What role for National Competition Authorities in protecting non-competition interests after Lisbon?

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Influenced by the economic crisis and the Lisbon Treaty, the role of national competition authorities in protecting non-competition interests has again become topical. This article puts forward a number of legal and economic arguments for the integration of non-competition interests in competition decisions by the European Commission and the national competition authorities. However, a transparent framework for balancing these interests is lacking. The article therefore suggests some initial steps towards formulating principles in order to guide authorities in balancing competition and non-competition interests.

Introduction

Since the 1990s the role of economic analysis in the application of competition law has grown, a tendency which has been denoted as 'the economization' of competition law.[1] A central feature of economization is that economic analysis plays a crucial role in interpreting and applying the relevant concepts of European competition law. Instead of a form-based approach, restrictive practices should be assessed on the basis of their potential effects for competition and their impact on consumer welfare.[2]

Parallel to the economization of European competition law, the enforcement of competition law was modernized, resulting in the adoption of Regulation 1/2003, which promotes the decentralized enforcement of European competition law by national competition authorities (NCAs). To stimulate a consistent and economically sound application of the European competition rules by the NCAs in the 27 Member States, the European Commission has adopted several policy documents that provide guidelines to the NCAs on how to apply the European competition rules and conduct relevant economic analysis.[3] In these guidelines the Commission suggests that, in principle, the NCAs should not balance economic, competition-related arguments with other public policy arguments, such as the protection of public health (non-competition interests). It seems to adopt a strict approach with regard to the protection of non-competition interests: "Goals pursued by other Treaty provisions can be taken into account to the extent they can be subsumed under the four conditions of Article

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[1] See e.g. the case note of A. Gerbrandy to case C-8/08, T-Mobile, to be published in (2010) 47 *CMLRev*.

[2] K. Cseres, "The Controversies of the Consumer Welfare Standard" (2007) 3 *Competition Law Review* 121.

[3] See e.g.: Commission notice, Guidelines on the applicability of Article 81 EC to horizontal co-operation agreements, OJ 2001C 3/2 and Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97.

101(3) TFEU (ex Art. 81(3) EC)".[4] In its recently published draft revised guidelines on horizontal agreements the Commission seems to stick to this approach.[5]

This strict economic approach by the Commission stirred the debate as to how far it was in harmony with the system of the EC Treaty itself and the case law of the European Courts, where it was recognized that the Commission has the power to take into consideration other public interest considerations than purely competition-related arguments when applying competition law.[6] After a few relatively silent years, the debate has become topical once again for three reasons.

First, the economic and financial crisis raised the question of the extent to which the European cartel prohibition of Article 101(1) TFEU and its exception in Article 101(3) TFEU leave leeway for considering social and industrial policy arguments when assessing the legality of crisis cartels.[7]

Secondly, the Lisbon Treaty modified the EU Treaty and the EC Treaty, which included the formulation of the central goals and activities of the EU in Article 3 TEU and Article 3 TFEU (ex Article 2 TEU; ex Articles 2 and 3 TEC). In the new EU Treaty the goals are listed but a competition goal is not mentioned (see Article 3 TEU), whereas the old Article 3(1)(g) TEC listed - as a corollary to the goals mentioned in the old Article 2 TEC - competition policy as an instrument to achieve these central goals.
Some commentators argue that these changes mean that the ECJ, the Commission and the NCAs will have more leeway to take non-competition interests into account in competition cases.[8] Their line of reasoning suggests there is more room for non-competition considerations now that competition policy is not mentioned in the new list of goals in Article 3 TEU. But this argument is not convincing, given that competition policy is explicitly mentioned as a Union competence in Article 3(1)(b) TFEU. The latter provision has taken over the function of Article 3(1)(g) of the EC Treaty.[9] Moreover, Protocol 27 on the Internal Market states that the internal market as set out in Article 3 TEU includes a system in which competition is not distorted. The Protocol confirms that competition policy is part of the internal market, which is listed as a central objective in Article 3 TEU. A second argument in favour of more leeway for non-competition considerations, which is more convincing, is the fact that the Lisbon Treaty has enhanced the importance of policy-linking clauses. Article 7 of the Treaty on the Functioning of the European Union now explicitly states that "The Union

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[4] Guidelines on the application of Article 81(3) of the Treaty, par. 42. See also the White Paper on modernization of the rules implementing Articles 85 and 86, OJ 1999 C 132/1.
[5] European Commission, Draft Communication from the Commission, Guidelines on the Applicability of 101 TFEU to horizontal co-operation agreements, SEC(2010) 528/2.
[6] C. Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing 2009), G. Monti, "Article 81 EC and Public Policy" (2002) 39 *Common Market Law Review* 1090, O. Odudu, *The Boundaries of EC Competition Law, the Scope of Article 81 EC* (Oxford: Oxford University Press 2005), p. 160, S. de Vries, *Tensions within the Internal Market, the Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Groningen: Europa Law Publishing 2005), p. 221, P. Kalbfleisch, "The Assessment of Interests in Competition Law; A Balancing Act", in: Monti et al (eds), *Economic Law and Justice in Time of Globalization* (Nomos 2007), pp. 455-474, T. Prosser, *The Limits of Competition Law* (Oxford: Oxford University Press 2005), p. 27 and R. Wesseling, *The Modernisation of Antitrust Law (* Oxford: Hart Publishing 2000), pp. 101-113.
[7] See e.g. 'Many achievements, more to do', Opening speech by Neelie Kroes at the International Bar Association conference, Brussels 12 March 2009. Recently the Commission reduced the fine of five undertakings because of their likely inability to pay the fine given their financial situation. See European Commission, IP/10/790, Commission fines 17 bathroom equipment manufacturers in price fixing cartel.
[8] See L. Parret, "Do we still know what we are protecting", TILEC Discussion paper 2009-010.
[9] B.J. Drijber, "Het hervormingsverdrag van de EU: stap vooruit of stap achteruit? (2007) *Markt en Mededinging* 131.

shall ensure consistency between its policies and activities, taking all of its objectives into account".[10] This could be seen as an important indication that the Lisbon Treaty seeks to underscore the duty of the European Commission and the NCAs to give consideration to non-competition interests in applying European competition law.

