neither require nor favour the conclusion of any unlawful agreement, decision or concerted practice by insurance intermediaries, since the prohibition which they lay down is a self-contained one."*<sup>260)</sup>

Regarding the second prong as to whether the legislation reinforced the effects of agreements contrary to Article 85 EC, the Court similarly answered in the negative, as it found that:

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258) See *ibid.*, at Ground 8.

259) See *ibid.*, at Ground 14.

260) See *ibid.*, at Ground 15.

*"...the rules at issue were not preceded by any agreement in the sectors to which they relate, namely those of health insurance, indemnity insurance and legal expenses insurance.<sup>261)</sup> However, the Commission has stated that certain undertakings had concluded an agreement intended to prohibit transfers of commission in the life assurance sector and that, by rendering that agreement applicable to other sectors, the rules reinforced its scope.<sup>262)</sup> That view cannot be upheld. Rules applicable to a particular branch cannot be regarded as reinforcing the effects of a pre-existing agreement, decision or concerted practice between economic agents in that sector."<sup>263)</sup>*

Finally, the Court considered the third prong concerning whether the Member State was depriving its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. The Court stated in this regard that:

*"...the rules themselves prohibit the grant of special advantages to policyholders and do not delegate to private traders responsibility for taking decisions affecting the economic sphere."<sup>264)</sup>*

In conclusion, the Court held that the legislation was not contrary to Articles 3(g), 5(2) and 85 EC.

### 6.2.3. Commentary

The application of the first prong is quite clear. The legislation did not require or encourage undertakings' entering into new agreements.

In opposition to the *Güterfernverkehr* Case, the second prong is this time applied by the Court. This application is, however, not without problems. The criterion involved in the

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261) See *ibid.*, at Ground 17.

262) See *ibid.*, at Ground 18.

263) See *ibid.*, at Ground 19.

264) See *ibid.*, at Ground 20.

test is, simply put, whether, firstly, there was any agreement among undertakings before the enactment of the legislation, and, secondly, whether the effects of this agreement were reinforced by the legislation. As the Court found that there was no pre-existing agreement, it never had to analyse whether such was reinforced. However, Advocate General Tesouro had in his account of the facts of the case referred to several pre-existing agreements, including, *inter alia*, one of 1900, 1911, 1919 and 1978, of which the first three were pre-existing and the last came after the enactment of the legislation in question.<sup>265)</sup> In addition, the Commission, in support of the defender of the doctrine, also referred to the existence of agreements.<sup>266)</sup> In contrast to the views of Tesouro, the Court did not find these agreements to be connected with the legislation in question. With regard to the Commission's claim, the Court found that the mentioned agreements were entered by undertakings belonging to different sectors of the insurance business and then made applicable to those sectors concerned with sickness insurance, *etc.*, and consequently could not be considered relevant. Without direct knowledge of the agreements and the complex nature of the legislation, it is not possible to follow this discrepancy further, but the Court's argumentation does not seem convincing in the context outlined.<sup>267)</sup> For instance, it would have been helpful if the Court had provided further guidance with respect to whether there were any limits as to how old agreements and contested legislation would have to be in order to establish a prohibited link between them. The existence of agreements from the turn of the century and from a time when competition legislation was not yet existing in all the present Member States does

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265) See Advocate General Tesouro's Opinion of 14 July 1993, Paragraph 3.

266) See the *Meng* Case, at Ground 18.

267) van der Esch adds to this that it is problematic to require a complete identity between an agreement and a state measure to fulfill this prong of the *van Eycke* test, because it is naive to believe that it would not be very simple for Member States to alter marginally the conditions of the agreement in order to escape its obligation pursuant to the doctrine, see van der Esch, "Loyauté fédérale et subsidiarité a propos des arrêts du 17 Novembre 1993 dans les affaires C-2/91 (Meng), C-245/91 (Ohra) et C-185/91 (Reiff)", *Cahiers de droit Européen*, Volume 30, 1994, Numbers 5-6, p. 538. Bach further adds to this that the wording of the prohibitions in the measures covering the different sectors were almost identical and that they all had a common spirit, see Bach, Albrecht, "Case C-185/91, *Bundesanstalt für Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*; Case C-2/92, *Meng*; Case C-245/91, *OHRA Schadeverzekeringen NV*", *Common Market Law Review*, Volume 31, Number 6, pp. 1361.

appear as being a weak criterion for finding legislation contrary to Articles 3(g), 5(2) and 85 EC.

- As pointed out already in the introduction, in *Chapter One*, two issues were raised in the Order in which the Court ordered the reopening of oral hearings. The first issue was whether Articles 3(g), 5(2) and 85 EC should, despite the non-existence of agreements between undertakings, be interpreted as prohibiting any state measure which would make such agreements superfluous and would affect competition within the common market. The second issue was whether Member States can justify anti-competitive measures on grounds such as those in, for example, Article 36 EC or those recognised by the Court in connection with Articles 30 and 59 EC. Both issues were ignored by the Court in its final judgment (as well as in the *Ohra* and the *Güterfernverkehr* Cases), in spite of the fact that the Court itself in the Order had pointed out that the circumstances of the case could give rise to clarification of its jurisprudence.<sup>268)</sup>

To understand this *volte-face*, it is first of all helpful to think of the impact on the Court of the reactions from the Member States, which, together with the parties of the case and the Commission, were invited to answer six more specific questions connected to the mentioned issues of the Order. These were strongly advocating against the doctrine and proposing to limit its scope. In connection with this influence, Reich suggests a similar factor which might have influenced the Court. This factor is the entering into force of the principle of subsidiarity.<sup>269)</sup> Reich points out that the fact that the shift of power to Member States had come at this time might have been a pure historical coincidence, but is worrying nevertheless because the principle of subsidiarity only applies to areas which are not the exclusive jurisdiction of the Community.<sup>270)</sup> Thus, the problem, implicitly understood from Reich, is that the area of competition is an exclusive competence of the Community and

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268) See the *Meng* Order, at Ground 2.

269) See Reich, Norbert, "The 'November Revolution' of the European Court of Justice: *Keck, Meng* and *Audi* Revisited", *Common Market Law Review*, Volume 31, Number 3, 1994, pp. 477-479.

270) See *ibid.*, at p. 477-478.

Therefore the principle of subsidiarity is not even applicable.<sup>271)</sup> However, the real issue is determining a definition of the area of anti-competitive measures in terms of competence.

Another conclusion to be drawn - based on the Court's silence - is perhaps that the Court now has decided to completely abandon the efficiency criterion found primarily in the *Leclerc* Case, and which could be more generally referred to as the doctrine of *effet utile*. Therefore, the Court, as pointed out by Reich, at the same time prefers a formalistic approach, thereby on the surface indicating a promise of higher legal certainty.<sup>272)</sup>

Supporting the feeling of a retreat executed by the Court is also the circumstance that the facts of this case contained many similarities to those of the *Vlaamse Reisbureaus* Case. That case concerned a similar national prohibition against the transfer of commissions, from travel agents to their customers. The opposing outcomes is due to the fact that the Court in *Vlaamse Reisbureaus* did find the existence of agreements and, further, that the measure in that case was found to reinforce the effect of the agreements. Without a more intensive knowledge of the documents presented to the Court, it is not possible to survey any further the justification of the difference in outcome of the cases. If the difference is justified, it is demonstrated, however, that the formalistic approach consisting of the finding of a link between agreement and legislation at times will bring different outcomes on, what to some must seem, a very thin grounding.

### 6.3. The *Ohra* Case

In this case, the Court handed down a judgment concerning a Dutch measure, which was, as in the *Meng* Case, connected to the insurance sector<sup>273)</sup>. This time the national prohibition was of a more general character as it prohibited insurance companies from granting any kind of rebate or other financial advantage to their customers, *i.e.* it did not only prohibit the transfer of commissions from brokers to customers as in *Meng*.

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271) See *ibid.*, at p. 478. For a further discussion of the application of the principle of subsidiarity, see *Chapter 18* concerning *Distribution of Competences*.

272) See *ibid.*, at pp. 464-465, 468-470 and 472-473.

273) See Case C-245/91, *Criminal proceedings against Ohra Schadeverzekeringen N.V.*, Judgment of 17 November 1993, [1993] E.C.R. I-5851.



### 6.3.1. The Facts

Again, the case was referred to the European Court of Justice pursuant to Article 177 EC. In this case, the questions came from the Netherlands.

The Dutch insurance company, Ohra Schadeverzekeringen NV (hereinafter referred to as Ohra), which had contravened the prohibition against granting financial advantages to customers, was prosecuted under Dutch criminal law.

Ohra was what is called a "direct writer", implying that the company offered its services directly to the public rather than through agents. It was active in the field for civil liability, sickness, pensions and life insurances. In order to take advantage of Ohra's lower costs arising from not using agents, the company granted certain benefits to its new policy-holders or beneficiaries such as free credit cards, rebates on the cost of the said card or not invoicing the costs of taking out contracts of insurance.

The prohibition of insurance companies granting rebates or other financial advantages is embodied in Article 16(1) in the *Wet assurantiebemiddelingsbedrijf* of 7 February 1991. The *Wet op de economische delicten* provides that infringements of Article 16(1) can be punished with imprisonment or fine. As Ohra claimed that the Netherlands provisions were contrary to Articles 3(g), 5 and 85 EC, the national court in question asked whether this was the case.

### 6.3.2. The Position of the Court

As in the *Güterfernverkehr* and *Meng* Cases, the Court began its decision by stating the general principle and the *Van Eycke* test. With regard to the first prong regarding the requirement of new agreements, the Court's grounding was exactly the same as that of the *Meng* Case.<sup>274)</sup> The grounding related to the second prong, concerning reinforcement of pre-existing agreements, was however even briefer than that of the *Meng* Case, as there were no agreements involved in any way and consequently the legislation did not reinforce the effects of such.<sup>275)</sup> Finally, the Court did not find that the Member State had deprived its own legislation of its official character. The language used by the Court was again the same

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274) See *ibid.*, at Ground 11.

275) See *ibid.*, at Ground 12.

as that to be found in the *Meng Case*.<sup>276)</sup> As the three prongs were all answered in the negative, and the Court consequently did not find a link between an activity prohibited according to Article 85 and the contested measure, it was in conclusion found not to be an infringement of Articles 3(g), 5(2) and 85 EC.<sup>277)</sup>

### 6.3.3. Commentary

The case gives rise to only a few observations which have not yet been put forward in the commentaries to the two previous cases. Firstly, it is clear that one important difference between this case and the *Meng Case* is that only in the latter were there agreements involved, which were related to the contested measure. This adds to the understanding of the outcome of the *Meng Case*: it would have been difficult for the Court, without strongly inviting great criticism, to have decided the two cases differently, because the measures at stake in all other aspects were very similar, having the exact same economic effects.

Secondly, despite the anti-competitive limitation of the insurance companies and their agents' alternatives of price fixing as outlined in the measures, these measures also contain to a certain degree advantages from an economic point of view as they increase the transparency of price structures, which is very helpful to consumers.

Finally, although the Court answered the third prong of the *Van Eycke* test in the negative, as it held that no delegation to private actors had taken place, it is possible to claim the opposite. In this regard, van der Esch points out that from the point of view of the agents who are forced not to compete on prices because they have to accept the prices established by the insurance companies, it will seem as if the public authorities have deprived its legislation of official character by delegating the responsibility for price setting to these insurance companies.<sup>278)</sup>

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276) See *ibid.*, at Ground 13.

277) See *ibid.*, at Ground 14-15.

278) See van der Esch, "Loyauté fédérale et subsidiarité a propos des arrêts du 17 Novembre 1993 dans les affaires C-2/91 (*Meng*), C-245/91 (*Ohra*) et C-185/91 (*Reiff*)", *Cahiers de droit Européen*, Volume 30, 1994, Numbers 5-6, p. 537.

In conclusion, the examination of the three "November" Cases demonstrates that the Court, by its application of the *Van Eycke* test, sticks to a more formalistic approach than previously. The impression gained is that on the formal level only measures with a clear and strong link between agreement and measure, or measures delegating decisional powers to private actors, are contrary to Articles 3(g), 5(2) and 85 EC. It is, however, a bit difficult to imagine actual measures in which the link or the delegation of decisional power is much stronger than in the *Meng* and *Güterfernverkehr* Cases respectively. Rather, it seems that the Court strived hard to approve the contested measures and, in so doing, largely bent the *Van Eycke* criteria in order to reach this end. Only the future will tell whether the importance of the doctrine has vanished forever or if it will return.

## 7. Confirmation of the "November" Cases or Renewed Insecurity?

The cases following the *Güterfernverkehr*, *Meng*, and *Ohra* Cases do not contain many surprises seen in the light of these "November" Cases. The examined cases are *Heukske*, *Delta*, *Peralta*, *van Schaik*, and *Leclerc-Siplec*, all from 1994. From 1995, the *Spediporto*, *DIP*, and *Esso* Cases are dealt with.<sup>279)</sup> Finally, from 1997 the *Sodemare* Case is analysed. The Court is still extremely reluctant to condemn national measures pursuant to the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC. In fact, in none of the cases does it condemn national measures as contrary to the doctrine. One fortunate development does take place, as more clarity is given to the role of Article 86 EC.

### 7.1. The *Heukske* Case

In this case, as in *Chapuis*, the doctrine was applied to shop closing legislation.<sup>280)</sup> Probably due to the presence of a precedent, only five judges participated. The case had its origins in criminal proceedings against the petrol stations *Heukske* and *Boermans*.

Both *Heukske* and *Boermans* were accused of having infringed the Dutch shop closing rules. According to the *winkelsluitingswet*, opening hours were restricted. Among others, a maximum number of hours was stated as well as an obligation for shops to be

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279) Among others, the *van Schijndel* Case, Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, Judgment of 14 December 1995, [1995] E.C.R. I-4728, is not dealt with here. Although the referring national court asked about the compatibility of an anti-competitive measure (*i.e.* making membership of occupational pension schemes established by the members of the profession compulsory) with Articles 3(g), 5, 85, 86 and/or 90 EC, this was not answered because the Court, due to another question, found it unnecessary. It should also be mentioned that in the *Banchero* Case, which is further dealt with in *Chapter 14 concerning Control of Anti-Competitive State Measures Through Article 90 EC*, the Court chose not to interpret a question concerning the interaction of Articles 5 and 85 EC due to insufficient information from the national court. See Case C-387/93, *Criminal proceedings against Giorgio Domingo Banchero*, Judgment of 14 December 1995, [1995] E.C.R. I-4683, at Grounds 17-18.

280) See Joined Cases C-401/92 and C-402/92, *Criminal proceedings against Tankstation't Heukske vof and J.B.E. Boermans*, Judgment of 2 June 1994, [1994] E.C.R. I-2199.

closed in certain periods. This law also stated that shops had to indicate the opening hours at each public entrance to the shop.<sup>281)</sup> Shops forming part of the Heukske and Boermans petrol stations, and located in built-up areas, had not placed a number of articles which were not "for the road" in lockable cabinets outside normal opening hours. In addition, they had kept the shops open to the public without a certified notice being affixed at each public entrance, as prescribed in the contested law. Finally, they had sold tobacco products outside normal opening hours otherwise than from vending machines. As Heukske and Boermans considered that the contested law was contrary to Community law, the national court decided to refer four questions in this regard to the Court. Among these, one was interpreted by the Court to mean that the national court wanted to know whether Articles 3(g), 5 and 86 EC precluded such rules which distinguished between different categories of undertakings, taking into consideration the connection between the measure as such and the national rules granting permits to run petrol stations.<sup>282)</sup>

The reply of the Court started by first reiterating the general principle, this time also including Article 86 EC, and then stating the *Van Eycke* test.<sup>283)</sup> By applying this test, however in a not very detailed manner, the Court found that Articles 3(g), 5, 85 or 86 EC were not applicable in the case at hand.<sup>284)</sup>

In this case, it is interesting how the Court, although the national court only referred to Article 86 EC and the Court itself interpreted this question as including only Article 86 EC, nevertheless took into account Article 85 EC in its final answer. However, it appears that this decision was based on an application of Article 85 EC rather than Article 86 EC, because the *Van Eycke* test takes into account situations of relevance only to Article 85 EC. It is

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281) According to decrees adopted pursuant to the law, derogations from the general rules existed. It was, for example, provided that the rules were not applicable to petrol stations situated outside built-up areas alongside a dual carriageway or a motorway, if - when sale was taking place outside the normal opening hours - the only goods offered for sale were goods such as fuels, supplies intended for the use or emergency repair of vehicles, articles for personal hygiene, and foods which are customary to consume while travelling in a vehicle. For all other kinds of petrol stations, the rules were identical except that tobacco products could be sold outside normal opening hours only from vending machines.

282) See *ibid.*, at Ground 9.

283) See *ibid.*, at Ground 16.

284) See *ibid.*, at Grounds 17-18.

questionable in this regard why Article 86 EC was not applied more explicitly, possibly in conjunction with Article 90 EC.<sup>285)</sup>

## 7.2. The *Delta* Case

The measure at stake in this case contains many similarities to the measure contested in the *Güterfernverkehr* Case, as it concerned a German law on tariffs for commercial inland waterways traffic.<sup>286)</sup> Due to the obvious precedent, only five judges participated in the ruling.

The German *Landgericht Duisburg* referred a question for a preliminary ruling in proceedings between the Federal Republic of Germany, represented by the Wasser- und Schifffahrtsdirektion West, and the Delta Schifffahrts- und Speditionsgesellschaft mbH (hereinafter referred to as "Delta"). The main action was initiated because Delta had had goods transported at a price lower than that which was prescribed according to official tariffs. According to the *Binnenschiffsverkehrsgesetz* (Law on inland waterways traffic), official tariffs were determined by freight commissions. These consisted of two numerically equal groups of representatives of shipping companies and shippers. The representatives were appointed by a public authority acting on the basis of proposals from the concerned professional associations. If the commissions could not agree, expanded commissions would have to be established, including, among others, a chairman and two assessors. It was provided in the law that all members hold honorary office and are not bound by orders or instructions. All decisions had to be approved by the federal Minister for Transport, who might, if it were required for the sake of the public interest, fix other tariffs himself. The tariffs were issued by the Minister in the form of orders, which were binding on all companies. If any companies charged other prices, as Delta experienced, the difference between that price and the tariff in question would be payable to the federal government.

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285) Article 90 EC could be of relevance to the case, because permits to run petrol stations were granted by the State. See *Chapter 14* below concerning *Control of Anti-Competitive State Measures Through Article 90 EC*.

286) See Case C-153/93, *Republic of Germany v. Delta Schifffahrts- und Speditionsgesellschaft mbH*, Judgment of 9 June 1994, [1994] E.C.R. I-2517.

In this context, a question was referred to the Court, which it interpreted as requiring an assessment as to whether Articles 3(g), 5(2) and 85 EC precluded the contested measure.<sup>287)</sup> The Court began its judgment by stating the general principle and the *Van Eycke* test.<sup>288)</sup> In its application of the first prong, the Court redefined the test as to see whether the existence of an agreement, decision or concerted practice within the meaning of Article 85 EC could be inferred from the contested measure.<sup>289)</sup> Its reply to this was in the negative as it could not regard the members of the freight commissions as representatives of the concerned professional associations, called upon to negotiate and conclude agreements on prices.<sup>290)</sup> This decision was, among others, based on the fact that the members, according to the law, held an honorary office and were not bound by orders or instructions, and the fact that the tariff setting also had to take into account interests such as those of the agricultural sector, of medium-size businesses, and of economically weak areas.<sup>291)</sup> The second prong was not applied, whereas the Court with regard to the third prong found that it would have to answer it in the negative as the public authorities had not delegated their powers in the matter of fixing tariffs to private economic operators.<sup>292)</sup> This finding was primarily based on the fact that the Minister of Transport was entitled to fix the tariffs himself by substituting his decision for that of the commissions if the tariffs decided by them were not in accordance with the public interest.<sup>293)</sup> Through this pattern, the contested national measure was held to be in accordance with Articles 3(g), 5(2) and 85 EC. This was formulated in the following words:

*"Articles 3(f), 5 and 85 of the Treaty do not preclude rules of a Member State from providing that tariffs for commercial inland waterway traffic be determined by freight*

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287) See *ibid.*, at Ground 13.

288) See *ibid.*, at Ground 14.

289) See *ibid.*, at Ground 15.

290) See *ibid.*, at Ground 18.

291) See *ibid.*, at Grounds 16 and 17.

292) See *ibid.*, at Ground 22.

293) See *ibid.*, at Ground 21.

*commissions and made compulsory for all economic operators, after approval by the public authorities, if the members of those commissions, although chosen by the public authorities acting on a proposal from the professional circles concerned, are not representatives of those circles, called upon to negotiate and conclude an agreement on prices, but are responsible for fixing tariffs independently and on the basis of considerations relating to the public interest and if the public authorities, by ensuring that the commissions determine tariffs on the basis of those considerations and by substituting, if need be, their own decision for that of the commissions, do not relinquish their powers."*

In comparison to the *Güterfernverkehr* Case, no major differences really exist, neither with regard to the facts of the case nor the Court's position. The Court itself, however, points out one difference, that is, that the members in the case at hand could not be described as experts in tariff matters as they could in *Güterfernverkehr*.<sup>294)</sup> To the Court it was nevertheless enough that it found that they held an honorary office and were not bound by orders or instructions. Another difference, also pointed out by the Court itself in *Delta*, is that the Minister was not entitled to be a member of the freight commissions. That the outcome was the same in both cases despite these differences could be taken as a further softening of the test's requirements. Again, as in *Güterfernverkehr*, it is possible to argue in opposition to the outcome that the Court seems to put too much emphasis on the formal independence of the representatives.<sup>295)</sup> This is so especially with regard to the Court's analysis of whether the Minister of Transport had delegated his powers to private actors. The analysis was to a large degree based on whether it was this Minister who had the legislative power in the field, not on whether the Minister in practice ever intervened in the fixing of tariffs.

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294) See *ibid.*, at Ground 16.

295) Also see Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 366-367.



### 7.3. The *Peralta* Case

This case concerned an Italian law on sea protection, which had certain anti-competitive effects.<sup>296)</sup> The case represents a conflict between the interest of protection of the environment and the interest of competition.

This case was referred to the Court pursuant to Article 177 EC by the Italian Pretora Circondariale di Ravenna. It had arisen from criminal proceedings against Mr. Peralta who was an Italian national and the master of a tanker registered in Italy. The tanker itself was owned by an Italian company. Mr. Peralta had several times discharged into the sea outside Italy's territorial waters harmful substances and was consequently prosecuted for having infringed the Italian law on sea protection. This law had more restrictive requirements on vessels flying the Italian flag than other vessels. As the national court saw a number of ways in which the measure could have the effect of making cleaning operations by tankers more difficult or costly for vessels flying the Italian flag than for vessels of other Member States, it asked in one of its questions whether the principles of Community law for ensuring undistorted competition preclude national legislation like the Italian legislation in question, since it causes distortions of competition between ports and shipowners in the Community.<sup>297)</sup>

In its reply to the national court, the Court firstly stated that the competition provisions are applicable to the sea transport sector and then reiterated the general principle and the *Van Eycke* test.<sup>298)</sup> Thereupon, the Court rejected the relevance of the doctrine to the measure at hand in the following wording:

*However, those provisions may not be relied upon as against legislation like the Italian legislation. That legislation does not require or foster anti-competitive conduct since the prohibition which it lays down is sufficient in itself. Nor does it reinforce the effects of a pre-existing agreement".*<sup>299)</sup>

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296) See Case C-379/92, *Criminal Proceedings against Matteo Peralta*, Judgment of 14 July 1994, [1994] E.C.R. I-3453.

297) See *ibid.*, at Ground 19.

298) See *ibid.*, at Grounds 20-21.

299) See *ibid.*, at Ground 22.

In conclusion, the measure was not found contrary to Articles 3(g), 5 and 85 EC.

This case deserves one comment and that regards the Court's rather new choice of wording, namely that the measure "*is sufficient in itself*". A similar wording was applied in the *Meng Case*, namely "*a self-contained one*". It is not completely clear what the exact meaning is, but a likely explanation is that the Court hereby answers the first prong of the *Van Eycke* test in the negative, in other words that it does not find the existence of any agreements. The formulation is not taken up again in the case law to follow.

#### 7.4. The *van Schaik* Case

This case concerned Dutch rules relating to the conduct of roadworthiness tests in conjunction with the periodic servicing of motor vehicles.<sup>300)</sup> Only five judges were involved in the ruling and the decision appears as if it was so obvious to the reader that the doctrine is not applicable that the Court did not even make the effort to mention the existence of the general principle and the *Van Eycke* test.

The case came to the Court from the *Hoge Raad*, the Netherlands, pursuant to Article 177 EC, where the referred questions arose in the context of criminal proceedings against Mr. van Schaik. The contested national measure was, first of all, the *Wegenverkeerswet* (the road traffic law) in connection with various related orders and decrees, all concerning the annual testing of motor vehicles. In the Netherlands, it was required when driving a motor vehicle on a public road that a valid test certificate be issued in respect of that vehicle. Authorisation to issue test certificates could be granted to persons who operated either independent testing stations where no maintenance or repair work was undertaken, or garages where those services were provided. With regard to the fee charged, it did not make a difference whether the service was carried out by an independent testing station or a garage, but if the inspection was carried out in the framework of a maintenance service which already included verification of the test requirement, then according to the law no fee was due. As it in practice was not possible for foreign stations/garages to obtain authorisation to carry out the test, national garages had an advantage to garages situated in other Member States,

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300) See Case C-55/93, *Criminal proceedings against Johannes Gerrit Cornelis van Schaik*, Judgment of 5 October 1994, [1994] E.C.R. I-4837.

because they could offer test certificates in connection with a maintenance service, free of charge. Mr. van Schaik had been driving a car without a valid test certificate. In his defence, he claimed that the described regulations were contrary to Community law. One of the questions referred to the Court, given this background, was altered to concern the compatibility of the national measure (by virtue of which test certificates for vehicles registered in the Netherlands could not be issued by garages established in another Member State) with the competition provisions.<sup>301)</sup>

The reply of the Court filled one single paragraph, carrying the headline "The Rules on Competition":

*"In so far as the national court seeks an interpretation of the Community rules on competition, it need only be observed that the purpose of the legislation in question is neither to authorize or reinforce an existing agreement or concerted practice, nor to impose or facilitate such an agreement or practice. As regards the existence of an abuse of dominant position on the market for vehicle testing, no allegation has been made to that effect."* <sup>302)</sup>

Consequently, the national measure was found not to be precluded by the competition provisions relating to competition.

The third prong of the *Van Eycke* test was not applied. Had it been applied, the answer would have been that no delegation to private economic operators had taken place. Its application would therefore have made no difference to the outcome of the test. The question concerning the applicability of Article 86 EC was rejected because the Court had found no allegation in this respect. Such application would neither have changed the outcome of the case.

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301) See *ibid.*, at Ground 11.

302) See *ibid.*, at Ground 25.

## 7.5. The *Leclerc-Siplec* Case

In opposition to the previous case, the Court in the *Leclerc-Siplec* Case took the effort to reiterate the general principle and the *Van Eycke* test, but, as in the previous case, it omitted to answer the test's third prong.<sup>303)</sup> Five judges participated in the ruling which concerned a limitation on televised advertisements for the distribution sector.

The referring court was the French Tribunal de Commerce de Paris, where proceedings were commenced by Leclerc-Siplec against TF1 and M6. Leclerc-Siplec operated supermarkets in France, attached to which service stations were integrated. Through these, petrol and other fuels were distributed. TF1 and M6 were French television advertising companies. The main action arose because TF1 and M6 refused - pursuant to the law - to let Leclerc-Siplec broadcast an advertisement concerning the distribution of fuel in Leclerc supermarkets. The contested decree provided that the distribution sector was prevented from advertising on television. Also, the advertising on television of alcoholic beverages with an alcohol content in excess of 1.2 degrees, and literary publications, as well as the cinema and press were prohibited from advertising. As Leclerc-Siplec, in agreement with TF1 and M6, claimed that the decree was contrary to Community law, the national court referred a question which the Court limited to deal with the exclusion of the distribution sector from televised advertising, and, consequently, not to deal with all of the other excluded goods or economic sectors.<sup>304)</sup>

In its reply concerning the application of Articles 85 and 86 in conjunction with Articles 3(g) and 5 EC, the Court firstly stated the general principle and the *Van Eycke* test.<sup>305)</sup> Thereupon, it applied the first and second prong of this test on the subject matter in the following manner:

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303) See Case C-412/93, *Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, Judgment of 9 February 1995, [1995] E.C.R. I-179.

304) See *ibid.*, at Grounds 15-16.

305) See *ibid.*, at Ground 25.

*"In this case, there is nothing in the documents before the Court to suggest that the national provisions at issue require or favour anti-competitive conduct or reinforce the effects of a pre-existing agreement".* <sup>306)</sup>

Accordingly, the Court concluded that the reply should be:

*"...that Articles 85 and 86 in conjunction with Articles 3(f) and 5 of the Treaty are not applicable to such national provisions".* <sup>307)</sup>

The first observation to be made about this case is that, identically to the position of the Court in the previous case, *van Schaik*, the third prong of the *Van Eycke* test was ignored. It was mentioned, but not applied. This can be understood as an indication of the Court perhaps now being ready to escape the application of this third prong. Had it been applied, it would however not have made any difference to the outcome. No responsibility for regulating television advertising had been delegated to private undertakings. This could also be an explanation for the non-application. The Court simply did not make the effort to state this.

Another observation concerns the role of Article 86 EC. Although the referring court had included Article 86 EC (as well as Article 85 EC) in its question, the Court did not really consider the provision's application to the case. In fact, it referred to the provision in its reiteration of the general principle and its final reply, but this only demonstrates the confusion in the case law as to the role to be played by this provision in comparison to Article 85 EC. The *Van Eycke* test is really only designed to be applied on Article 85 EC issues (as it is speaking of agreements, decisions, and concerted practices). This is finally stated in express terms by the Court in the following case, *Spediporto*.

A third observation is that, as in most of the precedent, it is of no importance that a national measure is anti-competitive, not even in situations where - as the case at hand - both the object and the effect is anti-competitive. Here, the measure's purpose and effect was

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306) See *ibid.*, at Ground 26.

307) See *ibid.*, at Ground 27.

to protect the regional daily press from competition with regard to advertising from television.<sup>308)</sup>

A final observation concerns the prongs regarding the involvement of agreements. Here, it is understood from the opinion of the Advocate General that the argument of Leclerc-Siplec was that its competitors had entered into an agreement regarding the composition of a new unleaded petrol product.<sup>309)</sup> Their agreement concerned their decision to market this product jointly by means of a selective distribution system under which the retailer was obliged to display the manufacturer's name at the pump.<sup>310)</sup> On this basis, Leclerc-Siplec argued that the competitors had entered an agreement contrary to Article 85 EC and that they were seeking abusively to acquire a dominant position contrary to Article 86 EC.<sup>311)</sup> The connection between that agreement and the decree was, according to Leclerc-Siplec, that it had been facilitated or even made possible by the decree, because it hindered Leclerc-Siplec from reacting to the competitors by the means of television advertising.<sup>312)</sup> It does not appear whether also the competitors were hindered from this - the answer to this depends on whether the definition of distributor only includes wholesalers such as Leclerc-Siplec or also includes manufacturers. Nevertheless, the agreement was not linked to the decree such as conditioned in the first two prongs of the *Van Eycke* test. What Leclerc-Siplec really was saying with the argument was rather that the measure - as mentioned - was quite anti-competitive.

## 7.6. The *Spediporto* Case

This case represents a new development. In the judgment, delivered by only five judges, the Court, apparently inspired from the Opinion of the Advocate General, finally divided the doctrine into two, one concerning the interaction of Articles 3(g), 5 and 85 EC

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308) See the Opinion of Advocate General Jacobs, *ibid.*, at p. I-182.

309) See *ibid.*, at p. I-207.

310) See *ibid.*, at p. I-207.

311) See *ibid.*, at p. I-207.

312) See *ibid.*, at p. I-207.

and one concerning the interaction of Articles 3(g), 5 and 86 EC.<sup>313)</sup> The measure contested in the case concerned tariffs within the road transport sector, which were made binding by ministerial decree.

The case came to the Court in connection with proceedings between the transport companies Centro Servizi Spediporto Srl and Spedizioni Marittima del Golfo Srl. The case had arisen because the latter refused to pay the price of road transport services charged by the former on the ground that the prices were far too excessive. The charged prices were in conformity with compulsory prices fixed pursuant to a national measure. Accordingly, the exercise of road-haulage activities for hire or reward was subject to entry on a register and to the grant of a permit by the public authorities. The register was kept by a central committee composed of 17 representatives of the public authorities and 12 representatives of road haulers' associations. The members were appointed by the Minister of Transport and Civil Aviation. The committee was also responsible for proposing tariffs,<sup>314)</sup> which were subject to subsequent approval by the Minister.<sup>315)</sup> When approved, the Minister brought the tariffs into force by decree.

In this context, the national court referred several questions to the Court, among which the first was interpreted by the Court as asking whether Articles 3(g), 5, 85 or 86 EC precluded the measure in question.<sup>316)</sup> In its answer, the Court firstly reiterated the general principle governing the interaction of Articles 5 and 85-86 EC.<sup>317)</sup> The Court then divided its decision into one part concerning Articles 5 and 85 EC in conjunction and another part

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313) See Case C-96/94, *Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo Srl*, Judgment of 5 October 1995, [1995] E.C.R. I-2883.

314) According to Article 52 of the relevant Italian Law of 31 July 1974, it was provided that in the tariff fixing regard shall be taken to the average cost of the relevant transport services, including commercial expenses, calculated for well-managed undertakings operating under normal conditions as regards utilization of their transport capacity, and to the market situation in such a manner as to enable transport undertakings to obtain a fair return; see *ibid.*, at Ground 7.

315) If the Minister does not approve the proposals, he refers them back to the central committee with a request for new proposals or counter-proposals. If the Minister does not consider those new proposals or counter-proposals to be satisfactory, he may amend the proposals originally submitted and bring them into force by decree; see *ibid.*, at Ground 9.

316) See *ibid.*, at Ground 18.

317) See *ibid.*, at Ground 20.

concerning Articles 5 and 86 EC in conjunction. In this respect, the Court immediately following its reiteration of the general principle in parentheses referred to the *Van Eycke*, *Reiff*, and *Delta* Cases concerning Article 85 EC and to the *INNO* Case concerning Article 86 EC as the guiding precedents.

With regard to the interaction of Articles 5 and 85 EC, the Court stated the *Van Eycke* test. In the examination of the first and second prong of the test, it found that the Committee's proposals were not to be considered as agreements, decisions or concerted practices between economic agents which the public authorities had imposed or favoured or the effects of which they had reinforced.<sup>318)</sup> This conclusion was based on the observation that the committee was composed of a majority of 17 representatives of the public authorities and of a minority of 12 representatives of the road haulers' associations.<sup>319)</sup> Another observation of significance, according to the Court, was that the Committee was obliged to take into account various defined criteria.<sup>320)</sup> In the examination of the third prong, the Court found that the public authorities had not delegated their powers to private economic agents.<sup>321)</sup> This conclusion was grounded on the observations that the responsible Minister had the competence to approve, reject or amend the proposed tariffs, that this Minister had to consult the regions and the representatives of the economic sectors concerned and that there existed a possibility of derogation from the tariffs.<sup>322)</sup>

With regard to the interaction of Articles 3(g), 5 and 86 EC, the Court determined that the first element of a first prong of a test determining compliance with these provisions was to establish whether the national measure in question created a dominant position:

*"Articles 3(g), 5 and 86 of the Treaty could only apply to legislation of the kind contained in the Italian Law if it were proved that the legislation concerned placed an undertaking in a position of economic strength enabling it to prevent effective*

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318) See *ibid.*, at Ground 25.

319) See *ibid.*, at Ground 23.

320) See *ibid.*, at Ground 24.

321) See *ibid.*, at Ground 30.

322) See *ibid.*, at Ground 29.



*competition from being maintained on the relevant market by placing it in a position to behave to an appreciable extent independently of its competitors, of its customers and ultimately of the consumers".* <sup>323)</sup>

The second element of a first prong of the test was to establish whether a joint dominance existed:

*"The Court has held that Article 86 of the Treaty prohibits abusive practices resulting from the exploitation by one or more undertakings of a dominant position on the common market or in a substantial part of it in so far as those practices may affect trade between Member States".* <sup>324)</sup>

The criterion was to establish whether the companies in the group were linked in such a way that they adopted the same conduct on the market.<sup>325)</sup> When applying this criterion, the Court had to conclude that Articles 3(g), 5 and 86 EC were not infringed by the contested measure because:

*"National legislation which provides for the fixing of road-haulage tariffs by the public authorities cannot be regarded as placing economic agents in a collective dominant position characterized by the absence of competition between them."* <sup>326)</sup>

From this sentence it is at the same time understood that there has to be a link between the measure and the dominant position/abusive behaviour.<sup>327)</sup> In conclusion, the measure was not contrary to Articles 3(g), 5 and 85-86 EC.

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323) See *ibid.*, at Ground 31.

324) See *ibid.*, at Ground 32.

325) See *ibid.*, at Ground 33.

326) See *ibid.*, at Ground 34.

327) This is at the same time expressed in Ground 31 as quoted above.

The judgment must be seen as one of the milestone cases in the case law concerning anti-competitive state measures because the Court now clearly divides the doctrine into two, one concerning Articles 3(g), 5 and 85 EC and one concerning Articles 3(g), 5 and 86 EC. The general principle logically still applies to both, but only in the former case is the *Van Eycke* test applicable. With regard to Articles 3(g), 5 and 86 EC the Court launched a new test, consisting of the following elements:

1. establishment of existence of a dominant position, or, establishment of the companies in the group being linked in such a way that they adopt the same conduct on the market;
2. establishment of existence of abusive behaviour; and
3. establishment of a link between the measure and the dominant position/abusive behaviour.

In general, these elements are all very logical and are based on previous case law concerning a more traditional application of Article 86 EC. However, the test contains one particular element which should be noticed; that is the establishment of a link between the companies in the group as an alternative to the existence of a dominant position (*i.e.* the first prong of the test). This element may be understood as referring to the concept of joint dominance, which is still at its earliest stages of development, and therefore still lacks clarity.<sup>328)</sup> The concept is rooted in the reference within the text of Article 86 EC of it applying to the behaviour of one or more undertakings.<sup>329)</sup> From the *Spediporto* Case it is understood that the main feature of joint dominance is the absence of competition between the companies in question.

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328) See Soames, Trevor, "An Analysis of the Principles of Concerted Practice and Collective Dominance: A Distinction without a Difference?", *European Competition Law Review*, Volume 17, 1996, Number 1, pp. 24-39. This article is also very informative to the many problematic aspects of the new concept.

329) See *ibid.*, p. 30.

With regard to the Court's application of the delegation criterion contained in the *Van Eycke* test, one remark suffices. In Ground 29, the Court noted that there existed a possibility of derogation from the tariffs, which increases the possibility of competition, as an observation supporting the conclusion that the Minister in question had not delegated his competence to private economic actors. However, this observation does not support such a conclusion. Rather, it means that the measure is not one hundred per cent anti-competitive. The sentence is, in fact, a bit of a surprise because the Court for quite a while had avoided taking into consideration the degree of distortion of competition.

### 7.7. The *DIP* Case

This case, in which the Court examines the compatibility of an Italian measure concerning licences to open shops with the doctrine on anti-competitive state measures, confirms the new division of the doctrine into two parts as launched in the *Spediporto* Case.<sup>330)</sup> By virtue of clear precedents and the uncomplexity of the case, only three judges participated in the ruling. The parties in the main proceedings were four companies, wishing to open new shops, against two municipalities. According to national law, the opening of new shops was subject to a trading licence issued by the Mayor.<sup>331)</sup> The Mayor had to receive an opinion of a municipal committee before issuing a licence. However, he did not have to follow the opinion obtained. The municipal committee had to take into account the criteria stated in a commercial development plan. If such a plan had not yet been approved, licences could be granted by the Mayor if he had received a favourable opinion from the committee. A committee would consist of a majority of representatives of the public authorities and a

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330) See Joined Cases C-140/94, C-141/94 and C-142/94, *DIP SpA and Others v. Comune di Bassano del Grappa and Comune di Chioggia*, Judgment of 17 October 1995, [1995] E.C.R. I-3287.

331) Also see Caputi Jambrenghi, Paola M. T., "Creating a 'Level Playing-field' in the Italian Retail Distribution Market: The Use of EC Law and the Role of the Italian Anti-trust Authority", *European Competition Law Review*, Volume 17, 1996, Number 3, pp. 189-193, where the background of this legislation is further explained.

minority of representatives appointed by traders' organisations.<sup>332)</sup> In the main action, applications from the four companies to open new shops had been refused and they consequently sought to have the decisions refusing their applications annulled. In this context, the national court asked the Court to determine how the described measure was to be viewed in the light of, *inter alia*, Articles 85 and 86 EC. The Court altered this question to also include Articles 3(g) and 5 EC.

This ruling is very similar to that of the *Spediporto* Case and shall consequently not be summarised as thoroughly. As in that case the Court initiated the decision by reiterating the general principle and then divided its statement into two parts: one concerning Articles 3(g), 5 and 85 EC and the other concerning Articles 3(g), 5 and 86 EC. The contested measure was in both regards found to be in conformity with the Treaty.

It is worth mentioning that, with regard to the first prong of the *Van Eycke* test concerning the existence of agreements, *etc.*, the Court put emphasis on the criterion that representatives of traders' organisations were in a minority in the committees compared to the other categories of representatives.<sup>333)</sup> The Court furthermore found it of significance that the representatives of traders' organisations were present as experts on distribution problems and not in order to represent their own business interests.<sup>334)</sup> Finally, the Court stressed that the committees had to observe the public interest.<sup>335)</sup>

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332) This was according to Grounds 5 and 6: "*Where the municipality is the administrative centre of a province or has more than 50 000 inhabitants, the committee consists of 14 members as follows: - the mayor or his delegate acting as chairman, - an urban planning expert and a traffic expert, both appointed by the town council, - the director of UPICA (public provincial office representing industry, commerce and artisans), - a representative of the provincial tourist office, - five experts on distribution problems, of whom three are appointed by unions of shopkeepers with fixed premises, one by the consumers' cooperative organizations and one by the union of stallholders, - four representatives nominated by the national workers' confederation. Where the municipality has fewer than 50 000 inhabitants, the committees consist of 10 members: - the mayor or his delegate, - an urban planning expert and a traffic expert, both appointed by the town council, - three experts on distribution problems, appointed by the town council on the advice of traders' organizations and consumers' cooperative organizations, - three workers' representatives, - a representative of the social security office.*"

333) See *ibid.*, at Ground 17.

334) See *ibid.*, at Ground 18.

335) See *ibid.*, at Ground 18.

Worth mentioning is also the criteria applied by the Court with regard to the application of the third prong of the *Van Eycke* test concerning delegation. It was of importance to the Court that the purpose of the commercial development plan was to provide the best possible service for consumers and the best possible balance between permanent trading establishments and foreseeable demand from the population.<sup>336)</sup> Also, the Court stressed the significance of the fact that the committees only expressed their opinion, which the Mayor however did not have to follow (except in those instances where the commercial development plans had not yet been approved).<sup>337)</sup>

Finally, it should be noted that, with regard to what may now be referred to as the first prong of the *Spediporto* test, the Court rejected the existence of a collective dominant position with the following argumentation:

*"National rules which require a licence to be obtained before a new shop can be opened and limit the number of shops in the municipality in order to achieve a balance between supply and demand cannot be considered to put individual traders in dominant positions or all the traders established in a municipality in a collective dominant position, a salient feature of which would be that traders did not compete against one another."* <sup>338)</sup>

The overall impression of this judgment is that it is very systematic and thorough. Two minor points of criticism may be made, not with respect to the outcome, but in terms of the argumentation.

First, it is clear that it is impossible to view the opinions given by the committees as agreements in a traditional sense of Article 85 EC, mainly due to the fact that the representatives of the traders' organisations were in such a minority. However, that the Court adds to this finding that it is further supported by the fact that the representatives of traders' organisations were present as experts on distribution problems and not in order to represent their own business interests and that the committees as a whole had to observe the public

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336) See *ibid.*, at Ground 21.

337) See *ibid.*, at Ground 22.

338) See *ibid.*, at Ground 27.

interest, seems unnecessary, especially because it is a bit unrealistic to have such expectations of the representatives of traders' organisations. These will first and foremost act as what they are: representatives of traders' organisations.

Second, it makes sense not to view the Mayor's competence as delegated to private economic actors. However, in evaluation of this, it was unnecessary to test whether the purpose of the commercial development plan was to provide the best possible service for consumers and the best possible balance between permanent trading establishments and foreseeable demand from the population. This represents a mix of issues.

### 7.8. The *Esso* Case

As is the case with most of the judgments dealt with in this section, the *Esso* Case does not contain any new or interesting aspects.<sup>339)</sup> It concerned a measure governing the wholesale trade in petroleum products in the Canary Islands. The High Court of Justice, Canary Islands, referred several questions on the compatibility with the Treaty of a measure requiring that wholesalers in petroleum products wishing to establish themselves in the Canary Islands were required to supply at least four islands. The purpose of this measure was to ensure supplies throughout the national territory. The main action was initiated because the company Esso was discontent with the measure and sought to have it annulled.

One of the referred questions was interpreted by the Court as asking whether the measure was incompatible with Articles 3(g), 5(2) and 85 EC. The answer to this consisted in a reiteration of the general principle and the *Van Eycke* test, followed by a negative answer to the first two prongs of this test. Thereupon, the Court stated that the measure was compatible with the mentioned provisions. Seen in the light of the previous case law and the comments connected therewith, this judgment does not contain any surprises or any aspects of particular interest to deserve further comment.

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339) See Case C-134/94, *Esso Española SA v. Comunidad Autónoma de Canarias*, Judgment of 30 November 1995, [1995] E.C.R. I-4223.

## 7.9. The *Sodemare* Case

The last case to be dealt with here is the *Sodemare* Case from 1997.<sup>340)</sup> The contested measure was in essence a "non-profit condition". This condition had as its effect that only non-profit-making companies were entitled to be reimbursed by the public authorities the costs of providing social welfare services of a health-care nature. The central question referred to the European Court of Justice pursuant to Article 177 EC was whether Articles 3(g), 5, 85 and 86 EC precluded this condition. In its reply, the Court firstly reiterated the general principle, and then firstly applied the *Van Eycke* test and secondly the *Spediporto* test. In conclusion, the Court held that the national measure did not infringe the Treaty provisions in question.

In conclusion, *Sodemare* and the other cases examined in this chapter demonstrate that it is very surprising that litigants continue to raise the issue of the doctrine on the interaction of Articles 3(g), 5 and 85-86 EC, even though the effort has hardly ever brought any positive results from the point of view of litigants. Not since the *Ahmed Saeed* Case in 1989 has the Court turned national measures down in this regard. This should be considered in the light of approximately fifteen cases have been tried at the Court since then. One explanation could be that it seems appealing to many that national measures are contrary to Community law if they have anti-competitive effects. This, however, as largely indicated from the above analysis, is not really an issue in the opinion of the Court. It is also possible to answer the question contained in the title to this chapter: the cases largely confirm the trend signalled in the "November" Cases that the Court is now completely reluctant to condemn national anti-competitive measures. At the same time, the Court continues its application of very formal criteria. One new development has occurred; that is, the division of the doctrine into two parts, one concerning the interaction of Articles 3(g), 5 and 85 EC, where the *Van Eycke* test applies, and one concerning the interaction of Articles 3(g), 5 and 86 EC, where the *Spediporto* test applies. Thereby, the Court has indicated that measures placing companies in dominant positions might be contrary to the Treaty. This doctrine should

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340) See Case C-70/95, *Sodemare SA, Anni Azzurri Holding SpA, and Anni Azzurri Rezzato Srl v. Regione Lombardia*, Judgment of 17 June 1997, n.y.r.

however be understood in light of the case law governing the interaction of Articles 90 and 86 EC.<sup>341)</sup>

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341) See *Chapter 14* below concerning *Control of Anti-Competitive Measures Through Article 90 EC*.



## 8. Conclusions to the Evolution of the European Doctrine

This chapter will provide a comprehensive analysis of the thirty-three judgments (plus six preliminary ones) which have already been examined individually. The chapter will first offer some general observations. It will then analyse the development of the law. Finally, the chapter will identify the principles of the doctrine which may be derived from the Court's decisions, and state some of the strengths and weaknesses thereof.

### 8.1. General Observations

First and foremost, it must be noted that all of the decisions examined herein were submitted for preliminary rulings pursuant to Article 177 EC.<sup>342)</sup> This partially explains the general impression of arbitrariness which exists in this area; the reply normally depends on the question.

Only in three cases, *Vlaamse Reisbureaus*, *Aubert* and *Ahmed Saeed*, did the Court unambiguously hold that a government measure violated Articles 3(g), 5(2) and 85 EC; in all these cases private agreements played a major role. These were decided in the short period between the years 1987-1989. However, in three other cases, *Leclerc*, *Asjes* and *Libraires*, the Court probably would have found the contested state measure invalid if it had not found that the measure was "protected" because it was within a Member State's competence. In two of these cases, *Leclerc* and *Libraires*, private agreements were not involved - but private agreements were involved in *Asjes*. In addition, in the *Clair* Case, to be read in context with *Aubert*, government encouragement was found not to be a defence in an Article 85 action - a case in which a private agreement was at issue - although the case did not refer to Articles 3(g) and 5 EC. Finally, in the *INNO* Case, the Court did not explicitly state whether the Belgian legislation was contrary to Articles 3(g), 5(2) and 86 EC, but rather left that determination to the referring national court. Not since *Ahmed Saeed*, in 1989, has the Court

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342) Among the preliminary judgments, one, i.e. the *Continental Can* Case, was not an Article 177 ruling.

turned national measures down. Since then fifteen cases have been tried at the Court with the outcome of being in conformity with the doctrine.

The final general observation to be made here is that the variety of subject matters involved in these cases is fairly large. This variety includes various resale price maintenance systems, which in some cases, such as *Lefèvre*, consisted of maximum retail prices and in other cases, such as *Asjes*, consisted of minimum prices. *Leclerc* involved both maximum and minimum prices. Several cases, such as *Güterfernverkehr* and *Delta*, involved price fixing through committees established by the public authorities. More uncommonly, case law was contested in *Alstom*, unwritten policy in *Bulk Oil*, sea protection in *Peralta*, closing-hours legislation in *Heukske*, and general price freezing legislation in *Buys*. Lastly, it is worth noting that most cases involved Article 85 rather than Article 86 EC. In fact, until 1995, it was not clear what role Article 86 EC was to play.<sup>343)</sup>

## 8.2. The Development of the Law

The first judgment of interest, though classified as a preliminary one, was handed down in 1969.<sup>344)</sup> It was not until eight years later, in *INNO*, that the Court made a serious attempt to substantiate the relationship among Articles 3(g), 5(2) and one of the competition provisions of the Treaty (Article 86 EC), and it took another ten years, until 1987, before the Court for the first time clearly held that a state measure violated these provisions.<sup>345)</sup> Since 1989, it has not unambiguously condemned any national measures pursuant to Articles 3(g), 5(2) and 85 EC.

Although the Court would often amend the questions referred from the national courts, and was therefore in complete control of the development of the law, this development was never consistent. However, it is possible to claim that the initial cases, from *Walt Wilhelm* to *Leclerc*, concentrated on the establishment of a general principle governing the interaction among the analysed provisions. Such a claim would not be completely accurate because on the road to the establishment of such a general principle the Court often reverted,

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343) See the *Spediporto* Case.

344) See the *Walt Wilhelm* Case.

345) See the *Vlaamse Reisbureaus* Case.

quite suddenly, to a minimalist approach, according to which Articles 85 and 86 EC would be interpreted as not prohibiting Member States' anti-competitive legislation. In addition, the following cases, including *Leclerc*, focused on the development of tests which would allow the Court to apply the general principle in specific situations - and this development can not be described as finished yet.<sup>346)</sup> Especially the *Van Eycke* Case from 1988 deserves special mentioning because the Court here launched a test which in later case law would be specified as applicable when examining whether Articles 3(g), 5 and 85 EC had been contravened.<sup>347)</sup> The so-called "November" cases from 1993, the *Güterfernverkehr*, *Meng* and *Ohra* Cases, might contain the message from the Court that the scope of the doctrine has been reduced, a message strongly supported by the decisions to follow these. Importantly, in the *Spediporto* Case from 1995, the Court launched a test to be applied when examining whether Articles 3(g), 5 and 86 EC have been contravened. Considering the case law from the point of view of a Court which is constantly seeking to establish a coherence between two levels of governance, it is most characteristic that Article 85 EC through the years has transformed its original meaning from what it was in the initial cases into a very different meaning of today when read together with Articles 3(g) and 5(2) EC. The truism of Article 85 EC only being applicable to companies is legal history. Today, at least when reading the case law in its literal wording, Article 85 EC has transformed its function and is now in principle also applicable to Member States' measures. In other words, a minor revolution has occurred in this field. To which degree this provision is applicable to state measures is, however, a matter where the Court draws the line from case to case; a line which is never situated at a constant place. In other words, from the examination of the case law, it appears that no constant equilibrium has been established, but rather that it may often move. Nevertheless, a *leitmotif* seems to have been formed, which shall be demonstrated immediately below.

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346) The questions raised in the *Meng* Order, as described in *Chapter 1* and *10*, represent an example of how the doctrine may still be characterised as being unsettled.

347) See the *Spediporto* Case.

### 8.3. The Principles of the Doctrine

It should first be noted that there is no longer any doubt that there exists a general principle governing a combined interpretation of Articles 3(g), 5(2) and 85-86 EC. The principle implies that Member States are obliged to refrain from enacting measures which would detract from the effectiveness of the competition provisions.<sup>348)</sup> Case law and national unwritten policies is included within the concept of such measures.<sup>349)</sup> In addition, in order to establish a violation, the Court will require that the measures are capable of affecting trade between Member States.<sup>350)</sup> Finally, a link between the measure and the anti-competitive unlawful conduct has to be established.<sup>351)</sup>

Although the general principle has, through time, been implemented in different ways, the Court has clearly established the criteria contained in the so-called *Van Eycke* test, which in the *Spediporto* Case was specified to be applicable only with regard to Articles 3(g), 5(2) and 85 EC. Consequently, a Member State violates the three provisions,

- a) if it were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 EC; and/or
- b) if it were to reinforce the effects of agreements, decisions or concerted practices contrary to Article 85 EC; and/or
- c) if it were to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.<sup>352)</sup>

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348) The established criteria through which this principle is implemented represent an even more important impact of the judgments than the general principle itself, see *infra*.

349) This is according to the *Alsthom* and *Bulk Oil* Cases respectively.

350) See the *Aubert*, *Vlaamse Reisbureaus* and *Morais* Cases.

351) See e.g. the "November" Cases and the *Spediporto* Case

352) The criteria are identical to those established in the *Van Eycke* Case, at Ground 16.

Central to the criterion mentioned in paragraph a) is whether new agreements, decisions or concerted practices are required or favoured, whereas in criterion b) it is central that pre-existing agreements, *etc.*, are reinforced by the measure. Accordingly, there is a difference of time perspective between criterion a) and b). In the situation of committees established pursuant to national measures, the Court has developed a specific body of law in which it puts emphasis on, among other factors, whether the members are bound by orders or instructions from companies or associations of companies when called upon to conclude agreements,<sup>353)</sup> whether the majority of the members represent their own professional associations<sup>354)</sup> or whether the members do not have to take into consideration defined criteria<sup>355)</sup> or interests other than those of the undertakings such as the interests of economically weak regions.<sup>356)</sup> This being the case, the three provisions are likely to be considered as infringed. This body of law should be seen as analogous to the criterion mentioned under c).

Concerning the criterion mentioned in paragraph b), *supra*, the Court has held that state measures which reinforce the effects of agreements include permanent legislative restrictions which the parties can not alter, which are based on previously existing contractual prohibitions, and which contain legal remedies allowing cartel members to force unwilling non-members to comply with the rules, or contain other sanctions which effectively force unwilling non-members to comply with the agreed rules, and are likely to be contrary to the criterion.<sup>357)</sup> Furthermore, the Court demands that pre-existing agreements concern exactly the same sectors as those regulated in the contested measure.<sup>358)</sup> In other words, an extremely strong link has to be established between the measure and the pre-existing agreement, *etc.*

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353) See the *Güterfernverkehr* Case.

354) See the *Spediporto* Case.

355) See the *Spediporto* Case.

356) See the *Güterfernverkehr* Case.

357) See the *Vlaamse Reisbureaus* Case, at Ground 23.

358) See the *Meng* Case.

Regarding the third outlined criterion concerning delegation of power mentioned in paragraph c), *supra*, it appears as if the Court will apply this criterion independently, *i.e.* not simultaneously with the first two criteria. This implies that, although no agreements, decisions or concerted practices may be found to exist, national legislation may nevertheless be found to violate the Treaty provisions if the national legislation delegates the power to make certain decisions. The area of price maintenance systems provides a good example of the application of this criterion. Pursuant to this criterion, it would be a violation of the competition provisions for the public authorities to partially delegate to undertakings the power to fix prices; on the other hand, if the public authorities retained the right to fix prices, then there would be no violation. The criterion has been strongly refined in more recent cases such as *Güterfernverkehr*, *Delta*, *Spediporto*, and *DIP*. In these cases, committees influencing the state of competition were established pursuant to the measures contested. The Court put emphasis on whether a responsible minister was entitled to *e.g.* fix prices himself by substituting his decision for that of the committees.<sup>359)</sup> In light of this delegation criterion, the Court may be said to have moved in the direction of testing whether the measure in question stems from genuine state regulation. The criterion, in fact distinguishing between state and company, influences the organisation of the national administrations in the Member States.<sup>360)</sup> However, it is not as such a question of whether the pertinent body constitutes a company or a public authority pursuant to national law, but rather whether Articles 3(g), 5(2) and 85 EC in the above context are infringed.<sup>361)</sup>

For a long time a major uncertainty ruled with regard to Article 86 EC in conjunction with Articles 3(g) and 5(2) EC. Often the Court applied the *Van Eycke* test on questions concerning these three provisions, although it was obvious that this test only made sense with regard to Articles 3(g), 5(2) and 85 EC. Although the *INNO* Case, which actually introduced the general principle, referred to Article 86 EC rather than Article 85 EC, it was not until 1995, in the *Spediporto* Case, that the Court clearly stated the role to be played by

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359) See the *Delta* Case. In the *DIP* Case, it was a mayor instead of a minister who was in a situation to make his own decisions.

360) See Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 364.

361) See *ibid.*, at p. 365.

Article 86 EC with regard to anti-competitive state measures and the applicable criteria.<sup>362)</sup> Consequently, a Member State violates the three provisions provided that there is a link between the measure in question and the unlawful conduct where:

d) existence of a dominant position is established, or, - in the case of more than one company - the companies in the group are linked in such a way that they adopt the same conduct on the market;

e) existence of abusive behaviour is established; and

f) existence of a link between the measure and the dominant position/abusive behaviour.

With regard to the first part of the criterion mentioned in paragraph d) concerning dominant position, it is necessary that the measure in question places a company in a position of economic strength enabling it to prevent effective competition from being maintained on the relevant market by placing it in a position to behave, to an appreciable extent, independently of its competitors, of its customers and ultimately of the consumers.<sup>363)</sup> This prong of the test is similar to that which determines in more traditional analyses whether a dominant position pursuant to Article 86 EC exists.

Regarding the requirement of a link between the companies in a group, *i.e.* the second part of the first criterion mentioned in paragraph d), this naturally, would not apply in the situation of a monopoly. What is examined, according to this part of the criterion, is whether the public authorities place economic agents in a collective dominant position characterised by the absence of competition between them<sup>364)</sup>. This part of the criterion represents a new application of Article 86 EC.<sup>365)</sup>

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362) These findings in *Spediporto* were supported by *DIP* and *Sodemare*.

363) See the *Spediporto* Case, at Ground 31.

364) See *ibid.*, at Ground 34.

365) See Soames, Trevor, "An Analysis of the Principles of Concerted Practice of Collective Dominance: A Distinction without a Difference?", *European Competition Law Review*,

Concerning the criterion mentioned in paragraph e) according to which abusive behavior has to be established, the Court has held that this results from the exploitation by one or more undertakings of a dominant position on the common market or in a substantial part of it in so far as those practices may affect trade between Member States.<sup>366)</sup> This criterion also originates from the more traditional application of Article 86 EC.

Concerning the criterion mentioned in paragraph f) which demands a link between the measure and the dominant position/abusive behaviour, *i.e.* the two former criteria, this is a parallel to the case law of Articles 3(g), 5 and 85 EC. This requirement is, naturally, essential to the doctrine.

The three criteria stated in the *Van Eycke* test have never in explicit terms been stated by the Court to be an exhaustive list. Other criteria which the Court has applied, but regarding which there nevertheless remains at least some uncertainty not only concerning how well-established they actually are, but also concerning exactly when they should be applied, are the following:

g) the competence criterion, which is used to determine whether the power to enact the measure at issue belongs to the Community or to the Member States;<sup>367)</sup> and

h) the efficiency criterion, which is used to test whether the challenged measure has deprived the competition provisions of their effectiveness; this criterion may very well apply to state measures which have anti-competitive effects, but which do not originate from *e.g.* pre-existing agreements.<sup>368)</sup>

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Volume 17, 1996, Number 1, pp. 24-39.

366) See *ibid.*, at Ground 32.

367) This criterion was applied only in *Leclerc* and *Asjes* (and in a summary of the *Leclerc* Case in *Libraires*).

368) This criterion was applied, *inter alia*, in *Leclerc*, but seemed abandoned again in *Libraires*. In *Spediporto*, the Court includes one sentence which may be understood as a reference to the degree of the measure's anti-competitive effects. Under all circumstances, the criterion appears to be included in the wording of the general principle.



The Court rarely applies the seventh criterion regarding the Community's balance of competences, mentioned in paragraph g) *supra*. This is surprising because, if expanded, it might prove helpful in resolving the conflict between national anti-competitive state measures and Community competition law.<sup>369)</sup>

The efficiency criterion, mentioned in paragraph h), *supra*, is probably the most problematic and controversial of the criteria. It could potentially be applied in a great many areas, and, if not somehow limited, *e.g.* by the competence test, or a test similar to that contained in Article 36 EC, it could in fact end up including all national anti-competitive legislation. This would clearly hinder Member States' regulation of their economies.<sup>370)</sup>

Further, the Court's decisions do not provide any guidance regarding whether Member States can justify anti-competitive measures on grounds such as those set out in *e.g.* Article 36 EC, or on grounds such as those recognised by the Court in connection with Articles 30 and 59 EC.<sup>371)</sup> However, in the *Aubert* Case, the Court stated that declining sales or overproduction provides undertakings with no more than the basis for an application to the Commission pursuant to Article 85(3) EC. Accordingly, undertakings at least have the possibility of receiving an exemption pursuant to Article 85(3) EC. Whether Member States may also receive such an exemption is not clearly indicated in any of the Court's decisions.

For Member States, the greatest implication of the doctrine, when taken to its broadest scope, lies in its implicit potential limitations of Member States' field of competence. In addition, certain anti-competitive measures are at risk of being held void, at least when taking into consideration the case law until the "November" Cases.<sup>372)</sup> In particular, Member States should be careful to legitimise national undertakings' agreements, *etc.* - which the Treaty's competition provisions otherwise prohibit - by incorporating such agreements,

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369) See in particular *Chapter 18* below concerning *Distribution of Competences*.

370) See in particular *Chapter 13* below concerning *The Treaty as an Economic Constitution*.

371) Reference is made to the grounds reflected in the second of the issues raised in the Order of the Court in the *Meng* Case; see *Chapter 1* concerning *Introduction* and *Chapter 6* concerning *A Withdrawal From the European Court of Justice*.

372) See, for instance, Mørch, Henrik, "Lovgivningsmagtens kompetence vedrørende konkurrencebegrænsende foranstaltninger", *Ugeskrift for Rejsvæsen*, 1993, Number 5, p. 49 and p. 55, who considers the Danish tobacco legislation, *i.e.* "Lov nr. 938 af 27.11.1991", as contrary to Articles 3(g), 5(2), and 85 EC.

*etc.* into national law. Also, when establishing committees with members representing private interests, the Member States would have to be extremely aware of the more recent case law which has a great potential impact on what the actual design of such committees should be. Companies, for their part, must realise that protection pursuant to national law is not always total. The doctrine offers legal opportunities to companies who believe they have a competitive advantage in the market place. By claiming that the national measure is contrary to Community law, they can challenge national measures which they believe protect their less capable competitors. However, the interpretation of the doctrine has in these years become very strict, and the practical impact with regard to anti-competitive state measures should not be overemphasised. Rather, the situation is that the Court formally declares that it is willing to condemn anti-competitive state measures, but, in actual fact, is not in the least willing to do so.<sup>373)</sup> Member States are likely to be free to legislate in this field if not for other Treaty provisions or secondary Community legislation which may otherwise condemn such legislation. But, inherent in the general principle is still a possibility for the Court to broaden again its attitude towards such measures.

Finally, it should be noted that the general impression of all these cases is that the Court very often applies various criteria and applies them in various ways. What the Court does depends on the facts of a given case. Therefore, despite a relatively extensive line of cases, the doctrine is still ambiguous, especially due to very formalistic criteria. This creates legal uncertainty and gives an impression internal rationality.

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373) As Bacon points out, in practice the Court has never held that a state measure infringes Articles 3(g), 5 and 85 EC without there being an independent breach of Article 85 EC by the companies in question; see Bacon, Kelyn, "State Regulation of the Market and E.C. Competition Rules: Articles 85 and 86 Compared", *European Competition Law Review*, Volume 18, 1997, Number 5, p. 284.

#### 8.4. Strengths and Weaknesses of the Court's Standard

In this section the first three criteria presented above under a), b) and c) are commented upon.<sup>374)</sup> The aim is primarily to outline the interests behind the criteria and the most significant strengths and weaknesses.

