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STRICT COMPETITION ENFORCEMENT AND WELFARE: A CONSTITUTIONAL PERSPECTIVE BASED ON ARTICLE 101 TFEU AND SUSTAINABILITY

EDITH LOOZEN*

Abstract

This article investigates the purpose and workings of EU competition law and policy: how does the protection of competition promote welfare? It scrutinizes the claim that sustainable consumption and production (SCP) requires flexible rather than strict enforcement of Article 101 TFEU. Flexible antitrust proponents argue that SCP requires sector-wide private coordination, as manufacturers of sustainable products suffer if consumers can opt for cheaper, less sustainable products. Four main arguments build on compliance with, respectively, the constitutional context of EU competition law, the more economic approach, the legitimate objective doctrine, and the useful effect doctrine. This article questions all four arguments. Integrating principle and practice, the article shows that strict competition enforcement is the way forward to promote welfare, in this case SCP. Problems of under-regulation should be addressed by the regulatory State.

1. Introduction

This article addresses the purpose and workings of EU competition law and policy.[1] How exactly does the protection of competition help to promote welfare? Do the competition rules allow for a balancing of competition and non-competition interests? What does objective competition enforcement actually entail? The test case competition rule is Article 101 TFEU. The test case welfare consideration is "sustainability", a concept that links environmental protection needs to sustainable consumption and production

* Visiting researcher at VU University, Amsterdam (e.m.h.loozen@vu.nl). At the time of writing, the author was Fernand Braudel senior fellow at the European University Institute, Florence. The author thanks Heike Schweitzer, Marco Bronckers, Jan Kees Winters, Julian Nowag, Peter Drahos, Giorgio Monti and 3 anonymous referees for their helpful comments on an earlier draft.

1. This article focuses on the enforcement of the EU competition rules addressing undertakings, not on the EU competition rules covering aids granted by Member States (State aid).

(SCP). Most people agree that, in order to limit global warming, we must urgently step up SCP. The question is, however, what kind of antitrust promotes SCP best. Proponents of "green antitrust" claim that strict enforcement of Article 101 TFEU obstructs SCP (where "strict" implies that the protection of competition prevails over the promotion of sustainability). SCP requires sector-wide private coordination because manufacturers of more sustainable products may suffer from so-called first mover disadvantage, insofar as consumers can opt for cheaper, less sustainable products. In order to achieve SCP, therefore, sector-wide coordination needs to be facilitated by a more flexible approach to competition enforcement (where "flexible" implies that the promotion of sustainability may prevail over the protection of competition).[2]

This article challenges the idea of flexible competition enforcement. In essence, this is because the idea of competition agencies and courts balancing competition and non-competition interests does not sit well with their duty to apply the law objectively. This article is obviously not the first to advocate antitrust "simple and pure".[3] Its aim is to break through an ever revolving debate by presenting an enforcement narrative that coherently connects principle and practice. To do so, it starts from the premise that legitimate and effective enforcement must follow logically and coherently from first principles. This means that the constitutional fundamentals of EU competition law are given primacy over the case law of the EU courts or competition policy

2. Townley, *Article 81 EC and Public Policy* (Hart Publishing, 2009); Kingston, "Integrating environmental protection and EU competition law: Why competition isn't special", 16 ELJ (2010), 780–805; Townley, "Which goals count in Article 101 TFEU? Public policy and its discontents", (2011) ECLR, 441–448; Gerbrandy and Claassen, "Rethinking European competition law: From a consumer welfare to a capability approach", 12 *Utrecht Law Review* (2016), 1–15; Nowag, *Environmental Integration in Competition and Free Movement Laws* (OUP, 2016); Monti and Mulder, "Escaping the clutches of EU competition law", (2017) EL Rev., 635–656; Gerbrandy, "Solving a sustainability deficit in European competition law", 40 World Comp. (2017), 539–562. More generally: van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Wolters Kluwer, 2012); Witt, "Public policy goals under EU competition law: Now is the time to set the house in order", 8 *European Competition Journal* (2012), 443–470.

3. Amato, *Antitrust and the Bounds of Power* (Hart Publishing, 2012). Cf. Schaub and Dohms, "Das Weissbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag", (1999) *Wirtschaft und Wettbewerb*, 1055–1089; Ehlermann, "The modernization of EC antitrust policy: A legal and cultural revolution", 37 CML Rev. (2000), 537–590; Loozen, "Professional ethics and restraints of competition", 31 EL Rev. (2006), 29–48; Odudu, *The Boundaries of Competition Law* (OUP, 2006); Loozen, *Het begrip mededingingsbeperking zoals neergelegd in artikel 101(1) VWEU: een beslismodel* (Boom Juridische Uitgevers, 2010); Odudu, "The wider concerns of competition law", 30 *Oxford Journal of Legal Studies* (2010), 599–613; Hovenkamp, "Antitrust policy and inequality of wealth" (2017/Oct.) *CPI Antitrust Chronicle*, 7–13; Lyons, "Inequality and competition policy" (2017/Oct.) *CPI Antitrust Chronicle*, 32–37.

as defined by the EU Commission. In order to examine the main arguments put forward to legitimize flexible antitrust, the article uses the Dutch sustainability dossier, which specifies four flexibility policies.[4,5] Building on the constitutional context of EU competition law, a first policy uses a broad welfare standard to balance competition and sustainability under Article 101(3) TFEU.[6] Based on the more economic approach *and* endorsed by the Commission, a second policy balances both interests under Article 101(3) TFEU, provided that net welfare gain can be evidenced in quantitative consumer surplus terms (qNWG).[7] Relying on the *legitimate objective* doctrine introduced in *Wouters*,[8] a third policy also balances both interests, but under Article 101(1) TFEU.[9] Building on the *useful effect* doctrine, a fourth policy aims to preclude competition enforcement altogether by proposing a new law on the realization of sustainability initiatives that allows the Dutch Government to convert sustainability initiatives into generally binding rules.[10]

The article is organized as follows. Section 2 analyses whether the constitutional context of EU competition law does indeed allow for a broad welfare standard and associated prioritization of sustainability over competition within Article 101 TFEU. Having investigated the relevant constitutional provisions from both a welfare economics and democratic legitimacy perspective, this section comes to three conclusions. Efficiency and consumer surplus are the proper standards to interpret the legal frameworks of the EU competition rules. Neither Article 101(3) nor 101(1)

4. Dutch competition law and practice is fully aligned to EU competition law and practice. In order to increase readability, this article therefore refers to Art. 101 TFEU only, even when referring to exclusively Dutch settings.

5. For more details on the Dutch story, see Monti and Mulder, op. cit. *supra* note 2.

6. Minister for Economic Affairs, Policy rule on competition and sustainability 2014 and 2016 (Beleidsregel mededinging en duurzaamheid, *Stcrt*. (2014), 13375; 2016, 52945).

7. Authority for Consumers & Markets (ACM), Vision document competition and sustainability (Visiedocument mededinging en duurzaamheid), May 2014, <www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability> (all websites last visited 25 June 2019).

8. Case C-309/99, *Wouters and Others,* EU:C:2002:98.

9. In a Dutch context: Amtenbrink and van de Gronden, "Economisch recht en het Verdrag van Lissabon I: mededinging en interne markt", 56 SEW (2008), 323–329; Ottervanger, "Maatschappelijk verantwoord concurreren. Mededingingsrecht in een veranderende wereld", 13 *Markt & Mededinging* (2010), 93–99; Pijnacker Hordijk, "Beoordeling van duurzaamheidsinitiatieven onder het kartelverbod", 16 *Markt & Mededinging* (2013), 187–195; Gerbrandy, "Duurzaamheidsbelangen in het mededingingsrecht", 9 NTER (2013), 326–332; Gerbrandy, "Toekomstbestendig mededingingsrecht", (2016) *Markt & Mededinging*, 102–112.

10. Dutch Goverment, Proposal for a new Law on the realization of sustainability initiatives, *Kamerstukken II* 2018/19, 35247 Nos. 1–4.

TFEU allow for a balancing of competition and non-competition interests. Both legitimate and effective competition enforcement imply strict competition enforcement. Having identified the constitutional fundamentals of EU antitrust, those fundamentals then provide the basis for analysing the legitimacy and effectiveness of the other flexibility policies. Section 3 then investigates whether the more economic approach can enable competition agencies to use qNWG as a baseline for the legal interpretation of the indispensability and residual competition conditions of Article 101(3) TFEU. Based on the constitutionally embedded premise that the promotion of welfare is only an indirect goal of the competition rules, while efficiency and consumer surplus serve to interpret the legal frameworks of those rules meaningfully, this section concludes that qNWG enforcement policy is neither legitimate nor effective in its aim to promote SCP. Section 4 subsequently addresses the workings of the *legitimate objective* doctrine by revisiting *Wouters* and *Meca-Medina,*[11] and by scrutinizing its application in *OTOC* and *CNG*.[12] It concludes that, while this doctrine did not contain a balancing mechanism when first introduced, the later judgments show that the inclusion thereof in *Meca-Medina* does not work in practice. Finally, section 5 investigates the Dutch proposed law on the realization of sustainability initiatives (draft-Law) in the context of the *useful effect* doctrine. It asks whether indeed the draft-Law and the associated regulations accord with that doctrine, or, if not, whether the latter may constitute sovereign State measures in their own right. It also examines whether that doctrine needs to be amended to allow innovative governance structures aiming to achieve SCP.[13] All three questions are answered in the negative – precluding antitrust accountability requires proper articulation of State policy which is absent in the proposed legislation. Section 6 presents overall conclusions.

2. The constitutional fundamentals of EU competition law and policy

The Dutch sustainability dossier begins with the Policy rule on competition and sustainability ("Policy rule") issued by the Minister for Economic Affairs.[14] Considering that sector-wide private coordination on sustainability restricts competition as meant in Article 101(1) TFEU, the Policy rule

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

12. Case C-1/12, *Ordem dos Técnicos Oficias de Contas (OTOC),* EU:C:2013:127; and Case C-136/12, *Consiglio nazionale dei geologi (CNG),* EU:C:2013:489.

13. Monti and Mulder, op. cit. *supra* note 2.

14. Policy rule, cited *supra* note 6.

instructs the Dutch competition agency (Authority for Consumers and Markets, ACM) to use a broad welfare standard in order to balance competition and sustainability considerations under Article 101(3) TFEU. Broad welfare is defined in so-called Brundtland terms – development that meets the needs of current generations without compromising the ability of future generations to meet their own needs.[15]

The Commission has opposed the Policy rule because it contravenes EU competition policy, which is based on a consumer welfare standard in terms of consumer surplus.[16,17] Flexible antitrust proponents, however, claim that this focus on economic efficiency constitutes a political choice, since Article 3(3) TEU explicitly refers to various socio-economic goals, while Article 11 TFEU requires the Commission to balance competition and sustainability when enforcing the competition rules. They also posit that a dualist perspective on market and State in antitrust is outdated given that society is no longer organized along the traditional lines of the public *vis-a-vis* private domain. Rather than forcing market actors into the straitjacket of consumer surplus and economic efficiency, the better alternative is a broad welfare standard that leaves market actors with sufficient room for "direct consideration of socio-political criteria, such as environmental policy".[18]

The important question is thus whether the institutional balance between the market order, the State and the competition agency as defined in the EU Treaties allows competition enforcement to be based on a broad welfare standard and a balancing of competition and sustainability. While constitutional commentaries do not generally dissect this particular institutional balance,[19] this article analyses the relevant constitutional provisions in two separate strands. The first strand builds on Article 3(3) TEU,

15. World Commission on Environment and Development, *Our Common Future* (OUP, 1987).

16. See Letter of 26 Feb. 2016 from DG Comp (signed by Laitenberger) to the Secretary-General at the Dutch Ministry of Economic Affairs, Camps, *Kamerstukken II* 2015/16, 30196, 463.