Thirdly, it follows from the judgments of the ECJ in *Glaxo Smith Kline* and *T-Mobile* that, in addition to the goal of consumer welfare, the goals of market integration and competition are core goals of competition law.[11] Though the ECJ did not rule on the role of non-competition arguments as such, these judgments show that the Commission cannot adopt a strict economic approach exclusively focusing on the promotion of 'consumer welfare' when applying the competition rules. While the promotion of consumer welfare is a legitimate goal of competition law, which may be pursued by the Commission in setting its enforcement priorities and enforcing competition law, it is not the only relevant objective.[12] In this paper it is submitted that in the event of conflict between different objectives of competition law, the Commission should acknowledge this and balance the conflicting interests in a transparent and proportionate way in the light of the system and the central goals of the EU Treaty.

While the Commission encouraged the NCAs to apply Articles 101 and 102 TFEU from an economic point of view, the EU and/or its Member States continued to liberalize public service sectors, such as healthcare, social housing, transport, energy and the postal service. European and/or national legislators decided that the liberalization process should not threaten the public interests of the security, quality, affordability and accessibility of these services. For that purpose, sector-specific legislation included specific provisions to protect these interests.[13] As competition was gradually introduced in the public service sectors, the role of the NCAs in these sectors grew as well. The NCAs were increasingly confronted with possible tension between the application of competition-related concepts and the protection of other, non-competition related public interests, such as the quality of healthcare. In this respect the following remarks by the President of the Dutch NCA, Pieter Kalbfleisch, are very illustrative of the dilemmas the NCAs may face:

"So with respect to the application of competition law, we have a problem: when we really want competition law to promote welfare, we cannot categorically dismiss arguments that are based on market failure. But on the other hand, how must we weigh those arguments carefully, but also critically, staying aware of the fact that those who bring forward special public interest arguments often also have their private arguments to restrict competition?"[14]

The above quotation leads to the central question of this article: what role is there for the NCAs in protecting public interests not aimed at the promotion and protection of competition (non-competition interests)? The article will not only examine the legal and economic framework within which the NCAs exercise their powers, but will also analyse whether the NCAs *de facto* take into account non-competition interests and, if so, how. Moreover, it will be debated whether the NCAs should protect non-competition public interests when exercising their powers on the basis of European and/or national competition law. If so, suggestions will be made as to how they can balance competition and non-

[10] Townley, n6 above, 68-70. See e.g. also Article 9 TFEU (new).
[11] *GlaxoSmithKline* (C-501/06P), n.y.r. at [62]-[63] and *T-Mobile* (C-8/08), n.y.r. at [38]-[39]. For a discussion of these goals, see Monti 2002, pp. 1059-1069.
[12] Parret, n8 above.
[13] Prosser, n6 above, chapter 8.
[14] Kalbfleisch, n6 above, p. 468.

competition interests in a fair and transparent way, contributing to the protection of both types of interests.

Public interests

Contrasting legal and economic approaches

Lawyers and political scientists tend to approach the concept of public interests differently than economists do. Lawyers define public interests as societal interests identified by political processes as in need to be promoted and protected by government.[15] Legal literature on competition policy and public interests usually makes a distinction between economic and non-economic interests.[16] Economic interests are the interests that are aimed at the promotion and protection of competition and at the realization of market integration. Non-economic interests are linked to horizontal and flanking policies, which "are the caring, idealistic and spending policy areas, affecting everybody and characterized by the Court of Justice as non-economic, but with economic consequences".[17] The horizontal and flanking policies aim to protect interests which are relevant across sectors and for all citizens, such as the protection of the environment, the consumer, public health, culture, sport and education. The TFEU constitutionalizes the relevance of these policies and interests by means of the so-called integration or policy-linking clauses.[18] Depending on the exact wording of these clauses, they require the Community institutions to take into account, or integrate, horizontal and flanking policy interests in other Community policies, such as EU competition law.[19] In addition, non-economic interests are linked to interests that are specific to certain public service sectors, such as the protection of a secure, affordable and high-quality energy supply or the protection of affordable, accessible and high-quality healthcare services. Undertakings may be charged with services of general economic interest in the sense of Article 106(2) TFEU so as to protect these specific interests. According to Article 14 TFEU (ex Article 16 TEC) the Union and its Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of the principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.[20]

It is uncommon for economists to refer to the distinction between economic and non-economic public interests.[21] Generally, economists apply a broad welfare concept.[22] For

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[15] Wetenschappelijke Raad voor het Regeringsbeleid, *Het borgen van het publiek belang* (The Hague: SDU 2002), p. 46.

[16] J.W. van de Gronden and K.J.M. Mortelmans (eds), *Mededinging en niet-economische belangen* (Deventer: Kluwer 2001).

[17] De Vries, n6 above, 8, referring to K.J.M. Mortelmans, "De interne markt en het facettenbeleid: nationaal beleid, vrij verkeer of harmonisatie" (1994) *SEW* 237.

[18] Article 9 TFEU (new), Article 11 TFEU (ex Article 6 EC), Article 12 TFEU (ex Article 153(2) EC), Article 13 TFEU (new), Article 168 TFEU (ex Article 152 EC), Article 167 TFEU (ex Article 151 EC).

[19] De Vries, n6 above, 11 ff. See also Townley, n6 above, 53.

[20] See also European Commission, Services of general economic interest, including social services of general interest: a new European commitment COM (2007) 725 and European Commission , Communication, White Paper on services on general interest COM(2004) 374 final.

[21] Kalbfleisch, n6 above, 467, pp. 22-30 and E. van Damme & M.P. Schinkel (eds), *Marktwerking en Publieke belangen* (Amsterdam: Koninklijke Vereniging voor de Staathuishoudkunde 2009).