The first two criteria, namely a), concerning subsequent unlawful activity required or favoured by the measure, and b), concerning measures reinforcing the effects of pre-existing unlawful activity, are the least controversial among the ones applied by the Court and give little reason for further remarks here. Their major strength is that they are fairly logical in the sense that they are not too removed from an immediate reading of Articles 3(g), 5(2) and 85 EC. In this regard, it is of significance that a link is required between the measure and the unlawful activity. Therefore, the criteria are also acceptable to most.<sup>375)</sup> The weaknesses of the criteria primarily lie in the details of their application, in particular that the Court within recent years has applied them in a manner which to many has appeared as far too formalistic. In other words, problems of delimitation still exist. With regards to the first prong, this would, for example, be whether it is completely correct not to - as in the *Delta* Case - consider the members of the freight commissions as representatives of the concerned professional associations, called upon to negotiate and conclude agreements on prices, although these members according to the measure in question held an honorary office. With regard to the second prong, this would, for example, be whether it is completely correct not to - as in the *Meng* Case - consider the degree of similarity between the measure and the pre-existing agreement as sufficient although the agreement concerned another sub-degree of the insurance sector other than that regulated in the measure.

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374) The competence criterion and the efficiency criterion, under g) and h) above, are analysed below in *Part Four*, in *Chapter 18* concerning *Distribution of Competences*, and *Chapter 13* concerning *The Treaty as an Economic Constitution*, respectively. The criteria related to the doctrine on the interaction of Articles 3(g), 5(2) and 86 EC are left out for further analysis, as this doctrine is not the primary object of this thesis, as pointed out already in *Chapter 1, Introduction*.

375) Chung, however, finds the actual application of the Court so strict that only few measures would be condemned and therefore prefers an *effet utile* approach, see Chung, Chan-Mo, "The Relationship between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach", *European Competition Law Review*, Volume 16, 1995, Number 2, p. 90.

The third criterion, namely the delegation criterion, concerning whether a Member State has deprived its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere, is much more controversial and deserves several more remarks here than the first two criteria. That this criterion is more controversial is not only due to problems of delimitation or to a far too formalistic application thereof, but is also due to its double-sided aim: on the one hand, as an extra, alternative check as to the existence of agreements, and, on the other hand, to check whether state action is apparent. The first of these aims is directed at catching those situations where the legislative framework in reality works as a medium for an agreement, *i.e.* finding those situations where the delegated powers are regulatory in form but contractual in fact.<sup>376)</sup> The second aim is directed at prohibiting those measures where, although presented as a state measure, the delegated regulatory power is in reality not an expression of an affirmatively articulated state policy, but rather a cover designed to make it possible to engage in anti-competitive acts to the detriment of the achievement of the aims of the Community.<sup>377)</sup> Both aims are inter-related. It is understood from the formulation of this double-sided aim that this criterion is far more distant from a more immediate reading of Articles 3(g), 5(2) and 85 EC than the first two criteria, and, most of all, is far more complicated.<sup>378)</sup>

The delegation criterion is in particular of relevance to testing the lawfulness of committees established by Member States. The reason why Member States set up these committees is to involve interest groups and experts in the decision-making process.<sup>379)</sup>

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376) See Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, pp. 365-366.

377) See *ibid.*, at pp. 365-366. It is in the grey area between public administration and private associations that national governments must ensure that delegated public competence to committees consisting of members representing commercial interests may not be so broad as to enable the delegates to use the public competences to distort competition, see *ibid.* p. 366.

378) Also see Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC63.

379) See Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 365.

These are often the individuals who know the most about the details of the economic realities. In this way, Member States strive to ensure that conflicting interests are heard, that the different aspects of the involved problems are presented, and that the possibility of reaching compromise solutions is enhanced.<sup>380)</sup> However, at the same time, such committees might in effect work in the same way as a cartel, indeed a cartel whose decisions are enforced by law. It is in the latter situation where the doctrine might come into force, condemning the measure allowing for such a cartel.

One of the more significant of the Court's sub-criteria to decide whether unlawful delegation has taken place in such committees is whether the members are in fact acting as representatives of the commercial interests regulated by the committee. The committee in this situation functions in a way which is closer to that of a cartel than to that of an executor of a policy of the state.<sup>381)</sup> In actual fact, however, the Court applies this sub-criterion in a very formal manner, primarily putting emphasis on whether the pertinent measures themselves expressly underline the independence of the committee members and thereby prevent them from following instructions on how to vote.<sup>382)</sup>

Another sub-criterion is whether the measure in question lays down obligations for the members of the committees to take due account of particular political considerations.<sup>383)</sup> These are, for instance, the interests of small and medium-sized companies and

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380) See *ibid.*, at p. 365. Also see Holst-Christensen & Høegh, who see so many advantages in regulation through delegation that they assert that the delegation criterion should be completely avoided, see Holst-Christensen, Nina & Høegh, Katja, "Lovgivers forpligtelser i henhold til EU-konkurrenceretten", *Ugeskrift for Retsvæsen*, 1995B, p. 6.

381) See Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 366.

382) See *ibid.*, at pp. 366-367. According to *Bach*, this sub-criterion lacks realism, because - as he asks - why should a simple change of hat provide independence and why should, for instance, the manager of a company pursue interests different from those defined by the company once he is, following a proposal of that very company, appointed to any committee with regulatory competence, see *Bach, Albrecht*, "Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*; Case C-2/91, *Meng*; Case C-245/91, *OHRA Schadeverzekeringen NV*", *Common Market Law Review*, Volume 31, 1994, Number 6, p. 1368.

383) See Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 367.

of economically weak regions. Again, this requirement is formalistic in character since such obligations will not be sufficient to change the nature of decisions adopted in a corporatist framework.<sup>384)</sup>

A third sub-criterion is whether a high-ranking public representative, preferably democratically elected, such as a minister or a mayor, has the possibility of altering the content of the negotiated result. This is only of formal impact, at least in the examined cases, because in practice it does not seem to happen that the public representative intervenes in the decision-making. Actually looking at how such a public representative makes use of his competence is therefore not, at least not expressly, part of the Court's approach. This is because only in a minority of cases will the Court have the information necessary to carry out an analysis of how frequently a Member State has intervened in the decisions of the committee, which is why it will normally be necessary to perform the test on the basis of the formal structure of the rules of the board.<sup>385)</sup> This, however, means that the delegation criterion may be criticised since, quite paradoxically, it encourages a larger degree of regulation by public authorities rather than by the free market, and it is the development of the free market which, presumably, is one of the objectives of the competition provisions. Member States must formulate more detailed policy, frame more elaborate legislative directions to committees and write rigid rules in advance when, instead, they would prefer administrative flexibility. And the more detailed legislation, the higher its costs. On the other hand, Member States have a legitimate interest in the advantages of such committee work, and it is important that the application of the criterion does not hinder this interest.

Central to the delegation criterion is whether the Member State has renounced its role as regulator by delegating to private traders responsibility for taking decisions affecting their own and their competitors' competitive positions.<sup>386)</sup> Therefore, Fenger & Broberg read the case law as containing a substantive test to see whether the committee in question

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384) See Bach, Albrecht, "Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*; Case C-2/91, *Meng*; Case C-245/91, *OHRA Schadeverzekeringen NV*", *Common Market Law Review*, Volume 31, 1994, Number 6, p. 1368.

385) See Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 367.

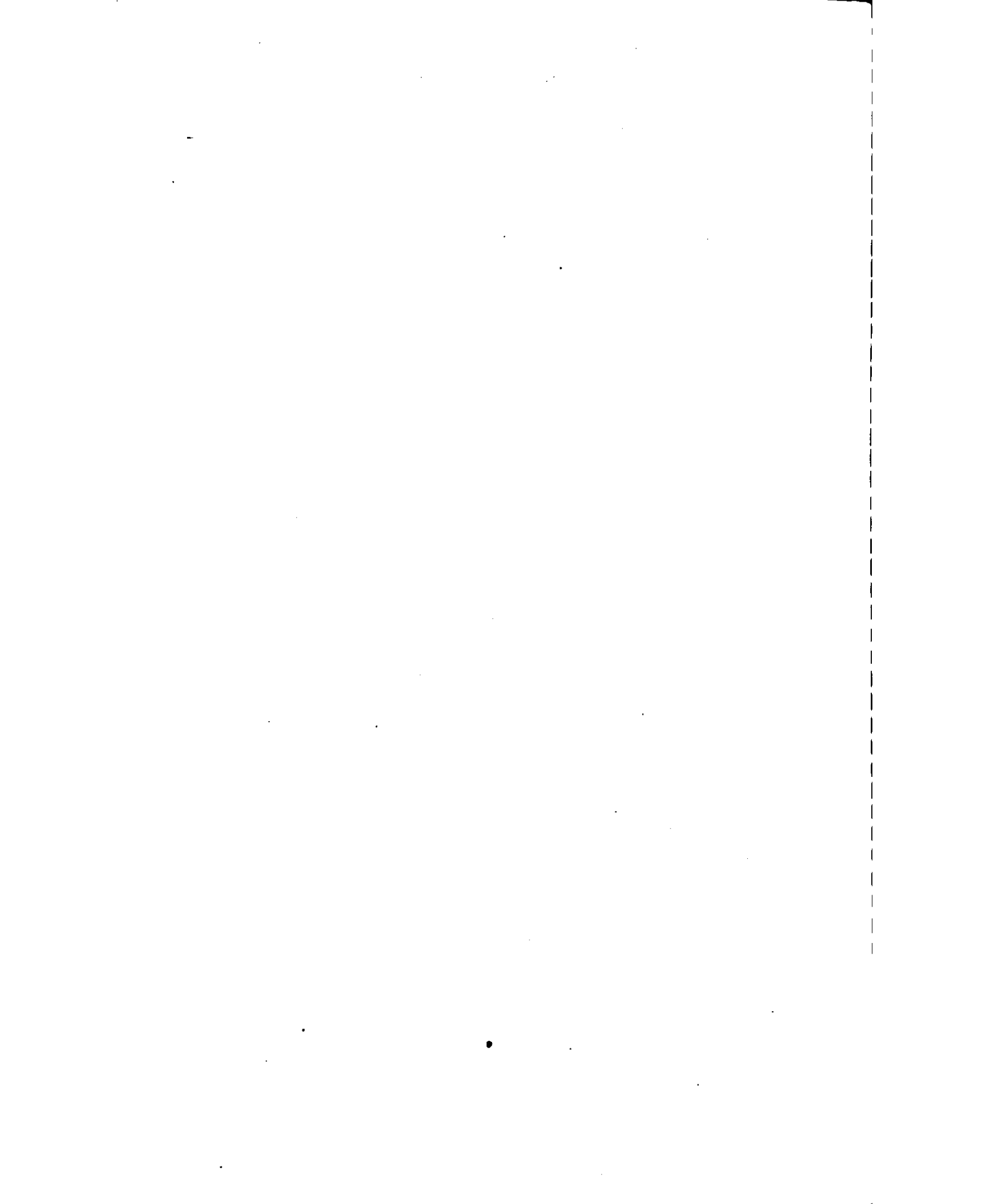
386) See *ibid.*, at p. 367.

represents a clearly articulated state policy, the administration of which is actively supervised by the state itself, or, whether the power structure of the committee tends towards commercial interests.<sup>387)</sup> This was referred to above as the aim of controlling whether state action is apparent. If this reading is correct, the Court has been strongly inspired from the American case law, in which the terminology of supervision and clear articulation play a large role. In the following *Part Three* the problems related to such an emphasis are stated.

Given this background, it must be concluded that a kind of internal irrationality exists in the criteria. All three criteria have in common that they may be seen as an attempt to accommodate between an aim of competition at the central level and the Member States' right to economic self-determination. However, as it at the same time is evident that economic efficiency is not the test itself applied to the measures, it is not clear why this accommodation is so vividly maintained. However, a final evaluation of the Court's solution to the tensions between central competition law and peripheral anti-competitive law will have to await the following analysis of its alternatives, beginning with the American *pendant*.

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387) See *ibid.*, at p. 367.





**Part Three**

**The American Example**

The sub-question of this part is the following:

What legal principles does the US Supreme Court apply in its decisions when reviewing the tensions between the American Sherman Act and anti-competitive state measures, and how is the American doctrine characterised in comparison with the European?

The focus of this part is the American doctrine on state action, also referred to as the *Parker* doctrine. This part will commence with a presentation of the relevant framework of law within which the doctrine operates (*Chapter 9*).

Subsequently, the analysis will focus on those significant cases representing the development of the legal principles.<sup>388)</sup> This analysis is divided into two chapters. The first chapters and most important to this thesis, is concerned with the state action doctrine itself (*Chapter 10*). The other chapter is concerned with a parallel doctrine which may be referred to as the antitrust petitioning immunity doctrine, which specifically only regards the situation of state measures enacted pursuant to prior petitioning (*Chapter 11*). The aim of these two chapters is to analyse the case law critically in order to evidence the final state of the tensions.

Finally, a comprehensive analysis of the case law is provided and a comparison with the European doctrine is made (*Chapter 12*). The goal of the comparison is to contribute to a greater understanding of the proportions of the problems and to provide a basis for gaining insight into the weaknesses and strengths involved in each of the systems' models of solution.

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388) See *Chapter 1* with regard to reservations respecting the chosen case law, such as only taking Supreme Court cases into account. Of particular interest in terms of the American law is that early cases (1905-1934) concerning the conflict between federal and state legislation were based upon the Due Process Clause of the Fourteenth Amendment to the Constitution. This approach has now been discredited; see Marengo, Giuliano, "Government Action Antitrust in the United States: What Lessons for Community Law?", *Legal issues of European integration*, Volume 14, 1987, Number 1, pp. 2-3. These cases are not included in the analysis.

That the two legal systems are suitable for comparison with regard to the doctrines on anti-competitive state measures is due to the fact that both legal systems provide for the supremacy of upper level over lower level law and that both have the competition rules at the upper level and the states' legislation at the lower level.<sup>389)</sup> In addition, there are many common features in the content of the centrally placed competition rules and their interpretation as well as the structure of the society in which they are operating.<sup>390)</sup> Also, it is an advantage that the American Supreme Court's experience with the problems connected to state action is more extensive<sup>391)</sup> and therefore has considered the issues over a longer period of time, although it does not offer any perfect solution, as it is still evolving.<sup>392)</sup>

At the same time, there are differences between the systems; *e.g.*, the Sherman Act is federal legislation, whereas Article 85 EC, being placed in the Treaty itself, could be said to contain some constitutional elements. Accordingly, the European Court of Justice might put greater emphasis on economic and social values than would the US Supreme Court.<sup>393)</sup> On the other hand, the US Supreme Court, due to that Court's particular interpretative traditions, will put greater emphasis on the history and motivations of the

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389) See Marengo, Giuliano, "Government Action and Antitrust in the United States: What Lessons for Community Law?", *Legal issues of European integration*, Volume 14, 1987, Number 1, p. 2.

390) See, *inter alia*, Fejø, Jens, "Law and Market. Studies of EC Competition Law with US American Antitrust Law as a Frame of Reference and Supported by Basic Market Economics", Boston, 1989, p. 9.

391) The very first American judgments concerning the issue of the validity of state action under the antitrust laws date back to 1904.

392) The main reason why the American system has been chosen for analysis, instead of other existing federal systems, is that also in this system is the doctrine in question court made. Also, the tradition of comparison of the US with the EU and the relatively easy access to American legal sources has been of impact to the choice. It should be added that another possibility of comparison could have been Australia. However, in this system, no equivalent to the European and American doctrines exists. See Fels, Allan, "Decision Making at the Centre", Paper presented at the *Workshop on the implementation of Antitrust Rules in a Federal Context*, EUI, 19 April 1996, pp. 15 and 17.

393) See van der Esch, Bastiaan, "EC Rules on Undistorted Competition and U.S. Antitrust Laws: The Limits of Comparability", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1989, New York, p. 18-7.

antitrust laws.<sup>394)</sup> Another difference is that, in contrast to American law, Article 5 EC directly raises the possibility of prosecuting a Member State for having enabled enterprises to infringe the central competition law. Furthermore, the US does not have an equivalent of Article 3(g) EC, which means that the temptation to interpret the Sherman Act in direction of a more general prohibition of distortion of the system of competition is not existing to the same degree as in Europe. Moreover, there exists fundamental differences between the content and application of the doctrine of pre-emption in the two legal systems. Finally, and perhaps most importantly, the European problem is likely to be much more complicated than the American because the American debate concerns federalism in a more pure sense, whereas the European discussion concerns the issue of how to make the non-constitutional and almost non-democratic state, namely the EU, compatible with its opposition, *i.e.* the constitutional, democratic Member States.

Despite the differences, the overall impression is that a comparison with American law could prove fruitful. The expectation is not that solutions will necessarily be found in the American system, but, rather, that a better understanding of the issues at stake will be obtained.<sup>395)</sup> However, despite this presentation of American law and the comparison with European law, it should be stressed that the role to be played by American law in this thesis is that of an example. The objective is not in the least that of providing a thorough analysis of the American situation nor to attempt to solve the Americans' problems.

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394) In contrast, the *travaux préparatoires* of the Treaty have not been published and are not pleaded before the European Court of Justice. See Weiler, J. H. H. & Haltern, Ulrich R., "The Autonomy of the Community Legal Order - Through the Looking Glass", *Harvard International Law Journal*, Volume 37, 1996, p. 432.

395) For a more general account of similarities and differences between the two legal systems, see Krislov, Samuel; Ehlermann, Claus-Dieter & Weiler, Joseph, "The Political Organs and the Decision-Making Process in the United States and the European Community", in *Integration Through Law*, Edited by Cappelletti, Mauro; Seccombe, Monica & Weiler, Joseph, Volume 1, Book 2, 1986, *inter alia* pp. 3-4 and 11-16. Also see Mackenzie-Stuart, "Problems of the European Community - Transatlantic Parallels", *International and Comparative Law Quarterly*, Volume 36, 1987, pp. 183-197. Mackenzie-Stuart also concludes that although the European Court of Justice and the US Supreme Court differ fundamentally in their origin, function and jurisdiction, it is instructive to take specific problems inherent in the nature of a federal structure, understood in a broad sense, and see how the US Supreme Court with its long experience has handled them compared to the European Court of Justice's handling of the problem; see *ibid.*, at p. 187.

## 9. An Outline of the Relevant Legislation

The following outline of the legislative provisions of importance to the state action doctrine will focus on presenting the most important antitrust laws and the constitutional provisions of relevance.

### 9.1. The Antitrust Laws

The most significant antitrust act is the world's first and oldest antitrust law: the *Sherman Act* from 1890. The Act contains no preamble to indicate the legislative policy at which it was aimed, and no terms are defined.<sup>396)</sup>

The first two sections of the act are of primary importance, and define the illegal activities of companies. More precisely, Section 1 is, like Article 85 EC, concerned with anti-competitive agreements, *etc.* The Section reads as follows:

*"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding \$ 10,000,000 if a corporation, or if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court."*

Section 2, on the other hand, concerns the prohibition of monopolisation and contains many similarities to Article 86 EC. In exact terms, the provision determines that:

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396) See Fejo, Jens, "Law and Market. Studies of EC Competition Law with US American Antitrust Law as a Frame of Reference" and Supported by Basic Market Economics", Boston, 1989, p. 23.

*"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 10,000,000 if a corporation, or, if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."*

The remaining provisions of the Sherman Act are concerned with procedure and enforcement of the provisions. In general, the Sherman Act has only to a minor degree been amended through the years, and that has primarily been with regard to the amount of fines.<sup>397)</sup>

To clarify the Sherman Act, and to supplement and strengthen its enforcement, the *Clayton Act* was enacted in 1914.<sup>398)</sup> The Act contains, *inter alia*, a prohibition against price discrimination and certain restrictions on purchasers.<sup>399)</sup>

The *Federal Trade Commission Act* was also enacted in 1914. The legislation concerns the establishment of the Federal Trade Commission having the aim of examining and prosecuting violations of the Clayton Act, but not the Sherman Act. Only the federal Department of Justice is responsible for the latter. However, as the Federal Trade Commission, according to Section 45 of the act, "...is empowered and directed to prevent persons, partnerships, or corporations...from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce", the Commission might in practice have the same wide terms of reference as the Department of Justice.<sup>400)</sup>

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397) See *ibid.*, at p. 22, footnote 3.

398) See *ibid.*, at pp. 23-24.

399) See Sections 2 and 3 of the Clayton Act.

400) See Fejø, Jens, "Law and Market. Studies of EC Competition Law with US American Antitrust Law as a Frame of Reference and Supported by Basic Market Economics", Boston, 1989, p. 25.

The *Robinson-Patman Act* from 1936 contains, as does Section 2 of the Clayton Act, a prohibition against price discrimination, this time further extended.

The final legislation to be introduced here is the *Local Antitrust Act* from 1984. The enactment of this law is a direct consequence of the state action doctrine. In the *Lafayette Case*, it was decided that cities and other subordinate governmental units' regulations only can gain immunity if the regulations are enacted in accordance with adequate authority given to the governmental entity to operate in the particular area.<sup>401)</sup> Due to the more than one hundred antitrust actions that were brought against cities after *Lafayette*, the Local Antitrust Act was passed by Congress in order to restrict the availability of antitrust treble damages against local governments and their officials.<sup>402)</sup> Hovenkamp & Mackerron stress, however, that the legislation only relieve municipalities from treble damages, that it neither exempts municipal conduct from antitrust scrutiny nor changes the liability standard to be applied.<sup>403)</sup>

## 9.2. Constitutional Provisions of Importance

Unlike the Treaty, the Constitution of the United States expressly provides supremacy of the Constitution itself and its derived legislation. Regarding the state action doctrine, it is of importance that as a result of the "Supremacy Clause" acts of Congress have supremacy over state legislation.<sup>404)</sup> In other words, the federal Sherman Act, at a

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401) See *City of Lafayette, Louisiana and City of Plaquemine, Louisiana v. Louisiana Power & Light*, 435 US 389, 55 L Ed 2d 364, 98 S Ct 1123, [No. 76-864], Argued 4 October 1977, Decided 29 March 1978. More particularly, see 435 US 415 or the analysis of the case, *infra*.

402) See Howard, Jeffrey H., "Applying the Antitrust Laws to Local Governments: Congress Changes the Approach", *The Antitrust Bulletin*, Volume 30, 1985, p. 745.

403) See Hovenkamp, Herbert & Mackerron, John A. "Municipal Regulation and Federal Antitrust Policy", *UCLA Law Review*, Volume 31, 1985, p. 719.

404) See Jacobs, Francis G. & Karst, Kenneth L., "The 'Federal' Legal Order: The U.S.A. and Europe Compared - A Juridical Perspective", in *Integration Through Law*, Edited by Cappelletti, Mauro, Seccombe, Monica & Weiler, Joseph, Volume 1, Book 1, 1986, p. 226.

minimum, takes precedence over similar state legislation. In exact terms, the "Supremacy Clause" determines that:

*"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."* <sup>405)</sup>

In the determining which competences belong to Congress, the following clause comes into play:

*"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."* <sup>406)</sup>

This clause gives the impression of the prevalence of a principle of enumerated competences, but in actual fact the legislative power of Congress is now seen to be practically unrestricted.<sup>407)</sup> This is better understood when the previous clause is related to the "Necessary and Proper Clause", which, after outlining a list of legislative competences, provides that the Congress shall have power to:

*"...make all laws which shall be necessary for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof."* <sup>408)</sup>

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405) See the Constitution, Article VI, Clause 2.

406) See the Tenth Amendment of the Constitution.

407) See Jacobs, Francis G. & Karst, Kenneth L., "The 'Federal' Legal Order: The U.S.A. and Europe Compared - A Juridical Perspective", in *Integration Through Law*, Edited by Cappelletti, Mauro, Seccombe, Monica & Weiler, Joseph, Volume 1, Book 1, 1986, p. 226.

408) See Article 1, Section 8, Clause 18 of the Constitution.



Consequently, it is much more correct to speak of a doctrine of implied competences than of one of enumerated competences.

The final constitutional provision to be presented in this chapter is the "Commerce Clause", which states that Congress shall have power:

*"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."* <sup>409)</sup>

This provision is the American *pendant* to the European Article 30 EC doctrine. It has been, and still is, the chief constitutional foundation for congressional regulation of the private sector of the economy.<sup>410)</sup> The Sherman Act itself, for example, is based on this provision.

Lastly, it is necessary to add that in the US, as in Europe, the principle of pre-emption exists, which can be applied in order to strike down state regulations on the ground of pre-emption by federal law.

Now, the analysis of the cases concerning the American state action doctrine can begin.

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409) See Article I, Section 8, Clause 3 of the Constitution.

410) See Jacobs, Francis G. & Karst, Kenneth L., "The 'Federal' Legal Order: The U.S.A. and Europe Compared - A Juridical Perspective", in *Integration Through Law*, Edited by Cappelletti, Mauro, Seccombe, Monica & Weiler, Joseph, Volume 1, Book 1, 1986, p. 228.

## 10. Legal Principles of the State Action Doctrine

In search of the origin of the state action doctrine, it is natural to look at the Sherman Act itself. However, the text of the act does not reveal in express terms that it was meant to include state legislation in its scope.<sup>411)</sup> The legislative history of the law demonstrates as well that the law was never intended to run against the States.<sup>412)</sup> As Kennedy points out, this is of course historically correct, but today largely irrelevant. The reason for this is the creation of the state action doctrine by the courts.<sup>413)</sup> It is therefore necessary to start an analysis of the doctrine by examining the case law. This analysis centers around the two most significant cases, namely the *Parker Case* from 1943 and the *Midcal Case* from 1980. Therefore, the first section below is concerned with the *Parker Case* and, in this context, focuses on the genesis of the state action doctrine. Of special interest to the second section is the *Midcal Case*, and, in particular, the establishment of the first formalistic criteria to test the existence of state action will be examined. In the third section, the further refinement of the criteria which were established in *Midcal* will be scrutinised.

### 10.1. Genesis of the State Action Doctrine

The earliest judicial state action interpretations at the U.S. Supreme Court level took place already in 1904, where two cases related to the doctrine were decided. Below, these two cases will be briefly presented. Then, the significant *Parker Case* from 1943 is analysed in detail. To establish how the cases following *Parker* were decided, *Schwegmann* from 1951 and *Seagram* from 1966 are also discussed, however briefly.

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411) See the *Parker Case*, 317 US 341, at 350-352.

412) See Kennedy, Ronald E., "Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws", *Northwestern University Law Review*, Volume 74, 1979, Number 1, p. 33.

413) See *ibid.*, at p. 34.

The *Northern Securities Case* was one of the most famous cases of its time.<sup>414)</sup> It concerned a merger of two railway companies by the means of the establishment of a common holding corporation, which meant a severe removal of competition in this field. The merger had been organised under the corporation laws of New Jersey. When confronted with the claim that this merger violated the Sherman Act, the railway companies therefore defended themselves, *inter alia*, by claiming that state authorisation immunised the merger.<sup>415)</sup> This claim, among others, was rejected by the Supreme Court because it would destroy the just authority of the United States.<sup>416)</sup> In the decision, the Supreme Court largely relied upon the principle of supremacy, according to which federal law has primacy over inconsistent state law, but not without stressing the need to respect state authority in certain instances.

In the *Olsen Case*, pilotage laws of the state of Texas were at stake.<sup>417)</sup> These provided that the business of pilotage was reserved to pilots so licensed by the State. A pilot,

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414) See *Northern Securities Co. v. United States*, 193 US 197, [No. 277], Argued 14-15 December 1903, Decided 14 March 1904. See First, Harry, "Private Interest and Public Control: Government Action, The First Amendment, and the Sherman Act", *Utah Law Review*, 1975, p. 18.

415) See *ibid.*, at, *inter alia*, 332: "*Underlying the argument in behalf of the defendants is the idea that, as the [holding corporation] is a state corporation, and as its acquisition of the stock of the [original railway companies] is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations.*"

416) See *ibid.*, at 345. The importance of the initial argumentation of the Court justify a quotation thereof: "*So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, describe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind - domestic, interstate and international... But neither a state corporation nor its stockholders can, by reason of the nonaction of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is, by the Constitution, under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words...*" See *ibid.*, at 349-350. Also see, in particular, at 333, 338, 343-346.

417) See *Olsen v. Smith*, 195 US 332, 49 L Ed 224, 25 S Ct 52, [No. 42], Argued 3 November 1904, Decided 28 November 1904.

who was contravening these laws by offering his services although he was not authorised to do so, was sued by duly authorised pilots to recover their damages and to refrain him from his activities. The unlicensed pilot alleged, *inter alia*, that the state did not have the power to enact the pilotage laws, as the power to any enactment of that subject belongs to Congress due to the Commerce Clause of the Constitution. To this contention the Supreme Court found that the competence to enact regulations on pilotage correctly was vested in Congress, but that they fell within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject.<sup>418)</sup> Consequently, as Congress had not yet acted in this respect, the state measure was not in conflict with the Constitution. The pilot also claimed that the laws were in conflict with various laws of the United States, including the Sherman Act. The Supreme Court rejected this.<sup>419)</sup> It is understood from the decision that the approach of the Supreme Court was that of focusing on the distribution of competences between the center and the periphery. The Supreme Court can also be said to have taken on a totally minimalist approach. This may be appreciated given that the Supreme Court at the same time overtly stated that the pilots formed a monopoly. It should be added that although this decision was rendered only eight months after *Northern Securities*, the Supreme Court avoided referring to that decision and therefore did not make any attempt to explain how a state measure restricting entry and regulating prices could stand under the Sherman Act, while a state measure allowing corporations to combine into monopolistic holding companies could not.<sup>420)</sup>

Despite the two previous early decisions, which certainly did concern reviews of state action under the Sherman Act, it is the *Parker Case* which traditionally is characterised

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418) See *ibid.*, at 341.

419) The argumentation was as follows: "*The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.*" See *ibid.*, at 344-345.

420) See First, Harry, "Private Interest and Public Control: Government Action, The First Amendment, and the Sherman Act", *Utah Law Review*, 1975, p. 22.

as the founding case.<sup>421)</sup> The case was decided in 1943, *i.e.* fifty-three years after the enactment of the Sherman Act and almost forty years after *Northern Securities and Olsen*. Although the state action doctrine is often alternatively referred to as the *Parker* doctrine, the case thus lending its name to an entire doctrine, it is ironic that at the time that it was made, the decision was virtually ignored by legal commentators.<sup>422)</sup> At the same time, being one of the most significant of the cases related to state action, it is, still, also one of the most debated.

The case came to the Supreme Court on appeal. The parties were Parker, director of agriculture, *et al.*, as appellant and Brown as appellee. The state measure at stake was rather complicated. A Commission consisting of nine members was established pursuant to California's Agricultural Prorate Act of 1940. One of the members, *ex officio*, was a state official, in fact, the Director of Agriculture. The other eight members were appointed by the the Governor, an appointment which subsequently was confirmed by the Senate. The members were required to take an oath of office. The purpose of the Commission was to approve producers' applications of the establishment of so-called prorate marketing plans. The procedure started with a petition of ten producers concerning any commodity within a defined production zone. If the petition was granted, a program committee could be established. The members here would consist of qualified producers within the zone together with a few handlers or packers of the commodity. These members, nominated by the producers, were selected by the Director, however under approval of the Commission. The established program committee's first job was then to formulate a proration marketing program for the commodity in question. This program would also have to gain the acceptance of the Commission as well as of the public and a majority of the producers. From then onwards, the committee had the authority to administer the program. Producers or handlers acting contrary to the program were punishable by fine and imprisonment. In 1940, a proration marketing program for the production of raisins was instituted. The program had the purpose of reducing the supply of raisins and increasing the price level.

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421) See *Parker, Director of Agriculture, et al. v. Brown*, 317 US 341, 87 L Ed 315, 63 S Ct 307, [No. 46], Argued 5 May 1942, Decided 4 January 1943.

422) See Handler, Milton, "The Current Attack on the Parker v. Brown State Action Doctrine", *Columbia Law Review*, Volume 76, 1976, Number 1, p. 1.

Brown, who was engaged within the defined zone in producing as well as in purchasing and packing raisins for sale, had prior to the adoption of the program, entered into contracts concerning the crop of the year 1940. Therefore, in order to fulfil his contracts, he was not at the same time capable of complying with the program. Consequently, he sued, among others, the members of the Commission and the committee at the District Court in California to hinder the enforcement of the program. The District Court held that the program was invalid pursuant to the Commerce Clause of the Constitution.

Parker, *et al.*, appealed the case to the Supreme Court which tried the validity of the proration marketing program adopted for the 1940 raisin crop pursuant to the California Agricultural Prorate Act under, *inter alia*, the Sherman Act. In its decision, the Supreme Court assumed that the program would have violated the Sherman Act if it had been organised and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. It was further assumed that Congress had the competence to prohibit a state from maintaining such a program. Then, the Supreme Court made it clear that the program could not be said to operate by force of any kind of agreement, and furthermore, that it clearly derived its authority and efficacy from the State.<sup>423)</sup> It was thereupon stated that the Sherman Act never was intended to restrain state action. In this context the Supreme Court referred to the distribution of competences between Congress and the States. The Supreme Court's statement in this regard is often quoted and deserves to be reiterated in its original language:

*"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."*<sup>424)</sup>

The Supreme Court stressed, however, that States were not allowed to give immunity to those who violate the Sherman Act by authorising them to do so or by declaring

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423) See 317 US 341, at 350.

424) See *ibid.*, at 351.

that their action is lawful.<sup>425)</sup> Furthermore, a State should refrain from participating in illegal agreements, *etc.*<sup>426)</sup>

Based on the outlined principles, the Supreme Court, without dissent, held that the contested measure was in conformity with the Sherman Act. More particularly, the Court summed up that the Act only prohibits individual and not state action. Therefore, the measure was valid because it definitely was characterised as that of a state action<sup>427)</sup> and because the state had made no contract or the like. Rather, the State had, "*...as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit*".<sup>428)</sup>

The chief rule to be deduced from the judgment is that anti-competitive state measures are lawful. The condition is, however, that they completely have the nature of a state measure. Furthermore, two criteria according to which the measures or agreements will be found contrary to the Sherman Act exist. These are: a) state measures that immunise undertakings acting contrary to the Sherman Act by authorising them to do so or by declaring that their action is lawful, and b) agreements, *etc.*, that violate the Sherman Act and in which the State itself participates, thereby acting as market participant rather than legislator.

It is surprising that the *Parker Case* has been interpreted by many commentators as well as by the Supreme Court itself as containing an exemption of the States' actions from

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425) See *ibid.*, at 351.

426) See *ibid.*, at 351-352.

427) This was formulated as follows: "*It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.*" See 317 US 352.

428) See 317 US 341, at 352.

the coverage of the antitrust laws.<sup>429)</sup> In actual fact, the Supreme Court nowhere applies the term exemption. Furthermore, it rather decided the opposite, namely that anti-competitive state measures as the chief rule are lawful. In support of this, the Court stated, for instance, that the Sherman Act must be taken to be a prohibition of individual and not state action. Accordingly, it has not been quite correct to interpret the case as stipulating an exemption rendering anti-competitive state measures lawful, as the Supreme Court instead decided that these, as a general rule, are not included in the scope of the Sherman Act.<sup>430)</sup>

The Supreme Court's evaluation of whether the action really was that of the State and not that of an individual was based on the degree of the State's interference with the decision-making of producers. The Court chose to neglect the importance of the producers proposing the organisation of the prorate zone themselves and their subsequent approval of the program. Alternatively, the Court preferred to put emphasis on States' influence in other regards. However, there is no doubt that the producers were put in a strong position to enforce a cartel, authorised by the state. This was, therefore, definitely not a criterion applied by the Court. Easterbrook therefore perceives the decision as a result of the time in which it was passed as it was common during and after the Great Depression to believe strongly in the advantages of state interference in the economy and to view excessive competition as evil.<sup>431)</sup> This is also understood from the fact that the stated aim of the contested measure was to conserve the agricultural wealth and prevent economic waste in marketing agricultural products. The state legislator thus demonstrated a complete ignorance of basic economic principles.

As many as thirty-two years passed between the *Parker Case* and the next case directly dealing with the state action doctrine, the *Goldfarb Case* decided in 1975. However,

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429) See, for instance, Jorde, Thomas M., "Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism", *California Law Review*, Volume 75, 1987, Number 1, p. 228; or see the *Hoover Case*.

430) See Handler, Milton, "The Current Attack on the Parker v. Brown State Action Doctrine", *Columbia Law Review*, Volume 76, 1976, Number 1, p. 9.

431) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law & Economics*, Volume 26, 1983, Number 1, p. 27. Also see Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, p. 499, who has the opposite opinion, namely that the *Parker Case* was not really a case about judicial faith in economic regulation.



in the intervening years, a few cases were handed down which peripherally touched upon the doctrine. Two of these are briefly discussed so as to describe the intervening position of the Supreme Court regarding the relationship between federal anti-trust and state anti-competitive laws.<sup>432)</sup> The first case, *Schwegmann*, which concerned a resale price maintenance system, was the only one that directly mentioned *Parker*. The second case which is presented here, *Seagram*, is an example of a case which most likely wrongfully did not refer to *Parker*.

The first case containing a certain degree of relevance to the state action doctrine is the *Schwegmann Case*, which was decided eight years after *Parker*.<sup>433)</sup> Two distributors of gin and whisky located in Maryland and Delaware had entered contracts with more than one hundred retailers in Louisiana, hindering them from selling their products at prices lower than those stated in the contracts. As a retailer in the State refused to sign such contract, and furthermore sold the distributors' products at prices less than the minimum prices, the distributors decided to bring a suit against the retailer. The argument was that the retailer, according to state law, was obliged to follow the pricing policy of the distributors. Louisiana had a law permitting price-fixing contracts such as the ones at stake. Furthermore, the state law allowed distributors to enforce such contracts on non-signers. Once any single retailer had signed a price-fixing contract, all other retailers' sale at lower prices was condemned as unfair competition. The distributors contended that the state law was not outlawed by the Sherman Act as it was immunised by the Miller-Tydings Act of 1937 amending Section 1 of the Sherman Act. This law exempted from the Sherman Act "...contracts or agreements prescribing minimum prices for the resale" when these are lawful according to state law. The retailer disagreed with this argument, an opinion which was supported by the Supreme Court. In essence, the decision concerned the degree to which the scope of the Sherman Act was reduced by the Miller-Tydings Act. The grounding of the Supreme Court was based upon a narrow interpretation of the latter statute, especially upon its legislative history. The Court found that the scope of the Sherman Act was reduced by the Miller-Tydings Act with regard to state action allowing price fixing agreements, but not with regard to state action favouring

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432) Three other cases, *Noerr*, *Pennington*, and *California Motor*, which were also decided in that period, are dealt with in the next chapter concerning *The Antitrust Petitioning Immunity Doctrine*.

433) See *Schwegmann Brothers et al. v. Calvert Distillers Corp.*, 341 US 384, 95 L Ed 1035, 71 S Ct 745, [No. 442], Argued 9-10 April 1951, Decided 21 May 1951.

non-signing provisions. It is important in the context of the state action doctrine that the Supreme Court in fact invalidated, under the Supremacy Clause,<sup>434)</sup> the state law's non-signer provision, thereby demonstrating a willingness to strike down state laws as inconsistent with the federal competition laws.<sup>435)</sup> This is supported by the Supreme Court's reference to the *Parker Case*.<sup>436)</sup>

The *Seagram Case* is an example of a case in which the Supreme Court dealt with a claimed inconsistency between a state act and the federal antitrust laws without mentioning *Parker* at all.<sup>437)</sup> The state act in question was the New York Alcoholic Beverage Control Law which provided minimum prices on the sale of liquor in the state. Prices should be no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. Despite the law's obvious anti-competitive effects, the Court found no clear conflict between it and the antitrust laws.<sup>438)</sup> The Court's holding was therefore based upon a narrow interpretation of the scope of the antitrust laws.

To sum up, the first three cases dealt with in this section, *Northern Securities*, *Olsen* and *Parker*, which gave birth to the state action doctrine, have in common that they

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434) See Davidson, Mark L. & Butters, Robert D., "*Parker* and *Usery*: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action", *Vanderbilt Law Review*, Volume 31, 1978, p. 589.

435) This is expressed by *Rahl* in the following words: "In the midst of a national inflationary crisis, word from the high court that it is actually lawful for a dealer to lower his prices if he wants to must have sounded decidedly anomalous to some consumers, and academic to others. But to friends of competition the decision was good and significant news." See *Rahl*, James A., "Resale Price Maintenance, State Action, and the Antitrust Laws: Effect of *Schwegmann Brothers v. Calvert Distillers Corp.*", *Illinois Law Review*, Volume 46, 1951, Number 3, p. 350. It should be added that after the *Schwegmann* decision, Congress enacted the McGire Amendment of 1952 allowing states' statutes to contain nonsigner clauses. However, in 1975, Congress removed the resale price maintenance exemption from the Sherman Act completely. See *Werden*, Gregory J. & *Balmer*, Thomas A., "Conflicts Between State Law and the Sherman Act", *University of Pittsburgh Law Review*, Volume 44, 1982, pp. 8-9.

436) See 341 US 384, at 389. This reference to *Parker* was with approval, but without explicit explanatory comment.

437) See *Joseph E. Seagram & Sons, Inc., et al. v. Donald S. Hostetter, etc., et al.*, 384 US 35, 16 L Ed 2d 336, 86 S Ct 1254, [No. 545], Argued 23 February 1966, Decided 19 April 1966.

438) See 384 US 35, at 45.

settled the tensions between state and federal law by basing the decisions on values of federalism. It is noteworthy that in these initial cases the Supreme Court did not unequivocally give boundless deference to the States; neither did it completely reject the idea that state laws may give shelter to anti-competitive activities.<sup>439)</sup> For many years, *Parker* was reaffirmed only in *Schwegmann*. Then, as will be outlined in the succeeding section, a new development began.

## 10.2. Establishment of Formalistic Criteria

The other very important case, besides *Parker*, to the American state action doctrine is the *Midcal* Case from 1980. This was the first case in which a state measure was clearly found not to be protected under the doctrine. At the same time, two criteria to decide whether state action exists are seen as having been firmly established in that case. The first of these criteria is concerned with whether an anti-competitive restraint is clearly articulated and affirmatively expressed as state policy,<sup>440)</sup> whereas the other regards whether an anti-competitive policy is subject to active supervision by the State itself.<sup>441)</sup> Below, the development towards a final formulation of these criteria is traced and the section is finalised with a discussion of the *Midcal* Case itself. The cases to be dealt with, which were decided before *Midcal*, are *Goldfarb*, *Cantor*, *Bates*, *Lafayette*, *Exxon* and *Orrin Fox*. Then came the mentioned *Midcal* Case. The first two cases and *Lafayette* have in common that it was not the measures themselves which were under scrutiny, but only liability issues of concern to the involved parties.

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439) It could be said that in *Northern Securities* state authorisation did not protect the unlawful conduct from the application of the Sherman Act and therefore gave primacy to competition, whereas the opposite was the situation in *Olsen* and *Parker*. Also see Elhauge, Einer Richard, "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 721.

440) This is hereinafter referred to as the "clear articulation criterion".

441) This is hereinafter referred to as the "supervision criterion".

### 10.2.1. The *Goldfarb* Case

It was in 1975 that the Supreme Court again took up in a detailed manner the state action doctrine, recognising the vitality of *Parker* as a controlling precedent.<sup>442)</sup> This happened in the *Goldfarb* Case which concerned minimum-fee schedules. In this case, the first steps towards the formulation of the supervision criterion was also taken. The parties of the case were the married couple Goldfarb against Virginia State Bar and the Fairfax County Bar Association. The Goldfarbs experienced when they contracted to buy a house in Fairfax County, Virginia, that they needed a title examination, a service that only members of the Virginia State Bar could legally provide. Furthermore, they found that it was impossible to find a lawyer who would provide the service for less than a fee of 1% of the value of the property involved. This fee was exactly the same as the minimum price recommended in a list of common legal services published by the voluntary association without formal powers, the County Bar, and enforced by the State Bar. The Virginia Supreme Court was, through its legislature, authorised to regulate the practice of law. This regulation partially took place through the State Bar operating in the role of administrative agency under the Supreme Court. However, the Virginia Supreme Court had explicitly directed lawyers not to follow the recommended fees as their sole guide in determining the amount of a fee. The couple decided to bring an action alleging that the list of minimum fees was violating the Sherman Act.

The Supreme Court initiated its inquiry of whether the classic price fixing activities were immune as state action by referring to the *Parker* Case, in which the Court summarised that it had been held that the Sherman Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government.<sup>443)</sup> In this context, the Supreme Court also mentioned the *Olsen* Case. In line with this, the decisive test was formulated as determining:

*"...if an anticompetitive activity...is required by the State acting as sovereign"*  
444)

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442) See *Lewis H. Goldfarb et ux. v. Virginia State Bar et al.*, 421 US 773, 44 L Ed 2d 572, 95 S Ct 2004, [No. 74-70], Argued 25 March 1975, Decided 16 June 1975.

443) See *ibid.*, at 788.

444) See *ibid.*, at 790.

This was answered in the negative as there was no Virginia statute requiring the activity.<sup>445)</sup> Furthermore, the Virginia Supreme Court had not approved the recommended fees.<sup>446)</sup> The Supreme Court stressed in this regard that:

*"It is not enough that...anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."* <sup>447)</sup>

In conclusion, the Supreme Court therefore held that both respondents had voluntarily joined in a private anti-competitive activity and thereby had violated the Sherman Act.<sup>448)</sup>

The decision was important, especially to the lower courts which in the years from *Parker* until now had acted more and more uncertainly as to the application of the state action doctrine.<sup>449)</sup> Renewed guidance was indeed needed. The holding of the Supreme Court is very much in line with *Parker* in its focus upon the existence of a state act. Had there been any, it would have been valid.<sup>450)</sup> However, what is new in the case is the distinction between prompted and compulsory activities. Companies are shielded from liability according to the Sherman Act when the activities are compulsory according to state legislation. The need for such a criterion arises from the significant difference between *Parker* and *Goldfarb* that the former is concerned with the validity of the measure itself whereas the latter concerns the lawfulness of the private companies' activities. According to the *Goldfarb*

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445) See *ibid.*, at 790.

446) See *ibid.*, at 791.

447) See *ibid.*, at 791.

448) See *ibid.*, at 792.

449) See Robinson, Stanley D., "Recent Antitrust Developments: 1975", *Columbia Law Review*, Volume 76, 1976, Number 2, p. 191.

450) This is understood, *inter alia*, from the Supreme Court's ruling that in: "...holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." See 421 US 773, at 793. It may be noted that although the decision reaffirmed the *Parker* doctrine, it did not mention the two criteria also originating from that case.

decision the activity would have been lawful if there had been a measure of the State compelling it. On the other hand, the measure itself would be valid no matter whether it prompted anti-competitive activities as the ones at stake or made them compulsory. It is furthermore noteworthy that in the *Goldfarb* Case, the Supreme Court took one of its first steps towards the formulation of the supervision criterion, a criterion which the later *Midcal* Case is normally taken into account of. The supervision indication is found in the Court's emphasis upon the fact that the Virginia Supreme Court had not approved the State Bar's opinions dealing with the minimum fees. Indeed, the public decision-maker only took the slightest degree of participation in formulation and enforcement of the minimum fees.

#### 10.2.2. The *Cantor* Case

Decided just one year after *Goldfarb*, the Supreme Court quite quickly found it necessary again to take a position on the state action doctrine.<sup>451)</sup> The case was initiated by Lawrence Cantor, who was the owner of a company selling electric light bulbs against the private electricity utility, Detroit Edison Company. This latter company at the same time provided electric light bulbs to as many as five million people in the State. This amounted to fifty per cent of the most frequently used standard-size bulbs. By the utility's use of its monopoly power, the petitioner was effectively hindered at entering a large part of this market. Furthermore, price transparency was influenced to the disadvantage of the consumer. According to a Michigan statute, the Michigan Public Service Commission was given power to regulate the distribution of electricity, but not of light bulbs, in the State. This Commission gave its implicit approval to the electricity utility's marketing practice distributing bulbs to its customers, when approving the rates charged for the electricity. The program could not be changed without the Commission's approval after prior application of a new rate. Customers paid no separate charge for bulbs, but the electricity utility included the cost of providing bulbs as part of its general cost of providing service to the customers. Although the electricity utility's accounting records reflected no direct profit as a result of the distribution

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451) See *Lawrence Cantor, dba Selden Drugs Company, etc. v. the Detroit Edison Company*, 428 US 579, 49 L Ed 2d 1141, 96 S Ct 3110, [No. 75-122], Argued 14 January 1976, Decided 6 July 1976.

of bulbs, competition from the point of view of Cantor was indeed restrained and he therefore claimed that the marketing program was violating the federal antitrust laws.

The Supreme Court defined the crux of the matter as whether or not the *Parker* rationale immunises private action which has been approved by a State. The Court firstly discussed the holding of the *Parker* Case and stated in this regard that the judgment was limited to give immunity to actions taken by state officials pursuant to express legislative command.<sup>452)</sup> It further stated that the difference between *Parker* and the present case was that in the former the defendant was a public official, whereas in the latter the defendant was a private company.<sup>453)</sup> In addition, in *Parker* a state measure was claimed to violate the antitrust laws, but in *Cantor* there was no such claim.<sup>454)</sup> Concerning the issue of whether immunity could be given to the electricity utility despite the non-applicability of the *Parker* holding, the Supreme Court stated that two reasons might support such a rule. The first rule was that if a private citizen had done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he had thereby offended federal law.<sup>455)</sup> The second rule was that if the State was already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism.<sup>456)</sup> Both rules were rejected.<sup>457)</sup> Consequently, the

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452) See 428 US 579, at 589.

453) See *ibid.*, at 591.

454) See *ibid.*, at 591-592.

455) See *ibid.*, at 592. The first of these rules could be named the compulsion criterion. This criterion was in many respects similar to that applied in *Goldfarb*. The Supreme Court stressed that in most instances the compulsion exception would not apply, because a mixture of private and public decision-making typically would rule. See 428 US 579, at 593. However without giving examples or other clear definitions, the Supreme Court stated that there would be instances where the exception could come into force. That would be when the State's participation is so dominant that it would be unfair to hold a private party responsible. See *ibid.*, at 594-595.

456) See *ibid.*, at 592. The second of the rules was a kind of competence criterion. In this context, in essence, discussion took place as to whether the antitrust laws should be given supremacy to conduct already being regulated under a state standard. The approach is related to that applied in *Parker*. The Supreme Court also found this argument unacceptable. It did, as with the compulsion criterion, state that the possibility of such an exemption is not excluded by the judgment. See *ibid.*, at 596-597. The requirements to such an exemption are that (1) it is necessary to make the regulatory act work, and (2) that it is allowed only to the minimum extent necessary. See *ibid.*, at 597.

electricity utility was therefore held liable for violating the antitrust laws as it was concluded that:

*"...neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exception from the federal antitrust laws for that program."* <sup>458)</sup>

It is important to stress that, like *Goldfarb*, this case concerned the liability of a private company as opposed to the validity of a state measure, as in *Parker*. It is further noteworthy that the Supreme Court held that immunity according to *Parker* is limited to state officials as opposed to private actors.<sup>459)</sup> Therefore, actions of the State itself and actions taken by state officials within their authority are exempt according to *Cantor*.<sup>460)</sup> As *Parker* prior to *Cantor* had been traditionally cited for the proposition that both the State and regulated private parties could invoke immunity from the federal antitrust laws, *Cantor* has been viewed as a great limitation of *Parker*.<sup>461)</sup> It should be added that, in this case, no indications in the direction of a formulation of the *Midcal* criteria are to be found.

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457) See *ibid.*, at 592-596.

458) See *ibid.*, at 598.

459) This holding arrives from statements made in *Parker* decision, such as where it was held: *"...that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act"*, cf. 428 US 579, at 589 and that it *"...limited the Court's holding to official action taken by state officials"*, cf. 428 US 579, at 591.

460) See Phillips, Perry Allan & Raymond, Philip Titus, "The State Action Doctrine and State Antitrust Laws - Thirty-five Years of Struggle", *Mercer Law Review*, Volume 30, 1979, p. 1044.

461) See Posner, Gerald, L., "The State Action Antitrust Exemption: The Confinement of the Parker Doctrine within the Emerging Cantor Formula", *The Hastings Law Journal*, Volume 29, 1977, p. 212.



### 10.2.3. The *Bates* Case

*Bates* was decided one and a half years after *Cantor*.<sup>462)</sup> This time, the validity of a state measure was under scrutiny. The measure involved a rule prohibiting lawyers from advertising, which displaced competition by preventing price cutters from making their prices known to the public. Importantly, in this case, a formulation of the supervision criterion as well as a first attempt to formulate a clear articulation criterion emerged.

The case came on appeal to the Supreme Court. Before then, the two appellants, the attorneys Bates and O'Steen, had been through three instances, which all found that they had violated a rule providing that lawyers were prohibited, pursuant to state regulation, from publicising themselves or others through advertisements or other means of commercial publicity. The two lawyers had specialised in offering legal services at modest cost. This concept included only accepting routine matters such as uncontested divorces and simple personal bankruptcies. The lawyers found it necessary in order for the law office to survive that they advertise the availability of legal services at low cost, specifying the exact fees for certain services. It was such an advertisement in a daily newspaper that initiated the case when the State Bar of Arizona filed a complaint.

To their defence, the appellants claimed that the state regulation, *inter alia*, violated the Sherman Act. The part of the decision concerning the possible violation of the Sherman Act could be said to be divided into three pillars, each relating respectively to *Parker*, *Goldfarb* and *Cantor*. In the sub-part concerning the *Parker* Case, it was stated that, in that case, it was held that the State as sovereign imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.<sup>463)</sup> To the case at hand, *Parker* had the implication of validating the contested rule.<sup>464)</sup> With respect to *Goldfarb*, the Supreme Court held that in this case the situation was the opposite because the challenged restraint here was the affirmative command of the Arizona Supreme Court, which was the ultimate body wielding the State's power over the practice of law, and, thus, the restraint was

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462) See *John R. Bates and Van O'Steen v. State Bar of Arizona*, 433 US 350, 53 L Ed 2d 810, 97 S Ct 2691. [No. 76-316], Argued 18 January 1977, Decided 27 June 1977.

463) See 433 US 350, at 359.

464) See *ibid.*, at 359.

'compelled by direction' of the State acting as a sovereign.<sup>465)</sup> In the third sub-part, that concerning the *Cantor* Case, the Supreme Court stated three reasons (or differences between the cases) why *Cantor* did not result in invalidating the measure.<sup>466)</sup> In conclusion, the regulation was sustained as valid state action.

From *Bates* it can be understood that the immunity granted state measures in *Parker* is still in force, or with the words of *Davidson* and *Butters*: "*Bates confirms the Supreme Court's adherence to Parker and the doctrine of federalism remains as vigorous today as in 1943*".<sup>467)</sup> In particular, the case is of significance as it was the first to apply both of those criteria which were to become the *Midcal* test.<sup>468)</sup>

#### 10.2.4. The *Lafayette* Case

The *Lafayette* Case, decided in 1978, is particular because it was the first one in which the application of the Sherman Act to municipalities, or rather, to municipally owned enterprises, was in question.<sup>469)</sup> The petitioners were two cities situated in Louisiana, in

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465) See *ibid.*, at 359-360.

466) The first reason given was that in *Cantor* the claim was directed against a private party in opposition to the present case, where the real party was the State through the Arizona Supreme Court. See *ibid.*, at 361. Secondly, in contrast to *Cantor*, the State here had an independent regulatory interest in the regulation. See *ibid.*, at 361. The Supreme Court added that the competence to regulate lawyers is vested in the State level. See *ibid.*, at 361-362. Finally, contrary to *Cantor*, the disciplinary rule reflected a clear and affirmative expression of the State's policy and the State's active supervision thereof. See *ibid.*, at 362.

467) See Davidson, Mark L. & Butters, Robert D., "Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action", *Vanderbilt Law Review*, Volume 31, 1978, p. 594-595.

468) In general, the decision does not appear as completely clear. In particular, it is difficult to understand the contrasting outcomes in *Bates* and *Goldfarb*. Many legal commentators agree to this. For instance, *Easterbrook* notes that the "*the distinction between the cases seems entirely artificial, perhaps fortuitous*". See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, p. 48.

469) See *City of Lafayette, Louisiana, and City of Plaquemine, Louisiana v. Louisiana Power & Light Company*, 435 US 389, 55 L ED 2d 364, 98 S Ct 1123, [No. 76-864], Argued 4 October 1977, Decided 29 March 1978. It should be noted, as indicated in *Chapter 1*, that, in principle, issues related to state-owned undertakings, etc., are not

their role as operators of electric utility systems. The respondent was the private utility company, Louisiana Power & Light Company.

The proceedings had started because the cities instituted an action against several competitors, including the respondent, which were all private utility companies. That action concerned a claim of breach of the antitrust laws. The respondent, however, counterclaimed that the cities themselves had committed various antitrust offenses. The background for this counterclaim was that cities under the laws of Louisiana were granted power to own and operate electric utility systems within their city limits as well as beyond. It was therefore lawful for the cities to provide their service to customers in the respondent's area. One of the cities took advantage of this by contracting with the respondent's electric customers to provide them gas and water service only on condition that the customers also purchased electricity from the city rather than from the respondent. With these tying arrangements, the city was strongly distorting competition. The respondent further alleged that the petitioners had conspired with others to litigate against the respondent with the effect of delaying approval and construction of its nuclear electric generating plant. Pursuant to the *Parker* doctrine, the petitioners defended themselves on the ground that as cities and sub-divisions of the State of Louisiana, the antitrust laws were inapplicable to them.

The Supreme Court defined the main issue to be the scrutiny of the cities' argument that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws.<sup>470)</sup> First, the Court summarised the holdings of three precedents, *Parker*, *Goldfarb* and *Bates*. In *Parker*, the chief rule that the sovereign State's anti-competitive measures are lawful was stated.<sup>471)</sup> However, the Supreme Court declared that according to *Goldfarb* the scope of *Parker* is decreased as: "...not every act of a state agency is that of the State as sovereign" <sup>472)</sup>. Finally, the Supreme Court took the *Bates* Case into account, holding the requirements of 1)

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included in the discussion with respect to the European case law analysis, this meant in particular that cases related to Article 90 EC were excluded. However, the instant case contains elements of great relevance to the understanding of the *Parker* doctrine and is consequently considered herein.

470) See 435 US 389, at 408.

471) See *ibid.*, at 409.

472) See *ibid.*, at 410.

compulsion, 2) supervision and 3) clear articulation and affirmative expression as state policy.<sup>473)</sup> Thereupon, the Supreme Court stated that the three cases required the dismissal of the cities' argument. In this context the Supreme Court stated that:

*"Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them."*<sup>474)</sup>

The exemption to this is when the actions of municipalities reflect state policy.<sup>475)</sup> On this basis, the Supreme Court concluded that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its sub-divisions, pursuant to state policy to displace competition with regulation or monopoly public service.<sup>476)</sup>

This decision is similar to many of its most recent precedents as it contained many separate opinions and was very long. The main conclusion to be drawn from the decision is nevertheless clear: state action immunity does not apply to political sub-divisions within States unless their anti-competitive conduct is directed by the State. This holding must be seen as a further curtailment of the application of the doctrine. It is a consequence of the "*sovereign State*" argument, which again is a consequence of the Supreme Court's perception of the principles of federalism.<sup>477)</sup> Therefore, only the State is excluded from the antitrust laws and only the State can exclude sub-levels from these laws.

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473) See *ibid.*, at 410.

474) See 435 US 389, at 412.

475) See *ibid.*, at 413.

476) See *ibid.*, at 413.

477) In practice, *Lafayette* (strengthened by *Boulder*) had the effect, as *Shaw* predicted in his article from 1979, that local governmental activity would be strongly exposed to antitrust attack. See Shaw, Gregory, "Notes - the Application of Antitrust Laws to Municipal Activities", *Columbia Law Review*, Volume 79, 1979, Number 3, p. 518. This prediction indeed was fulfilled and led to the enactment of the Local Antitrust Act in 1984, having as its purpose the restriction of the availability of antitrust treble damages against local governments.

### 10.2.5. The *Exxon* Case

The statute at stake in *Exxon* regulated the distribution and pricing of gasoline among retail stations.<sup>478)</sup> The case was decided just a few months after *Lafayette*. However, although concerning the conformity of a statute with anti-competitive effects with the federal antitrust laws, the state action doctrine was not mentioned with a single word. Consequently, the only mention of the case is the Supreme Court's comment to this issue:<sup>479)</sup>

*"In this sense, there is a conflict between the statute and the central policy of the Sherman Act - our 'charter of economic liberty'...Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."* <sup>480)</sup>

On this basis, the Court concluded that there was no conflict between the Maryland statute and the federal antitrust laws sufficient to require pre-emption.<sup>481)</sup> The

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478) See *Exxon Corporation et al. v. Governor of Maryland et al.* [No. 77-10]; *Shell Oil Company v. Governor of Maryland et al.* [No. 77-11]; *Continental Oil Company, et al. v. Governor of Maryland et al.* [No. 77-12]; *Gulf Oil Corporation v. Governor of Maryland et al.* [No. 77-47]; *Ashland Oil, Inc., et al. v. Governor of Maryland, et al.* [No. 77-64], 437 US 117, 57 L Ed 2d 91, 98 S Ct 2207, Argued 28 February 1978, Decided 14 June 1978.

479) The case came to the Supreme Court on direct appeal by the appellant five oil companies Exxon, Shell, Continental, Gulf and Ashland. It was a Maryland statute from 1974 that was contested. The statute 1) prohibited producers or refiners of petroleum products from operating any retail service station within the State, and 2) ordered that they extend all "voluntary allowances" uniformly to all service stations they supply. See *ibid.*, at 119-120. The implication of the statute was, *inter alia*, that the oil companies after 1975 would have to give up all the service stations that they operated, and that they would have to stop their price policy of favouring their own service stations with reduced prices to those operated by retail service station dealers. The statute therefore had a great impact on the oil companies' distribution and pricing decisions, having the effect of decreasing certain competitive advantages.

480) See *ibid.*, at 133.

481) See *ibid.*, at 130.

decision requires only one comment and that is that it has importance to the analysis because the Supreme Court so clearly rejected that a conflict between a state statute and the central policy of the Sherman Act due to the former's anti-competitive effect may constitute a reason for invalidating the statute. It is noteworthy that the Supreme Court in fact did find that there was a conflict, but that it was not such a conflict as to effect pre-emption.<sup>482)</sup> Significantly, the argument of the Supreme Court was that the competence to engage in economic regulation is vested in States.

#### 10.2.6. The *Orrin Fox* Case

In *Orrin Fox*, which was decided in 1978 by a unanimous Supreme Court with regard to the state action doctrine, the contested measure made it difficult for new distributors to enter the market.<sup>483)</sup> The focus was the validity of this measure rather than the immunity of an involved state agency and supporting private actors. It is characteristic to the case that both the clear articulation criterion and the supervision criterion were applied.

The California Automobile Franchise Act regulated the establishment of retail car dealers. It provided that before an automobile manufacturer could open or relocate such dealership, dealers already established in the area could protest. If a protest were filed, the manufacturer would have to obtain approval from the California New Motor Vehicle Board (hereinafter referred to as the Board). Before the issue of an approval, the merits of the protest would be examined, which included the holding of a hearing, to see if there was good cause for refusing to permit the establishment or relocation. While this examination was taking place, the opening or relocation was postponed. This postponement could appear pointless because in practice approvals were most likely to be granted.<sup>484)</sup> The purpose of the regulation was to protect dealers against the manufacturers who had a much stronger

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482) Also, see Marengo, Giuliano, "Governmental Action and Antitrust in the United States: What Lessons for Community Law?", *Legal issues of European integration*, Volume 14, 1987, Number 1, p. 19.

483) See *New Motor Vehicle Board of the State of California et al. v. Orrin W. Fox Co. et al.* (No. 77-837); *Northern California Motor Car Dealers Association et al. v. Orrin W. Fox Co. et al.* (No. 77-849). 439 US 96, 58 L Ed 2d 361, 99 S Ct 403, [Nos. 77-837 and 77-849]. Argued 3-4 October 1978. Decided 5 December 1978.

484) See 439 US 96, footnote 14.

bargaining power than the dealers. A car manufacturer and two dealers decided to bring an action challenging the constitutionality of the act against, among others, the Board when they experienced that existing dealers had filed protests against the one dealer's establishment of a new dealership and the other dealer's relocation of his. They did not await the Board's examination of the protests' merits.

When the case came to the Supreme Court the question of whether the state act was in conflict with the Sherman Act was, among others; examined. With regard to the Sherman Act, the manufacturer and the two dealers claimed that the act was invalid because it gave effect to privately initiated restraints on trade by delaying the establishment of automobile dealerships whenever competing dealers protested.<sup>485)</sup> The Supreme Court rejected this contention, putting emphasis upon its finding that the act was:

*"...a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships"* <sup>486)</sup>

and that it was:

*"...subject to ongoing regulatory supervision."* <sup>487)</sup>

Moreover, the Supreme Court rejected that *Schwegmann* had relevance to the case,<sup>488)</sup> and finally referred to the *Exxon* Case as ground that the act's anticompetitive effect gave no reason not to enforce it.<sup>489)</sup>

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485) See 439 US 96, at 109.

486) See *ibid.*, at 109.

487) See *ibid.*, at 110.

488) See *ibid.*, at 110.

489) See *ibid.*, at 110-111.

Altogether, the case did not contain any new elements. It was, however, very much based upon formalistic criteria, a development which is further cemented in the following case, *Midcal*.

#### 10.2.7. The *Midcal* Case

The *Midcal* decision was taken by a unanimous Supreme Court in 1980.<sup>490)</sup> In principle, the enforceability of a state measure fixing minimum prices of wine was contested. The measure was, for the first time, found not to be protected under the state action doctrine.

The effect of the contested law was that prices for each brand were fixed within various trading areas.<sup>491)</sup> For wholesalers, the law meant that they were prohibited from selling at prices lower than those set in the schedules or contracts. Wholesalers selling below those prices would face fines, or even license suspension or revocation. However, during the summer of 1978, the wholesaler *Midcal* sold wine at such lower prices. Consequently, the Department of Alcoholic Beverage Control charged *Midcal* with infringement of the law. *Midcal* reacted by alleging that the wine pricing scheme restrained trade in violation of the Sherman Act.

