



# **EUI Working Papers**

**LAW 2007/30**

Competition Law and Public Policy:  
Reconsidering an Uneasy Relationship.  
The Example of Art. 81

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ISSN 1725-6739

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Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy

<http://www.eui.eu/>  
<http://cadmus.eui.eu/>

## **Abstract**

The EU is currently re-conceptualizing the goals of competition law and their place within the EC Treaty. Whereas the Draft Reform Treaty is emphasizing the weight of public policy goals vis-à-vis the goal of undistorted competition, the EU Commission has made an effort to remove non-competition goals from competition policy in the course of the “decentralization” of EU competition law enforcement and to refocus competition law on the efficiency criterion, namely the consumer welfare goal.

This contribution shall discuss the regulation of the interface between competition policy and public policy goals in the interpretation and application of Art. 81 EC under the old and the new enforcement regime. Doctrinally, the debate is led on two levels: With regard to the interpretation of Art. 81(1) the question is raised whether conflicting policy goals can delimit its scope. Art. 81(3) with its broad and general terms, potentially provides an opening of EU competition law for the consideration of non-competition related policy goals on the level of exemptions. The interpretation of Art. 81(3) EC has gained new relevance since it has been declared directly applicable by Art. 1 of Regulation 1/2003. Whereas, under the former regime, the Commission could regulate the competition-public policy interface case-by-case based on its monopoly for granting exemptions, the direct applicability of Art. 81(3), i.e. its enforcement by national competition authorities and courts, calls for more conceptual guidance. The difficulties to provide such guidance throw some light on the conceptual uncertainties associated with the recent reform of EU competition policy.

## **Keywords**

Competition policy – Public policy goals – Internal market – Art. 81 EC –  
Modernization of competition law – Wouters – Piau – Albany – Employment policy –  
Environmental protection



***Competition Law and Public Policy:  
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## **I. Introduction**

The development of an internal market with undistorted competition is one of the central fields of activity of the EU (Art. 3(1) lit. g EC), and has long been one of its seemingly uncontroversial goals. The debate about the relation between this goal and other, non-competition goals listed in Art. 2 and Art. 3 EC has been a reminder of the political tensions that the application of competition rules can raise at times. The Draft IGC Mandate in the Presidency Conclusions of the Brussels EU Council of June 23, 2007 reveals how strongly these tensions are perceived by some Member States, when it confirms the establishment of an internal market as an objective to be included in a future Art. 2 of the EU-Treaty, but, upon French pressure, eliminates the commitment towards a system of undistorted competition from the envisioned text.<sup>1</sup>

While the Draft IGC Mandate reflects attempts to reduce the EU competition policy's weight vis-à-vis a growing diversity of EU policy goals, the EU Commission's recent reforms in the area of competition policy are informed by a very different attempt to reconceptualize its goals: according to the Commission, the interpretation of EU competition rules should nowadays mainly be driven by an efficiency criterion, namely the consumer welfare goal. The formerly strong inter-linkage between competition rules

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<sup>1</sup> According to the Draft IGC Mandate's text, the future Art. 3(3) EU-Treaty shall read: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced." See <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001.en07.pdf> (last visited 6th August 2007). A „Protocol on internal market and competition“ shall, however, be annexed to this new version of the EU Treaty, according to which „[t]he High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that, to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the Union“.

and the market integration goal should be softened,<sup>2</sup> if not abandoned,<sup>3</sup> and the accompanying concept of freedom to compete should be given up. EU competition law should, in this conception, certainly not cede to conflicting political goals unrelated to the efficiency goal. Decision-making power should not be transferred to the political sphere. At the same time, the interpretation of competition rules is to some extent decoupled from its embeddedness in the EC Treaty's system of goals,<sup>4</sup> namely from the internal market goal which has successfully driven the European integration process so far.

This contribution shall trace these two diverging approaches towards the regulation of the interface between competition policy and public policy goals in the interpretation and application of Art. 81 EC. Doctrinally, the debate is led on two levels: With regard to the interpretation of Art. 81(1) the question is raised whether conflicting policy goals can delimit its scope. Art. 81(3) with its broad and general terms, potentially provides an opening of EU competition law for the consideration of non-competition related policy goals on the level of exemptions. The interpretation of Art. 81(3) EC has gained new relevance since it has been declared directly applicable by Art. 1 of Regulation 1/2003.<sup>5</sup> Whereas, under the former regime,<sup>6</sup> the Commission could regulate the competition-public policy interface case-by-case based on its monopoly for granting exemptions, the direct applicability of Art. 81(3), i.e. its enforcement by national competition authorities and courts, calls for more conceptual guidance. The difficulties to provide such guidance throw some light on the conceptual uncertainties associated with the recent reform of EU competition policy.

## II. Non-competition goals in the interpretation of Art. 81(1)

The French initiative to confirm the EU's commitment towards establishing an internal market while eliminating the reference towards "undistorted competition" can be read

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<sup>2</sup> EU Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, [1999] OJ 132/1, executive summary, point 8: "At the beginning the focus of its activity was on establishing rules on restrictive practices interfering directly with the goal of market integration. [...] The Commission has now come to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive structures". See also: *Odudu*, *The Boundaries of EC Competition Law*, 2006, p. 21: "The formal completion of the internal market diminishes the extent to which integration as an ideological constituent of the concept of competition can be supported".

<sup>3</sup> For a summary and discussion of the objections brought forward against the internal market goal as a goal of competition policy see: *Rein Wesseling*, *The Modernisation of EC Antitrust Law*, Oxford 2000, p. 80-82 and pp. 85-88 (himself also critical with respect to the integration goal).

<sup>4</sup> For this embeddedness see, e.g., ECJ Case 6-72 *Europemballage Corporation and Continental Can Company v. Commission*, [1973] ECR I-215, paras. 22-27: competition rules must be read in the light of the broader goals of the European Community.