[22] For a discussion of the concept of welfare from the perspective of welfare economics, see L. Kaplow and S. Shavell, *Fairness vs Welfare* (Harvard University Press, 2006), pp. 18-38. Very often the notion of well-being is used to describe a broad welfare concept: B. Baarsma & J. Theeuwes, "Publiek belang en marktwerking: Argumenten voor een welvaartseconomische aanpak", in Van Damme en Schinkel (eds), n21 above.

instance, public environmental and cultural protection measures can also be translated into economic terms, in that consumers attach value to cultural or environmentally-friendly products. As a result, measures promoting certain products can be seen - according to the broad concept - as welfare-enhancing, and can therefore be efficient. Economists usually use the total welfare standard to define efficiency. The starting point is that the market mechanism will satisfy the needs of society and will enhance total welfare; it allocates the scarce resources of society in an efficient way, satisfying the needs of everyone.[23]

If the market mechanism does not lead to efficient outcomes, this is caused by some type of market failure, which may include imperfect competition, information asymmetry, public goods or external effects.[24] The presence of a market failure may justify government intervention to safeguard an efficient allocation of scarce resources. Government intervention in a market can, however, also be considered desirable even when the market yields an efficient outcome. This may occur for reasons of welfare distribution among citizens, for example. In any case, government intervention requires scarce resources. A trade-off must therefore be made between the costs and benefits of government intervention.

Summing up, economists tend to apply a broad welfare concept, not only including competition factors, such as output, prices, innovation, choice and quality, but also factors relating to the general well-being of citizens, such as sustainable development, culture, public health etc. However, it may be difficult to apply this broad welfare concept and the total welfare standard in practice, as it is difficult to measure or compare the economic value of non-competition interests and their contribution to total welfare. This is one explanation for the reason why competition policy's limits are generally set so that it merely deals with competition factors and focuses on the promotion of consumer welfare.[25]

Taking into account the different perspectives of lawyers and economists, it may be confusing to use the term economic and non-economic interests. This paper speaks of the distinction between competition and non-competition interests. Competition interests are directly aimed at the promotion and protection of competition. The idea is that competition will lead to lower prices, higher quality services and products, more output and innovation, all of which are in the interest of consumers. There is a general consensus that competition interests fall within the ambit of the legal mandates of the NCAs. Non-competition interests, on the other hand, are aimed at the promotion of horizontal and flanking policy interests and sector-specific public service interests, such as the quality of healthcare. As will be discussed below, the extent to which NCAs can take these non-competition interests into account is controversial.

Mixed or purist: two basic approaches

It is realistic to assume that there are two basic ways in which NCAs can deal with non-competition interests.[26] First, they may follow a purist approach, as seems to be advocated by the European Commission, implying that the NCAs will solely or mainly focus on arguments related to competition, market structure, efficiencies and consumer welfare

[23] J.E. Stiglitz and C.E. Walsh, *Economics* (New York/London: W.W. Norton & Company), pp. 221-225.
[24] Economists tend to differ as to the categorization of the different types of market failure. See Kalbfleisch, n6 above, 467 and Stiglitz, n23 above, 239 ff.
[25] F. van Doorn, *Resale Price Maintenance in EC Competition Law, a law and economics perspective*, Master's thesis in law and economics, 2009, Utrecht University and Cseres, n2 above, 127 ff.
[26] Townley, n6 above, 76.

when applying competition law. They may also follow a mixed approach, one in which economic analysis plays a crucial role, but in which there is still a role for non-competition arguments. Two types of balancing can be distinguished within the context of the mixed approach. The first type has been characterized by Townley as 'market balancing'.[27] Although it is clear that non-competition interests play a role, these interests should be internalized in the competition analysis as far as possible; the non-competition interests are translated into economic efficiencies and in that form they are balanced against the restrictions of competition. The second type of balancing has been characterized by Townley as 'mere balancing'.[28] When this type of balancing is applied, non-competition interests are weighed more independently against competition interests and are given a central role in a competition analysis.

The legal framework for balancing competition and non-competition interests

Preliminary remarks

Depending on the relevant competition provision, the legal and economic context of the behaviour concerned and the non-competition interest involved, non-competition interests can play a greater or less prominent role in the decision-making process of the Commission or the national competition authorities.[29] Distinguished authors have aptly analysed and illustrated that Articles 101 TFEU, 102 TFEU, 106(2) TFEU and the merger control provisions provide leeway for integrating non-competition interests in competition decisions.[30] Therefore, it is not the purpose of this section to reiterate all the different competition provisions and methods for integrating non-competition interests in applying these provisions. This paper focuses on the role of the NCAs in balancing competition and non-competition interests, with the practice of the Dutch competition authority serving as a case study. For a good understanding of the case study, this section sets out the limits and possibilities for integrating non-competition interests in the provisions that have most frequently given rise to questions regarding non-competition interests in the practice of the Dutch NCA. From this perspective this paper analyses the leeway for taking into account non-competition interests in the material scope of Articles 101 and 106(2) TFEU and the merger control provisions.[31]

European competition law provides the relevant legal framework for the NCAs when they apply European and/or national competition law. First, in the case of a parallel application of European and national competition law, the NCAs should ensure that the national cartel prohibition is applied neither more strictly nor more loosely than European competition law.[32] Secondly, in some Member States, such as the Netherlands and the UK, national law goes beyond the requirements of European law and Regulation 1/2003, as it

[27] Townley, n6 above, 7.
[28] Townley, n6 above, 7.
[29] For an analysis of six methods by which to integrate public policy considerations in competition decisions, see G. Monti, *EC competition law* (Cambridge University Press 2007), pp. 113-117.
[30] See footnote 6.
[31] For an analysis of the personal scope of competition law, see De Vries, n6 above, 104. For an analysis of the role of non-competition interests in Article 102 TFEU, see E. Rousseva, 'Abuse of Dominant Position Defences', in: G. Amato and C.D. Ehlerman (eds), *EC Competition Law, a critical assessment* (Oxford: Hart Publishing 2007), p. 389 ff.
[32] See Article 3(1) and (2) of Regulation 1/2003.