When the case came to the Supreme Court, its decision was initiated by stating that California's system for wine pricing plainly constituted resale price maintenance in violation of the Sherman Act, because price competition was prevented.<sup>492)</sup> Thereupon, the Supreme Court scrutinised whether the program was sheltered under the state action

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490) See *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., et al.*, 445 US 97, 63 L Ed 2d 233, 100 S Ct 937, [No. 79-97], Argued 16 January 1980, Decided 3 March 1980.

491) The California Business and Professions Code provided as follows: "Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall: (a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand. (b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." See *ibid.*, at footnote 1.

492) See *ibid.*, at 103.



doctrine due to the fact that a State was involved in it.<sup>493)</sup> Based upon an analysis of the precedents, *Parker, Goldfarb, Cantor, Bates and Orrin Fox*, two criteria were presented as the standards for antitrust immunity:

*"First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."* <sup>494)</sup>

Only the first of the two criteria was satisfied. Regarding the second criterion, the Supreme Court specified as follows:

*"The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program."* <sup>495)</sup>

Consequently, the state action doctrine gave no shelter to the state law.

The Supreme Court applied the criteria of clear articulation<sup>496)</sup> and supervision to evaluate anti-competitive state measures' possible immunity under the state action doctrine. These criteria must be considered as now strongly established by the judgment. The cases before *Midcal* had not delivered much clarity as to the doctrine. Therefore, *Midcal* was

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493) See *ibid.*, at 103.

494) See *ibid.*, at 105.

495) See *ibid.*, at 105-106.

496) According to Garland, this requirement ensures that antitrust law will not be set aside unless the State does in fact intend to displace competition. In other words, the criterion contains an examination of the State's intention. See Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, p. 501.

designed to bring order by fashioning a simple, two-prong test.<sup>497)</sup> However, the test represents certain problems in itself, especially because the Supreme Court refrained from explaining why it is of significance that the criteria are fulfilled. However, they can be viewed as a conversion of the starting point, the *Parker* requirement, that only the sovereign State's anti-competitive activity gain immunity. Therefore, as Dlouhy puts it, the *Midcal* test can be seen as a device used to distinguish anti-competitive actions in which the State is to some degree involved from the purely private actions of non-governmental actors.<sup>498)</sup> Both criteria are formalistic, *i.e.* they represent an attempt to lay down objective, easily applicable criteria, that typically will be present when a regulation is unacceptable, rather than evaluating the regulation itself. The focus is on the process rather than the content, *i.e.* it is on the mechanics that produce the regulation rather than on the desirability of it.<sup>499)</sup> Therefore, the criteria are not based upon what the State does but rather upon how it does it.<sup>500)</sup> In general, the decision can, especially in relation to *Parker*, be viewed as a limitation of the States' right to economic intervention, as the two criteria are broadening the situations in which state measures are not permitted. This is further supported by a comparison of the two measures, which provide the perception that the differences are not great. The change can be attributed to the loss of faith in the efficacy of regulation.<sup>501)</sup>

All the cases dealt with in this section, decided in the short period between 1975-1980, gave vitality again to the state action doctrine. In general, the cases represent first and foremost a tendency to restrict the scope of the degree to which immunity can be gained,

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497) See Handler, Milton, "Reforming the Antitrust Laws", *Columbia Law Review*, Volume 82, 1982, Number 7, p. 1335.

498) See Dlouhy, Michael, "Judicial Review as *Midcal* Active Supervision: Immunizing Private Parties from Antitrust Liability", *Fordham Law Review*, Volume 57, 1988, p. 412.

499) See Jorde, Thomas, "Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism", *California Law Review*, Volume 75, 1987, Number 1, p. 236.

500) See Werden, Gregory J. & Balmer, Thomas A., "Conflicts Between State Law and the Sherman Act", *University of Pittsburgh Law Review*, Volume 44, 1982, p. 26.

501) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1298.

either by the actors involved or by the measures themselves, from the doctrine compared to the original understanding of *Parker*. At the same time, a severe development took place, from an application of criteria changing from case to case, to an apparently clear and simple two-prong test as seen in *Midcal*. Thereby, the criteria of clear articulation and supervision should be regarded as established. The first steps towards the formulation of the first criterion, that of clear articulation, were taken already in *Bates*. The second of the two *Midcal* criteria, that of supervision, can be traced back to *Goldfarb*. It is justified to hold the *Bates* Case responsible for the first application of both criteria in one judgment. It was, however, not until *Midcal* that they were applied to condemn a state measure. Another interesting development took place as the Supreme Court to a very large degree had to consider the issue of liability of regulated parties. This brought a distinction between the State, cities, and private actors, where the evaluation of eventual liability depended on the identity of the involved party. Within the concept of a State is included a State's supreme court. Finally, it has been seen that the economic effect of a regulated activity is completely without importance. This understanding was strongly emphasised in *Exxon*. Due to the application of formalistic criteria, the most recent decisions appear clearer as compared to that which has been observed in the earlier cases. However, in the next section, the cases dealt with will demonstrate further refinement of the test.

### **10.3. Further Refinement of the *Midcal* Criteria**

In this last section of the chapter, the development of the criteria from *Midcal* to the present day will be examined. More specifically, the following cases are analysed: *Boulder*, *Hoover*, *Hallie*, *Southern Motor Carriers*, *324 Liquor Corp.*, *Patrick* and

*Ticor*.<sup>502)</sup> All of these cases respect the original formulation of the *Midcal* test; however, the test becomes further refined, in particular with regard to liability issues.

### 10.3.1. The Boulder Case

In the *Boulder Case*, decided in 1982, the application of the Sherman Act to a city ordinance was at issue.<sup>503)</sup> The involved parties were the Community Communications, Inc., a company conducting cable television business within the City of Boulder's limits, and that city. The city was located in the State of Colorado and had the status of being a "home rule" municipality, implying that it was granted extensive powers of self-government.

The measure at stake was an emergency ordinance enacted by Boulder in 1979. According to this ordinance, the company was prohibited from expanding its business into other areas of the city for a period of three months. The background of the enactment was that the company in 1966 had been assigned a permit to provide cable television service in the city, valid for twenty years. Due to the lower level of technology at that time, the company only covered an area of twenty per cent of the city's population. However, in 1979, the company informed the City Council that it was now able to, and desired to, expand the covered area. The city found it necessary to reconsider its entire cable television policy.

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502) Two cases, *Rice* and *Fisher*, are excluded from the analysis because they did not directly consider whether the measures in question were saved from invalidation under the state action doctrine; see *Baxter Rice, Director, Department of Alcohol Beverage Control of California v. Norman Williams Company et al.* [No. 80-1012]; *Bohemian Distributing Company v. Norman Williams Company et al.* [No. 80-1030]; *Wine & Spirits Wholesalers of California v. Norman Williams Company et al.* [No. 80-1052], 458 US 654, 73 L Ed 2d 1042, 102 S Ct 3294, [Nos. 80-1012, 80-1030, and 80-1052], Argued 21 April 1982, Decided 1 July 1982, and *Alexandra Fisher, et al., v. City of Berkeley, California, et al.*, 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045, [No. 84-1538], Argued 12 November 1985, Decided 26 February 1986. Instead, the cases were solved within the framework of a distinction between *per se* and rule of reason violations of the Sherman Act. Furthermore, it should be noted that the *Omni* Case from 1991 also peripherally touched upon the state action doctrine. However, as this case primarily is concerned with the antitrust petitioning immunity doctrine, it seems preferable to present it in the next chapter.

503) See *Community Communications Company, Inc., v. City of Boulder, Colorado, et al.*, 455 US 40, 70 L Ed 2d 810, 102 S Ct 1155, [No. 80-1350], Argued 13 October 1981, Decided 13 January 1982.

especially whether other competitors should be permitted to provide competing cable television service in Boulder. To provide itself with the needed time, and to prevent the company's continued expansion from discouraging potential competitors from entering the market, the ordinance was enacted.

The company reacted by filing a suit in the District Court, complaining that the ordinance violated the Sherman Act. Eventually the case came to the Supreme Court. The plurality opinion here was initiated by defining the main question of the case as to whether a "home rule" municipality was exempt from Sherman Act liability according to the state action doctrine.<sup>504)</sup> After a summary of the precedents, primarily *Parker* and *Lafayette*, the Supreme Court defined a two-prong test in order to determine whether the ordinance could be exempted. It was necessary that the ordinance:

*"...constitutes the action of the State of Colorado itself in its sovereign capacity,...., or...it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."* <sup>505)</sup>

Both prongs of the test were answered in the negative. With regard to the first prong, *i.e.* whether the action constituted an action of the State, the Supreme Court could not place sovereign cities on an equal footing with sovereign States.<sup>506)</sup> Concerning the second prong, *i.e.* whether the ordinance constituted a clearly articulated and affirmatively expressed state policy, the Supreme Court stated that this requirement is not satisfied when the State's position is one of mere neutrality with respect to the contested municipal actions.<sup>507)</sup> The Supreme Court explained that a State that allows its municipalities to do as they please can not be said to have contemplated the action in question and the action can not be said to have

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504) See *ibid.*, at 43.

505) See *ibid.*, at 52.

506) In this context, the Supreme Court declared as follows: "*The Parker state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a 'dual system of government, '...which has no place for sovereign cities.'*" See *ibid.*, at 53.

507) See *ibid.*, at 55.

been executed according to granted powers.<sup>508)</sup> Applying these guidelines to the case, the Supreme Court found that the State of Colorado had executed such neutral policy, having the effect that one city in the State could choose to prescribe monopoly service, another free-market competition, *etc.*, within the field of television services.<sup>509)</sup> In conclusion, the ordinance was held contrary to the Sherman Act and not exempt under the state action doctrine.

As a comment to this case, it is important first to categorise the decision as one among those related to municipalities.<sup>510)</sup> It is to this category that the two-prong test applies. Then it should be noted that the two prongs in the decision are made equal, as one rightly could claim that the second is subordinate to the first, *i.e.* has as its purpose to help define the situations in which actions are those of the sovereign State. Thirdly, it is further noteworthy that the second prong of the *Midcal* test, that of supervision, is not included.<sup>511)</sup> This either means that it is not applicable to "city-cases" or that it is applicable only upon finding that the ordinance constitutes a clearly articulated and affirmatively expressed state policy. Fourthly, it is interesting that the Supreme Court nowhere states why the ordinance is anti-competitive and contrary to the Sherman Act. This is simply implicit. However, to a certain degree one could claim the opposite, namely that it had as its purpose to increase the level of competition by inviting more competitors to the area, and thereby removing the monopoly status the petitioner had enjoyed.<sup>512)</sup> In other words, it was only the monopolist's possibility of taking further advantage of his situation which was harmed by the ordinance. Finally, the consequence of not including cities as part of the sovereign State implies a state of centralisation as the city in the future, in order to escape liability under the

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508) See *ibid.*, at 55.

509) See *ibid.*, at 55-56.

510) The instant case is different compared to *Lafayette* as that case concerned municipally owned enterprises under state law and not city law.

511) According to footnote 14 of the decision, the Supreme Court itself recognised that it was not necessary to decide whether the criterion should be applied.

512) Also see Wiley, John Shepard, "A Capture Theory of Antitrust Federalism"; *Harvard Law Review*, Volume 99, 1986, Number 4, p. 754. Wiley actually believes that the outcome of the case could have been the opposite, if the Supreme Court would have based its decision on efficiency criteria.

Sherman Act, will have to make sure that very specific laws are enacted by the State. If not, the alternative is that litigation and liability costs increase. On the other hand, the advantage of the Supreme Court's solution is, as put forward by Perry, that, as economic choices made by governments might harm consumers, the risk of this harm is decreased by only entrusting this possibility to States.<sup>513)</sup>

### 10.3.2. The *Hoover* Case

The next case, *Hoover*, concerned the enforcement of entry restraints.<sup>514)</sup> At stake was not a state measure as such, but rather the conduct of a committee appointed by, and pursuant to, the Rules of the Arizona Supreme Court.

According to the Constitution of Arizona, the State's Supreme Court was granted competence to determine who should be admitted to practice law in the State. In practice, a committee was therefore established in order to examine and recommend applicants. However, the Supreme Court of Arizona reserved to itself the final decision to grant or deny admission to the practice of law. Respondent Ronwin tried in 1974 to pass this bar examination, but failed. In 1978, he succeeded at filing an action against the members of the committee, complaining, *inter alia*, that they had conspired to restrain trade in violation of the Sherman Act. In this regard, Ronwin argued that the committee artificially had reduced the numbers of new attorneys through the setting of the grading scale on the examination with reference to the number of attorneys it found desirable rather than with reference to a suitable level of competence. Eventually, the case came to the Supreme Court.

The Supreme Court started its judgment by summarising the precedents. Grounded primarily on *Parker*,<sup>515)</sup> it stated that the chief rule applicable is the test of whether the conduct at issue is in fact that of a state legislature or supreme court. In that

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513) See Perry, Mark A., "Municipal Supervision and State Action Antitrust Immunity", *The University of Chicago Law Review*, Volume 57, 1990, Number 4, p. 1421.

514) See *Charles R. Hoover et al. v. Edward Ronwin*, 466 US 558, 80 L Ed 2d 590, 104 S Ct 1989, [No. 82-1474]. Argued 16 January 1984, Decided 14 May 1984.

515) In addition, the Supreme Court referred to *Bates*, *Goldfarb*, *Boulder*, *Midcal*, *Orrin Fox* and *Lafayette*.

situation, it is not necessary to address the issues of clear articulation and active supervision.<sup>516)</sup> The subsequent examination of whether the challenged conduct was that of the State's Supreme Court, based primarily on *Bates*, resulted in a conclusion in the affirmative.<sup>517)</sup> Consequently, the conduct was exempt from Sherman Act liability under the state action doctrine.<sup>518)</sup>

From the decision, it is understood that the *Midcal* test is only applicable when it is not possible to declare a contested conduct that of the State or of its Supreme Court. Thus, the *Midcal* criteria are not applied as such to demonstrate immediate state action, but only in the next phase, *i.e.* when it is not immediately possible to indicate the existence of state action. The consequence is that the scope of the *Midcal* test is relaxed, thereby providing further chances for States to obtain immunity.<sup>519) 520)</sup>

### 10.3.3. The *Hallie* Case

The *Hallie* Case from 1985 concerned the anti-competitive activities of a municipality.<sup>521)</sup> It is characterised as being very systematic and by bringing further clarity

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516) See 466 US 558, at 569.

517) However, the Supreme Court stated that although the Arizona Supreme Court "...necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenge[d] was in reality that of the Arizona Supreme Court." See *ibid.*, at 573.

518) See *ibid.*, at 573.

519) Marengo goes as far as to maintain that the case marks at least a partial return to *Parker*. See Marengo, Giuliano, "Government Action and Antitrust in the United States: What Lessons for Community Law?", *Legal issues of European integration*, Volume 14, 1987, Number 1, p. 43.

520) One of the other cases concerning States' regulation of lawyers, *Goldfarb*, was mentioned but not truly taken into account. Rather, in footnote 20 the Supreme Court rejected that the facts of *Goldfarb* and *Hoover* were analogous with regard to whether the performed functions were required. See 466 US 558, at 570. In this context, it is noteworthy that the Supreme Court again addressed the question of compulsion, however, only in a footnote. This criterion has not truly been applied since *Bates*.

521) See *Town of Hallie, et al. v. City of Eau Claire, et al.*, 471 US 34, 85 L Ed 2d 24, 105 S Ct 1713, [No. 82-1832], Argued 26 November 1984, Decided 27 March 1985.



to the application to municipalities of the criteria of clear articulation, supervision and compulsion.

The case was brought to the Supreme Court on *certiorari*. The respondent was a city in Wisconsin. The petitioners were a group of towns, located adjacent to the city in unincorporated areas. The city had build a sewage treatment facility. Although the facility was the only one in the market available to the towns, the city refused to provide its services to the towns. It did, however, supply the services to areas which were willing to be annexed to the city and to accept the city's sewage collection and transportation services. Due to the various tying arrangements of the city, the towns, as potential competitors of the city, were hindered from competing freely with the city. However, according to the statutes of the State of Wisconsin, cities were in fact granted authority to construct sewage systems. Furthermore, they were authorised to fix the limits of such service in unincorporated areas and were not obliged to serve beyond the area so delineated. Notwithstanding this legal basis, the towns filed suit against the city in the District Court. They contended, *inter alia*, that the city was violating the Sherman Act by acquiring a monopoly over the supply of sewage treatment services, and by tying the supply of such services to the provision of sewage collection and transportation services. They also alleged that the city's actions constituted an unlawful refusal to deal with the towns.

The starting point of the ruling of a unanimous Supreme Court was a short summary of the precedents. Based on these, the chief rule was formulated as follows:

"...before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." <sup>522)</sup>

The Supreme Court found that this test was satisfied as the Wisconsin statutes indeed evidenced a clearly articulated and affirmatively expressed state policy to displace competition with regulation.<sup>523)</sup> In this context, the Supreme Court detailed various guidelines of relevance to the application of the test. Important to mention is that it is not

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522) See *ibid.*, at 40.

523) See *ibid.*, at 44.

necessary for a state legislature to state explicitly that it expects a municipality to engage in conduct that would have anti-competitive effects.<sup>524)</sup> In other words, legislation is not required to contain an explicit formulation of the State's intention to distort competition. Thereupon, the Supreme Court examined whether municipalities, in order to obtain immunity, had to demonstrate that they were compelled to act.<sup>525)</sup> Such requirement was found only to govern in the case of private parties' liability. Consequently, the city of the instant case did not have to show that it had been compelled to act. As the final point, the Supreme Court took into consideration the possible requirement of supervision.<sup>526)</sup> Again, this criterion was found only to be imposed on examinations of private parties' liability.<sup>527)</sup> In conclusion, the anti-competitive activities of the city were found to be exempt from the Sherman Act.

The case provides guidance with regard to municipalities' anti-competitive activities. In principle, these only have to satisfy the requirement of clear articulation.<sup>528)</sup> The criteria of compulsion and supervision, in contrast, are not applicable to municipalities, but only to cases where private parties are involved. This means that the state action doctrine distinguishes between three parties: 1) the State; 2) the municipality; and 3) the private party. Between the State and the municipality there exists the difference that the former, as sovereign, always is granted immunity, whereas the latter has to demonstrate that its anti-competitive conduct is pursuant to state policy. Between the municipality and the private party, the difference lies in the requirements as stated above. As explained by Perry, this

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524) See *ibid.*, at 42.

525) See *ibid.*, at Part III.C.

526) See *ibid.*, at Part IV.

527) See 471 US 34, footnote 10.

528) The clear articulation requirement is relaxed, especially when compared to *Boulder*. In *Boulder*, the ordinance of a "home rule" municipality which had been granted a large degree of self governance from the State was found not to be in accordance with a clearly articulated state policy. The City of Boulder, as pointed out by Garland, had not acted *ultra vires*, but plainly had the authority to regulate. See Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, pp. 496-497. But, because this authority was too general, the City of Boulder was given no immunity. *Hallie* therefore seems close to overruling *Boulder* since the distinction between general and sector-specific grants of authority is without logical significance. See *ibid.*

implies that municipalities are not as free as States, but more free than private parties, to implement an independent regulatory regime, as they are constrained by the principles of competition and federalism.<sup>529)</sup> Consequently, a municipality's regulation either has to be independently congruent with antitrust policy or to be pursuant to state authorisation under the requirements of the state action doctrine.<sup>530)</sup> The decision represents a retreat from previous cases in the direction of allowing a relatively general state authorisation to immunise a wide and unspecified range of anti-competitive conduct.<sup>531)</sup> The following case to be presented, *Southern Motor Carriers*, which was decided on the very same day as *Hallie*, completely confirms this tendency.

#### 10.3.4. The *Southern Motor Carriers* Case

The *Southern Motor Carriers* Case from 1985 concerned the liability of private parties who, pursuant to state legislation, were involved in price fixing (which had a much more efficient effect than that of a cartel).<sup>532)</sup> The decision is of particular importance to the role of the *Midcal* test and of the compulsion criterion when private parties are involved.

In each of the four states, Georgia, Mississippi, North Carolina and Tennessee, the rates of motor common carriers for the intrastate transportation of general commodities were set by Public Service Commissions. The motor common carriers were required to submit proposed rates to the Commission situated in the State in which he operated for approval or rejection. The motor common carriers were, however, authorised, but not compelled, to submit joint rate proposals to the Commissions. In practice, the motor common carriers preferred such collective ratemaking, and organised it through rate bureaus. Disapproving members were, though, not bound by the joint proposal and were always free

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529) See Perry, Mark A., "Municipal Supervision and State Action Antitrust Immunity", *The University of Chicago Law Review*, Volume 57, 1990, Number 4, p. 1422. Also see 471 US 47.

530) See *ibid.*

531) See Wiley, John, "A Capture Theory of Antitrust Federalism", *Harvard Law Review*, Volume 99, 1986, Number 4, p. 737.

532) See *Southern Motor Carriers Rate Conference, Inc., et al., v. United States*, 471 US 48, 85 L Ed 2d 36, 105 S Ct 1721, [No. 82-1922], Argued 26 November 1984, Decided 27 March 1985.

to submit independent rate proposals. In 1976, the United States filed an action against two such rate bureaus, Southern Motor Carriers Rate Conference, Inc., and North Carolina Motor Carriers Association, Inc. (hereinafter referred to as the petitioners) in the District Court. These petitioners were private associations, and their members were motor common carriers operating in all four of the above-mentioned southeastern States. The legislation in three of these States, Georgia, North Carolina and Tennessee, was similar in that it explicitly permitted collective ratemaking. In Mississippi, however, the relevant statute did not specifically address collective ratemaking.

The United States contended that the petitioners had violated the Sherman Act, and sought to enjoin the alleged anti-competitive conduct. In its decision, the Supreme Court defined the core issue to be whether the petitioners' collective ratemaking activities, though not compelled by the States, were entitled to Sherman Act immunity under the state action doctrine.<sup>533)</sup> Thereupon, it summarised the two main cases of the state action doctrine, *Parker* and *Midcal*, in order to state that the doctrine applies to private parties.<sup>534)</sup> With regard to the general guidelines to the application of the doctrine, the Supreme Court further ruled that although a state policy does not compel anti-competitive conduct, this does not exclude it from satisfying the first prong of the *Midcal* test, that of being clearly articulated.<sup>535)</sup> Finally, it stated that compulsion is not a prerequisite to a finding of state action immunity,<sup>536)</sup> but that it, however, is the best evidence that the State had articulated its policy clearly.<sup>537)</sup>

Thereupon, the Supreme Court went on to apply these general principles to the specific facts of the case. Firstly, it found that the supervision criterion of the *Midcal* test should be considered as satisfied as this was not contested by any of the parties.<sup>538)</sup> As

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533) See *ibid.*, at 50.

534) See *ibid.*, at 56-57. Also see 471 US 48, at 58, where the applicability of the *Midcal* test to private parties is explained: "*The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant.*"

535) See *ibid.*, at 59-60.

536) See *ibid.*, at 60-61.

537) See *ibid.*, at 62.

538) See *ibid.*, at 62.

both criteria of the test are required to be satisfied, the Supreme Court then examined whether the state policy could be considered as clearly articulated. Here, it was necessary to distinguish between the statutes in Georgia, North Carolina, and Tennessee on the one hand, and Mississippi on the other hand. The statutes of the former three states explicitly permitted collective ratemaking by common motor carriers and they were therefore at once characterized as being an express and clearly articulated state policy.<sup>539)</sup> In contrast, the statutes of Mississippi had a more general form as they only provided that the Public Service Commission prescribes just and reasonable rates for the intrastate transportation of general commodities.<sup>540)</sup> However, the details of the rate-setting process were completely left to the Commission's discretion.<sup>541)</sup> Nevertheless, the Supreme Court held that:

*"A private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct...As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the Midcal test is satisfied."* <sup>542)</sup>

Consequently, also the statutes of Mississippi were found to satisfy the *Midcal* test.<sup>543)</sup> In conclusion, the petitioners' conduct, although not compelled by the States, was held to be immune from Sherman Act liability.<sup>544)</sup>

From the judgment, two significant developments further to the precedents should be noticed: 1) private parties can obtain immunity although their anti-competitive conduct is not compelled pursuant to state legislation, and 2) the first prong of the *Midcal* test, that of clear articulation, only requires that the State has expressed an intent to distort competition;

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539) See *ibid.*, at 63.

540) See *ibid.*, at 63-64.

541) See *ibid.*, at 64.

542) See *ibid.*, at 64.

543) See *ibid.*, at 64-65.

544) See *ibid.*, at 65-66.

in other words, it is not required that the State has described the implementation of its policy in detail. It is clear that the decision represents a return, although not complete, to *Parker*. This means that immunity is more likely to be obtained.

With regard to the compulsion criterion, this originates from *Goldfarb*; a decision which the Supreme Court indeed departed from in *Southern Motor Carriers*. This was also pointed out in the dissenting opinion, where the main argument actually was that only when anti-competitive conduct is compelled is immunity available to private parties.<sup>545)</sup> It should be stressed that now, and in opposition to *Goldfarb*, the criterion is inferior to, or one could say an indicator of, the clear articulation criterion.

As far as the clear articulation criterion is concerned, this has definitely been softened compared to the precedents. It is, for instance, noteworthy that, from a common sense point of view, the statutes of Mississippi were in no regard clear or express. Or, to use the words of Elhauge, it has become increasingly evident that nothing has to be very clear or affirmative about state authorisation in order to immunise regulation.<sup>546)</sup>

The Supreme Court stated that when private parties' immunity is scrutinised, both prongs of the *Midcal* test need to be satisfied. It is important to note that this is in opposition to the situation of municipalities' immunity where, according to the *Hallie* Case, the supervision criterion does not have to be satisfied. This difference is justified, as stated by the Supreme Court in *Hallie*, when presuming that municipalities act in the public interest and need no supervision, whereas private parties tend to act in their own interest and, consequently, do need to be supervised.<sup>547)</sup>

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545) See 471 US 48, at 67.

546) See Elhauge, Einer Richard, "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 691.

547) See *Hallie*, 471 US 34, at 45. Also see Babrow, Jared B., "Notes - Antitrust Immunity for State Agencies: A Proposed Standard", *Columbia Law Review*, Volume 85, 1985, Number 5, p. 1489.

### 10.3.5. The 324 Liquor Corp. Case

The 324 Liquor Corp. Case from 1987 concerned a resale maintenance system established pursuant to state legislation.<sup>548)</sup> The contested state measure was the New York Alcoholic Beverage Control Law which provided that wholesalers of liquor file monthly schedules with the State Liquor Authority indicating bottle and case prices charged to retailers. Retailers of liquor were then not permitted to sell below the reported price plus twelve per cent, in effect at the time the retailer was selling the item. Retailers were subject to penalties for failure to adhere to these requirements. Investigators from the State Liquor Authority detected that the appellant, the retailer 324 Liquor Corporation, was selling liquor for less than the required price. Accordingly, the appellant's licence was suspended for ten days. However, the appellant sought relief from the penalties on the ground that the measure violated the Sherman Act.

The case came to the Supreme Court. In the decision, the validity of, *inter alia*, the resale maintenance system was scrutinised under the state action doctrine. In a two-step analysis, the Supreme Court firstly examined the question of whether the measure was inconsistent with the antitrust laws. This was answered in the affirmative, as resale price maintenance generally always had been (and still is) viewed as a *per se* violation of the Sherman Act.<sup>549)</sup> Furthermore, the antitrust violation in the instant case was regarded as essentially similar to the violation in *Midcal*.<sup>550)</sup> With regard to the second step, the evaluation of whether the measure would be valid, in any case, under the state action doctrine, the Supreme Court based its holding upon the *Midcal* test:

*"New York's liquor-pricing system meets the first requirement. The state legislature clearly has adopted a policy of resale price maintenance. Just as clearly, however, New York's liquor pricing system is not actively supervised by the State. As in Midcal, the State 'simply authorizes price setting and enforces*

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548) See *324 Liquor Corp., Dba Yorkshire Wine & Spirits v. Thomas Duffy, et al.*, 479 US 335, 93 L Ed 2d 667, 107 S Ct 720, [No 84-2022], Argued 3 November 1986, Decided 13 January 1987.

549) See 479 US 335, at 341.

550) See *ibid.*, at 342.

*the prices established by private parties...New York 'neither establishes prices nor reviews the reasonableness of the price schedules'. "* 551)

The Supreme Court therefore concluded that only the first criterion of the *Midcal* test, and not that of supervision, was satisfied, and that, accordingly, the measure was not considered as immune under the state action doctrine.

This judgment deserves only a few remarks. Firstly, compared to *Hoover*, the case might represent a deviation. The reason is that in *Hoover* it was held that state legislation does not have to satisfy the *Midcal* test as long as it clearly represented the restraint of the sovereign State. In other words, had *Hoover* been applied, the measure probably would have been valid, at least when assuming that the restraint was that of the State and not, for instance, a state agency (the State Liquor Authority). This assumption appears as supported by the wording of the Supreme Court which speaks of "the system" and "New York" rather than of a state agency. In general, the case reflects an awakened and increasing federal suspicion of regulation.<sup>552)</sup>

#### 10.3.6. The *Patrick* Case

In the *Patrick* Case from 1988, the liability of private parties was again at stake.<sup>553)</sup> This time, the supervision criterion of the *Midcal* test was of central interest. The measure which the private actors' anti-competitive conduct was connected to was hospital peer-review process regulations.

In the city of Astoria, situated in Oregon, there was a hospital as well as a private group-medical practice. Physicians employed at the hospital were often also either employees or partners at the clinic. In 1972, the petitioner Patrick, who was a general and vascular surgeon, became employed at the hospital. When Patrick, a year later, was invited to become a partner of the clinic, he declined the offer and instead established his own practice. As he

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551) See *ibid.*, at 344-345.

552) See Wiley Jr., John Shepard, "Revision and Apology in Antitrust Federalism", *The Yale Law Journal*, Volume 96, 1987, Number 6, p. 1282.

553) See Timothy A. Patrick v. William M. Burget, *et al.*, 486 US 94, 100 L Ed 2d 83, 108 S Ct 1658, [No. 86-1145], Argued 22 February 1988, Decided 16 May 1988.



was now a competitor to his colleagues at the hospital, *i.e.* the partners at the clinic, various kinds of trouble started. Patrick experienced that the physicians associated with the clinic refused to have professional dealings with him and that a complaint criticising his patient care at his clinic was given to the executive committee of the hospital's medical staff and referred from there on to the State Board of Medical Examiners. This pursuit culminated in a review by the executive committee of Patrick's hospital privileges which recommended a termination of such privileges as his patient care was found to be below hospital standards.<sup>554)</sup> Patrick demanded a hearing, and a five-member committee was established pursuant to the hospital's by-laws. However, before this committee rendered its decision, Patrick decided to resign from the hospital. In addition, Patrick filed suit against various partners from the clinic in the District Court. He alleged that the partners had violated the Sherman Act, because they had initiated and participated in the hospital peer-review proceedings, in an attempt to reduce competition.

The question to be examined in the case was defined by a unanimous Supreme Court as whether the state action doctrine protected the clinic partners from federal antitrust liability for their activities on hospital peer-review committees.<sup>555)</sup> After summarising the general principles applicable relating to the state action doctrine, especially the principle that in instances where private parties are involved both criteria of the *Midcal* test have to be satisfied, the Supreme Court went on to apply the *Midcal* test to the case.<sup>556)</sup> With regard to the first criterion of the test, that of clear articulation, the Supreme Court held, without any inquiry, that it was not necessary to consider this further because it was going to hold that the second criterion was not satisfied.<sup>557)</sup> The scrutiny of the second criterion, that of supervision, was long and thorough. It was divided into three sub-analyses, namely

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554) It should be added that the legislation regulating hospital peer-review proceedings in Oregon is not described thoroughly in the decision. It is, though, understood that hospitals in the State were under a statutory obligation to establish peer-review proceedings and to review those proceedings on a regular basis, and that the State Health Division could initiate judicial proceedings against any hospital violating this law. See *ibid.*, at 102. However, it must be presumed that details of the proceedings were to be found in the hospitals' by-laws.

555) See *ibid.*, at 95.

556) See *ibid.*, at 99-100.

557) See *ibid.*, at 100.

whether the State of Oregon had actively supervised the peer-review proceedings through 1) the State Health Division; 2) the State Board of Medical Examination; or 3) the judicial system.<sup>558)</sup> On the basis of these analyses, the Supreme Court concluded that the clinic partners were not protected under the state action doctrine from federal antitrust liability for their activities on hospital peer-review committees, because the criterion of supervision was not satisfied<sup>559)</sup>.

The case is particularly of interest because it raises the issue of whether judicial review constitutes sufficient review. However, this is not, as the Supreme Court itself points out, generally answered in the decision. The implication of judicial review as sufficient supervision is, in general, that the supervision criterion itself could become superfluous as most activities and measures are within the jurisdiction of courts.<sup>560)</sup> It should be added

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558) The requirement of active supervision was not considered as satisfied by the activities of the State Health Division, primarily because it did not have competence to review private peer-review decisions and overturn a decision that failed to accord with state policy. See *ibid.*, at 102-103. Neither could the State Board of Medical Examination be considered as engaged in active supervision. This was grounded on the Supreme Court's finding, *inter alia*, that the Board did not have the competence to disapprove private privilege decisions. See *ibid.*, at 103. Finally, with regard to judicial review, the Supreme Court ruled that if such review existed at all, it fell far short of satisfying the active supervision requirement. See *ibid.*, at 104. This was reasoned by the fact, *inter alia*, that the Oregon law afforded no direct judicial review of private peer-review decisions and by the indication of Oregon courts themselves that if they were to provide judicial review it would be of a very limited nature. See *ibid.*, at 104. Therefore, it was not necessary to decide the broad, and very interesting, question as to whether the judicial review of private conduct could ever constitute active supervision. See *ibid.*, at 104.

559) More specifically, the concluding words were the following: "*Because we conclude that no State actor in Oregon actively supervises hospital peer-review decisions, we hold that the state-action doctrine does not protect the peer-review activities challenged in this case from application of the federal antitrust laws. In so holding, we are not unmindful of the policy argument that respondents and their amici have advanced for reaching the opposite conclusion. They contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own. The State of Oregon has not done so.*" See *ibid.*, at 105-106.

560) Concerning a general examination of whether judicial review by courts should satisfy the active supervision requirement, see the article of Dlouhy, Michael, "Judicial Review as

that it is difficult not to sympathise with the petitioner Patrick and the outcome of the case, and it is justified to claim that had the State been more actively supervising the peer-review proceedings, the pursuit of Patrick would probably not have gone that far. However, it is relevant to consider whether it is an attractive solution to the problem that the antitrust provisions are applied to such matters. In this regard, certain comments of Page are of interest.<sup>561)</sup> Page indicates that until *Patrick*, it appeared that the main practical effect of the active supervision requirement was to invalidate resale price maintenance systems. Now, however, Page warns, the requirement has a far more negative effect in its use against the existence of bureaucratic regulatory structures as a criterion of legitimacy in regulation. The consequence of the decision is, in other words, that all peer-review decisions are subject to review in courts as potential antitrust violations, introducing an intolerable degree of uncertainty into the regulatory process.<sup>562)</sup>

#### 10.3.7. The *Ticor* Case

The alleged anti-competitive activities in the *Ticor* Case from 1992 consisted in a price fixing arrangement, authorised pursuant to state measures, performed by title insurance companies within the field of title searches and title examinations.<sup>563)</sup>

The petitioner in this case was the Federal Trade Commission, which had issued a complaint in 1985 in which it alleged that the petitioners, *i.e.* several large title insurance companies, had violated Article 5(a)(1) of the Federal Trade Commission Act which prohibits unfair methods of competition in or affecting commerce. FTC's complaint concerned the petitioners' practice of setting uniform rates for title search and examination, but did not

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*Midcal* Active Supervision: Immunizing Private Parties From Antitrust Liability", *Fordham Law Review*, Volume 57, 1988, pp. 403-423. Also see Elhauge, Einer Richard, "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, pp. 716-717.

561) See Page, William H., "State Action and 'Active Supervision': An Antitrust Anomaly", *The Antitrust Bulletin*, Volume 35, 1990, Number 3, pp. 769-770.

562) See *ibid.*, at 763.

563) See *Federal Trade Commission v. Ticor Title Insurance Company, et al.*, 504 US 621, 119 L Ed 2d 410, 112 S Ct 2169, [No. 91-72], Argued 13 January 1992, Decided 12 June 1992.

concern the title insurance itself. In the U.S., these services were performed in connection with insuring the record title of real property against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it referred. The title searches were conducted to produce a list of the public documents in the chain of title to the real property, whereas the examinations constituted an interpretation of the search results. In other words, these searches and examinations were produced to inform the insured and to reduce the title insurance companies' own liability by identifying the risks. In most States, uniform rates for these services were established through rating bureaus. These were private entities organised by title insurance companies themselves. In the four States with which this decision is concerned, namely Arizona, Connecticut, Montana and Wisconsin, the rating bureaus were licensed by the State and authorised to establish joint rates for their members. The rating bureaus filed the rates with the State, whereafter the rates automatically became effective unless the State rejected them within a specific period. This system may be referred to as a negative option system.

In all stages of the proceedings, only the issue of the *Midcal's* active supervision criterion was central.<sup>564)</sup> The case was brought to the Supreme Court on *certiorari*.<sup>565)</sup> Part II of the Supreme Court's decision concerned the rationale of the doctrine. It is explained that the state action doctrine is defined, according to *Parker*, as holding that central antitrust laws are subject to supersession by state regulations. The doctrine should, at the same time, be balanced with the principles of the free market. However, immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of *e.g.* price restraints. In other words, the purpose is not to determine whether a State has met some

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564) The issue of the other *Midcal* criterion, that of clear articulation, was not at issue in the various proceedings. The complaint was firstly reviewed by an administrative law judge, who held that the supervision criterion was not met in two of the States, namely Connecticut and Wisconsin. The Federal Trade Commission, however, held that in none of the four States was this criterion satisfied. Finally, the United States Court of Appeals for the Third Circuit reversed the decision as it held that the requirement was met in all four States and that the respondents' conduct was entitled to state action immunity in each of them.

565) The Supreme Court had granted *certiorari* to consider two questions, namely whether the Court of Appeals was correct in its statement of the law and its application of law to fact, and whether the Court of Appeals exceeded its authority by departing from the factual findings entered by the administrative law judge and adopted by the Federal Trade Commission. This meant in practical terms that the issue of the application of the supervision criterion became limited to only two States, namely Wisconsin and Montana.

normative efficiency standard to see how well state regulation works, but only to see whether an anti-competitive measure is the State's own. Yet, the Supreme Court rejected that immunity should easily be obtainable, because States must accept political responsibility for actions they intend to undertake. Therefore, if States choose to displace the free market with regulation, the *Midcal* criteria serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control. In this regard, the Supreme Court stated that both criteria are directed at ensuring that particular anti-competitive mechanisms operate because of a deliberate and intended state policy. However, the clear articulation criterion is not sufficient to ensure this object, because it easily could become a rather meaningless formal constraint. Accordingly, it has to be supplemented with the supervision criterion.

Part III of the decision concerned the Supreme Court's interpretation and application of the supervision criterion. Here, the Court strongly departed from the formal application of the supervision criterion which the Court of Appeals had relied upon.<sup>566)</sup> Instead, the Supreme Court preferred not to establish the requisite level of active supervision. In particular, and of relevance to the case at hand, the Supreme Court held that the mere potential for supervision is not an adequate substitute for a decision by the State. It has to be demonstrated that the potential for state supervision had also been realised in fact. That, the Supreme Court held, was not proved to be the case. Rather, the case involved horizontal price fixing under a vague imprimatur in form and agency inaction in fact. With this background, the Supreme Court determined that the supervision criterion was not fulfilled as no supervision had taken place. Accordingly, the activities of the insurance companies were held not to be immune from antitrust liability.

This decision is most of all characterised by the Court's desire not to apply the supervision criterion in a formal manner. The case therefore signals a departure from a formalism previously dominating the doctrine. In this regard the Court thereby has stopped further criticism. However, the new pragmatism gives rise to other problems. As Justice Scalia in his concurring opinion pointed out, the judgment is likely to be a fertile source of

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566) The Court of Appeals had formulated the more specific requirements of the supervision criterion by the following wording: "*Where...the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established*", see the *Ticor Case*.

uncertainty and hence invite unnecessary litigation, and will produce a total abandonment of some state measures because private actors will not take the chance of participating in them.<sup>567)</sup> Also, that the Court did not in explicit terms state exactly how active a State's regulators must be in order to satisfy the criterion is criticised by Chief Justice Rehnquist in his dissenting opinion.<sup>568)</sup> However, this is exactly one of the differences between a formal criterion and one taking into account the actual circumstances of the situation at hand. To companies, the more pragmatic application of the supervision criterion implies that they might experience that they are liable under the antitrust laws although it was out of their reach to control that a State's supervision be sufficiently active.<sup>569)</sup> It should be understood that the negative option system is a very practical way for States to administer their laws. This ensures less administrative costs. In this light it is not completely correct of the Supreme Court to claim that its decision increases States' regulatory flexibility.<sup>570)</sup> Finally, it is of impact to the doctrine that it was decided that the state action doctrine is applicable also to cases arising under the Federal Commission Act, which seems natural as this is also a central competition law.

Based upon the foregoing analysis of the decisions dealt with in this section, it would appear that the *Midcal* criteria have been retained.<sup>571)</sup> They have been much further refined, and it is clear that, with regard to liability issues, it is necessary to distinguish between the following categories: 1) conduct of state legislatures or state supreme courts; 2) conduct of municipalities; and 3) conduct of private parties. In the first category, the *Midcal* test is only applicable when it is not possible to declare a contested conduct that of the State or of its supreme court (see *Hoover*). In the second category, only the first prong of the *Midcal* test, that of clear articulation, need be satisfied (see *Hallie*). Finally, both prongs of

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567) Justice Scalia stresses that he accepts those consequences because he sees no alternative within the constraints of the criterion if that is not to be completely abandoned, see *ibid*.

568) See *ibid*.

569) See the dissenting opinion of Justice O'Connor.

570) In this regard, also see McGowan, David & Lemley, "Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment", *Harvard Journal of Law & Public Policy*, 1994, pp. 293-400.

571) Overall conclusions to, *inter alia*, decisions analysed in this chapter are to be found in Chapter 12 concerning *Conclusions to the American Example*.

the *Midcal* test have to be satisfied if private parties are to obtain immunity. However, private parties' conduct does not have to be compelled in order to escape liability (see *Southern Motor Carriers*). The more recent cases seem to demonstrate a new development towards limiting the ability to meet the requirements for obtaining immunity. The recent *Ticor Case* furthermore signals a departure from a too formal application of the state action doctrine.

## 11. Legal Principles of the Antitrust Petitioning Immunity Doctrine

Parallel to the state action doctrine exists the antitrust petitioning immunity doctrine, sometimes also referred to as the *Noerr-Pennington* doctrine. This is concerned with activities of lobbying and other kinds of petitioning leading to anti-competitive measures. It was the *Noerr* Case from 1961 which gave birth to it. Together with *Pennington* and *California Motor*, *Noerr* represents what may be referred to as the old trilogy of cases dealing with the issues related to antitrust petitioning immunity. The principles of the doctrine have, however, changed to a certain degree with a new line of cases, consisting of *Allied Tube*, *Trial Lawyers*, *Omni*, and *Real Estate Investors*. In order to establish which principles govern the doctrine in this field, all of the mentioned cases are analysed below. That this parallel doctrine is of interest here is largely due to the fact that it is of essential relevance to the understanding of the state action doctrine itself.

### 11.1. The Old Trilogy

The *Noerr* Case could, with some right, be said to have constructed a new doctrine concerning antitrust petitioning immunity by relying on *Parker*. The other cases, *Pennington* and *California Motor*, were to a large degree in the line of *Noerr*.

#### 11.1.1. The *Noerr* Case

In this case,<sup>572)</sup> the Supreme Court twice referred to *Parker*, first by holding that where a restraint upon trade or monopolisation is the result of valid governmental action, as opposed to private action, no violation of the Sherman Act can be made out.<sup>573)</sup> Secondly,

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572) See *Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight, Inc., et al.*, 365 US 127, 5 L Ed 2d 464, 81 S Ct 523, [No. 50], Argued 12 and 13 December 1961, Decided 20 February 1961.

573) See *ibid.*, at 136. Here, the Supreme Court referred to *Parker* in a footnote attached to the quoted text.



the Court referred to *Parker* in an account of the legislative history of the Sherman Act, where the conclusion of *Parker* was summed up to be, *inter alia*, that the language and the legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade.<sup>574)</sup>

The case did not, however, as such concern the validity of a state law due to a conflict between such a law and the Sherman Act. The issue was, rather, and quite interestingly, whether the Sherman Act hinders undertakings from lobbying the legislator to enact anti-competitive legislation which might injure competitors.

The case concerned a conflict between the railroad and trucking industry within the field of long-distance transportation. Forty-one Pennsylvania truck operators and their trade association charged twenty-four eastern railroads *et al.* with, among other acts, having attempted to influence legislation by means of their publicity campaign. For instance, the trucking industry complained that the railroads had persuaded the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill", which would have permitted the trucking industry to carry heavier loads over Pennsylvania roads. By hindering the enactment, the railroads decreased a competitive advantage of the trucking industry.

The Supreme Court found that such lobbyism was not prohibited by the Sherman Act as:

*"...no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws."* <sup>575)</sup>

Besides referring to *Parker*, the Supreme Court, *inter alia*, relied upon the importance to a representative democracy that the people freely can make their wishes known to their representatives and that the right of petition is one of the freedoms protected by the Bill of Rights.<sup>576)</sup>

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574) See *ibid.*, at 137, and especially footnote 17.

575) See *ibid.*, at 135.

576) See *ibid.*, at 137-138.

It is understood from the case that there exists a distinction between the acquisition of anti-competitive power and its subsequent use. Perry very pointedly expresses this in the following words:

*"Under Noerr-Pennington, the private party seeking anticompetitive regulation or legislation is exempt from the antitrust laws; legitimate attempts to influence the political process are the very activities that the doctrine was designed to protect. Once a private party has gained the power to act anticompetitively, however, the inquiry should shift to the Parker doctrine. Independent anticompetitive activities cannot properly be characterized as political action; Noerr-Pennington is simply inapplicable. Rather, if the actor is to escape antitrust liability, the private activity must be actively supervised by the state itself and thereby qualify for the state action exemption."* <sup>577)</sup>

This distinction is significant in understanding the difference between the two doctrines, *i.e.* the antitrust petitioning immunity doctrine and the state action doctrine, where the former relates to violations "prior" to the enactment of the measure in question, whereas the latter concerns "subsequent" violations.

#### 11.1.2. The Pennington Case

The *Pennington* Case, rendered four years after *Noerr*, did not in the least mention *Parker*.<sup>578)</sup> Again, as in *Noerr*, political activity was suggested exempted from antitrust liability.

Under scrutiny was, *inter alia*, the joint efforts of a Union and several large companies to influence the Secretary of Labor to establish a minimum wage for all sellers of coal. These efforts were successful, but were to the detriment of the small competitors who could not pay such a high wage rate. Also at stake were the efforts of the Union and the

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577) See Perry, Mark A., "Municipal Supervision and State Action Antitrust Immunity", *The University of Chicago Law Review*, Volume 57, 1990, Number 4, pp. 1437-1438.

578) See *United Mine Workers of America v. James M. Pennington et al.*, 381 US 657, 14 L Ed 2d 626, 85 S Ct 1585, [No. 48], Argued 27 January 1965, Decided 7 June 1965.

mentioned companies to collectively urge an authority to curtail its spot market purchases, which were not restricted by the minimum wage requirement. Again, the purpose of these efforts was to harm the small competitors. The Supreme Court held that these efforts were immune from antitrust liability. In particular, the Court grounded its holding in the following terms:

*"Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose... Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."* <sup>579)</sup>

As in *Noerr*, the overall rationale of the opinion is its emphasis on the desirability of free communication between those affected by regulation and the regulators.

### 11.1.3. The *California Motor Case*

This case is the third of the old trilogy cases concerned with the doctrine of antitrust petitioning immunity from antitrust liability.<sup>580)</sup> No state measure as such was involved in this case.

The petitioners, the highway carriers California Motor Transport Co. and others, had allegedly conspired to put the competitors and respondents in the case, *Trucking Unlimited et al.*, out of business. The petitioners' strategy was to institute actions in legal proceedings to prevent the respondents from acquiring operating rights.<sup>581)</sup>

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579) See *ibid.*, at 670.

580) See *California Motor Transport Co. et al. v. Trucking Unlimited et al.*, 404 US 508, 30 L Ed 2d 642, 92 S Ct 609, [No. 70-92], Argued 10 November 1971, Decided 13 January 1972.

581) According to Elhauge, Einer, "Making Sense of Antitrust Petitioning Immunity", *California Law Review*, Volume 80, 1992, Number 5, p. 1184, the petitioners apparently harassed their competitors by instituting these proceedings with or without probable cause and regardless of the merits of the cases, which did not mean, however, that the proceedings were baseless. In fact, the petitioners had won twenty-one out of forty cases. The crux of the complaint

The Supreme Court reaffirmed the general principle of the *Noerr* Case, *i.e.* that attempts to influence legislators for the passage of laws or their enforcement by the executive branch are not unlawful.<sup>582)</sup> Furthermore, this general principle was extended to include not only legislators and the executive branch but also administrative agencies and courts<sup>583)</sup>. In this regard, the Supreme Court relied heavily on the constitutional rights of association and petition. Therefore, as a starting point, the petitioners' activity was not contrary to the Sherman Act.<sup>584)</sup> However, due to an exemption to this petitioning immunity, the case was remanded for trial to the District Court which originally had dismissed it.<sup>585)</sup> The exemption was the so-called sham exception which originated from *Noerr*,<sup>586)</sup> applying to "*forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes*".<sup>587)</sup> The Supreme Court mentioned, *inter alia*, fraud as well as conspiracy with or bribery of decision-makers as examples of sham activities.

The case has been criticised for not really being in conformity with *Noerr*. First, for instance, believes that the Court deserted the sham exception set out in *Noerr* by, in fact, largely increasing its scope of application.<sup>588)</sup>

It would appear from the three decisions of the Supreme Court dealt with in this section that the overall principle dominating the antitrust petitioning doctrine is the one which originated in *Noerr*, which determines that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws. To this principle,

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therefore was that the petitioners were instigating litigation automatically in order to impose costs and delays on their competitors.

582) See *California Motor*, at 509-510.

583) See *ibid.*, at 510.

584) See *ibid.*, at 510-511.

585) See *ibid.*, at 515-516.

586) See *ibid.*, at 511.

587) See *ibid.*, at 513. Depending on what proof would be adduced, the Supreme Court held that, at its face value, the allegations could come within the sham exception and consequently could be unlawful, see *ibid.*, at 516.

588) See First, Harry, "Private Interest and Public Control: Government Action, The First Amendment, and the Sherman Act", *Utah Law Review*, 1975, pp. 40-41.

*California Motor* is in particular responsible for the sham exemption, implying that no immunity can be obtained in the case of illegal and reprehensible practice which may corrupt the administrative or judicial process.

## 11.2. The New Cases

Below, the latest decisions concerning the antitrust petitioning immunity doctrine, *Allied Tube*, *Trial Lawyers*, *Omni*, and *Real Estate Investors*, are analysed.

### 11.2.1. The *Allied Tube* Case

The *Allied Tube* Case was decided approximately sixteen years after the *California Motor* Case, namely in 1988.<sup>589)</sup> It concerned events influencing the adoption of the National Electrical Code, which was commonly written directly into most related state measures.

The petitioner, Allied Tube and Conduit Corporation, was the largest producer of steel conduit in the United States. Before the National Fire Protection Association was going to have its 1980 annual meeting, at which time it would decide whether the respondent's proposal that the National Electrical Code published by the Association should be extended to cover the respondent's product, plastic conduit, the petitioner met with other members of the steel industry to work against it. The steel producers thus attended the meeting with numerous new members who were recruited solely in order to vote against the proposal. The outcome naturally was that the proposal was defeated. To the respondent this rejection meant that the firm's alternative product to steel conduit was not included in the very influential code. As the code contained the Association's recommendations with regard to product and performance requirements for the design and installation of electrical wiring systems, and was furthermore routinely adopted by most state and local governments into law, the respondent was effectively hindered at entering the market of electrical conduit. Consequently, the respondent contended that the petitioner had restrained trade in violation of the Sherman Act.

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589) See *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, 486 US 492, 100 L Ed 2d 497, 108 S Ct 1931, [No. 87-157], Argued 24 February 1988, Decided 13 June 1988.

When the case ultimately came to the Supreme Court, the Court concentrated its decision on whether the petitioner's efforts to affect the product standard-setting process of the Association were immune from antitrust liability under the *Noerr* doctrine.<sup>590)</sup> It initially outlined the general principles of the *Noerr* doctrine. Furthermore, it stressed that the validity of governmental action varies with the source, impact, context, and nature of the activity.<sup>591)</sup> Thereupon, the Supreme Court went on to define the kind of restraint of trade on which liability was predicated in the instant case. It held that the relevant context was the standard-setting process of a private association, and added that such associations have traditionally been objects of antitrust scrutiny because their agreements are implicitly agreements not to manufacture, distribute, or purchase certain types of products.<sup>592)</sup> On this basis, it was argued that:

*"...petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade [as]...the Association cannot be treated as a 'quasi-legislative' body simply because legislatures routinely adopt the Code the Association publishes... Whatever de facto authority the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. "* <sup>593)</sup>

As the restraint had resulted from private action, the Court concluded that no immunity could be granted to the petitioner. In the remaining parts of the decision, the Supreme Court examined related questions, such as whether the exclusion of plastic conduit and the effect that exclusion had of its own force in the marketplace were incidental to a

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590) See *ibid.*, at 495.

591) See *ibid.*, at 499 and 504.

592) See *ibid.*, at 500.

593) See *ibid.*, at 501.

valid effort to influence governmental action,<sup>594)</sup> and whether the present case was distinguished from *Noerr*.<sup>595)</sup> None of this, however, changed the overall conclusion that the petitioner was found not to enjoy immunity from antitrust liability.<sup>596)</sup> It was in this context stressed that actors are not permitted to bias the process by stacking the private standard-setting body with decision-makers sharing their economic interest in restraining competition.<sup>597)</sup>

The main change between the old trilogy and this cases consists of the Supreme Court now having shrunk the original sham and conspiracy exemptions so that the sham exemption no longer includes improper petitioning activities if those activities are genuinely intended to influence the government, and the conspiracy exemption has been rejected with the possible exemption of cases where the government is acting as market participant.<sup>598)</sup> It is furthermore important to note that the Supreme Court in *Allied Tube* introduced the approach of evaluating the activity's source, impact, context, and nature. This is demonstrating a tendency toward less formalistic solutions. At the same time, however, the Supreme Court was not very informative as to which sources, impacts, contexts, and natures provide immunity and the approach's lack of clarity consequently can be criticised.<sup>599)</sup> It is

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594) See *ibid.*, at 502-504. In this context, the Court stated that the *Noerr* doctrine does not immunize every concerted effort that is genuinely intended to influence governmental action, because if "...all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental rate making or price supports."

595) See *ibid.*, at 505-507.

596) See *ibid.*, at 509-511.

597) See *ibid.*, at 511.

598) See Elhauge, Einer, "Making Sense of Antitrust Petitioning Immunity", *California Law Review*, Volume 80, 1992, Number 5, p. 1179.

599) See *ibid.*, at p. 1180. One particularly interesting aspect of the case is that the Supreme Court distinguished between decision-making bodies composed of persons with or without economic incentives to restrain trade. Elhauge, in fact, constructs an entire approach, the so-called functional process approach, on this basis to identify factors to determine whether petitioning immunity applies. See *ibid.*, at pp. 1177-1251. Accordingly, Elhauge suggests that the incentive structure of the relevant decision-maker is of major importance so that only instances where the decision-maker did not have an objective financial interest in the restraint's anti-competitive consequences enjoy immunity. See *ibid.* The distinction can be seen as a specification of the Supreme Court's traditional distinction between public and private action.

important to note that the Court did not strike down product standard-setting by private associations in general, as such agreements in principle are legal. Only, these associations have to establish rules that safe-guard that competition is not restrained. In this case, such safe-guards did not exist. Therefore, the agreement reached by the Association would not have been contrary to the Sherman Act had the rules not allowed for a conduct as that performed by the petitioners. Also, the subsequent application by various public authorities would in principle be lawful.

### 11.2.2. The *Trial Lawyers Case*

The *Trial Lawyers Case* is the second in the new line of cases concerning antitrust petitioning immunity.<sup>600)</sup> It was decided two years after *Allied Tube*, in 1990. It concerned attorneys' concerted refusal to represent indigent criminal defendants without an increase in the statutorily fixed fees. This activity led to a regulation with the demanded content.

The respondents Superior Court Trial Lawyers Association *et al.* (hereinafter referred to as 'SCTLA') consisted of a group of approximately one hundred lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in criminal cases in the District of Columbia. The fees paid for this work were established by a Committee pursuant to the District of Columbia Criminal Justice Act. The fees were not to exceed the rates established by the federal Criminal Justice Act of 1964. Those rates could be amended only pursuant to the federal statute or the District Code. As the members of the SCTLA found the fees paid for their work far too low, they resolved in 1983 not to accept any new cases unless they were granted a substantial increase in this regard. Besides effecting this boycott, the lawyers arranged a series of events to attract the attention of the news media. The effect of the boycott was severe and after less than two weeks the criminal justice system was on the brink of collapse. The District government capitulated and increased the fees to a level which was acceptable to SCTLA. The boycott therefore came to an end. However,

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600) See *Federal Trade Commission v. Superior Court Trial Lawyers Association, et al.*; *Superior Court Trial Lawyers Association, et al. v. Federal Trade Commission*, 493 US 411, 107 L Ed 2d 851, 110 S Ct 768, [Nos. 88-1198 and 88-1393], Argued 30 October 1989, Decided 22 January 1990.



after these events had taken place, the petitioner, a Federal Trade Commission (hereinafter referred to as 'FTC'), filed a complaint against SCTLA.

When the case came to the Supreme Court, the Court commenced its decision by declaring that SCTLA's boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act, and at the same time violated the prohibition against unfair methods of competition in §5 of the FTC Act.<sup>601)</sup> The argumentation was primarily that prior to the boycott the lawyers in question were in competition with one another in the sense that they each had to decide independently of one another whether and how often to provide their services.<sup>602)</sup> The agreement however changed this, as it was concerned with price fixing, since, as the lawyers jointly refused to serve their customers, they at the same time reduced output and thereby increased the price offered.<sup>603)</sup> The Supreme Court then examined whether the *Noerr* Case in any way changed this decision. In this regard, the Court firstly summarised the general principle of that case.<sup>604)</sup> Then, the Court, based on a description of the differences between the *Noerr* Case and the present case, rejected the applicability of the former to the latter in the following formulation:

*"But in the Noerr case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the means by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In Noerr, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislation response to the boycott put an end to the restraint."* <sup>605)</sup>

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601) See *ibid.*, at 422.

602) See *ibid.*, at 422.

603) See *ibid.*, at 423. In this connection the Supreme Court also examined whether the agreement was outside the reach of the Sherman Act because its objective was the enactment of favourable legislation. This was answered in the negative, as this issue was of no relevance; see *ibid.*, at 423-424.

604) See *ibid.*, at 424.

605) See *ibid.*, at 424-425.

This was followed by a statement that *Allied Tube* also should be read in confirmation of the outcome, because in that case it was explained that the *Noerr* Case should not be read as extending to every concerted effort that is genuinely intended to influence governmental action.<sup>606)</sup> In sum, the action of the SCTLTA was found in violation of the central antitrust laws.

When reading this decision, it is, in relationship to the state action doctrine itself, most of all important to understand that the antitrust petitioning doctrine is not concerned with an evaluation of state measures themselves, but only with activities influencing the adoption of such measures. Therefore, it must also be understood that, in this case, it was not the price fixing contained in the District of Columbia Criminal Justice Act of 1964, nor the rates established by the Committee, nor the price fixing pursuant to the emergency legislation which was under scrutiny. It was solely the boycott itself which was examined by the Supreme Court. It is in this light that the Supreme Court's statement that in this case the emergency legislation put an end to the restraint should be understood, because in a more broad context the boycott did lead to a restraint, namely, an anti-competitive measure. But, this is not what the Supreme Court had in mind. What the case established is that the general rule originating in *Noerr* is that all attempts to influence the enactment of laws are lawful, the exemption to this being a situation where the attempt itself constitutes the unlawful activity, such as a price cartel which is what the boycott in the *Trial Lawyers Case* in fact constituted.

### 11.2.3. The *Omni* Case

The *Omni* Case from 1991 is the third case belonging to the new line of antitrust petitioning immunity cases.<sup>607)</sup> At the same time, the case dealt with the state action doctrine. It therefore contributes with further clarity as to the doctrines' mutual interaction. At stake was a city's ordinance restricting billboard construction, enacted after lobbyism of

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606) See *ibid.*, at 425.

607) See *City of Columbia and Columbia Outdoor Advertising, Inc. v. Omni Outdoor Advertising, Inc.*, 499 US 365, 113 L Ed 2d 382, 111 S Ct 1344, [No. 89-1671], Argued 28 November 1990, Decided 1 April 1991.

a company controlling the billboard market. Due to the ordinance, the company enjoyed enhanced protection against new market entrants.

The parties of the case were the petitioners, the City of Columbia situated in South Carolina and COA, against the respondent, Omni. COA had, since the 1940's, done billboard business in the City and by 1981 it controlled more than 95 per cent of the market. When the respondent, originally located in Georgia, entered the billboard market in 1981, COA responded by, *inter alia*, lowering its prices and modernising its billboard stock. Moreover, of relevance to the case, COA met with city officials. The aim was to seek the enactment of zoning ordinances restricting billboard construction. Already in the spring of 1982, COA's efforts led to the enactment of the desired ordinance. Pursuant to this ordinance, every billboard construction required the approval of the City's council. Later on, however, this was amended to a 180-day moratorium on construction. As the ordinance from the spring of 1982 was invalidated by a state court, a new ordinance was enacted in the autumn. This ordinance restricted the size, location, and spacing of billboards. The respondent was now effectively hindered at setting up new billboards, whereas COA already had its billboards in place. Consequently, the respondent filed suit against the petitioners at the Federal District Court. The charge was, *inter alia*, that the petitioners had violated the Sherman Act.

The opinion of the Supreme Court is divided into two major parts, whereof one treats the question of whether the first of the petitioners, the City, in its identity as a governmental municipality, enjoyed immunity from the Sherman Act. The second part is concerned with the issue of whether the other petitioner, COA, as a private party, was immune from its activities relating to enactment of the ordinances.

With regard to the City's possible immunity, the Supreme Court applied the state action doctrine rather than the *Noerr* doctrine. The Court commenced by stating that a municipality's restriction of competition may sometimes be an authorised implementation of state policy, and *Parker* immunity may be accorded where that is the case.<sup>608)</sup> In relation to this, the Supreme Court held that the City had acted in accordance with state authority.<sup>609)</sup> Moreover, the first criterion of the *Midcal* test was satisfied, *i.e.* the ordinance constituted a clear articulation of a state policy, as the Supreme Court found it to be enough

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608) See *ibid.*, at [\*\*392].

609) See *ibid.*, at [\*\*392-393].

that suppression of competition was the foreseeable result of what the statute in question authorised.<sup>610)</sup> The second criterion of the *Midcal* test was not applied. Additionally, the Supreme Court examined whether the doctrine contained a conspiracy and a bribery exemption, respectively.<sup>611)</sup> The existence of any of the exemptions was denied. The City was thus found immune from the Sherman Act.

With regard to COA's possible immunity, the Supreme Court applied the *Noerr* doctrine instead of the state action doctrine. As a starting point, it implied that COA's petitioning efforts were immune because *Noerr* shields from the Sherman Act concerted efforts to influence public officials regardless of intent or purpose.<sup>612)</sup> Thereupon, it scrutinised whether the sham exception also originating from *Noerr* was applicable.<sup>613)</sup> This was rejected. In addition, the Supreme Court analysed the respondent's proposal that a conspiracy exemption to petitioning immunity should apply.<sup>614)</sup> Such existence was, however, denied.

Thus, both petitioners were entitled to immunity from the antitrust laws for their activities relating to enactment of the restrictive billboard ordinances.<sup>615)</sup>

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610) See *ibid.*, at [\*\*393].

611) See *ibid.*, at [\*\*394-397]. According to the conspiracy exemption, immunity is not granted where politicians or political entities are involved as conspirators, or, more narrowly defined, as suggested by the respondent, encompassing either any governmental act not in the public interest or instances of governmental corruption. The bribery exemption, on the other hand, refers to instances where immunity is not granted because bribery or some other violation of state or federal law has been established in connection with the governmental action in question.

612) See *ibid.*..at [\*\*398]. The Supreme Court here quoted from the *Pennington* Case.

613) See *ibid.* at [\*\*398-399]. According to the Supreme Court, the sham exemption encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon, or, in other words, it applies to situations in which activities directed toward influencing governmental action is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

614) See *ibid.*, at [\*\*399-400]. The conspiracy exemption was defined as applicable to situations where government officials conspire with a private party to employ government action as a means of stifling competition.

615) See *ibid.*, at [\*\*400].

Concerning this case, only a few remarks seem to be necessary. It is understood from the decision that the *Noerr* doctrine applies only to situations in which the liability of private parties is raised. In contrast, the doctrine does not apply to instances where the liability of municipalities that have been influenced to enact anti-competitive measures as such is questioned, because the state action in this case already entitles the desired immunity. In this regard, the Supreme Court stated in the case that both doctrines are complementary expressions of the principle that the antitrust laws regulate business, not politics.<sup>616)</sup> It was explained that the state action doctrine protects the states' acts of governing, and the *Noerr* doctrine the citizens' participation in government.<sup>617)</sup>

#### 11.2.4. The *Real Estate Investors* Case

In 1993, the Supreme Court rendered a judgment of importance to the definition of the sham exception.<sup>618)</sup> As in the *California Motor* Case, no state measure as such was involved. The central issue was whether an original copyright action had been instituted to cloak underlying violations of the Sherman Act.

Of great interest to the antitrust petitioning immunity doctrine examined here is the two-part definition of the sham exception outlined by the Court, which, therefore, should be quoted in detail:

*"First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail... Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to...*

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616) See *ibid.*, at [\*\*400].