<sup>5</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1-25.

<sup>6</sup> Council Regulation No. 17 (EEC), [1962] OJ P 13, p. 204.

as an attempt to delimit the scope of EU competition rules where they conflict with other public policy goals. Under the current regime of the EC Treaty, the ECJ has generally rejected such restrictive interpretations of Art. 81(1). Only in a narrowly limited group of cases have public policy considerations led the ECJ to exclude a certain restraint from the scope of Art. 81(1). Two groups of cases can be distinguished:

One covers acts of self-regulation by collective bodies where the restraints of the freedom to compete are justified by a legitimate objective and inherent in the organisation and proper conduct of the regulated activity. The ECJ has, *inter alia*, accepted such exceptions with regard to the setting of rules of professional conduct by the Netherlands Bar (*Wouters*<sup>7</sup>) and in the sphere of sports (see, *inter alia*, *Meca-Medina*<sup>8</sup>). The rationale of this exception is an important, but limited one: In those cases where self-regulation by professional associations is regarded as legitimate in principle with a view to an act of state delegation or the nature of a given activity, the ECJ controls this self-regulatory activity according to the same criteria that it would apply to Member State regulation itself. It essentially transfers the exceptions to the free movement rules to the sphere of Art. 81. Where the conditions for an exception are met, Art. 81(1) does not apply. The case-law on the analysis of legitimate self-regulatory activity under Art. 81(1) does not justify the broader conclusion that free movement rules and competition law rules are generally converging<sup>9</sup> and that, therefore, the accepted justifications for violations of free movement rules can equally be applied to justify restraints of competition.<sup>10</sup> Under a legal policy perspective, the transfer of public policy justifications recognized in the context of the free movement rules to competition law rules would significantly broaden the scope of justifications, and would imply the recognition of a general authority of private parties to self-regulate commerce

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<sup>7</sup> ECJ, C-209/00, 2002 ECR I-1577 paras. 97 et. seq. – *Wouters*; see particularly recital 110: „... a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned“.

<sup>8</sup> ECJ, C-519/04 P, 2006 I-6991, paras. 43-47 – *Meca-Medina* (18.07.2006). For a recent comment on the sports cases and their relevance from the perspective of competition law see Szyszczak, *Competition and Sports*, 32 *ELRev.* (2007), 95 et. seq.

<sup>9</sup> See Gyselen, *The emerging interface between competition policy and environmental policy in the EC*, in: Cameron / May (eds.), *Trade and Environmental Law*, London 1994, p. 242: The Commission should operate an identical legality standard when assessing the compatibility with the Common Market of market-based or regulatory environmental action (“seamless web approach”). If competition policy were more generous than internal market policy, companies in states with a strong regulatory tradition might collude. If competition law were stricter than internal market policy, companies might put pressure on their authorities to regulate. For a careful and more cautious analysis of the alleged convergence see Mortelmans, *Towards Convergence in the Application of the Rules on Free Movement and on Competition?*, 38 *CMLRev.* (2001), 613 et seq. Doubts with regard to a broad claim of convergence result, *inter alia*, from ECJ, C-519/04 P, 2006 I-6991, paras. 32-34 – *Meca-Medina* (18.07.2006) where the ECJ has found that the fact that certain sports regulations, since they are considered to be non-economic, do not fall within the scope of Art. 39, Art. 49 EC does not automatically imply that those regulations do not fall under Art. 81, 82 EC.

<sup>10</sup> For such a proposition see Roth, *Zur Berücksichtigung nichtwettbewerblicher Ziele im europäischen Kartellrecht – eine Skizze*, in: Engel / Möschel (eds.), *Recht und spontane Ordnung. Festschrift für Ernst-Joachim Mestmäcker zum 80. Geburtstag*, 2006, p. 413, at 424, 426-427 and 433-434. Against this proposition: Loozen, *Professional ethics and restraints of competition*, 31 *ELRev.* (2006), 28-47.

and competition. The CFI has been unwilling to accept such a claim: In *Piau*,<sup>11</sup> it expressed serious doubts whether the FIFA could assert general policing power and regulate the economic activity of sports agents. Since the FIFA could not rely on an accepted public rule-setting competence, the CFI did not apply the *Wouters* test under Art. 81(1), but rather performed an analysis strictly along the criteria of Art. 81(3). FIFA could, in other words, not rely on the public policy justifications accepted under the free movement rules.

The second exception, established by the ECJ in *Albany*,<sup>12</sup> deals with collective bargaining. In *Albany*, the ECJ has held that agreements concluded in the context of collective negotiations between management and labour by virtue of their nature and purpose fall outside the scope of Art. 81(1) where the purpose of the agreement is to improve conditions of work and employment.<sup>13</sup> Some have concluded that the ECJ is now generally willing to engage in a balancing of EC Treaty goals to delimit the scope of Art. 81(1). Such allegations clearly overstate the case. *Albany* reflects both the social importance and Member States' traditional respect for collective bargaining agreements between employers and employees, the conclusion of which is also encouraged by Art. 138f EC. Another example of the ECJ's particular respect for the Member States' social policy choices is the restrictive interpretation of the term "undertaking" where Member States decide to structure their social systems according to the principle of solidarity. These decisions demonstrate that the ECJ is aware of the political sensitivity of competition law where Member States' fundamental social policy choices are concerned. These decisions do not, however, stand for the proposition of a general balancing of EC Treaty's policy goals in defining the scope of Art. 81(1).<sup>14</sup>

Under the current EC Treaty's regime, claims that such balancing should be performed are generally met by the argument that the competition rules themselves are firmly anchored in the European Community's system of goals, namely in Art. 3(1) lit. g EC

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<sup>11</sup> CFI, T-193/02, 2005 ECR II-209, paras. 76-78 – *Piau v Commission*: "With regard to FIFA's legitimacy, contested by the applicant, to enact such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football ..., is indeed open to question in the light of the principles common to the Member States on which the European Union is founded. The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties. In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. ...".