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

18. Townley (2009), op cit. *supra* note 2, at 1 and 62–63. Cf. Amtenbrink and van de Gronden, op. cit. *supra* note 9; Ottervanger, op. cit. *supra* note 9; Townley (2011), op. cit. *supra* note 2; Gerbrandy (2013, 2016 and 2017), op. cit. *supra* notes 2 and 9; van Rompuy, op. cit. *supra* note 2, pp. 66 and 226; Nowag, op. cit. *supra* note 2, pp. 28–29; Kingston, op. cit. *supra* note 2; Monti and Mulder, op. cit. *supra* note 2.

19. Constitutional literature generally focuses on the balance between the formal EU institutions. See Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010); von der Groeben, Schwarze and Hatje, *Europäisches Unionsrecht* (Nomos, 2015); Craig and de Búrca, *EU Law. Text, Cases and Materials*, 6th ed. (OUP, 2015).

which specifies the objectives the EU aims to achieve. Based on Article 51 TEU, which stipulates that protocols are an integral part of the Treaties, this strand also includes Protocol 27 on the internal market and competition. The second strand builds on Article 2 TEU, which lists the values on which the Union is based, amongst which are democracy and the rule of law. Although Article 11 TFEU is one of the mainstreaming provisions of Title II TFEU and therefore completes the objectives of Article 3(3) TEU,[20] it is included in the second strand. The reason for this is that the values of democracy and the rule of law are particularly relevant to determine the exact competence the competition rules confer on the Commission.[21] The following paragraphs conduct a welfare-economic and democratic legitimacy analysis to determine what exactly both strands ordain and how they fit together.

2.1. *The first constitutional strand: Article 3(3) TEU and Protocol 27*

Article 3(3) TEU begins as follows:

> "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. …"[22]

The broad welfare proposition builds on the following reading of this provision. As the Union encompasses the Commission in its capacity as competition agency, the second sentence instructs the Commission to use a broad welfare standard in order to absolve sector-wide coordination aiming to promote SCP. This article submits a different reading. The starting point for the alternative interpretation is that the two sentences form complementary but separate parts, each of which lists different kinds of objectives the Union should achieve. The first sentence covers an institutional objective – the establishment of an internal market. It is here that the market order is designated as a basic instrument which the EU uses in order to promote welfare. Based on Protocol 27 and Article 51 TEU, the first sentence also

20. Von der Groeben et al., op. cit. *supra* note 19, p. 71.

21. Cf. Drexl, "La Constitution Économique Européenne – L'Actualité du Modèle Ordolibéral", 25 *Revue Internationale de Droit Économique* (2011), 419–454. Presenting an ordoliberal motivation of the European economic constitution, Drexl includes Protocol 27 in the constitutional context of the competition rules and welcomes Art. 2 TEU as a valuable contribution because it permits an ordoliberal approach to individual, political and democratic freedom, at 439–440.

22. Only that part of the text of Art. 3(3) TEU is quoted that is relevant for the purposes of this paper.

stipulates that an internal market comes with a "system ensuring that competition is not distorted". The second sentence lists the end-goals the Union must aim at – it specifies the overall aim listed in Article 3(1) TEU in several socio-economic goals. This suggests the following institutional balance. The market order (as it is in the internal market) is listed first without having been assigned a particular (welfare) goal. The State (as it is in the Union) must secure the socio-economic goals specified. The competition agency (as it is in the Commission in its capacity as enforcer of the competition regime referred to in Protocol 27) is separated from the Union, as addressed in the second sentence and is instead annexed to the market order.[23] A welfare economic perspective helps to understand why this reading of Article 3(3) TEU makes sense.

2.1.1. *The institutional balance between market and State action*

It is unclear whether the High Contracting Parties deliberately put the establishment of the internal market first in Article 3(3) TEU. While the establishment of the internal market had originally been included in Article I-3(2) of the failed Constitutional Treaty (now as amended Art. 3(2) TEU), the mandate of the Intergovernmental Conference that was to redraft the existing treaties specifically required a clearer distinction between the provisions on the internal market and those on the Area of Freedom, Security and Justice.[24] As a consequence, the establishment of the internal market was moved to the beginning of Article 3(3) TEU. This makes sense, as both market and State action are instruments to promote welfare. Following this logic, it also makes sense to put the market order first. Living in a world of scarce resources means that the promotion of welfare builds on efficient use, while the market order allocates resources more efficiently than any other method. Hayek has insightfully explained why.[25] Market competition constitutes "decentralized planning by many separate persons" which make "fuller use" of existing, yet

23. Note that the notions "market order", "State" and "competition agency" also include the national counterparts of the "internal market", the "Union" and the "Commission". Arts. 119 and 120 TFEU on economic (and monetary) policy specify that Member States shall also conduct their economic policies with a view to contributing to the objectives defined in Art. 3(3) TEU and act in accordance with the principle of an open market economy with free competition. Since 2004, Council Regulation 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, O.J. 2003, L 1/1 empowers national competition authorities to apply the EU competition rules to agreements and practices that may affect trade between Member States.

24. Piris, op. cit. *supra* note 19, p. 36.

25. von Hayek, "The use of knowledge in society", 35 *American Economic Review* (1945), 519–530. Cf. Vanberg, "Consumer welfare, total welfare and economic freedom: On the normative foundations of competition policy", in Drexl et al. (Eds.), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar, 2011), pp. 44–71.

"unorganized knowledge" regarding "each kind of scarce resource".[26] Key to the effectiveness of decentralized decision-making is the price mechanism, which enables producers and consumers "to communicate information" that reflects "[the] significance [of each resource] in view of the whole means-end structure".[27] Thus, "without anyone having to tell them what to do", the price mechanism induces producers and consumers to "move in the right direction" and promote welfare by using scarce resources most sparingly.[28] Hayek's explanation clarifies two points. The market order is successful because competition and the price mechanism push market actors to maximize welfare.[29] The market order has not been assigned a particular welfare goal, because decentralized decision-making is inherently open-ended in the results it will achieve.[30]

The above, however, indicates that the market order will only succeed as the most efficient allocation system if the price mechanism reflects all the relevant information correctly. If it cannot, competition will fail to yield efficient outcomes. This is the first reason for the State to step in and correct the respective market failures. In the case of SCP, the most relevant market failures are negative externalities and market power.[31] "Negative externalities" occur when prices do not reflect all of the costs of a product; the result is overconsumption compared to the situation in which prices do reflect all costs. Simple externalities concern few stakeholders who can internalize the externality through additional transactions. In case of complex externalities, however, correction by the market fails due to high transaction costs and extensive free riding. The result is under-correction of the respective externality. "Market power" concerns situations in which market actors affect the price mechanism by hampering competition to the extent that they become price makers rather than price takers.[32] A second reason for the State to intervene is that people are not equally equipped in life. Given this inequality, governments may want to redistribute wealth by reassigning initial

26. Hayek, op. cit. *supra* note 25, at 521.
27. Ibid., at 525.
28. Ibid., at 527.
29. Cf. Tirole, *Economics for the Common Good* (Princeton University Press, 2017), pp. 33 and 357.
30. More on this: von Hayek, "Der Wettbewerb als Entdeckungsverfahren", Kieler Vorträge No. 56 (Institut für Weltwirtschaft an der Universität Kiel, 1968), translated by Snow, "Competition as a discovery procedure", 5 *Quarterly Journal of Austrian Economics* (2002), 9–23. Cf. Böhm, "Privatrechtgesellschaft und Marktwirtschaft", (1966) ORDO, 75–171; reprinted in Mestmäcker (Ed.) *Freiheit und Ordnung in der Marktwirtschaft* (Nomos, 1980).
31. The other market failures are information asymmetry and public goods.
32. Rosen and Gayer, *Public Finance* (McGraw-Hill, 2012).

endowments in order to increase fairness and social cohesion. Once market failures have been addressed and initial endowments have been reset in a more socially acceptable way, it is (again) up to the market to maximize welfare by allocating resources efficiently.[33]

In brief, market and State constitute complementary but separate institutions used to increase welfare, also in modern times. The difference with the past is that, in Tirole's words, the modern State no longer "substitute[es] itself for the market as a mediocre manager of enterprises" but rather "sets the rules and intervenes to correct market failures".[34]

2.1.2. *The institutional balance between competition enforcement and State regulation*

The next question to consider is why competition surveillance is singled out in Protocol 27. This protocol traces back to the transfer of "an internal market where competition is free and undistorted" in Article I-3(2) of the failed Constitutional Treaty to Article 3(3) TEU. The French Government wished to no longer include the wording "where competition is free and undistorted".[35] The aim was to recalibrate the goals of the EU by underscoring that undistorted competition is only a means to increase welfare.[36] The reference was removed but without legal consequences.[37] The reason is that its inclusion did not make "free and undistorted competition" an end goal of the EU. Article 2 EC (now as amended Art. 3 TEU) stated that the Community would promote welfare "by establishing a common market . . . and implementing the common policies referred to in Articles 3 and 4", amongst which "a system ensuring that competition in the internal market is not distorted" (Art. 3(1)(g) EC). In other words, both "common market" and "competition policy" were already listed as instruments to promote welfare. Article I-3(2) of the failed Constitutional Treaty did not deviate from its predecessor other than that it provided a summarized version thereof by listing the internal market and

33. Cf. Piris, op. cit. *supra* note 19, p. 73. Piris identifies a twofold role of the State by reference to the social market economy model developed in post-war Germany in which the State, on the one hand, enables the free play of forces on the market by creating the framework for competition to work and, on the other, provides for a complete system of social protection.