617) See *ibid.*, at [\*\*400].

618) See *Professional Real Estate Investors, Inc., et al. v. Columbia Picture Industries, Inc., et al.*, 508 US 49, [No. 91-1043], Argued 2 November 1992, Decided 3 May 1993.

*interfere directly with the business relationships of a competitor,' ... through the 'use [of] the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon,... This two-tiered process requires the plaintiff to disprove the challenged lawsuit's economic viability. Of course, even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim. "* 619)

On the basis of this definition, the Court concluded, under the objective prong of the sham exception, that the original plaintiff had probable cause to sue to original defendant for copyright infringement.<sup>620)</sup> The former was accordingly entitled to immunity.

The analysis performed in this chapter of the selected cases concerning the antitrust petitioning doctrine has provided knowledge as to the legal principles governing private parties' activities leading to anti-competitive measures. In principle, such activities are entitled to immunity under the antitrust petitioning immunity doctrine. The primary exemption to this appears today to be where the activities in themselves are anti-competitive in their nature. Such activities would be concerted actions or agreements contrary to the Sherman Act, such as was the case in *Allied Tube* and *Trial Lawyers*.<sup>621)</sup> The other exemption is the two-part sham exemption which was defined in the *Real Estate Investors* Case, and, therefore, is likely only to be applicable in cases concerning "petitioning" of courts.

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619) See *ibid.*

620) For a thorough critique of the two-part definition of the sham exception, see, in particular, McGowan, David & Lemley, Mark A., "Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment", *Harvard Journal of Law & Public Policy*, 1994, pp. 293-400.

621) It should also be summarised up that in *Noerr*, *Pennington*, *Omni* and *Real Estate Investors* immunity was in principle obtained. In contrast, this was not granted in *Allied Tube* and *Trial Lawyers*. Finally, in *California Motor*, the case was remanded for trial to the district court, which originally had dismissed it, in order to be examined pursuant to the sham exemption, and which would most likely not grant immunity.

## 12. Conclusions to the American Example

This chapter serves the purpose of comprehensively analysing the twenty-four judgments (plus two preliminary ones) that were analysed individually above. The chapter first offers some general observations, followed by a description of the development of the law. Then, the principles of the doctrine that may be derived from the case law are outlined, strengths and weaknesses of the Supreme Court's approach are discussed, and finally, a comparison to the European doctrine is made. The chapter mainly focuses on the state action doctrine rather than the related antitrust petitioning immunity doctrine.

### 12.1. General Observations

The first general observation is that less than half of the analysed cases were those of unanimous opinions. Very often the dominating picture would rather be that of dissenting and/or concurring opinions.

It may also be observed that only in two cases, *Midcal* and *324 Liquor Corp.*, did the Supreme Court hold that the contested measure violated the Sherman Act and at the same time was not sheltered under the state action doctrine. Moreover, in *Schwegmann*, the measure at stake was also found contrary to the federal antitrust laws. However, the state action doctrine was only applied in a somehow premature manner. Finally, in *Boulder*, a city ordinance was held contrary to the Sherman Act.

In several decisions, the focus was not the validity of anti-competitive measures but rather the liability due to actors' activities related to such measures. In four of these decisions, the Supreme Court found that liability prevailed.<sup>622)</sup> In *Cantor*, *Patrick*, and *Ticor*, private parties were held liable. In *Goldfarb*, on the other hand, the liable parties were an administrative agency under the state supreme court as well as a bar association. It should be added that in *Lafayette*, the likely outcome of the case was that the sued municipalities,

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622) For the sake of completeness, it should be mentioned that in the preliminary case, *Northern Securities* from 1904, a merger did not find shelter from the Sherman Act under the state corporation laws pursuant to which it had been authorised.

in their role as operators of utilities, were subject to antitrust liability. Furthermore, also in *Allied Tube* and *Trial Lawyers*, private parties were held liable, this time, however, under the antitrust petitioning immunity doctrine as the petitioning activity involved was not considered protected.

The last general observation regards the kinds of subject matters involved in the analysed cases. These, indeed, cover a large area. Four main categories, however, may be distinguished: 1) petitioning activities; 2) licences; 3) resale price maintenance systems; and 4) tying arrangements. The most common anti-competitive effect of the measures was either that of reducing market entry or that of establishing cartel-like arrangements.

## 12.2. The Development of the Law

The first cases of interest were handed down as early as 1904, *i.e.* fourteen years after the enactment of the Sherman Act in 1890.<sup>623)</sup> Although those cases were related to the state action doctrine, it was not until 1943, in *Parker*, that the doctrine truly could be considered as established. It took another thirty-seven years, until 1980, before the Supreme Court unambiguously held that a state measure violated the Sherman Act without being sheltered by the doctrine.<sup>624)</sup> However, some years earlier, in *Goldfarb* from 1975, which was also the case revitalising the state action doctrine after more than three decades of almost complete silence on the matter, an administrative agency under a state supreme court and a bar association were held liable as their activities were found not to be beyond the reach of the Sherman Act.

The overall impression of the development of the law is that it was never completely consistent. Certain general tendencies of development may, however, be identified. It is evident that the Supreme Court initially grounded the doctrine on the basis of a distribution of competences between the federal center and the peripheral States.<sup>625)</sup> The general principle emerging was that anti-competitive state measures were lawful. From this starting point, the doctrine evolved towards an application of more and more formalistic criteria to

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623) See the *Northern Securities* and *Olsen* Cases.

624) See the *Midcal* Case.

625) See especially the *Parker* Case.



evaluate anti-competitive state measures, where the point of departure would now be whether immunity could possibly be given under the doctrine, thereby in fact changing the original general principle.<sup>626)</sup> One further tendency has been an increasing focus on the identity of the involved parties and a sophistication of the applicable criteria to each category of identity, primarily a distinction between the State, sub-levels of the State and private parties.

It should be added that co-ordinated with, yet at the same time a product of, the state action doctrine itself, was the establishment of the antitrust petitioning immunity doctrine, concerning actors' influence of legislators to enact anti-competitive measures. The development of this doctrine was initiated with the old trilogy from the sixties and early seventies,<sup>627)</sup> and continued with the new line of cases from the late eighties and early nineties.<sup>628)</sup> In two of these, *Allied Tube* and *Trial Lawyers*, a private party was held not to enjoy immunity.<sup>629)</sup> This happened in 1988.

### 12.3. The Principles of the Doctrine

The state action doctrine establishes the general position, based on values of federalism and state sovereignty, that:

*"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."*<sup>630)</sup>

This sentence supports the general principle that the States have the right to enact

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626) In particular, the *Midcal* Case is seen as responsible for the introduction of formalistic criteria.

627) See the *Noerr*, *Pennington* and *California Motor* Cases.

628) See the *Allied Tube*, *Trial Lawyers* and *Omni* Cases.

629) The outcome of *California Motor*, from 1972, which was remanded for further trial, was also likely to be that no immunity would be granted.

630) See the *Parker* Case, at 317 US 351.

anti-competitive measures, even those which may be in conflict with the federal antitrust laws.

From this point of departure, certain modifications exist. Accordingly, state measures have to fulfill both of the following two conditions, also known as the *Midcal* criteria:<sup>631)</sup>

a) anti-competitive measures have to be clearly articulated and affirmatively expressed as state policy; and

b) anti-competitive state policies have to be subject to ongoing regulatory supervision by the State itself.<sup>632)</sup>

Besides the evaluation of anti-competitive state measures, the case law has been quite preoccupied with liability issues. In this regard, it is necessary to distinguish between the identity of the involved parties, *i.e.* between conduct of:

1) the State, such as state legislators and state supreme courts;

2) sub-levels of the States, such as municipalities and cities; and

3) private persons, such as companies.

Where the anti-competitive conduct, authorised by a state measure, is that of the category mentioned in paragraph 1) above, namely that of the State, it is not necessary to address the *Midcal* criteria.<sup>633)</sup> The true test then is to determine whether the challenged conduct is that of the State (*e.g.* state legislators and state supreme courts).

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631) However, also see the *Hoover Case* where it was stated that the *Midcal* criteria are only applicable if it is not immediately clear that the measure is that of the State.

632) In relation to state measures, these two criteria have clearly been applied in, for instance, *Orrin Fox*, *Midcal* and, more recently, *324 Liquor Corp.* However, it is justified to hold the *Bates Case* from 1977 responsible for their introduction. Though, already in *Goldfarb* from 1975, the first steps towards the formulation of the supervision criterion were taken.

633) See the *Hoover Case*.

Concerning the category mentioned in paragraph 2) above, for anti-competitive activities performed by sub-levels of the State pursuant to a state measure, the measure in question has to satisfy the criterion of clear articulation.<sup>634)</sup> Only if that criterion is satisfied, will the mentioned actors escape liability despite the authorisation inherent in a state measure.

Regarding the third outlined category mentioned in paragraph 3) above, both criteria of the *Midcal* test have to be satisfied by the policy if private parties are to obtain immunity from antitrust liability, although their anti-competitive activity may have been authorised by state measures.<sup>635)</sup>

It is understood from this distinction that the further away the actor is from the State, the more conditions have to be satisfied by the policy in order for the actor to escape liability.<sup>636)</sup> The difference between the State and the sub-level of the State is explained by the Supreme Court's constant point of departure in principle viewing the sovereign State as immune. On the other hand, the difference between the sub-level of the State and the private party is justified by the Supreme Court when presuming that municipalities act in the public interest and need no supervision, whereas private parties tend to act in their own interest and consequently must be supervised.<sup>637)</sup>

Besides the *Midcal* criteria, the Supreme Court has applied other criteria, regarding which there nevertheless remains at least some uncertainty concerning not only how well established they actually are, but also exactly when they should be applied. These are

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634) See the *Hallie Case*. Here, it was decided that the other *Midcal* criterion, that of supervision, was not applicable to the conduct of municipalities.

635) See the *Southern Motor Carriers Case*.

636) It is not clear from the analysed cases what the link is between the issue of the measure's validity and the authorised actors' liability; in other words, there is no case in express terms stating that where liability is found, this means at the same time that the measure which authorises the unlawful conduct is automatically invalid. However, this would be a logical conclusion. It might therefore be considered as implicit in the doctrine that: 1) if the measure is completely valid, *i.e.* both *Midcal* criteria are satisfied, then all three levels of involved actors are not in the least liable; 2) if the measure is invalid because the related anti-competitive activities are not sufficiently supervised then only private companies may be found liable; and 3) if the measure is not valid because it is not sufficiently clearly articulated, then both private companies and sub-levels of the State are likely to be held liable for anti-competitive conduct authorised pursuant to that measure.

637) See the *Hallie Case*.

primarily the following:

c) the competence criterion, which is used to determine whether the power to enact the measure or activity at issue belongs to the Congress or to the States;

d) the efficiency criterion, which is used to test whether the challenged measure or activity has an adverse effect on competition;

e) the compulsion criterion, which is used to examine whether the contested measure or activity is prompted or compelled;

f) the interest criterion, which is used to scrutinize whether States have an independent regulatory interest in the measure.

The competence criterion mentioned in paragraph c) above is clearly the basis of the state action doctrine. It was most strongly applied in the *Parker Case*.<sup>638)</sup> However, in the more recent decisions, it seems evident that it is no longer applied independently, but rather substituted by formalistic criteria, primarily those of the *Midcal* test.

In the *Exxon Case* from 1978, the Supreme Court clearly rejected the relevance of the efficiency criterion mentioned in paragraph d) above. In general, this rejection appears to be supported by the majority of the decisions.<sup>639)</sup>

The compulsion criterion mentioned in paragraph e) above was first applied in *Goldfarb* in 1975. In that case, the Supreme Court decided that for private parties to escape liability it was not enough that the anti-competitive conduct was prompted by state action as it had to be compelled by direction of the State. In later cases, however, the Supreme Court appears to have departed from the criterion.<sup>640)</sup>

The interest criterion mentioned in paragraph f) above was only directly applied in

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638) However, also see the *Bates Case*, in which the competence criterion was given an independent role.

639) See e.g. the more recent *Ticor Case*, where the Supreme Court also in explicit terms rejected that efficiency as a normative standard is of direct relevance to the doctrine.

640) See especially the *Southern Motor Carriers Case*.

one single case.<sup>641)</sup> Pursuant to this criterion, a condition of granting immunity was that the State had an independent regulatory interest in the measure.

It does not appear that the Supreme Court distinguishes between whether the activity at stake is that of a monopoly or cartel, or other. Further, the Supreme Court does not appear to allow States to justify anti-competitive measures and activities with reasons such as protection of the environment, culture, health, *etc.*

In general, the legal principles applied by the Supreme Court may be said to be based on a paradigm of accommodation. In other words, an appropriate mediation is sought between the federal policy favouring competition and the States' conflicting interest in being free to regulate in ways that might interfere with aims of efficiency. This characterisation is supported by, for example, *Midcal*, where the Court stated that the central policy in favour of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement.<sup>642)</sup> At the same time, as expressed in *Ticor*, the federal competition laws are subject to supersession by state regulating programs due to principles of federalism.<sup>643)</sup> In that case, it was in more specific terms stated that actual state involvement, not deference to private price fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law and that immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraints.<sup>644)</sup>

It should be added that along with the state action doctrine itself, another approach exists. That is the antitrust petitioning immunity doctrine, which is applied more independently of the state action doctrine. The doctrine in principle grants immunity to parties urging legislators to restrain trade.<sup>645)</sup> The exemption to this is situations where the petitioning activities in themselves are contrary to the Sherman Act, *i.e.* where they, for example, constitute an unlawful agreement. Another exemption, which is likely only to be

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641) See the *Bates Case*.

642) See the *Midcal Case*, at 445 US 106.

643) See the *Ticor Case*.

644) See the *Ticor Case*.

645) See *e.g.* the *Allied Tube Case*.

applicable in law suit cases, consists of a two-part test, as it was defined in the *Real Estate Investors Case*. This latter doctrine is only of relevance to situations where the liability of private parties is raised, as opposed to the liability of municipalities.<sup>646)</sup>

#### 12.4. Strengths and Weaknesses of the Court's Standard

The purpose of this section is to outline some of the most significant strengths and weaknesses of the two *Midcal* criteria, stated above under a) and b).<sup>647)</sup>

The first criterion of the *Midcal* test, namely whether an anti-competitive measure has been clearly articulated and affirmatively expressed as state policy, is directed at ensuring that particular anti-competitive mechanisms operate because of a deliberate and intended state policy.<sup>648)</sup> It has an obvious relationship to the concern that States accept responsibility for their anti-competitive measures and is designed to establish a visible legislative process.<sup>649)</sup> It can be viewed as a conversion of the starting point in *Parker* that only the sovereign State's anti-competitive activity gain immunity. Exactly how clearly articulated and how affirmatively expressed the state policy has to be is the issue of major disagreement. From the case law, it is understood that the criterion was non-existent in *Parker* and developed into its present content with *Bates* from 1977 where the Supreme Court required

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646) See the *Omni Case*.

647) The competence criterion stated above under c) is analysed below in *Chapter 18* concerning *Distribution of Competences*, whereas the efficiency criterion stated above under d) is commented upon below in *Chapter 13* concerning *The Treaty as an Economic Constitution*. Both criteria will, however, be analysed in a European context. The remaining two criteria, mentioned above under e) and f) are excluded from further scrutiny primarily due to the insignificant role that they play in the more recent case law and their general minor importance to the major interests at stake. It should be added that, in what follows below, an evaluation of that part of the doctrine which concerns the liability of concerned parties is not included, and therefore the distinction between various levels of the State, *etc.* is also excluded as this is not of relevance to the parallel European doctrine in its present state. Also see *Chapter 1* above concerning *Introduction*.

648) See the *Ticor Case*.

649) See McGowan, David & Lemley, Mark A., "Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment", *Harvard Journal of Law & Public Policy*, 1994, pp. 293-400.

that a state measure be clearly articulated in order to be lawful.<sup>650)</sup> The cases after *Bates*, i.e. *Lafayette* and *Orrin Fox* from 1978, followed up on *Bates* with regard to this criterion.<sup>651)</sup> With *Midcal* from 1980, the criterion then became considered as firmly established. Accordingly, the Supreme Court applied the terminology that a policy must be clearly articulated and affirmatively expressed as state policy. In the *Hallie* Case from 1985, the Court further specified that it is not necessary that legislation contain an explicit formulation of the State's intention to distort competition. In another case from 1985, *Southern Motor Carriers*, the Court slightly softened the criterion as it held that a program need not point to a specific detailed legislative authorisation; it is enough, to fulfill the criterion, that the State as sovereign clearly intends to displace competition in a particular field. It should be added that the case law has demonstrated that this criterion, with regard to liability issues, is only important to escape liability when the conduct in question is that of a sub-level of the State or that of a private party, but not necessarily when it is the conduct of the State itself.<sup>652)</sup> According to Perry, the different treatment of actors is based on values of federalism; the federal government is bound to respect the regulatory choices of independent sovereigns, but has no reason to pay such deference to non-sovereign state

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650) See the *Bates* Case, at 433 US 362, where the Supreme Court applied the following expression: "...we deem it significant that the state policy is so clearly and affirmatively expressed..."

651) See the *Lafayette* Case, at 435 US 410 where the Supreme Court applied the following expression: "...the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as a part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy..." In *Orrin Fox* a similar expression was applied.

652) This state of law is explained by *Page* in the following way: "*The clear articulation test rests upon several related assumptions about the respective roles of courts, legislatures, and administrative agencies. Legislatures announce the policy of the state as sovereign; administrative agencies make subordinate policies and execute the legislative mandate; and the courts decide if the policy alleged to conflict with the Sherman Act had its source in the legislative enactment or in the administrative policy. Legislation presumptively embodies the sovereign choice of the state and is therefore worthy of deference. The policies adopted by an administrative body, by contrast, do not necessarily reflect the same reconciliation of interests as in the Madisonian model, and must therefore fall if not specifically authorized by the enabling legislation.*" See *Page, William H., "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after Midcal Aluminum"*, *Boston University Law Review*, Volume 61, 1981, Number 5, p. 1125-1126.

agencies or municipalities and not at all to private companies.<sup>653)</sup>

Among the strengths of this criterion is first of all its simplicity compared to, for instance, an efficiency criterion. In its focus on whether the language of a measure is clear as the best embodiment of the State's regulatory purpose, a court examines a field it has the qualifications to perform.<sup>654)</sup> This should at the same time enhance legal certainty. Another strength is that the criterion is completely neutral as to the economic legitimacy of a measure. The criterion simply assumes that economic legislation enacted through the democratic process will be in the public interest.<sup>655)</sup> A third strength is that the criterion due to the principle of deference to States embraced by it, is largely in conformity with an attractive model of federalism.

Among the weaknesses of this criterion is its focus upon the formulation itself of the measure. This makes it far too formalistic. In other words, the overall purpose of evaluating whether the measure represents a deliberate and intended state policy is not in actual fact the test itself.

The second of the *Midcal* criteria, which primarily comes into force with regard to liability issues of private parties, namely whether an anti-competitive state policy has been subject to ongoing regulatory supervision by the State itself, is, like the first criterion, directed at ensuring that particular anti-competitive mechanisms operate because of a deliberate and intended state policy.<sup>656)</sup> The first steps towards the formulation of this criterion were already taken in *Goldfarb*, decided in 1975.<sup>657)</sup> The criterion also emerged in *Bates* from 1977 as well as *Lafayette* and *Orrin Fox*, both from 1978. However, not until

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653) See Perry, Mark A., "Municipal Supervision and State Action Antitrust Immunity", *The University of Chicago Law Review*, Volume 57, 1990, Number 4, p. 1416.

654) See Page, William H., "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after *Midcal Aluminum*", *Boston University Law Review*, Volume 61, 1981, Number 5, p. 1123.

655) See *ibid.*, p. 1125.

656) See the *Ticor Case*.

657) In *Goldfarb*, the Supreme Court indicated that the "...anticompetitive activities must be compelled by direction of the State acting as a sovereign." It is here the term "direction" which is analogous to "supervision". In more practical terms, the Supreme Court in that case put emphasis upon the fact that the Virginia Supreme Court had not approved the State Bar's opinions with the minimum fees.



the *Midcal* Case from 1980, was the criterion considered as fully established.<sup>658)</sup> Thereupon, the supervision criterion was applied, for example, in *324 Liquor Corp.*, in a way which clearly reaffirmed its application in *Midcal*.<sup>659)</sup> In *Patrick* from 1988, a difference came to light when the criterion was not satisfied in this case due to the fact that the relevant supervisory bodies did not have the competence to perform a sufficient degree of supervision. Finally, it should be mentioned that in *Ticor*, the Supreme Court made it clear that the supervision criterion is to be taken extremely seriously by the States as it has to be demonstrated in actual fact that active supervision has taken place. A mere formal potential for supervision is not in the least sufficient. The Supreme Court has thereby departed from a formal application of the criterion, which must be classified as a major strength of the criterion.

Despite the advantage that lies in this pragmatic application of the criterion, at the same time this gives rise to another kind of legal uncertainty, albeit different from that which lies in a very formal application thereof: it is not completely clear exactly what degree of active supervision is required.

Another weakness of the criterion is that it injures the administrative flexibility of the States, and increases the regulatory costs. This will to some seem paradoxical in light of the efficiency aims of the central competition laws, of which the state action doctrine is, after all, one way or the other, a product.

Thirdly, the criterion is inconsistent with its aim of ensuring that anti-competitive mechanisms operate because of a deliberate and intended state policy, with which it is not at all concerned. In other words, it is possible to claim that if a State has made an active choice to displace competition, this decision should stand, no matter how the State has determined that the specific implementation take place, *i.e.* whether the State supervises the displacement

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658) In *Midcal*, a state measure did not pass the supervision criterion because the State simply authorised the price setting, and did not establish prices, review the reasonableness of the price schedules, monitor market conditions and engage in any printed reexaminations of the program.

659) The measure here was also not considered as immune under the state action doctrine as the State simply authorised the price setting and did not establish prices, nor review the reasonableness of the price schedules.

or not.<sup>660)</sup>

Fourthly, the criterion is largely self-contradictory because it accepts anti-competitive measures as long as they are supervised properly. The question is really whether such supervision actually improves at all these kinds of measures. In other words, this criterion seeks to balance between not completely accepting the competence of States to enact anti-competitive regulation and not completely prohibiting anti-competitive measures. At the same time, it in fact reflects a lack of faith in democratic legislative processes and a blind faith in administrative processes.<sup>661)</sup>

Finally, a weakness lies in the rationale of the criterion, which is not completely explainable. It is clear that the criterion is still formal in the sense that it tests something different than what on the surface it says it tests. What it really tests is whether States help companies circumvent the central competition laws, but what it says it tests is whether States supervise authorised anti-competitive conduct. Difficulties will always develop if the real aim of a legal principle is forgotten. It is important to explain why it is of significance that the principles are satisfied, so that they are not wrongly applied.

Altogether, the *Midcal* criteria, especially the supervision criterion, are not completely honest, and they lack internal rationality, which again brings legal uncertainty to daylight.<sup>662)</sup>

## 12.5. Comparison with the European Doctrine

Above, a comprehensive analysis of the American case law concerning the doctrine on state action has been provided. Below, the intention is to compare the conclusions of this analysis with those of the analysis of the equivalent European doctrine, namely that of the

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660) See Perry, Mark A., "Municipal Supervision and State Action Antitrust Immunity", *The University of Chicago Law Review*, Volume 57, 1990, Number 4, p. 1417.

661) See Page, William H., "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after *Midcal Aluminum*", *Boston University Law Review*, Volume 61, 1981, Number 5, p. 1137.

662) In an on-line search accomplished in June 1997, in *BNA Antitrust & Trade Regulation Daily*, applying the search criteria of "*Parker doctrine*" and "*state action doctrine*", it was significant that an improved clarity as to the criteria's application is not the general characterisation of the judgments of the lower court instances.

interaction of Articles 3(g), 5(2) and 85 EC, as presented at the end of *Part Two*.

The plan is to follow the framework applied so far, *i.e.* to compare: 1) general observations; 2) developments of the law; and 3) principles of the doctrines. Thereupon, general conclusions as to the comparison of the two systems are presented.

#### 12.5.1. Comparison of the General Observations

The overall impression of both systems is that the decided cases contained many complexities as well as a great political impact. One of the consequences is that many judgments were decided in plenum at the European Court of Justice. In the American system this was furthermore illustrated by many not unanimous decisions.<sup>663)</sup>

Despite the fairly large number of cases which were taken to the highest instance in each of the analysed legal systems, only a few decisions held that a state measure violated the central competition provisions. Different from the European decisions, the US Supreme Court strongly took into account the issue of liability, and actually did hold several private as well as public and semi-public parties liable.

A final general observation is that both systems developed their doctrines on the basis of a fairly large variety of subject matters. The American system, however, took into account the significant issue of antitrust petitioning, which the European Court of Justice still awaits to decide upon. In the European system, the most common anti-competitive effect of the measures was that of establishing cartel-like arrangements, whereas in the US, a typical effect of contested measures was also that of reducing market entry.

#### 12.5.2. Comparison of the Development of the Law

The development of the doctrines was started at rather different times as the American system can be said to have started on a formulation of a doctrine already in 1904 (*Northern Securities and Olsen*), or, perhaps more correctly, in 1943 (*Parker*), whereas the European development was not initiated until 1969 (*Walt Wilhelm*), or again perhaps more

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663) At the European Court of Justice, the possibility of giving dissenting and/or concurring opinions does not exist.

correctly, in 1977 (*INNO*).<sup>664)</sup> Although the development of the European doctrine was initiated much later than the American one, by now more cases have been decided at the European Court of Justice than at the U.S. Supreme Court. Both systems have in common, however, that the founding cases did not hold that the contested measures violated the analysed central provisions. Rather, quite some years had to pass before the courts held measures to be in such violation.

The overall impression is that the development of the law in both systems was never completely consistent. Furthermore, the two systems could be said to have in common that the starting point has been the establishment of a general principle governing the conflict between central competition provisions and peripheral anti-competitive measures, followed by the development of tests which would allow the courts to apply the established general principle in specific situations. The most recent cases deliver the impression of a greater and greater tendency towards an application of formalistic criteria to evaluate anti-competitive state measures under the doctrines.<sup>665)</sup> An obvious difference, on the other hand, is the US Supreme Court's tendency of focusing on the identity of the involved parties, mainly as a result of its focus on liability issues.

A major difference is that the US Supreme Court along with the development of the state action doctrine itself also established the antitrust petitioning immunity doctrine, concerning actors' influence of legislators to enact anti-competitive measures.<sup>666)</sup> The subject matter of this doctrine is in no way represented in the European development.<sup>667)</sup>

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664) The time difference between when the central competition provisions were enacted (respectively 1890 and 1957) and the introduction of doctrines (respectively 1904/1943 and 1969/1977), however, is not that large.

665) However, in the U.S., the development of this tendency has been slowed down with the recent *Ticor* Case.

666) It is noteworthy that in these cases liability issues were at stake rather than the validity itself of state measures.

667) In *Allied Tube* and *Trial Lawyers*, the antitrust petitioning immunity doctrine did not grant immunity to the conduct in question because it was unlawful in itself. Such unlawful conduct could arise due to, *inter alia*, anti-competitive agreements, which is exactly what the European doctrine is often concerned with.

### 12.5.3. Comparison of the Principles of the Doctrines

The point of departure in each legal system indeed varies. In the US, a general principle, based on values of federalism, dictates that the States have the right to enact anti-competitive measures. In Europe, on the other hand, the general principle is not literally based on values of federalism, and it rather implies that Member States are obliged to refrain from enacting measures which would detract from the effectiveness of the competition provisions.<sup>668)</sup> In other words, the point of departure is in the former system that States have the right to enact anti-competitive measures, whereas the situation is completely the opposite in the latter system. However, the application of the doctrines has demonstrated that the overall practical impact of the doctrines is the same: States beat the center. States have the right to enact anti-competitive measures.

Both courts have developed conditions which state measures have to satisfy. Among these, similarities exist. First of all, the criterion established by the European Court of Justice that a Member State be prohibited from depriving its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere contains parallels to the US Supreme Court's condition that anti-competitive policies be subject to ongoing active supervision by the State. The US Supreme Court has come further with its supervision criterion, however, as in *Ticor* it demanded not only a formal application but also a substantial examination. Furthermore, both legal systems have from time to time applied what has been referred to as the competence criterion. However, only the US Supreme Court could be said to strongly put emphasis on it. Also, both systems neglect the importance of applying an efficiency criterion. The dismissal by the US Supreme Court is nevertheless much more direct and clear than what has been the situation in Europe.

On the other hand, only the European Court of Justice focuses strongly on the existence of agreements (expressed as the prohibition against Member States requiring or favouring the adoption, or reinforcing the adoption, of illegal agreements, decisions or concerted practices).<sup>669)</sup> This development could be partially explained by the differences

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668) Some analogy to the American system is, however, apparent in an early case, namely *Cullet*, at Ground 17, where the European Court of Justice emphasises that the contested regulations are those of "State rules".

669) It could, however, with some right, be maintained that this criterion contains parallels to the *Parker* ruling that States are not allowed to give immunity to those who violate the Sherman Act by authorising them to do so or by declaring that their action is lawful, and especially

in the subject matters of cases which have been before each of the courts. In addition, only the US Supreme Court demands that anti-competitive state measures be clearly articulated and affirmatively expressed.<sup>670)</sup> Furthermore, the US Supreme Court is alone to directly take up the issue of liability, and, in this connection, to distinguish between the identity of the involved parties. There are two further observed criteria which have been applied by the US Supreme Court, but only sporadically, and which in contrast have never been addressed at the European Court of Justice. These are the criteria of compulsion and interest. Finally, only the US Supreme Court has taken into consideration the issue of antitrust petitioning and particular legal principles governing that situation.

Neither of the legal systems have provided any guidance regarding whether States can justify anti-competitive measures on grounds such as protection of culture, health, *etc.*

From the analyses of the decisions in each of the legal systems, it is possible to make the observation that both courts focus on what could be defined as a distinction between: 1) activities taking place prior to the enactment of the measure; 2) the measure itself; and 3) activities arising from the measure. The distinction may be helpful in understanding the role to be played by the dominant criteria.

With regard to the European doctrine, the three *Van Eycke* criteria may be divided amongst the three stages contained in the distinction as follows. The first criterion, which concerns the issue of whether a Member State requires or favours the adoption of agreements, *etc.*, is related to the third category of the distinction, namely, activities arising from the measure. The second criterion, which concerns the issue of whether a Member State reinforces the effects of agreements *etc.*, has primarily its focus on the first category of the distinction, namely, activities taking place prior to the enactment of the measure. Finally, the third criterion, which concerns the issue of whether a Member State deprives its own

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that States should refrain from participating in illegal agreements, *etc.* Though this part of the *Parker* ruling has not been actively applied in the case law following *Parker*. Also, in a couple of cases decided under the antitrust petitioning immunity doctrine, namely *Allied Tube* and *Trial Lawyers*, anti-competitive agreements were at stake.

670) However, lately the European delegation criterion has been read to contain a substantive test to see whether committees represent a clearly articulated state policy; see Fenger, Niels & Broberg, Morten P., "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, Number 6, p. 367. Therefore, in this regard, the difference between the two legal systems may also soon diminish.

legislation of its official character through delegation, is related to the third category of the distinction, namely, activities arising from the measure.

With regard to the American system, the two *Midcal* criteria may be divided amongst the three categories contained in the distinction in the following manner. The first criterion, which requires that a state measure is clearly articulated and affirmatively expressed, is related to the second category, namely, the measure itself. The second criterion, the one concerning supervision, could be classified as belonging to the third category, as it is related to activities arising from the measure.

It may then be noted that when considering these various criteria at their face-value, the European doctrine does not view the measure itself, *i.e.* it does not have a criterion related to the second category of the distinction, whereas the American doctrine does not view activities prior to the enactment of the measure, *i.e.* does not have a criterion related to the first category of the distinction. However, this is not the whole story, because the American antitrust petitioning immunity doctrine may be classified as belonging to the first category, *i.e.* it concerns activities taking place prior to the enactment of the measure. It may accordingly be observed that a major difference then becomes clear between the European and the American doctrines with regard to activities taking place prior to the enactment of the measure, because in the European system the focus is upon agreements, *etc.*, whereas in the American system it is upon petitioning activities. Furthermore, in the European system, such activities are in principle unlawful, whereas in the American system, they are in principle lawful.<sup>671)</sup> The difference is significant, especially if one claims that an unlawful agreement presented to a public authority, which finds it worthwhile to transfer the agreement into state law, might be considered as a kind of lobbyist activity, or at least part of such. Under all circumstances, the subsequent democratic enactment of each of the activities into law largely equalises the two situations.

With regard to the second category, the measure itself, the difference between the two systems is genuine. In the European system it is not really of significance to estimate the measure itself, only to a minor degree in connection with the application of the criteria. When understanding the American clear articulation criterion at its face-value, this European

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671) Although prior anti-competitive conduct in *Allied Tube and Trial Lawyers* was considered unlawful, this did not include the subsequent transferral thereof into state law; *i.e.* the validity of the state measure itself.

situation is not really regrettable. However, when understanding that the American clear articulation criterion has more as its true purpose the attempt to evaluate whether the measure in question really is that of the State, in order that the measure may be granted complete immunity, then the criterion appears to contain more values than what at first glance may seem to be the case.

With regard to the third category, *i.e.* the activities arising from the measure, most similarities exist between the two systems mainly due to the existence of the delegation criterion in the EU and the supervision criterion in the U.S., and the conformity of these with one another.

Altogether, quite a lot of similarities exist between the two systems, although they can not be categorised in the least as being identical.

#### **12.5.4. General Conclusions**

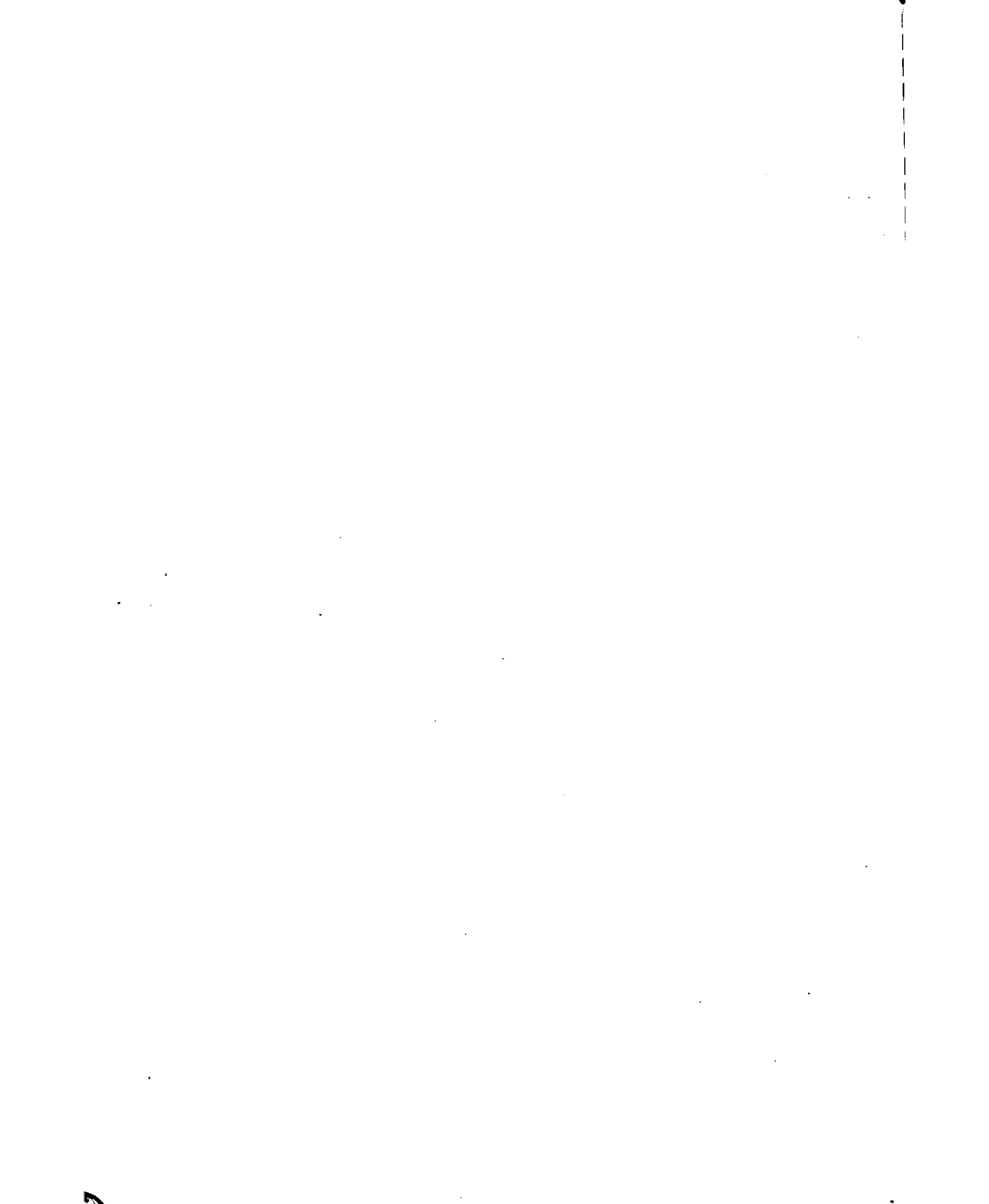
Despite the facts that the doctrines in both of the analysed legal systems have now existed for quite a long time, that many decisions have been made and that legal commentators have produced a lot of literature containing proposals for solutions to the tensions between the central competition provisions and peripheral anti-competitive measures, neither system can be characterised as being firmly settled in this regard. Rather, both systems are under constant development. In other words, the state of the law is still quite dynamic.

This reflects that the conflict is unavoidable and not easy to resolve within the traditional framework of the structures of the two legal systems. Apparently, the courts have found it too simplistic to resolve the conflict either by giving the protection of competition full and unconditional supremacy or by outlining a kind of opposite principle of supremacy according to which state measures would always be given supremacy. Rather, both courts have chosen to establish alternative solutions which may be characterised as adjustive to the facts of the actual case under scrutiny. This is one of the reasons why the applied criteria appear as rather inconsistent and consequently critical from a point of view of legal certainty.

At the same time, it must be concluded that neither of the analysed legal systems nor the comparison thereof delivers criteria which appear to point towards a solution of the tensions which must immediately be preferred to any other. Therefore, the following part



serves the purpose of further analysing the alternative solutions suggested by the two courts,  
along with other proposals.



**Part Four**

**Towards Legal Principles  
of Coherence**

The previous parts demonstrate the need to find a more suitable norm ensuring coherence between the central competition provisions and national anti-competitive state measures. Therefore, the sub-objective of this part may be formulated as the following:

Which principles exist in order to decide which state intervention is covered by Articles 3(g), 5(2) and 85 EC, such principles deriving primarily from constitutional principles and the discipline of economics, as well as from various proposals of the scholars in the field, and how are these principles to be evaluated?

The overall aim here is therefore to rationalise the present norm applied by the European Court of Justice.

This part consists of seven chapters, each concerned with an analysis of one of the selected proposals of a solution to the scrutinised tensions. The first chapter pays attention to the Treaty as an economic constitution. The second chapter deals with Article 90 EC as an alternative to control anti-competitive state measures. Then, a third chapter follows which concentrates on interest group theory, and a fourth one which is concerned with whether restraints are controlled by financially disinterested and politically accountable actors. The fifth chapter examines the theory of competition between legal orders, whereas the sixth chapter contains an analysis of the relevance of constitutional principles to the doctrine.

The final chapter in this part will draw some comparative conclusions as to the many analysed proposals of a rationalisation of the doctrine. In conformity with what was stated in *Chapter 1* as being the overall assertion of this thesis, it will here be concluded that ultimate legal principles ensuring the coherence of the two legal orders are not to be found, and it will be explained why the case law of the European Court of Justice has changed from time to time. In addition, a helpful vision will be presented.

Each chapter, with a few exceptions, is organised around the framework of firstly defining the proposal, then outlining its background and thereupon analysing it with regard

to weaknesses and strengths. On this basis follows a discussion of its legal relevance, and, finally, an evaluation as to its suitability for solving the tensions under scrutiny in this thesis.

As follows from the formulation of the above sub-objective, the focus is finding legal principles applicable to the European framework of law rather than to the American one. The role of American law (including case law) and literature is rather that of providing inspiration.

Although concerned with various theories, this part in no manner attempts to give an exhaustive account or critique in this regard. This would be an inappropriate task in the present context, and besides the point. Rather, this part is an attempt to present the theories, aiming at delivering a background understanding of the various positions maintained as solutions to the problem.

### 13. The Treaty as an Economic Constitution

A widespread perception is that the Community is based on market economic principles. As a natural consequence, expectations frequently prevail that regulation, at the level of the Community as well as of the Member States, has to be in accordance with such principles. The reality, however, is that this is seldom the case. Neither the Community, nor the Member States, are completely bound by market economic principles. This paradox is reflected in the debate connected with the doctrine concerning the interaction of Articles 3(g), 5(2) and 85 EC.

On the one hand, it is, with regard to national regulation, understandable that companies, which for instance are put in a disadvantageous situation compared to their competitors due to certain regulations' anti-competitive effects, will expect such to be condemned when relying on the market economic principles associated with the Community. In fact, it is in view of such expectations that the doctrine is likely to have arisen, *i.e.* as a weapon of companies to invoke market conditions in conformity with basic market economic principles.

In view of the lack of market economic philosophy as the sole lodestar in the context of the Community, it is, on the other hand, understandable that strong forces exist struggling against such wide application of the doctrine. Accordingly, in contrast to the direction supporting an economically based application as that reflected in the efficiency criterion,<sup>672)</sup> this other direction advocates for a narrow application. In principle, it allows all kinds of national measures despite eventual negative economic effects, unless they are contrary to Community law. However, state measures can not be found contrary to Community law due to efficiency reasons. Defenders of this latter point of view are primarily the Member States and privileged national enterprises.

The economic part of this latter defense is often based on a referral to public interest theory of regulation, according to which confidence in market regulation as both economically and politically justified is the main message. The theory holds that enactment

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672) See, *inter alia*, Chapter 8 above concerning *Conclusions to the Evolution of the European Doctrine*.

of regulation is an honest attempt of the public authority in question to promote the interest of society as a whole, and consequently to correct market failures.<sup>673)</sup> The theory is, according to Posner, based on two assumptions. The first assumption is that economic markets are extremely fragile and apt to operate very inefficiently if left alone.<sup>674)</sup> The other assumption is that regulations are costless to enact and uphold.<sup>675)</sup> It is believed that the opposite situation of non-regulation inevitably leads to abuses in the market place.<sup>676)</sup>

The ideal competitive market is traditionally described as consisting of 1) an infinite number of buyers and sellers, 2) homogeneous products, 3) free resource mobility, and 4) perfect knowledge.<sup>677)</sup> In addition to these four criteria, various other less explicit assumptions must be fulfilled if markets are to be reasonably efficient and socially tolerable.<sup>678)</sup> When any of these criteria or assumptions are not satisfied, the results are classified as the above-mentioned market failures.<sup>679)</sup> A market failure may therefore be defined as a departure of the market equilibrium allocation from the set of Pareto optimal allocations of goods and services, which again are allocations such that no consumer can be made better off without making another consumer worse off.<sup>680)</sup>

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- 673) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1303, footnote 49.
- 674) See Posner, Richard A., "Theories of Economic Regulation", *The Bell Journal of Economics and Management Science*, 1974, Volume 5, Number 2, p. 336.
- 675) See *ibid.*, at p. 336.
- 676) See Gavil, Andrew I., "Reconstructing the Jurisdictional Foundation of Antitrust Federalism", *The George Washington Law Review*, Volume 61, 1993, Number 3, p. 672.
- 677) See Cirace, John, "An Economic Analysis of the 'State-Municipal Action' Antitrust Cases", *Texas Law Review*, Volume 61, 1982, p. 491.
- 678) See *ibid.*, at p. 491.
- 679) See *ibid.*, at p. 491.
- 680) See Spulber, Daniel F., "Regulation and Markets", Cambridge (Massachusetts), 1990, p. 3. Examples of market failure are manifold. One classification consists of the following categories: 1) imperfections in competition associated with barriers to entry; 2) externalities, where transactions create costs for third parties; and 3) internalities, where costs or benefits of transactions are not reflected in the terms of the exchange, see *ibid.*, at pp. 8-9.

Although public interest theory of regulation still has a large influence on the general thinking of regulators, politicians, *etc.*, it is now universally acknowledged by modern scholars as being improper. This criticism is supported by several empirical studies of various types of regulatory schemes which indicate that they are frequently ineffective and often actually serve the interests of the regulated group at the expense of consumers.<sup>681)</sup> For example, it is stated that if the public interest theory of regulation were correct, it would mainly be in the highly concentrated industries that regulations are to be found, because it is in these industries that the danger of monopoly is greatest. This is not so at all.<sup>682)</sup>

Accordingly, the main problem with the point of view of believers in regulation is that its underlying theoretical basis today has been classified as completely wrong. The question then is whether the other point of view, according to which national anti-competitive measures should be condemned due to the prevalence of market economic principles, is better grounded. Thus, the object of this chapter is to analyse one of the most significant of the suggestions to a solution, in scholarly writing, of the tensions, namely that suggestion based on the *effet utile* doctrine of Community law, which is related to viewing the European Treaty as an economic constitution. The background is that the European competition law system has from its early years been strongly influenced by the German competition law and at the same

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681) See Page, William H., "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after *Midcal Aluminum*", *Boston University Law Review*, Volume 61, 1981, Number 5, p. 1109.

682) See Posner, Richard A., "Theories of Economic Regulation", *Bell Journal of Economics and Management Science*, 1974, Volume 5, Number 2, p. 336. The explanations for the failure of regulation are manifold. One is said to be the corruption or incompetence of the regulators. See Page, William H., "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after *Midcal Aluminum*", *Boston University Law Review*, Volume 61, 1981, Number 5, p. 1109-1110. Another reason given is that the traditional view misconceives the regulatory purpose, which really is to maximise the profits of the regulated industry, and thus arrives at erroneous policy conclusions, *ibid.* at p. 1110. A third explanation is that a regulatory apparatus is cumbersome and costly, *ibid.* at p. 1135. If the state can achieve the same result without the apparatus, it is in the taxpayers' interest to do so, *ibid.* at p. 1135. A final reason to be mentioned concerns externalities, which at least according to the so-called Coase theorem, do not necessitate government intervention. This theorem may be formulated as follows: in the absence of transactions and bargaining costs, affected parties to an externality will agree on an allocation of resources that is both Pareto optimal and independent of any prior assignment of property rights. See Mueller, Dennis C., *Public Choice II*, Cambridge, 1989, p. 28.



time by the German concept of ordo-liberalism. In that context, the European Treaty has been viewed as an economic constitution.

Among the analysed proposals in this part, this is the most extreme as it totally appraises the market economic philosophy as an ultimate good and would always mandate that national economic regulations achieve the same results as a smoothly functioning market. It may therefore be classified as based on a paradigm of conflict, because all anti-competitive regulations in principle are seen as being in conflict with the doctrine on Articles 3(g), 5(2) and 85 EC, and are therefore condemnable. Below, the proposal is further defined, then the underlying theoretical basis is outlined, followed by an analysis of the approach. Thereupon, the legal relevance is discussed. Finally, an evaluation of the position follows.

### 13.1. Definition

The present position is analogous to what was referred to as the efficiency criterion above. In *Chapter 8* above containing *Conclusions to the Evolution of the European Doctrine*, the efficiency criterion was defined to test whether the challenged measures deprived the competition provisions of their effectiveness. In principle, this criterion was understood as condemning all national legislation having anti-competitive effects.

However, it is convenient to tighten the definition of the efficiency criterion a bit further. It is appropriate to do this by relating it to the distribution of competences.<sup>683)</sup> This reveals that it is strongly based on the principle of implied competences. Taken to its most extreme form, it is assumed that the approach implies that the competence at stake is the aim itself of securing competition or de-regulation. This competence is viewed as an exclusive Community competence. The effect is that due to the principle of pre-emption and pursuant to the doctrine concerning the interaction of Articles 3(g), 5(2) and 85 EC, Member States are completely hindered from legislating in a way which would harm basic market economic principles. The objective of competition will always prevail over national objectives as Member States can not be allowed to put the pre-eminent Treaty objectives at risk, except

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683) See *Chapter 18* below concerning *The Distribution of Competences*.

when and if the Treaty provides for it.<sup>684)</sup> Member States' distortion of competition is only allowed to the extent strictly necessary for the pursuit of the national objectives which are compatible with the Treaty.<sup>685)</sup>

In addition, the position will be understood as including a rule of reason inquiry, and demands a serious economic analysis, which is specific for each individual case.<sup>686)</sup> It requires the European Court of Justice to weigh the costs and benefits of every state regulatory scheme and demands a direct assessment of the substance of the Member State's economic choices.

Pescatore is among the most radical Community lawyers in favour of the described norm.<sup>687)</sup> He clearly states that more control over Member States should be obtained and that it is unrealistic to believe that the objectives of the internal market will be achieved so long as Member States retain legislative sovereignty in the field of economic legislation.<sup>688)</sup> His major concern is that if the competition rules of the Community are to be efficient, they must deal with all competition problems, not only with those on the level of private business.<sup>689)</sup> In complete agreement with Pescatore is van der Esch, who believes that the fundamental objective of undistorted competition should be made a reality, also with regard to anti-competitive state measures. This point of view is greatly supported by another Community lawyer, Verstrynge. His fear is that the envisaged and expected positive economic benefits could not be produced without the underlying forces of free

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684) See Verstrynge, Jean-Francois, "The Obligations of Member States as Regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1989, New York, p. 17-22.

685) See *ibid.*, at p. 17-22.

686) See Waelbroeck, D., "Application des règles de concurrence du Traité de Rome à l'autorité publique", *La Revue du Marché Commun*, Volume 30, 1987, Number 303, p. 31.

687) See Pescatore, Pierre, "Public and Private Aspects of European Community Competition Law", *Fordham International Law Journal*, Volume 10, 1987, Number 3, pp. 373-419.

688) See *ibid.*, at p. 374.

689) See *ibid.*, at p. 375.

competition.<sup>690)</sup> Furthermore, many of the provisions of the Treaty would then become devoid of substance or fail to produce the required economic or legal results.<sup>691)</sup> Finally, among the radical proponents of the *effet utile* doctrine to be mentioned here, is Chung.<sup>692)</sup> He finds the recent decisions of the European Court of Justice in the field of Articles 3(g), 5(2) and 85 EC as being far too formalistic and states that legal certainty could be better served by an objective criterion composed of economic effects.<sup>693)</sup>

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690) See Verstrynge, Jean-Francois, "The Obligations of Member States as Regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1989, New York, p. 17-14.

691) See Verstrynge, Jean-Francois, "The Obligations of Member States as Regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1989, New York, p. 17-14.

692) See Chung, Chan-Mo, "The Relationship between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach", *European Competition Law Review*, Volume 16, 1995, p. 90.

693) Yet another supporter of the norm is Ehrlicke, who, however, is less radical. He maintains that all state intervention is covered by Articles 3(g), 5(2) and 85 EC unless they find their *ratio legis* in fiscal or monetary policy considerations or other fields entrusted to the Member States. See Ehrlicke, Ulrich, "State Intervention and EEC Competition Law. Opportunities and Limits of the European Court of Justice's Approach - a Critical Analysis of Four Key-Cases". *World Competition. Law and Economics Review*, Volume 14, 1990, Number 3, p. 98. Almost in accordance with this point of view is Gyselen's proposal. He suggests that all anti-competitive state measures are contrary to Articles 3(g), 5(2) and 85 EC, unless they aim at achieving genuine economic or monetary policy objectives, and that Member States must have the opportunity to justify anti-competitive regulations aimed at achieving other objectives. See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, pp. CC65-66. More recently, Reich has expressed sympathy for the general norm, however also in a less extreme manner. He maintains that state action may be measured by a test combining elements of Articles 3(g), 5(2), and 85 EC, which means that it is primarily the effect of state action on competition which provokes a negative reaction in Community law and consequently not the specific forms of action which undertakings may choose. See Reich, Norbert, "The 'November' Revolution of the European Court of Justice: *Keck, Meng and Audi Revisited*", *Common Market Law Review*, Volume 31, 1994, Number 3, p. 488.

## 13.2. Background

The present position is rooted in the *effet utile* doctrine of Community law, which originates from the perhaps bygone "happy" days of Community law where the purpose of integration would justify a wide interpretation of the Treaty.<sup>694)</sup> Accordingly, among various alternatives of interpretation, the one which would ensure an effective application of the Treaty should be chosen. In other words, the pursuance of the aims stated in the Treaty would always be given major emphasis. Therefore, the Community legal order was pictured in the direction of an all-encompassing liberalisation, in fact so that Community law was used as a broad leverage to deregulation.<sup>695)</sup>

With regard to the "traditional" application of the competition provisions in the Treaty, the *effet utile* doctrine implies that these are interpreted in consideration, especially of Article 3(g) EC. As a mean of interpretation, the economists' recommendations with regard to competition should be taken into consideration.

Moving the focus once again, this time from the "traditional" application of the competition provisions to anti-competitive state measures, proponents of the *effet utile* doctrine advocate for a norm having a constitutional character and claim that the test is the

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694) Rasmussen explains as follows: "*Effet utile translates directly to useful effect, however it loses much of its substantive meaning in the translation. While the notion in English has no life and blood of its own, the judges loaded the French concept with pro-Community ideology and values so as to offer strong interpretative guidance to the initiated elite; not as regards the determination of disputes over legal technicalities (to which most of other methods of interpretation were attuned) but in terms of societal orientation. Vested with a quasi-total interpretative monopoly, the judges - or their majorities - had it in their power to choose the right directions... Those were the directions in which Community law and the Community's legal system ought to develop. These judges would add that their heavy reliance on the effet utile and of teleology was not a result of any discretion on their part: their hands and minds were bound to seek out and translate into operational law the effet utile. The Court, the judges explained, was compelled by the very Treaty to do so. It had, on the one hand, to give effect to the Preamble's 'ever closer Union' telos; on the other, Article 4 made it the Court's duty to carry out the tasks of the Community... If the politicians did not accomplish more union, the judges would. Hence, if one would accept these explanations on face value, all legal choices were made and done within the realm of law...*" See Rasmussen, Hjalte, "The Court of Justice. On Judicial Authority, Legitimacy and Policymaking", *Draft of not yet published book*, 1997, p. 18.

695) See Reich, Norbert, "The 'November' Revolution of the European Court of Justice: *Keck, Meng and Audi Revisited*", *Common Market Law Review*, Volume 31, 1994, Number 3, pp. 480-481.

real effect of the national measures on competition in the market. Thus, in each case, the effects of state intervention must be uncovered by a concrete analysis of the market and its distortion, and the more this market is distorted by state intervention, the more this measure is likely to be contrary to the doctrine concerning the interaction of Articles 3(g), 5(2) and 85 EC.<sup>696)</sup> In the name of efficiency many national regulations are likely to be questioned.

The *effet utile* doctrine has to be understood in the light of an orientation towards a Community Economic Constitution.<sup>697)</sup> In other words, behind the doctrine is a normative theory which is presupposed and which claims an economic order in its own right.<sup>698)</sup> This has to be understood in light of European competition law being based on *ordo-liberalism*, which was the dominant version of neo-liberalism in Germany at the time of the Treaty's foundation.<sup>699)</sup>

*Ordo-liberalism* originates from the members of the so-called *Ordo-Kreis* which was a group of German liberal economic and legal thinkers, who began their activities as opponents of the Nazi regime.<sup>700)</sup> They highly influenced post-war economic policy in

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696) See Ehrlicke, Ulrich, "State Intervention and EEC Competition Law. Opportunities and Limits of the European Court of Justice's Approach - a Critical Analysis of Four key-Cases", *World Competition - Law and Economics Review*, Volume 14, 1990, Number 3, p. 98.

697) See Reich, Norbert, "The 'November' Revolution of the European Court of Justice: *Keck, Meng and Audi Revisited*", *Common Market Law Review*, Volume 31, 1994, Number 3, pp. 479-483.

698) See Joerges, Christian, "European Economic Law, the Nation-State and the Maastricht Treaty" in *The European Union Treaty*, Edited by Dehousse, Renaud, Munich, 1994, pp. 41-42.

699) See Gerber, David J., "The Transformation of European Community Competition Law?", *Harvard International Law Journal*, Volume 35, 1994, Number 1, p. 104, footnote 27.

700) See Peacock, Alan & Willgerodt, Hans, "Preface", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. xxi. The members of this *Ordo-Kreis* are at times referred to as members of the Freiburg School; see Streit, Manfred E., "Economic Order, Private Law and Public Policy. The Freiburg School of Law and Economics in Perspective", *Journal of Institutional and Theoretical Economics (JITE)*, Volume 148, 1992, p. 675. Leading members have been, among others, *Böhm, Eucken, Hayek, Meyer, Miksch, Müller-Armack, Röpke, and Rüstow*.

Germany.<sup>701)</sup> The term *ordo* is Latin and indicates that the ordo-liberals were interested in determining the appropriate economic and constitutional "order" or "system". The concept also indicates that the ordo-liberals believed in a holistic point of view, which extends far beyond the confines of the economics of the market.<sup>702)</sup> The holistic view implies that all economic activity is interdependent.<sup>703)</sup> Therefore, agricultural policy, company law, *etc.*, has to be viewed as comprising component systems which together make up the whole economic system.<sup>704)</sup> In this regard, constant *ad hoc* treatment of economic problems may obscure the economic system and should be avoided.<sup>705)</sup>

It is characteristic that ordo-liberals, explicitly or implicitly, take value judgments as a starting point and as a standard for qualifying facts and relationships.<sup>706)</sup> In fact, they treat economics as a moral science.<sup>707)</sup> The overall aim is the promotion of a good society.<sup>708)</sup>

One of the key concepts of ordo-liberals is the preservation of individual freedom. They maintain that the spirit of freedom has helped to bring about industrialisation, yet this

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- 701) See Peacock, Alan & Willgerodt, Hans, "Preface", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. xxi.
- 702) See Peacock, Alan & Willgerodt, Hans, "German Liberalism and Economic Revival", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 4.
- 703) See Eucken, Walter, "What Kind of Economic and Social System?", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 30.
- 704) See *ibid.*, at p. 30.
- 705) See *ibid.*, at p. 38.
- 706) See Peacock, Alan & Willgerodt, Hans, "German Liberalism and Economic Revival", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 5.
- 707) See *ibid.*, at p. 5.
- 708) See Peacock, Alan & Willgerodt, Hans, "Overall View of the German Liberal Movement", in *German Neo-Liberals and the Social Market Economy*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 8.

industrialisation has become a serious threat to freedom.<sup>709)</sup> The kind of economic control, they claim, would determine the individual's range of freedom and his right to manage his own affairs.<sup>710)</sup> Consequently, the preferred economic system is the system which ensures the freedom of individuals.

The ordo-liberals do not find the over-optimistic political theory of *laissez-faire* to be acceptable.<sup>711)</sup> They rather believe that it may be necessary to intervene actively in the economic process in an attempt to maintain some control, but without, on the other hand, obtaining other extremes such as the emergence of dictatorship.<sup>712)</sup> However, compared to conventional economic theorising, the ordo-tradition would lend itself much less to interventions in the process of market coordination.<sup>713)</sup> Their recommendation is that the rule of law together with the legal and social framework must circumscribe both spontaneous processes and the activities of the State.<sup>714)</sup> Accordingly, the development of the legal framework can not be left to the mercy of irrational political processes, but shall be guided by principles which pay regard to the "interdependence of orders".<sup>715)</sup>

Ordo-liberals accept the market economy as indispensable for a modern free society.<sup>716)</sup> Among the principles to be observed are, in general terms, the following: free

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709) See Eucken, Walter, "What Kind of Economic and Social System?", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 34.

710) See *ibid.*, at p. 36.

711) See Peacock, Alan & Willgerodt, Hans, "German Liberalism and Economic Revival", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 4.

712) See *ibid.*, at p. 4.

713) See Streit, Manfred E., "Economic Order, Private Law and Public Policy. The Freiburg School of Law and Economics in Perspective", *Journal of Institutional and Theoretical Economics (JITE)*, Volume 148, 1992, p. 677.

714) See Peacock, Alan & Willgerodt, Hans, "German Liberalism and Economic Revival", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 4.

715) See *ibid.*, at p. 4.

716) See *ibid.*, at p. 6. Peacock & Willgerodt point out that there is a certain academic debate among the ordo-liberals about why the market economy should be defended, in particular whether the reason is that it is preferable due to its efficiency or to its expression of

and open competitive markets, monetary stability, private ownership of the means of production, freedom of contract, responsibility for economic decisions and constancy or stability of economic policy.<sup>717)</sup> At the same time, the following regulating principles should be pursued: an anti-monopoly and anti-cartel policy, some regulation of income distribution and measures to correct substantial market failures.<sup>718)</sup>

Decentralisation not only of government but also of private enterprise is favoured by the ordo-liberals.<sup>719)</sup> With regard to decentralisation of government, they find due to historical evidence that it is dangerous to grant even a democratically legitimised State almost unlimited authority in the field of economic policy and that if individual freedom is to be preserved, the central task is to establish and secure an economic order of which the State is neither the master nor the servant.<sup>720)</sup> Minimal public intervention and maximal competition is sought. In a country where parliamentary democracy prevails, the control of the production process will be transferred more and more into the hands of monopolistic and partially monopolistic power groups.<sup>721)</sup> Therefore, monopolies will exert more and more political influence because of their economic power, and the opinion of voters will have less and less influence on the politicians.<sup>722)</sup> They are therefore against unrestricted power of

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freedom.

717) See Peacock, Alan & Willgerodt, Hans, "German Liberalism and Economic Revival", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 7.

718) See *ibid.*, at p. 7.

719) See *ibid.*, at p. 6.

720) See Streit, Manfred E., "Economic Order, Private Law and Public Policy. The Freiburg School of Law and Economics in Perspective", *Journal of Institutional and Theoretical Economics (JITE)*, Volume 148, 1992, p. 691.

721) See Eucken, Walter, "What Kind of Economic and Social System?", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 31. This article is a translation of the original German article from 1948.

722) See Eucken, Walter, "What Kind of Economic and Social System?", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 32.



private pressure groups.<sup>723)</sup> The reason may be understood from the following warning of Eucken delivered in 1952:

*"He who grants the first privilege should know that he strengthens the power and provides the basis from which the second privilege will be obtained, and that the second privilege will provide the basis to battle for a third one."*<sup>724)</sup>

The ordo-liberals operate with a broad concept of an economic constitution. This concept was defined by Böhm, Eucken and Grossmann-Doerth in their *Ordo Manifesto of 1936*:

*"...the economic constitution must be understood as a general decision as to how the economic life of the nation is to be structured. Adherence to this idea alone provides the means of acquiring truly reliable and conclusive rules for interpreting many aspects of public or private law. This applies not only to the basic laws, but also particularly to special laws relating to economic matters."*<sup>725)</sup>

In this regard, the ordo-liberals believe that it is pointless to devise constitutions without regard for the economic system which exists.<sup>726)</sup> The reason is that the economic system is capable of affecting the constitutional system quite significantly.<sup>727)</sup>

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723) See Peacock, Alan & Willgerodt, Hans, "German Liberalism and Economic Revival", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 6.

724) As quoted by Streit, Manfred E., "Economic Order, Private Law and Public Policy. The Freiburg School of Law and Economics in Perspective", *Journal of Institutional and Theoretical Economics (JITE)*, Volume 148, 1992, p. 691.

725) See Böhm, Franz, Eucken, Walter & Grossmann-Doerth, Hans, "The Ordo Manifesto of 1936", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 24. This article is a translation of the original German article from 1936.

726) See Eucken, Walter, "What Kind of Economic and Social System?", in *Germany's Social Market Economy: Origins and Evolution*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 32.

727) See *ibid.*, at p. 32.

In relationship to the European Treaty, the concept of an economic constitution has influenced its interpretation. In this regard, it has been understood as committed to the advancement of market integration and the achievement of the principles of a market economy.<sup>728)</sup> The net effects of European integration would therefore be liberalisation and deregulation.<sup>729)</sup>

### 13.3. Analysis

The following analysis discusses advantages and disadvantages of the approach based on the *effet utile* doctrine. Topics to be evaluated are: 1) consistency between the norm and its underlying theoretical basis; 2) rule of reason, formalistic, or *per se* criteria; and 3) loss of competence in the economic field.

#### 13.3.1. Consistency between the Norm and Its Underlying Theoretical Basis?

Above, it was pointed out that the general norm based on the *effet utile* doctrine has to be perceived in the light of a movement toward a Community Economic Constitution and, consequently, in light of the theory of ordo-liberalism. However, it is likely that the norm, as defined above, is in fact not completely in concurrence with its underlying theory.

It is understood from the above general outline of the theory that the ordo-liberals are in favour of free and open competitive markets and that they would only to a minor degree accept interventions in the process of market coordination. Therefore, at first sight it appears that the approach based on the *effet utile* doctrine in this respect is completely in accordance with this theory.

However, from the concepts developed in a recent piece of work accomplished by Streit & Mussler, comparing the recommendations of this theory with the original Treaty

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728) See Joerges, Christian, "European Economic Law, the Nation-State and the Maastricht Treaty", in *Europe after Maastricht. An Ever Closer Union?*, Edited by Dehousse, Renaud, Munich, 1994, p. 38.

729) See Sauter, Wolf, "The Relationship Between Industrial and Competition Policy under the Economic Constitution of the European Union with a Case Study of Telecommunications", *Thesis submitted for assessment in a view to obtaining the degree of Doctor of the European University Institute*, Florence, 1995, p. 36.

of Rome and the Treaty of Maastricht of today, a different result may appear. Here, two types of approaches to economic integration are distinguished. The first approach is labelled "integration by intervention" or "integration from above".<sup>730)</sup> The second approach is labelled "integration by competition" or "integration from below".

The first approach, integration by intervention, is negative in the point of view of the authors in the sense that it is contrary to the framework delivered by ordo-liberals. It implies that the market system is viewed as an instrument which has to serve collective purposes.<sup>731)</sup> Therefore, it can be shaped and reshaped by rules and regulations whenever perceived results are considered politically unacceptable. It results in centralisation of decision-making and harmonisation of rules and regulations, but also in a preservation of privileges granted to national interest groups.