<sup>12</sup> ECJ, C-67/99, 1999 ECR I-5751 – *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie*.

<sup>13</sup> *Ibid.*, at para. 60: „It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty“.

<sup>14</sup> For a narrow reading and critical comments on *Albany* see also: Camesasca / Van den Bergh, Irreconcilable principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust, 25 ELRev. (2000) 492-508. For a detailed analysis of *Albany* and more general (potentially broader) conclusions to be drawn from it see Tatjana Mühlbach, Tarifverträge in der europäischen Kartellkontrolle, Baden-Baden 2007.

and in Art. 4(1) EC. The EC Treaty does not establish a hierarchy between the various goals mentioned in Art. 2 and Art. 3 EC. The Community organs are therefore generally held to reconcile the various goals in implementing Community policies.<sup>15</sup> There are, however, limits to the mandate to consider conflicting goals. One of them is that conflicting goals cannot endow national authorities and courts or Community organs with discretion to disregard the lines drawn by the specific provisions of primary law that are mandatory and directly applicable. The application of directly applicable EU law may not be transformed into the exercise of political discretion and choice.

Eliminating the reference to undistorted competition in the list of the Union's goals in the Draft IGC Mandate is an attempt to weaken this line of argument by degrading competition rules to the status of a mere instrument to achieve the superior goal of an internal market with balanced economic growth, full employment and social progress, a high level of protection for the environment and scientific and technological progress. An instrument may arguably have to cede where presumably better instruments, like direct policy intervention, are available. It is, however, highly doubtful whether such arguments would indeed be available to weaken the binding force of norms that continue to be mandatory, directly applicable and part of the "acquis communautaire".

### **III. Non-competition goals in the interpretation and application of Art. 81(3)**

For practical purposes the most important locus for the consideration of public policy goals is thus Art. 81(3) which provides a possibility to declare Art. 81(1) non-applicable where the economic benefits of the restriction of competition outweigh the harm caused.

The conditions for taking public policy goals into account have fundamentally changed with the entry into force of Regulation 1/2003. Under the old system, the Commission, in its dual function as an enforcement agency endowed with a monopoly for granting exemptions under Art. 81(3) and a policy making institution, enjoyed broad discretion in applying Art. 81(3). It included the possibility to take public policy goals into account.<sup>16</sup> The Commission generally made cautious use of this possibility. In some cases, however, it allowed restrictive agreements fundamentally in opposition to the logic of competition policy (see 1.). Under the new system, Art. 81(3) is directly applicable, i.e. national competition authorities and courts are to apply Art. 81(3). This requires that Art. 81(3) is clear and unconditional. Policy discretion is not compatible with a system in which Art. 81(3) is directly applicable. The relevance of public policy goals in the interpretation and application of Art. 81(3) under the new regime is thus unclear (2.).

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<sup>15</sup> In Germany, this mandate is termed „praktische Konkordanz“ – see Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 559 et. al.

<sup>16</sup> See for further discussion Mestmäcker/Schweitzer, *Europäisches Wettbewerbsrecht*, 2. ed. 2004, § 3 para. 75-76. For the interaction between the Commission's institutional role under Reg. 17 and the recognition of its discretion to take public policy goals into account see also Roth, in: FS Mestmäcker, 2006, p. 413, at 427.

### ***1. Non-competition goals in the interpretation and application of Art. 81(3) before the reform – The EU Commission’s practice and the ECJ’s jurisprudence***

It is a general tenet of US antitrust law that restraints of competition are to be assessed with a view to their pro- and anticompetitive effects. Public policy goals, different from the public interest inherent in competition policy, are of no (direct) relevance in the application of Sec. 1 Sherman Act<sup>17</sup> – although they are, in some cases, considered implicitly where they can be linked to pro-competitive effects.<sup>18</sup>

Art. 81(3) differs from the “rule of reason”-test under Sec. 1 Sherman Act. It is frequently characterized as an efficiency defence: firms can justify restrictive agreements where the efficiency gains resulting from the restrictive agreement outweigh the anti-competitive effects. The ECJ has consistently stressed that advantages realized by the parties to the restrictive agreement are not sufficient, and not decisive, for an exemption under Art. 81(3). An exemption shall only be granted where an “objective advantage” results, where, in other words, a public interest in the restrictive agreement can be said to exist with a view to the realization of the EC Treaty goals. The “objective advantage” must go beyond the individual purposes which the parties to the restrictive agreement pursue and the gains they can realize, and at least part of the benefit must be passed on to the consumers.

Art. 81(3) thus framed provides for a public interest exception to Art. 81(1), although one related and generally restricted to the realization of economic benefits. In the vast majority of decisions in which the EU Commission has granted an exemption based on Art. 81(3) the public interest lay directly in the realization of economic benefits like the realization of economies of scale or scope, the rationalisation of production, saving of resources, solving of coordination problems, facilitation of product or process development and the like.

In a limited, nonetheless significant number of cases, the EU Commission has taken broader non-competition goals into account, for example environmental goals,<sup>19</sup> cultural policy goals,<sup>20</sup> the protection of public health<sup>21</sup> and consumers,<sup>22</sup> but also employment

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<sup>17</sup> *National Soc’y of Professional Engineers*, 435 U.S. 679, at 688, 98 S.Ct. at 1363: “Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions”

<sup>18</sup> Quality improvements (see *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, at 114-115, 104 S.Ct. 2948, at 2967, 82 L.Ed. 2d 70 (1984)), the protection of public health, consumer protection (for example measures to prevent false or misleading advertising – see *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79-80, 54 S.Ct. 315, 78 L. Ed. 655 (1934)), and even the goal of promoting socio-economic diversity in universities (*US vs. Brown University*, 5 F.3d 658, 62 USLW 2170, 1993-2 Trade Cases P 70,358, 85 Ed. Law Rep. 1027) have thus been considered relevant by US courts under a rule of reason approach.