requires the NCAs to apply the cartel prohibition and the prohibition of the abuse of a dominant position in intrastate situations insofar as possible and in a manner consistent with EU law.[33] Moreover, in the Netherlands, national law also obliges to interpret the national merger provisions in a manner consistent with the EU merger regulation.[34]

Article 101(1) TFEU

The European Commission and the NCAs may have to deal with non-competition interests when assessing whether there is an appreciable restriction of competition in the sense of Article 101(1) TFEU. First, the ECJ has created a special status for agreements that improve working and employment conditions and that are concluded in the context of collective bargaining between employer and employee associations. In the *Albany* case the ECJ held that these types of agreements fall outside the scope of Article 101(1) TFEU.[35]

Secondly, it follows from ECJ case law that certain types of agreements that may restrict the commercial behaviour of undertakings do not violate Article 101(1) TFEU if, because of their objectives and context, these agreements are necessary and proportionate for the realization of non-competition interests.[36] These types of cases, such as *Wouters* and *Meca Medina*, in any event concern acts of collective bodies, regulating the behaviour of their members pursuing a non-competition interest, and resulting in restrictions that are inherent in and proportionate for the realization of the non-competition interest concerned.[37] Monti has characterized this exception as the introduction of a European-style rule of reason in competition law.[38] The Court incorporated the rule of reason deployed in the free movement area, entailing a balancing of trade restrictions with domestic mandatory requirements of public policy, as a mechanism for justifying an agreement otherwise unlawful under Article 101(1) TFEU.[39] In literature the question has been raised whether the case law of the ECJ in these cases should be narrowly interpreted or not.[40] At the moment ECJ case law is not conclusive on this point.

Article 101(3) TFEU

If article 101(1) TFEU is deemed to be applicable to restrictive agreements, the question arises to what extent non-competition interests can play a role in the application of the exception in Article 101(3) TFEU. Until Regulation 1/2003 entered into force, the

[33] J.W. van de Gronden & S.A. de Vries, "Independent competition authorities in the EU", (2006) 2 *Utrecht Law Review* 32.
[34] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of concentrations between undertakings [2004] OJ L 24/1.
[35] *Albany* (C-67/96) [1999] E.C.R. I-5751 with annotation by L. Gyselen (2000) 37 *CMLRev* 441. See also H. Schweitzer, "Competition Law and Public Policy, the Example of Article 81", EUI Working papers, Law 2007/30, p. 4.
[36] *Wouters* (C-309/99) [2002] E.C.R. I-1577 at [97] and *Meca Medina* (C-519/04P) [2006] E.C.R. I-6991 at [42]. See G. Davies, "Article 86 EC, The EC's Economic Approach to Competition Law and the General Interest", (2009) 5 *European Competition Journal* 567.
[37] Davies, n36 above, 567.
[38] Monti, n6 above, 1086 ff.
[39] Monti, n6 above, 1086 ff.
[40] See e.g. Townley, n6 above, 63 and Davies, n36 above, 568 who advocate, especially after case C-519/04P, *Meca Medina*, a broad reading of the ECJ case law. For a contrary view, see E. Loozen, "Professional Ethics and Restraints of Competition" (2006) 31 *European Law Review* 28 and Schweitzer, n35 above.

Commission had been willing to integrate non-competition interests, such as public health, environmental and cultural interests, in its exemption decisions to the extent that these interests could be subsumed under the conditions of Article 101(3) TFEU.[41] Particularly the condition of "contribution to improving the production or distribution of goods or advance technological and economic progress" may include non-competition interests.[42] This practice has been accepted by the ECJ.[43] In general the Commission took a cautious approach. It linked non-competition interests to the conditions of Article 101(3) TFEU and they were used as complementary arguments to substantiate that the economic conditions of Article 101(3) TFEU had been fulfilled.[44]

However, in some cases, such as the *CECED* case on protection of the environment, the Commission came close to using a non-competition interest as a core argument in granting an exemption for a restrictive agreement.[45] It did not apply an intensive proportionality test when assessing whether the agreement qualified for exemption: it examined other, less restrictive means to realize the environmental benefits concerned, though not in an in-depth way. Commentators have argued with regard to the protection of the environment that the Commission is willing to adopt a broad welfare approach. Accordingly, environmental benefits can be translated into economic values that are of importance for consumers and that can, like productive efficiencies, be directly balanced as independent factors against the restriction of competition.[46] This approach is justified by the high priority that both TEU and TFEU place on sustainable development.[47]

Despite these developments, the question whether and to what extent protection of the environment can play a separate role in applying Article 101(3) TFEU has not yet clarified in law. Since Regulation 1/2003 has entered into force, the Commission suggests that it adopts a restrictive welfare approach, giving little room to non-competition interests.[48] However, it remains to be seen whether the ECJ will accept this purist approach and how the Commission will apply its policy in practice. As discussed before, according to modern economic theory, non-competition interests can be translated into economic efficiencies and if translated and adequately substantiated they can be weighed against competition restrictions. In any event the Commission has indicated that it adopts, under certain conditions, a positive stance on environmental agreements.[49] This indicates that the Commission is aware that in practice a purist approach will not always be in the interest of consumers. However, probably in order to ensure a consistent and effective application of competition law by the NCAs, it is cautious about deciding in advance in which cases non-competition interests might play a role.