The second approach, integration by competition, is positive in the point of view of Streit & Mussler and in conformity with ordo-liberal recommendations. Here, the market system is viewed as a self-organising system which has no purpose on its own.<sup>732)</sup> It is consequently left to the market participants to find out what serves their interests best and it is left to them to choose between those national institutional systems which suit them the best. This unrestricted competition within the Common Market makes it difficult for national interest groups to sustain the privileges which have been granted them.

To relate the general norm based on the *effet utile* doctrine to these two approaches of integration is not without difficulty. On the one hand, at first sight, it may be claimed that it facilitates integration, through competition, from below as it removes national legislation which is anti-competitive and which most likely has been based on the efforts of national interest groups to gain special privileges.

On the other hand, it may be maintained that it leads to integration through intervention because much national legislation will be condemned and accordingly, at least

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730) See Streit, Manfred E. & Mussler, Werner, "The Economic Constitution of the European Community - From 'Rome' to 'Maastricht'", *European Law Journal*, Volume 1, 1995, Number 1, pp. 5-30. Also see the comments on the article by Ehlermann, Claus-Dieter and Hancher, Leigh, as well as the reply to these comments by Streit & Mussler in *European Law Journal*, pp. 84-91.

731) See *ibid.*, at p. 12.

732) See *ibid.*, at p. 12.

in part, will be substituted by central, harmonised regulations. Regulations at the European level are likely to be far too detailed and largely enacted through a strong, and according to the ordo-liberals, negative influence from interest groups, agencies, *etc.* In this regard, Streit & Mussler conclude that the general evolution of the Treaty revisions develops in the direction of integration by intervention. Also, as already stated in the introduction to this chapter, the Community itself is not completely bound by market economic principles.<sup>733)</sup> One could fear that national anti-competitive regulation would be substituted by even more anti-competitive regulation by the Community. As an already existing example, one need only mention the Community's agricultural regulatory regime. On the other hand, if the Community does not substitute national regulations, one could fear that a legislative vacuum would occur. Generally, the approach is likely to result in a centralisation of decision-making. Furthermore, it may be found to eliminate competition from below, because the variety of national legislation is reduced and, accordingly, the competition of regulations from different legal systems is removed.

Thus, the proponents of the position under scrutiny here have based it on a point of view of the market system as that entailed in the first approach of integration. They do not, therefore, see competition as a process which deals with the endemic lack of knowledge resulting from the high and changing complexity of a market system which produces results that cannot be known in advance.<sup>734)</sup> Instead, the market is viewed as a device to obtain specific results in an optimal way, provided that the relevant "data", are given, whereby these "data" relevant to the market participants, can also include conditions set by policy makers to achieve the desired results.<sup>735)</sup> Consequently, the approach analysed here is hardly reconcilable with a market process that leaves to private agents and competition the task of

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733) See *e.g.* Falke, Josef & Joerges, Christian, "Rechtliche Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationaler und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung", *Gutachten erstellt im Auftrag des Büros für Technikfolgen - Abschätzung des Deutschen Bundestages*, Bremen, 1995, pp. 141f and 149f; or van der Esch, B., "Loyauté fédérale et subsidiarité a propos des arrêts du 17 Novembre 1993 dans les affaires C-2/91 (Meng), C-245/91 (Ohra) et C-185/91 (Reiff)", *Cahiers de droit Européen*, Volume 30, 1994, Numbers 5-6, p. 542.

734) See Streit, Manfred E. & Mussler, Werner, "The Economic Constitution of the European Community - From 'Rome' to 'Maastricht'", *European Law Journal*, Volume 1, 1995, Number 1, p. 25.

735) See *ibid.*, at p. 25.

identifying viable industrial and technological developments.<sup>736)</sup> The approach often replaces national regulatory traditions with interventionism at the European level, a replacement which due to the EU's immature and incomplete ways of enacting and designing regulations is not exactly better. Deregulation is, in other words, not necessarily achieved by moving the level of regulation. In this regard, Joerges points out that European interventions in national legal systems are risky because the replacement of legal rules may affect the functioning of legal institutions, and because the new legal regimes may operate in social vacuums and then remain either useless or counterproductive. Accordingly, legal integration may generate unintended and uncontrollable disintegrative effects at the national level.<sup>737)</sup>

Consequently, it would be fair to conclude that a most serious critique of the general norm is that, as claimed, it may not truly be consistent with the recommendations of the ordo-liberals. One could suspect that the Community lawyers in favour of a Community Economic Constitution have most likely misunderstood its underlying theory because they have focused too much on one of its dimensions, namely competition, or, one could say, efficiency, and this even from a more conventional economic theoretical point of view.<sup>738)</sup> In this light, it may be contested that the function of the concept of a Community Economic Constitution really, as for instance pointed out by Reich, requires a strong and not a weak Community involvement in trade practices law in order to allow for free access to and free choice in markets.<sup>739)</sup>

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736) See *ibid.*

737) See Joerges, Christian, "The Process of European Integration and the 'Denationalization' of Private Law", in *New Directions in Business Law Research*, Edited by Dahl, Børge & Nielsen, Ruth, Copenhagen, 1996, pp. 82-83.

738) Möschel points out, in this regard, that the goal of competition policy according to ordo-liberals is to secure individual freedom of action. Efficiency therefore is not considered as an ultimate goal, but is only seen as derived from and indirect of the goal of freedom, because it results generally from the realisation of individual freedom. See Möschel, Wernhard, "Competition Policy from an Ordo Point of View", in *German Neo-Liberals and the Social Market Economy*, Edited by Peacock, Alan & Willgerodt, Hans, London, 1989, p. 146.

739) See Reich, Norbert, "The 'November' Revolution of the European Court of Justice: *Keck, Meng and Audi Revisited*", *Common Market Law Review*, Volume 31, 1994, Number 3, p. 492.

### 13.3.2. Rule of Reason, Formalistic, or *Per Se* Criteria

The general norm calls for a discussion of advantages and disadvantages of a rule of reason test applied to distinguish justified from excessive regulation, as opposed to more formalistic criteria, such as the American supervision criterion, or *per se* criteria, understood as prohibiting certain kinds of national measures, *e.g.* resale price maintenance schemes or licensing regulation.

Rule of reason tests are traditionally believed to be more correct, closer to the truth than the other two kinds of criteria. A guarantee of a correct and exact outcome of a case in economic terms should therefore exist. Unfortunately, rule of reason tests are very difficult to apply. Often courts are not equipped for judgments in the field of economics, and experts - and the problems therewith connected - are invited. It takes a long time to perform a rule of reason test and it is consequently quite expensive. Serious issues of burden of proof are also raised. In addition, it has to be decided which economic theory or even sub-theory to apply. Furthermore, it is difficult to tell exactly how the effects on the market should be registered and, in that context, how in practice to transfer economic theories into an estimation of national measures' effect on competition. In the case of the European Court of Justice, this pushes it toward a more marginal role in the system because it is not in a position generally to carry out such analysis itself; instead it increasingly must rely on the Commission for the economic facts and limit itself to assessing the adequacy of the Commission's procedures in making such evaluations.<sup>740)</sup>

The rule of reason test has been presented as a test of comparing the pre-eminent objectives of the Treaty with the concerned national objectives.<sup>741)</sup> This version is criticised by various scholars, because it would have the European Court of Justice either rely

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740) See Gerber, David J., "The Transformation of European Competition Law?", *Harvard International Law Journal*, Volume 35, 1994, Number 1, p. 128. It shall be emphasised that already in the *Consten* Case, the European Court of Justice stressed as follows: "*Besides, for the purpose of applying Article 85(1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition*"; see Joined Cases 56 and 58/64, *Établissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*, Judgment of 13 July 1966, [1964] E.C.R. 585.

741) See Verstryngne, Jean-Francois, "The Obligations of Member States as regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1989, New York, pp. 17-21 - 17-22.

on the objective of the law as asserted by the State or ascertain the true purpose.<sup>742)</sup> Moreover, the former would encourage the Member States to evade Article 5 EC simply by stating, for example, a fiscal purpose even though it is minor or nonexistent, whereas the latter would involve problems of evidence, standards of intent, multiple purposes, *etc.*<sup>743)</sup> This critique is quite relevant and a rule of reason test should definitely not be designed as a test of objectives against objectives, but primarily as a test of the objectives of the Treaty against the effects of national measures.

In contrast, formalistic criteria, which often are presented as rationalisations or simplifications, appear as more plausible and are more suited to application by courts because they allow decisions to be made on the basis of documentary analysis.<sup>744)</sup> In reality, however, they turn out to be at the origin of increased uncertainty, and therefore increased numbers of preliminary rulings.<sup>745)</sup> Moreover, it is relevant to ask whether Community law is so simple that it is possible to solve conflicts on the basis of simple formalistic criteria. Also, formalistic criteria seek the same results as rule of reason tests but due to their indirect way of measurement the outcome will, in the end, sometimes be the opposite.

With regard to *per se* criteria, if limited to mere forms of regulations, these contain a mix of the rule of reason tests and the formalistic criteria, and are often more preferable than the formalistic criteria. However, as stated by Easterbrook, some methods of regulation may be worse, for both consumers and regulated firms, than other methods, but it is usually hard to tell which method of regulation is best.<sup>746)</sup>

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742) See especially Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, pp. 23-24.

743) See Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, pp. 23-24.

744) See Gerber, David J., "The Transformation of European Competition Law?", *Harvard International Law Journal*, Volume 35, 1994, Number 1, p. 128.

745) See van Gerven, Walter, "The Role and Structure of the European Judiciary Now and in the Future", in *Reforming the Treaty on European Union. The Legal Debate*, The Hague, 1996, pp. 221-236; or Reich, Norbert, "Competition between Legal Orders: A New Paradigm of Law?", *Common Market Law Review*, Volume 29, 1992, p. 9.

746) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law & Economics*, Volume 26, 1983, Number 1, p. 32.

Altogether, the alternatives to the sophisticated rule of reason test contains at least as serious imperfections as the test itself. Therefore, it is difficult to say that the method is better or worse than its alternatives. Furthermore, its advantages are so great that this characteristic of the *effet utile* doctrine is an asset.

### 13.3.3. Loss of Competence in the Economic Field

It could, with a great deal of right, be maintained that the *effet utile* doctrine collides with the principle of enumerated competences.<sup>747)</sup> From this point of view it is understandable that certain scholars caution that this general norm implies that Member States would no longer be able to enact anti-competitive legislation and would therefore no longer be able to regulate their economies, which again would be contrary to the "federal" idea.<sup>748)</sup>

Proponents, on the contrary, defend themselves by stating that not all economic regulation distorts or eliminates competition, or at least totally eliminates competition.<sup>749)</sup> However, the reality is rather that the majority of Member States' measures have the potential of eliminating competition.<sup>750)</sup> This indeed represents a disadvantage of the approach. A

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747) See Chapter 18 below concerning *The Distribution of Competences*.

748) See e.g. Marengo, Giuliano, "Competition between National Economies and Competition between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, Spring 1987, Number 3, pp. 439-440; or Waelbroeck, "Applications des règles de concurrence du Traité de Rome a l'autorité publique", *La Revue du Marché Commun*, Volume 30, 1987, Number 303, p. 31.

749) See e.g. Verstrynge, Jean-Francois, "The Obligations of Member States as Regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1989, New York, p. 17-18; or Pescatore, Pierre, "European Community Competition Law - A Rejoinder by Judge Pescatore", *Fordham International Law Journal*, Volume 10, 1987, Number 3, p. 445.

750) See e.g. Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law & Economics*, Volume 26, 1983, Number 1, p. 23; Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, p. 491, footnote 32; Hoffman, Alan B., "Anti-competitive State Legislation Condemned Under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go After Van Eycke?", *European Competition Law Review*, Volume 11, 1990, Number 1, pp. 23-24; Jorde, Thomas M., "Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism", *California Law Review*, Volume 75, 1987, Number 1, p. 227; or Marengo, Giuliano,



compromise could of course be, as suggested by *Slot*, to accompany the approach by safeguard clauses similar to those of Article 36 EC and the rule of reason test.<sup>751)</sup>

To sum up, the overall impression of the analysis accomplished in this section is that considerable advantages as well as disadvantages are connected with it. No doubt, if it were to be applied, it would certainly need further refinement.

#### 13.4. Legal Relevance

Below, the legal relevance of the general norm will be outlined, firstly with an analysis of the general system of the Treaty, followed by an analysis of the case law of the European Court of Justice. The focus is whether there is legal basis at all to claim the applicability of the position. In this regard, it should be pointed out that the European Court of Justice, in opposition to the US Supreme Court, has not yet clearly rejected the relevance of standards such as efficiency.<sup>752)</sup>

##### 13.4.1. Support in the General System of the Treaty?

The supporters of the *effet utile* doctrine base their arguments in support of its justification on what could be referred to as the system of the Treaty. Pescatore, Verstrynge,

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"Competition Between National Economies and Competition Between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, Spring 1987, Number 3, p. 421.

751) See Slot, Piet Jan, "The Application of Articles 3(f), 5 and 85 to 94 EEC", *European Law Review*, Volume 12, 1987, Number 3, p. 187.

752) See the *Exxon Case*, 437 US 117, at 133, where the US Supreme Court pointed out that "a conflict between the statute and the central policy of the Sherman Act - our 'charter of economic liberty' cannot itself constitute a sufficient reason for invalidating the Maryland statute"; or the *Ticor Case*, Section II, where the Supreme Court explained that the "...decisions make clear that the purpose ...is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices".

and van der Esch are among the most radical proponents of this point of view.<sup>753)</sup> Their arguments will be presented in the following paragraphs.

Pescatore's main vision is that, on the one hand, the rules on competition are applicable to Member States, and, on the other hand, the rules on free movement are likewise binding on undertakings.<sup>754)</sup> Systematic control of Member States' anti-competitive activities is viewed as a necessary task to be fulfilled by the Community.<sup>755)</sup> This is, *inter alia*, claimed to be supported by the preamble's guarantee of "fair competition" and Article 3's reference to the aim of undistorted competition as well as to the broad reading of Articles 3(g), 5(2) and 85 EC as already explained in *Chapter 2* above concerning *The Individual Application of Articles 3(g), 5(2) and 85-86 EC Respectively*.

Verstrynge is primarily concerned with whether the competition provisions are only applicable to undertakings or also include Member States. He also postulates that competition should not be eliminated by national measures.<sup>756)</sup> Likewise, he finds support in the general system of the Treaty, in the objectives of the Community and in various other provisions, especially Articles 6, 90, 101 and 102 EC. He states that the particular rules of the Treaty are to be seen as instruments to achieve the particular objectives of the Treaty which include the institution of a system ensuring that competition in the common market is not distorted.<sup>757)</sup> Furthermore, Member States cannot render ineffective the competition

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753) See *Section 13.1.* above concerning *Definition*. In that section, also proponent *Chung* was mentioned. His arguments with regard to the legal basis of the norm are primarily based on Article 90 EC. These will be further analysed in *Chapter 14* below concerning *Control of Anti-Competitive State Measures Through Article 90 EC*.

754) See Pescatore, Pierre, "Public and Private Aspects of European Community Competition Law", *Fordham International Law Journal*, Volume 10, 1987, Number 3, pp. 379-380 or pp. 416-417. In general, *Waelbroeck* shares the views of *Pescatore*.

755) See Pescatore, Pierre, "Public and Private Aspects of European Community Competition Law", *Fordham International Law Journal*, Volume 10, 1987, Number 3, *e.g.* p. 416.

756) See Verstrynge, Jean-Francois, "The Obligations of Member States as Regards Competition in the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1989, *inter alia* p. 17-42.

757) See *ibid.*, at p. 17-13.

system of the Treaty except to pursue other non-economic or non-Treaty related objectives.<sup>758)</sup>

Finally, van der Esch bases his arguments in favour of a prohibition against Member States' enactment of measures distorting competition mainly on the constitutional rank and importance of the objective stated in Article 3(g) EC. The argument therefore goes that commitment of the Treaty to undistorted competition reaches far beyond the specific provisions such as Articles 85 and 86 EC.<sup>759)</sup>

In particular Pescatore's (to a certain degree supported by Verstrynge and van der Esch) argumentation of the general system of the Treaty in favour of an *effet utile* norm, is, however, flawed, and indeed appears more as a combination of manipulation and imagination.<sup>760)</sup> In other words, sometimes Pescatore, in particular, presents such a reading of the Treaty as a matter of fact, and at other times admit that much has to be changed in order to realise such a reading. Generally, their arguments are not convincing. As Marengo puts it, Pescatore artificially forces the provisions of the Treaty to express what plainly they do not say.<sup>761)</sup> The same could to a large degree be said about Verstrynge and van der Esch's approach.

To this should also be added the arguments of Bach, who maintains that the general norm would lead to an elimination of the fundamental distinction between rules governing state measures and those governing behaviour of companies, which is not

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758) See *ibid.*, at p. 17-22.

759) See van der Esch, Bastiaan, "The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof", *Fordham International Law Journal*, Volume 11, 1988, Number 2, p. 415.

760) For further elaboration of this statement, see in particular *Chapter 18* concerning *Distribution of Competences*.

761) See Marengo, Giuliano, "Competition Between National Economies and Competition Between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, Spring 1987, Number 3, p. 443.

acceptable.<sup>762)</sup> In addition, Bach indicates that it is certain that Member States are entitled to regulate and intervene in the economy.<sup>763)</sup>

In conclusion, little basis is found in the general system of the Treaty to go as far as condemning all kinds of anti-competitive state measures. It has to be remembered anyway that competition is not the only aim contained in the Treaty, and perhaps after all not the most important.<sup>764)</sup>

#### 13.4.2. Support in the Case Law?

The supporters of the general norm base their point of view primarily on the *Leclerc* Case and secondarily on the *Cullet* Case.<sup>765)</sup> It is quite controversial whether it is even at all correct to rely on the *Leclerc* Case.

The matter under discussion in *Leclerc* is Ground 15, in which the European Court of Justice, after having stated in the first sentence of the paragraph that there was no "traditional" infringement of Article 85 EC, pointed out as follows:

*"Accordingly, the question arises as to whether national legislation which renders corporate behaviour of the type prohibited by Article 85(1) superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of Article 85 and is therefore contrary to the second paragraph of Article 5 of the Treaty."*<sup>766)</sup>

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762) See Bach, Albrecht, "Case C-185/91 Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG; Case C-2/91, Meng; Case C-245/91, OHRA Schadeverzekeringen NV", *Common Market Law Review*, Volume 31, Number 6, 1994, p. 1371.

763) See *ibid.*

764) See, *inter alia*, Articles 2 and 3 EC.

765) For a thorough analysis of these cases, see *Chapter 4* above concerning *Towards the Formulation of a Test for Application of the General Principle*.

766) See the *Leclerc* Case, at Ground 15. The quotation represents what above was referred to as the second prong of the *Leclerc* test.

As explained by Slot, the argument goes that as the first sentence of the paragraph seems to exempt the contested national measure since it does not require agreements to be concluded and as the European Court of Justice nevertheless in the quoted second sentence continues to examine the measure, then the Court can only be regarded as having intended that the norm contained in the quoted paragraph be a general one.<sup>767)</sup> Without repeating that which has already been said above under the analysis of the case itself, it suffices in the present context to stress that the European Court of Justice in this paragraph certainly did introduce a criterion implying a broader application than merely requiring the existence of agreements, decisions or conduct unlawful under Article 85 EC. In other words, it is correct to assume that the norm was presented by the quoted paragraph.<sup>768)</sup>

The critics of such an interpretation of the *Leclerc* Case in support of the existence of the approach, however, point out that the Court never answered the question it had raised itself.<sup>769)</sup> Consequently, they say, the quoted passage should be interpreted as non-existing. This, however, as stated above under the analysis of the case is certainly an exaggeration. Rather, the logical consequence of the Court's decision is that the Court intended to answer its own question in the affirmative.

What the supporters of the norm seldom point out, and which nevertheless is of great significance, is that the application of the norm in *Leclerc* was limited by an examination based on the distribution of competences. Accordingly, although a national measure is condemned as interfering with Articles 3(g), 5(2) and 85 EC due to the norm, it might be acceptable after all if the competence belongs to the Member State. In *Leclerc*, the relevant competence was most likely viewed as shared.<sup>770)</sup> Until the Community has

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767) See Slot, Piet Jan, "The Application of Articles 3(f), 5 and 85 to 94 EEC", *European Law Review*, Volume 12, 1987, Number 3, p. 186.

768) As a supporter of a broad interpretation of *Leclerc*, see van der Esch, "The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof", *Fordham International Law Journal*, Volume 11, 1988, Number 2, p. 421.

769) As a supporter of a restricted interpretation of *Leclerc*, see Marengo, Giuliano, "Competition between National Economies and Competition between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, Spring 1987, Number 3, p. 438-442.

770) See Chapter 18 below concerning *Distribution of Competences*.

enforced common rules, the Member State has competence over the field in question. In *Leclerc*, as there was no Community policy enacted in the field of book pricing, the Member State still had the competence. This was why the Member State despite the *effet utile* doctrine could enact an anti-competitive law.

The claim that the norm was applied in the *Cullet* Case, decided a few weeks after *Leclerc*, is justified to a certain degree. The European Court of Justice did in fact make a referral to the norm. On the other hand, the outcome of the application of the criterion was that the Court approved of a strongly anti-competitive measure. Therefore, the case is not truly supportive of the *effet utile* point of view.

The conclusion to be drawn from this short analysis of the two cases in which it is claimed that the norm was applied, is that the norm is in no way strongly manifested in the case law of the European Court of Justice. This is especially so due to the doubt as to whether the Court in *Leclerc* answered its question raised in Ground 15 and to the fact that the Court's referral to the norm in *Cullet* was undermined by the outcome of the application of the norm, *i.e.* that a very anti-competitive measure was not condemned.

This point of view is furthermore supported by the fact that the Court in the cases to follow *Leclerc* and *Cullet* seemed to have abandoned the general norm completely. This is especially so in *Libraires*, a case factually almost identical to *Leclerc*, where the Court did not even in its resumé of *Leclerc* refer to the approach.

Also, prior to the final judgments of the recent "November" Cases, the Court had issued an order in which the parties of the case as well as the Commission and the Member States were invited to comment, *inter alia*, on whether Articles 3(g), 5(2) and 85 EC should, despite the non-existence of agreements between undertakings, be interpreted as prohibiting any state measure that would make such agreements superfluous and would affect competition within the common market, *i.e.* whether the *effet utile* understanding should rule.<sup>771)</sup> The fact that the Court ignored this question in its final decisions is a strong indication of the state of law being that the approach is not applicable.

There is therefore no basis in the case law for giving the norm too much emphasis, and if so, it should be viewed as limited by the application of the competence criterion as in *Leclerc*. This observation is also made by Joliet, who points out that in light

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771) See Case C-2/91, *Criminal proceedings against Wolf W. Meng*, Order of 9 December 1992.

of the case law, it is not the effects of a particular measure on competition that are decisive in themselves.<sup>772)</sup> On the other hand, by not ever having rejected the general norm explicitly, the Court has not closed the door for taking it into consideration again one day and relaunching it. In other words, the Court has never, not even in its most recent case law, clearly overruled *Leclerc*.<sup>773)</sup> This possibility also stands due to the broad formulation of the general principle which could be interpreted in support of the norm.

### 13.5. Evaluation

First of all, the danger of the present general norm is that it is so all-encompassing. It would invalidate not only competitive displacements, but also all regulations and restrictions that do not conform to the competitive model, including occupational licensing, zoning and Sunday closing laws.<sup>774)</sup> Moreover, the eventual economic benefits do not balance with the need of people to live in an organised community. Furthermore, it is not in accordance with values of federalism, and there is not truly any legal basis for its application. In addition, one could, with the words of Petersmann, point out that it has never been the task of constitutions and lawyers to decide on economic theories.<sup>775)</sup> Finally, it may be doubted whether the recommendations of its underlying theoretical basis, ordo-

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772) See Joliet, René, "National Anti-competitive Legislation and Community Law", *Fordham International Law Journal*, Volume 12, 1989, Number 2, p. 188.

773) See Holst-Christensen, Nina & Høegh, Katja, "Lovgivers forpligtelser i henhold til EU-konkurrenceretten", *Ugeskrift for Retsvæsen*, 1995B, p. 5.

774) See Cirace, John, "An Economic Analysis of the 'State-Municipal Action' Antitrust Cases", *Texas Law Review*, Volume 61, 1982, p. 487.

775) See Petersmann, Ernst-Ulrich, "National Constitutions and International Economic Law", in *National Constitutions and International Economic Law*, Edited by Hilf, Meinhard & Petersmann, Ernst-Ulrich, London, 1991, p. 39. This point of view is supported by Bernard, who states as follows: "The economic inefficiency, or even the absolute uselessness, of certain regulatory policies of the Member States cannot be per se an argument to control them via the medium of the competences that the Community enjoys from the objective of establishing and completing the internal market", see Bernard, Nicolas, "The Future of the European Law in the Light of Principle of Subsidiarity", *Common Market Law Review*, Volume 33, 1996, p. 638.

liberalism, truly imply such a centralisation of the Community which would be the result if the norm were fully implemented.



## 14. Control of Anti-Competitive State Measures through Article 90 EC

Proponents of the Treaty as an economic constitution, as defined in the previous chapter, have also claimed that Article 90 EC constitutes a legal basis for the condemnation of anti-competitive state measures. This point of view has been opposed by others, who support a more restricted and legalistic interpretation of Article 90 EC according to which only measures related to public companies or companies granted special or exclusive rights are in focus (hereinafter referred to as public and privileged companies).

Accordingly, the hub of the problem in this chapter is to examine the correct role to be played by Article 90 EC with regard to anti-competitive state measures.<sup>776)</sup> It is to be seen whether it is justified to solve the tensions between the central competition provisions and national anti-competitive measures in the context of a paradigm of conflict, condemning such measures as contrary to the Treaty. More precisely, it is Article 90 EC read in conjunction with Articles 85 and 86 EC, and to a minor degree with Articles 3(g) and 5(2), which is at focus here. By virtue of the great disagreement amongst legal scholars with regard to the interpretation of Article 90 EC, the case law of the European Court of Justice is central to the analysis. Conveniently, several informative cases in this regard have within recent years been decided. The provision may therefore no longer be characterised as dormant.

At the outset, it should be stressed that as this provision is one of the more complicated and politically controversial provisions in the Treaty, it is extremely difficult to find much agreement amongst scholars on even the most simple and general of issues. The difficulties connected to the interpretation of Article 90 EC is largely due to the heterogenous character of its first two paragraphs. One scholar points out that it is difficult to understand

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776) It should be stressed, as also indicated in *Chapter One, Introduction*, that Article 90 EC as such is not the object of analysis in this thesis. Therefore, this chapter will not contain a thorough general analysis of the provision, since the aim of the thesis is restricted (except as regards the present chapter's aim of testing the proposal's suitability to a solution of the conflict), as mentioned, to a survey of the role to be played by this provision in relationship to anti-competitive state measures and the doctrine on the interaction of Articles 3(g), 5 and 85 EC. Focus is, to a large degree, whether the state of law governing national measures regulating public/privileged companies may be transferred to measures regulating private companies.

how they interact and that one gets the impression of two extraneous bodies forced to live under the same roof.<sup>777)</sup> It is a provision which seeks to reconcile the pursuit of free competition with the protection of state planning.

The chapter is organised around firstly a further definition of the proposal (*Section 14.1.*), followed by a description of each of the paragraphs contained in Article 90 EC (*Section 14.2.*). This description serves as a background understanding delivered before a brief discussion of strengths and weaknesses of the proposal (*Section 14.3.*). Then, the issue of legal relevance is discussed, and in this regard, most importantly, an analysis of the case law is presented (*Section 14.4.*). Finally, an evaluation of the proposal is made with regard to the proposal's suitability as a solution to the conflict under scrutiny here (*Section 14.5.*).

#### 14.1. Definition

The understanding of Article 90 EC to be analysed here is rooted in the general direction perceiving the Treaty as an economic constitution as described in the previous chapter.<sup>778)</sup> However, in that chapter, it was mainly a combined reading of Articles 3(g), 5(2) and 85 EC which was in focus. Here, on the other hand, it is rather Article 90 EC which is read as the basis of condemnation of national anti-competitive measures. According to this reading, all kinds of state measures are regulated pursuant to Article 90 EC, *i.e.* both measures concerning public or privileged companies and measures concerning other kinds of companies are included in the scope of Article 90 EC.

One of the scholars who specifically interprets the provision in this regard is Capelli. Accordingly, he maintains that Article 90(1) EC often has been wrongly interpreted because it refers to public undertakings.<sup>779)</sup> The correct interpretation is that it provides

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777) See Marengo, Giuliano, "Public Sector and Community Law", *Common Market Law Review*, Volume 20, 1983, p. 505.

778) See *Chapter 13* above concerning *The Treaty as an Economic Constitution*.

779) See Capelli, Fausto, "Commentaire sur les effets des règles communautaires de concurrence (art. 85 et 86) sur l'activité des Etats membres", in *Discretionary Powers of the Member States in the Field of Economic Policies and Their Limits under EEC Treaty - Contributions to an International Colloquium of the European University Institute Held in Florence on 14-15 May 1987*, Edited by Schwarze, Jürgen, Baden-Baden, 1987, pp. 69-72.

that Member States shall respect all Treaty provisions, also in their relationship to public and privileged companies. Therefore, when Article 90(1) EC is read together with Articles 3(g) and 5(2) EC, the Member States do not have the competence to intervene in the market in any way that limits competition.

Another supporter of this interpretation is van der Esch. He provides an explanation of the rationale as to why state action in respect of private undertakings is governed by the same principles as those governing public and privileged companies under Article 90 EC.<sup>780)</sup> The reason is that otherwise the Member States would have less competences under the Treaty in respect of public and privileged companies than in respect of private companies. This again would be contrary to the neutrality of the Treaty in respect of private or public ownership of undertakings.

A third supporter is Chung, who submits that Article 90 EC should be read as having a dual role: one as *lex specialis* for the application of the competition rules to the public sector and one as *lex generalis* for the delimitation of the scope of the Treaty principles, in particular free competition, as against state intervention in the economy.<sup>781)</sup> In other words, that author also reads Article 90 EC as applicable to companies as well as Member States and, in particular, as extended to include anti-competitive state measures in its scope.

## 14.2. Background

The previous review in *Chapter 13* of the *effet utile* doctrine, of the theory of ordo-liberalism, and of the idea of the Treaty as an economic constitution, as well as the conclusions presented in this regard, apply equally well to an explanation of the present proposal's background. Accordingly, the present section is limited to a short presentation of each of the three paragraphs contained in Article 90 EC itself.

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780) See van der Esch, Bastiaan, "EC Rules on Undistorted Competition and U.S. Antitrust Laws: The Limits of Comparability", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1989, p. 18-25.

781) See Chung, Chan-Mo, "The Relationship between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach", *European Competition Law Review*, Volume 16, 1995, Number 2, p. 95.

Article 90(1) EC is addressed to the Member States and determines as follows:

*"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94."*<sup>782)</sup>

Public companies are companies influenced directly or indirectly by the public authorities through ownership or the like. Exclusive rights may be defined as where a single company is granted by the Member State the sole right to operate in a particular field, whereas special rights are the rights granted to more than one company, where that number is limited, such as, a closed class of companies.<sup>783)</sup>

It is difficult to mention Article 90(1) EC without also referring to the *Sacchi* Case which was decided already in 1974.<sup>784)</sup> The contested national measure was related to the grant of exclusive rights to a company controlled by a State holding company in a matter concerning the television industry. What makes the case important is that it gave the Court the occasion to point out that Article 90(1) EC is a permission, rather than a prohibition, to Member States, *inter alia*, to grant exclusive rights to companies.<sup>785)</sup> Competition may consequently be removed in connection with the establishment of exclusive rights. This permission should be understood as including not only the establishment of exclusive rights, but also the establishment of special rights and public companies. *Sacchi* therefore established that Article 90(1) EC may be understood as a general rule according to which Member States are obliged to obey all the rules of the Treaty in their relations with

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782) Article 7 EC is now named Article 6 EC after the enactment of the EUT.

783) See Hutchings, Michael, "Competition Law: State Monopolies and State Undertakings", in *1993: The European Market. Myth or Reality*, Edited by Campbell, Dennis & Flint, Charles, Deventer, 1994, pp. 33-34.

784) See Case 155/73, *Giuseppe Sacchi*, Judgment of 30 April 1974, [1974] E.C.R. 409.

785) See the *Sacchi* Case, at Ground 14.

public and privileged companies.<sup>786)</sup> It is a necessary provision because, without it, Member States could use the commercial freedom and the considerable economic power of public and privileged companies to evade Community law rules binding on the Member State itself.<sup>787)</sup> In the *Terminal Equipment Case*, decided in 1991, the Court specified that Article 90 EC does not presuppose that all special or exclusive rights are compatible with the Treaty.<sup>788)</sup> In fact, as will be demonstrated in detail below in *Section 14.4.1.*, there has in the more recent case law arrived a change which may be perceived as a movement from an assumption of neutrality towards public and privileged companies towards an assumption of their illegality unless permitted in specific circumstances.<sup>789)</sup>

In opposition to the first paragraph of Article 90 EC, Article 90(2) EC is, when literally understood, addressed to a certain category of companies rather than to Member States:

*"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."*<sup>790)</sup>

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786) See Temple Lang, John, "Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1985, p. 544.

787) See *ibid.*, at p. 544.

788) See Case C-202/88, *French Republic v. Commission of the European Communities*, Judgment of 19 March 1991, [1991] E.C.R. 1223, at Ground 22.

789) See Gardner, Anthony, "The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors", *European Competition Law Review*, Volume 16, 1995, Number 2, p. 79.

790) Also see the new Article 7D to be added when the Amsterdam Treaty comes into force.

In the *Sacchi* Case from 1974, the Court arrived at an opinion as to the general interpretation of Article 90(2) EC. It decided that companies entrusted with the operation of services of general economic interest are also subject to the competition provisions of the Treaty unless these provisions are incompatible with the performance of the companies' tasks by reason of Article 90(2) EC.<sup>791)</sup>

In the *Terminal Equipment* Case, from 1991, the Court described the rationale behind Article 90(2) EC as follows:

*"In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market."*<sup>792)</sup>

Edward & Hoskins conclude from this that Member States have not retained complete sovereignty in relation to the creation of legal monopolies, because this creation must be balanced with the principle of free competition.<sup>793)</sup> At the same time, however, the rationale is that there are some economic activities which cannot be properly performed by fully respecting the rules on competition.<sup>794)</sup>

Insofar as there are differences in the legal rules relating to private and public/privileged companies, they accordingly result from Article 90(2) EC.<sup>795)</sup> The

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791) See the *Sacchi* Case, at Ground 15.

792) See the *Terminal Equipment* Case, at Ground 12.

793) See Edward, David & Hoskins, Mark, "Article 90: Deregulation and EC Law. Reflections Arising from the XVI Fide Conference", *Common Market Law Review*, Volume 32, 1995, Number 1, p. 160.

794) See Marengo, Giuliano, "Public Sector and Community Law", *Common Market Law Review*, Volume 20, 1983, p. 516.

795) See Temple Lang, John, "Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1985, p. 547.

companies belonging to this latter category, have the possibility of derogating from the competition provisions under the conditions set out in Article 90(2) EC - a possibility from which private companies are excluded. Yet, the assumption behind the provision is that Articles 85 and 86 EC apply to public and privileged companies in the same way as to other companies.<sup>796)</sup> The provision does not therefore modify the legal position of these companies with regard to Articles 85 and 86 EC, but stresses that these companies and the Member States have to respect the competition provisions.<sup>797)</sup> In general, the exception contained in Article 90(2) EC is to be interpreted quite narrowly.<sup>798)</sup> Most importantly to the present analysis here, is that the paragraph is not applicable to state measures, but only to the activities of the companies.

Article 90(3) EC is concerned with the competences conferred on the Commission to ensure that Article 90 EC is applied. Accordingly, the Commission is empowered to address directives or decisions to the Member States:

*"The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."*

This competence was not exercised until 1980, when the Commission issued a directive on the transparency of financial relations between Member States and public undertakings. Since then, the Commission has applied it more and more. Therefore, it is not surprising that an increasing number of cases at the same time were brought to the Court primarily by the Member States questioning the exact competences of the Commission pursuant to Article 90(3) EC.

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796) See *ibid.*, at p. 547.

797) See Pappalardo, Aurelio, "Measures of the States and Rules of Competition of the EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., New York, 1985, p. 518.

798) Also see Pescatore, Pierre, "Public and Private Aspects of European Community Competition Law", *Fordham International Law Journal*, Volume 10, 1987, Number 3, p. 398. For some most recent cases concerning Article 90(2) EC, see the *Air Inter Case*, Case T-260/90, *Air Inter SA v. Commission of the European Communities*, Judgment of 19 June 1997, n.y.r.; and the *GT-Link Case*, Case C-242/95, *GT-Link A/S v. De Danske Statsbaner (DSB)*, Judgment of 17 July 1997, n.y.r.

The first case of these to be mentioned here is the *Terminal Equipment Case* which was decided in 1991.<sup>799)</sup> With regard to Article 90(3) EC, the Court stated that the competence of the Commission to adopt directives is limited so that the Commission can only specify the Member States' obligations in general terms. Therefore, this competence cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty.<sup>800)</sup> It is also understood that the subject-matter of the competence conferred on the Commission by Article 90(3) EC is different from, and more specific than, the competences conferred on the Council by Article 100a EC as well as Article 87 EC.<sup>801)</sup> Finally, the Court emphasised that the competence conferred on the Commission pursuant to Article 90(3) EC is limited to the adoption of directives and decisions addressed to Member States.<sup>802)</sup> The competence to regulate anti-competitive conduct by companies is conferred on the Commission pursuant to Articles 85 and 86 EC.<sup>803)</sup>

Also worthy of mention is the *PTT Case* which was decided in 1992.<sup>804)</sup> The Court held that decisions, in contrast to directives may be adopted in respect of specific situations in one or more Member States.<sup>805)</sup> The Commission is thus empowered to determine that a given state measure is incompatible with the Treaty and to indicate what measures the Member State must adopt in order to comply with its obligations under Community law.<sup>806)</sup>

The final case to be mentioned in relationship to Article 90(3) EC is the *Telecommunications Services Case* from 1992, which again concerned the Commission's

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799) See Case C-202/88, *French Republic v. Commission of the European Communities*, Judgment of 19 March 1991, [1991] E.C.R. 1223.

800) See the *Terminal Equipment Case*, at Ground 17.

801) See *ibid.*, at Ground 25.

802) See *ibid.*, at Ground 24.

803) See *ibid.*, at Ground 55.

804) See Joined Cases C-48/90 and C-66/90, *Kingdom of the Netherlands and Others v. Commission of the European Communities*, Judgment of 12 February 1992, [1992] E.C.R. I-565.

805) See the *PTT Case*, at Ground 27.

806) See *ibid.*, at Ground 28.



competence to adopt directives rather than decisions.<sup>807)</sup> Here, the Court, with regard to the issue of whether the Commission was justified in requiring the withdrawal of exclusive rights as regards the supply of certain telecommunications services, emphasised that the creation of a dominant position by granting exclusive rights within the meaning of Article 90(1) EC is not as such incompatible with Article 86 EC.<sup>808)</sup> However, it is incompatible with Article 86 EC, or with Article 90(1) EC in conjunction with Article 86 EC, to extend a monopoly on the establishment and operation of the telephone network to the market in telecommunications services through a state measure, without any objective justification.<sup>809)</sup>

It may be summed up with regard to Article 90(3) EC that the Commission has quite a broad competence pursuant to this provision to ensure that Member States do not enact or maintain in force measures which are contrary to Article 90 EC. However, only measures related to specific links referred to in that provision are to be regulated through this competence. Therefore, the Commission is not empowered pursuant to Article 90(3) EC to supervise measures related to private, unprivileged companies. Furthermore, the competence does not include all kinds of measures which are anti-competitive in their nature, *i.e.* the Commission is not empowered to apply an *effet utile* norm.

### 14.3. Analysis

With regard to strengths and weaknesses of the Article 90 EC proposal, this section will be very brief because most of the criticism stated above in *Chapter 13* concerning *The Treaty as an Economic Constitution* applies equally well here. Furthermore, as the evaluation of the proposal also largely is a matter of interpretation, the following section containing more legal aspects is of great relevance to such an evaluation. Here, therefore, it

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807) See Joined Cases C-271/90, C-281/90 and C-289/90, *Kingdom of Spain and Others v. Commission of the European Communities*, Judgment of 17 November 1992, [1992] E.C.R. I-5859.

808) See *ibid.*, at Ground 35.

809) See the *Telecommunications Services* Case, at Ground 36. Therefore, the Commission was justified in requiring the withdrawal of the exclusive rights in question; *ibid.*, at Ground 38.

suffices to add that one of the major disadvantages of the proposal is that it treats private and public/privileged companies on equal terms without taking into consideration the particular characteristics and needs of each category.

#### **14.4. Legal Relevance**

The primary interest of this section is to analyse whether, according to the judgments of the European Court of Justice, there is any support for the claimed interpretation of Article 90 EC. In the first section, the general system of the Treaty is discussed as to whether there is any support here for the claimed interpretation of Article 90 EC. In the second section, the case law is discussed in more specific terms.

##### **14.4.1. Support in the General System of the Treaty?**

From the presentation of each of the paragraphs contained in Article 90 EC in *Section 14.2. concerning Background*, above, it should be understood that the individual paragraphs of this provision in themselves are not interpreted by the Court in accordance with the position analysed here. In other words, none of these paragraphs may in themselves be applied to prohibit all kinds of national anti-competitive measures. Below, therefore, the state of the law is examined in the broader context of the general system of the Treaty, with regard to anti-competitive state measures. Especially Article 90(1) EC, interpreted together with primarily Articles 85-86 EC and to a minor degree with Articles 3(g) and 5 EC, is in focus. Furthermore, the relationship between Article 90 EC and Article 222 EC, as well as the relationship between Article 90 EC and Article 37 EC, is commented upon in the section referred to below as *Other Aspects*.

*Article 90(1) EC read together with Articles 85-86 EC*

Most of the judgments of relevance to the interpretation of Article 90 EC in conjunction with Articles 85-86 EC have been decided within more recent years. Below, the most significant among these judgments will be analysed.<sup>810)</sup>

The first case of true relevance to the interaction of Article 90 EC with Articles 85 and 86 EC, and worthy of mentioning, is the *Bodson* Case from 1988.<sup>811)</sup> The disputed national measure involved rules on exclusive concessions of communal monopolies for certain funeral services. The relationship between Article 90 EC and Articles 85-86 EC was defined by the Court in the following terms:

*"...the aim of Article 90 is to specify in particular the conditions for the application of the competition rules laid down by Articles 85 and 86 to public undertakings, to undertakings granted special or exclusive rights by the Member States and to undertakings entrusted with the operation of services in the general economic interest."*<sup>812)</sup>

Furthermore, the Court found that Article 85 EC did not apply to contracts for concessions between public authorities and companies entrusted with the operation of a public service because this provision is only applicable to agreements between companies.<sup>813)</sup> In contrast, Article 86 EC was found to be of relevance to an evaluation of eventual anti-

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810) Several of the relevant cases also comment on whether the activities of the involved companies rather than the measures themselves, infringe Articles 85-86 EC. These provisions are interpreted by the Court to include both private and public/privileged companies in their scope. The observations of the Court in this regard are included below when appropriate to give a more complete picture of the Court's thinking. The primary focus, however, remains the measures themselves, which are regulated pursuant to Article 90 EC in conjunction with Articles 85-86 EC.

811) See Case 30/87, *Corinne Bodson v. Pompes funèbres des régions libérées SA*, Judgment of 4 May 1988, [1988] E.C.R. 2479.

812) See the *Bodson* Case, at Ground 16.

813) See *ibid.*, at Ground 18. The Court avoided, in this regard, evaluating the agreement in the light of Articles 90(1) and 85 EC, or at least ruling that Article 85 EC would not even be applicable in the light of Article 90(1) EC.

competitive behaviour performed by companies holding such concessions.<sup>814)</sup> As to the behaviour of the public authorities, these may not, in circumstances such as those of this case, either enact or maintain in force any measure contrary to Articles 85 and 86 EC.<sup>815)</sup> They may not therefore assist companies holding concessions to charge unfair prices by imposing such prices as a condition for concluding a contract for a concession.<sup>816)</sup> Whether the measure in question was condemned depended on a finding that the communes imposed a given level of prices on the concession holders as a condition for being granted a concession.<sup>817)</sup>

The *Höfner* Case was decided in 1991 and concerned the interaction of Articles 90 and 86 EC.<sup>818)</sup> The Court was asked whether a monopoly granted to a public employment agency, the *Bundesanstalt*, constituted an abuse of dominant position within the meaning of Article 86 EC in conjunction with Article 90 EC.<sup>819)</sup> The decision consisted of six steps. The Court first decided that the *Bundesanstalt* may be defined as an undertaking for the purpose of applying the Community competition rules.<sup>820)</sup> Second, the Court determined that Article 90(2) EC was not applicable, as an application of Article 86 EC could not obstruct the performance of the task assigned to the *Bundesanstalt*.<sup>821)</sup> In other words, the *Bundesanstalt* did not escape its liability pursuant to Article 86 EC as provided for in Article 90(2) EC. The third step of the Court was to state the responsibilities of Member States in

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814) See *ibid.*, at Ground 21.

815) See *ibid.*, at Ground 34.

816) See *ibid.*, at Grounds 33-34. In this connection, the Court stated that the term "measure" includes the granting by the public authorities at the regional, provincial or communal level of special or exclusive rights to companies.

817) From Ground 32 it is understood that the French Government and the concession holder actually maintain this to be the case: "...concession holders are not in a position to 'impose' any price, since the prices to be charged are fixed by the contract specifications which form part of the conditions for the concession."

818) See Case C-41/90, *Klaus Höfner and Fritz Elser v. Macroton GmbH*, Judgment of 23 April 1991, [1991] E.C.R. I-1979.

819) See the *Höfner* Case, at Ground 16.

820) See *ibid.*, at Grounds 20-23.

821) See *ibid.*, at Grounds 24-26.

this regard. This was done in a formulation similar to that of the general principle governing the interaction of Articles 3(g), 5 and 85-86 EC which originated from the *INNO* Case decided in 1977:<sup>822)</sup>

*"Whilst it is true that Article 86 concerns undertakings and may be applied within the limits laid down by Article 90(2) to public undertakings or undertakings vested with exclusive rights or specific rights, the fact nevertheless remains that the Treaty requires the Member States not to take or maintain in force measures which could destroy the effectiveness of that provision (see [the INNO Case]). Article 90(1) in fact provides that the Member States are not to enact or maintain in force, in the case of public undertakings and the undertakings to which they grant special or exclusive rights, any measure contrary to the rules contained in the Treaty, in particular those provided for in Articles 85 to 94."*<sup>823)</sup>

Thereupon, the Court specified when this general principle would be infringed with regard to Article 86 EC (which will from now on be referred to as the *Höfner* criterion):

*"Consequently, any measure adopted by a Member State which maintains in force a statutory provision that created a situation in which a public employment agency cannot avoid infringing Article 86 is incompatible with the rules of the Treaty."*<sup>824)</sup>

Based on this background, the Court went on to a fourth step where it pointed out that legal monopolies may be regarded as occupying a dominant position.<sup>825)</sup> Fifth, the Court determined that the *Bundesanstalt*, merely by exercising its exclusive right granted to

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822) This referral to the *INNO* Case makes sense because in *INNO* the Court applied the doctrine on the interaction of Articles 3(g), 5 and 85-86 EC simultaneously with Article 90 EC. Also see the analysis of this case in *Section 14.4.2.* below.

823) See *ibid.*, at Grounds 26-27.

824) See *ibid.*, at Ground 27.

825) See *ibid.*, at Ground 28.

it, could not avoid abusing its dominant position.<sup>826)</sup> Finally, trade between Member States was likely to be affected.<sup>827)</sup> In conclusion, the Court determined that the measure was contrary to Article 86 EC in conjunction with Article 90(1) EC. The outcome of the case is paradoxical because the *Bundesanstalt* in reality had itself tolerated competition in the segment of business executives and therefore had not fully taken advantage of the monopoly which it was granted by law.<sup>828)</sup> However, it should be remembered that although competition was tolerated by the *Bundesanstalt*, competition was not tolerated by the national law and contracts entered into in this segment could be declared void according to the German civil code.<sup>829)</sup> Nevertheless, the case must be understood as paying very little tribute to evidence of company behaviour in violation of Article 86 EC.<sup>830)</sup>

The *ERT* Case was also decided in 1991.<sup>831)</sup> An exclusive right was involved, granted to the Greek television and radio company in order to carry out its activities. The television station DEP had started similar activities, however within a smaller geographic area. In this context the national court wanted to know, in principle, whether the activities of ERT as well as the measure granting the exclusive right to ERT were contrary to Articles 90 and 86 EC. With regard to ERT's activities the Court stated it was for the national court to determine whether the practices were compatible with Article 86 EC and to verify whether those practices, if they were contrary to that provision, may be justified by the needs of the

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826) See *ibid.*, at Grounds 29-31.

827) See *ibid.*, at Grounds 32-33.

828) See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC77, who points out that the Court hereby stretched the notion of abuse to such a point that the granting of the exclusive rights and the "abusive" exercise of those rights virtually coincide.

829) Also see Gyselen, Luc, "Case C-192/90, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli* and Case C-18/88, *RTT v. SA 'GB-INNO-BM'*", *Common Market Law Review*, Volume 29, 1992, Number 6, p. 1240.

830) See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC79.

831) For further details of this case, see *Chapter 5* above concerning *Application of the Van Eycke Test*. Also see the protocol to the Amsterdam Treaty concerning public service obligations within the radio and television sector.

particular task with which the undertaking may have been entrusted.<sup>832)</sup> With regard to the measure granting the exclusive right to ERT, the Court firstly reiterated the general principle introduced in the *Höfner Case*.<sup>833)</sup> Immediately following this, the Court concluded:

*"In that respect it should be observed that Article 90 of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes."*<sup>834)</sup>

It should be noted that this conclusion includes a referral to the *Höfner* criterion<sup>835)</sup>. To fully understand the outcome of this case, the Commission's information in the Report of the Hearing, that ERT had completely refrained from 1975 to 1988 from broadcasting programmes of other Member States, is important.<sup>836)</sup> ERT therefore had not been able to handle the inherent conflict which lies in granting one company both the exclusive right to produce and broadcast its own programmes (primary transmission of

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832) See the *ERT Case*, at Ground 34.

833) See *ibid.*, at Grounds 35-36.

834) See *ibid.*, at Ground 37.

835) The formulation, "*liable to create a situation in which that undertaking is led to infringe Article 86*" points in the direction that the Court will not necessarily require evidence that the infringement has materialised. See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC78. Peculiarly, in an earlier article, Gyselen makes an opposing observation, namely that the Court did require evidence of abuse, see Gyselen, Luc, "Case C-192/90. *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli* and Case C-18/88 *RTT v. SA 'GB-INNO-BM'*", *Common Market Law Review*, Volume 29, 1992, Number 6, p. 1238. Rather, it will be enough if the measure gives the company such a strong incentive to abuse its monopoly power that an abuse will inevitably materialise and that Article 90(1) EC in conjunction with Article 86 EC must be applied to prevent this. See Edward, David & Hoskins, Mark, "Article 90: Deregulation and EC Law. Reflections Arising from the XVI Fide Conference", *Common Market Law Review*, Volume 32, 1995, Number 1, p. 162.

836) See the *ERT Case*, at p. 1-2936.

broadcasts) and the exclusive right to broadcast programmes produced by others (retransmission of foreign broadcasts).<sup>837)</sup> This will often lead to a neglect of the second category of activities to the advantage of the first, because ERT had the exclusive right to determine at its own discretion the conditions for entry into a market where it operated in competition with other companies.<sup>838)</sup> The Advocate General Lenz added to this that a company in dominant position would never by itself be able to create such a situation without the help of a legal monopoly.<sup>839)</sup> Consequently, a kind of limitation of production, within the meaning of Article 86(b) EC, was created.<sup>840)</sup>

At stake in the *Merci* Case from the end of 1991 was also an exclusive right, granted to the company *Merci* to organise dock work in the Port of Genoa for ordinary goods.<sup>841)</sup> When a ship chartered by the company *Siderurgica* was going to be unloaded in the port of Genoa, *Siderurgica* therefore had to contact *Merci*. *Merci* then called upon the dock-work company granted the exclusive right to perform dock work in this port. This company on its part was obliged only to apply dock-workers having an Italian nationality. The dispute was initiated because the delivery of the goods was delayed. In this context, the national court referred several questions to the Court, among which one aimed at assessing the facts in light of Article 86 EC in conjunction with Article 90(1) EC. In this regard, the Court firstly summed up the state of law inspired from *Höfner* and *ERT*, applying the formulation of the *Höfner* criterion: "liable to create a situation in which that undertaking is induced to commit such abuses".<sup>842)</sup> The Court found evidence of several kinds of abuse such as demanding payment for services which had not been requested, charging disproportionate prices, refusing to have recourse to modern technology, *etc.* and therefore

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837) See *ibid.*, at p. I-2936.

838) See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC76.

839) See the *ERT* Case, at p. I-2946.

840) See *ibid.*, at p. I-2946.

841) See Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, Judgment of 10 December 1991. [1991] E.C.R. I-5889.

842) See the *Merci* Case, at Ground 17.



concluded that the Member State had created a situation contrary to Article 86 EC in conjunction with Article 90(1) EC.<sup>843)</sup> Although evidence of abuse clearly was established in the case, the Court's sum up of the *Höfner* criterion suggests that there are situations where the mere granting of an exclusive right inevitably leads to abuses. This suggestion is based upon the assumption that there are situations where the creation and abuse of monopoly are inextricably linked.<sup>844)</sup> This suggestion, if literally understood and applied, could have far-reaching consequences, and serves as an analogy to the *effet utile* approach under Articles 3(g), 5(2) and 85 EC.<sup>845)</sup>

The *RTT* Case was also decided in 1991. It concerned the public undertaking RTT, which besides its monopoly to establish and operate the public telecommunications network in Belgium also held an exclusive right to grant type-approval of telephone equipment which it did not itself supply.<sup>846)</sup> The problem in this regard was that RTT at the same time produced such equipment itself. In other respects, through the help of a state measure, RTT also limited the admittance to the market of competitors. It was, in other words, not the monopoly as such which was under scrutiny by the Court in this case, but rather the measure permitting RTT to reserve these ancillary activities to itself. Concerning the application of Articles 3(g), 90 and 86 EC, the judgment was divided into one part concerned with an evaluation of RTT's conduct, and another part concerned with an evaluation of the measure itself. With regard to the evaluation of RTT's conduct, the Court found that had this been performed by RTT on its own initiative without the help of a state measure, it would have been contrary to Article 86 EC because the elimination of all competition from other undertakings was not objectively necessary.<sup>847)</sup> With regard to the evaluation of the state measure the Court initially outlined the prohibition contained in Article

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843) See *ibid.*, at Grounds 19-20.

844) See Gyselen, Luc, "Case C-192/90, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli* and Case C-18/88 *RTT v. SA 'GB-INNO-BM'*", *Common Market Law Review*, Volume 29, 1992, Number 6, p. 1239.

845) See *Chapter 13* above concerning *The Treaty as an Economic Constitution*.

846) See Case C-18/88, *Régie des Télégraphes et des Téléphones v. SA GB-Inno-BM*, Judgment of 13 December 1991, [1991] E.C.R. I-5941.

847) See the *RTT* Case, at Grounds 19-20.

90(1) EC.<sup>848)</sup> The Court pointed out that Article 90(2) EC was not applicable to the ancillary activity.<sup>849)</sup> Furthermore, it noted that abuse as such did not have to be evidenced, explaining as follows:

*"...[i]t is sufficient to point out in this regard that it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either."*  
850)

The Court then required that the drawing up of technical specifications, the monitoring of their application and the granting of type-approval must be carried out by an independent body.<sup>851)</sup> The Court concluded that the measure permitting RTT to reserve the ancillary activities to itself was contrary to the Treaty.<sup>852)</sup> According to this case, more generally anti-competitive measures had the possibility of being condemned as the Court completely rejected RTT's claim that abuse had to be evidenced. The case is therefore remarkable because the Court explicitly does not demand a formal infringement of Article 86 EC.<sup>853)</sup> However, as Gyselen stresses, the judgment does not stand for the general

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848) See *ibid.*, at Ground 20. In this context, the Court referred to "*laws, regulations or administrative measures*" as equal concepts.

849) See *ibid.*, at Ground 22.

850) See *ibid.*, at Ground 24.

851) See *ibid.*, at Ground 26.

852) This was formulated in the following terms: "*...Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.*" See the RTT Case, at Ground 28.

853) See Ground 24 of the RTT Case as quoted above.

proposition that evidence of formal infringement of Article 86 EC will never be required, but only that it will not be required in the particular situation evaluated in the judgment.<sup>854)</sup>

As in the *RTT* Case, the *Corbeau* Case from 1993 concerned an extension of a monopoly, this time with regard to an ancillary service, rather than product.<sup>855)</sup> An important difference seemed to be, however, that in *Corbeau* the postal monopolist, *Régie des Postes*, did not itself provide the service in question, namely express courier service, but wanted the provider of this service, Mr. Corbeau, prohibited from providing it. This factual difference might be the explanation of why the reasoning of the Court in the two cases was quite different. As in *Höfner* and *ERT*, the Court stated a general principle governing the application of Articles 90(1) and 86 EC. It thereafter left out the application of Article 86 EC completely. Instead, the Court stated that Article 90(1) must be read in conjunction with Article 90(2) EC, thereby hinting that this provision, despite a literal reading thereof is applicable to measures and not only to the activities of Member States.<sup>856)</sup> On the basis of this provision, the Court applied a two-prong test, firstly testing whether *Régie des Postes* was entrusted with a service of general economic interest. This was answered in the affirmative. Secondly, the Court applied the principle of proportionality.<sup>857)</sup> This part of the test was left to the national court to decide upon. However, based on the criteria to be applied by this national court, it was hinted that such a decision would point in the direction that it was not necessary to extend the monopoly to include express courier services.<sup>858)</sup> The judgment is therefore characteristic in respect of its ignorance of the link between Articles 90 and 86 EC, and in this respect its ignorance of a possible abuse. That framework, and in particular the *Höfner* criterion, was therefore not included here.

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854) See Gyselen, Luc, "Case C-192/90, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli*, and Case C-18/88, *RTT v. SA 'GB-INNO-BM'*", *Common Market Law Review*, Volume 29, 1992, Number 6, p. 1237.

855) See Case C-320/91, *Criminal proceedings against Paul Corbeau*, Judgment of 19 May 1993, [1993] E.C.R. I-2533. Also see Hancher, Leigh, "Case C-320/91, *Procureur du Roi v. Paul Corbeau*, Judgment of the Full Court, 19 May 1993", *Common Market Law Review*, Volume 31, 1994, Number 1, pp. 105-122.

856) See *ibid.*, at Ground 14.

857) See *ibid.*, at Ground 16.

858) See *ibid.*, at Ground 19.

In the *Corsica Ferries Case* from 1994<sup>859)</sup>, the Court decided that it did not need to answer a question from the national court concerning the compatibility of the public authorities' approval of tariffs resulting from agreements and concerted actions among the concerned trade associations with Articles 5, 85 and 90 EC.<sup>860)</sup> On the other hand, it did answer a question concerning the compatibility of the public authorities' inducement of a legal monopoly to abuse its dominant position with Article 90 and 86 EC. The parties to the dispute were, on the one hand, Corsica Ferries, which was a company established under Italian law but using ferries flying the Panamanian flag. It operated a liner service between the port of Genoa and Corsica. The other party was a corporation of pilots.

The relevant Italian rules regulating piloting services in Italian seaports were first of all stated in the navigation code and its implementing regulation. Here, it was, *inter alia*, determined that for each port pilots had to organise themselves in one corporation pursuant to a decree of the Italian President. According to such a decree, the Corporation was established in Genoa and it was given the exclusive right to offer compulsory piloting services. These services consisted in a pilot helping the master of a vessel to enter the port and to moor. Also noteworthy are the rules which brought the tariffs into force in each port. These, in the present case, had been suggested by the Corporation and subsequently approved by the Minister for Merchant Shipping after he had consulted the interested trade associations. The consulted trade associations were mainly the shipowners' associations and the Italian federation of port pilots. Thereupon, the harbourmaster of the port of Genoa rendered them applicable by decree. The port of Genoa operated with various reductions for the years of 1989, 1990, and 1991. For example, vessels permitted to carry on maritime cabotage, or, in other words, domestic traffic between two Italian ports, were offered a 30% reduction, whereas a 50% reduction was applied to vessels engaged in liner trading which were also permitted to carry on maritime cabotage but which moored at the port of Genoa at least once

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859) See Case C-18/93, *Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova*, Judgment of 17 May 1994, [1994] E.C.R. I-1783.

860) This part of the ruling was based on previous holdings of the Court that it has no jurisdiction to rule on questions submitted by a national court if those questions bear no relation to the facts or the subject-matter of the main action and hence are not objectively required in order to settle the dispute in that action; see the *Corsica Ferries Case*, at Ground 14. This was grounded on the Court's finding that the application before the national court only related to the allegedly discriminatory tariffs, and not to the method by which the tariff is determined; see *ibid.*, at Ground 15.

a week. In this context, it is important to note that only vessels flying the Italian flag could obtain permission to engage in maritime cabotage. Precisely because Corsica Ferries was flying the Panamanian flag, it could not obtain any of the mentioned reductions. It therefore initiated the proceedings because it considered that it was the victim of discrimination.

In its reply as to whether the measure infringed Articles 90(1) and 86 EC, the Court firstly stated that the Corporation had a dominant position within the meaning of Article 86 EC in a market constituting a substantial part of the common market.<sup>861)</sup> Thereupon, it referred to the *Höfner* criterion.<sup>862)</sup> On the basis thereof, the attitude of the Court was that the Member State had infringed Articles 90(1) and 86 EC. It is worth observing that the Court in fact found that the Member State's approval of the tariffs was contrary to Articles 90(1) and 86 EC, because it thereby induced the company to abuse its dominant position. This indicates perhaps that as long as exclusive rights are involved, the Court is more willing to condemn tariffs as illegal than under the doctrine on Articles 3(g), 5(2) and 85 EC. This thinking makes sense, in a way, because such companies are already artificially privileged due to the exclusive rights conferred upon them. It is a matter of not extending the exclusive right further than necessary (a kind of principle of proportionality). It should also be noted that the discriminating aspect of the tariff-setting indicates that the Court will not accept that public and privileged companies act in a manner which would have been unlawful had the Member States directly done the same itself. Member States should not have the possibility of avoiding the Treaty provisions through public and privileged companies.

In the *Crespelle* Case from 1994, the contested French measure concerned the granting of exclusive rights to serve a defined geographical area.<sup>863)</sup> In the main action, the beneficiaries of these rights were accused, *inter alia*, of abuse of dominant position. The

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861) See the *Corsica Ferries* Case, at Grounds 40 and 41.

862) This referral was made in the following terms: "*The mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) is not in itself incompatible with Article 86 of the Treaty. However, a Member State infringes the prohibitions in [Articles 86 and 90 of the Treaty] if, by approving the tariffs adopted by the undertaking, it induces it to abuse its dominant position inter alia by applying dissimilar conditions to equivalent transactions with its trading partners, within the meaning of Article 86(c) of the Treaty.*" See the *Corsica Ferries* Case, at Grounds 42-43.

863) See Case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle v. Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne*, Judgment of 5 October 1994, [1994] E.C.R. I-5077.

alleged abuse consisted in charging exorbitant prices. In this regard, the Court in the judgment first dealt with the issue of the measure's compatibility with Articles 5, 86 and 90(1) EC and secondly with the issue of the compatibility of the beneficiary's activities with Article 86 EC. With regard to the first issue, the Court made it clear that Article 5 EC cannot be applied independently when the situation concerned is governed by specific provisions of the Treaty, in this case by Articles 90(1) and 86 EC.<sup>864)</sup> Concerning the application of these provisions, it reiterated the *Höfner* criterion.<sup>865)</sup> The formulation was as follows: "*the undertaking in question cannot avoid abusing its dominant position*". The Court added that there has to be a link between the measure and the abuse in order to prohibit the measure.<sup>866)</sup> Such a link was not found, however, and Articles 90(1) and 86 EC did not therefore preclude a Member State from granting the exclusive rights in question.<sup>867)</sup> For the sake of completeness, it should be added that with regard to the second issue, the Court found that there was no abuse and therefore no infringement of Article 86 EC, provided that the additional costs charged were actually incurred by the beneficiary in meeting the requests of its customers.<sup>868)</sup>

In the *Banchero* Case from 1995, the Court considered an Italian measure concerning the distribution of tobacco products in the light of Articles 5, 90 and 86 EC.<sup>869)</sup> The Italian state had a monopoly over production, importation and distribution of tobacco products. This monopoly was operated by AAMS. With regard to distribution of tobacco products at the retail level, which was the only aspect of the Italian measure which was under scrutiny by the Court in relationship to Articles 5, 90 and 86 EC, this was carried

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864) See the *Crespelle* Case, at Ground 15.

865) See *ibid.*, at Ground 18.

866) This was expressed in the following terms: "*The question to be determined is therefore whether such a practice constituting the alleged abuse is the direct consequence of the national Law. It should be noted in this regard that the Law merely allows [the beneficiary] to require [the customers] who request the [beneficiary] to provide them with [the product] from other production centres to pay the additional costs entailed by that choice.*" See *ibid.*, at Ground 20.

867) See *ibid.*, at Grounds 21-22.

868) See *ibid.*, at Ground 27.

869) See Case C-387/93, *Criminal proceedings against Giorgio Domingo Banchero*, Judgment of 14 December 1995, [1995] E.C.R. I-4683.

out, in practice, solely by traders specially licensed by the AAMS.<sup>870)</sup> However, the measure contained certain - unused - possibilities for manufacturers from other Member States to directly ensure the marketing of their products at the retail outlets. The examination was divided into one part concerning the position of the AAMS and another part concerning the position of the retailers.