34. Tirole, op. cit. *supra* note 29, p. 169.

35. Piris, op. cit. *supra* note 19, p. 74; von der Groeben et al., op. cit. *supra* note 19, p. 72.

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

37. Piris, op. cit. *supra* note 19, at 74; von der Groeben et al., op. cit. *supra* note 19, p. 309.

undistorted competition as one package.[38] Other Member States nonetheless feared that the removal of the reference would diminish the EU's commitment to free competition – in particular, the EU's competence to legislate on competition matters based on Article 308 EC (now Art. 352 TFEU).[39] Protocol 27 was added to ensure the latter competence.[40] In addition, it confirms that the internal market comes with a competition regime.[41]

Yet, this constitutional history fails to explain why it makes sense to separate the correction of market power from the correction of the other market failures. The reason is simple and straightforward – market power differs fundamentally from the other market failures.[42] Market power is caused by market actors and potentially undermines the workings of the very mechanism that makes all markets successful – competition. Externalities, asymmetric information and public goods, by contrast, are the result of sector-specific characteristics and thus require sector-specific solutions. Market power can therefore be addressed by generally applicable rules protecting competition, while sector-specific problems are to be corrected by sector-specific regulations defining the market concerned. This fundamental difference between market power and the other market failures (further) indicates that competition enforcement and State regulation have fundamentally different roles in making sure that the market mechanism yields efficient outcomes. Whereas competition enforcement serves to guarantee the efficient operation of markets given the regulatory framework, State regulation serves to define this framework in such a way as to ensure that the market mechanism can yield efficient outcomes. This implies that the interdependent functioning of market and State has not altered the purpose and workings of the competition rules. Quite the contrary. Increased use of the market order makes effective competition enforcement all the more important. As it turns out, the efficiency and consumer surplus standards make the competition rules fit for purpose.[43] They objectively connect competition enforcement to the rationale and communication-tool of the

38. Cf. Arts. 4 EC and 119 TFEU on economic and monetary policy, which both refer to "an open market economy with free competition".

39. Piris, op. cit. *supra* note 19, p. 38; von der Groeben et al., op. cit. *supra* note 19, p. 72.

40. Ibid.

41. Case C-52/09, *Konkurrensverket* v. *TeliaSonera Sverige AB*, EU:C:2011:83, para 20; Case C-496/09, *Commission* v. *Italy*, EU:C:2011:740, para 60; Case C-610/10, *Commission* v. *Spain*, EU:C:2012:781, para 126.

42. Cf. Rosen and Gayer, op. cit. *supra* note 32, p. 47, who distinguish between market power and non-existent markets.

43. On the choice of consumer surplus over total surplus: Pittman, "Consumer surplus as the appropriate standard for antitrust enforcement", 3 *Competition Policy International* (2007), 205; Salop, "Question: What is the real and proper antitrust welfare standard? Answer: The *true* consumer welfare standard", 22 *Loyola Consumer Law Review* (2010), 337; Loozen, "The

market order – efficient use and the price-mechanism. Given that the market order serves to promote welfare by allocating resources efficiently, it follows logically that competition enforcement must be strict.[44]

The above welfare economic analysis of the first constitutional strand shows why the first two sentences of Article 3(3) TEU form complementary but separate parts. Also today, the institutional balance is dualistic with, on the one hand, the market order and strict competition enforcement, and, on the other, State regulation. Market actors may pursue any welfare goal based on the expectation that competition and the price mechanism will induce them to maximize welfare by allocating resources efficiently. Based on efficiency and consumer surplus, strict competition enforcement ensures that they do. State regulation is meant to ensure that markets are well-equipped to produce efficient outcomes.[45]

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

The starting point for the investigation of the second constitutional strand is Article 11 TFEU. This stipulates that "[e]nvironmental protection requirements must be integrated into the definition of the Union's policies and activities, in particular with a view to promoting sustainable development". Flexible antitrust proponents argue that this integration obligation requires competition agencies to balance sustainability and competition interests and, where appropriate, prioritize the promotion of sustainability over the protection of competition.[46] In principle, this obligation also applies to the competition rules addressing undertakings. Title II of the TFEU does not exclude these rules, whilst the General Court (then Court of First Instance) has indirectly confirmed its applicability to Article 101 TFEU.[47] At the same time, the principle of conferral implies that Article 11 TFEU cannot serve to extend the powers the competition rules bestow upon the Commission. The flexible antitrust proposition is that Article 101(3) TFEU may be operated as a

requisite legal standard for economic assessments in EU competition cases unravelled through the economic approach", (2014) EL Rev., 91–110.

44. Cf. Lyons, op. cit. *supra* note 3; Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice* (Northeastern University, 9 Oct. 2018).

45. When it comes to climate change, there are two economic instruments to put a price on carbon pollution: carbon tax and tradable emission permits. See Tirole, op. cit. *supra* note 29, pp. 216–221.

46. Kingston, op. cit. *supra* note 2; Gerbrandy (2013 and 2016), op. cit. *supra* note 10; and Nowag, op. cit. *supra* note 2.

47. Case T-451/08, *Stim* v. *Commission*, EU:T:2013:189, para 73. Based on Art. 151(4) EC (now 167(4) TFEU), the GC (then CFI) held that the objective of cultural diversity must be taken into account when applying the cartel prohibition.

balancing mechanism because the competition rules are open-textured.[48] This argument is, however, insufficient to justify flexible antitrust. One reason is that the open-textured nature of the competition rules may be explained by the fact that these rules serve to address the market failure of market power in *all* markets. This implies that, in order to be able to determine the powers conferred under the competition rules, we first need to (further) specify the meaning of the principle of conferral. This is where Article 2 TEU comes in.

The principle of conferral is laid down in Articles 5(1) and (2) and 13(2) TEU, which stipulate that the Union and its institutions shall act within the limits of the competences conferred in the Treaties. As such, it focuses on the relation between the Union and the Member States rather than on the relation between the Union and its citizens. Ultimately, however, the principle of conferral builds on the values of rule of law and democracy listed in Article 2 TEU. While the reference to the rule of law confirms the Union as a legal order, the reference to democracy confirms the Union primarily as a representative democracy (Art. 10(1) TEU).[49] The first reference affirms that institutions cannot act without legal basis. The second reference adds that laws and otherwise generally binding rules lack legitimacy when lacking parliamentary authorization.[50] Thus, the principle of conferral builds on the principle of democratic legitimacy. This principle holds that, in a representative democracy, the legislature, in representing the citizens with whom ultimate decision-making authority resides, is the only institution that may decide on behalf of society as a whole what interests are to be ensured by the use of coercion as it is in public power.[51]

The principle of democratic legitimacy helps to determine whether the EU competition rules allow competition agencies to balance competition and non-competition interests. As for the institutional balance between market and State action, the principle clarifies how the use of two institutions to increase welfare defines the relationship between (protecting) competition and (promoting) non-competition interests within competition law. As for the institutional balance between competition enforcement and State regulation, the principle highlights the limitations of competition enforcement as a public policy instrument and shapes the defining features of objective competition enforcement. The following paragraphs set out how.

48. Kingston, op. cit. *supra* note 2, at 783.
49. Von der Groeben et al., op. cit. *supra* note 19, pp. 66–67.
50. Ibid., pp. 54 and 105.
51. WRR (Netherlands Scientific Council for Government Policy), "Safeguarding the public interest", Report No. 56, 2000. Cf. Vanberg, op. cit. *supra* note 25.

2.2.1. *The institutional balance between market and State action revisited*

A first point to address is whether the fact that "economic and environmental goals [are on an] equal footing" as end goals of the EU implies that competition and sustainability interests are on an "equal footing" within the context of competition law.[52] It is beyond dispute that sustainable development has long been recognized as an end goal of the EU. It is also beyond dispute that competition is only a means to ensure sustainable development. Nonetheless, the principle of democratic legitimacy requires us to take a more nuanced approach to the relationship between competition and sustainability within a competition law context. The reason is that the EU uses two different institutions to realize sustainable development – the market and the State. This implies that we need to distinguish between "general interests" and "public interests" within a competition law context.[53] "General interests" are interests that benefit all and can be achieved by voluntary arrangements. "Public interests" are also interests that benefit all, but require the use of coercion to be realized.[54] This distinction is necessary because only the State is legitimized to use coercion when addressing inefficient situations. Based on the principles of freedom of contract and individual autonomy, the functioning of the market order inherently relies on voluntary interaction.[55] Where voluntary arrangements are insufficient to correct inefficient situations, the State is designated to take over. In order for the State to limit the freedom of contract and individual autonomy in a democratically legitimate way, public interests must be embodied in a sovereign State measure in which the legislature defines the purpose and scope of the State measure as well as the manner in which the interest at issue will be safeguarded.[56]

52. Nowag, op. cit. *supra* note 2, pp. 30 and 27. Cf. Kingston, op. cit. *supra* note 2; and Gerbrandy (2013 and 2016), op. cit. *supra* note 10.

53. Loozen (2010), op. cit. *supra* note 3. Note Commission Decision of 8 Dec. 2017 in Case AT.40208 – *International Skating Union's Eligibility Rules,* in which the Commission distinguishes between "legitimate objectives in the *general interest*" pursued by market actors like the International Skating Union, and "*public interest* objectives" pursued by Member States (italics added).

54. WRR Report, cited *supra* note 51; Teulings, Bovenberg and van Dalen, *De Calculus van het publieke belang* (Kenniscentrum voor Ordeningsvraagstukken, 2003).

55. Böhm, op. cit. *supra* note 30. Böhm explains that the functioning of the market mechanism presupposes a private law society. Protecting property rights and freedom of contract, private law enables market competition as a decentralized planning system as it in fact enables individuals to act freely and make their own choices. This implies that the individual autonomy (of some) may not be restricted by coercive power (used by others). Goals and plans requiring coercion in order to be realized require the "general will" and thus fall within the realm of the State.

56. WRR Report, cited *supra* note 51.

The above distinction between the market maximizing the general interest and the State warranting the public interest specifies the relationship between the competition interest and a non-competition interest such as sustainability as follows. It clarifies that the protection of competition has been identified as a public interest by way of the competition rules that define coercion by market actors in terms of market power. It also clarifies that the issue of the prevailing interest depends on whether or not the State has defined a sustainability consideration as a public interest. If so, the promotion of the sustainability interest prevails, which is ascertained by the fact that the competition rules do not apply to sovereign State measures. If not, the protection of the competition interest prevails in the sense that an anticompetitive agreement aiming to promote sustainability must meet all conditions of Article 101(3) TFEU in order for society to trust that it works for the benefit of all.

The result is that the competition rules do not prioritize the *public competition interest* over *the public sustainability interest*, but *do* prioritize the *public competition interest* over the *general sustainability interest*. The competition rules thus distinguish neutrally between the responsibilities of the market and the State to promote SCP. Whereas market actors are to address inefficient situations until correction results in coercion in terms of market power, the State is to address inefficient situations that can only be corrected by coercion and thus require recourse to public power.

2.2.2. *The institutional balance between competition enforcement and State regulation revisited*

A second point to address is whether the fact that the Commission is responsible for "defining . . . *competition policy"* (italics added)[57] nonetheless allows it to balance different political interests like competition and sustainability. This interpretation would be an uneasy conclusion to reach, however, given that competition enforcement is meant to be objective.[58] Again, the principle of democratic legitimacy helps out as it underscores the need to distinguish between the law-making and law-enforcement branches of public policy.

57. Case C-344/98, *Masterfoods and HB*, EU:C:2000:689, para 46.

58. Schweitzer, "Competition law and public policy: Reconsidering an uneasy relationship – The example of Article 81" in Drexl (Ed.), *Economic Theory and Competition Law. ASCOLA Competition Law Series* (Edward Elgar, 2009). Cf. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 Dec. 2018 to empower the national administrative competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive, O.J. 2019, L 11/3). Art. 4 in particular seeks to guarantee that national administrative competition authorities act independently from political influence.