A Service of General Economic Interest (SGEI)

[41] De Vries, n6 above, 199 ff, Monti, n6 above, 1069-1978 and Schweitzer, n35 above, 6-8.
[42] De Vries, n6 above, 199.
[43] See *Metro* (C-26/76) [1977] E.C.R. 1875 and *Métropole* (T-528/93) [1996] E.C.R. II-649.
[44] Schweitzer, n35 above, 7.
[45] Commission, Decision 24 January 1999, [2000] OJ L 187/47, CECED.
[46] Monti, n6 above, 1075, De Vries, n6 above, 205 and H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability* (Groningen: Europa Law Publishing 2003), p. 166-170.
[47] Monti, n6 above, 1075 and Articles 3 TEU and 11 TFEU.
[48] Guidelines on the application of Article 81 EC to horizontal agreements, OJ 2001 C 3/2, par. 31-36, Guidelines on the application of Article 81(3) EC OJ 2004 C 101/97, par. 33.
[49] Guidelines on horizontal agreements, par. 189-197.

If restrictive agreements cannot be excepted from the cartel prohibition on the basis of their objectives and context or on the basis of Article 101(3) TFEU, the behaviour concerned might still be excepted on the basis of Article 106(2) TFEU.[50] Though the Lisbon Treaty has not changed Article 106(2) TFEU, it has reformulated Article 16 TEC (now Article 14 TFEU), stressing the joint responsibility of the Union and the Member States in the protection of services of general economic interest and establishing a legal basis for the EU to take action in this field.[51]

Article 106(2) TFEU provides that undertakings charged with an SGEI are subject to the rules of the TFEU, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. It follows from ECJ case law that two conditions have to be met for a successful application of the exception in Article 106(2) TFEU.[52]

First, the undertaking concerned should be charged with a service of general economic interest. Secondly, the exception to the competition rules should be proportionate for an adequate performance of the SGEI.[53] Neither the TFEU nor ECJ case law define clearly what is meant by the SGEI concept.[54] If the Community legislator has not adopted specific or general legislation specifying the concept, the Member States enjoy significant latitude in formulating and designing SGEIs.[55] This is also confirmed by the Protocol on Services of General (Economic) Interest which was added to the TFEU by the Treaty of Lisbon.[56] However, in the cases in which the ECJ has accepted that a certain undertaking was charged with an SGEI, the concept of SGEI is linked to specific public service obligations to which an undertaking is made subject to ensure the protection of certain non-competition interests, including universal service.[57] Universal service refers to a right of everyone to access certain essential services at affordable tariffs and of a specified quality, including complete territorial coverage and security of supply, independently of the area where the user is located.[58]

The TFEU requires that an act entrusting an undertaking with an SGEI be present. It is not necessary that an undertaking is explicitly charged with an SGEI through the attribution of special or exclusive rights. An SGEI may also be entrusted to undertakings by an obligation imposed on a large number of, or indeed on all, operators active on the same market if the obligations entailed go considerably beyond ordinary conditions of authorization to exercise an activity in a specific sector.[59] Thus the existence of an SGEI may under certain conditions be implicitly derived from the broader legal context.[60]

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[50] W. Sauter, "Services of General Economic Interest and universal service in EU law" (2008) 33 *European Law Review* 167.
[51] European Commission 2007, n20 above, 3.
[52] There is a third condition found in the TEU itself, meaning that the interests of the EU may not be harmed, but this condition has not played an important role in the ECJ case law so far. See A. Jones and B. Sufrin, *EC Competition Law – Text, cases, and materials* (Oxford: Oxford University Press 2008), p. 667.
[53] See for a discussion Sauter, n50 above.
[54] Sauter, n50 above, 174-176.
[55] *BUPA* (T-289/03) [2008] E.C.R. II-81.
[56] Protocol 26.
[57] See e.g. *Commission v Netherlands* (C-157/94) [1997] E.C.R. I-5699, *Corbeau* (C-320/01) [1993] E.C.R. I-2533, *Ambulanz Glöckner* (C-475/99) [2002] E.C.R. I-808 and European Commission 2007, p. 10.
[58] Sauter, n50 above, 176 ff.
[59] See *BUPA* (T-289/03) [2008] E.C.R. II-81 at [179]-[184] and *Commission v Netherlands* (C-157/94) [1997] E.C.R. I-5699.
[60] See Sauter, n50 above, 184.

Since *Corbeau* the ECJ has been willing to apply the proportionality test in a rather marginal way when assessing state measures restricting competition for reasons **r**elated to the provision of universal services.[61] Accordingly, in order to invoke Article 106(2) TFEU successfully, a Member State is required to show that the measure restricting competition is necessary to ensure that the undertaking charged with an SGEI can fulfil its tasks under economically acceptable conditions.[62] The Member State is not required to prove positively that no other conceivable measure could enable the undertaking to perform its tasks under the same conditions. As this proportionality test concerns the assessment of state measures restricting competition for reasons of public interest, it is not yet clear whether the ECJ will apply a comparable marginal test in relation to restrictive practices of undertakings charged with an SGEI.[63]

Merger control

Non-competition arguments can also play a role in merger decisions. Merger Regulation 139/2004 creates the possibility for Member States to take appropriate measures to protect legitimate interests other than those taken into account by the merger regulation and which are compatible with the general principles and other provisions of Community law.[64] It is assumed that this provision should be negatively interpreted, empowering Member States to condemn concentrations, rather than to allow them on non-competition interest grounds.[65] This exception to the merger regulation will be strictly applied by the Commission and must respect the proportionality principle.[66] Further, non-competition interests may play a role in the strictly circumscribed conditions for the acceptance of an efficiency claim, to the extent that they can be translated into economic efficiencies.[67] The European Commission critically assesses whether efficiencies may compensate for the distorting effects that result from a merger and will only accept efficiency claims that are for the benefit of consumers, are merger-specific and verifiable. Here too, the proportionality principle plays an important role in the acceptance of the efficiency claim.[68] In the view of the Commission, efficiencies must be a direct consequence of the merger and may not be achievable by less anti-competitive measures.[69]