With regard to the AAMS, the Court held that the activity of the AAMS at the stage of retail sale amounted to the exercise of a state right and not to an economic activity, because this activity mainly consisted in authorising the opening of tobacco outlets and in controlling their number and distribution throughout Italy.<sup>871)</sup> However, the combination of this state right with the exclusive right which the AAMS retained in the sphere of production and wholesale in domestic tobacco products placed the AAMS in a dominant position.<sup>872)</sup> Thereupon, the Court referred to the *Höfner* criterion, as in previous cases, stressing that the existence of a dominant position does not necessarily imply that an abuse is taking place, because this would only be the case if the exclusive right granted to the company in question had the result of preventing it from avoiding an abuse of its dominant position.<sup>873)</sup> In this light, the Court stated that the measure did not cause the AAMS to abuse its dominant position.<sup>874)</sup>

Then the Court considered the measure with regard to retailers and found that the doctrine on the interaction of Articles 90(1) and 86 EC was not applicable, because neither Article 90(1) nor Article 86 EC were applicable individually. Article 90(1) EC was not applicable because the retailers could not be considered to have any exclusive rights, as the contested measure merely governed their access to the market in the retail distribution of tobacco products.<sup>875)</sup> The reason why Article 86 EC was not applicable was that the measure could not be seen as establishing in favour of authorised retailers a contiguous series

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870) See *ibid.*, at Ground 45.

871) See *ibid.*, at Ground 49.

872) See *ibid.*, at Ground 50.

873) See *ibid.*, at Grounds 50-51.

874) See *ibid.*, at Grounds 52-53.

875) See *ibid.*, at Ground 54.

of territorially limited monopolies which, created over the national territory a dominant position within the meaning of Article 86 EC.<sup>876)</sup> In conclusion, the Court did not find any infringement of Articles 5, 90 and 86 EC.

The most recently decided case concerning the interaction of Articles 90(1) and 86 EC is the *GT-Link* Case from 1997<sup>877)</sup>. Under scrutiny were the activities of a public company, DSB, which owns and operates the Gedser Havn (*i.e.* the port of Gedser) in Denmark. Central to the case was whether DSB had infringed the mentioned Treaty provisions by its abuse of its dominant position, because it, pursuant to national law, had levied port duties of an unreasonable amount for the use of the port, and, furthermore, that it had applied dissimilar conditions for equivalent transactions. The judgment of the Court may be summarised as completely based on the precedents, and its outcome, although partially left for the national court to determine, as pointing in the direction of an infringement.

This *GT-Link* Case is the last of the cases examined in this section on the interaction of Articles 90(1) EC and primarily Article 86 EC, and it is now possible to present a summary<sup>878)</sup>. This summary is divided into three subjects: 1) general observations; 2) the development of the law; and 3) the principles of the doctrine.

It may be observed that these cases have certain characteristics in common. First of all, they were all submitted for preliminary rulings pursuant to Article 177 EC. Secondly, it is interesting to see that in five out of the ten examined cases in this section, the Court unequivocally condemned the contested anti-competitive state measures as contrary to Articles

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876) See *ibid.*, at Ground 55. This finding was based on the criterion developed in the *Crespelle* Case.

877) See Case C-242/95, *GT-Link A/S v. De Danske Statsbaner (DSB)*, Judgment of 17 July 1997, n.y.r. This case may be read in connection with the *Texaco* Case, see Joined Cases C-114/95 and C-115/95, *Texaco A/S v. Middelfart Havn and Others*; and *Olieselskabet Danmark amba v. Trafikministeriet and Others*, Judgment of 17 July 1997, n.y.r. In the *Texaco* Case, the Court did not find it necessary to answer a question concerning Articles 90 and 86 EC in a matter similar to the *GT-Link* Case.

878) For the sake of completeness, it should be added that in Ground 48 of the *Sodemare* Case, from June 1997, summarised above in *Chapter 7* concerning *Confirmation of the "November" Cases or Renewed Insecurity?*, the Court also briefly mentioned Article 86 EC, read in conjunction with Article 90 EC, as it stated that these provisions did not apply, since no existence of dominant position could be established.



90(1) and 86 EC.<sup>879)</sup> In addition to this remarkable statistical result, the Court in *Bodson*, *Corbeau*, and *GT-Link* in all likelihood was willing to condemn the measure in question as the condemnation was conditioned on the referring courts' findings under specific guiding criteria. The only two cases where the measures unequivocally were not condemned were only the two more recently decided cases, namely *Crespelle* and *Banchero*. Either this points in a direction of a more restricted interpretation of Articles 90(1) and 86 EC or it is a coincidence that these cases were decided at near the end of the line of the analysed case law, so that if they had been decided earlier, the outcome would have been exactly the same due to the facts of the cases. A third general observation concerns the involved subject matters. Here, it is noteworthy that the involved rights were all exclusive in their character. However, the sectors in which these rights were granted varied a lot (involving e.g. the service of organising dock works, headhunting service, telephone equipment, etc.). Furthermore, in several cases, the issue of ancillary products or services were at stake<sup>880)</sup>. Finally, the alleged abuses also varied, including, for example, the charge of disproportionate prices,<sup>881)</sup> limitation of the admittance to markets,<sup>882)</sup> and dissimilar conditions to equivalent transactions with other trading parties.<sup>883)</sup>

The development of the case law substantiating the relationship between Article 90(1) EC and particularly Article 86 EC was initiated relatively late, mainly through the nineties, when comparing it with the time of initiation of the development of the doctrine on the interaction of Articles 3(g), 5 and 85 EC. Case law on the interaction of Article 90(1) EC with Article 85 EC does not even by now truly exist. As the case law is still relatively limited, it is difficult to generalise too much about the main headlines as to its development. An attempt, however, would be to say that a case like the *Bodson* Case from 1988 represents a kind of preliminary case, where the Court still has not decided completely in which direction to go. In contrast, the *Höfner* Case from 1991 to a large degree represents a

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879) See the *Höfner*, *ERT*, *Merci*, *RTT* and *Corsica Ferries* Cases.

880) See the *Höfner* and *RTT* Cases.

881) See e.g. the *Bodson* Case.

882) See e.g. the *RTT* Case.

883) See e.g. the *Corsica Ferries* Case.

milestone case as the Court here first of all stated a general principle similar in its formulation to that governing the doctrine concerning Articles 3(g), 5 and 85 EC. Second, the Court in *Höfner* applied a criterion to decide whether a measure is in infringement of Articles 90(1) and 86 EC. The general principle and the criterion stated in *Höfner* were reiterated and applied in the subsequent case, *ERT*, from 1991.<sup>884)</sup> However, in the cases to follow *Höfner* and *ERT*, the general principle was not reiterated, but the *Höfner* criterion was. The cases following *Höfner* and *ERT*, namely *Merci* (1991), *RTT* (1991), and *Corsica Ferries* (1994), were first of all remarkable because the Court went quite far in condemning the contested national measures as it did not demand evidence of abuse.<sup>885)</sup> In the *Crespelle* Case (1994), the Court followed the criterion introduced in *Höfner*. The outcome of the case was nevertheless that the contested measure was approved, because there was no link between the abuse and the measure. Also in the *Banchero* Case from 1995, the contested measure was not condemned. However, in the last case analysed here, the *GT-Link* Case, the judgment went in the direction of an infringement.

As to the principles of the doctrine governing the interaction of primarily Articles 90(1) and 86 EC, the general principle stated in *Höfner* and reiterated in *ERT* and *Corbeau* should firstly be commented on. This principle implies that Member States are obliged to refrain from enacting or maintaining in force measures which could destroy the effectiveness of Article 86 EC. The principle is limited to the situation of public and privileged companies. The principle originates from the *INNO* Case and indeed contains a formulation similar to the general principle governing the interaction of Articles 3(g), 5 and 85-86 EC. In *Höfner*, the Court stressed that Article 86 EC itself only concerns companies. In this general principle, Article 85 EC is also included, because the Court refers to the rules contained in the Treaty, in particular those provided for in Articles 85 to 94 EC. As already pointed out above, this general principle was only reiterated in *ERT* and *Corbeau*. However, as the thinking of the Court in those cases which do not reiterate the general principle is completely similar to that of *Höfner*, *ERT* and *Corbeau*, there is no reason to believe that the Court has not been guided by the said general principle in those cases as well.

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884) In *Corbeau*, the general principle was also reiterated.

885) The *Corbeau* Case falls outside this criterion, as the Court did not truly apply Article 90(1) EC in conjunction with Article 86 EC. See above.

In *Höfner*, this general principle was specified further as to the particular situation of Article 86 EC in the so-called *Höfner* criterion. To find a violation of Articles 90(1) and 86 EC, the Court, according to this criterion, requires that the measure adopted by the Member State creates a situation in which the privileged company cannot avoid abusing its dominant position. The important words in this criterion are "cannot avoid". In *ERT*, these words were substituted with "is led to". In *Merci*, both formulations were applied. In *RTT*, the companies should not be put in a situation which they "could not themselves attain by their own conduct". In *Corbeau*, the criterion was not included at all. Then, in *Corsica Ferries*, the formulation was included, but in an altered version. This time, a Member State is infringing Articles 90 and 86 EC if it "induces it" to abuse its dominant position. In *Crespelle* and *Banchero*, however, the Court returned to the formulation of *Höfner* as it applied the words "cannot avoid".<sup>886)</sup> It must therefore be concluded that the formulation "cannot avoid" continues to dominate. This implies that the Court intends to pay very little tribute to evidence of company behaviour in violation of Article 86 EC. It will be sufficient that the measure gives the company an incentive to abuse its dominant position.<sup>887)</sup> If literally interpreted, this criterion has strong parallels to the *effet utile* norm under Articles 3(g), 5 and 85 EC.<sup>888)</sup> Yet, this does not mean that evidence of a formal infringement of Article 86 EC will never be required; rather, the Court says that it will not necessarily require it. In most of the examined cases evidence of abuse was actually likely to be obtainable. Article 90(1) EC read in conjunction with Article 86 EC therefore imposes certain limits on the freedom of Member States to establish public companies, or to grant privileged rights. This limit implies that Member States are prohibited from placing companies in a situation where they cannot avoid abusing their dominant position. A limit is necessary

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886) The present author is only in possession of the *GT-Link* Case in its Danish version, as it has not yet been translated into English. From this language version, it is not possible to see which term among the mentioned ones that has been applied.

887) The significant difference compared to the state of law up until the end of the eighties is that Articles 90 and 86 EC now not only attack companies' exercise of their privileged rights in an abusive manner, but also attack the very existence of such rights. See Gardner, Anthony, "The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors", *European Competition Law Review*, Volume 16, 1995, Number 2, p. 79.

888) See Chapter 13 above concerning *The Treaty as an Economic Constitution*.

because privileged companies are put in such an extremely fortunate position compared to the normal conditions of competition. In deciding this limitation, the principle of proportionality is a helpful tool.

The measures analysed under the doctrine concerning the interaction of Articles 90(1) and 86 EC are in reality the same as those concerning the granting of rights or establishment of public ownership. In, for example, the *Bodson* Case, the Court specified that the term "measure" includes the granting of the public authorities, at the regional, provincial or communal level, of special or exclusive rights to companies.<sup>889)</sup> In *RTT*, the Court referred to laws, regulations or administrative measures.<sup>890)</sup>

In the more recent case of *Crespelle*, the Court stated in explicit terms that there has to be a link between measure and abuse. This corresponds to the requirement of the Court in the cases dealing with Articles 3(g), 5(2) and 85 EC.

The measures themselves are evaluated pursuant to Articles 90(1) and 86 EC (or in principle Article 85 EC), whereas the activities of public and privileged companies are evaluated pursuant to Articles 86 EC (or in principle Article 85 EC), with the possibility of derogation pursuant to Article 90(2) EC. As a matter of principle, the doctrine should also include Article 85 EC.<sup>891)</sup> Interestingly, the situation is the opposite in the cases related to the doctrines on the interaction of Articles 3(g), 5 and 85-86 EC, which have an emphasis on Article 85 EC rather than Article 86 EC. It is tempting to get the impression that this is not completely coincidental. Yet, an explanation to this situation is not easily found. On the one hand, it is clear that the problems related to dominant position are very likely to arise in

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889) See the *Bodson* Case, at Ground 33. This specification is likely also to be applicable to the doctrine concerning Articles 3(g), 5 and 85-86 EC. It is therefore not completely correct to speak only of state measures, as the concept includes regional, provincial and communal measures in a given Member State.

890) See the *RTT* Case, at Ground 20.

891) If this doctrine were interpreted as widely as it was by the Commission in the *PTT* Case, the application of Article 85 EC read in combination with Article 90 EC would be more common. In that case, the Commission maintained that a condition set out in national law would make price competition impossible in many cases and would have the same effect as price agreements; see the *PTT* Case, Ground 12. In other words, the Commission did not demand a formal infringement of Article 85 EC or, one could say, it applied an *effet utile* point of view.

the context of public and privileged companies.<sup>892)</sup> This is also confirmed in the examined case law, where it has mainly been the interaction of Article 86 EC with Article 90 EC which within recent years has been examined. On the other hand, it is not completely impossible to imagine that even such companies could have an incentive to conclude anti-competitive agreements or the like by the help of the public authorities, so that Articles 90(1) and 85 EC should be applicable.<sup>893)</sup> For instance, although the *Corsica Ferries Case* represented a good opportunity for the Court to decide upon Article 90's interaction with Article 85 EC, this opportunity was unfortunately not taken up. Furthermore, it is not completely illusory to imagine that private companies in a dominant position may contravene Article 86 EC through the help of public authorities, albeit not through the reception of exclusive or special rights, so that Articles 3(g), 5 and 86 EC would be applicable. In other words, the situations are not completely practically unimaginable. A likely explanation could therefore be that while perhaps the doctrines are not completely developed, it is more safe to base them on the most obvious situations. At the same time, cases are more likely to arise from such obvious situations.

Although the case law mainly is concerned with Articles 90(1) and 86 EC, it is therefore nevertheless in principle correct to refer to this doctrine as including Article 85 EC. A relevant question is, however, whether Articles 3(g) and 5 EC, as in the case of the state action doctrine, should also be included. With regard to Article 3(g) EC, the Court in the

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892) At the same time, it is more difficult to imagine objective and justifiable reasons for Member States to delegate regulatory competences to companies which have commercial interests in the sector to be regulated than is the case with committees under scrutiny under Articles 3(g), 5(2) and 85 EC. See Fenger, Niels & Broberg, Morten, "National Organisation of Regulatory Powers and Community Competition Law", *European Competition Law Review*, Volume 16, 1995, p. 372. One further reason to be more sceptical with delegation of competences to one single company rather than to a committee of companies is that it is easier for one company to abuse such competence than it is in the case of several companies which jointly have to agree in order to distort competition; see *ibid.* at p. 372.

893) A relevant question is whether the contracts themselves between the public authorities and the right holders, in the cases where these are granted in such a way, are regulated through Articles 90(1) and 85 EC. In *Bodson*, the Court made it clear that the contract is not included in the scope of Article 85 EC alone, because this provision only regulates agreements between companies. The question remains, however, whether Article 90(1) EC in conjunction with Article 85 EC could change this state of law, and with what result. Could, for instance, such an agreement be said to be included within the term "measure"?

*RTT* Case included Article 3(g) EC together with Articles 90(1) and 86 EC, perhaps as an extra support for its conclusion, as it explicitly did not require a formal infringement of Article 86 EC, and the applied approach was therefore in the direction of an *effet utile* norm. Under all circumstances, Article 3(g) EC, is because of Article 90 EC, not as important to this doctrine as to the state action doctrine. With regard to Article 5 EC, the national court in two cases referred to this provision in combination with Article 90(1) and 86 EC. In *Crespelle*, the Court found the opportunity to state that Article 5 EC requires Member States to carry out their Community obligations in good faith, but that this provision can not be applied independently when the situation concerned is governed by a specific provision of the Treaty.<sup>894)</sup> In that case, therefore, the question was instead solely considered in the light of Article 90(1) and 86 EC and not at all in the light of Article 5 EC. In *Banchemo*, on the other hand, although reiterating the same principle as that applied in *Crespelle* concerning this provision,<sup>895)</sup> the Court nevertheless and in opposition to *Crespelle* did refer to a doctrine concerning Articles 5, 90 and 86 EC.<sup>896)</sup> Despite this difference between the two cases, it may be concluded that referral to Article 5 EC would not be evident to obtain parallelism with the doctrine on the interaction of Articles 3(g), 5 and 85-86 EC, because the role of Article 5(2) EC is played by Article 90(1) EC, which is more specific than Article 5(2) EC.<sup>897)</sup> Although the Court appears more willing to condemn anti-competitive measures when these are related to public or privileged companies,<sup>898)</sup> the impact of this is, however, limited. The reason is that the amount of measures regulating private companies, restricting competition, is much larger.

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894) See the *Crespelle* Case, at Ground 15.

895) See the *Banchemo* Case, at Ground 17.

896) See *ibid.*, at Grounds 45, 46, and 56, as well as the final ruling itself.

897) As expressed by Gyselen, Article 90(1) EC is more specific in two respects: it addresses the specific situation of companies enjoying a legal monopoly, and it identifies the main Treaty provisions with which the state measures should comply rather than referring to vague Treaty objectives as does Article 5(2) EC. See Gyselen, Luc, "Anti-Competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard", *European Law Review (Competition Checklist 1993)*, p. CC75.

898) The same observation is made by Chung. See Chung, Chan-Mo, "The Relationship between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach", *European Competition Law Review*, Volume 16, 1995, Number 2, p. 92.

These reflections lead in the direction of an answer to the interesting question of why there is a difference with regard to outcome of the state action doctrines on the interaction of Articles 3(g), 5(2) and 85-86 EC and the doctrines on the interaction of Articles 90(1) and 85-86 EC. As it has already been remarked above, the European Court of Justice has both in a larger amount of cases and in a larger per centage of the decided cases unequivocally condemned state measures when the latter doctrines are involved than it has when the state action doctrines are involved. This difference may be explained by reason of the different legal bases of the two doctrines. As has been reflected upon various places in this thesis, Articles 3(g), 5(2) and 85-86 EC constitute a weak legal basis for condemning state measures and represent a rather extended interpretation of their scope, which is not to the same degree the case with Articles 90(1) and 85-86 EC, as Article 90 EC specifically make referral to state measures. The legal construction of each of the two doctrines is therefore not completely comparable. This perhaps also explains why the Court in its application of the latter doctrines has been more likely to apply an *effet utile* approach and therefore only to a minor degree has been concerned with evidence of abuse.<sup>899)</sup> A third element in an explanation to the difference also lies in the fact that Article 90(2) EC might provide a mechanism for exempting of certain state measures, when the latter doctrines are involved. Such mechanism is not apparent in connection with the former doctrines.<sup>900)</sup> This means that although the Court interprets the latter doctrines widely, the consequences are not necessarily as drastic as they would be if a similar interpretation were applied in the interaction of Articles 3(g), 5(2) and 85-86 EC.

With regard to the overall issue raised in this part of the chapter, it should now be concluded, on the basis of the foregoing, that there is not any basis truly for an interpretation of Article 90(1) EC in conjunction with Articles 85-86 EC as that claimed by proponents of the position analysed here. First of all, evidence of a rejection of the proposal may be found in the general principle governing the interaction of Article 90(1) and 85-86 EC as stated in the *Höfner* and *ERT* Cases, since it is therein stressed that the doctrine is

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899) This wider interpretation of Articles 90(1) and 85-86 EC adds as a further explanation as to why more cases have resulted in a condemnation of state measures than has been the situation with the state action doctrines concerning Articles 3(g), 5(2) and 85-86 EC.

900) See Bacon, Kelyn "State Regulation of the Market and E.C. Competition Rules: Articles 85 and 86 Compared". *European Competition Law Review*, Volume 18, 1997, Number 5, p. 289.

solely applicable to measures in the case of companies vested with special or exclusive rights. The scope of application of the doctrine on the interaction of Articles 90 and 86 EC is therefore much more specific than the doctrines on the interaction of Articles 3(g), 5(2) and 85-86 EC, as the latter, in principle, are applicable to all kinds of anti-competitive state measures, except for public or privileged companies vested with the rights provided for in Article 90(1) EC. This conclusion is supported by the entire case law examined in this section because the Court only considered the doctrine in relationship to measures concerning such rights.

### *Other Aspects*

Antagonists of the broad interpretation of Article 90 EC also argue that their point of view is supported by Article 222 EC, which should be interpreted in principle as meaning that a Member State is free to nationalise or privatise an industry. In contrast, proponents of that position maintain that Article 222 EC should be taken into account in consideration of the Treaty being neutral in respect of the sovereign act of nationalisation and in respect of the shift in the borderline between public and private sector implied therein, so that the principles contained in Article 90 EC accordingly apply equally well to the private sector.<sup>901)</sup> The provision provides as follows:

*"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."*

The antagonistic point of view was clearly supported in the *British Telecommunications* Case from 1985, where the Court took into consideration the issue of whether Article 222 EC entitled British Telecommunications to preserve its monopoly by preventing the contested activities of the private message-forwarding agencies. In this regard,

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901) See Panel Discussion, "Anti-Competitive State Measures in the EEC and EEC Competition Policy and Enforcement", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry, New York, 1989, p. 19-7.



the Court had a negative point of view as it found that Article 222 EC was not applicable.<sup>902)</sup> Therefore, Member States may take companies into public ownership, as Article 222 EC clearly indicates, and may as well give companies special or exclusive rights, but they may not create or protect monopolies or companies vested with special or exclusive rights contrary to the competition provisions.<sup>903)</sup> To a large degree, Article 90 EC may be seen as providing a balance between the preservation of national systems of property ownership and the principle of free competition, *i.e.* between Article 222 EC and Articles 85-86 EC.<sup>904)</sup>

As in the case of Article 222 EC, Article 37 EC has also been taken into account in a critique of the broad interpretation of Article 90 EC. This provision applies to situations in which the public authorities are in a position to control, direct or appreciably influence trade between Member States through a body established for that purpose or a delegated monopoly. Article 37(1) EC provides that:

*"Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.*

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- 902) This was formulated in the following wording: *"It is apparent from the documents before the Court that, whilst BT has a statutory monopoly, subject to certain exceptions with regard to the management of telecommunication networks and to making them available to users, it holds no monopoly over the provision of ancillary services such as the retransmission of messages on behalf of third parties. At all events, it must be observed that the schemes adopted by BT are not designed to suppress any private agencies which may be created in contravention of its monopoly but seek solely to alter the conditions in which such agencies operate. Accordingly, Article 222 of the Treaty did not prevent the Commission from appraising the schemes in question for their compatibility with Article 86 thereof."* See the *British Telecommunications Case*, at Ground 22.
- 903) See Temple Lang, John, "Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1985, New York, p. 573.
- 904) See Edward, David & Hoskins, Mark, "Article 90. Deregulation and EC Law. Reflections Arising from the XVI Conference", *Common Market Law Review*, Volume 32, 1995, Number 1, p. 158.

*The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others."*

To rely on Article 37 EC in favour of this position is not in accordance with how the provision is interpreted by the Court. According to the *Banchero* Case, for example, the Court has determined as follows:

*"...Article 37 of the Treaty does not require the abolition of national monopolies having a commercial character outright but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. It is clear not only from the wording of Article 37 but also from its position in the general scheme of the Treaty that the article is designed to ensure compliance with the fundamental rule of the free movement of goods throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States, and thereby to maintain normal conditions of competition between the economies of Member States where a given product is subject, in one or other of those States, to a national monopoly of a commercial character."* <sup>905)</sup>

Article 37 EC therefore assumes the legality in principle of Member States granting legal monopolies, as does Article 90 EC.<sup>906)</sup> The pattern revealed from this is accordingly that a Member State, unless otherwise provided may restrict competition among companies.<sup>907)</sup> This pattern is in accordance with the structure intended by the Treaty

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905) See the *Banchero* Case, at Ground 27.

906) See Marengo, Giuliano, "Competition Between National Economies and Competition Between Businesses - A Response to Judge Pescatore", *Fordham International Law Journal*, Volume 10, 1987, Number 3, p. 433.

907) See *ibid.*, at p. 433.

fathers.<sup>908)</sup> This structure is federal in character, which means that, provided competition is not restricted between national economies, each Member State is allowed to continue to regulate or not to regulate its economy according to the political drives prevailing at the time.<sup>909)</sup> The significance of Article 37 EC is consequently that, although it applies only to commercial monopolies, principles essentially similar to those worked out by the Court under this provision apply to all other national monopolies and privileged companies.<sup>910)</sup>

In other words, and in summary, neither Article 37 EC nor Article 222 EC change the conclusions reached so far in this section concerning the interpretation of Article 90 EC.

#### 14.4.2. Support in the Case Law?

Despite the findings in the previous sections, there are a few cases which contain certain aspects in support of the analysed position. The aim of this section is to see if any of these aspects are strong enough to support an interpretation of Article 90 EC as containing the legal basis for condemning all kinds of anti-competitive measures as claimed.

In the *INNO* Case from 1977, the position analysed here is somehow present.<sup>911)</sup> First of all, the Court determined as follows:

*"...Article 90 provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary inter alia to the rules provided for in Articles 85 to 94.<sup>912)</sup> Likewise, Member States may not enact*

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908) See *ibid.*, at p. 433.

909) See *ibid.*, at p. 434.

910) See Temple Lang, John, "Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty", in *Annual Proceedings of the Fordham Corporate Law Institute*, Edited by Hawk, Barry E., 1985, New York, p. 573.

911) See the thorough analysis of the *INNO* Case above in *Part Two*.

912) See the *INNO* Case, at Ground 32.

*measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty.*" <sup>913)</sup>

From the quotation, it is understood that the Court apparently transformed the Member States' specific obligation pursuant to Article 90 EC (in conjunction with Articles 3(g) and 5 EC<sup>914)</sup>) into a more general obligation pursuant to Articles 85 and 86 EC, according to which Member States shall abstain from enacting anti-competitive measures. It is important to note that the Court in the quotation referred to all kinds of private undertakings and consequently did not limit itself to public or privileged companies.

This impression is furthermore supported by the Court's opinion, also in *INNO*, expressed in connection with its answer to a question concerning whether special or exclusive rights within the meaning of Article 90 EC are created when national legislation enables companies to fix compulsory selling prices to the consumer. Although the Court indicated that this question should be answered in the negative,<sup>915)</sup> it nevertheless was tempted to express again as follows:

*"...since it has already been indicated in the reasons given for the answer to the first question that in any case Article 90 is only a particular application of certain general principles which bind the Member States, it does not appear necessary to give an answer to the second question."* <sup>916)</sup>

In other words, in this case the European Court of Justice drew a clear parallel between, on the one hand, the obligations under Articles 3(g), 5(2) and 85 EC and, on the other hand, to the obligations under Article 90(1) EC.<sup>917)</sup>

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913) See *ibid.*, at Ground 33.

914) The Court had referred to these two provisions in Grounds 29 and 30 of the *INNO* Case.

915) See the *INNO* Case, at Ground 41.

916) See *ibid.*, at Ground 42.

917) See Bach, Albrecht, "Case C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG, Case C-2/91, Meng; Case C-245/91, OHRA Schadeverzekeringen NV", *Common Market Law Review*, Volume 31, 1994, Number 6, p. 1359.

The position is also somewhat present in the *Ahmed Saeed* Case from 1989.<sup>918)</sup> In this case, the Court firstly reiterated the general principle governing the interaction of Articles 5, 85 and 86 EC<sup>919)</sup> and then condemned national authorities' approval or encouragement of tariff agreements contrary to Article 85 EC as contrary to this principle.<sup>920)</sup> Important to the relationship between this general principle and Article 90(1) EC is the following passage of the judgment which was inserted immediately after the mentioned condemnation:

*"In the specific case of tariffs for scheduled flights that interpretation of the Treaty is borne out by Article 90(1) of the Treaty, which provides that in the case of undertakings to which Member States grant special or exclusive rights - such as rights to operate on an air route alone or with one or two other undertakings - Member States must not enact or maintain in force any measure contrary to the competition rules laid down in Articles 85 and 86."*<sup>921)</sup>

In other words, the Court determined that there is a connection between the general principle governing Articles 5 and 85-86 EC and Article 90(1) EC when the companies at stake are those which have been granted special or exclusive rights. The connection is simply that the general principle is also applicable in the case of companies granted special or exclusive rights. Yet, it may not be deduced from the case that Article 90 EC in conjunction with Article 5 EC applies to measures concerned with all kinds of companies as the approach prescribes. That is definitely not the message here.

The approach is furthermore present in the *Meng* Order from 1992 where the Court ordered the reopening of the oral hearings and invited the parties, the Member States and the Commission to present their answers to six questions defined by the Court. The last of these questions concerned the role of Article 90 EC with regard to anti-competitive state measures. More precisely, the Court asked as follows:

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918) See a thorough analysis of the *Ahmed Saeed* Case above in *Part Two*.

919) See the *Ahmed Saeed* Case, at Ground 49.

920) See *ibid.*, at Ground 49.

921) See *ibid.*, at Ground 49.

*"In its judgment of 13 December 1991 in RTT (Case C-18/88 [1991] ECR I-5941, paragraph 20) the Court stated that Article 90(1) 'prohibits Member States from placing, by means of legislation, rules or administrative provisions, public undertakings and undertakings to which they accord special exclusive rights in a situation in which these undertakings could not place themselves on their own initiative without breaching the provisions of Article 86'. Does that judgment have any consequences as regards the assessment of Member States' legislation concerning private undertakings which do not enjoy special or exclusive rights (Article 3(f), second paragraph of Article 5 and Article 85 of the Treaty)?"<sup>922)</sup>*

In other words, the Court wanted to know whether the *RTT* Case could have implications under Articles 3(g), 5(2) and 85 EC, so that the position analysed here should be considered as existing. As previously mentioned in this thesis, the question was not taken up by the Court again in its final judgment, which may be understood as an indication in the direction of a rejection thereof.

Finally, the position is in a way present when considering that the Court does not always require evidence of abuse, see the previous section. In other words, the *effet utile* part of the position may be considered as present in several cases. However, it should be stressed that even this wide interpretation is only applicable to state measures related to public and privileged companies.

In conclusion, although several cases, as demonstrated in the examples given in this section, contain aspects pointing in the direction of support for the claimed position, these are first of all not very explicit and secondly, primarily due to the fact that the Court ignored its own question raised in the *Meng* Order (in the *Meng* judgment) to be considered as left out of the state of the law today.

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922) See Report for the Hearing in Case C-2/91, *Criminal proceedings against Wolf W. Meng*, Judgment of 17 November 1993, [1993] E.C.R. I-5770 - I-5771.

## 14.5. Evaluation

The judgments which have been rendered since the claims of Capelli and van der Esch, who were in favour of an interpretation of Article 90 EC as the basis for a prohibition of anti-competitive state measures as an alternative to the doctrine on Articles 3(g), 5(2) and 85 EC, have completely removed the previous total uncertainty as to the interpretation of Article 90 EC. Therefore, at the same time, these judgments have removed the doubt which previously existed as a result of a very wide interpretation of Article 90 EC as claimed by, *inter alia*, the mentioned scholars. It must therefore be concluded, first of all, that because there is no legal basis for the approach, and, secondly, that because there are so many disadvantages connected to the *effet utile* norm (see the previous chapter), the approach based on Article 90 EC must be classified as not suitable as a solution to the tensions under examination.

## 15. Interest Group Theory of Regulation

Among scholars, it has been suggested that legal principles to mediate between the two levels of governance in the analysed field should take its point of departure in the interest group theory of regulation. Central to the design of the legal principles should therefore be the fact that much evidence shows that regulation owes more to interest groups' capture of regulators than to regulators' concern for the welfare of society.<sup>923)</sup> It is suggested that the test to decide when Member States loose their right to legislate should be related to this evidence.

This position results to a large degree in the autonomy of Member States, as compared to the suggestions analysed in the two previous chapters. It may be defined as taking its point of departure in a paradigm of accommodation, where an appropriate accommodation is sought between the contrasting interests at each level of governance. The proposal partially involves evaluation of regulations' effects on the market in efficiency terms. The position will be further understood in light of the following definition, outline of its background, analysis, legal relevance and evaluation.

### 15.1. Definition

The American scholar, Wiley, introduced in 1986 a test taking into account interest group theory.<sup>924)</sup> Under the assumption that it is a serious threat to federal antitrust policy when an interest group consisting of producers captures regulation, he proposed a test according to which a regulation is condemned when it:<sup>925)</sup>

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923) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, p. 23.

924) Seven years later, in 1993, McGowan & Lemley launched a new test, which in part relied on Wiley's, however in a more limited version; see McGowan, David & Lemley, Mark A., "Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment", *Harvard Journal of Law & Public Policy*, 1994, pp. 293-400.

925) See Wiley, John Shepard, "A Capture Theory of Antitrust Federalism", *Harvard Law Review*, Volume 99, 1986, p. 743.



- 1) restrains market rivalry;<sup>926)</sup>
- 2) is not protected by a federal antitrust exemption;<sup>927)</sup>
- 3) does not respond directly to a substantial market inefficiency;<sup>928)</sup> and
- 4) is the product of capture in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint.<sup>929)</sup>

All four criteria have to be met at the same time in order to invalidate regulations and to expose private defendants to ordinary antitrust scrutiny and remedies, including treble damages.<sup>930)</sup> In contrast, public defendants should face no damage liability.<sup>931)</sup>

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926) The criterion is, in all its simplicity, a broad test of whether the measure at stake has anti-competitive effects. It has to be fulfilled because if competition is not restrained there is no conflict with federal antitrust policy. See *ibid.*, p. 745.

927) This criterion is a test of whether there are any exemptions under federal antitrust law which would protect the measure in question. An example of such a protection would be within the field of labor organisation. The criterion has to be fulfilled because if an exemption is found there is no conflict with federal antitrust policy. See *ibid.*, pp. 745-748.

928) This criterion is a test of whether the measure addresses a serious market failure which creates an efficiency loss likely to outweigh the efficiency losses accompanying the measure. In that case the measure would be enforceable. See *ibid.*, pp. 748-764.

929) This criterion accommodates both sides of the conflict between central competition policy and national regulatory policy as it focuses on those measures most likely to undermine market competition seriously while it at the same time limits preemption to instances of Member State political decision-making that deserve less deference. See *ibid.*, p. 764. Plaintiffs should be allowed to fulfill this last criterion in either of two ways: by producing evidence of decisive political efforts by producers, or by showing indirectly that the facial character of the regulation makes producer capture the most likely explanation of its origin, see *ibid.*, at p. 743. Naturally, focus would be the facts surrounding the regulation's origin, see *ibid.*, at p. 769. Only producer capture as opposed to consumer capture is included in the criterion. Otherwise, the criterion would fail to fit the premise of the exploitation of the many by the few, see *ibid.*, at p. 768.

930) See *ibid.*, pp. 743-744.

931) See *ibid.*, at p. 773.

Although the test is designed in an American framework, the assumption here is that it is transferable to European conditions. With regard to the European terminology of the distribution of competences, the test could, in simple terms, be described as the Member States having the exclusive competence to enact anti-competitive regulations unless such regulations are the products of producer capture. In such cases, competence is at the central level.

## 15.2. Background

Wiley's test is based on the phenomenon of producer capture. The concept of producer capture represents one application of a much broader theory of regulation that draws on the concepts and models of rational choice political economy, which again is referred to as the interest group or economic theory of regulation.<sup>932)</sup> This theory, in fact, can be considered a subset of an even larger theory, namely public choice theory.<sup>933)</sup>

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932) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1303. Also see Stigler, Geroge J., "The Theory of Economic Regulation", *The Bell Journal of Economics and Management Science*, 1971, Volume 2, Number 1, pp. 3-21, which constitutes one of the very original and almost revolutionary contributions to this economic theory of regulation.

933) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, footnote 50, p. 1303. Concerning public choice theory, see also *Chapter 17* concerning *Competition Between Legal Systems*. Public choice is defined by Mueller as the economic study of non-market decision-making, or more simply as the application of economics to political science; see Mueller, Dennis C., *Public Choice II*, Cambridge, 1989, p. 1. Accordingly, the subject matter is the same as that of political science, namely the theory of the state, voting rules, voter behaviour, interest group behaviour, etc.; see *ibid.* The approach to non-market decision-making has been able: 1) to make the same behavioural assumptions as general economics (rational, utilitarian individuals); 2) to depict the preference revelation process as analogous to the market (voters engage in exchange, individuals reveal their demand schedules via voting, citizens exit and enter clubs); and 3) to ask the same questions as traditional price theory (Do equilibria exist? Are they stable? Are they Pareto efficient? etc.); see *ibid.*, at pp. 3-4. Furthermore, the approach is characterised by rigorism and formalism, as the results must yield a proposition that in principle can be subjected to econometric testing; see Frey, Bruno S., "The Public Choice View of International Political Economy", in *The Political Economy of International Organization. A Public Choice Theory*, Edited by Maubel, Roland & Willett, Thomas D., Boulder, 1991, p. 9.

The dominating theme of the interest group theory of regulation is its rejection of the presumption that the government strives to further the public interest.<sup>934)</sup> Moreover, the theory offers an account of the mechanisms by which small groups with few votes can accomplish what seems paradoxical in a democratic system: a systematic bias in lawmaking that benefits small groups with concentrated (high per capita interests) at the expense of large groups with more votes, but with diffuse (low per capita) interests.<sup>935)</sup>

Among the more refined versions of the theory is one which treats regulations as products which are subject to the ordinary market forces of supply and demand.<sup>936)</sup> Research often concentrates on either the supply or the demand side.

On the supply side, researchers' focus is on the suppliers of regulation, namely the regulators. These provide regulations in exchange for the maximisation of values such as re-election margins, revenues and other considerations. Focus is consequently on unpacking political structures and operations to discover which features are sensitive to demand and how they respond, and an attempt is made in this way to generate specific predictions about regulatory outcomes.<sup>937)</sup> Considering the supply side also helps to explain how very large diffuse groups, in the end, sometimes manage to have their interests protected.<sup>938)</sup> The reason is, among others, that large groups have the important advantage of having more votes than the small groups.

On the demand side, researchers' focus is on the consumers of regulation (*i.e.* those who "demand" the regulation), namely the interest groups. By identifying the determinants of demand, researchers can predict changes in the mix of regulation that would follow

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934) See Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, p. 35. Also see *Chapter 13* concerning *The Treaty as an Economic Constitution*.

935) See Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, p. 32.

936) See Posner, Richard A., "Theories of Economic Regulation", *The Bell Journal of Economics and Management Science*, Volume 5, 1974, Number 2, p. 343.

937) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1306.

938) See Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, p. 40.

from actual or hypothetical changes in demand.<sup>939)</sup> Interest groups try to influence the political process in various ways. Some methods applied, for instance, are the following: voting or mobilisation of voters; payment of regulators in the form of bribes, speaking fees, supportive advertising, campaign contributions; or influencing the information that reaches regulators and the voting public.<sup>940)</sup> Politically cohesive interest groups seek favourable regulations and typically seek control over prices, output, and entry of new competitors into a field as a means of transferring wealth to themselves.<sup>941)</sup> This is often referred to as rent-seeking. Public authorities can help to increase favoured groups' so-called monopoly rents.<sup>942)</sup> Rent-seeking may, in popular terms, be understood as profit seeking, *i.e.* a profit gained by producers due to the higher price they may be able to charge with the help of the government.<sup>943)</sup> Rent-seeking is viewed as very negative because more and more resources are wasted in the process of individuals trying to secure the rents of profits promised by the public authorities.<sup>944)</sup> These socially wasteful expenditures are: 1) the expenditures of the potential recipients of the monopoly; 2) the efforts of the government officials to obtain or to react to the expenditures of the potential recipients; and 3) third-party distortions induced by the monopoly itself or the government as a consequence of the rent-seeking activity.<sup>945)</sup>

Among interest groups, free-riding is a significant problem. The success of any interest group depends on its ability to expend resources such as time and money on

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939) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1303.

940) See Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, pp. 35-36.

941) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1303.

942) See Mueller, Dennis C., *Public Choice II*, Cambridge, 1989, p. 229.

943) For an economically more refined definition of the term, see *ibid.*, at pp. 229-230.

944) See Buchanan, James, *Constitutional Economics*, London, 1991, p. 39.

945) See Mueller, Dennis C., *Public Choice II*, Cambridge, 1989, p. 230.

influencing the political process.<sup>946)</sup> Because regulators are likely to confer benefits on groups of persons whether or not those persons contribute to the enactment of the regulation in question, such persons have an incentive to "take a free ride" based on the efforts of and resources paid by others.<sup>947)</sup> Based on this knowledge, Olson, who provided the fundamental theoretical groundwork of the interest group theory in 1965, found that a large diffuse group with a common interest would encounter a greater obstacle to effective joint action - the free-rider problem - than would a small group. Large, diffusely interested groups will therefore tend to be under-represented.<sup>948)</sup> This leads to a systematic tendency for exploitation of the great by the small.<sup>949)</sup> For example, a concentrated group of companies would more easily be able to influence the shaping of regulation than would a diffuse group of consumers. Certain scholars view legislation as consisting of wealth transfers and accordingly view legislators as taking from those who are least capable of resisting the demands for wealth transfers and giving to those who are best organised for pressing their demands.<sup>950)</sup>

Wiley's test is based on Olson's insights. In particular, he is preoccupied with one of the consequences of Olson's insights which is that producers especially are likely to capture legislation. He therefore believes that government market intervention is very often an anti-consumer effort to enlarge producers' share of social wealth with the result of imposing a cost on society as a whole.<sup>951)</sup> Wiley stresses that he does not take the extreme position that producer capture theory is strong enough to account for all regulation or the position that all regulation originating with producer support should for that reason alone be condemned. In other words, he recognises that regulations are not always caused by producer capture and that regulations that are caused by producer capture are not always bad. Rather,

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946) Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, p. 36.

947) See *ibid.*, at pp. 36-37.

948) See *ibid.*, at p. 39.

949) See Olson, Mancur, *The Logic of Collective Action*, Cambridge, 1971, p. 29.

950) See Mueller, Dennis C., *Public Choice II*, Cambridge, 1989, p. 243.

951) See Wiley, John Shepard, "A Capture Theory of Antitrust Federalism", *Harvard Law Review*, Volume 99, 1986, Number 4, pp. 725-726.

he presumes that some state and local regulation is good, while others are bad, and that the task for central policy is to design a narrow but relatively searching standard that distinguishes between the two.

### 15.3. Analysis

The following analysis discusses advantages and disadvantages of the test based on interest group theory of regulation. It concentrates on the fourth step of Wiley's test.<sup>952)</sup> The evaluated topics are: 1) constitutional rights; 2) definitional delimitations; 3) post-enactment producer control; 4) democratic legitimacy; 5) altruism and ideology; and 6) implicit normative baselines.

#### 15.3.1. Constitutional Rights

The criterion in Wiley's test based on the interest group theory gives rise to constitutional problems, as constitutional rights are affected. According to American law, these rights are rights under the First Amendment, such as the right to speak freely, to debate public issues, to petition the government, and to seek to influence the outcome of the political process.<sup>953)</sup> Similar European rights exist. These are rights of fundamental importance to the traditions of any democratic society.

Wiley claims that these constitutional concerns are not an obstacle to producer capture pre-emption.<sup>954)</sup> His main argument is that the penalty for lobbying is light as producers are not penalised for lobbying *per se*, and its consequence is only an injunctive declaration that invalidates the resulting regulation. Accordingly, producers' injuries would

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952) With regard to the part of the test that concerns efficiency and rule of reason inquiry (first and second step), see *Chapter 13* concerning *The Treaty as an Economic Constitution*. With regard to the part of the test that concerns responses to market failures, see the introduction to *Chapter 13*.

953) See Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, pp. 512-513.

954) See Wiley, John Shepard, "A Capture Theory of Antitrust Federalism", *Harvard Law Review*, Volume 99, 1986, Number 4, p. 781.

be limited to: a) the loss of the benefits that they would have enjoyed under the anti-competitive state or local regulation; b) the loss of a defense to a Sherman Act prosecution premised on conduct other than the lobbying itself; and c) the cost of futile lobbying.

However, Garland raises the serious objection that the criterion is likely to strongly hinder interest group lobbying, because producers lose the incentive to lobby a law which must fail in the courts because of their lobbying.<sup>955)</sup> He adds that the fact that the test only penalises those who lobby for selfish anti-competitive laws, and the fact that producers remain free to lobby as much as they want to cure genuine market inefficiencies does not change anything.<sup>956)</sup> Actually, this almost worsens the infringement of the constitutional rights because it is an effort to select the subjects about which a person may speak and the persons who may speak.<sup>957)</sup> Making the speakers' self-interest the selection criterion only increases the damage.<sup>958)</sup> That only producer capture, as opposed to consumer capture, is part of the criterion adds to this picture - preferring one speaker over another is wholly foreign to the mentioned constitutional rights.<sup>959)</sup>

No doubt, Garland's objections to the test are quite serious. It is unsatisfactory to limit the right to petition public authorities. At the same time, it should be taken into account that many advantages are also connected with lobbying (*e.g.* information access to the public authorities), which should not be hindered too much.

### 15.3.2. Definitional Delimitations

Various definitional difficulties are connected with the test. One difficulty exists with regard to deciding which legislation is the result of capture and which is not. Indeed,

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955) See Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, p. 513.

956) See *ibid.*, at p. 513.

957) See *ibid.*, at p. 513.

958) See *ibid.*, at p. 513.

959) See *ibid.*, at pp. 517-518.

most committed interest group theorists are likely to view virtually any political result as suspect.<sup>960)</sup>

Another problem in this context is how far it is possible to go back when deciding a regulation's origin? Ten, fifty, or ninety years? More? Less? When legislation is rather old, interests involved are more difficult to sort out, but whether a regulation will be condemned or not should not depend on its age. Of course, Wiley includes "probable origin", but it will often be a quite hasardous test.

Furthermore, deciding "decisive" capture is difficult as one can hardly determine what was truly going on in the head of the individual regulator. It is always difficult to decide what the regulator would have done without the influence of producers. Therefore, courts would have to use some implicit models of how proper governments behave.<sup>961)</sup> This is critical because implicit models threaten to become *de facto* norms against which regulations are judged.<sup>962)</sup> It is preferable that courts instead openly make such normative choices rather than smuggling them into a determination of whether a producer support was "decisive".<sup>963)</sup>

All of these definitional difficulties put enormous discretionary power into the hands of an unelected judiciary.<sup>964)</sup> On the other hand, courts are used to routinely studying the origin and legislative history of challenged laws.<sup>965)</sup>

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960) See McGowan, David & Lemley, Mark A., "Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment", *Harvard Journal of Law & Public Policy*, 1994, pp. 293-400.

961) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 723.

962) See *ibid.*, at p. 723.

963) See *ibid.*, at p. 723.

964) See Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, p. 516.

965) See Wiley, John Shepard, "Revision and Apology in Antitrust Federalism", *The Yale Law Journal*, Volume 96, 1987, Number 6, p. 1286.



### 15.3.3. Post-Enactment Producer Control

As Spitzer points out, Wiley only includes anti-competitive measures as illegal when they are the result of producers' lobbying.<sup>966)</sup> Consequently, measures which for some other reason subsequently come under producers' domination or control are not included.<sup>967)</sup> The reason is that Wiley's approach mainly is process based. The test only looks at the substance of a regulation when this is necessary as an extra tool in order to decide whether the regulation benefits a larger number of persons than it hurts. It is a serious flaw of the test that it contains no control over the regulation's actual design, and therefore gives producers' a great possibility of control after enactment of the regulation in question. Regulation-creating committees deciding binding prices for various specific industries may wholly or partially be dominated by producers directly affected by the decisions of the committees. This being the case, however without the legislation being the result of producer capture, the legislation would not be condemned according to Wiley's test.

### 15.3.4. Democratic Legitimacy

Wiley explains that the rationale for the producer capture requirement is legitimacy.<sup>968)</sup> If there is no producer capture, federal regulators trust state and local decision-making.<sup>969)</sup> If, on the other hand, there is producer capture, federal suspicion about the ability to craft beneficial regulation arises, and pre-emption becomes appropriate.

Spitzer objects to this rationale. He maintains that it is based on the unfounded assumption that there is something unique about the self-interested behaviour of producers which gives a special taint to regulations which are generated by producers' efforts.<sup>970)</sup>

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966) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, footnote 39, p. 1300.

967) See *ibid.*, at p. 1300.

968) See *ibid.*, at p. 768.

969) See *ibid.*, at p. 768.

970) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1302.

According to Spitzer, this assumption is unfounded because the theory underlying the research upon which Wiley relies reveals that no grounds for regarding producer capture as less legitimate than other regulation seeking political action exist.<sup>971)</sup> The reality is that this research suggests that all regulation is produced by the same fundamental processes, regardless of whether producers seem to have been involved.<sup>972)</sup>

In fact, Wiley and Spitzer agree with regard to the relevance of the "Olsonian" insights concerning the relative effectiveness with which different groups express their demands.<sup>973)</sup> However, Spitzer argues forcefully that Wiley incorrectly does not take into account more recent research.<sup>974)</sup> Research subsequent to Olson's work point in the direction that it is too simplified to view the decision-making process of regulators as just pitting producers against consumers.<sup>975)</sup> Rather, many different interest groups compete in the market for regulation. Even producers may compete against one another, e.g. large producers against small producers. Furthermore, no interest group is likely to have its demand for regulation completely satisfied as most regulations will reflect compromises through which regulatory benefits are distributed among various groups depending on the

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971) See *ibid.*, at p. 1302.

972) See *ibid.*, at pp. 1302-1303.

973) See *ibid.*, at pp. 1298 and 1304.

974) Elhauge is in complete agreement with Spitzer. See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, pp. 723-724. Also, Needham supports this point of view. In an outline of the various existing interest group theories, he points out that evidence exists that certain types of regulation harm producers in some industries, which implies that consumer or other interest groups who lobbied for these regulations were more organized and politically powerful than the producer groups; see Needham, Douglas, *The Economics and Politics of Regulation. A Behavioral Approach*, U.S.A., 1983, p. 14. In addition to this, Needham emphasises that producers and consumers are not the only interest groups that may be affected by regulation, and furthermore that regulation need not necessarily advance the interests of one of these groups at the expense of the other. See *ibid.*, at p. 14.

975) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1304. For a more general critique of the theory, see Posner, Richard A., "Theories of Economic Regulation", *The Bell Journal of Economics and Management Science*, Volume 5, 1974, Number 2, pp. 335-358.

marginal returns the groups can offer the regulators.<sup>976)</sup> Wrongly therefore, according to Spitzer, Wiley views the decision-making process of legislators as a too simplistic bipolar producer capture model.<sup>977)</sup> Because regulatory politics are extremely complex, frequently combining winning coalitions from many different groups, it is difficult to know when, if ever, the regulatory process has been captured.<sup>978)</sup> Spitzer continues this line of argument by pointing out that the regulatory demand of producers differs in no material way from the corresponding demands of consumers, resource owners, bureaucracies, or any other groups seeking economic benefits from legislators.<sup>979)</sup> Indeed, the advantages of small group size, low transaction costs, and high per capita stakes do not always accrue to producers.<sup>980)</sup> In summary, Wiley's test is not in concurrence with empirical findings of more recent times.

#### 15.3.5. Altruism and Ideology

It is a general question whether interest group theory of regulation is not too simplistic and inaccurate with regard to its description of the political process, and therefore only offers an incomplete theory of regulation.<sup>981)</sup> Critics of the theory do not deny that interest groups have a large influence, but point out that non-economic factors such as altruism and ideology play at least some role in the political process.<sup>982)</sup> Consequently, they argue that the preferences of the regulators sometimes prevail over the preferences of

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976) See Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, pp. 42-43.

977) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, pp. 1305, 1310-1313 and 1315-1318.

978) See *ibid.*, at p. 1305.

979) See *ibid.*, at p. 1305.

980) See Spitzer, Matthew L., "Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory", *Southern California Law Review*, Volume 61, 1988, p. 1305.

981) See Elhauge, Einer R., "Does Interest Group Theory Justify More Intrusive Judicial Review?", *The Yale Law Journal*, Volume 101, 1991, Number 1, p. 43.

982) See *ibid.*, at p. 43.

the interest groups. This general critique of the interest group theory of regulation points in the direction that its impact on judicial review should not be given such a large role as advocated by Wiley.

#### 15.3.6. Implicit Normative Baselines

As Elhauge points out, Wiley's approach suffers from the problem that any defects in the political process identified by interest group theory depend on implicit normative baselines and thus do not stand independent of substantive conclusions about the merits of particular political outcomes.<sup>983)</sup> Interest group theory helps to identify the factors that make certain groups more willing than others to expend resources on petitioning for governmental action.<sup>984)</sup> But, identifying those factors cannot alone demonstrate which groups' petitioning efforts are normatively disproportionate.<sup>985)</sup> Such a normative conclusion is only possible if there exists some baseline for determining the level of petitioning effort that is normatively proportional to each group's interest.<sup>986)</sup> Unfortunately, neither interest group theory nor, consequently Wiley's test itself, provides such a normative baseline.<sup>987)</sup> In fact, only implicit normative baselines are adopted. The overall example of an implicit normative baseline, which takes its origin from the insights of Olson, is that a group's influence should be proportional to the number of individuals represented by the group.<sup>988)</sup> Elhauge criticises this baseline because there are no grounds for concluding that the majority should always prevail over the minority. In fact, there are instances where it is desirable for the minority to win. The classic example is that racial minorities should not be oppressed by a racial majority.<sup>989)</sup> Economists have suggested as a normative baseline that

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983) See *ibid.*, at p. 34.

984) See *ibid.*, at p. 49.

985) See *ibid.*, at p. 49.

986) See *ibid.*, at p. 49.

987) See *ibid.*, at p. 49.

988) See *ibid.*, at p. 50.

989) See *ibid.*, at p. 50.

a group's political influence is disproportionate when it exceeds either the group's economic interest in the matter or, in fact, a test of whether the regulation in question is efficient.<sup>990)</sup> Others suggest an egalitarian baseline according to which wealth should not be distributed to politically powerful groups at the expense of others.<sup>991)</sup>

However, interest group theory can not generate any normative conclusion about whether a group's influence was disproportionate to the influence it should have had. Such a normative conclusion would require some normative baseline based on which would be appropriate levels of influence for the minority and the majority. But once such a normative baseline is available, interest group theory does not provide any additional insight, because the normative standards used to derive the baseline could simply be applied directly to judge the legal outcome itself in order to reach the same conclusions without the detour through interest group theory.<sup>992)</sup>

In sum, the above analysis has demonstrated severe defects in the application of interest group theory as a guiding rationale in the evaluation of anti-competitive state measures.

## 15.4. Legal Relevance

In this section, the legal relevance of the test will be briefly discussed, firstly with a few remarks on whether support in the general system of the Treaty may be found. Thereupon, a short discussion of the case law itself follows.

### 15.4.1. Support in the General System of the Treaty?

The general system of the Treaty provides no explicit indication that the European Court of Justice is authorised to use competition law as a tool for condemning regulatory capture. On the other hand, the Treaty text signals an awareness of producer versus consumer interests. In this regard, although concerned with giving producers the very best conditions

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990) See *ibid.*, at p. 52.

991) See *ibid.*, at pp. 55-56.

992) See *ibid.*, at pp. 51-52.

(free establishment, no trade barriers, *etc.*), it now also contains a provision on consumer protection (Article 129a EC). But this is not, in the least, the same as saying that the present test is directly provided for in the system of the Treaty. If anything, to some the Treaty itself may be said to have been captured by producers.

#### 15.4.2. Support in the Case Law?

Looking at the doctrine, as stated in the case law, on the interaction of Articles 3(g), 5(2) and 85 EC as such, there is no connection to the present test. This does not mean, however, that during the proceedings at the European Court of Justice there has not from time to time been indications in the direction of interest group capture. For instance, in the *INNO* Case, it was indicated that part of the contested measure was imposed with the aim of protecting small retailers. In the *Leclerc* Case, it was specialist booksellers who were meant to gain protection. In the *Güterfernverkehr* Case, the aim was, among others, to ensure an economically reasonable distribution between road, rail and inland waterway transport means. But these indications do not seem to have influenced the European Court of Justice's thinking in the direction of perceiving state measures from the perspective of whether the measures in question were the product of producer capture. Trying to stipulate what would have been the outcome of the cases had the test been applied would be a matter of utter speculation. There are simply too few facts with regard to the genesis of the various contested measures to be able to do this.

In summary, there is no basis in neither the system of the Treaty nor the case law to give the test too much emphasis.

#### 15.5. Evaluation

As Garland points out, interest group theory is very helpful in understanding the genesis of regulation and the underlying interests, but in using the theory as a criterion to solve the conflict between anti-competitive state measures and central competition aims, it

becomes a weapon to overturn results of the political process in a democratic society.<sup>993)</sup>

That is not recommendable.

Above, other misgivings have been professed. These are, among others, that the right to speak freely is injured, various definitional uncertainties exist, the application of the interest group theory does not appear so completely updated, and altruism and ideology also have a role to play in the results reached through the political process. In addition, legally, there is not much support in favour of the test.

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993) See Garland, Merrick B., "Antitrust and State Action: Economic Efficiency and the Political Process", *The Yale Law Journal*, Volume 96, 1987, Number 3, p. 519.

## 16. Focus on Financially Disinterested, Politically Accountable Actors

Among the many suggestions from the scholars for a solution to the tensions between central competition provisions and anti-competitive state regulations, the present one is definitely one of the more thoroughly elaborated. It focuses on the decision-making processes established by the measure in question and therefore reflects a simple process view.<sup>994)</sup> Of special interest is whether the anti-competitive restraint is controlled by a financially disinterested and politically accountable actor. It may be classified as based on the paradigm of accommodation as it neither completely condemns anti-competitive state measures nor completely accepts them as never conflicting with the central competition provisions.

### 16.1. Definition

The test was introduced in 1991 by the American scholar Elhauge.<sup>995)</sup> Based on the rationale that American antitrust law embraces the principle that financially interested parties cannot be trusted to decide which restrictions on competition advance the public interest, he proposed a test according to which a measure is condemned when it results in a restraint:

- 1) which is anti-competitive;
- 2) which is not controlled by a financially disinterested and politically accountable actor; and

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994) The proposal may be defined as process-oriented because it turns on objective indicia about the incentives of the decision-makers. It does not, therefore, turn on the substance of the restraint or on subjective motives. See Elhauge, Einer R., "Making Sense of Antitrust Petitioning Immunity", *California Law Review*, Volume 80, 1992, Number 5, p. 1197.

995) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, pp. 668-747.



3) where this actor does not make a substantive decision in favour of the terms of the challenged restraint before it is imposed on the market.

All three conditions have to be fulfilled at the same time. Moreover, the test is only applicable to state restraints as opposed to municipal restraints.

The first part of the test requiring that the regulation leads to an anti-competitive restraint is not specified in any further detail by Elhauge.

The second part of the test, concerning control of the restraint by a financially disinterested and politically accountable actor, is the most central in the test. This control is necessary because such actors traditionally are thought to act in the public interest. This derives from the fact that they represent all the affected personal interests and can aggregate them or weigh them against each other.<sup>996)</sup> Although this representative process is not always perfect, the overall result will in average be preferable to alternative approaches.

The purpose of the third part of the test, concerning whether a substantive decision has been made in favour of the restraint, is to ensure that the restraint truly is controlled by the financially disinterested and politically accountable actor. Only in that case is there a realistic assurance that the approved restraint is in the public interest. To avoid a purely formal control, where the State through inaction and rubberstamping could accomplish a *de facto* delegation that would be void *de jure*, it has to be required that the actor also makes a substantive decision in favour of the restraint's terms.<sup>997)</sup>

It is assumed that the test is transferable to the European situation. In European terminology, with regard to the distribution of competences, the test defines the competences to enact anti-competitive regulations, which transfer the control of the restraint to financially interested and politically unaccountable actors who have not made a substantive decision, as exclusively at the Community level. Consequently, national measures conflicting with Community competence would be pre-empted according to the test.

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996) See *ibid.*, at p. 703.

997) See *ibid.*, at p. 695.

## 16.2. Background

Elhauge's point of departure is that an affirmative theory has to be developed which will guide the courts through inevitable doctrinal ambiguities.<sup>998)</sup> In practical terms, Elhauge analyses whether there are any functional differences between the decision-making processes that produce those restraints that the Supreme Court immunises from antitrust scrutiny and the processes that produce those restraints that the Supreme Court does not immunise.<sup>999)</sup> Interestingly, Elhauge finds - and this is his basic descriptive thesis - that such differences exist and it is on this basis that his test is designed. Consequently, his test is in reality the test which the Supreme Court already, however, implicitly applies.<sup>1000)</sup>

Elhauge claims that it is possible to define an affirmative theory which illuminates the underlying ideals of the state action doctrine.<sup>1001)</sup> The main ideal, Elhauge finds, is a distinction between what types of decision-making processes do and do not provide sufficient assurance that restraints resulting from the process will serve the public interest.<sup>1002)</sup> Elhauge does not, however, define the public interest as being against all economically inefficient restraints of market competition.<sup>1003)</sup> Rather, it is only in the public interest that those who stand to profit financially from restraints of competition can not be trusted to determine which restraints are in the public interest and which are not.<sup>1004)</sup>

## 16.3. Analysis

Below, the following four issues will be discussed: 1) definitional delimitations; 2) a paradoxical effect of the approach; 3) the public interest as the real test; and 4) the importance of financially interested actors not being in control.

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998) See *ibid.*, at p. 670.

999) See *ibid.*, at p. 671.

1000) See *ibid.*, at p. 671.

1001) See *ibid.*, at p. 670-671.

1002) See *ibid.*, at p. 671.

1003) See *ibid.*, at p. 672.

1004) See *ibid.*, at p. 672.

### 16.3.1. Definitional Delimitations

Surprisingly, Elhauge, in his article, is mainly preoccupied with the defence of his test than with thoroughly defining it. This is apparently meant to be further developed by the courts, and the purpose of Elhauge's article has primarily been to make the courts aware of the test's existence. Although the definitional problems connected to the approach are likely to be solved through an explicit application by the courts, it is nevertheless of relevance to the analysis to point out some of the difficulties in this regard.

The test is only of relevance to anti-competitive restraints, but Elhauge does not explicitly define what this concept embraces. As already discussed in *Chapter 13* concerning *The Treaty as an Economic Constitution*, some would refer to any kind of regulation as affecting competition and would therefore disapprove of such. Others would, for instance, allow for regulation as a cure of market failure and give allowance for concerns such as health and culture. Also, what does restraint refer to? Does it strictly refer to the regulation itself, or does it also include restraints occurring due to the regulation? An example of this would be a regulation which allows for agreements to be made by market participants. A standpoint in this regard is therefore a serious definitional matter which has yet to be further worked out.

It is problematic to define financial interest in exact terms. It is important to note, however, that the focus is not any kind of interest such as political concerns for votes and power or personal concerns for career and promotion, but only more true financial interests. Although it is possible to claim that also the mentioned concerns could be converted into financial terms, this is apparently not what Elhauge had in mind. Rather, "financial" has to be literally understood to a large degree as such, although market advantages obtained by companies such as limitations of market entry, price controls, *etc.*, due to various regulations, on the other hand, must also be included in the concept. As well, non-profit organisations are considered to have a financial interest since non-profit status does not preclude firms from reaping financial profits by restraining trade, as it only disables them from distributing those profits to investors.<sup>1005)</sup> Moreover, attention should not be paid as to whether or not actors with a financial interest in the case at stake actually are driven by a financial

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1005) See *ibid.*, at p. 696, footnote 147.

motivation or by other motives; of importance is only that they have a financial interest in the subject matter.<sup>1006)</sup>

Elhauge himself gives several examples of line-drawing problems with regard to the definition of financial interest. One example is that it will sometimes be unclear whether a state board composed of all affected interests (producers, consumers, laborers, *etc.*) should be treated as financially interested.<sup>1007)</sup> The argument is that if the state board's composition is representative of the affected interests then it could be trusted just as well as the political process.<sup>1008)</sup> An important question here would be whether the board is truly representative. Elhauge's solution to this is for the courts to work on a further refinement of the test. An example of another line-drawing problem concerning financial interest would be the situation where financially interested actors have coerced the State to restrain competition.<sup>1009)</sup> For instance, a disinterested, politically accountable actor might enact minimum prices for medical services to stop a boycott by doctors. Elhauge solves this problem by taking into account his general tool, the public interest, and declares that as the restraint is not furthering the public interest, no immunity should apply.<sup>1010)</sup> The last line-drawing example with regard to the definition of financial interest to be mentioned is that of conspiracy between the State and financially interested actors. The solution in this case is that a State acting in response to petitioning through the normal means of the relevant political or

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1006) See *ibid.*, at p. 703.

1007) See *ibid.*, at p. 703.

1008) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 703. Falke & Joerges are very critical towards such criterion. See Falke, Josef & Joerges, Christian, "Rechtliche Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationaler und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung", (*Gutachten erstellt im Auftrag des Büros für Technikfolgen-Abschätzung des Deutschen Bundestages*), Bremen, July 1995, p. 153.

1009) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 704.

1010) See *ibid.*, at p. 704. Also, see Elhauge, Einer R., "Making Sense of Antitrust Petitioning Immunity", *California Law Review*, Volume 80, 1992, Number 5, pp. 1206-1212.

procedural process by financially interested actors is not a "co-conspirator" unless it or its officials have a financial interest in the action.<sup>1011)</sup>

It is important to know to which degree the politically accountable actor has to be accountable. For example, does the concept include only truly accountable actors such as politically elected actors, or does it also include officials who are responsible to such truly accountable actors. In this respect, one may ask the same question about court decisions.<sup>1012)</sup> Another example of a line-drawing problem concerns whether a regulation is legal when it is adopted by politically accountable actors but is based on prior agreements between the market participants affected by the regulation. If it can be proved that the politicians adopted the regulation after they had made a substantive decision themselves, *i.e.* that the third condition is fulfilled, the regulation is probably meant to pass Elhauge's test. Hereby, States have the possibility of circumventing the central competition provisions by allowing for the terms of anti-competitive agreements through laws. A third example of a line-drawing problem with regard to political accountability concerns whether regulations

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1011) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, pp. 705-706. As a consequence of the American case law's distinction between a doctrine of state action and a doctrine of petitioning, Elhauge equally applies such a distinction. In his article, *The Scope of Antitrust Process*, from 1991, the first doctrine is treated, whereas the latter is considered in his article entitled *Making Sense of Antitrust Petitioning Immunity*, from 1992. The approaches which Elhauge applies to the cases connected to each of the doctrines are identical, except that only in the cases connected to the first doctrine does he require that a substantive decision be made by the financially disinterested and politically accountable actor in favour of the terms of the restraint. Unfortunately, *Elhauge* nowhere explains why this difference is relevant. Certainly, it has the unfortunate effect that emphasis on classification of subject matters into either one of the two categories becomes excessive significant - a classification which will often be artificial.