<sup>19</sup> See, *inter alia*: Commission, 25th Annual Report on Competition Policy, Brussels 1995, para. 85; Commission, Decision of 21.12.1994, [1994] OJ L 378/37 – *Philips/Osram*; Commission, Decision of 24.01.1999, [2000] OJ L 187/47, at p. 52 paras. 55 et seq. – *CEDEC*. For further references to relevant Commission decisions see: Roth, in: FS Mestmäcker, 2006, p. 413, at 417 fn. 26.

<sup>20</sup> EC Commission, *VBVB/VBBB* [1982] OJ L 54/36. Upheld in *VBVB and VBBB v. Commission* [1984] ECR 19 (Joined Cases 43 & 63/82). For discussion of the consideration of cultural goals in the application of Art. 81 EC see Schmid, Diagonal competence conflicts between European competition law and national regulation – A conflict of laws reconstruction of the dispute on bookprice fixing, 8 *European Review of Private Law* (2000), 155, at p. 164.

policy,<sup>23</sup> regional policy and industrial policy goals.<sup>24</sup> The ECJ has generally endorsed the Commission's practice, and acknowledged that the Commission enjoyed broad discretion in applying Art. 81(3),<sup>25</sup> including the authority to reconciling competition with "objectives of a different nature", i.e. with broader public interest goals.<sup>26</sup>

While the Commission has generally used its discretion cautiously, and has been unwilling to sacrifice the core objective of protecting competition to conflicting public interest goals,<sup>27</sup> some decisions have compromised competition law goals to a certain extent.<sup>28</sup> Much-debated examples are the Commission's *Stichting Baksteen*-decision, the *Ford/VW*-case and the *CEDEC*-decision:

- In the *Stichting Baksteen*-decision<sup>29</sup> the Commission exempted a classic crisis cartel. The agreement, which provided for a coordinated closing down of plants and a compensation scheme among competitors, would improve production and promote technical and economic progress by leading to a closure of the least efficient production units, so that afterwards production would be concentrated in the more modern plants. Also, the coordination would allow the restructuring to be carried out in acceptable social conditions, including the redeployment of employees (paras. 26-27).

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<sup>21</sup> See, *inter alia*, Commission, Decision of 6.10.1994, [1994] OJ L 309/1, at p. 18 para. 89 – *Pasteur Mérieux*; Commission, Decision of 8.5.2001, [2001] OJ L 302/1, at p. 21 para. 89 – *Glaxo Welcome*.

<sup>22</sup> For example in the form of protecting product safety – see, *inter alia*, Commission, Decision of 13.12.1974, [1975] OJ L 29/1, at pp. 6-7, paras. 23-24 – *BMW*; Commission, Decision of 29.10.1982, [1982] OJ L 314/34, at p. 36, para. 11 – *Amersham Buchler*.

<sup>23</sup> Commission, Decision of 23.12.1992, [1992] OJ L 20/14, at p. 17 para. 23 – *Ford/Volkswagen*; Commission, Decision of 29.4.1994, [1994] OJ L 131/15, at p. 20 para. 27 – *Stichting Baksteen*. See also the relevant literature: Whish, *Competition Law*, 5th ed. 2003, p. 153; Sufirin/Jones, *EC Competition Law*, 2001, p. 192 et. al.

<sup>24</sup> For references and discussion see *Ellger*, in: Immenga/Mestmäcker, *Kommentar zum Europäischen Kartellrecht – Wettbewerbsrecht EG*, Teil 1, 4. ed. 2007, Art. 81Abs. 3 para. 318-328; Roth, in: FS Mestmäcker, 2006, p. 413, at 417 et seq.

<sup>25</sup> ECJ, C-14/68, 1969 ECR I, at 14 para. 5 – *Walt Wilhelm*.

<sup>26</sup> ECJ, C-26/76, 1977 ECR, 1875, at para. 21 – *Metro v Commission (Metro I)*: "The powers conferred upon the Commission under Art. 85(3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of **objectives of a different nature** and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market." See also ECJ, T-528/93, T-542/93, T-543/93 and T-546/93, [1996] ECR II-649, para. 118 – *Metropole télévision SA*: "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemptions under Art. 81(3)".

<sup>27</sup> See, *inter alia*, Roth, *Zur Berücksichtigung nichtwettbewerblicher Ziele im europäischen Kartellrecht – eine Skizze*, in: Engel / Möschel (eds.), *Recht und Spontane Ordnung*, Festschrift für Ernst-Joachim Mestmäcker, 2006, p. 413, at 418: the Commission has attempted to link non-competition goals to the wording of Art. 81(3) and has generally referred to non-competition goals merely in support of its decisions, without essentially basing its decisions on such goals.

<sup>28</sup> For a careful analysis of the relevant case law see: *Giorgio Monti*, *Article 81 and Public Policy*, 39 CMLRev. (2002), 1057-1099. See also: Gasse, *Die Bedeutung der Querschnittsklauseln für die Anwendung des Gemeinschaftskartellrechts*, Frankfurt a.M. 2000, pp. 154 et. seq.

<sup>29</sup> Commission, Decision of 29 April 1994, [1994] OJ L 131/5 – *Stichting Baksteen*.