"Public policy" is a somewhat vague notion that has come to encompass everything that the State does.[59] In its relation to law, it is, however, important to distinguish between law-making and law-enforcement processes in public policy, as they guarantee democratic legitimacy in different ways.[60] Law-making processes typically require political choices to be made. In the context of SCP, for example, the political debate will focus on whether a sustainability consideration is best secured via market competition or via State regulation (or a combination thereof). It is here that the general or public interest status of a sustainability consideration is determined. In the case of law-making, democratic legitimacy is secured by, on the one hand, parliamentary deliberation in the legislative process, and on the other, *limited* judicial review, because the making of political choices requires broad discretion.[61] The Commission's competences regarding the definition of competition policy contrast sharply with the law-making branch of public policy. Its main competence is defined as the duty to "ensure *the application of the principles* laid down in Articles 101 and 102" (Art. 105(1) TFEU), while its participation in the legislative process is of a preparatory or executive nature (Arts. 103(1) and 105(3) TFEU).[62] In other words, the power of the Commission to define competition policy concerns the enforcement of laws and political choices already made. In this case, democratic legitimacy is secured by the fact that the Commission is squeezed in between, on the one hand, the obligation to objectively execute the task and duties conferred on it by law, and on the other, *full* judicial review.[63] This implies that the Commission, when enforcing open-textured competition norms, is not to

59. Lowi, "Law vs. public policy: A critical exploration", 12 *Cornell Journal of Law and Public Policy* (2003), 493–501; John, *Analysing Public Policy* (Pinter, 2012); Anderson, *Public Policy-Making* (Praeger, 1975).

60. Lowi, op. cit. *supra* note 59.

61. Case C-341/95, *Bettati* v. *Safety Hi-Tech*, EU:C:1998:353, para 35; Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741, para 123; Case C-434/02, *Arnold André*, EU:C:2004:800, para 46; A.G. Geelhoed in Case C-161/04, *Austria* v. *Parliament and Council*, EU:C:2006:66, paras. 39–40 and 50.

62. Even when the Council and the European Parliament legislate, they are expected to *give effect to principles* laid down in Arts. 101 and 102 TFEU (Art. 103 TFEU) or, when those rules prove insufficient to warrant one of the objectives of the Treaty (in this case the establishment of an internal market that serves to yield efficient use of scarce resources, EL), stay within *the framework of the policies defined in the Treaties* (Art. 352 TFEU). Cf. von der Groeben et al., op. cit. *supra* note 19, p. 871; Craig and De Búrca, op. cit. *supra* note 19, p. 92.

63. Case C-67/13 P, *Groupement des cartes bancaires (CB)* v. *Commission*, EU:C:2014:2204, paras. 44–46. In addition to earlier case law in which the ECJ had already held that the Commission's discretionary margin in complex economic assessments relates to the fact that the judiciary is not allowed to substitute its own economic assessment for the Commission's, this judgment confirmed that the marginal error standard does not exclude full judicial review. Cf. Loozen, op. cit. *supra* note 43.

recalibrate the balance between competition and sustainability as determined in the political decision-making process but to develop a truly objective law enforcement policy that coherently meets both constitutional fundamentals and administrative governance principles.[64]

A last point to consider is what objective competition enforcement exactly entails. Nowag has put forward that balancing of different interests is not beyond the normal task of implementing legal norms, while competition enforcement would often entail making socio-economic decisions.[65] Put differently, it is unrealistic to expect that competition enforcement can be truly objective. Again, the principle of democratic legitimacy points in the opposite direction as it determines the defining features of objective competition enforcement as follows. Legitimacy requires that competition enforcement be confined to efficiency and consumer surplus as these are the standards that connect objectively to the political choices made. Legitimacy also implies that the colloquial understanding of the cartel prohibition as a balancing mechanism must be limited to the so-called balancing of the costs established under Article 101(1) TFEU against the compensatory benefits established under Article 101(3) TFEU. If indeed competition enforcement is to stay away from political decision-making, either paragraph is precluded from conferring a balancing power in its own right. Instead, both costs and benefits are to be evidenced according to the mode of analysis provided by the relevant legal framework.[66] Finally, legitimacy implies strict enforcement. If indeed the evidentiary requirements of Article 101(3) TFEU serve to objectively distinguish between justified and unjustified expectation of compensation, it follows logically that agreements that do not meet each of these requirements cannot be expected to yield the benefits that compensate for the welfare costs established under Article 101(1) TFEU. (See further section 3 below). In other words, while (political) balancing in competition enforcement may be a "fact of life",[67] the principle of democratic legitimacy requires those concerned to take competition enforcement to a higher level.

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

65. Nowag, op. cit. *supra* note 2, p. 44.

66. Likewise in a US context, Hovenkamp, "The rule of reason", 70 *Florida Law Review* (2018), 81.

67. Nowag, op. cit. *supra* note 2, p. 43.

It appears that Article 11 TFEU cannot justify flexible antitrust.[68] EU competition law constitutes single purpose law that prioritizes the public competition interest over the general sustainability interest,[69] and the Commission's task to define competition policy does not include the competence to balance competition and non-competition interests like sustainability. Instead, legitimate enforcement means strict enforcement on the basis of objective evidence of inefficient use that is established according to the mode of analysis provided by the relevant legal framework.

2.3. *Conclusion on the first flexible enforcement policy*

The first flexibility policy misreads the constitutional fundamentals of the EU competition rules. Article 3(3) TEU and Protocol 27 allow market actors to pursue any welfare goal they choose, provided they do not hamper the efficient workings of market competition given the regulatory framework. Efficiency and consumer surplus do not represent a political choice, but objectively connect the competition rules to the rationale and the communication-tool of the market order – efficient use and the price mechanism. In order to be effective, competition enforcement should be strict, as market competition is the very mechanism that pushes market actors towards SCP. Articles 2 TEU and 11 TFEU underscore these findings and shape them further. EU competition law prioritizes the public competition interest over the general sustainability interest. The Commission is not empowered to balance competition and sustainability – neither under Article 101(1) nor under Article 101(3) TFEU. In order to be legitimate, competition enforcement must be strict as it is the mode of analysis provided by the legal framework that determines how to evidence inefficient use objectively. It follows that the Commission was right to inform the Dutch government that competition enforcement "cannot substitute for the absence of . . . regulation".[70]

3. The constitutional limits of the more economic approach

Although published jointly, the Vision document on competition and sustainability issued by the Dutch authority ACM crucially adjusts the Policy

68. Cf. Odudu (2010), op. cit. *supra* note 3, who argues that the mainstreaming clauses only apply when the Union legislates.

69. Competition policy thus abides by the Tinbergen Rule, which holds that, in order to be effective, a public policy instrument should only aim to secure one goal. Cf. Tinbergen, *On the Theory of Economic Policy* (North Holland, 1952).

70. Letter from DG Comp cited *supra* note 16.

rule as it replaces the broad welfare standard by the consumer surplus standard.[71] This flexibility policy builds on the more economic approach which, according to both ACM and the Commission, allows sector-wide private coordination to be exempted under Article 101(3) TFEU, provided that quantitative cost-benefit analysis evidences net welfare gain. This policy builds on two presumptions. qNWG precludes political decision-making because negative and positive welfare effects of sector-wide sustainability coordination are accommodated within the consumer surplus standard.[72] Second, accommodation of first mover disadvantage and partial foreclosure accords with the indispensability and residual competition conditions of Article 101(3) TFEU.[73] ("First mover disadvantage" was defined in the opening paragraph of this article. "Partial foreclosure" implies that the restriction of competition on sustainability can be compensated by competition on other parameters. The indispensability and residual competition conditions are hereafter referred to as the "competition conditions".)

qNWG enforcement policy can be traced back to the Commission decision in *CECED* that concerned a sector-wide agreement banning least energy-efficient washing machines.[74] Although increasing prices, the agreement was exempted because it was held also to bring compensatory benefits. For producers to improve upon under-correction of negative externalities by preventing free riding in an under-regulated economy, first mover disadvantage and partial foreclosure were accommodated under the competition conditions.[75] Having confirmed the *CECED*-approach in the 2011 Guidelines on horizontal cooperation agreements,[76] the Commission reconfirmed this approach in its support of ACM's qNWG enforcement policy.[77]

Current practice thus holds that evidence of qNWG may serve as a baseline for legal interpretation of Article 101(3) TFEU. Apparently, the principle that non-competition interests may only be taken into account "to the extent that they can be subsumed under the four conditions of Article [101(3)]" must be

71. Vision document, cited *supra* note 7.

72. Don (Board-member ACM), "Toepassing van het ACM-visiedocument Mededinging en Duurzaamheid", *Presentation Vereniging van Mededingingsrecht*, 11 June 2015; Letter from DG Comp cited *supra* note 16.

73. Vision document, cited *supra* note 7, paras. 2.6 and 3.4.5.

74. Case IV.F.1/36.718 *CECED*, O.J. 2000, L 187/47.

75. Ibid., paras. 58–66.

76. Commission Guidelines on the applicability of Art. 101 TFEU to horizontal co-operation agreements, O.J. 2011, C 11/1, para 329.

77. Letter from DG Comp cited *supra* note 16.

interpreted less strictly after all.[78] To judge whether this makes for legitimate and effective competition enforcement, two issues will be analysed. First, whether constitutional fundamentals allow the more economic approach to be translated in a qNWG enforcement policy. Second, whether first mover disadvantage and partial foreclosure concur with the competition conditions of Article 101(3) TFEU.

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

qNWG enforcement policy builds on (estimated) quantitative outcome. It monetizes the positive welfare effects expected to result from the correction of non-priced negative externalities and calculates whether they offset the pertaining expected negative welfare effects in terms of price increase resulting from sector-wide coordination. Depending on the net outcome, an agreement may or may not be exempted from the cartel prohibition. So far, ACM based two (informal) decisions on this approach – *Coal-Fired Power Plants* and *Chicken of Tomorrow*.[79] The first case concerned the closure of five old, coal-fired power plants agreed upon between Dutch energy producers. Here, the emission reductions of SO_2, NO_2 and particulate matters were monetized on the basis of shadow prices and avoided damage costs.[80] The second case concerned the introduction of a higher environmental and animal welfare standard for chicken breasts agreed upon between broiler farmers, meat processors and supermarkets. Here, the environmental and animal welfare benefits were monetized on the basis of a willingness-to-pay analysis. ACM stopped both agreements because they were estimated to result in a net welfare loss.

Building on (estimated) quantitative outcome, qNWG enforcement policy presumes that the introduction of the more economic approach has led welfare maximization (this time in terms of consumer surplus) to become the direct

78. Commission Guidelines on the application of Art. 81(3) of the Treaty, O.J. 2004, C 101/97, para 42.

79. Analysis by ACM of the "Planned Agreement on Closing Down Coal-Fired Power Plants from the 1980s as Part of the SER Energy Accord", 26 Sept. 2013, <www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord>; and ACM, Assessment of the sustainability agreements "Chicken of Tomorrow", ACM/DM/2014/206028, Jan. 2015, <www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow>.