1012) Elhauge provides some of the answers to these questions in Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 671, footnote 10: "I define an actor as 'politically accountable' if his or her authority can be traced to an election, appointment by elected officials, or through some chain of appointment starting with elected officials. Ongoing political accountability is not required; it is sufficient that the political process can influence the initial selection of personnel to exclude those with unacceptable policy preferences. For example, within the meaning used here, the term 'politically accountable' embraces a state judge with life tenure who was appointed by elected officials. It also embraces a state administrator serving a fixed, nonrepeatable term who was appointed by a state official who was herself appointed by elected officials. Such retrospective or derivative accountability to political forces is a common hallmark of our political system". Elhauge adds that state action immunity requires only that a neutral state agency actually made a substantive decision in favour of the challenged restraint and that the doctrine thus excludes challenges to the adequacy of a neutral agency's consideration of anti-competitive effects; see *ibid.*, at p. 696, footnote 145.

enacted by accountable decision-makers which allow private actors to enter an anti-competitive agreement will pass the test. If this permission is formulated in general terms, it is difficult to decide whether the decision-makers actually could be said to have approved the terms of the restraint after it has been imposed on the market seeing as this approval in fact had taken place prior to the restraint being formulated. The solution would therefore have to depend on the actual circumstances of the case.

In addition, the definition of "substantive decision" is not completely clear. Would it, for example, be acceptable that the actor decide that a proposal from a state board composed of all affected interests regarding prices for a given sector be made generally binding? Or is this actor's decision more acceptable if the actor changes the proposal with one per cent? How is it ever possible to know what was going on in the head of such an actor? Again, this part of the test needs further refinement by the courts. In addition, it should be noted that the substantive decision has to be made before the challenged restraint is imposed on the market. It should be understood that this part of the test has the effect that if an anti-competitive restraint has been controlled by a financially interested, but politically unaccountable actor, it may be legal after all if a financially disinterested and politically accountable actor subsequently makes a substantive decision in favour of the terms of the restraint, if this is done in a way which fulfills the condition that it is made after the restraint is imposed on the market. It is in this regard necessary to know which stages a restraint is understood to include: does it only include the stage of adoption of the regulation, the regulation itself, or also the results of the regulation such as agreements allowed for by the regulation or prices set by committees?<sup>1013)</sup> The test only truly makes sense if all stages are included. Otherwise, its effect would be too narrow and not consequential.

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1013) An example of the problem is the situation where an agreement leads to the adoption of a state measure. Will the restraint be seen as having been implemented due to the existence already of the agreement? Or, providing that its terms are not put into force until the enactment of the state measure, may this measure be considered as being the action which really implements the restraint? The questions are important as to the decision of whether immunity is obtained or not, when agreements are involved. Thus, according to a strict understanding of the condition that the substantive decision has to be made *before* the restraint is imposed, only in the latter instance is immunity provided.

### 16.3.2. A Paradoxical Effect

The test has as a consequence that if there is a public need for *e.g.* regulated price setting, then the public authorities would to a large degree have to formulate the prices themselves, rather than consulting the affected market participants. However, the greater the degree of regulation by the public authorities, the less the free market determines, in this example, the price. This is paradoxical because allowing the free market to set prices is in fact one of the objectives of competition law.

### 16.3.3. The Public Interest as the Real Test?

According to Elhauge, federal antitrust law is viewed as favouring competitive markets on the premise that competition furthers the public interest by advancing economic efficiency, consumer welfare, or socio-political conceptions of the public good.<sup>1014)</sup> Therefore, Elhauge understands the object of competition as furthering the public interest. The link between competition and the public interest is, according to Elhauge, that federal antitrust policy does not stand for the proposition that restraining competition can never serve the public interest.<sup>1015)</sup> Rather, it stands for the more limited proposition that certain persons - those with financial interests arising out of restraints of trade - cannot be trusted to determine which restraints are in the public interest and which are not.<sup>1016)</sup> In consequence, his test has the purpose of finding those state regulations which are in conflict with the public interest.

The pressing question, then, is why not make "*is the regulation in the public interest?*" the real test? Accordingly, if a regulation is in conflict with the public interest, then it is condemned. Why make the detour, as Elhauge's test prescribes, in order to find out which regulations are conflicting with the public interest? All regulations could be tested against whether they are in conformity with the public interest and Elhauge's test would then only be one of the criteria applied when making this decision. In other words, Elhauge, in

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1014) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 668.

1015) See *ibid.*, at p: 706.

1016) See *ibid.*, at pp. 706-707.

fact, does what he says he does not do: he sets up a formal rule instead of designing the test in accordance with what he really wants to find out, *i.e.* which state regulations harm the public interest.

The answer to this could be that the question of public interest only is asked when the test itself encounters difficult cases. Then, the public interest issue serves as an extra tool or, as Elhauge himself points out, as an underlying affirmative theory. Making public interest the real test would be difficult and would under all circumstances need further refinement into sub-tests such as Elhauge's. Or, in the words of Elhauge, speaking of this test: courts are incapable of evaluating the desirability of deviations from market competition, which is why this test is better than an efficiency or public interest test.<sup>1017)</sup>

#### 16.3.4. The Importance of Financially Interested Actors Not Being in Control

The rationale of Elhauge's test is that competition law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest.<sup>1018)</sup> In an evaluation of the test, it is therefore essential to ask why this is so.

Elhauge's argument starts from the general opinion that economic concerns such as regulating and restraining competition to correct market failures, as well as non-economic concerns which inevitably result in limitations on free markets such as bans on prostitution, cocaine dealing, or baby selling, are in the public interest.<sup>1019)</sup> According to Elhauge, financially interested parties cannot be trusted to further these economic or non-economic conceptions of the public good or to weigh them against the harm to efficiency, consumer welfare, and other antitrust objectives. The reason is that their financial incentives will bias them toward fixing profit-maximising output and price levels irrespective of whether they further public goals. Indeed, furthering their financial interest will often require action that frustrates antitrust goals and ensures that market imperfections remain uncorrected.

Actors who are financially disinterested and politically accountable stand in a different light. They lack the structural financial incentives to restrain trade in ways that harm

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1017) See *ibid.*, at p. 707.

1018) See *ibid.*, at p. 696.

1019) See *ibid.*, at p. 702.



the public interest.<sup>1020)</sup> The assurance that they will act in the public interest is provided by a belief in their accountability, political or procedural, to the affected parties.<sup>1021)</sup> This is further supported by the fact that this political or procedural process is defined and policed by various legal doctrines, of which some are of a constitutional character.<sup>1022)</sup> Therefore, on the one hand, if freely permitted to restrain trade, those financially interested in the sale or purchase of goods or services have incentives to stifle competition, reduce output, and raise prices.<sup>1023)</sup> They are thus systematically prone to restrain trade in ways that injure the social, economic, and distributive goals of antitrust. On the other hand, financially disinterested actors lack these incentives.

Elhauge's argument appears sound and quite appealing. From the personal sphere the argument can be partially compared to the situation where we leave to financial institutions the care of our money. In this case, we would always condition that the financial interest of the financial institution is minimised and defined. Otherwise, it would not be possible to trust the financial institution.

Nevertheless, it is possible to oppose Elhauge's line of argument. For example, if States which in themselves are financially disinterested, want to delegate the control of a given field to financially interested actors, it is not explained by Elhauge why they should not be allowed to do so. Furthermore, although Elhauge refers to the legislative history of the Sherman Act, it is not completely explainable why this removal of financially interested actors is supposed to be regulated particularly through the federal antitrust laws.<sup>1024)</sup> In addition, the premise of trusting that the politically accountable decision-makers represent all the affected interests and can weigh them against each other may be questioned. In general,

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1020) See *ibid.*, at p. 703.

1021) See Elhauge, Einer R., "Making Sense of Antitrust Petitioning Immunity", *California Law Review*, Volume 80, 1992, Number 5, p. 1198.

1022) See *ibid.*, at p. 1198.

1023) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 702.

1024) McGowan & Lemley point out that Elhauge's project is revolutionary because he aimed to reconceptualise the purpose of the antitrust laws in an entirely new way, which, pursuant to McGowan & Lemley is also an entirely incorrect way; see McGowan, David & Lemley, Mark A., "Antitrust Immunity: State Action and Federalism: Petitioning and the First Amendment", *Harvard Journal of Law & Public Policy*, 1994, pp. 293-400.

decision-makers are specialists familiar only with their own particular field. Very often they will not even have a general idea of the effects that a decision will have on the economy as a whole. Also, public actors are not necessarily as accountable as Elhauge presumes, and private actors are not always as suspect.<sup>1025)</sup>

#### 16.4. Legal Relevance

Among Elhauge's arguments in favour of the test is that it is already inherent in the thinking present in the case law of the US Supreme Court. Furthermore, in his analysis of whether there are any functional differences between the decision-making processes that produce those restraints that the Supreme Court invalidated and those that it did not invalidate, he found the difference that in the former case the terms of the restraint were controlled by financially interested actors. Due to this finding, Elhauge designed his test. It is therefore interesting to see, firstly, whether the thinking of Elhauge is apparent in the case law of the European Court of Justice,<sup>1026)</sup> and, secondly, whether a similar functional difference in the European case law exists.<sup>1027)</sup> This analysis is of significance in making a decision as to whether the test may be normatively recommended to be applied in the European context.

##### 16.4.1. The Appearance of Elhauge's Insights in the European Case Law

The thinking of Elhauge with regard to the control of financially interested actors is partially and implicitly apparent, however only in a seminal version, in the thinking of the European case law. Especially the delegation criterion presented in the *Leclerc Case* and the third prong of the *Van Eycke* test reflect that this thinking is not completely foreign to the

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1025) See *ibid.*

1026) As Elhauge's thinking is not explicitly apparent in any of the Treaty provisions, only case law is under scrutiny here. An account of the legislative history of especially the competition provisions, such as that presented by Elhauge concerning the Sherman Act, will not be made as this is not an element typically given importance in Community law.

1027) This survey concerning a financial interest element in the case law of the European Court of Justice is primarily limited to cases actually taking into consideration the interaction of Articles 3(g), 5 and 85 EC.

European Court of Justice. Below, examples of the presence of Elhauge's insights are presented.

In the *Leclerc* Case from 1985, the delegation criterion was formulated as an examination of whether:

*"...national legislation ... renders corporate behaviour of the type prohibited by Article 85(1) superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices" 1028)*

This was answered in the affirmative as the Court found that, in the terminology of Elhauge's test, financially interested and politically unaccountable actors were in control of the restraint:

*"...legislation of the type at issue...imposes on publishers and importers a statutory obligation to fix retail prices unilaterally." 1029)*

*Leclerc*'s delegation criterion was applied in the *Cullet* Case as well, which was also decided in 1985. Here, the Court came to the opposite result than in *Leclerc*, as it found that financially disinterested and politically accountable actors were in control of the contested restraint, *i.e.* that public authorities were in control. The Court even reflected upon whether this actor made a substantive decision in favour of the terms of the restraint. This is understood from the following phrase:

*"[Rules such as those concerned in this case] entrust responsibility for fixing prices to the public authorities, which for that purpose consider various factors of a different kind". 1030)*

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1028) See the *Leclerc* Case, at Ground 15.

1029) See *ibid.*, at Ground 15.

1030) See the *Cullet* Case, at Ground 17.

In *Clair*, which was handed down in 1985 and did not entail a solution within the framework of Articles 3(g), 5 and 85 EC,<sup>1031)</sup> but only in relationship to Article 85 EC, the Court reflected upon whether the board members were financially disinterested and politically unaccountable and came to a negative conclusion.<sup>1032)</sup>

In the *Lefèvre* Case from 1987, the Court found that prices were set by public authorities, *i.e.* by actors which were financially disinterested and politically accountable:

*"...it must also be observed that the purpose of such rules is not to compel traders to conclude agreements or to take any other action of the kind prohibited by Article 85(1) of the EEC Treaty but to entrust responsibility in pricing matters to the public authorities. As the Court has already ruled in ...[the Cullet Case]..., Article 3(f) and Article 85 do not prohibit the adoption by Member States of such national rules providing for retail sale prices to be fixed by the public authorities".* <sup>1033)</sup>

The next case in which Elhauge's thinking could be said to be apparent is *Libraires* from 1988 as it was based on the findings in *Leclerc*.

Then, in 1988, *Van Eycke* was decided. Here, the three-prong test was launched. This is of cardinal importance because the third prong to a large degree could be seen as containing the thinking of Elhauge. According to this prong, national legislation would be annulled if a Member State were:

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1031) See however also the *Aubert* Case.

1032) This appears from the following: *"The Board observes that the members who attended its general meeting and who negotiated and concluded the agreement in question were all appointed by the Minister for Agriculture. Thus they do not represent the various trade organizations from which they come and the agreement between them cannot be regarded as an agreement between associations of undertakings. That argument cannot be accepted. Article 85 must be interpreted as covering such an agreement, since it was negotiated and concluded by persons who, although appointed by the public authorities, were, apart from the two appointed directly by the minister, proposed for appointment by the trade organizations directly concerned and who consequently must be regarded as in fact representing those organizations in the negotiation and conclusion of the agreement".* See the *Clair* Case; at Grounds 18-19.

1033) See the *Lefèvre* Case, at Ground 7.

"...to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere." <sup>1034)</sup>

What is tested here is, in other words, whether the financially interested and politically unaccountable actors are in control of the restraint instead of the public authorities. As the *Van Eycke* test has ever since been applied by the Court, accordingly this thinking has been apparent in almost all of the succeeding cases. Also, in the reply of the Court in the *Van Eycke* Case to the question inherent in the third prong, Elhauge's insights were also clearly present.<sup>1035)</sup> Accordingly, the Court found that the power to fix maximum rates on interest was held by the financially disinterested and politically accountable public authorities.

The last example, to be mentioned here, of a case where the thinking of *Elhauge*, including the requirement of the existence of a substantive decision, appears, is the *Güterfernverkehr* Case decided in 1993.<sup>1036)</sup> *Güterfernverkehr* was confirmed in various subsequent cases, such as *Delta*, *Spediporto* and *DIP*.

#### 16.4.2. Functional Differences in the European Case Law

After pointing out in what respect the insights of Elhauge flourish in the European case law, it is now convenient to examine whether there are any functional differences

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1034) See the *Van Eycke* Case, at Ground 16.

1035) The formulation of this was as follows: "... it is apparent from the legislation in question that the authorities reserved to themselves the power to fix the maximum rates of interest on savings deposits and did not delegate that responsibility to any private trader. That legislation thus has an official character which cannot be called in question by the mere fact,... that... the decree was adopted following consultation with the representatives of associations of credit establishments." See the *Van Eycke* Case, Ground 19.

1036) The final conclusion especially sums this up quite well: "Article 3(f), the second paragraph of Article 5 and Article 85(1) of the EEC Treaty do not preclude rules of a Member State which provide that tariffs for the long distance transport of goods by road are to be fixed by tariff boards and are to be made compulsory for all economic agents, after approval by the public authorities, if the members of those boards, although chosen by the public authorities on a proposal from the relevant trade sectors, are not representatives of the latter called on to negotiate and conclude an agreement on prices but are independent experts called on to fix the tariffs on the basis of considerations of public interest and if the public authorities do not abandon their prerogatives but in particular ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary, substitute their decision for that of the boards". See the *Güterfernverkehr* Case, at Ground 24.

between the decision-making processes that produce those restraints which the European Court of Justice has held contrary to the doctrine on the interaction of Articles 3(g), 5 and 85 EC, and those which it has not found to be in violation of the said provisions.

The overall impression from the European case law is that when comparing the actual outcomes with probable outcomes based on Elhauge's test, these are surprisingly concurrent. It should, however, be stressed that a large degree of insecurity is associated with an application of this test to cases already decided due to the lack of information relevant to this test. This does not, though, imply that this would also be the situation in new cases. Rather, the impression is that the test seems operational if applied to new cases by a court having all relevant information at hand.

Another observation to be mentioned is that most of those measures contested in the European case law appear as having been adopted by financially disinterested and politically accountable actors.<sup>1037)</sup> The adoption itself of the contested measures is therefore likely to pass Elhauge's test, also in those situations where the adoption was influenced by financially interested actors who were not politically accountable. Therefore, it is primarily the restraint following from the adoption which is looked upon in the following analysis.

Among those cases where the Court could be said to have held that the contested measure violated the analysed Treaty provision, *INNO*, concerning Belgian legislation fixing binding retail prices on tobacco, was the first.<sup>1038)</sup> It was decided in 1977. Applying Elhauge's test would most likely have led to a similar outcome, because the contested restraint was clearly distorting competition and was in practice controlled by financially interested private actors as the determination of prices was in the hands of the manufacturers and importers themselves. Furthermore, the public authorities did not make any substantive decision in favour of the prices.

The next case of relevance here is *Leclerc* from 1985, where the Court would have held the contested measure contrary to the analysed Treaty provisions, had it not found that it was protected according to Member State competence in the field. Again, this finding appears identical to that which would have resulted based on an application of Elhauge's test.

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1037) The available amount of information as to the circumstances that led to the adoption of the contested measures is very minimal in the case law.

1038) However, the final determination in this matter was left to the referring national court.

The contested French regulation of minimum prices on books was anti-competitive. Moreover, the fixing of the binding prices was made unilaterally by publishers and importers without any approval or the like by the public authorities.

In *Clair*, which was also delivered in 1985, the Court found that a measure fixing minimum prices for, among other things, cognac, violated Article 85 EC (not in combination with Articles 3(g) and 5 EC). Had the Court alternatively applied the test under scrutiny here, the outcome would likely have been the same. This is due to the fact that the measure was anti-competitive, and the restraint was largely controlled by financially interested actors, namely the members of the price board fixing the prices. This evaluation corresponds to that of the Court, and the doubt presented by Elhauge, as to whether a board composed of all affected interests should be treated as financially interested, can therefore be ignored with a certain degree of justification.<sup>1039)</sup> This is also grounded on the fact that the board in *Clair* was not really composed of all the affected interests. Among others, consumers were not presented. It should be added that the agreement made was subsequently made generally binding pursuant to ministerial order without, it appears, any substantial decision made by the issuing Minister for Agriculture, who may be considered as financially disinterested in the restraint and politically accountable.

*Asjes*, from 1986, was the next case in which the Court's ruling could be said to condemn the contested national measure, however under the reservation that the measure nevertheless was held protected due to Member State competence in the field in question. The contested measure concerned the minimum price of airline tickets. The anti-competitive restraint was controlled by financially interested private actors, namely those airlines which decided the binding tariffs. Although the tariffs had to be submitted to the Minister for Civil Aviation, it does not seem as if this Minister made a substantive decision himself in this regard. Again, a minister must be considered as fulfilling the requirement of being a disinterested accountable decision-maker. The outcome according to Elhauge's test is therefore likely to be the same as that of the Court.

*Vlaamse Reisbureaus*, decided in 1987, was the first case where the Court unambiguously held a national measure contrary to the analysed doctrine. At stake was a prohibition against the transfer of travel agent commission to customers. The measure was

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1039) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 703.

anti-competitive in its nature. The agreement which led to the adoption of the Royal Decree of 1966 which was the main part of the measure being contested was entered into by financially interested actors. As the terms of the agreement and the Decree were quite analogous, it appears as if the financially disinterested and politically accountable actors adopting this Decree did not make a substantive decision. Accordingly, outcomes were identical, but under the reservation of the requirement that a substantive decision really be fulfilled, which is not in the least certain. This is, as mentioned above, definitely a part of the test which needs further refinement.

In the *Aubert* ruling, which came in 1987, it was also unambiguously held that the contested national ministerial order was contrary to the doctrine. The facts were more or less the same as in *Clair*, except that this time it was production quotas which were at issue. Under the same arguments as stated above under the analysis of the *Clair* Case, the outcome pursuant to Elhauge's test would have been the same as the Court's.

In the *Libraires* Case from 1988, the measure would have been held contrary to the doctrine had the Court not found it protected by a Member State competence. As the facts of the case were quite similar to those of *Leclerc*, it suffices here to refer to the comments above to that case and to point out that Elhauge's test would also have led to a condemnation of the contested restraint.

The *Ahmed Saeed* Case is the last of the judgments where the Court found national measures contrary to the analysed doctrine. The judgment was delivered in 1989 and the outcome here was unambiguously that a violation of Articles 85 and 5 EC had taken place. The anti-competitive measure at hand concerned prices of airline tickets, which were decided through tariff agreements entered into by the airlines concerned and subsequently approved by aeronautical authorities. If Elhauge's test had been applied, the outcome would have been the same because the restraint was controlled by financially interested actors and no substantive decision appeared as having been made in favour of the restraints's terms by a disinterested, accountable decision-maker; the measure could not be held in force by the Member State.

As already mentioned above, this comparison of outcomes has been conducted under a great deal of uncertainty, especially with regard to the third prong of Elhauge's test as to whether a substantive decision has been made. However, it may be concluded that there is



a tendency that those cases in which the Court ruled that measures were contrary to the doctrine would at the same time not have been able to pass Elhauge's test.

The decisions in which the Court approves the contested national measures as being in conformity with the doctrine also correspond fairly well with the probable result according to Elhauge's test. For the sake of illustration, the two more recent decisions, *Güterfernverkehr* (1993), and *Delta* (1994), are analysed in the light of Elhauge's test. They have in common, however, that Elhauge's test probably would have led to the opposite result than that of the Court. In the *Güterfernverkehr* Case, although the Court itself puts emphasis on the fact that the members of the tariff boards were not bound by orders from the associations that they represented, that they had to take other interests (other than their own financial ones), such as those concerned with the sector of agriculture into consideration, and that they had to carry out their duties on an honorary basis, it is possible to claim that they were only from such a formal point of view financially disinterested. In addition, although the responsible minister was competent to reject approval of the proposed prices, the question remains whether this really indicates that this minister would then actually make a substantive decision in favour of the terms of the restraint.<sup>1040</sup> Although the facts of the *Delta* Case are quite similar to *Güterfernverkehr*, there are however a few differences which point in the direction that *Delta* is even further away from fulfilling the condition of Elhauge's test. This is due to the fact that in this case, the responsible minister was not allowed to become a member of the freight commissions, and to the fact that the Court could not describe the members as experts in tariff matters. These two cases, in which the Court probably to the largest degree seen so far could be said to apply the insights of Elhauge, nevertheless demonstrate how dangerous it is to apply the test in a too formal manner.

Finally, *Van Eycke* (1988) and *Meng* (1993) shall also be presented for the sake of illustration in the light of Elhauge's test as examples of cases where the outcomes correspond but where the outcomes of the cases would have however been better explainable had this test been explicitly applied.

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1040) In this regard, Bach indicates that for the last ten years preceding the judgment, the Minister did not promulgate any tariffs other than those decided by the tariff commissions, see Bach, Albrecht, "Case C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG; Case C-2/91, Meng; Case C-245/91, OHRA Schadev. Zekehringen NV", *Common Market Law Review*, Volume 31, 1994, Number 6, p. 1360.

In *Van Eycke*, the challenged measure was found to be in accordance with the doctrine. The measure concerned maximum interest rates. Due to very high savings deposits interests rates, various financial institutions entered into a self-regulatory agreement with the purpose of easing the vigorous competition. The agreement was adopted pursuant to a national Decree and a recommendation. As the agreement did not remove this undesirable level of competition, a new Decree was issued. It fixed, *inter alia*, a maximum basic interest rate. The Court found, in a not too well-founded manner, that there was no link between the Decree and the agreements. A better argument would have been, had the Court applied Elhauge's thinking explicitly, that the financially disinterested and politically accountable issuers of the Decree presumably had made a substantive decision in favour of the terms of the Decree. Therefore, although the agreement as such was adopted by financially interested and politically unaccountable actors, this was counterbalanced by the circumstances as to the adoption of the Decree.<sup>1041)</sup>

Also in the *Meng* Case, the Court found that the contested measure was in accordance with the doctrine on control of anti-competitive state measures through the competition provisions. The measure embraced a prohibition of insurance brokers transferring their commissions, which are normally paid to themselves by the insurance sector, to their customers. Although agreements had existed prior to the adoption of the measure, the Court held that as these agreements had been entered into by undertakings belonging to sectors of the insurance business other than those regulated in the measure, and then made applicable to the concerned sectors, there was no link between the agreements and the measure. This grounding of the Court is a bit flawed, and the case would have been better explained through Elhauge's test. What the Court perhaps really wanted to say was that although financially interested actors, namely the insurance companies, had influenced the measure, financially disinterested and politically accountable actors had made a substantive decision in favour of the restraint. This is presumed by the Court, it seems, because the terms of the agreements were applied to a different sector. The public authorities had made a substantive decision to apply those terms to a different sector.

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1041) This was in a way also what the Court attempted to say in the following paragraph: "...[I]t is not apparent from any of the findings made by the national court in its judgment that such legislation merely confirmed both the method of restricting the yield on deposits and the level of maximum rates adopted under pre-existing agreements, decisions or practices." See the *Van Eycke* Case, at Ground 18.

It is now possible to conclude that the thinking of Elhauge indeed is present in the European case law on the interaction of Articles 3(g), 5 and 85 EC. At the same time there is a tendency that had Elhauge's test been applied, the outcomes would have been the same as the actual outcome of the European case law. However, especially the third prong of the approach as to whether a substantive decision has been made needs further refinement as to what the more exact requirements are. Is it enough that, for example, price tariffs are approved by the responsible minister as in *Clair* and *Asjes*, or that a decree has been issued as in *Vlaamse Reisbureaus*, or should it be required that various politicians have truly considered the various price determinants or whatever is relevant to the decision?

### 16.5. Evaluation

Elhauge himself stresses that his test is perhaps not perfect but that it is preferable, both as a matter of policy and of statutory interpretation, to its alternatives.<sup>1042)</sup> The above analyses demonstrate that this holds true to a large degree. Indeed, the test contains many advantages, and its weaknesses may be compensated for by an explicit application by the courts and consequently, by their further development and refinement of the test. However, one major weakness can not be removed: the rationale of the approach, namely that competition law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest, is not founded in reality, and in particular not in the European context.

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1042) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 697.

## 17. Competition Between Legal Systems

In the context of the American debate on state action, Easterbrook is responsible for the introduction of a test based on competition between legal systems.<sup>1043)</sup> The test results in a considerable preservation of the Member States' autonomy and does not involve efficiency evaluations of individual regulations. Yet, efficiency is the goal of the test. The test may be classified as based on a paradigm of non-conflict or *laissez-faire*, because it only to a minor degree perceives any conflicts between the two levels of governance to be present.

The underlying theoretical basis is, as will be explained below, founded on a subset of public choice theory, namely that part of the theory concerned with competition between legal systems.<sup>1044)</sup> Before that explanation, the test will be further defined. After the presentation of the theory behind the test, it is further analysed, followed by an examination of its legal basis and finally by an evaluation of whether it is an appropriate tool as a solution to the conflict.

### 17.1. Definition

The test is defined as permitting States to adopt any regulations they choose, so long as the residents of the State that adopts the regulation also bear the whole monopoly overcharge.<sup>1045)</sup> That means that the only limitation to the Member States' regulation is that it must not imply that monopoly overcharges are exported.

Monopoly overcharges of the kind at issue here occur where one State has a large market share of a particular resource and, pursuant to State legislation, it enforces a cartel for the producers of the resource in question. These producers are then capable of charging

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1043) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, pp. 23-50.

1044) For a definition of public choice theory, see *Chapter 15* above concerning *Interest Group Theory of Regulation*.

1045) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, p. 45.

a price higher than that which would have been charged under free competition, in fact a price close to that which a monopoly could charge, as ways of cheating are strongly delimited by the State regulation. The overcharge is then, due to the monopoly status of the resource in question, exported. Other States' residents pay the overcharge. The State's own residents also pay part of that overcharge, but they can be made better off by placing a significant tax on the cartel's profits.<sup>1046)</sup> With regard to testing whether an overcharge is exported, a rule of reason inquiry is applied.

It is assumed here that the thinking behind the test, in principle, is transferable to the European context. In the European terminology of distribution of competences, this implies that the competence to enact economic regulation, except export of monopoly overcharges of resources having a monopoly status in the State, is generally an exclusive State competence.

The test is based on a rationale which does not, however, have as its point of departure the distribution of competences. Rather, it offers a way to approach the State-Center relation with an eye to maximising efficiency and thus to achieving the goal of the competition provisions.<sup>1047)</sup>

## 17.2. Background

Easterbrook refers to the economics of federalism, which deals with the allocation of functions between different governments, as the underlying rationale of his approach.<sup>1048)</sup> This theory, he adds, develops the implications of the fact that, just as there is competition in the market, there also may be competition among States with regard to their "sale" of laws.<sup>1049)</sup> An obvious example is ongoing immigration to the United States of

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1046) See *ibid.*, at p. 39.

1047) See *ibid.*, at p. 42.

1048) See *ibid.*, at p. 28. In fact, Easterbrook's theoretical basis is the same as that contained in the theory which is referred to as public choice, as some public choice theorists also deal with competition between legal systems; see e.g. Reich, Norbert, "Competition Between Legal Orders: A New Paradigm of EC Law?", *Common Market Law Review*, Volume 29, 1992, pp. 861-896.

1049) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, p. 287. In other words, Easterbrook is concerned with horizontal competition, which may be described as economic institutions at

people seeking a better government and living conditions. Another example is companies choosing establishment in those States with the most attractive laws; for instance, Ireland's tax laws are very advantageous to new firms establishing there.

The test does not, however, deny that regulations often are harmful and that they frequently have been enacted under undesirable pressure from politically powerful groups.<sup>1050)</sup> It is important, however, that by allowing States to regulate as they wish, in the long run, people and companies in principle get the regulation that they desire. Therefore, better regulations are enacted and ultimately a higher degree of welfare is reached. Otherwise, people and companies would move to a State with the regulations that they prefer. This is the cause of interjurisdictional competition, which, in theory, provides optimal regulation.

The point of departure of the theory is thus the assumption that people have two principal responses to dissatisfaction with the state of things: "exit" and "voice".<sup>1051)</sup> "Exit" is, in this context, the primary focus and is understood as firms' or people's change of jurisdiction whenever considerable dissatisfaction occurs. "Voice" is understood as people's other option in the case of dissatisfaction: speaking out and organising political campaigns.

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the same level of social organisation which compete for economic power and welfare; see Trachtman, Joel P., "International Regulatory Competition, Externalization and Jurisdiction", *Harvard International Law Journal*, Volume 34, 1993, Number 1, p. 51. Vertical competition, on the other hand, may be defined as the dynamics by which regulatory authority should be allocated among institutions at different levels, *i.e.* whether the regulator should for example be the EU, the State or the market, see *ibid.* p. 53.

1050) Easterbrook emphasises, however, that regulation might be a common good, as well, under certain conditions. The argument is the following: "*The inefficiencies of extensive command-and-control regulation fall on consumers and producers alike. And there is some reason to think that whenever politically powerful groups are denied their preferred methods of regulation, the result will be worse for all groups. If firms have political power, they maximize the redistribution of income in their favor by holding as low as they can the deadweight allocative efficiency loss of their chosen methods: the greater the allocative loss, the smaller the pie the 'powerful' firms can slice in their favor. There is thus at least a weak presumption that politically powerful groups initially choose methods of redistribution that have relatively low deadweight losses. If these preferred methods are foreclosed, perhaps by federal antitrust doctrine, politically powerful groups will shift to other methods of redistribution that benefit them less but, perhaps, also leave less for the rest of us.*" See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, p. 31.

1051) See Easterbrook, Frank H., "Antitrust and the Economics of Federalism", *The Journal of Law and Economics*, Volume 26, 1983, Number 1, p. 33.

The more the following four conditions are satisfied, the more a tendency toward competition among jurisdictions and consequently optimal regulation is created: 1) people and resources are mobile; 2) there is a large number of jurisdictions; 3) jurisdictions can select any set of regulations that they desire; and 4) all of the consequences of one jurisdiction's laws are felt within that jurisdiction.<sup>1052)</sup>

The first condition concerning mobility is important in order to put pressure on governments, or, in other words, for the existence of the possibility of "exit".

The significance of the second condition, concerning the number of jurisdictions, lies in the fact that the more jurisdictions there are, the more likely persons or companies seeking to exit can find at least one jurisdiction with laws suited to their needs and wants, and the more pressing is the competition among the jurisdictions to provide such regulations.<sup>1053)</sup> The condition is similar to the condition of there existing many suppliers in order to approximate perfect competition.

The role of the third condition, concerning the freedom to select regulations, is to give States the option of altering its regulations in order to attract entry.<sup>1054)</sup> As a consequence, pressure is put on competition between jurisdictions.

Finally, the fourth condition, concerning regulations' consequences, is the one strongly being visible in the definition of the test above, as it has as its effect that States should be prohibited from exporting monopoly overcharges.<sup>1055)</sup> The background of the condition is that if the consequences of a jurisdiction's laws are not felt within that jurisdiction, then the forces needed to create competition, "exit" and "voice", are reduced in strength. Burdens connected to the laws in question are paid by non-residents who do not have the possibility of protesting by either "exit" or "voice". In addition, the residents of the jurisdiction have less reason to exit. This is why a solution should be offered by the Center rather than by the States.

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1052) See *ibid.*, at p. 33.

1053) See *ibid.*, at p. 36-38.

1054) See *ibid.*, at p. 38.

1055) See *ibid.*, at pp. 38-39.

### 17.3. Analysis

Below, the following issues will be further analysed: 1) definitional delimitations; 2) amount of competition between States; 3) long run perspective; 4) the burden of seeking governmental action; 5) the assumption of "exit"; 6) decentralisation versus centralisation; and 7) transferability to the Community.

#### 17.3.1. Definitional Delimitations

An obvious advantage of the test is that it appears to be simple to apply. Although it is based on a rule of reason test, it appears as if courts only have to decide whether a State has a large market share of a particular resource and, in addition, whether the State has allowed for a cartel.

However, the test, as presented by Easterbrook, is not yet fully developed and therefore appears as rather unclear. In fact, he says it himself when he refers to a "*Sketch of a New Approach*".<sup>1056)</sup> This does not, though, remove the problem of lack of clarity: for instance, are only natural resources such as the raisin production contested in the *Parker Case* included as prohibited by the approach? Or are also "brand" resources such as port produced in Portugal, gorgonzola cheese manufactured in an Italian region, or Dijon moustard produced in a French region - all products which can easily be copied, but, although they are easy to substitute, consumers will prefer them to similar products due to their status as "brand" products - included in the definition of a Member State's monopoly production? Furthermore, are fields such as communication, utility and traffic, which are typically regulated nationally, to be perceived as monopolies? Another unclear aspect regards how to measure whether an overcharge is taken by the producers and whether it has been exported. Moreover, are only cartels in this regard illegal or are also monopolies more generally prohibited?

Naturally, these unclear matters are to be overcome by further development by the courts. A clear rule, from a legal point of view, could be that only regulation of producers of natural resources face the danger of being condemned. Few cases would then cause trouble.

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1056) See *ibid.*, at p. 45.



### 17.3.2. Amount of Competition Between States

A weakness of the theory is of course, as Easterbrook himself points out, that there is a lack of empirical evidence on the size of the effect of competition among jurisdictions.<sup>1057)</sup> In this connection, one may, ask, as Easterbrook does, whether competition among States really works in the described manner. These two observations are also emphasised by Sun & Pelkmans in a more recent study. They point out in this regard that although an extensive amount of literature-by now exists on competition between legal orders, there is scant literature on how this competition works in actual practice.<sup>1058)</sup> The authors, therefore, provide two case studies, and on the basis of these as well as on a comparative, qualitative cost-benefit analysis of regulatory competition and harmonisation, they conclude that in the European context, competition between legal orders should not be applied as a complete substitute for harmonisation.<sup>1059)</sup> Rather, the optimal regulatory solution in a given case would combine minimum harmonisation of the essential requirements with competition between legal orders beyond this level.<sup>1060)</sup> The demarcation between the two will have to be determined on a case-by-case basis.<sup>1061)</sup> In other words, the conclusions of Sun & Pelkmans do not support Easterbrook's test. They stress, however, that more detailed case studies are necessary before any definite conclusions can be drawn.

### 17.3.3. Long Run Perspective

The test implies that anti-competitive regulations (even those having the purpose of circumventing the central competition provisions, unless other legislation catches these instances) generally are allowed. The argument goes that in the long run this does not matter. The question then is whether the best solution is to wait that long, because meanwhile the

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1057) See *ibid.*, at p. 44.

1058) See Sun, Jeanne-Mey & Pelkmans, Jacques, "Regulatory Competition in the Single Market", *Journal of Common Market Studies*, Volume 33, 1995, Number 1, p. 68.

1059) See *ibid.*, at p. 68.

1060) See *ibid.*, at p. 88.

1061) See *ibid.*, at p. 88.

market is injured until the restraints are corrected.<sup>1062)</sup> But, if the alternative is to centralise all regulation or to control national regulation, it is, from the point of view of the theory on competition between legal orders, convincingly best to wait.

#### 17.3.4. The Burden of Seeking Governmental Action

As Elhauge points out, Easterbrook's test is flawed because it ignores or misallocates the burden of seeking governmental action.<sup>1063)</sup> Because it is quite costly and difficult to convince regulators to change unattractive legislation, and due as well to the inertia of lawmaking, this will often not be corrected, not even in the long run as claimed by Easterbrook.

#### 17.3.5. The Assumption of "Exit"

An even more serious flaw of the test is, as Elhauge argues, that the assumption of "exit" does not hold. The reason is that for most people and companies the transaction costs of moving outweigh the differences in inefficiency costs between the regulation regimes of different States.<sup>1064)</sup> In fact, the main explanation as to why people, but not companies, move, is not really that of a comparison of the efficiency of States' regulatory regimes, but rather that of access to family, friends, and jobs. Furthermore, not many people would take the informational task of assessing and comparing the different States' regulatory regimes, because this is quite costly. Finally, States often lack the desire to increase the number of its residents.

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1062) See Elhauge, Einer R., "The Scope of Antitrust Process", *Harvard Law Review*, Volume 104, 1991, p. 714.

1063) See *ibid.*, at p. 712.

1064) See *ibid.*, at p. 713.

### 17.3.6. Decentralisation Versus Centralisation

Easterbrook's test leads to a high degree of decentralisation. This is advantageous, as already mentioned, due to the consequence of a certain degree of competition in regulation and the economic benefits therewith connected. But, it must not be forgotten, that centralisation/harmonisation is also connected with certain benefits. These are among others: 1) acquisition of economies of scale and reduction of learning costs (implying that one single set of rules govern a broad class of transactions so that transactors need not learn to deal with multiple sets of rules); and 2) reduction of costs of double compliance due to overlapping and differing regulation.<sup>1065)</sup> It would therefore have to be proved that the benefits to decentralisation and regulatory competition more than outweigh the benefits to centralisation.

### 17.3.7. Transferability to the Community

Finally, it is appropriate to ask whether the test is transferable to the Community. In this regard, it is particularly relevant to ask whether the four conditions for competition between jurisdictions are fulfilled in the Community.

The first condition, concerning the mobility of people and companies, is in theory fulfilled but in practice is not, or at least not to a comparable level as that prevailing in the United States; reference may be made to the problem of language barriers. At the same time, mobility is not really possible to enforce further, at least not in a manner that would really have an impact.

In contrast, the second condition, *i.e.* that there is a large number of jurisdictions, must be considered as fulfilled, as fifteen jurisdictions is a fairly large number (however many less than in the US).

The third condition concerns whether jurisdictions are free to choose any set of laws that they desire. As the EU to a large degree generally limits the autonomy of Member States, this condition is not truly fulfilled. This situation could, however, be changed by decision.

With regard to the last condition, *i.e.* the requirement that the consequences of one State's regulations be felt within that State, the situation is, as reflected in the test itself, that

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1065) See Trachtman, Joel P., "International Regulatory Competition, Externalization, and Jurisdiction", *Harvard International Law Journal*, Volume 34, 1993, Number 1, pp. 65-70.

it is possible to simply enact a central rule demanding this, so that the condition can be fulfilled.

In sum, on this basis, it is possible to conclude, especially due to the first condition, that competition between jurisdictions in Europe is less likely to exist than in the United States and, consequently, that it is less likely that harmful effects of national regulations over time will correct themselves.

#### **17.4. Legal Relevance**

In order to determine the legal basis of the test, a few remarks are appropriate. It is convenient to firstly look at the general system of the Treaty and then the case law.

##### **17.4.1. Support in the General System of the Treaty?**

To put it generally, the system of the Treaty does not truly give support for an autonomy of the Member States to the degree reflected in Easterbrook's test. The reason is first of all that the spirit of the Treaty and especially its interpretation by the European Court of Justice is that of condemning national regulation in the name of liberalisation.

Furthermore, an introduction of the limitation to the test's general rule, *i.e.* that Member States' regulations must not imply that monopoly overcharges are exported, would have to be characterised as competences being implied, even if one claimed it to be consistent with the competition objectives of the Treaty.

##### **17.4.2. Support in the Case Law?**

The doctrine on the interaction of Articles 3(g), 5(2) and 85 EC as stated in the case law of the European Court of Justice is not in conformity with the present test. Rather, it reveals a belief that Member States are not free to select any set of laws that they desire (third condition) and furthermore that the rule that the consequences of one jurisdiction's laws are felt within that jurisdiction (fourth condition) is very foreign to the European Court of Justice's case law on state action (but not to Article 30 case law).

Looking at the actual cases and comparing their outcomes with those that would have resulted had the test been applied, differences also prevail. As no cases concern natural resources, all cases would have the outcome that the measures are lawful. Cases such as *Vlaamse Reisbureaus*, *Aubert* and *Ahmed Saeed* were therefore wrong according to the test.

As stated above, one could consider whether the test not only should concern the production of natural resources, but also products less perfectly having a status of monopoly products in the Member State in question. In fact, certain cases did concern such products which with some right could be claimed to have a monopoly status. In this regard, cognac production in *Clair* and *Aubert* is the most obvious example. Cognac is not a natural resource, and can to a certain degree be substituted with other products, also suitable around the "coffee table". But cognac has such a special status and many are willing to pay a high price because cognac worldwide is the only "correct thing" to serve at certain occasions; in a way, it is a monopoly resource in France. When France by law allows cognac producers to enter price cartels, other States pay the overcharge. The regulation should then be prohibited, as in the end, in fact, it was by the European Court of Justice.

In summary, there is not explicitly any legal support for the test, but given the audacious interpretations often made by the European Court of Justice, an introduction of this test could also be imagined.

## 17.5. Evaluation

From an overall point of view, the test contains obvious appeals and few disadvantages. Importantly, its results are in compliance with the principle of enumerated competences and leads to a preservation of the Member States' autonomy. However, one has to accept that regulations that appear as strongly anti-competitive and which even might have been enacted on the basis of a prior agreement between members of a cartel solely to circumvent the Community's competition provisions, generally will be viewed as legal. The most significant objection to the test is, besides the lack of supporting empirical evidence of its underlying theoretical basis that the degree of mobility of citizens in Europe is very reduced, and that, accordingly, one of the fundamental premises of the test is not fulfilled. At the same time, this is not an objection which is possible to seriously change, even within

a long time perspective (due to, for example, language and cultural barriers). This implies that the test is not an obvious tool as a solution to the conflict.

## 18. Distribution of Competences<sup>1066)</sup>

It is fundamental to the federal or transnational system of government that governmental competences shall be shared or divided among a central federal or transnational authority and the governments of the Member States.<sup>1067)</sup> Despite this basic, evident idea, and although general principles actually exist, specific conflicts between Community law and national law have seldom been viewed as an issue of division of competences, not even by the European Court of Justice, which is surprising as the European Court of Justice normally appears as quite audacious. The reality is that it has never tried to fix in one broad sweep a general borderline between national and Community competences.<sup>1068)</sup>

However, perhaps due to the introduction of the principle of subsidiarity in the Treaty on European Union or, in that context, the more and more touchy climate in which the Community has to operate, a certain degree of renewed interest is emerging.<sup>1069)</sup>

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1066) The analysis contained in this chapter has, in a previous version, been published in Boegh Neergaard, Ulla, "Distribution of Competences and the Doctrine on the Interaction of Articles 3(g), 5(2) and 85 EC", in *New Directions in Business Law Research*, Edited by Dahl, Børge & Nielsen, Ruth, Copenhagen, 1996, pp. 189-219.

1067) See Cappelletti, Mauro & Golay, David, "The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration", in *Integration Through Law*, Edited by Cappelletti, Mauro; Seccombe, Monica & Weiler, Joseph, Volume 1, Book 2, 1986, p. 262. Although the exact status of the Community is not entirely clear, the problem of the distribution of competences exists here in the same way as in an acknowledged federation; see Steyger, Elies, "Europe and Its Members. A Constitutional Approach", The Hague, 1995, p. 30.

1068) See Koopmans, T., "The Quest for Subsidiarity", in *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Edited by Curtin, Deidre & Heukels, Ton, Dordrecht, 1994, Volume 2, p. 43.

1069) This development is also referred to by González in the following terms: "The widening of the objectives of the Community following the entry into force of the Single European Act and the Treaty on European Union has focused attention on the pre-federal aspects of the Community system. Associated with this widening of objectives, the abandonment of the requirement of unanimity has compelled the Member States to face up to the possibility of finding themselves in a minority on matters which they regard as fundamental. In such circumstances, it is no surprise that the Member States have felt it necessary to endow the institutional structure of the Community with the systems of cooperation and division of powers similar to those already found in modern federal systems"; see González, José Palacio, "The Principle of Subsidiarity (A Guide for Lawyers with a Particular Community

Interest taken in this division of competences, though, immediately encounters the problem that only little guidance exists as to how competences should be divided between center and periphery, It suffices to compare the following statement of the European Council in Edinburgh:

*"The requirement of an attribution of powers under the Treaties had always been a basic feature of the Community legal order; the powers of the individual States have always been the rule, those of the Community, the exception."* <sup>1070)</sup>

with that of de Witte:

*"...there is no clear division of competences between the Union and the Member States, but rather an open-ended authorisation to the Council to do whatever it thinks fit within broadly defined areas"* <sup>1071)</sup>,

which demonstrate considerable discrepancy with regard to the clarity of the rules and, more importantly, with regard to the Community's possibility of implying competences.

The purpose of this chapter is to analyse the current situation regarding this distribution of competences.<sup>1072)</sup> The underlying hypothesis is that it is possible to take

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Orientation)", *European Law Review*, Volume 20, 1995, pp. 357-358.

1070) As cited by the German *Bundesgerichtshof* in the *Brunner Case*; see English version of *Manfred Brunner and others v. the European Union Treaty* (Cases 2 BvR 2134/92 & 2159/92) before the *Bundesverfassungsgericht* (Federal Constitutional Court), Judgment of 12 October 1993, *Common Market Law Reports*, Volume 69(2), 11 January 1994, Part 950, p. 93. The judgment was given in connection with the German road to ratification of the Treaty on European Union.

1071) See de Witte, Bruno, "International Agreement or European Constitution?", in *Reforming the Treaty on European Union. The Legal Debate*, Edited by Winter, Jan A.; Curtin, Deidre; Kellermann, Alfred E. & de Witte, Bruno, The Hague, 1996, p. 14.

1072) The analysis is primarily legal and looks more upon how competences are distributed than why they are distributed the way they are. Answers to the latter question are better found among political scientists. A very interesting account in this regard is presented by the new so-called historical institutionalists. Among these, Pierson in a very informative article is concerned with the question of why Member States end up with long term consequences of the bargaining results which they had never expected nor desired; see Pierson, Paul, "The Path to European Integration. A Historical Institutional Analysis", *Comparative Political*



the general principles normally taken into account of governing this distribution seriously,<sup>1073)</sup> and further, derives from a conviction that it is possible to transfer them into a specific field. Otherwise, the general principles would lose their *raison d'être*. The specific field under scrutiny is the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC.

Accordingly, the chapter consists of a further definition of a test to decide which level of governance has the competence to legislate in the analysed field (*Section 18.1.*), followed by a presentation of its background focusing on outlining the general principles governing the distribution of competences (*Section 18.2.*). This section, it must be stressed, should be perceived as an experiment in which some clarity as to how the principles normally taken into account of the distribution are defined - definitions which are constantly under development. Furthermore, after having defined these principles in a general manner, an attempt is made, under even greater uncertainty, to further specify them, as they are related to the subject of anti-competitive state measures (*Section 18.3.*). In the final section (*Section 18.5.*), the text turns to conclusions as to the suitability of the principles governing the distribution of competences to solve the analysed specific field of conflict between Community law and national law.

## 18.1. Definition

The test to be analysed here is understood as a decision of whether it is the Member State or the EU which has the competence to legislate in the field in question. This decision is based on the general principles governing the division of competences between the center and the periphery. The test is analogous to that which was referred to above as the

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*Studies*, Volume 29, 1996, pp. 123-163. In other words, Pierson's focus is on why gaps emerge in Member State control over the evolution of European institutions and public policies, why these gaps are difficult to close, and how these openings create room for actors other than Member States to influence the process of European integration while constraining the room for maneuver of all political actors; see *ibid.*, at p. 126. The historical institutional approach appears as promising, when further developed, in understanding why Member States have lost competences which they often think they still possess.

1073) Weiler & Haltern has predicted that a possible reaction by the European Court of Justice to the German *Brunner Case* could be: "*The current move could also force the Court to take competences seriously*"; see Weiler, J.H.H. & Haltern, Ulrich R., "The Autonomy of the Community Legal Order - Through the Looking Glass", *Harvard International Law Journal*, Volume 37, 1996, p. 446.

competence criterion in *Chapter 8 containing Conclusions to the Evolution of the European Doctrine* and has to a certain degree its origin in the case law of the European Court of Justice.

Interestingly, in the US, the conflict has to a much larger degree than in Europe been viewed from a constitutional point of view.<sup>1074)</sup> This, in combination with the following statement of Gyselen concerning the mentioned European doctrine:

"...[t]he constitutional implications... can hardly be overlooked as it raises the broader question concerning the equilibrium between, on the one hand, the powers allocated to the Community and, on the other hand, those retained by the Member States" <sup>1075)</sup>,

justifies the aim of answering how the tensions are to be viewed from a constitutional point of view.<sup>1076)</sup> In other words, the test analysed here may be seen as based on a paradigm of constitutionalism.

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1074) The US Supreme Court in fact goes as far as to refer to "the principle of freedom of action for the states, adopted to foster and preserve the federal system"; see the *Ticor Case*.

1075) See Gyselen, Luc, "State Action and the Effectiveness of the EEC Treaty's Competition Provisions", *Common Market Law Review*, Volume 26, 1989, p. 35.

1076) The European Court of Justice has constantly stressed that the Treaties are the constitutional charter of a Community based on the rule of law. See, *inter alia*, Curtin, Deidre, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", *Common Market Law Review*, Volume 30, 1993, p. 18; Grimm, Dieter, "Does Europe Need a Constitution?", *European Law Journal*, Volume 1, Issue 3, 1995, pp. 282-302; Mancini, Federico G., "The Making of a Constitution for Europe", *Common Market Law Review*, Volume 26, 1989, pp. 595-614; or Stein, Eric, "Lawyers, Judges, and the Making of a Transnational Constitution", *American Journal of International Law*, Volume 75, 1981, pp. 1-27. This situation is often referred to as a "constitutionalisation" of the Treaty, designating a spiral process in which the Treaty is interpreted by the Court according to a systematic, teleological and above all dynamic method; see da Cruz Vilaca, José & Picarra, Nuno, "Are There Material Limits to the Revision of the Treaties on the European Union?", *Seminar Paper*, Luxembourg, 1994, p. 4.

## 18.2. Background

The relationship between the Community and its Member States with regard to competences is governed by several principles, all closely interrelated, and which mainly have been established by the European Court of Justice rather than being expressly part of the Treaty itself. To define the test further, this section focuses on a few of the most relevant principles, *i.e.*: 1) the principle of enumerated competences; 2) the principle of implied competences; 3) the principle of supremacy; 4) the principle of pre-emption; and 5) the principle of subsidiarity. It does not purport to be exhaustive in this regard. Whenever appropriate, the approach will be evolutionary so that the main changes over time will be outlined.

### 18.2.1. The Principle of Enumerated Competences

The principle of enumerated competences, originating from the French concept of the special functions of international organisations,<sup>1077)</sup> states, according to *Bradley*, that:

*"...the Community enjoys only those powers which are expressly set out in its constituent treaties."*<sup>1078)</sup>

The Treaty had not included this principle until the enactment of the Treaty on European Union.<sup>1079)</sup> Now, Article 3b(1) EC states as follows:

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1077) See Bleckmann, Albert. "The Competence of the EEC", in *Division of powers between the European Communities and their Member States in the field of external relations*, Colloquium 30 and 31 May 1980, Amsterdam, 1981, p. 3.

1078) See Bradley, Kieran St. C., "The European Court and the Legal Basis of Community Legislation", *European Law Review*, Volume 13, 1988, p. 400.

1079) However, the principle existed in the Treaty in a preliminary version as Article 4, paragraph 1, stating that "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty."

*"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."* <sup>1080)</sup>

The first part of this paragraph can be read as containing the principle. The very original understanding of the principle of enumeration has been that the Treaty should be strictly interpreted with regard to competences enjoyed by the Community so that jurisdictional enlargement can not be lightly undertaken.<sup>1081)</sup> The background of this understanding is the fact that the Treaty was originally expected to be interpreted as a traditional multi-partite international treaty with a strong presumption against loss of sovereignty by States.<sup>1082)</sup> This view was greatly supported in the *Van Gend* Case, which is normally taken into account as support of the principle.<sup>1083)</sup> The case concerned the establishment of another central principle, that of direct effect. In this context, the European Court of Justice stated that:

*"...the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields..."*  
<sup>1084)</sup>

In the context of enumerated competences, it is helpful to define certain concepts, also to be found in Article 3b EC, but in the second paragraph. The provision refers to the concept of exclusive competences of the Community and the concept of those competences

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1080) Article 3b was inserted in the Treaty by Article G(5) TEU.

1081) See Weiler, Joseph, "The Transformation of Europe", *The Yale Law Journal*, Volume 100, 1991, pp. 2433-2434.

1082) See Weiler, Joseph, "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law*, Volume 1, 1981, p. 270.

1083) See Case 26/62, *N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos and Nederlandse administratie der belastingen*, Judgment of 5 february 1963, [1963] E.C.R. 1.

1084) See *ibid.*, at p. 12.

which are not exclusive.<sup>1085)</sup> The latter ones are normally classified as concurrent or shared competences. The distinction is inspired by the Basic Law of the Federal Republic of Germany and by proposals drawn up by the Commission during the preparation of the Tindemans Report.<sup>1086)</sup> Consequently, the map of competences can be reviewed as follows:

- 1) Exclusive Member State competences, implying that the Community has no competence over the field in question. An example of such a field is still the currency and coin,<sup>1087)</sup> national and local taxation, family law, and regional planning.<sup>1088)</sup>
- 2) Exclusive Community competences, implying that the Member States have no competence over the field in question. Examples of such fields are activities related to external trade<sup>1089)</sup> and the establishment of the internal market, which, *inter*

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1085) The application of these terms in the text of the Treaty did not take place until the enactment of the Treaty on European Union.

1086) See Capotorti, Francesco; Hilf, Meinhard; Jacobs, Francis G. & Jacqué, Jean-Paul, *The European Union Treaty - Commentary on the Draft Adopted by the European Parliament on 14 February 1984*, Oxford, 1986, p. 73.

1087) For a useful analysis of the changes of the distribution of competences between Member States and the Community according to the SEA and the TEU, see Lane, Robert, "New Community Competences Under the Maastricht Treaty", *Common Market Law Review*, Volume 30, 1993, pp. 939-979.

1088) For other examples, see the Parliament of the European Communities, "Interim Report Drawn on behalf of the Committee on Institutional Affairs on the Principle of Subsidiarity", 22.06.1990, *Series A, Document A3 - 163/90/Part B*, p. 10. With respect to the understanding of exclusive Member State competences, the following observation by Koopmans should be kept in mind: "the Court is little disposed to accept the argument that certain activities fall within the exclusive jurisdiction of Member States, and that it proceeds very carefully when faced with the logic of exclusivity in general", see Koopmans, T., "The Quest for Subsidiarity", in *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Edited by Curtin, Deidre & Heukels, Ton, Volume 2, 1994, Dordrecht, pp. 47-48.

1089) See Temple Lang, John, "The Widening Scope of Constitutional Law", in *Constitutional Adjudication in European Union and National Law*, Edited by Curtin, Deidre & O'Keefe, David, Ireland, 1992, p.230.

*alia*, includes the removal of barriers to the free movement of goods, persons, services and capital and the common commercial policy.<sup>1090)</sup>

3) Concurrent or shared competences, implying that Community and Member State competences overlap and interrelate. In such areas, either the Community or the Member States have to act, but not both of them jointly.<sup>1091)</sup> Examples are certain social, environmental and consumer protection measures, in particular when they are related to the internal market.<sup>1092)</sup>

Application of the principle of enumerated competences is of significance when deciding to which category a field belongs. This is decided in accordance with the legal basis on which a measure is based. In general, the process of defining which competence an area constitutes, is characterised by much insecurity, and is changeable over time. This is due to the fact, in the words of Toth, who is very critical about the distinction between exclusive and concurrent competences, that there is no indication either in the Treaty itself or in secondary legislation as to which provisions of the Treaty confer exclusive and which confer concurrent competence on the Community.<sup>1093)</sup> Lenaerts & van Ypersele add further food

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1090) See Commission of the European Communities. "The Principle of Subsidiarity: Communication from the Commission to the Council and the European Parliament", *SEC(92)1990 final*, Brussels, 27 October 1992, Annex, p. 7.

1091) See Toth, A. G., "Is Subsidiarity Justiciable?", *European Law Review*, Volume 19, Number 3, 1994, p. 270.

1092) See Commission of the European Communities, "The Principle of Subsidiarity: Communication from the Commission to the Council and the European Parliament", *SEC(92)1990 final*, Brussels, 27 October 1992, Annex, p. 10.

1093) See Toth, A. G., "The Principle of Subsidiarity in the Maastricht Treaty", *Common Market Law Review*, Volume 29, 1992, Number 6, p. 1081. A detailed list of competences in the Treaty, along with arguments pro and con, is discussed by Garcíá de Enterná, E., "Le Système des compétences de l'Union Européenne et des Etats membres dans le Projet de Constitution", Unpublished paper presented at the *Conference under the patronage of the President of the European Parliament: A Constitution for the European Union?*, Florence, 12-13 May 1994.

for thought to this picture, as they point out that all of the Community's competences are potentially exclusive.<sup>1094)</sup>

A less strict perception of the principle of enumerated competences than the very original perception must (to a large degree, more legitimately than before) be expected after the Treaty in Article 3b(1) EC now speaks of competences and objectives as seemingly equal values.<sup>1095)</sup> Also, Article 235 EC has not been taken away by the enactment of the Treaty on European Union, thereby still providing the possibility of creating new competences, however by the Council of Ministers rather than by the European Court of Justice.<sup>1096)</sup> Therefore, to a larger degree than before, a situation as that indicated by the principle of implied competences (see the following section) is now signalled by the text of the Treaty itself.

### 18.2.2. The Principle of Implied Competences

The principle of implied competences is contrary to the previous principle, but is more likely to be the one to govern today. It can, in the wording of Weiler, be defined as follows:

*"... powers [will] be implied in favor of the Community where they [are] necessary to serve legitimate ends pursued by it."*<sup>1097)</sup>

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1094) See Lenaerts, Koen & van Ypersele, Patrick, "Le principe de subsidiarité et son contexte: Etude de l'Article 3B du Traité CE", *Cahiers de Droit Européen*, Volume 30, Number 1-2, 1994, paragraph 23 and footnote 48, p. 21.

1095) Also see Article E TEU and Article F(3) TEU (to be renumbered Article F(4) when the new Amsterdam Treaty comes into force).

1096) In this regard, *Usher* is thought-provoking when he wonders if it would be an exaggeration to say that the scope of the Community's competence is ultimately what the Council of Ministers chooses to make it. See Usher, John A., "The Gradual Widening of EC Policy in Particular on the Basis of Articles 100 and 235 EEC Treaty" in *Structure and Dimensions of European Community Policy*, Edited by Schwarze, Jürgen & Schermers, Henry G., Baden-Baden, 1988, p. 36.

1097) See Weiler, Joseph, "The Transformation of Europe", *The Yale Law Journal*, Volume 100, 1991, p. 2416.

The principle is not stated in the Treaty itself. Rather, its origin is to be found in the case law of the European Court of Justice. The *ERTA* Case from 1971 is especially considered responsible for the creation of the principle.<sup>1098)</sup> The dispute, in which the parties were the Commission and the Council, concerned which of the two had the right to negotiate and conclude the European Agreement dealing with the work of crews of vehicles engaged in international road transport (hereinafter referred to as the *ERTA*-agreement). The European Court of Justice, in arriving at the resolution of the mentioned main issue, found it necessary to decide whether the competence to negotiate and conclude the *ERTA*-agreement was vested in the Community or in the Member States. It was in this context that the European Court of Justice stated as follows:

*"If [Articles 3(f) and 5 EC] are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope."*<sup>1099)</sup>

The implications of the case are, *inter alia*, that the European Court of Justice, when making determinations in the sphere of competences, will always favour the Community if this supports the pursuance of the aims stated in the Treaty.<sup>1100)</sup> This is generally referred to as the teleological style of interpretation. It provides the Community with a great deal of flexibility. In practical terms, the principle will slowly, but certainly, diminish the degree of competences retained by the Member States.<sup>1101)</sup>

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1098) See Case, 22/70, *Commission of the European Communities v. Council of the European Communities*, Judgment of 31 March 1971, [1971] E.C.R. 263.

1099) See *ibid.*, at Ground 22.

1100) For a detailed analysis of the *ERTA* case, see Temple Lang, John, "The *ERTA* Judgment and the Court's Case-law on Competence and Conflict", *Yearbook of European Law*, Volume 6, 1986, pp. 183-218. Also, for an analysis of the development of the law of the case, see Emiliou, Nicholas, "Towards a Clearer Demarcation Line? The Division of External Relations Power between the Community and Member States", *European Law Review*, Volume 19, 1994, Number 1, pp. 76-86; or Emiliou, Nicholas, "The Death of Exclusive Competence?", *European Law Review*, Volume 21, 1996, pp. 294-311.

1101) Also see below in *Section 18.3.2.3.*, concerning *Comparison*, the concept of mutation.



### 18.2.3. The Principle of Supremacy

In the wording of Cappelletti & Golay, the principle of supremacy can be defined as follows:

*"...Community law, both primary and secondary, is preeminent vis-à-vis both prior and subsequent national (Member State) law (including even national constitutional law)."* <sup>1102)</sup>

The Treaty itself is also silent on this issue, but the principle has its origin in the case law of the European Court of Justice. The principle was first clearly established by the Court in 1964 in the *Costa Case*.<sup>1103)</sup> Here, the Court ruled as follows:

*"The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law."*<sup>1104)</sup>

To truly understand the principle of supremacy, it must be added that it is not an absolute rule whereby the Community law trumps any Member State law, but instead it is a principle whereby each law is supreme within its sphere of competence.<sup>1105)</sup> Therefore, before applying the principle it is necessary firstly to define the spheres of competence. Here, among others, the question of *Kompetenz-Kompetenz* comes into force, *i.e.* which organ has the competence to decide who has the competence within a certain field. In the Community, it is the European Court of Justice which is considered to have this *Kompetenz-Kompetenz* and

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1102) See Cappelletti, Mauro & Golay, David, "The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration", in *Integration Through Law*, Edited by Cappelletti, Mauro; Seccombe, Monica & Weiler, Joseph, Volume 1, Book 2, 1986, p. 309.

1103) See Case 6/64, *Flaminio Costa v. ENEL*, Judgment of 15 July 1964, [1964] E.C.R. 585.

1104) See *ibid.*, at p. 594. This decision was confirmed in the *Simmenthal Case*, see Case 106/77, *Ammistrazione delle Finanze dello Stato v. Simmenthal SpA*, Judgment of 9 March 1978, [1978] E.C.R. 629.

1105) See Weiler, Joseph, "The Transformation of Europe", *The Yale Law Journal*, Volume 100, 1991, p. 2414.

determines which norms come within the sphere of application of Community law.<sup>1106)</sup> Due to another principle, that of direct effect, any Community norm that produces direct effects becomes the "Higher Law" of the Member State.<sup>1107)</sup>

It should be added that recent developments point in the direction that the precedence of Community law over national constitutional law is, after all, less assured than what one might have thought.<sup>1108)</sup> The reason for this renewed doubt of the strength of the principle of supremacy is especially due to the German Constitutional Court's so-called Maastricht judgment.<sup>1109)</sup>

#### 18.2.4. The Principle of Pre-emption

The principle of pre-emption is best understood when related to the principle of supremacy and to the concept of exclusive competences. The following distinction by Jacobs & Karst is helpful in describing this issue:

*"...the [principle of pre-emption] will be treated as going beyond the principle of primacy of Community law over Member State law; it will be taken to refer to cases where the Member States are precluded from legislating, not because the legislation would conflict with Community law but because the competence in question is exclusively a Community competence."*<sup>1110)</sup>

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1106) See *ibid.*, at p. 2414.

1107) See *ibid.*, at p. 2415.

1108) See de Witte, Bruno, "International Agreement or European Constitution?", in *Reforming The Treaty on European Union. The Legal Debate*, Edited by Winter, Jan A.; Curtin, Deidre M.; Kellermann, Alfred E. & de Witte, Bruno, The Hague, 1996, p. 14.

1109) For such an interpretation of the German Constitutional Court's Maastricht judgment see, *inter alia*, Herdegen, Matthias, "Maastricht and the German Constitutional Court: Constitutional Restraint for an 'Ever Closer Union'", *Common Market Law Reports*, Volume 31, 1994, Number 2, p. 239.