- In the *Ford/VW*-case,<sup>30</sup> the Commission analyzed a joint venture agreement between VW and Ford and exempted the agreement under Art. 81(3). According to its decision all four conditions of Art. 81(3) were met. It added that the JV would lead to the creation of 5000 jobs and attract investment in disadvantaged regions of Portugal, and would thus promote a more harmonious development of the Community and the reduction of regional disparities.<sup>31</sup>
- In the *CEDEC*-decision,<sup>32</sup> the Commission exempted an agreement between most European manufacturers of washing machines according to which certain washing machines which consumed particularly high quantities of electricity were to be phased out. The agreement was clearly in violation of Art. 81(1). The Commission exempted the agreement under Art. 81(3) due to its beneficial effects for the environment.<sup>33</sup>

## ***2. Non-competition goals in the application of Art. 81(3) under Regulation 1/2003 – The importance of the enforcement system for the interpretation of Art. 81(3)***

### *a) Direct applicability of Art. 81(3): the need for change in considering public policy goals*

The most noticeable characteristic of the Commission's decisional practice with respect to considering public policy goals in applying Art. 81(3) under the old regime is the Commission's broad margin of discretion.<sup>34</sup> Under the new regime, this feature cannot survive.<sup>35</sup> Art. 81(3)'s direct applicability presupposes the absence of discretion in applying this norm.

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<sup>30</sup> Commission, Decision of 23 December 1992, [1993] OJ L 20/14 – *Ford/Volkswagen*.

<sup>31</sup> According to the Commission's decision, this would not have been enough to make an exemption possible unless the conditions of Art. 81(3) had been fulfilled, but it was „an element which the Commission has taken into account“ (para. 36). Underlined also by the CFI in its decision *Matra Hachette* which confirmed the Commission's decision – CFI, T-17/93 [1994] ECR II-595, at para. 139.

<sup>32</sup> Commission, Decision 24 January 1999, [2000] OJ L 187/47 – *CECED*.

<sup>33</sup> For a very critical comment see Basaran, How should Article 81 EC address agreements that yield environmental benefits?, 27 ECLR (2006) 479-484.

<sup>34</sup> CFI [1995] II-289, at 382 (Rdnr. 288) *SPO /Commission* (T-29/92); confirmed by ECJ [1996] I-1611, at 1624 (C-137/95 P)

<sup>35</sup> See Mestmäcker/Schweitzer, *Europäisches Wettbewerbsrecht*, 2. ed. 2004, § 13 para. 77. Similar: Koch, *Die Einbeziehung nichtwettbewerblicher Erwägungen in die Freistellungsentscheidung nach Art. 81 Abs. 3 EG*, ZHR 169 (2005), 625, at 647. Against such a change in the interpretation of Art. 81(3): Everling, *Querschnittsklauseln im reformierten europäischen Kartellrecht*, in: Baums/Wertenbruch (eds.), *Festschrift für Ulrich Huber*, 2006, p. 1073, at 1088, with the claim that secondary law cannot change substantive primary law. Arguably, however, the discretionary element in Art. 81(3) was always intertwined with the former Commission's enforcement monopoly which was itself based on secondary law. In the *Metro*-decision, the ECJ explicitly referred to the “powers conferred upon the Commission under Art. 85(3) [Art. 81(3)]” – and thus to its powers under Regulation 17/62 – in finding that “the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible ...” (ECJ, C-26/76, 1977 ECR, 1875, at para. 21 – *Metro I*). Further to this point see *Quellmalz*, WRP 2004, 461, 467: Die Rspr. des EuGH zum nicht überprüfbaren Beurteilungsspielraum der Kommission im Rahmen des Art. 81(3) müsse „vor dem Hintergrund des Verhältnisses zwischen Kommission und Gerichtshof unter Geltung des in Art. 9 Abs. 1 VO 17/62 verankerten

The Commission, when proposing the new enforcement regime, was aware of the problem. The solution it suggested – in the White Paper preparing the reform<sup>36</sup> as well as in later documents – was to remodel Art. 81 along the lines of US antitrust law, i.e. of Sec. 1 Sherman Act. According to the Commission's view, Art. 81(3) was to be interpreted as a European rule of reason. Only pro-competitive effects were to be considered as potential justifications of competitive restraints. No room for public policy considerations should persist.<sup>37</sup> It is this path that the Commission largely follows in its Guidelines on the application of Art. 81 to horizontal agreements<sup>38</sup> and in its Guidelines on the application of Art. 81(3).<sup>39</sup>

As a matter of legal policy, there may indeed be much to recommend the rule of reason analysis developed under Sec. 1 Sherman Act,<sup>40</sup> according to which public interest concerns can be considered only insofar as they translate into pro-competitive effects; this is particularly true in a system of decentralized enforcement where the prohibition of competitive restraints is applied by national competition authorities and courts. De lege lata, however, Art. 81 EC differs fundamentally from Sec. 1 Sherman Act in structure and content. According to its wording and in the conception of the ECJ's case law, it incorporates not a US-antitrust-like "rule of reason", but a public interest defence, delimited by a proportionality principle. To change the character of Art. 81(3) EC, i.e. to transform it into a defence which is limited to a showing that a restrictive agreement has overall pro-competitive effects, is not within the powers of the EU Commission. The EU Commission has the power to define competition policy, but it cannot alter the structure and content of the competition rules as incorporated in primary law. Art. 81(3) thus continues to leave room for the consideration of public policy goals as long as they can be said to contribute to improvements of production and distribution of goods or to advance technological and economic progress, whether or not these

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Genehmigungssystem gesehen werden. Der Gerichtshof fungiert unter Geltung der VO 17/62 als Verwaltungsgericht, das dazu berufen ist, die Kommissionsentscheidungen entsprechend der Prinzipien des Art. 230 EG nachzuprüfen. ... Entsprechend den Vorgaben des Art. 230 EG, der die in Betracht kommenden Klagegründe abschließend aufzählt, versteht sich der EuGH grundsätzlich als bloße Kontrollinstanz und prüft im Rahmen der Nichtigkeitsklage die angefochtenen Rechtsakte nicht umfassend nach, sondern beschränkt sich auf eine Ermessenskontrolle ...“.