80. For a more detailed account of the workings of qNWG in this case: Kloosterhuis and Mulder, "Competition law and environmental protection: The Dutch agreement on coal-fired power plants", 4 *Journal of Competition Law & Economics* (2015), 1–26.

goal of the competition rules. This presumption is incorrect,[81] simply because it overlooks that EU competition law has to be enforced in accordance with its constitutional fundamentals regardless. As explained earlier, those fundamentals provide for the competition regime to protect the mechanism that spurs market actors to maximize welfare: competition. Accordingly, the ECJ time and again underscores the importance of protecting competition in itself. For example, when observing that those rules cover "not only [market behaviour] that directly cause[s] harm to consumers but also [market behaviour] that cause[s] harm through their impact on competition".[82] This, however, implies that, even though competition is only a means to increase welfare, the protection thereof is a goal in itself within the context of competition enforcement. This also implies that welfare maximization is not a direct but an indirect goal of the competition rules.

This misunderstanding regarding the interplay between protecting competition and promoting welfare has led to two further misunderstandings. qNWG enforcement policy overlooks that the competition rules serve to protect "competition on the merits" and "consumer sovereignty" in order for the market order to work as an "invisible hand". As explained by Vanberg, the first concept reflects "the ideal of a market order framed by rules that aim at making producers responsive to consumer interest", while the second concept underlines that "consumer preferences are the ultimate controlling force in the process of competition".[83] Thus, for competition enforcement to protect the efficient workings of the market mechanism effectively, competition agencies should acknowledge two essentials. First, that competition on the merits builds on first mover advantage and new entry to ensure producer responsiveness to consumer interest. More specifically, first mover advantage rewards producers that push for better quality and innovation, after which new entry allows prices to fall in the longer term. Second, that consumer sovereignty builds on consumer choice. Together, both concepts necessitate a competition policy that allows individual consumers to guard their individual

81. On this point generally: Zimmer (Ed.), *The Goals of Competition Law* (Edward Elgar, 2010); Zäch and Künzler, "Freedom to compete or consumer welfare: The goal of competition law according to constitutional law", in Zäch, Heinemann and Kellerhals (Eds.), *The Development of Competition Law: Global Perspectives* (Edward Elgar, 2010).

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

83. Vanberg, op. cit. *supra* note 25, p. 56. See also, Behrens, "The consumer choice paradigm in German ordoliberalism and its impact on EU competition law", in Nihoul, Charbit and Ramundo (Eds.), *Choice: A New Standard for Competition Law Analysis?* (Concurrences Review, 2016), pp. 123–152.

consumer surplus and self-assess whether the value added is worth the price increase rather than competition agencies deciding on their behalf.

In addition, qNWG enforcement policy overlooks that the more economic approach cannot possibly recalibrate the mode of cost-benefit analysis provided by the relevant legal framework. Given the limitations of the constitutional mandate discussed earlier, it appears that this approach rather serves for the Commission and its national counterparts to translate open-textured competition norms to a coherent set of evidentiary requirements.[84] Put differently, the more economic approach turns into a functional approach based on which separate evidentiary requirements of the legal framework are systematically connected to the rationale and workings of the market mechanism.[85] Important for this functional interpretation of the more economic approach to succeed is that each individual requirement must gather complementary information on the extent to which specific market behaviour affects the efficient workings of market competition, while together gathering all information necessary. If these conditions are met, the more economic approach moves competition policy forward in two crucial ways. It guarantees objective enforcement as the allocation of specific evidence to separate requirements prevents a balancing of costs and benefits other than those foreseen by the legislature. It also guarantees effective enforcement as together all requirements ensure that private coordination will actually promote welfare – in this case SCP. Again, it turns out that legitimate enforcement implies strict enforcement – if not all evidentiary requirements are met, private coordination cannot be expected to promote SCP.

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

The question has thus become whether accommodation of first mover disadvantage and partial foreclosure concur with the competition conditions of Article 101(3) TFEU when functionally interpreted. The indispensability condition protects consumers against overcharges resulting from restrictions of competition that are not necessary to achieve the benefits established under the first two conditions of Article 101(3) TFEU.[86] The residual competition condition protects rivalry and the competitive process.[87]

84. E.g. Odudu (2006), op. cit. *supra* note 3; Loozen (2010), op. cit. *supra* note 3, Vanberg, op. cit. *supra* note 25; Wright and Ginsburg, "The goals of antitrust: Welfare trumps choice", 81 *Fordham Law Review* (2013), 2405–2423.

85. Loozen (2010), op. cit. *supra* note 3.

86. Guidelines on Art. 81(3), cited *supra* note 78, paras. 73 and 75.

87. Ibid., para 105.

Accommodation of first mover disadvantage under the indispensability condition is based on the argument that this phenomenon may preclude producers from investing in sustainability. But, while it is true that the private coordination mechanism may be hampered in case of complex external effects as a result of free riding, it is also true that producers may typically find themselves in a prisoner's dilemma and simply want to avoid competition.[88] The urge to avoid competition becomes particularly urgent when producers have become last movers trying to catch up with the real first movers. In fact, both Dutch cases concern last mover situations. The agreement in *Coal-Fired Power Plants* was meant to facilitate the closure of *ancient* power plants. The agreement in *Chicken of Tomorrow* helped broiler farmers catch up with competitors already offering higher quality chicken meat.[89] If anything, these cases show that claims of first mover disadvantage call for vigilance. Accommodation of first mover disadvantage under the indispensability condition accomplishes the opposite, however. The reason for this is that it mixes up the investigations under the first and third condition of Article 101(3) TFEU. The benefit condition serves to establish that sector-wide coordination is suitable to correct a negative externality and thus promote welfare. The indispensability condition serves to establish that there is no less restrictive alternative to promote welfare.[90] Duplicating the benefit investigation, accommodation of first mover disadvantage weakens the indispensability investigation. Whether sector-wide coordination is necessary relative to a lesser restrictive alternative is replaced by whether this is necessary to correct a negative externality as such. This broadens the indispensability defence for an evidentiary element already covered. The result is that the indispensability condition no longer protects competition on the merits, while the consumer is forced to pay unnecessary overcharges. A case in point is *CECED*, where the alleged benefits could also have been realized through a non-restrictive energy efficiency label combined with an effective information campaign.[91]

88. van Damme, "Goede marktwerking en overige publieke belangen", (2017) *Markt & Mededinging*, 5–17, at 15.

89. ACM, *Chicken of Tomorrow*, cited *supra* note 79, at 7.

90. Guidelines on Art. 81(3), cited *supra* note 78: "the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies" (para 73), in the sense "that there are no other economically practicable and less restrictive means of achieving the efficiencies" (para 75).

91. Loozen (2010), op. cit. *supra* note 3, p. 32; Schweitzer, "Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Lichte der Querschnittsklauseln, Politischer Einfluss auf Wettbewerbsentscheidungen", Wissentschaftliches Symposium anlässlich des 40-jährigen Bestehens der Monopolkommission am 11. September 2014 in der Rheinischen Friedrich-Wilhems-Universität Bonn, at 32. Note that the Commission explicitly dismissed this option in *CECED*, cited *supra* note 74, because "plainly less effective than a standard"

Accommodation of partial foreclosure under the residual competition condition is a consistent feature of current law enforcement.[92] Sector-wide private coordination of a specific competition parameter is condoned as long as it does "not touch on other competition factors"[93] and "competition will still take place for other product characteristics".[94] The reason for this permissive attitude may well be that these agreements do not restrict rivalry and innovation above a newly established minimum sustainability threshold. All the same, accommodation of partial foreclosure does not meet the requirements of functional interpretation. Partial foreclosure obstructs consumer sovereignty and allows competition enforcement to substitute for the absence of regulation. Given that the cartel prohibition serves to filter out corrections of negative externalities by private coercion in terms of market power, it falls upon the residual competition condition to not only ensure dynamic efficiency as in ongoing innovation, but also safeguard democratically legitimized consumer choice within the market conditions set by the regulatory State. The latter requires a strict interpretation of the last condition of Article 101(3) TFEU based on which the effects on residual competition should be investigated *per individual competition parameter*.

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

3.3. *Conclusion on the second flexible enforcement policy*

The second flexibility policy oversteps the constitutional limits of the more economic approach. qNWG enforcement policy overlooks that the goal of the competition rules is not to promote welfare directly, but to effectively protect competition in order for the market mechanism to promote welfare by yielding most efficient outcomes given the regulatory context. It also overlooks that the more economic approach cannot recalibrate the mode of

(para 62). At this point, the Commission overlooks an observation made earlier, i.e. the savings on electricity bills allow a recouping of increased costs of upgraded, more expensive machines within 9 to 40 months depending mainly on frequency of use and electricity prices (para 52). This relatively short period of recoupment of higher initial purchase costs will make an energy efficiency label effective provided that the relatively short period of recoupment is also communicated clearly.

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

93. Case IV.F.1/36.718 *CECED,* cited *supra* note 74, paras. 65–66.

94. Guidelines on horizontal co-operation agreements, cited *supra* note 76, para 329.

cost-benefit analysis provided by the relevant legal framework, but instead serves to meaningfully connect the art of competition law enforcement to the efficient workings of a market order that is based on competition on the merits and consumer sovereignty. It may do so by translating open-textured legal norms into a coherent set of functional evidentiary requirements. The result is that qNWG enforcement policy is neither legitimate nor effective. It is not legitimate because recalibrating the legal framework in conceptual and evidentiary terms makes for political decision-making *per se*. Albeit in a consumer surplus context, qNWG does exactly what the Commission criticized the Policy rule for – it uses competition policy to substitute for the absence of regulation.[95] It is not effective because accommodation of first mover disadvantage and partial foreclosure frustrates the competition conditions in fulfilling their proper role. Problems of under-regulation are to be addressed by the State, which is in a better position to regulate effectively.[96] Given that the purpose of protecting competition is to push the market to engage in SCP, it would be most helpful if the Commission would revise current practice. That is, explicitly denounce qNWG enforcement policy and (further) clarify the purpose and workings of Article 101(3) TFEU.

4. The constitutional limits of the legitimate objective doctrine

Disappointed by the practical outcomes of qNWG enforcement policy under Article 101(3) TFEU, scholars suggested extending flexible enforcement to Article 101(1) TFEU.[97] This third flexibility policy is based on the *legitimate objective* doctrine introduced in *Wouters* in which sector-wide private coordination by the Bar of the Netherlands (Bar) was held not to restrict competition because the Bar "could reasonably have considered" that "[it was] necessary [to ensure] the proper practice of the legal profession".[98] Flexible antitrust proponents claim that the ECJ thus allowed the Bar to balance competition and non-competition interests under Article 101(1) TFEU. Subsequent case law in *Meca-Medina*, *OTOC* and *CNG* is claimed to confirm this reading of *Wouters*.

95. Letter from DG Comp cited *supra* note 16.

96. Cf. Schinkel and Toth, "Balancing the public interest-defense in cartel offenses", Amsterdam Center for Law & Economics Working Paper No. 2016-01. They argue that the underlying expectation of qNWG enforcement policy, which is that sector-wide coordination may yield net welfare gain, is misplaced when applying the Commission's instructions on consumer share.

97. Pijnacker Hordijk, op. cit. *supra* note 9; Gerbrandy and Claassen, op. cit. *supra* note 2; Monti and Mulder, op. cit. *supra* note 2.