1110) See Jacobs, Francis G. & Karst, Kenneth L., "The 'Federal' Legal Order, the U.S.A. and Europe Compared: A Juridical Perspective", in *Integration Through Law*, Edited by Cappelletti, Mauro; Seccombe, Monica & Weiler, Joseph, Volume 1, Book 1, 1986, p. 237.

It follows from the definition that the principle only applies to exclusive Community competences as opposed to the shared ones. Cross criticises the definition because, by only being applicable to exclusive competences, it becomes too restricted.<sup>1111)</sup> Cross's main argument is that the Treaty does not attempt to divide areas of legislative competence into exclusive spheres.<sup>1112)</sup> However, this argumentation falls apart now, after the Maastricht Treaty's clear introduction of a distinction between exclusive and shared competences in Article 3b EC.<sup>1113)</sup> Lenaerts supports this critique, contrary to Cross' objection, as he operates with a distinction between exclusive and shared competences when dealing with the concept of pre-emption.<sup>1114)</sup> However, a difference occurs when comparing Lenaerts' point of view with the definition of Jacobs & Karst, as Lenaerts interprets the case law of the European Court of Justice in such a way that both exclusive and shared competences are given a pre-emptive effect. Though, the pre-emptive effect given will vary depending on whether the competence at stake is exclusive or shared.<sup>1115)</sup>

Accordingly, it is now possible to improve the above-mentioned definition as follows. In the field of exclusive Community competences, the principle of pre-emption refers to cases where the Member States are completely precluded from legislating, not because the legislation would conflict with Community law but because the entire policy has been occupied by the Community. In the field of shared competences, however, the pre-emptive effect will occur only when the Community has already acted. If the Community has not yet

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1111) See Cross, Eugene Daniel, "Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis", *Common Market Law Review*, Volume 29, 1992, Number 3, p. 451.

1112) See *ibid.*, at p. 451.

1113) See Section 18.2.1. above concerning *The Principle of Enumerated Competences*.

1114) See Lenaerts, Koen, "Constitutionalism and the Many Faces of Federalism", *The American Journal of Comparative Law*, Volume 38, 1990, pp. 224-230.

1115) Interestingly, this is also in conformity with Waelbroeck's claim, made as early as 1982, that the European Court of Justice applies two approaches, *i.e.* the conceptualist-federal approach and the pragmatic approach. The first approach corresponds to the absolute approach in the case of exclusive EU competences, and the second approach corresponds to what happens in the case of shared competences. See Waelbroeck, M., "The emergent Doctrine of Community Pre-emption - Consent and Redelegation", in *Courts and Free Markets - Perspectives From the United States and Europe*, Edited by Sandalow, Terrance & Stein, Eric, Oxford, 1982, Volume 2, pp. 548-580.

acted, Member States are free to exercise their competences, as long as they do not damage the Community's interests. This means that if the competence is exclusively a Community competence, the effect will typically be absolute, so that Member States are completely hindered from legislating, even if the legislation is not in real conflict with Community legislation or the objectives of the Community.<sup>1116)</sup> However, this does not necessarily mean that the Member States can no longer legislate at all, as they still can do so if the Community has expressly delegated limited competences back to the Member States.<sup>1117)</sup>

On the other hand, when the competence in question is concurrent, the competences granted to the Community contain only a potential for it to exercise them; in the absence of such exercise, the Member States remain competent to act, albeit that they may not, in so doing hurt the Community's interests.<sup>1118)</sup> Lenaerts raises interestingly the issue of what happens in the situation where the Community has not exercised its potential competence in a field and nevertheless maintains that the matter is not regulated by the Community simply because the field remains free from any regulation, yet having the effect that the Member State competence is pre-empted.<sup>1119)</sup> It is understood from Lenaerts' analysis that no solution to the problem is found in the case law of the European Court of Justice, as the solution depends on the subject matter at stake.<sup>1120)</sup>

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1116) See Krislov, Samuel; Ehlermann, Claus-Dieter & Weiler, Joseph, "The Political Organs and the Decision-Making Process in the United States and the European Community" in *Integration Through Law*, Edited by Cappelletti, Mauro; Seccombe, Monica & Weiler, Joseph, 1986, Volume 1, Book 2, p. 90. As an example of how the European Court of Justice treats this "pre-clusion", see the classic *Simmenthal Case*, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, [1978] E.C.R. 629, especially at Ground 17.

1117) See Temple Lang, John. "European Community Constitutional Law: The Division of Powers Between the Community and Member States", *Northern Ireland Legal Quarterly*, Volume 39, 1988, Number 2, p. 210.

1118) See Lenaerts, Koen, "Constitutionalism and the Many Faces of Federalism", *The American Journal of Comparative Law*, Volume 38, 1990, p. 224.

1119) See *ibid.*, at p. 225.

1120) See *ibid.*, at p. 226. In this connection, *Lenaerts* quotes *Thomas Reed Powell* whom in 1937 ironically commented on this issue of the "silence of Congress" in an acute manner: "*Now Congress has a wonderful power to keep silent, Congress can regulate interstate commerce just by not doing anything about it. Of course, when Congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that Congress by keeping silent sometimes means that it is speaking.*"

The prevailing difficulty in defining the principle of pre-emption is better understood when seen in the light of the fact that its content has actually undergone an evolution from an originally pure, or absolute, approach of the European Court of Justice to the present-day pragmatic and very flexible approach.<sup>1121)</sup> In addition, the difficulty may also be understood by the fact that the principle is not to be found expressly in the Treaty, and, indeed, the European Court of Justice never applies the expression of a principle of pre-emption. However, it should be added that all scholars take the existence of the principle for granted, although, obviously, the exact content of the principle is not yet settled amongst them.<sup>1122)</sup>

#### 18.2.5. The Principle of Subsidiarity

The principle of subsidiarity, in the context of the Community, is rather new,<sup>1123)</sup> as it was not truly existing until its insertion in the Treaty by the enactment of the Treaty on

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1121) See Weiler, Joseph, "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law*, Volume 1, 1981, pp. 277-279.

1122) See, for example, Cross, Eugene Daniel, "Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis", *Common Market Law Review*, Volume 29, 1992, Number 3, p. 450. Most radically, Weatherill has suggested that today the principle can hardly be claimed any longer as a basic principle of Community law; see Weatherill, Stephen, "Beyond Preemption? Shared Competence and Constitutional Change in the European Community", in *Legal Issues of the Maastricht Treaty*, Edited by O'Keefe, David & Twomey, Patrick, M., Bath, 1994, p. 16.

1123) For information on the history and philosophy of the principle of subsidiarity, see, for instance, Wilke, Marc & Wallace, Helen, "Subsidiarity: Approaches to Power-sharing in the European Community", *The Royal Institute of International Affairs' Discussion Papers*, London, 1990, Number 27; or Constantinesco, Vlad, "Who's Afraid of Subsidiarity?", *Yearbook of European Law*, Volume 11, 1991, pp. 33-55. It is often claimed that the principle has always existed in the Community; see, for instance, Delors, Jacques, "The Principle of Subsidiarity: Contribution to the Debate" in *Proceedings of the Jacques Delors Colloquium. Subsidiarity: The Challenge of Change*, Organised by the European Institute of Public Administration, Maastricht, 1991, p. 8. Such a claim seems close to being a falsification of history or, in the words of Kapteyn: "It reminds me of the case of Monsieur Jenkins in the 'Bourgeois Gentilhomme' of Molière who to his amazement discovered that he was speaking prose when he asked for his slippers"; see Kapteyn, P. J. C., "Community Law and the Principle of Subsidiarity", *Revue des Affaires européennes*, 1991, Number 2, p. 37.

European Union.<sup>1124)</sup> Now, it is stated, *inter alia*, in Article B in the Common provisions,<sup>1125)</sup> and more significantly in Article 3b, second paragraph, of the Treaty, which reads as follows:

*"In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."*<sup>1126)</sup>

The principle does not determine which competences are attributed to the Community, but instead regulates how the competences in question shall be exercised.<sup>1127)</sup> It is therefore, in principle, not meant to grant the Community additional competences.<sup>1128)</sup> This is better understood when taking into consideration that the scope of the principle is limited to including only shared competences as opposed to exclusive Community or Member State competences.

The provision sets up a test in order to decide when the Community shall act. According to this, the Community shall only act if the objectives of the proposed action cannot be more efficiently achieved by the Member States. This is generally referred to as

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1124) Prior to the enactment of the TEU, the principle could be found, though, in a less explicit version in the environmental field, *i.e.* Article 130R, para. 4, which was inserted already by the SEA.

1125) Title I, Common provisions, Article B, last paragraph, reads as follows: *"The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community."*

1126) Article 3b was inserted in the Treaty by Article G(5) TEU.

1127) See The Council of the European Communities, "Conclusions of the Presidency - Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3B of the Treaty on European Union", Edinburgh, 11-12 December 1992, *Annex I to Part A*, p. 16.

1128) See Dehousse, Renaud, "Community Competences: Are There Limits to Growth?", in *Europe After Maastricht. An Ever Closer Union?*, Edited by Dehousse, Renaud, München, 1994, p. 110.

the comparative efficiency test. The Commission suggests which factors can be taken into consideration when deciding this, for example the effect of the scale of the operation (trans-frontier problems, critical mass, *etc.*), the cost of inaction and the necessity to ensure that competition is not distorted within the common market.<sup>1129)</sup> After having applied the principle of subsidiarity and if having found that the Community should act, yet another principle has to be applied, *i.e.* that of proportionality, concerning the intensity of the action.<sup>1130)</sup>

It should be added that the principle is still so new that much doubt as to its exact administration and interpretation prevails, or as Joerges expresses it, even the most benevolent reader of the Maastricht Treaty will have difficulties in deciphering its legal meaning with any degree of precision.<sup>1131)</sup> For instance, Cass explains that there exists a centralising as well as a decentralising approach to its interpretation.<sup>1132)</sup> This is further specified by Snyder, who emphasises that the principle is apparently intended to decrease the intensity of the Community action, but in practice it may lead to the result that Community action is increasingly discretionary and is subject only with difficulty to legal controls.<sup>1133)</sup> Also, it should be understood that the principle has to be applied dynamically,

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1129) See Commission of the European Communities, "The Principle of Subsidiarity: Communication from the Commission to the Council and the European Parliament", *SEC(92)1990 final*, Brussels, 27 October 1992, p. 2.

1130) Besides being indirectly mentioned in Article 3b, paragraph 2, this principle is stated in the third paragraph of Article 3b: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." Its origin is the case law of the European Court of Justice.

1131) See Joerges, Christian, "European Economic Law, the Nation-State and the Maastricht Treaty" in *The European Union Treaty*, Edited by Dehousse, Renaud, Munich, 1993, p. 56. For an account of the principle's rationale, see Bermann, George A., "Subsidiarity and the European Community", in *Europe After Maastricht. American and European Perspectives*, Edited by Lützel, Paul Michael, St. Louis, 1994, pp. 139-157.

1132) See Cass, Deborah Z., "The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community", *Common Market Law Review*, Volume 29, 1992, Number 6, p. 1108.

1133) See Snyder, Francis, "Soft Law and Institutional Practice in the European Community", *EUI Working Paper LAW*, Florence, 1993, p. 7. In contrast, Ver Loren van Themaat points out that Article 72 of the German Constitution is a good example of an application of the principle of subsidiarity as a decentralising factor. According to the author, the principle has in Germany been applied within a highly developed democratic system as a principle of federalism with far more legal guaranties for autonomy on the regional and local levels than

in the light of the Treaty aims<sup>1134</sup>). This implies that the activities of the Community can either be extended or confined depending on the needs at the present time.<sup>1135</sup> Finally, it is debatable to what extent the exercise of the principle can be reviewed by the European Court of Justice, which only adds to the insecurity as to the notion's meaning.<sup>1136</sup>

### 18.3. Analysis

Above, a synthesis of the principles of importance to the distribution of competences between Member States and the Community has been suggested. Below, the intention is to relate these principles, in a rather literal sense, to the tensions underlying the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC. A distinction will be made between two categories of state measures, namely: 1) "traditional" competition legislation (*Section 18.3.1.*); and 2) generally anti-competitive legislation, in particular including legislation having a link to private companies' illegal activities pursuant to Article 85 EC (*Section 18.3.2.*). The idea, in other words, is to see whether the test analysed here is workable in actual fact, which is essential to an evaluation of its suitability as a solution to the examined tensions between the two levels of governance.

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exist in non-federal States; see Ver Loren van Themaat, Pieter, "The Internal Powers of the Community and the Union", in *Reforming the Treaty on European Union. Legal Debate*, The Hague, 1995. The Commission, on the other hand, not surprisingly, advocates for the opposite point of view, pointing out that instead of using the term as a way of diluting the Union, it should rather be used positively to justify measures which are better taken collectively than in isolation; see the Commission of the European Communities, "Report on the Operation of the Treaty on European Union"; *SEC(95)731 final*, Brussels, 10 May 1995, p. 5.

1134) See protocol to the Amsterdam Treaty concerning this principle, 3rd section.

1135) See *ibid.*

1136) See, for instance, Dehousse, Renaud, "Does Subsidiarity Really Matter?", EUI Working Paper, Law, Number 92/31, Florence, 1993, pp. 9-21; or Toth, A. G., "Is Subsidiarity Justiciable?", *European Law Review*, Volume 19, Number 3, 1994, pp. 268-285.



### 18.3.1. Traditional Competition Legislation

The classic discussion related to the distribution of competences within the field of competition is only preoccupied with Community competition law versus national competition law. In other words, it does not involve generally anti-competitive state measures.

The competition provisions expressly confer an exclusive competence upon the Community within the field of competition with regard to enactment of legislation.<sup>1137)</sup> This is in accordance with the opinion of, for instance, the Commission which refers to "the general rules on competition, which guarantee a level playing field in the internal market" as an exclusive competence.<sup>1138)</sup> The Council also agrees with this, as it mentions in the *Conclusions of the Presidency* in Edinburgh in 1992 that "[t]he Treaty imposes a number of specific obligations upon the Community institutions, for example concerning the implementation and enforcement of Community law, competition policy and the protection of Community funds", which "are not effected by Article 3b"; in other words, these obligations are constituting exclusive competences.<sup>1139)</sup> In the Commission's notice concerning cooperation between the Commission and the national courts with regard to Articles 85 and 86 EC,

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1137) It is necessary to distinguish between legislative and judicial power. In the latter instance, the Commission and the national courts possess concurrent competences for the application of Articles 85(1) and 86 EC. See, *inter alia*, Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*. Judgment of 28 February 1991, [1991] E.C.R. I-935, at Grounds 44-46. With regard to Article 85(3) EC, however, the Commission has the exclusive authority to declare the provisions of Article 85(1) EC inapplicable according to Article 85(3) EC; see Regulation 17/62 of 6 February 1962, as amended, Article 9.

1138) See Commission of the European Communities, "The Principle of Subsidiarity: Communication from the Commission to the Council and the European Parliament", *SEC(92)1990 final*, Brussels, 27 October 1992, Annex, p. 7.

1139) See the Council of European Communities, "Conclusions of the Presidency: Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3B of the Treaty on European Union", Edinburgh, 11-12 December 1992, *Annex I to Part A*, p. 17. In extreme, Bos claims, more or less as an isolated voice, and in contrast to the Commission and the Council, that competition policy is not an exclusive competence of the Community; see Bos, Pierre-Vincent, "Towards a Clear Distribution of Competence between EC and National Competition Authorities", *European Competition Law Review*, Volume 16, 1995, Number 7, p. 412, and in particular footnote 11.

the Commission states that this competence involves the implementation and the thrust of the Community's competition policy.<sup>1140)</sup>

That there exists a particular limit to this exclusive competence is understood when taking into consideration another statement found in the aforementioned notice from the Commission. Here, it is said that Community competition law and national competition law can be applied simultaneously.<sup>1141)</sup> The immediate thought is that the consequence of this statement is that it is then not correct to speak of an exclusive Community competence, after all, because it rather must be defined as a shared one. An explanation lies in the fact that within the field of competition law, the Community's exclusive competence does not, unlike most other fields, have a total pre-emptive effect.<sup>1142)</sup> The difficulty in deciding whether competences are exclusive or shared is hereby greatly demonstrated. Even in such a well-documented field as competition law, nothing is completely settled in this regard. However, it is possible to conclude that just as long as the national competition legislation is not in direct conflict with the Community competition law, or does not prejudice the practical effectiveness and full and uniform application thereof, it can then be applied simultaneously with the Community law.<sup>1143)</sup> Therefore, Member States are allowed to have a parallel competition legislation just as long as this is not in conflict with the common competition provisions.

In practice, conflicts are solved in accordance with the principle of supremacy.<sup>1144)</sup> The main concern, then, is that the *effet utile* of the competition provisions is not hindered.<sup>1145)</sup> Also, the scope of the Community's competition law is limited to activities which may affect trade between Member States, however interpreted very broadly, whereas

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1140) See the Commission of the European Communities, "Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty", *OJ No C39/6*, Brussels, 13 February 1993, Section II, Paragraph 4.

1141) See *ibid.*, paragraph 12.

1142) See Fejø, Jens, "EF-konkurrenceret", Copenhagen, 1993, p. 156.

1143) See the *Walt Wilhelm Case*, at Grounds 6 and 9.

1144) See KonkurrenceRådet, "Konkurrenceretten i EF", Copenhagen, 1992, p. 107.

1145) See the Commission, "Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty", *OJ C 39/6*, Brussels, 13 February 1993, Appendix 1.2., Section II, Paragraph 12.

national competition law is concerned with national activities.<sup>1146)</sup> If the activities are covered by both levels of the legal systems, the strictest system becomes effective.<sup>1147)</sup>

It should be added that the principle of subsidiarity, which has not yet been taken into consideration, is not of significance to this category if that assuming the competence is exclusively at the Community level (because this principle is only applicable to shared competences).

### 18.3.2. Generally Anti-Competitive Legislation

Now, changing the focus from the classic relationship between Community competition law and national competition law to the relationship between Community law and national anti-competitive measures, especially including legislation having a link to undertakings' illegal activities pursuant to Article 85 EC, the analysis will begin by relating the principles outlined in *Section 18.1.* to this relationship. Thereupon, the manner in which the European Court of Justice has actually treated this relationship will be explained. Finally, the two angles will be united in a comparison.

#### *Literal Application of the Principles*

For the sake of analysis, it is relevant to distinguish between an application of the constitutional principles when the principle of enumerated competences and that of implied competences respectively is assumed to govern.

#### *The Principle of Enumerated Competences*

When firstly applying the principle of enumerated competences, implying a strict reading of the Treaty, it is in no respect obvious that there exists an exclusive Community competence that hinders Member States from enacting legislation of the kind under scrutiny

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1146) See Teigum, Siri B., "Nasjonal og Europeisk konkurrancerett", presented at the *33. nordiske Juristmøde*, Copenhagen, 1993, pp. 6-7; or Siragusa, Mario & Scassellati-Sforzolini, Giuseppe, "Italian and EC Competition Law: A New Relationship - Reciprocal Exclusivity and Common Principles", *Common Market Law Review*, Volume 29, 1992, pp. 93-131.

1147) See Fejø, Jens, "EF-konkurrenseret", Copenhagen, 1993, p. 157.

here. When solely considering Article 85 EC, this is definitely not the case. When considering Articles 3(g) and 5(2) EC read in conjunction with Article 85 EC, it is still not possible to speak of an expressly set out Community competence. According to the principle of enumerated competences, this means that the Member States are likely to have exclusive competences in enacting legislation having a link to companies' illegal activities pursuant to Article 85 EC, including various kinds of anti-competitive measures. This kind of legislation is therefore likely not to be contrary to the Treaty.

For the sake of completeness, it should be pointed out that when the point of departure is the principle of enumerated competences, the principles of supremacy, pre-emption and subsidiarity accordingly in this case are not really of relevance.

#### *The Principle of Implied Competences*

When, in opposition to the principle of enumerated competences, one takes into consideration the principle of implied competences, the emerging picture alters considerably.

Putting emphasis on Articles 3(g) and 5(2) EC, as well as the necessity of securing the efficiency of the competition provisions, the Community has either an exclusive or at least a shared competence in this category of national legislation. The reason is that competences according to the principle of implied competences shall be implied in favour of the Community when they are necessary in order to serve legitimate ends pursued by it. No doubt, the aim of ensuring that competition in the internal market is not distorted is clearly a legitimate end pursued by the Community.

The principle of supremacy would imply that Community law has supremacy to Member States' conflicting legislation legitimising private companies' illegal activities pursuant to the competition provisions. Accordingly, Member States can be hindered from helping private undertakings to escape the competition provisions by, for instance, adopting as law illegal anti-competitive agreements originally entered into private undertakings. Furthermore, the Community's competition provisions could trump conflicting national anti-competitive legislation due to the principle of supremacy.

When applying the principle of pre-emption, it is necessary to distinguish between the instances where the Community competence in question is exclusive and where the competence is shared, which, as already indicated, is not in the least clear. It was concluded above that the Community's exclusive competence in the field of competition does not have

a total pre-emptive effect. With regard to the present category of national legislation it is consequently logical to assume that if it is correct to speak of exclusive Community competences, then these do not have a total pre-emptive effect. The consequence is that just as long as the national legislation is not in direct conflict with the Community competition law, or does not prejudice the practical effectiveness and full and uniform application thereof, it can then be applied simultaneously with the Community law. However, this is not a workable situation for the measures at stake here, which is precisely that they in themselves prejudice the practical effectiveness and full and uniform application of the competition provisions and especially their aim. Therefore, it makes more sense if the competences related to this category are given a total pre-emptive effect, implying that Member States are precluded from legislating.

On the other hand, it could be, as stated above, that the competences at stake in this category rather should be classified as shared ones. In this case, the pre-emptive effect does not come into force until the Community has enacted common legislation in the field with Articles 3(g), 5(2) and 85 EC as legal basis. Then, it is most likely that the Member States freely can legislate on the subject matter until the Community has occupied the field.

The last principle to be dealt with here is the principle of subsidiarity. It only comes into force with regard to shared competences. Assuming this to be the case, the Community shall take action *"only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States"*. If the objective of the action is understood as a protection of the competition provisions and more generally competition in the internal market, then this objective can most likely be best achieved by the Community *"by reason of the scale or effects"*.

#### *Actual Application by the European Court of Justice*

Now, it is convenient to outline how the European Court of Justice has actually treated the relationship between Community law and anti-competitive state measures. Above, it was stated that the European Court of Justice only rarely attempts to solve the conflict with a determination of whether the competence to enact the measure belongs to the Community or to the Member State. This approach can actually only be said to have been used of in

*Leclerc* from 1985 and *Asjes* from 1986 (and in a summary of the *Leclerc* Case in *Libraires* from 1988).<sup>1148)</sup>

To be more specific, in the *Leclerc* Case the European Court of Justice focused on the fact that there was no common competition policy for the book industry and declared as follows:

*"It is thus apparent that the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. It follows that, as Community law stands, Member States' obligations under Article 5 of the EEC Treaty, in conjunction with Articles 3(f) and 85, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books..."*<sup>1149)</sup>

The European Court of Justice in *Leclerc*, in determining what is appropriate competition policy, paid particular attention to the fact that the Commission had not completed its investigation of all the systems and practices at issue, and, further, that the Commission had not yet determined the manner in which it would exercise, in this area, the competences the Treaty and Regulation No. 17 of 30 October 1962 confer on the Commission. In addition, the Commission had not submitted any proposal to the Council nor had it initiated any proceedings under Article 85 of the Treaty to prohibit national systems from fixing book prices.

In the other case, *Asjes*, the criterion was applied in a somehow more complicated manner, due to the special circumstances of the air transport industry. The European Court of Justice stated as follows:

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1148) For the sake of completeness, it should be mentioned that in the *INNO* Case, the European Court of Justice in Ground 14 stated that "[i]n the present state of Community law, it is for each Member State to choose its own method of fiscal control over manufactured tobacco on sale in its territory." Quite curiously, the European Court of Justice did not return to this piece of information's relevance to the subject matter of the case, and answered the question from the referring national court independently thereof.

1149) See the *Leclerc* Case, at Ground 20.

*"Where a decision has been taken by the competent national authorities under Article 88 or by the Commission under Article 89(2) ruling that the concerted action leading to the establishment of the air tariffs was incompatible with Article 85, it is contrary to the obligations of the Member States in the field of competition to approve such tariffs and thus to reinforce their effects." 1150)*

In both cases, it seems that the European Court of Justice defines the competences as shared ones, so that the Member States have the competence over the field in question until the Community enforces common rules. Then, according to the principle of supremacy, the Member States no longer are allowed to enact conflicting legislation in the field. Another observation is that it is not enough that there exist the common competition provisions in the Treaty. Rather, it is required that there exists a common competition policy in the field in question, *i.e.* in the book or air transport sector.

As only two judgments, *Leclerc* and *Asjes*, can be said to contain a more constitutional solution, the majority of the judgments from the European Court of Justice concerning the doctrine on control of anti-competitive state measures is not based on such a test. Yet, if these judgments are to be viewed from a constitutional perspective, it is helpful to distinguish, further, between two, more roughly formed, categories.

One category contains those decisions in which the European Court of Justice goes the furthest as it condemns national anti-competitive state measures. Here, it is the competition provisions themselves rather than a particular competition policy for the field in question (such as the book or air transport sector) which is at stake. To mention an example, in the *Vlaamse Reisbureaus* Case, the European Court of Justice did not analyse any common policy in the travel industry nor did it put emphasis on an eventual lack of such common policy. It found that the contested measure was incompatible with the obligations of the Member States pursuant to Article 5 EC, in conjunction with Articles 3(g) and 85 EC. In this category, it is probably correct to say that the general principle governing a combined interpretation of Articles 3(g), 5(2) and 85 EC can be understood as a court-made piece of law, interpreted according to the various tests equally set up by the European Court of Justice, and which gives the Community an exclusive competence with a content which is

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1150) See the *Asjes* case, at Ground 76.

defined according to the general principle and having a pre-emptive effect on Member States' legislation.

Another category would contain decisions such as the "November" Decisions, *Meng*, *Güterfernverkehr* and *Ohra*, where the European Court of Justice does not disregard neither the general principle nor the possibility of condemning national anti-competitive state measures according to the formalistic criteria (the *Van Eycke* test), but where the reality is that it is difficult to imagine, due to the actual premises of those judgments, under which circumstances a condemnation could possibly happen. The practical impact of these decisions is that Member States retain their right to economic intervention, also when this has a negative effect on competition.

### *Comparison*

In order to set up a framework for a comparison of the two approaches presented in this section, *i.e.*: a) literal application of the principles; and b) actual application by the European Court of Justice, as to a constitutional solution to the conflict between central competition provisions and national anti-competitive measures, it is helpful to introduce the concept of mutation. It originates from Weiler, according to whom jurisdictional mutation in the concept of enumeration would occur "*where there is evidence of substantial change in this map without resort to Treaty amendment.*" <sup>1151)</sup>

In other words, Weiler refers to the slow erosion of the principle of enumerated competences, meaning that the Community gains more and more competences. In fact, *Weiler* goes so far as to assert that the principle of enumerated competences, understood as a constraint on Community material competence, has substantially eroded and in practice has virtually disappeared.<sup>1152)</sup> To clarify the concept further, it may be useful to draw a distinction between Weiler's four categories of mutation.

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1151) See Weiler, Joseph, "The Transformation of Europe", *The Yale Law Journal*, Volume 100, 1991, p. 2436.

1152) See *ibid.*, at pp. 2434-2435.



Firstly, the notion of "extension" is understood as "*mutation in the area of autonomous Community jurisdiction.*" <sup>1153)</sup> This means that the Community extends its competences within the field already occupied by it. Therefore, the mutation does not have a direct effect on the competences of the Member States.

"Absorption", on the other hand, is a widening outside the Community competences which occurs when "*the Community legislative authorities, in exercising substantive legislative powers bestowed on the Community, impinge on areas of Member State jurisdiction outside the Community's explicit competences.*" <sup>1154)</sup> It should be added that absorption does not give the Community original legislative competences, but rather concerns the situation in which the Community in fact had clear original competences but the effects of the Community legislation in the field spilled over into fields reserved to the Member States.<sup>1155)</sup> Nevertheless, the absorption doctrine is characterised by invoking a clear preference for Community competence over Member State competence.

The third concept is "incorporation", which denotes, for example, "*the process by which the federal Bill of Rights, initially perceived as applying to measures of the federal government alone, was extended to state action through the agency of the Fourteenth Amendment.*" <sup>1156)</sup> Important to note is that this concept, so far, can not be considered as a *fait accompli* in the European context.<sup>1157)</sup>

The final concept is "expansion" which refers to "*the case in which the original legislation of the Community 'breaks' jurisdictional limits.*" <sup>1158)</sup> This kind of mutation is found in the context of Article 235 EC, where *Weiler* maintains that not only can no core activity of state function be seen any longer as still constitutionally immune from Community action, but also, that no sphere of the material competence can be excluded from the Community acting under Article 235 EC.

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1153) See *ibid.*, at p. 2437.

1154) See *ibid.*, at p. 2438.

1155) See *ibid.*, at pp. 2441-2442.

1156) See *ibid.*, at p. 2441.

1157) See *ibid.*, at p. 2442.

1158) See *ibid.*, at p. 2442.

When comparing the two approaches of application: a) the literal application of the constitutional principles; and b) the actual application by the European Court of Justice with regard to the first category of judgments, *i.e.* that based on a constitutional solution as in *Leclerc* and *Asjes*, the impression is that the principle of implied competences has influenced the actual application. If, on the other hand, the principle of enumerated competences had governed, the competence to enact anti-competitive measures would have been viewed as an exclusive Member State competence. Now, in that category, the competences are shared, indicating that a certain degree of absorption has taken place.

Alternatively, when comparing the literal application of the constitutional principles and the actual application by the European Court of Justice with regard to the second category of judgments, *i.e.* where the European Court of Justice goes the furthest and condemns national anti-competitive state measures, ignoring the principle of implied competences and instead putting emphasis on the principle of enumerated competences, the impression is gained that the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC can clearly be classified as a strong case of absorption. The Community originally solely had competence in competition, but the protection of this competence has had as its spill-over effect the consequence that fields reserved to the Member States are slowly absorbed. With regard to the issue of "competing competences", the Community competence is preferred over almost any competence of Member States. With regard to the principle of implied competences, its implication in a comparison is that differences vanish. However, the existence of the principle itself is a strong symptom of absorption.

Finally, when comparing the literal application of the constitutional principles and the actual application of the European Court of Justice with regard to the third category of judgments, the recent "November" judgments especially,<sup>1159)</sup> as well as the cases which followed in which the European Court of Justice executed a *volte-face*, it is correct to introduce a fifth notion of mutation, which could be named "return". The reason is that the European Court of Justice in those judgments changed direction and took again a cautious and reserved approach to the doctrine. Thereby, it transferred competences originally belonging to Member States back to them, although it was not a total return seeing as the general principle still stands and can be awakened again at any time. Doubt as to the scope of the

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1159) See the *Güterfernverkehr*, *Meng* and *Ohra* Cases.

remaining transferred competence still exists. Apparently, this phenomenon of return can be seen as meaning that transfers of competence to the Community are not necessarily irreversible.<sup>1160)</sup>

All of this can not but leave one with the impression that the scope of the Community's competences contra those of the Member States is not fixed, but may undergo a gradual evolution.<sup>1161)</sup> This phenomenon, of course, due to its strong, yet silent nature, is very critical.

#### 18.4. Evaluation

A number of conclusions can be drawn from the above discussion.<sup>1162)</sup> First of all, it is striking how important it is to the approach, whether the point of departure for a constitutional review of conflicts between central competition provisions, as well as aims, and peripheral anti-competitive state measures, is based on the principle of enumerated competences or the principle of implied competences.

If the principle of enumerated competences is applied, in general terms, the Member States almost completely retain their right to economic intervention with regard to the kind of anti-competitive measures under scrutiny here. Only when the conflict concerns "traditional competition law" is Community law likely to be given preference over Member State law.

If, on the other hand, the principle of implied competences prevails, the situation, in general terms, is likely to be a tendency towards competences being centralised at the Community level.

The advantage of the first point of departure, based on the principle of enumerated competences, primarily is that it appears to be in accordance with the spirit of the Treaty and with traditional legal methods of interpretation. The German Constitutional Court agrees with

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1160) A propos is the title of Usher's work; see Usher, John, *European Community Law and National Law - The Irreversible Transfer?*, London, 1981.

1161) See *ibid.*

1162) In the tests analysed in the five previous chapters, a section, before the final evaluation, containing the issue of legal relevance has been included. With regard to the test analysed here, the answer to this question is so obviously in the affirmative, and to a large degree specified in the two previous sections, that it will not be further elaborated upon now.

this in its Maastricht judgment.<sup>1163)</sup> In addition, it is in accordance with a movement towards an attractive model of federation, based upon a great deal of peripheral self-determination, rather than envisioning a strong center surrounded by subordinate political units. The disadvantage is that, in its pure form, it might be very stiff and inflexible, and tend to look at only a few objectives (especially economic ones) instead of - as national law - taking a more holistic point of view into consideration.

The advantage of the second point of departure, based on the principle of implied competences, is that it enhances the speed of integration, but most likely only in the short run. A disadvantage is that in the long run, this approach might do more harm than good because antagonists of the Community truly have good arguments against it.<sup>1164)</sup> The pressing question is whether this principle should play a less dominating role in the future, and, thus, whether it is or is not acceptable that mutations as defined by Weiler flourish.

Another significant conclusion to be drawn is that a transferral of the general principles governing the distribution of competences into a specific field is quite complicated and the analysis has therefore at times been quite speculative. A considerable degree of uncertainty as to the principles' definitions and applications exist. Also, there is little guidance to be found in the Treaty as well as in secondary Community legislation, in the decisions from the European Court of Justice and in the academic debate.

As an overall conclusion, a test based on a distribution of competences to solve tensions between the two levels of governance in a specific field contains many obvious positive qualities and is at a minimum enlightening to the understanding of the interests at stake. Indeed, the tools are there, but they require a great deal of further development. A suggestion for the future would be to make the Treaty more specific in this regard, providing further clarity with respect to fundamental competence matters such as defining competences

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1163) See e.g. English version of *Manfred Brunner and others v. the European Union Treaty* (Cases 2 BvR 2134/92 & 2159/92) before the Bundesverfassungsgericht (Federal Constitutional Court), Judgment of 12 October 1993, *Common Market Law Reports*, Volume 69(2), 11 January 1994, Part 950, p. 105.

1164) In fact, such a reaction is now said to have initiated; see e.g. Bourlanges, Jean-Louis, "Working Document of the Commission on Institutional Affairs on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conference", Adopted on 17 May 1995, *PE 212-450/fin./Part I.B.2*, p. 50.

as either exclusive or shared<sup>1165)</sup> and outlining the exact functioning of the principles of supremacy and pre-emption, as well as providing for a greater cautiousness in implying competences. If further developed, the principles contain elements which, to a much larger degree than seen so far, have the potential quality of an alternative, yet evident, way of solving many of the tensions between Community and national law.

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1165) It seems, however, that this is hardly likely to occur in the near future, or at least it seems when one considers the signals of the Reflection Group which in its Interim Report for the Intergovernmental Conference starting in 1996 indicated that it is against even a catalogue of competences; see the Reflection Group, "Statusrapport fra formanden for Reflektionsgruppen for Regeringskonferencen i 1996", Madrid, 24 August 1995, *SN 509/95 (Reflex 10)*, p. 35. The Parliament, represented by Bourlanges, is also against such a list of competences as well as a distinction between kinds of competences; see Bourlanges, Jean-Louis, "Working Document of the Commission on Institutional Affairs on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conference", Adopted on 17 May 1995, *PE 212-450/fin./Part I.B.2*, p. 32. In accordance with these signals, Lipsius predicts that an attempt to establish a list of areas which fall within the exclusive competences of the Community would be a difficult task; see Lipsius, Justus, "The 1996 Intergovernmental Conference", *European Law Review*, Volume 20, 1995, Number 3, p. 260. It is difficult then to understand why the distinction between exclusive and shared competences was inserted in Article 3b in the first place. The Amsterdam Treaty has confirmed that such a list has not been politically possible to establish.

## 19. Conclusions to this Part

A dilemma may be defined as a situation requiring a choice between equally undesirable alternatives. Choosing among the various positions analysed in this part exactly represents such a situation. The preceding analysis does not point in the direction of an obvious, desirable solution to the tensions between anti-competitive national measures and central competition provisions, given the structure itself of the Community of today. The objections to the analysed norms are, *inter alia*, those which follow.

The formal positions applied through the years by both courts themselves, the European Court of Justice as well as the US Supreme Court, analysed already in *Part Two* and *Part Three* respectively, lack a sufficient degree of internal rationality and legal certainty.

The first position analysed in this *Part Four*, based on the paradigm of conflict and viewing the Treaty as an economic constitution, is based on the application of economic tools, which in itself implies an analytically attractive method. However, the position contains no normative meaning to the field in question. The reason is in essence that economic theories and their recommendations, although important, are not absolute values rating higher than, for example, values of democracy and legitimacy. The claimed supremacy of economic rationality over political choices is not acceptable.

The second position analysed in this part, namely the interpretative position based on control of anti-competitive state measures through Article 90 EC, is also related to the paradigm of conflict and the interpretation of the Treaty as an economic constitution. The same objections therefore apply equally well here. Furthermore, it is incorrect to interpret Article 90 EC as including in its scope national measures which are not related to public or privileged companies. The position taken is therefore not helpful to the kind of measures under scrutiny here.

The third position, which takes its point of departure in a paradigm of accommodation, seeks to mediate between the central interest in economic efficiency and the Member States' often conflicting interest in regulating competition. The application of interest group theory in order to estimate which measures should be considered as lawful also contains the problem of attributing supremacy to the discipline of economics at the cost of all other values.

Other misgivings could also be mentioned such as injury to the right to speak freely, and that the proposed application of interest group theory does not appear as updated.

The fourth position, focusing on whether restraints are controlled by financially disinterested, politically accountable actors, may also be characterised as based on a paradigm of accommodation. It transforms the values inherent in competition law into a value of prohibition of delegation of decisional competences to financially interested and politically non-accountable actors. As there is no true connection between the values before and after the transformation, the rationale of the approach is somehow ill-founded.

The fifth position, which is based on a paradigm of non-conflict, holding that Member States in principle are free to adopt any measure that they choose, has to be criticised for, *inter alia*, lack of supportive empirical evidence, and for the premise of citizen mobility which is not fulfilled in Europe.

Finally, the position based on the distribution of competences which may be characterised as founded on a paradigm of constitutionalism is important, but is still so undeveloped that it is problematic to transfer the general principles governing the distribution of competences into a specific field of law as the one in focus here.

Consequently, all of the analysed positions contain severe critical elements and none could stand on its own. It is therefore of relevance to this conclusion to call into consideration the issue of why all of the analysed positions seem more or less inapplicable and, in this connection, the issue of why the case law of the European Court of Justice with regard to the doctrine on Articles 3(g), 5(2) and 85 EC has changed so radically from time to time. It is the assertion of this thesis that both of these issues may be better understood in the light of the perspective of multi-level governance, originating from the discipline of political science.<sup>1166)</sup>

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1166) It should be stressed that what follows below is not a complete account of the mentioned perspective. Rather, only the aspects of direct relevance to the issues raised here are touched upon in order to shed some light on the central problems. It should be added that the perspective may also be seen as that of a quasi-federal or multi-tiered political system. A scholar like Pierson prefers the terminology of historical institutionalism and specifically includes a dynamic perspective as he analyses the consequences of the original bargain over time; see Pierson, Paul, "The Path to European Integration. A Historical Institutional Analysis", *Comparative Political Studies*, Volume 29, Number 2, 1996, pp. 123-163. Others, again, refer to the perspective as a constructivist approach within the reflectivist camp; see e.g. Wind, Marlene, "Europe Towards a Post-Hobbesian Order? A Constructivist Theory of European Integration (Or How to Explain European Integration as an Unintended

The point of departure of this perspective is that European integration, understood as the penetration of Community law into the national legal order, is to be seen as a polity-creating process in which competences are shared across multiple levels of governance, which include both sub-national, national and supranational levels.<sup>1167) 1168)</sup>

One of the significant dimensions of the perspective is that control has slipped away from the Member States to the supranational institutions.<sup>1169)</sup> Member States still play a central part in policy development within the Community, but they do so in a context that

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Consequence of Rational State-action)", *EUI Working Paper RSC*, Number 96/31, p. 4. Finally, it should be mentioned that this perspective is very new and therefore not to be considered as a mature, fully developed theory.

- 1167) See Marks, Gary; Nielsen, Francois; Ray, Leonard & Salk, Jane, "Competencies, Cracks and Conflicts: Regional Mobilization in the European Union", in *Governance in the European Union*, Edited by Marks, Gary; Scharpf, Fritz W.; Schmitter, Philippe C. & Streeck, Wolfgang. London, 1996, p. 41. Although the perspective considers multiple levels of governance, it is to the issues at stake in connection with the doctrine on Articles 3(g), 5(2) and 85 EC mainly the major two levels, namely the Community level and the Member State level, which are of interest here. This does not however touch upon the validity of the insights of the perspective of multi-level governance to the issues at stake here, as it does not imply that a traditional bifurcated model of politics across two autonomous levels is then applicable; see the footnote below concerning the approach of inter-governmentalism.
- 1168) It should be understood that the perspective of multi-level governance is launched as an alternative to the dominant approach within the theory of international relations applied to explain European integration, namely the approach of state-centric governance or, simply, inter-governmentalism. According to this approach, state sovereignty is preserved or even strengthened through membership in the Community; see Marks, Gary; Hooghe, Liesbet & Blank, Kermit, "European Integration from the 1980s: State-Centric v. Multi-level Governance", *Journal of Common Market Studies*, Volume 34, 1996, Number 3, p. 342. Also, Member States remain the commanding political actors on account of their control of the Council of Ministers and the European Council, which is perceived as an intergovernmental meeting of heads of State; see Marks, Gary; Nielsen, Francois; Ray, Leonard & Salk, Jane, "Competencies, Cracks and Conflicts: Regional Mobilization in the European Union", in *Governance in the European Union*, Edited by Marks, Gary; Scharpf, Fritz W.; Schmitter, Philippe C. & Streeck, Wolfgang. London, 1996, p. 41. The other institutions, such as the Commission, the European Court of Justice and the Parliament, are viewed as agents of the Member States or as having only a symbolic role; see *ibid*. For instance, the European Court of Justice is seen as operating in the shadow of its ultimate masters, namely the governments of the Member States, so that the implicit threat of intervention by the Member States constrains judicial activism, see Garrett, Geoffrey & Weingast, Barry R., "Ideas, Interests and Institutions: Constructing the EC's Internal Market", *Working Paper 1.2.*, Political Economy of the European Integration Research Group, 1991, p. 5.
- 1169) See Marks, Gary; Hooghe, Liesbet & Blank, Kermit, "European Integration from the 1980s: State-Centric v. Multi-level Governance", *Journal of Common Market Studies*, Volume 34, 1996, Number 3, p. 342.



they do not fully control.<sup>1170)</sup> Indeed, more and more competences are lost by the Member States in an increasing number of areas to the benefit of the Community.<sup>1171)</sup> It should therefore be understood that individual state sovereignty is diluted in the Community by collective decision-making among national governments and by the institutions of the Community.<sup>1172)</sup>

Pursuant to this perspective, however, it is not only observed that competences have slipped away from the Member States, but in addition that the integration process has gone much further than what was the original intention, as well as the current desire, of the Member States.<sup>1173)</sup> It is therefore very central to the perspective that institutional and policy reforms may fundamentally transform their own functions in ways that are unanticipated and/or undesired.<sup>1174)</sup>

Finally of relevance here is that it is observed according to this perspective that control is largely shared, so that in a growing number of cases no one of the actors at the various levels of governance has complete competence over a particular policy.<sup>1175)</sup> At

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1170) See Pierson, Paul, "The Path to European Integration. A Historical Institutional Analysis", *Comparative Political Studies*, Volume 29, Number 2, 1996, p. 158.

1171) See Majone, Giandomenico, "Regulatory Federalism in the European Community", *Environment and Planning C: Government and Policy*, Volume 10, 1992, p. 303.

1172) See Marks, Gary; Hooghe, Liesbet & Blank, Kermit, "European Integration from the 1980s: State-Centric v. Multi-level Governance", *Journal of Common Market Studies*, Volume 34, 1996, Number 3, p. 342.

1173) See Wind, Marlene, "Europe Towards a Post-Hobbesian Order? A Constructivist Theory of European Integration (Or How to Explain European Integration as an Unintended Consequence of Rational State-action)", *EUI Working Paper RSC*, Number 96/31, pp. 46-47. As a support of the observation, also note the following remark of Chancellor Kohl: "If one takes the Court of Justice...it does not only exert its competence in legal matters but goes far further. We have an example of something that was not wanted in the beginning." See Weiler, J. H. H., "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", *Journal of Common Market Studies*, Volume 31, 1993, Number 4, p. 444.

1174) See Pierson, Paul, "The Path to European Integration. A Historical Institutional Analysis", *Comparative Political Studies*, Volume 29, Number 2, 1996, p. 126.

1175) See Marks, Gary; Nielsen, Francois; Ray, Leonard & Salk, Jane, "Competencies, Cracks and Conflicts: Regional Mobilization in the European Union", in *Governance in the European Union*, Edited by Marks, Gary; Scharpf, Fritz W.; Schmitter, Philippe C. & Streeck, Wolfgang, London, 1996, pp. 41-42.

the same time, there is unlikely to be a stable equilibrium so that control is seen as variable, not constant, across policy areas. The reason is that as long as no consensus exists as to what the Community is and what it should be, the distribution of competences becomes unclear, especially when stated in the form of that which is closer to an international agreement than a constitution, albeit by now having to function more as the latter.

With reference to the doctrine on Articles 3(g), 5(2) and 85 EC, it may be understood that the combined reading has transformed the meaning of Article 85 EC from that which was originally foreseen by the Treaty. Today, the provisions have to operate in a world different from that which existed when the European legal order started its life. Rather, they operate in a largely undefined world, neither being a federation, nor being an ordinary international organisation, combined with a traditional conception of the nation-state. At the same time, the laws of the Community and the Member States have to co-exist, however without a clear hierarchy.<sup>1176)</sup> The laws of the two legal orders are in other words interwoven. These are the explanations for the imperfection of the analysed positions as well as the moving equilibrium of the case law of the European Court of Justice concerning the doctrine on Articles 3(g), 5(2) and 85 EC.

Yet, despite the imperfections of the various positions, the above analysis is enlightening as to the interests at stake, and it is, after all, possible to make recommendations on the basis thereof. The choice therefore falls on a vision consisting of a mixture of several of the positions, however in a new disguise. The term vision is chosen to stress that a magic model for coping with all the problems is not launched.<sup>1177)</sup> The vision fits well with the described insights of the observations delivered by the perspective of multi-level governance.

From a more general perspective, the primary constitutional problem of the Community may be defined as how to make compatible supranational regimes with democratic societies. Due to the precarious legitimacy of the European polity, supremacy claims of European political processes are questionable when considering that the legitimacy

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1176) MacCormick describes this relationship as pluralistic as opposed to monistic, and interactive rather than hierarchical; see MacCormick, Neil, "The Maastricht-Urteil: Sovereignty Now", *European Law Journal*, Volume 1, Issue 3, 1995, p. 264. He adds that the principle of supremacy is not to be confused with any kind of all-purpose subordination of national law to Community law since these two legal orders are to be seen as interacting systems.

1177) The following suggestions are inspired from the works of Joerges, see references in the footnotes below.

of the Member States' political processes rests upon democratic processes.<sup>1178)</sup> This is in particular so with regard to the European Court of Justice's court-made law. The keyword to the normative vision is therefore coherence, understood as a positive term for an acceptance of imperfect legal integration.<sup>1179)</sup> According to its definition, less than detailed harmonisation and more than regulatory competition through mutual recognition is required.

Transferring these observations to the more specific perspective of the relationship between central competition law and anti-competitive state measures, there is no doubt that this relationship also reflects the mentioned constitutional problem and that compatibility would be an attractive tool to solve the many existing tensions. Principles of compatibility would also in this area have to be developed. These principles should mediate between central competition provisions and national anti-competitive measures. The implicit assumption would be that both national and supranational legal orders each have their own legitimacy.<sup>1180)</sup> According to the normative vision, the primary competence of Member States for the development of economic regulations has to be acknowledged, because the legitimacy of

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1178) See Joerges, Christian, "The Process of European Integration and the 'Denationalization' of Private Law", in *New Directions of Business Law Research*, Edited by Dahl, Borge & Nielsen, Ruth, Copenhagen, 1996, p. 87. The concept of legitimacy should not, however, be understood solely as a matter of democracy or not, but just as well understood as the national democratic societies being perceived as having legitimacy according to a general perception of the populations in the EU, because of, *inter alia*, the existence of democracy. In this regard, see the very helpful article by Obradovic, Daniela, "Policy Legitimacy and the European Union", *Journal of Common Market Studies*, Volume 34, 1996, Number 2, pp. 191-221. Here, it is pointed out that the notion of legitimacy is exceedingly complex and confusing; see *ibid.* p. 194. It reflects the belief that one system is just because it embodies not only any shared understanding but an accepted superior justificatory principle, the myth; see *ibid.* p. 195. Obradovic defines the legitimacy as the acceptance of decisions as something which one should defend, even at personal cost, because they were made in a way that morally obliges one to accept them, or, in other words, legitimacy depends on the consent of the governed; see *ibid.* p. 194. Also, see e.g. Weiler, J. H. H., "Legitimacy and Democracy of Union Governance: The 1996 Intergovernmental Agenda and Beyond", *Working Paper*, Number 22, Arena, 1996, for an account of the concept.

1179) See Joerges, Christian, "European Economic Law, the Nation-State and the Maastricht Treaty", in *The European Union Treaty*, Edited by Dehousse, Renaud, Munich, 1994, p. 51.

1180) See Joerges, Christian, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration", *European Law Journal*, Volume 2, 1996, Number 2, p. 117.

economic regulations rests primarily on the national context.<sup>1181)</sup> However, at the same time, it has to be accepted that it is a legitimate objective of the Community to institute a system ensuring that competition in the common market is not distorted.<sup>1182)</sup> Both legal systems contain vital concerns which need to be respected, but only where important Community interests are at stake should the Community intervene. The reason is that only compelling values should overturn political decisions made in the Member States.

The vision does not claim to solve all the tensions between the central competition provisions and the national anti-competitive regulation, but it indicates normative principles which need further development in order to increase the legitimacy of the present structure of the Community.<sup>1183)</sup> The necessity of legitimacy essentially lies in ensuring that European law is supported by the populations of the Community.

The development of this vision is entrusted primarily to the European Court of Justice which already has come quite far. What has to be made compatible is the "logic of market-building" with the "logic of national economic law". The field of law in this area needs some more general guidance which can only be gained from a comprehensive understanding of the integration process and its objectives.<sup>1184)</sup>

Within the framework of the vision, it is possible to indicate that the Treaty's competition provisions in only a minority of situations should override state autonomy, assuming a structure of governance as that which exists today. However, the vital question of exactly when the central competition provisions should be permitted to intrude into the presumptive sovereignty of state law needs to be posed. The objective in this regard, besides respecting the rationale behind the vision, is to formulate a rule of decision, in particular for

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1181) See Joerges, Christian, "The Process of European Integration and the 'Denationalization' of Private Law", in *New Directions of Business Law Research*, Edited by Dahl, Børge & Nielsen, Ruth, Copenhagen, 1996, p. 89.

1182) See *ibid.*, at p. 89. However, economic law within legal systems mediates between economic objectives and other policy concerns, see Joerges, Christian, "European Economic Law, the Nation-State and the Maastricht Treaty", in *The European Union Treaty*, Edited by Dehousse, Renaud, München, 1994, p. 49. With regard to Community law it would not be an attractive situation to restrict Community law only to its narrowly defined objective because it is necessary to take a holistic point of view; see *ibid.*, at p. 50.

1183) See Joerges, Christian, "European Economic Law, the Nation-State and the Maastricht Treaty", in *The European Union Treaty*, Edited by Dehousse, Renaud, München, 1994, p. 5.

1184) See *ibid.*, at p. 33.

the European Court of Justice to apply, which has more predictive force than at present. In other words, it should be avoided that the reading of a judgment from the European Court of Justice in this field is similar to the reading of a good detective story, where one never knows what the exciting and surprising ending will be. With the vision as an all-embracing lodestar, the case law would be given the needed internal logic which would at the same time signal a larger degree of legal certainty and internal rationality.

Compatibility would be gained, if - as long as no central harmonisation of a field in question has been implemented - only anti-competitive measures which can not be characterised as that of the Member State were condemned, and only if they would otherwise be contrary to the three *Van Eycke* criteria. The notion of what constitutes a state measure should be broadly interpreted. The rationale then is that even though a measure might infringe one of the *Van Eycke* criteria, this does not matter because the measure is immunised due to the fact that it is legitimised as a state measure. In other words, the doctrine should be reconstructed so that it allows Member States to depart from the model of efficiency when their citizens so elect. In this way, the doctrine is brought into conformity with a desirable rationale of federalism. As a matter of fact, operating with a standard of "state action" is what the European Court of Justice already appears to do in its more recent case law. A more honest position would be to more overtly operate with the described standard.<sup>1185)</sup>

With regard to the first criterion (according to which a Member State violates Articles 3(g), 5(2) and 85 EC if it requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 EC) and the third criterion (according to which the three provisions are violated if a Member State deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere) of the *Van Eycke* test, both applied by the European Court of Justice to activities arising from a measure, the above implies that such violations nevertheless are acceptable if the measure truly is an act of the Member State. The reason is that a Member State legitimately has decided to allow for such violations due to a balance of various

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1185) However, on the basis of the perspective of multi-level governance, the advantage to the European Court of Justice of operating with a formal approach is that it can constantly move the balance of competence, whenever this seems appropriate, under a disguise of formal criteria ensuring legal certainty. It should be added that when the promotion of economic efficiency, as demonstrated above, is not the concern, then it makes sense to allow for deference to state authority as there then in actual fact is no longer a genuine conflict.

interests. In particular, with regard to the third criterion, it should be added that this may be read either as a supportive criterion of the first criterion or as an indirect way of testing whether an act is that of the Member State. In the latter case, its real purpose then is better obtained by directly applying the overall test, *i.e.* by defining whether a measure is the act of a Member State.

With regard to the European Court of Justice's second criterion, namely the one which determines that a Member State violates the mentioned three provisions if it reinforces the effects of agreements, decisions or concerted practices contrary to Article 85 EC, and which is related to activities taking place prior to the enactment of the measure in question, what is outlined above implies that such violation nevertheless is lawful if transferred into a legitimate act of a Member State. Although this is perhaps psychologically difficult to accept, as it seems difficult to allow an unlawful agreement, for instance, to be made lawful by transferral into national law, it should be remembered that it is after all a Member State which makes this decision. The activity could just as well be viewed as an effort at lobbying which naturally should be allowed due to universal principles such as the freedom to petition the government and the freedom of expression.

The above proposal for a reconstruction of the present doctrine on the interaction of Articles 3(g), 5(2) and 85 EC emphasises deference to Member States' considered economic choices and is neutral to the wisdom of those choices, also in economic terms. The proposed criterion as to whether the measure in question constitutes the act of the Member State has as a major quality also the feature of being fairly simple to apply. However, it should not, as its American equivalent, focus on the clarity of the measure's language, nor should it be understood as a test of the political adequacy of the Member State's legislative processes. It shall hence only test whether the measure is the act of the Member State, or is enhanced pursuant to the delegation of this act. Thus, the interest in citizen participation is promoted.

In the long run, the competition objective contained in the Treaty, with regard to Member States' regulations which are not directly concerned with "traditional" competition law, would have to be obtained rather through more particular Treaty amendments or through harmonisation initiatives, but only within vital fields<sup>1186</sup>). Otherwise, the normative vision

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1186) This is exactly what is going to happen in Australia, where the States. Due to the obstacles of the Constitution, in a separate agreement, have decided to review and reform States' anti-competitive legislation. The guiding principles are that legislation of any kind should not

signals that autonomy of Member States should be the prevalent rule in the field of anti-competitive state measures given the present state of the Community and in particular for the sake of this seemingly being the actual standard applied by the European Court of Justice in its case law today. Competition imperialism will come to an end.<sup>1187)</sup> The last word here shall be given to the US Supreme Court, which in a nearly one hundred years-old judgment concerning state action expressed a great deal of wisdom:

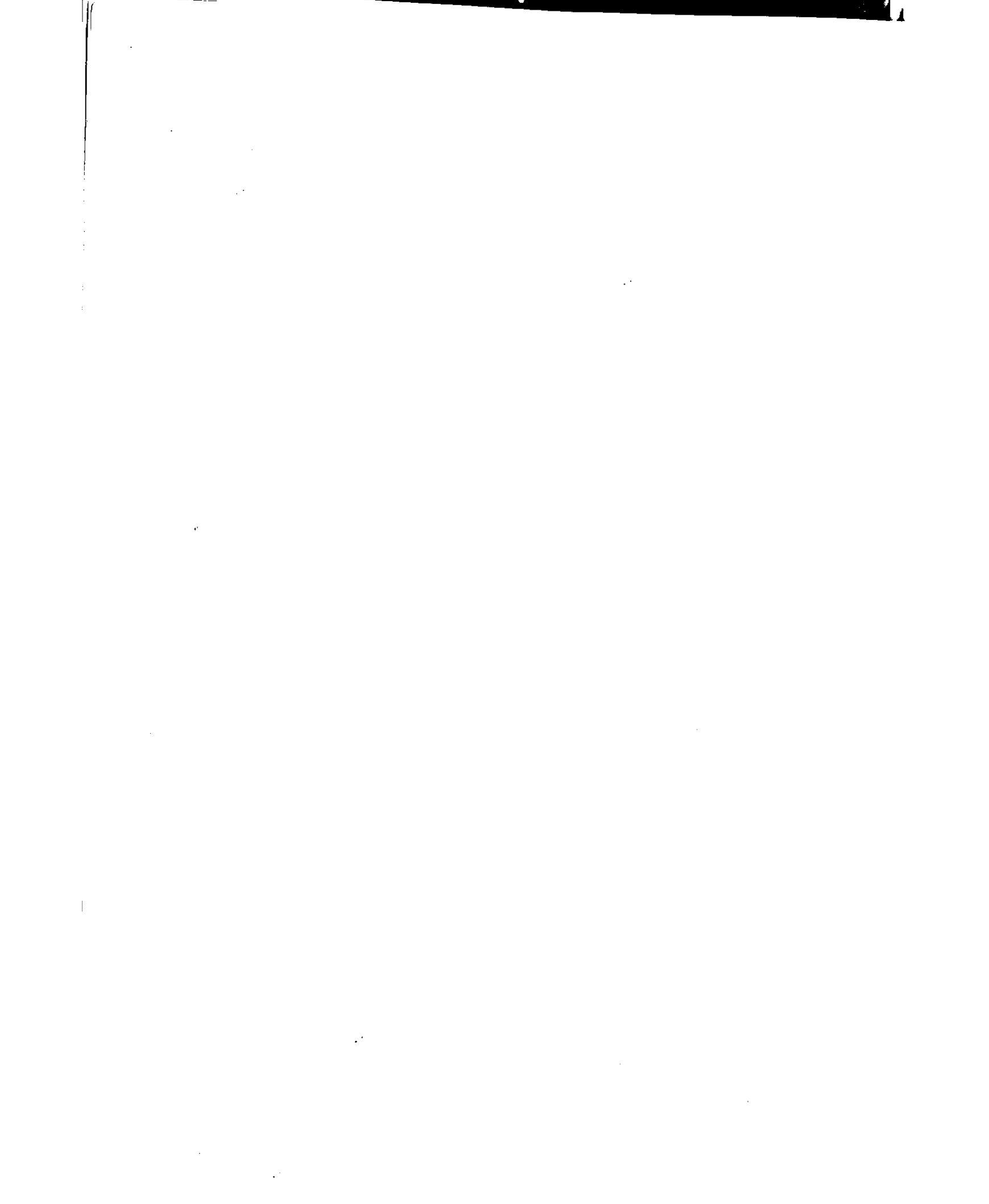
*"When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas law are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusions - which we do not at all imply is the case - the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act the premises."* <sup>1188)</sup>

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restrict competition unless it can be demonstrated that the benefits of the restriction as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition; see Fels, Allan, "Decision Making at the Centre", Paper Presented at the *Workshop on the Implementation of Antitrust Rules in a 'Federal' Context*, EUI, 1996, pp. 19-20.

1187) Or, in the words of Friedbacher "a paradigmatic shift from a presumption of knee-jerk intolerance of Member State infractions to a more critical search for the precise parameters of the Common Market ideal [is signalled]. If the Court stands by its judgments and enforces the primacy of Member State prerogatives within their own spheres, we will witness the emergence of a radically new approach to integration; namely, one which accepts the dual existence of severable Community and Member State competences in substantive areas previously considered purely Communitarian given the drive toward integration. Severing those spheres and allowing their 'peaceful coexistence', however, will ironically lead to a more stable, healthier evolution of the Common Market." See Friedbacher, Todd J., "Motive Unmasked: The European Court of Justice, the Free Movement of Goods, and the Search for Legitimacy", *European Law Journal*, Volume 2, 1996, Number 3, p. 249.

1188) See the *Olsen Case*, at 195 US 345.





**Part Five**

**Final Remarks**

In *Chapter 19*, conclusions as to more specific criticisms and recommendations with regard to a "solution" to the tensions between central competition provisions and anti-competitive state measures have been provided. In this part, a few further remarks are added.

## 20. Final Remarks

The treatment of the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC in this thesis has been both descriptive and prescriptive in its character. *Part Two* and *Part Three* have contained the descriptive dimension, as the current state of law has been established, and *Part Four* has contained the normative dimension, as suggestions to a solution of the tensions between anti-competitive national law and central competition law have been analysed and an alternative launched.

The European Court of Justice's doctrine on the interaction of Articles 3(g), 5(2) and 85 EC is most of all an example of the tensions which are always inherent in any system of divided sovereignty, in which there exists simultaneously a central government and several state governments. Because the analysed field potentially touches upon a large ambit of national economic regulation, it is an extremely complex and politically sensitive area which has been under scrutiny. Yet, the above analysis, and the recommendations based thereupon, have attempted to refrain from the overall political message of what the future constitutional model should be for the EU, but instead have tried to operate within the present structure. At the same time, a certain degree of objectivity as to the desirable level of regulation has been an aim in itself. The reason is, first of all, an avoidance of "politicising" the thesis too much, and, secondly that the future of the EU's structure under all circumstances is fairly unpredictable and under constant transformation.

The thesis has been based on the assumption that the doctrine on the interaction of Articles 3(g), 5(2) and 85 EC is most fruitfully understood when analysed in its legal, economic and political context, because this field of law in itself represents a hybrid of these disciplines. The interdisciplinary approach has provided both opportunities and limitations to the analysis. The primary opportunity has lied in viewing the pertinent law as something more and different from simply a highly technical set of rules. At the same time, such a framework naturally ensures a more coherent critical analysis. Among the limitations to the analysis have been those existing due to the disciplinary boundaries. It is difficult for one individual to acquire interdisciplinary methodology and knowledge. At the same time, such an approach broadens the aspects of analysis which, however, may exclude other aspects from the analysis. Furthermore, neither discipline includes only one sub-direction and it is obviously

impossible to take into account all of these. Evidently, which sub-direction is chosen is of significance to an interdisciplinary analysis. This being said, however, the interdisciplinary approach has provided many enlightening aspects, also of primary importance to the understanding of the legal analysis itself, which otherwise would not have come to light. Also, errors which could have occurred due to an ignorance of the interdependence of disciplines are more likely to have been avoided.

The comparative element in the thesis is also characterised by several opportunities and limitations. As with the interdisciplinary approach, a comparison with another legal system brings new enlightening aspects to light, but, at the same time, it is difficult for one individual to fully acquire a complete knowledge of a foreign legal system, which limitation might indeed represent a danger to conducting such a comparison. The gain, however, should in all likelihood be able to outweigh this problem.

In sum, it is the hope of the present researcher that this thesis has helped the reader to understand the many complexities related to the doctrine on Articles 3(g), 5(2) and 85 EC, and, more importantly, has provided an analytical framework for finding a solution to the tensions inherent in the doctrine, which framework will improve the ability to address, ensure and improve the quality of such solutions.

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*Exxon: Exxon Corporation, et al. v. Governor of Maryland, et al.* [No. 77-10]; *Shell Oil Company v. Governor of Maryland, et al.* [No. 77-11]; *Continental Oil Company, et al. v. Governor of Maryland, et al.* [No. 77-12]; *Gulf Oil Corporation v. Governor of Maryland, et al.* [No. 77-47]; *Ashland Oil, Inc., et al. v. Governor of Maryland, et al.* [No. 77-64], 437 US 117, 57 L Ed 2d 91, 98 S Ct 2207, [Nos. 77-10, 77-11, 77-12, 77-47 and 77-64], Argued 28 February 1978, Decided 14 June 1978.

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*California Motor Transport: California Motor Transport Co. et al. v. Trucking Unlimited, et al.,* 404 US 508, 30 L Ed 2d 642, 92 S Ct 609, [No. 70-92], Argued 10 November 1971, Decided 13 January 1972.

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*Schwegmann: Schwegmann Brothers, et al. v. Calvert Distillers Corp.,* 341 US 384, 95 L. Ed. 1035, 71 S Ct 745 [No. 442], Argued 9 - 10 April 1951, Decided 21 May 1951.

*Parker: Parker, Director of Agriculture, et al. v. Brown,* 317 US 341, 87 L Ed 315, 63 S Ct 307, [No. 1040], Argued 5 May 1942, Decided 4 January 1943.

*Olsen: Olsen v. Smith,* 195 US 332, 49 L Ed 224, 25 S Ct 52, [No. 42], Argued 3 November 1904, Decided 28 November 1904.

*Northern Securities: Northern Securities Co. v. United States,* 193 US 197, [No. 277], Argued 14-15 December 1903, Decided 14 March 1904.