<sup>36</sup> EU Commission, White Paper on Modernisation of the Rules Implementing Art. 85 and 86 of the EC Treaty, [1999] OJ C 132/1, para. 56.

<sup>37</sup> EU Commission, White Paper on Modernisation of the Rules Implementing Art. 85 and 86 of the EC Treaty, [1999] OJ C 132/1, para. 57: The Commission emphasized its purpose to "provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations".

<sup>38</sup> [2001] OJ C 3/2 para. 33.

<sup>39</sup> EU Commission, Guidelines on the application of Art. 81(3), OJ 2004 C 101/97, para. 33: "The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals".

<sup>40</sup> Favoring such a reinterpretation Art. 81, *inter alia*, Thomas Ackermann, Art. 85(1) EGV und die rule of reason, 1997.

benefits can at the same time be shown to have pro-competitive effects. In describing the relevant economic benefits, Art. 81(3) uses “open” terms, the interpretation of which can potentially be influenced by the broad range of policy goals set out in Art. 2 and Art. 3 EC.<sup>41</sup>

It is not easy to conceptualize, then, how Art. 81(3) is to be applied by national competition authorities and courts as a matter of law, i.e. without allowing these institutions to exercise policy discretion. In various areas of Community law are national courts required to balance diverging policy goals – *inter alia* when applying the exceptions to the free movement rules or Art. 86(2) EC.<sup>42</sup> In these cases, the legal framework is, however, comparatively clearly circumscribed: courts analyze the legitimacy and proportionality of a clearly defined measure of public policy infringing upon free movement rules or competition rules. In the context of Art. 81(3), the measure restrictive of competition results from private agreement, with no authority to define public policy. The benefit of the restriction for public policy must be established by the national court or competition authority itself. Within the limits of the wording of Art. 81(3), the reference point is the broad set of public policy goals set out in Art. 2 and Art. 3 EC Treaty. Upon linking the restrictive effect to one of these policy goals, a national court or competition authority must, within the limits of the proportionality principle established by Art. 81(3), decide whether a public interest of the Community outweighs the loss of competition which results. Absent a clear hierarchy of goals, a court or competition authority, in making such value judgments, acts no longer in the role of a judge, but enters the field of policy making.<sup>43</sup> It is against this background that US courts have declared their inability to consider public policy goals in interpreting Sec. 1 Sherman Act.<sup>44</sup>

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<sup>41</sup> This has been implicitly accepted by the Commission in its Guidelines on the Application of Article 81(3), OJ C 101/97, at para. 42: „Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)“.

<sup>42</sup> This has been emphasized by various authors in favor of the continued possibility to consider conflicting public policy goals in the application of Art. 81(3) under the decentralized regime – see, *inter alia*: Roth, in: FS Mestmäcker, 2006, p. 413, at 431; Fox, *Modernisation: Efficiency, Dynamic Efficiency, and the Diffusion of Competition Law*, in: Ehlermann / Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, 2001, p. 125; Baudenbacher, *The European Commission’s Reform Proposal Seen From the Point of View of the EEA/EFTA Countries, the EFTA Surveillance Authority and the EFTA Court*, in: Ehlermann/Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, 2001, p. 478. See also Schaub, *The Reform of Regulation 17/62: The Issues of Compatibility, Effective Enforcement and Legal Certainty*, in: Ehlermann/Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, 2001, p. 245.

<sup>43</sup> For a critical view with regard to the ability of courts to make the value judgments required to consider public policy goals within the framework of Art. 81(3) see also: *Quellmalz*, *Die Justiziabilität des Art. 81 Abs. 3 EG und die nichtwettbewerblichen Ziele des EG-Vertrages*, WRP 2004, 461, 466: „Die Einbeziehung von nichtwettbewerblichen Zielen in die Anwendung des Art. 81 Abs. 3 EG wäre nur dann justiziabel, wenn nicht nur das jeweilige nichtwettbewerbliche Ziel selbst politisch konkretisiert ist, sondern auch der Maßstab für die Lösung von Konflikten dieses Ziels mit der Wettbewerbspolitik. Denn ein Gericht kann die Lösung von Zielkonflikten nur dann vornehmen, wenn sie maßstabsgebunden ist“.

<sup>44</sup> *United States v. Topco Associates*, 405 U.S. 596 (1972) (regarding exclusive territorial arrangements and their effects on intra-brand and inter-brand competition): “Private forces are too keenly aware of their own interests in making such decisions [to sacrifice competition in one portion of the economy for greater competition in another portion] and courts are ill-equipped and ill-situated for such decision-

Is there a way to delimit and rationalize the public interest dimension of Art. 81(3) in a way that is compatible with the wording and structure of Art. 81(3) and manageable for national courts? This question leads back to the distinction between the interpretation of competition rules in the light of the plurality of EC Treaty goals, but within the limits drawn by the Treaty provisions themselves and a method of open balancing of conflicting goals.