State action doctrine

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[61] *Corbeau* (C-320/01) [1993] E.C.R. I-2533 and De Vries, n6 above, 163-165 and Sauter, n50 above.
[62] *Commission v Netherlands* (C-157/94) [1997] E.C.R. I-5699, *Corbeau* (C-320/01) [1993] E.C.R. I-2533 and *Ambulanz Glöckner* (C-475/99) [2002] E.C.R. I-8089.
[63] Advocate General Jacobs suggested in his opinion in *AOK* (C-264/01) [2004] E.C.R. I-249 that the restrictive measures of undertakings entrusted with an SGEI should be subjected to a proportionality test comparable to that for state measures.
[64] Article 21(4) of Merger Regulation 139/2004.
[65] Jones and Sufrin, n52 above, 985, R. Whish, *Competition Law* (Oxford: Oxford University Press 2009), pp. 839-840 and De Vries, n6 above, 241.
[66] See for example Case M.567, *Lyonnaise des Eaux/Northumbrian Water* and Case M.423, *Newspaper Publishing*.
[67] European Commission, 'Guidelines on the assessment of horizontal mergers under the Council regulation on the control of concentrations between undertakings', OJ 2004 C 31/5.
[68] Horizontal merger guidelines, par. 79 ff.
[69] Horizontal merger guidelines, par. 85.

It is possible for Member States to supervise or stimulate restrictive practices for non-competition reasons, for instance by delegating regulatory powers. When there is state support for restrictive practices, this may have two consequences.

On the one hand there are indications from ECJ case law and from Commission practice that a more lenient proportionality test will be applied to assess whether those practices can be excepted from the cartel prohibition.[70] For instance, in *Wouters*, the ECJ used a marginal proportionality test to assess whether the rules adopted by a professional body acting under state supervision could be excepted from Article 101(1) TFEU. In *CECED,* the Commission could justify a moderate proportionality test by referring to Article 174 of the EC Treaty (now Article 191 TFEU), providing that environmental damage should be rectified at source.

On the other hand, the state action doctrine could apply to such state measures and render the state responsible for allowing or promoting anti-competitive action.[71] In particular, Article 4 TEU and Article 101 TFEU are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects.[72] Articles 4 TEU and 101 TFEU are also infringed where a Member State divests its own rules of the character of legislation by delegating responsibility for taking decisions affecting the economic sphere to private actors.[73] The case law of the ECJ is not entirely consistent with regard to the requirements to be met by state measures delegating certain regulatory functions to undertakings.[74] There are indications that the following (procedural) factors are relevant: the members of regulatory commissions/bodies act as experts and operate independently from the undertakings concerned; they are obliged to take into account public interest criteria; there is some type of state supervision, which includes the possibility to annul, amend, substitute or approve the decision taken by the commissions/bodies involved.[75]

It follows that, as the case law now stands, there is a procedural defence for the state under the state action doctrine, provided that the private practices are subject to active state supervision. However, the ECJ has not yet ruled that there are any substantive defences for the state under the state action doctrine, including Article 101(3) TFEU. So the defences for private parties and the state are not coextensive. This could lead to a situation in which private parties justify restrictive behaviour by referring to state measures and substantive exceptions, whereas the state measures themselves cannot be justified because of a lack of substantive defences. In the subsections on state support under the heading "Proportionality", procedural and substantive norms are developed for the assessment of state measures under the state action doctrine and the consequences for the legality of the private practices involved.

Observations

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[70] If national legislation has precluded any scope for autonomous private conduct that may distort competition, the regulatory framework acts as a shield against the consequences of an infringement of Article 101 TFEU. See e.g. *Ladbroke Racing* (C-379/96P) [1997] E.C.R. I-6165 at [33] et seq.

[71] *Reiff* (C-185/91) [1993] E.C.R. I-5801 at [14], *Delta Schiffahrts* (C-153/93) [1994] E.C.R. I-2517 at [14], *Arduino* (C-35/99) [2002] E.C.R. I-1529 at [34] and *CIF* (C-198/01) [2003] E.C.R. I-8055 at [45].

[72] *CIF* (C-198/01) [2003] E.C.R. I-8055 at [46].

[73] See Baquero Cruz, "The State Action Doctrine", in: G. Amato and C.D. Ehlerman (eds), n31 above, 588.

[74] Baquero Cruz, n73 above, 588.

[75] *Arduino* (C-35/99) [2002] E.C.R. I-1529 at [37]-[42].

From a legal perspective, it may be concluded that the TFEU and the policy-linking clauses in particular, as well as the case law of the ECJ, leave some leeway for non-competition interests in the interpretation of competition law. From an economic perspective, non-competition arguments can (to a certain extent) be translated into economic efficiencies and be weighed against competition factors. Accordingly, from an economic point of view, it would be in the interest of consumers if, under certain conditions, those arguments could also play a role in competition decisions. However, very often there is a problem of proof: it is difficult to measure how much value consumers attach to e.g. environmentally-friendly products.[76] A relevant question is under what circumstances there is sufficient (economic) proof to substantiate the value of non-competition claims (see subsection "Proportionality").

The limits to the role of non-competition interests in applying the various competition provisions are not yet clearly delineated. Two trends relating to the role of non-competition interests can be discerned from the case law:

1) The proportionality principle plays a crucial role in justifying restrictions to competition for non-competition reasons. The proportionality principle is applied with varying intensity, depending on the restrictive behaviour at issue and the relevant economic and legal context in which the behaviour occurs. The intensity of the proportionality test can be assessed on a sliding scale, with an intensive test at the one extreme and a marginal test at the other. In the middle of these two extremes one can identify a moderate proportionality test. An example of a marginal proportionality test is the test adopted by the ECJ when assessing whether the restrictions resulting from the professional regulations adopted by the collective bodies in *Wouters* and *Meca Medina* were necessary and proportionate to realize the non-competition interests concerned. In *Wouters* the ECJ merely reviewed whether the measures involved could reasonably be considered necessary to ensure the proper practice of the legal profession as it was organized in the Member State concerned. An example of a moderate proportionality test can be found in *CECED*. In assessing whether an environmental agreement complied with the conditions of Article 101(3) TFEU, the Commission did examine less restrictive alternatives, although it did not go into them very deeply. In the guidelines on Article 101(3) TFEU, the Commission indicates that, in principle, it will apply an intensive proportionality test to assess whether restrictive agreements comply with the conditions of Article 101(3) TFEU, i.e. it will critically examine whether there are less restrictive measures. The Commission also suggests that it applies an intensive proportionality test, thoroughly examining less restrictive alternatives, when assessing an efficiency claim within the context of merger control.[77] On the other hand, the ECJ has been willing to apply a marginal proportionality test when assessing whether restrictive state measures could be justified on the basis of Article 106(2) TFEU.[78]