98. Case C-309/99, *Wouters*, para 110.

The pressing issue is whether this account of the *legitimate objective* doctrine is correct.[99] Given the limitations of the constitutional mandate discussed earlier, this requires three analyses. Whether *Wouters* actually contains a balancing act that allows for a flexible interpretation of a "restriction of competition". Whether *Meca-Medina* is in line with its predecessor and constitutional fundamentals. And whether indeed *OTOC* and *CNG* confirm a flexible reading of the *legitimate objective* doctrine.[100]

4.1. *Wouters up close*

Wouters concerns a situation of delegated regulatory power. Mandated by Dutch law, the Bar had issued the Regulation on Joint Professional Activity ("JPA Regulation"), under which members of the Bar are not permitted to "assume or maintain any obligations" that might jeopardize the proper practice of the legal profession as defined in "essential rules adopted for that purpose".[101] Based on the JPA Regulation, lawyers are prohibited from forming structural partnerships with accountants.[102] Notwithstanding its public mandate, the ECJ held the Bar accountable for the JPA Regulation under the cartel prohibition. The Bar constitutes an association of undertakings and the Regulation is attributable to the Bar alone, as a result of which it does not qualify as State action.[103] But, even though the JPA Regulation triggers anticompetitive effects, it is held not to infringe Article 101(1) TFEU because it "could reasonably be considered necessary" to ensure a legitimate objective.[104] The following paragraphs set out to clarify that the ECJ did not actually bestow any balancing power upon the Bar (or the competition agencies and the judiciary for that matter)

It is important to note that the ECJ applies a two-stage method of analysis when analysing the presence of a "restriction of competition" under Article 101 TFEU. The first stage concerns the essential rules governing the legal profession that underlie the JPA Regulation.[105] The second stage concerns the JPA Regulation and its anticompetitive effects.[106] At the first stage, the ECJ establishes three points. A first point is that, absent specific Community rules,

99. Loozen (2006 and 2010), op. cit. *supra* note 3. Also on this, Janssen and Kloosterhuis, "The *Wouters* case law, special for a different reason?", (2017) ECLR, 335–339.

100. Pijnacker Hordijk, op. cit. *supra* note 9; Nowag, "*Wouters*, when the condemned live longer: A comment on OTOC and CNG", 36 ECLR (2015), 39–44; Monti and Mulder, op. cit. *supra* note 2.

101. Case C-309/99, *Wouters*, paras. 9, 15 and 100.

102. Ibid., paras. 16–29.

103. Ibid., paras. 54–71.

104. Ibid., para 110.

105. Ibid., paras. 98–104.

106. Ibid., paras. 105–110.

each Member State is in principle free to regulate the exercise of the legal profession in its territory.[107] A second point is that three essential rules underlie the JPA Regulation: the duty to act in complete independence and in the sole interest of their clients, the duty to avoid all risk of conflict of interest, and the duty to observe strict professional secrecy.[108] Here it is relevant to note that the essential rules, which provide clients and the justice system with the necessary guarantees in relation to integrity,[109] are placed within the realm of the State. Multiple references like "the current approach of the Netherlands",[110] "the prevailing perceptions of the profession in that State",[111] and "as . . . organized in the Member State concerned",[112] indicate that the ECJ attributes these rules to the State.[113] Accordingly, they constitute the legal context within which the anticompetitive effects of the JPA Regulation are investigated.[114] In other words, the essential rules are acknowledged as a public interest defined by the State. A third point is that the accountancy profession in the Netherlands is not subject to comparable duties.[115]

At the second stage, the ECJ establishes in two steps that the Bar could reasonably have considered that the JPA Regulation does not infringe Article 101(1) TFEU. The JPA Regulation pursues a legitimate objective in its aim to ensure that lawyers comply with the essential rules applicable to them.[116] Second, its anticompetitive effects are inherent in the pursuit of that objective, because the essential rules governing the legal and accountancy professions are incompatible.[117] This implies that the JPA Regulation "could reasonably be considered necessary" because it follows directly from the essential rules.[118] In other words, "reasonable necessity" means "objective necessity".

107. Ibid., para 99.
108. Ibid., para 100.
109. Ibid., para 97.
110. Ibid., para 100.
111. Ibid., para 105.
112. Ibid., paras. 107 and 110.
113. The attribution to the State is easily misunderstood as the ECJ also indicates that the Bar "adopted" the essential rules in the framework of the JPA Regulation (para 100). This ambiguity between adoption by the Bar and attribution to the State may stem from the fact that, while the Advocatenwet did not make explicit the essential rules at the time, these rules did constitute, as A.G. Léger had pointed out, "the very essence of the legal profession", not only in the Netherlands but "in all Member States" (Opinion, EU:C:2001:390, para 180). Cf. Case C-309/99, *Wouters* para 92; Case C-155/79, *AM&S*, EU:C:1982:157, para 24.
114. Case C-309/99, *Wouters*, para 98.
115. Ibid., paras. 100, 102–104.
116. Ibid., para 105.
117. Ibid., paras. 105–110 and 103–104.
118. Loozen (2006), op. cit. *supra* note 3, at 38.

Translated in functional terms, the ECJ applies the ancillarity doctrine introduced in *Remia* in a public interest setting.[119] Key to this is that the JPA Regulation is not submitted to a competition analysis, but to a necessity analysis relative to State-defined essential rules. This analysis serves to investigate whether the JPA Regulation specifies only the essential rules (in which case the consequential anticompetitive effects do not stem from the Bar but from the State) or adds an additional anticompetitive layer (in which case there are further anticompetitive effects that do stem from the Bar). Given that the JPA Regulation (merely) ensures that lawyers comply with the essential rules governing the legal profession, it does not yield anticompetitive effects for which the Bar is accountable under the cartel prohibition.

The above leads to the following conclusion on *Wouters*. The ECJ held the Bar accountable for the JPA Regulation, since the conditions for State action were not met. It then used an ancillarity analysis to scrutinize the legitimacy of the anticompetitive effects resulting from the JPA Regulation. In doing so, it did not bestow any balancing power upon the Bar, but determined instead that the JPA Regulation did not yield anticompetitive effects other than those already caused by the essential rules underlying it. Thus, *Wouters* is in line with both constitutional fundamentals and functional interpretation of Article 101(1) TFEU.

4.2. *Meca-Medina vs. Wouters*

Meca-Medina did not concern a situation of delegated regulatory power. The ECJ nonetheless applied the *legitimate objective* doctrine. It held that the Anti-doping rules issued by the IOC and implemented by FINA (Anti-doping rules) fall within the scope of Article 101 TFEU, while the *Wouters* method of analysis serves to verify whether these rules meet antitrust requirements.[120] Two questions occur however: whether indeed the Anti-doping rules fall within the cartel prohibition; and whether the method of analysis applied in *Meca-Medina* concurs with the one applied in *Wouters*.

A first question to address in the context of Article 101 TFEU is whether an agreement is capable of restricting competition in the first place.. It appears that the Anti-doping rules do not meet this requirement.[121] Aiming to assure athletes that their opponents compete fairly, they facilitate sports competition rather than restricting downstream economic activities. In a similar vein, the

119. Case C-42/84, *Remia* v. *Commission*, EU:C:1985:327; Case C-382/12 P, *MasterCard and Others* v. *Commission*, EU:C:2014:2201. Cf. Whish and Bailey, *Competition Law*, 7th ed. (OUP, 2015), p. 138.

120. Case C-519/04 P, *Meca-Medina,* paras. 32, 33 and 42.

121. Ibañez Colomo, "Rules of purely sporting interest and EU competition law: Why the *Wouters* exception is not necessary", 8 *Competition Law International* (2012), 1–6.

Court of First Instance, supported by Advocate General Léger, had concluded that the Anti-doping rules fall outside the scope of Article 101 TFEU because they qualify as "purely sporting rules".[122]

Discarding the CFI's reasoning as an error of law, the ECJ determined that the *legitimate objective* doctrine must be used to verify the legitimacy of the Anti-doping rules. Following this, it is all the more striking that *Meca-Medina* differs from *Wouters* both in terms of legal context and method of analysis. As for the legal context, *Wouters* builds on the combination of the Bar having a public mandate to regulate the profession and the JPA Regulation pursuing a legitimate objective that consists of ensuring compliance with underlying, State-defined essential rules. *Meca-Medina* lacks a similar public context. The IOC does not enjoy a public mandate and the Anti-doping rules do not specify underlying, State-defined principles of "good sportsmanship". Absent a public mandate, the IOC does not enjoy antitrust immunity for sector-wide restrictive coordination as such. Absent underlying, State-defined principles, the ancillarity test cannot serve to justify the Anti-doping rules under Article 101(1) TFEU. This unavoidably affects the method of analysis as applied. First, the ECJ observes that the Anti-doping rules do not necessarily restrict competition because the objective they pursue is inherent in the organization and proper conduct of competitive sport.[123] Here, the ECJ considers the non-restrictive nature of the Anti-doping rules rather than their ancillary necessity. Next, the ECJ investigates the possibility of a restriction of competition as a result of unwarranted exclusion.[124] However, the risk of unwarranted exclusion does not affect the non-restrictive nature of the Anti-doping rules. Penalties are subject to appeal to the Court of Arbitration for Sport (CAS),[125] and the German Supreme Court has held that the CAS' rules of procedure "contain adequate guarantees for safeguarding the rights of athletes", amongst others because "its arbitration awards are subject to review by the Swiss Federal Court".[126,127] In other words, trying to overcome the differences between both cases, the ECJ did not apply an ancillarity analysis to establish legitimacy, but instead verified the non-restrictive nature of the Anti-doping rules rather than their ancillary necessity.

122. Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, EU:T:2004:282; Opinion of A.G. Léger in Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, EU:C:2006:201.

123. Case C-519/04 P, *Meca-Medina*, para 45.

124. Ibid., paras. 47–54.

125. Cf. Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, paras. 55 and 67.

126. Bundesgerichtshof, Case KZR 6/15, *Pechstein* v. *International Skating Union*, DE:BGH:2016:070616UKZR6.15.0

127. Note that the athletes chose not to appeal the *CAS* judgment to the Swiss Federal Court. See Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, para 67; Case C-519/04 P, *Meca-Medina*, para 14.

The *Meca-Medina* judgment is unfortunate. Recourse to the *legitimate objective* doctrine was unnecessary.[128] This doctrine serves to investigate the legitimacy of agreements that fall within Article 101 TFEU because they are capable of restricting competition. The Anti-doping rules form a different category.[129] They fall outside the scope of Article 101 TFEU because they qualify as purely sporting rules by virtue of their non-restrictive nature. Moreover, the widening of the *legitimate objective* doctrine to situations lacking a public mandate and State-defined objective introduces a balancing of competition and non-competition interests under Article 101(1) TFEU. Thus, the judgment contrasts sharply not only with constitutional fundamentals but also with other case law based on which restrictive agreements aiming to achieve self-defined welfare objectives can only be legitimized by fulfilling the conditions of Article 101(3) TFEU.[130]

4.3. *Meca-Medina in practice*

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

OTOC concerns the Order of Chartered Accountants which holds a public mandate to "promote continued training" and "plan, organize and provide compulsory training schemes" for chartered accountants in Portugal.[131] Based thereupon, OTOC issued the Training Credit Regulation ("TC Regulation") aimed at securing the quality of services provided by its members.[132] The starting point for the application of the *legitimate objective* doctrine is that the TC Regulation artificially segments the market of compulsory training for chartered accountants (a third of which is reserved to OTOC), while imposing discriminatory conditions on the remaining segment of that market to the detriment of OTOC's competitors.[133] Acknowledging that the TC Regulation contributes to the quality of the services offered by chartered accountants, the ECJ nonetheless holds those restrictions as going beyond what is necessary to

128. Cf. Ibañez Colomo, op. cit. *supra* note 121.

129. Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, para 65.