In the light of this distinction there are two groups of cases into which the EU Commission's practice under the old regime can be said to fall:

- In the overwhelming number of cases, the EU Commission has taken public policy considerations into account in a complementary fashion: they have been referred to in order to specify the "economic benefit" of restrictive measures, and thus the Community's public interest granting exemptions under Art. 81(3). Public interests were accepted as relevant to the extent to which they were not in direct and principled conflict with competition and did not jeopardize the working of the competitive system in its core. In such cases, the Commission has accepted that restrictive agreements may be a legitimate instrument to address imperfections of the market process – *inter alia* with regard to the protection of consumers, public health or the environment.<sup>45</sup> At the same time, those agreements did not challenge the fundamental policy choice in favor of the competitive process itself. The public policy goals considered were complementary, not contradictory. In these types of cases, national competition authorities and courts will also be able to consider public policy goals under the new regime.
- In a second group of cases – the exemption of the crisis cartel or to some extent also the justification of the VW/Ford JV –, the Commission has brought public policy interests or instruments to bear which were in direct opposition to the core assumptions and principles of competition policy. Where parties to an agreement in violation of Art. 81(1) claim that restricting competition will protect employment or will allow for a coordinated restructuring of the industry, but also in a case where restrictions of price competition are justified with a claim that price competition may confuse consumers, the underlying presumption is the superiority of planning over a competitive process with respect to resource allocation or consumer protection. Granting exceptions under Art. 81(3) for such measures implies a value judgment which is in direct opposition to competition policy rationales and hence implies policy choices that national competition authorities and courts are not authorized to take.<sup>46</sup>

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making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required".

<sup>45</sup> With a view to the relevance of the protection of the environment see the Commission Guidelines on the applicability of Art. 81 EC to horizontal cooperation agreements, [2001] OJ C 3/2 No. 198, where the Commission justifies the exemption under Art. 81(3) with respect to the benefits for individual purchasers who – although they have to buy more expensive products – will rapidly recoup the cost increase due to the lower running costs of the environmental-friendly washing machines.

<sup>46</sup> This line of reasoning is close to the reasoning underlying the rejection of US antitrust courts to consider public policy goals within the rule of reason analysis – see *FTC v. Indiana Federation of*

*b) Can the Commission reintroduce public policy goals?*

If national competition authorities and courts are not entitled to take into account those public policy considerations which are fundamentally opposed to the underlying assumptions of competition policy, the question arises whether the EU Commission can step in and reintroduce such goals. Some authors have argued that in cases in which public policy goals become relevant, national competition authorities and courts should be under a duty to refer the case to the Commission which would then, in granting exemptions, enjoy the same discretion as before the reform. According to this reading, Regulation 1/2003 has left nature and content of Art. 81(3) untouched and has merely imposed a split competence with respect to the application of the different aspects of Art. 81(3). National competition authorities and courts would be competent as far as the balancing of anti-competitive effects against private efficiency gains is concerned. The Commission or the ECJ would be competent to apply Art. 81(3) where public policy interests are implied. This interpretation is, however, unconvincing. According to Art. 1(1) Regulation 1/2003, Art. 81(3) is directly applicable. Above all, this implies that undertakings must be able to self-evaluate their intended conduct, and their competitors' conduct, in the context of Art. 81(3). Referring relevant cases to the Commission ex post and thus avoiding national biases does not solve the problem of ensuring legal certainty. For similar reasons, the Commission cannot reintroduce EU public policy considerations into the application and interpretation of Art. 81(3) in special cases on the basis of a "declaration of non-applicability" of Art. 10 Reg 1/2003.<sup>47</sup> The division of Art. 81(3) into two separate exemptions – one directly applicable, with no room to consider public policy goals, and to be administered by national competition authorities and courts, the other explicitly designed as a public policy exemption, not directly applicable, and to be administered by the Commission on the basis of Art. 10 –<sup>48</sup> does not have a basis in Reg. 1/2003 nor, more importantly, in Art. 81(3).

*Quellmalz* has argued that a possible way for the Commission to sustain the influence on public policy goals on competition policy is by way of issuing group exemptions and

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*Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed. 2d 445 (1986): A group of dentists agreed to withhold x-rays from patients' insurers. The dentists association argued that this was necessary to protect quality of care: since x-rays, standing alone, were no adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment, there would be a danger that insurers would erroneously decline to pay for treatments that were in fact in the interest of the patient, and the patient would be deprived of fully adequate care. The Supreme Court found: "The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act'".

<sup>47</sup> By contrast, *Quellmalz*, WRP 2004, 461, 466-467 believes this to be a way by which the EU Commission could reintroduce public policy goals.

<sup>48</sup> *Quellmalz*, WRP 2004, 461, 470: "Es ist also denkbar, im Zusammenspiel zwischen Art. 1 und Art. 10 VO 1/2003 die von Monti für die Ebene des Primärrechts vorgeschlagene Dichotomie in zwei verschiedene Ausnahmetatbestände verwirklicht zu sehen – in einen justiziablen einerseits sowie einen der Kommission für eine etwaige Berücksichtigung nichtwettbewerblicher Vertragsziele vorbehaltenen andererseits. Subjektive Rechte könnten nach diesem Verständnis im Rahmen des Art. 1 VO/2003 lediglich unter Berücksichtigung rein wettbewerblicher Faktoren geschützt werden, während die Freistellung einer Verhaltenskoordinierung aus nichtwettbewerblichen Gründen im Rahmen des Art. 10 VO/2003 nur aus öffentlichem Interesse möglich wäre. ... In Bezug auf eine etwaige Einbeziehung nichtwettbewerblicher Vertragsziele müßte der Gerichtshof der Kommission dabei einen Beurteilungsspielraum und damit eine gewisse Politikkompetenz einräumen ..."

guidelines.<sup>49</sup> Indeed, the Commission may, in designing group exemptions or issuing guidelines, take into account various EC Treaty goals and shape competition policy. The limits for such considerations are drawn by Art. 81 itself. They are no different for the EU Commission as compared to the national competition authorities and courts. Art. 81(3) is primary Treaty law, and thus equally binding for the Commission and national actors. Thus, a new concept of Art. 81(3) under a regime of direct applicability, with new limits for considering public policy goals, must be respected by the Commission as well.