2) As discussed, there are indications from ECJ case law and Commission practice that non-competition interests will be more readily accepted if the undertakings concerned can refer to policy-linking clauses or operate under some type of state supervision as

[76] Davies, n36 above, 570.
[77] The Commission suggests that it applies an intensive proportionality test when assessing non-competition arguments in the context of Article 102 TFEU, Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings, COM (2008), par. 27-30.
[78] Sauter, n50 above, 186-188.

compared to the situation where they conclude a cartel on their own initiative (see subsection "Proportionality").[79]

These legal and economic factors raise doubts as to the legitimacy of the purist approach that the Commission had adopted in its post-2000 policy guidelines.[80] The next section discusses that the decision-making practice of the Dutch NCA, in contrast to Commission practice, provides interesting examples of the role of non-competition interests in competition decisions.

Case study: the Netherlands Competition Authority and non-competition interests

Preliminary remarks

There are indications that national competition authorities adopt different approaches with regard to the role of non-competition interests in competition decisions. For instance, the German BundesKartellamt seems to follow a more purist approach, excluding non-competition arguments from competition analysis as far as possible.[81] A speech by Peter Freeman, the chairman of the UK Competition Commission, suggests that the Competition Commission gives some scope to non-competition interests when making competition law assessments and adopts a mixed approach.[82] Freeman explains that competition law can internalize non-competition interests in several ways by not needlessly shutting one's eyes to the overall context and other policy objectives, but he emphasizes that it is not up to the competition authorities but to elected governments to resolve conflicts between competition interests and non-competition interests.[83]

The Netherlands Competition Authority (hereafter NMa) also takes a mixed approach with regard to the role of non-competition interests in competition decisions. At the end of the 1990s a restrictive agreement concerning a collective arrangement for the collection and recycling of used batteries was exempted from the cartel prohibition. The importers and producers of batteries involved had agreed to contribute to the financing of the arrangement by paying a fixed disposal charge for each battery marketed by them on the Dutch market. NMa was willing to exempt the agreement and referred to similar environmental considerations as the Commission did in the *CECED* decision, though it decided that the obligation of the producers to pass on the disposal charge to the consumers was disproportionate.[84] After a relatively silent period, since 2008 NMa has been more active in advocating the relevance of competition law as a means of promoting non-competition interests. In its annual reports on its activities in the years 2008 and 2009, NMa explicitly

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[79] See also Davies, n36 above, 565, with regard to the role of state support in the context of article 102 TFEU.
[80] See also Townley, n6 above, 86, who discusses the fact that even Commission decisions and comfort letters after 2000 showed some acceptance of the notion that public policy goals have a place in Article 101 TFEU, but there is no consistent practice.
[81] See for an example: BundesKartellamt prohibits merger between municipal hospitals in Hesse, press release 19 June 2009. See Van de Gronden & De Vries, n33 above, 49.
[82] Peter Freeman, Chairman, Competition Commission, speech at the Law Society on 21 July 2008 "Is Competition everything?".
[83] See also Competition Commission, *Market Investigation into the supply of groceries in the UK*, 30 April 2008, par. 2.11-2.18.
[84] Decision 51 (Stichting Stibat). See Vedder, n46 above, 391-397.

stated that it will have regard to non-competition interests in competition decisions.[85] In somewhat guarded terms it acknowledged that in some cases tensions may arise between competition interests and non-competition interests.[86] Though NMa says that it will do a balancing act in those cases, it does not provide much clarity on the framework within which this is to be carried out.

This section will look at some recent cases of NMa, since they are illustrative of the way NMa has tinkered with the ambiguity as to the role of non-competition interests that was revealed in the section above. They also show that NMa (and other NCAs) may need more assistance in developing a transparent framework for balancing competition and non-competition interests, for which this article will provide some suggestions in the section "How to balance?".

Central elements of the Dutch Competition Act

In 1998 the Dutch Competition Act (*Mededingingswet*, hereafter Mw) entered into force. This act introduced a system prohibiting restrictive cartel agreements (Article 6 Mw) and abuses of a dominant position (Article 24 Mw) as well as an ex ante merger control regime. The prohibition system replaced a system in which restrictive practices and abuses of a dominant position were allowed, unless they were prohibited by the Minister of Economic Affairs.[87] Compliance with the Competition Act 1998 is enforced by an independent administrative agency, the Netherlands Competition Authority (NMa).

The provisions of the Dutch Competition Act were drafted in harmony with the competition law provisions of the TFEU, albeit that they also apply to intrastate situations. They must be interpreted in harmony with ECJ case law and the policy guidelines of the European Commission. The Act also provides exceptions for services of general economic interest: Article 11 Mw 1998 stipulates an exception to the cartel prohibition for the performance of such services. NMa is obliged to apply this provision in a manner consistent with Article 106(2) TFEU.