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

131. Case C-1/12, *OTOC*, para 4.

132. Ibid., para 2.

133. Ibid., para 62.

guarantee this objective.[134] The reservation of training sessions to OTOC eliminates competition within a substantial part of the relevant market. Furthermore, the discriminatory conditions for access to the market are not indispensable, as the quality of those services could have been safeguarded by a less restrictive alternative. Unlike *Wouters*, however, this motivation does not reflect an ancillarity analysis under Article 101(1) TFEU, but a competition analysis under the last two conditions of Article 101(3) TFEU.[135] The reason for "borrowing" the Article 101(3) analyses is obvious. It is impossible to conduct an ancillarity analysis under Article 101(1) TFEU when a State-defined reference point to investigate the necessity of the TC Regulation, is lacking.

CNG concerns the National Association of Geologists which holds a public mandate to safeguard the proper practice of the geologist profession in Italy.[136] Although the public mandate used to include the power to determine fees, all laws and regulations imposing compulsory fixed or minimum fee scales for the liberal professions were repealed in 2006, and provisions relating to professional ethics, agreements and self-regulation codes had to be amended accordingly.[137] CNG nonetheless continued the operation of a Code of Conduct (Code) based on which fees set below a certain level could be penalized on grounds of breach of "dignity of the profession",[138] a notion adopted from Article 2233 of the Italian Civil Code.[139] Bypassing the *legitimate objective* doctrine, the Italian competition agency held the Code to be anticompetitive.[140] Considering that all fixed and minimum tariffs were repealed, the classification of the fee scale as a reference criterion for remuneration was held to encourage geologists to set their fees accordingly, while the obligation to determine fees in accordance with general standards like "dignity of the profession" was held to strengthen the compulsory perception of the fee scale. The ECJ reasoned differently however. Although a rule penalizing fees below a certain level was found to restrict competition,[141] it held that "dignity of the profession" may be a legitimate criterion to

134. Ibid., paras. 96 and 100.
135. Ibid., paras. 97–99. The ECJ confirms this similarity in para 103.
136. Case C-136/12, *CNG*, paras. 5 and 6.
137. Ibid., para 7.
138. Ibid., paras. 9 and 38.
139. Ibid., para 8. Art. 2233 of the Italian Civil Code concerns the intellectual professions and holds that "[i]f the fees have not been agreed by the parties and cannot be determined by reference to fee scales or custom and practice, they should be determined by the court, after the opinion of the professional association to which the professional belongs has been obtained. In any event, the amount of remuneration must be commensurate with the scale of work performed and the dignity of the profession".
140. Case C-136/12, *CNG*, paras. 11 and 12.
141. Ibid., para 52.

determine professional remuneration, because it may be necessary to ensure the quality of geologists' services.[142] Following this, the case was referred back to the national court as the ECJ was unable to determine whether indeed "dignity of the profession" constituted a necessary criterion given that it was just one of several relevant remuneration criteria closely linked to the quality of geologists' work.[143] The referral is surprising, and actually shows the weakness of the *Meca-Medina* widening of the *legitimate objective* doctrine. One might ask how the national court could possibly be in a better position to check ancillary necessity, given that a State-defined reference point is missing and the national legislature has repealed and annulled this type of restriction.[144]

The above cases show that the *Meca-Medina* version of the *legitimate objective* doctrine does not work in practice.[145] Both cases show that it is impossible to conduct an ancillarity test if a State-defined reference point is lacking. In *OTOC*, the ECJ thus resorted to analyses that are generally conducted under the competition conditions of Article 101(3) TFEU. In *CNG*, the ECJ simply referred the case back to the national court.

4.4. *Conclusion on the third flexible enforcement policy*

The third flexibility policy misunderstands the constitutional limits of the *legitimate objective* doctrine. As it turns out, *Wouters* does not contain a balancing act but concurs with constitutional fundamentals and functional interpretation in its use of both State action doctrine and ancillarity analysis. *Meca-Medina,* by contrast, does introduce a balancing mechanism under Article 101(1) TFEU. The added value thereof is not self-evident when compared to the accountability mechanisms already in place. The ancillarity analysis under Article 101(1) TFEU requires agreements that are capable of

142. Ibid., para 53.

143. Ibid., paras. 54 and 55. Other criteria are the scale and difficulty of the task to be performed, technical knowledge and the commitment required.

144. After referral, the Consiglio di Stato held that deontological rules based on which the guarantee of quality of professional services corresponds with the remuneration of professional dignity restricts competition and cannot be considered necessary to ensure a legitimate objective that concurs with the protection of the consumer. Il Consiglio di Stato, *Autoritá Garante della Concurrenza e del Mercato* v. *Consiglio Nazionale dei Geologi*, N. 00238/2015REG.PROV.COLL., N. 04710/2011 REG.RIC, N. 04584/2011 REG.RIC.

145. Another, less instructive example is Joined Cases C-427 & 428/16, *CHEZ Elektro Bulgaria*, EU:C:2017:890. This case concerns national legislation that prohibits lawyer and client from agreeing on remuneration below a minimum amount to be set by the professional organization of lawyers. After introducing the *legitimate objective* doctrine, the ECJ referred the case back to the national court, because it could not apply the doctrine on the basis of the file before it.

restricting competition to be based on a public mandate and ensure a State-defined objective in order for society to trust that they do not yield additional anticompetitive costs. The efficiency analysis under Article 101(3) TFEU requires restrictive agreements that pursue a self-selected objective to fulfil the welfare and competition conditions in order for society to trust that the benefits of an agreement outweigh its anticompetitive costs. On the one hand, *Meca-Medina* does not seem to cause much harm. Anti-doping rules are not likely to restrict competition, while *OTOC* and *CNG* confirm that a widened *legitimate objective* doctrine does not work out in practice. On the other hand, *Meca-Medina* obscures the purpose and workings of EU competition law and motivates the broad welfare and balancing propositions discussed earlier (and in the next section). It would, therefore, be most welcome if the ECJ explicitly returned to the original version of the *legitimate objective* doctrine.

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

Following the Commission's opposition to the Policy rule, the Dutch government has devised a fourth policy that aims to preclude competition enforcement altogether. Pursuant to the draft-Law on the realization of sustainability intiatives the government will attain the power to convert private sustainability initiatives into generally binding rules (Regulations). The draft-Law aims to kill three birds with one stone.[146] Sustainability initiatives that enjoy "broad societal support" may overcome first mover disadvantage problems. The responsibility for prioritizing sustainability over competition will shift from the competition agency to the government. Finally, sustainability will be maximized as the draft-Law makes utmost use of the innovative power of civil society. This flexibility policy builds on the *useful effect* doctrine which specifies the loyalty obligation of Member States under Article 4(3) TEU in the context of the competition rules. According to the Dutch Government, the draft-Law complies with the requirements of this doctrine since Regulations will not ratify coordinated conduct nor does the draft-Law delegate regulatory powers to market actors. Additionally, the Dutch Government seems to consider that the *useful effect* doctrine does not apply because parliamentary involvement ensures that Regulations constitute sovereign State measures in their own right. Less optimistic on *useful effect* compliance, scholars have argued that this doctrine is in need of repair. Its focus on institutional responsibility is claimed to obstruct "innovative

146. Explanatory notes to the draft-Law, *Kamerstukken II* 2018/19, 35247 No.3.

non-State structures of governance", while lagging behind the more substantive approach of the *legitimate objective* doctrine.[147]

Again, the issue is whether the above arguments are correct. Does the draft-Law guarantee the *useful effect* of the competition rules? Does parliamentary involvement in the coming about of Regulations secure their sovereignty indeed? If not, is the *useful effect* doctrine in need of repair to promote SCP?

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

The *useful effect* doctrine constitutes a specific branch of the EU State action doctrine which serves to prevent Member States from enacting State measures that enable undertakings to escape antitrust accountability.[148] Ever since *Reiff*,[149] case law consistently states that this doctrine operates along two prongs.[150] The first prong prohibits Member States from requiring or favouring the adoption of agreements contrary to the cartel prohibition, or from reinforcing their anticompetitive effects. The second prong prohibits Member States from depriving legislation of its official character by delegating the responsibility for taking decisions affecting the economic sphere to private traders. The rationale for a second prong is obvious. The fact that the first is easy to circumvent makes it critical to have an additional test to ascertain that the State has been responsible for displacing "the competition rules with an alternative scheme".[151]

It follows that the absence of upfront anticompetitive coordination by undertakings is insufficient to guarantee *useful effect*. The key question thus is whether the draft-Law precludes delegation of regulatory power to market actors. Overall, the case law referred to earlier indicates that two requirements must be met for Regulations to qualify as State measures: the State must have both originator and State responsibility. "Originator responsibility" reflects the fact that the State must make sure that market actors "conduct themselves

147. Monti and Mulder, op. cit. *supra* note 2, p. 656.

148. Case C-13/77, *INNO* v. *ATAB,* EU:C:1977:185.

149. Case C-185/91, *Bundesanstalt für den Güterfernverkehr* v. *Reiff*, EU:C:1993:886. Actually, *Reiff* confirmed that delegation constituted a separate prong, as had been indicated already in Case C-267/86, *Van Eycke* v. *ASPA*, EU:C:1988:427. On the two prongs of the *useful effect* doctrine: Schepel, "Delegation of regulatory powers to private parties under EC competition law towards a procedural public interest test", 39 CML Rev. (2002), 31–51.

150. Case C-153/93, *Germany* v. *Delta Schiffahrts- und Speditionsgesellschaft*, EU:C:1994:240; Case C-96/94, *Centro Servizi Spediporto* v. *Spedizioni Marittima del Golfo*, EU:C:1995:308; Case C-35/99, *Arduino*, EU:C:2002:97; Case C-250/03, *Mauri*, EU:C:2005:96; Joined Cases C-94 & 202/04, *Cipolla and Others*, EU:C:2006:758.