#### **IV. Conclusion**

In EU competition law – and, albeit less openly, also in US antitrust law – the relation between competition policy and public interest goals is complex. Private restraints of competition can have economic benefits which relate to public policy goals and bring about pro-competitive effects. Also, competition policy can never be isolated completely from other public policy choices relevant to democratic societies.<sup>50</sup> Within the system of the EC Treaty, competition policy interacts to some extent with other policy goals set out in Art. 2 and Art. 3.<sup>51</sup> The “pure” view of competition policy oriented towards efficiency only incompletely reflects the reality of the plurality of legal institutions which frame the competitive process and influence it. Public policy choices and value judgments are to some extent inherent both in balancing pro- and anticompetitive effects under Sec. 1 Sherman Act and in balancing effects restrictive of competition and economic benefits under Art. 81 EC.

At the same time, competition law norms cannot incorporate an open balancing of all the goals set out in Art. 2 and Art. 3 of the EC Treaty without losing their meaning and effectiveness. In a system in which Art. 81(3) is directly applicable, an open balancing of conflicting goals is not only impossible as a matter of policy, but as a matter of law. In order to make Art. 81(3) a clear and unconditional norm – binding preconditions for any EC Treaty norm which is directly applicable – Art. 81(3) must be interpreted and applied with a clear reference to the overall goal of EU competition policy as set out in Art. 3(1) lit. g: promoting a common market with undistorted competition. Where private restraints reflect a value judgment that private planning better protects public interest than the competitive process and that the former may therefore replace the latter, the limits for exemptions under Art. 81(3) is reached. National competition authorities and courts can take public policy interests into account only to the extent that they are not in direct opposition to the EC Treaty’s fundamental decision in favour of

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<sup>49</sup> *Quellmalz*, WRP 2004, 461, 467.

<sup>50</sup> With regard to US antitrust law see Hovenkamp, *Federal Antitrust Policy*, § 2.2, p. 69. With a view to the EU see Monti, *Article 81 EC and Public Policy*, 39 CMLRev. (2002), 1057, at p. 1059.

<sup>51</sup> See AG Jacobs, conclusions in ECJ 21.9.1999, Slg. 1999 I 5751, 5797 recital 179 – *Albany*: It is an established principle of interpretation that, with respect to EC Treaty provisions of equal ranking, no set of provisions can be implemented without taking into account other relevant provisions, and that no set of provisions may completely lose meaning. See also: Everling, *Querschnittsklauseln im reformierten Europäischen Kartellrecht*, in: Baums / Wertenbruch (eds.), *Festschrift für Ulrich Huber*, 2006, p. 1073, at 1081; Roth, in: *FS Mestmäcker*, 2006, p. 413, at 425-427.

open and competitive markets, and to the extent that practical concordance between competition and public policy interests can be achieved within the framework delineated by the wording of Art. 81(3).<sup>52</sup>

The same limitations apply to the EU Commission itself.<sup>53</sup> While the ECJ has accepted the Commission's competence to make discretionary policy choices in applying Art. 81(3) under the old regime of Regulation 17/62, this can no longer be true under the new regime of Regulation 1/2003. If Art. 81(3) is directly applicable, this excludes the existence of policy discretion also on the part of the Commission itself.<sup>54</sup> The direct applicability of Art. 81(3) presupposes that the direct addressees of this provision – the undertakings – are able to self-evaluate the legality of their conduct *ex ante* with sufficient certainty. Policy reservations on the part of the EU Commission would be incompatible with this requirement.

The Draft IGC Mandate attached to the Presidency's Conclusions of the Brussels Council of June 23, 2007 would likely not change the legal framework developed here. It could, however, potentially enhance the Community institutions' discretion to compromise the binding force of competition rules by way of secondary law. Based on the envisioned revision, political attempts can be expected to exempt certain state measures, or even whole sectors of the economy to which special public interests attach, from the scope of the EC competition rules in the name of conflicting public policy goals. If successful, the envisioned transformation of the system of undistorted competition into a pure instrument among others to achieve superior public goals could thus redefine the line between integration by law and integration by policy. The latter could easily result in disintegration where national interventionism is protected in the name of public interest and national sovereignty.

Against this tendency, it is worthwhile recalling the indissoluble links between the system of undistorted competition and the project of European integration itself. Against parts of the literature, the linkage between competition rules and market integration is not outdated - neither legally nor economically. The internal market is based on the protection of the fundamental freedoms, i.e. of individual rights to participate in markets, from the exercise of which the competitive process results. The balance between the internal market goal and other public interest goals is defined by the exceptions to the fundamental freedoms and to the competition rules. The balance of rules and exceptions determines at the same time the lines between EU and Member States' competencies. Through this system, EU competition rules are integrated into the larger set of public policy goals which the EU pursues. But these public policy goals cannot challenge the space assigned to a system of undistorted competition within the EU. The internal market, the goal of economic integration, is to be achieved not by state or Community intervention, but by the forces of competition. Within their respective

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<sup>52</sup> Similar: Koch, ZHR 169 (2005), 625, at 635 and 638.

<sup>53</sup> This is controversial. Some argue that the Commission, in decisions under Art. 10 Reg. 1/2003 and in block exemption regulations, can re-introduce, on a discretionary basis, the broader range of public policy goals – see Quellmalz, *Die Justiziabilität des Art. 81(3) und die nicht-wettbewerblichen Ziele des EG-Vertrags*, WRP 2004, 461, at 466-467. See also Monti, 39 CMLRev. (2002), 1057, at 1096 et seq. who proposes a revision of Art. 81(3), namely the creation of a new para. (4), under which the Commission has a monopoly to address public policy questions. Against such approaches rightly: Roth, in: FS Mestmäcker, 2006, p. 413, at 430.

<sup>54</sup> See also: Roth, in: FS Mestmäcker, 2006, p. 413, at 430.

spheres of competence, Member States and the EU set the legal framework within which integration takes place. But they may not replace competition by alternative means. Under the revised European Treaties, this regime will likely persist not unchallenged, but basically unchanged.