151. Crane, "Judicial review of anticompetitive State action: Two models in comparative perspective", 1 *Journal of Antitrust Enforcement* (2013), 418–436, at 421.

like an arm of the State working in the public interest". This implies that regulatory measures must originate with the State in the sense that it is the State who specifies the subject-matter, method and extent of regulation as well as the criteria subsequent market input must meet.[152] "Concluder responsibility" reflects the fact that a regulatory measure may not lose its character of State legislation along the way.[153] This implies that regulatory measures only qualify as State measures if the State verifies that the market input actually concurs with the legislative framework set out earlier.[154] In this way, the *useful effect* doctrine corresponds with the US State action doctrine, which limits antitrust immunity to those situations where the State has "clearly articulated and alternatively expressed" State policy, and where subsequent market involvement is "actively supervised" by the State itself.[155]

The draft-Law does not seem to ensure that the State has originator responsibility for Regulations. In fact, it only specifies that initiatives must aim to promote sustainable development (defined as development towards an economically, socially and environmentally sustainable future for our planet and for present and future generations), and that requests must cover the reduction of greenhouse gas emissions, sustainable development or animal welfare (Arts. 1 and 2). Absent originator responsibility, the minister concerned cannot even start to take concluder responsibility, as a reference framework for verification is missing.

5.2. *Do Regulations constitute sovereign State measures?*

Additionally, the Dutch government seems to reason that the *useful effect* doctrine does not apply because Regulations constitute sovereign State

152. Some cases discuss originator responsibility under both prongs: Case C-185/91, *Reiff*; Case C-153/93, *Delta Schiffahrts- und Speditionsgesellschaft*. Other cases lean on originator responsibility established under the first prong: Case C-96/94, *Centro Servizi Spediporto*; Case C-38/97, *Librandi*. *Arduino* and *Cipolla* appear to disconnect both prongs seemingly implying that lack of originator responsibility does not obstruct (stand-alone) concluder responsibility. The reason is that the underlying statute does not lay down public interest criteria which the Council of the Italian Bar must take into account when producing the draft-tariff (C-35/99, *Arduino*, para 38; Joined Cases C-94 & 202/04, *Cipolla*, para 49). On this point, the ECJ overlooked that specific terms on which tariff calculation must be based also ensure the public interest (Case C-96/94, *Centro Servizi Spediporto*, paras. 7 and 24; Case C-38/97, *Librandi,* paras. 9 and 34).

153. Cf. Monti and Mulder, op. cit. *supra* note 2, p. 652.

154. Case C-185/91, *Reiff*, para 22; Case C-153/93, *Delta Schiffahrt- und Speditionsgesellschaft*, para 21; Case C-96/94, *Centro Servizi Spediporto*, paras. 23 and 27-28; Case C-38/97, *Librandi*, paras. 35-36; Case C-35/99, *Arduino*, para 41; Case C-250/03, *Mauri*, paras. 32-36; Joined Cases C-94 & 202/04, *Cipolla*, paras. 49-52; Joined Cases C-184-187, 194, 195 & 208/13, *API*, paras. 39 and 41.

155. Crane, op. cit. *supra* note 151.

measures in their own right. For, albeit upon the request of market actors (or other stakeholders), it will be the minister concerned, having heard parliament, who will "make an independent and integral assessment of whether it is in the general interest to convert a sustainability initiative to a generally binding rule" (Art. 4).[156] Parliamentary involvement is claimed to ensure that Regulations are determined in a democratically legitimate manner and thus rightfully set aside the public competition interest.[157] However, in representative democracies like the EU Member States, democratic legitimacy depends on State measures being determined in a deliberative process in which the views of all citizens are represented. In other words, for Regulations to constitute sovereign State measures, they must accord with Dutch rule-making standards that ensure *appropriate parliamentary involvement*. More specifically, the question is whether the draft-Law meets the standards on delegation and the use of the verification procedure based on which parliamentary involvement will take place.

Two main principles govern delegation to a lower rule-maker (in this case the government).[158] "Primacy of the legislature" implies that the delegating statute must contain at least the main elements of the rules to be set. "Limitation of delegation" implies that the delegating statute limits the extent of delegated regulatory power in specific and precise terms.[159] As shown in the preceding paragraph, these principles are not met. Instead, the draft-Law provides for "controlled delegation" based on a so-called verification procedure (Art. 7(1)).[160] This procedure allows for limited parliamentary involvement in the delegated rule-making process.[161] However, controlled delegation is only meant to be used when regulation by statute, although desirable, is not suitable because of the subject-matter's highly technical

156. "Independent and integral assessment" will also be based on expert advice regarding the effects regulations will have on sustainable development; the ACM will advise on their market effects.

157. Explanatory notes to the draft-Law, cited *supra* note 146.

158. The government is the lower rule-maker: draft-Regulations will be discussed in the Council of Ministers, while the Council of State will render advice.

159. Notice from the Prime Minister, *Instructions for rule-making* (Circulaire van de Minister-President of 18 Nov. 2018, Instruction 2.19 and 2.23, <wetten.overheid.nl/BWBR0005730/2018-01-01>. This implies that the main principles, main substantive norms and the extent of the rules to be set must be defined by statute. Lower rule-makers can make implementation rules within that framework. See Voermans, "Legaliteit als middel tot en doel", Preadvies van de Nederlandse Juristen-Vereniging (2011), 1-102, p. 54.

160. *Instructions for rule-making*, cited *supra* note 159, Instruction 2.36 para 2.

161. The verification procedure allows Parliament to express its views on the draft-Law within four weeks. Regular parliamentary deliberation, by contrast, is institutionalized and includes preparation in a specialized committee, plenary debate, vote on amendments and on the complete legislative proposal.

nature, the need for quick updates, or the large number of rules to be set.[162] Again, none of these requirements seems to be met. As the government acknowledges, the actual reason for using the verification procedure is that rule-making based on as yet unknown private initiatives precludes an upfront limitation of delegated regulatory power.[163] This argument brings us back to square one: the draft-Law contravenes the "primacy of the legislature", as it bypasses institutionalized and full parliamentary deliberation on the main elements of generally binding rules. As such, the draft-Law fails to ensure democratic legitimacy; which means that Regulations will fail to constitute sovereign State measures in their own right.[164]

The above implies that the *useful effect* doctrine will apply after all. Given that this doctrine extends to national competition agencies that have a duty to disapply national legislation contravening EU competition law,[165] market actors can therefore not assume that their sustainability initiatives will escape antitrust accountability.[166]

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

Lack of sovereignty brings us to the scholarly proposition that the *useful effect* doctrine needs to be updated. Schepel submitted earlier that, by focusing on institutional responsibility rather than substantive outcome, the delegation test erroneously overlooks that the "appropriate demand is for 'public-regarding' regulation, not for public regulation".[167] In the same vein, Monti and Mulder recently proposed the ECJ to follow the lead of the *legitimate objective* doctrine and move away from "conventional State centred understandings of *dominium* and *imperium*", and develop "basic conditions for input and output

162. *Instructions for rule-making*, cited *supra* note 159, Instruction 2.36 para 1.

163. Advice Council of State and Reaction Government, *Kamerstukken II* 2018/19, 35427 No. 4, p. 10.

164. Lack of democratic legitimacy was one of the reasons why the Council of State advised against the draft-Law (Advice Council of State, cited *supra* note 163, p. 9-10). Use of the verification procedure was considered insufficient to restore the infringement of primacy of the legislature.

165. Case C-198/01, *CIF*, EU:C:2003:430.

166. Note that ACM has issued enforcement guidelines for sustainability agreements (Duurzaamheid en concurrentie. Uitgangspunten toezicht ACM op duurzaamheidsafspraken), 2 Dec. 2016, <www.acm.nl/nl/publicaties/publicatie/16673/ACM-stelt-uitgangspunten-vast-voor-toezicht-duurzaamheidsafspraken-en-mededinging>. The main principle of the new guidelines is that the cartel prohibition will not be enforced if (sector-wide) sustainability agreements are supported by the government and other stakeholders.

167. Schepel, op. cit. *supra* note 149, at 49.

legitimacy [of competition restrictive measures] within new governance processes".[168] These propositions build on several misunderstandings.

First, the delegation prong of the *useful effect* doctrine rightly focuses on institutional responsibility of a regulatory measure. After all, it only serves to determine which mechanism must be used to check on substantive outcome – the free movement or the competition rules. Second, *Wouters* does not evidence any shortcomings of a conventional understanding of *dominium* and *imperium*. By contrast, the ECJ appears to have underlined the timeless validity thereof when observing that Member States are free to opt for State or market action, provided that either choice triggers accountability under the free movement or the competition rules.[169] Third, the *legitimate objective* doctrine as originally applied in *Wouters* does not apply a more substantive approach but again focuses on institutional responsibility. On the one hand, the *legitimate objective* doctrine builds on originator State responsibility in terms of public mandate and State-defined objective in order to preclude private accountability for anticompetitive effects for which the State is actually responsible. On the other, this doctrine uses the ancillarity test, which, failing concluder State responsibility for subsequent regulation specified by market actors, serves to verify whether the State or the market is responsible for the anticompetitive effects of such regulation.

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

5.4. *Conclusion on the fourth flexible enforcement policy*

The fourth flexibility policy misreads the purpose and workings of the *useful effect* doctrine. In line with a dualist institutional balance, this doctrine serves to ensure that regulatory measures only escape antitrust accountability if based on proper State action. The proposed legislation does not yield proper State action. Regulations lack originator State responsibility because the draft-Law fails to define the main elements of State policy. At the same time, limited parliamentary involvement in the coming about of Regulations precludes stand-alone sovereignty. This outcome does not signal a need for a

168. Monti and Mulder, op. cit. *supra* note 2, at 656. "Input legitimacy" refers to the extent to which public law framework sufficiently enables and embeds private actors to pursue objectives in the public interest. "Output legitimacy" refers to whether restrictions on competition are proportionate and necessary to achieve the objectives concerned.

169. Case C-309/99, *Wouters*, paras. 67–69.

change of the *useful effect* doctrine. A focus on institutional responsibility does not obstruct innovative governance structures, but only serves to ensure that these innovations are not used to improperly escape antitrust accountability which after all serves to protect the general (sustainability) interest.

6. Conclusion

The above constitutional perspective which is based on Article 101 TFEU and sustainability, shows that strict rather than flexible competition enforcement is the way forward to promote welfare. The constitutional fundamentals of EU competition law do not allow a broad welfare standard but mandate a consumer surplus standard to check on efficient use. They moreover do not allow a balancing of competition and non-competition interests but mandate objective competition enforcement. Based on the requirements of democratic legitimacy and economic effectiveness, objective competition enforcement translates to strict competition enforcement. Strict enforcement precludes agencies and courts from deviating from the mode of cost-benefit analysis provided by the relevant legal framework, which neutrally distinguishes between the responsibilities of the market and the State to promote welfare. Strict enforcement also pushes the market to engage in SCP and maximize sustainability because the separate evidentiary requirements of the relevant legal framework functionally connect to the rationale and workings of the market mechanism. First mover disadvantage poses a problem of under-regulation that is to be addressed by the regulatory State and requires proper articulation of State policy in order to preclude antitrust accountability. In brief, the cartel prohibition provides a straightforward accountability mechanism that serves to foster rather than hamper SCP. In order to use it properly, current practice needs to be amended. The Commission should consider explicitly rejecting *CECED* and qNWG enforcement policy and clarifying the purpose and workings of the competition conditions of Article 101(3) TFEU. The ECJ should consider correcting the *Meca-Medina* widening of the *legitimate objective* doctrine first introduced in *Wouters*.