The cartel prohibition and non-competition interests

The quality of home-care services

NMa imposed huge fines on home-care organisations for having concluded market share agreements that divided the geographical market for the provision of home-care services (household work and nursing for elderly, disabled and sick people) in certain areas of the Netherlands.[88] The parties phrased their defence in a *Wouters* type of argument and argued that the agreements did not violate Article 6(1) Mw. They held that the restrictions resulting from the agreements were necessary and proportionate to ensure the efficient provision of high-quality home-care and personal-care services. By dividing these two markets, the parties

[85] NMa, Annual report 2008, *De Keuze* and NMa, Annual report 2009, *Belangen wegen.* See also NMa policy guidelines on the application of competition law in the healthcare sector 2010.
[86] T.R. Ottervanger, *Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld* (inaugural lecture), Leiden University, 2010.
[87] P.J. Slot et al., *Inleiding Mededingingsrecht* (The Hague: Boom Juridische Uitgevers 2007), p. 39.
[88] NMa, case 6108/258, Kennemerland and NMa case 5851/211, 't Gooi.

were able to provide home-care and personal-care services from their intramural locations close to their clients' homes. This lowered the costs for the care services and enabled the clients to live in their own homes for a longer period.

In the absence of any state involvement that promoted or delegated the conclusion of the agreements, NMa was not convinced that the agreements solely pursued legitimate objectives. NMa considered that the relevant agreements had the object of restricting competition, as the infringements, by their very nature, could be considered harmful to the proper functioning of normal competition. The intentions of the parties or the goals of the agreements could not justify the practices concerned. Moreover, in the opinion of NMa, if the parties had merely wanted to ensure the quality of the home-care services, different, less restrictive measures would have been available to them. For instance, instead of structurally dividing the market, the parties could also have chosen the option of a once-only transfer of care teams and a limited form of co-operation focused on this transfer to help clients in a certain area. In addition, NMa did not see its way to justifying these restrictions on the basis of the exception to the cartel prohibition (Article 6(3) Mw), which includes the same conditions as Article 101(3) TFEU. To assess whether the conditions of an exception had been fulfilled, it applied a strict proportionality test and placed a heavy burden of proof on the parties who claimed that the restrictions were necessary to protect the quality of home-care services.

From this case it follows that NMa will not readily accept arguments relating to the protection of non-competition interests in order to justify agreements that have the object of restricting competition and that were concluded on the initiative of the parties concerned, without any involvement of the state.

Animal welfare

In an informal opinion NMa accepted a non-competition argument related to the promotion of animal welfare to justify an agreement between various associations in the food and agricultural sector with regard to the castration of piglets under anaesthetic.[89] It was found to be relevant that the parties in the pork meat supply chain had concluded the agreement as part of the implementation of a Declaration (*Verklaring van Noordwijk*) to promote the welfare of piglets, which was supported by the Minister of Agriculture and the Dutch Association for the Protection of Animals. The parties involved formulated the goal of ending the practice of castrating piglets by 2015 at the latest. As an intermediate solution the parties set up an arrangement with horizontal and vertical effects applicable to the entire supply chain. The first part of the arrangement is the creation of a compensation fund. The participating pig farmers are given once-only compensation from the fund for their investment in the anaesthetic equipment. The fund has been fed by the participating supermarkets, which pay a surcharge of € 0.03 on every kilogram of meat purchased in the initial phase of the arrangement. Secondly, the parties agreed that the supermarkets would stop buying fresh pork obtained from pigs that were castrated without being anaesthetized.

With regard to the first part of the arrangement (the compensation fund) NMa considered that the fund is of a temporary nature, as the parties can only receive one-off compensation for a limited period for their investments in anaesthetic equipment. Moreover,

[89] NMa, informal opinion, reference 5455_1. See for a critical assessment E.G. Litjens, "Kleine ingreep" (2009) *Markt & Mededinging* 161.

the compensation only covers part of the investment costs. The supermarkets have the autonomy to set their selling prices, and are not required to pass on the costs to consumers. NMa was therefore of the opinion that the first part of the arrangement was not obviously restrictive, in particular because the goal of the arrangement was to promote animal welfare, and the information provided did not indicate that the parties would engage in parallel price behaviour. With regard to the second part of the arrangement NMa considered that 95% of the supermarkets would participate in the arrangement and would stop buying meat obtained from piglets castrated without anaesthetic; 53% of the total amount of fresh pork marketed would be sold via this channel. Although this part of the arrangement did amount to a purchase restriction, NMa was of the opinion that there was no foreclosure effect and no obvious restriction of competition, as long as the demand from the remaining outlet channels for pork obtained from pigs castrated without anaesthetic could be met.

Although the arrangement raised some serious competition concerns, NMa managed to allow the agreement by giving a central role to the promotion of animal welfare. NMa applied a *Wouters* type rule of reason by referring to the goal of promoting animal welfare in assessing whether the agreement violated the cartel prohibition. However, it did not elaborate this argument to any degree; it did not deal with the question of whether the restrictions are inherent in and proportionate for the realization of the goal of animal welfare. It combined its reasoning with a limited assessment of the question whether the agreement would have an (appreciable) effect on competition, leading to an ill-founded conclusion that there was no restriction of competition as long as alternative outlet channels were not foreclosed. In particular, NMa did not adequately investigate the foreclosure effects of the purchase restriction in practice. It did not take into account that, due to the structure of the supply chain, the effect of the agreement would be that in practice, pig holders would no longer sell meat from pigs castrated without being anaesthetized.[90]

Despite the informal character of the opinion, it shows that NMa is more ready to accept non-competition arguments to justify restrictive agreements if the agreements are supported by the political arena and the parties involved have asked NMa for an opinion on the compatibility of the arrangement with competition law. It is also of interest that NMa in effect applied a broad welfare concept. In assessing whether a restrictive agreement would have a positive effect on welfare, it was willing to include the promotion of animal welfare. It gave substantial weight to this interest, without analysing less restrictive measures, and without substantiating its opinion with economic evidence about the value attached by consumers to meat produced in an animal-friendly way. The opinion suggests that, in NMa's view, the political declaration itself expressed that consumers significantly value animal-friendly meat.

Quality of hospital care

In 2009 NMa conditionally approved a much debated merger between two hospitals in an isolated area in the south-west of the Netherlands (Midden-Zeeland).[91] The merger

[90] Litjens, n89 above, 164-165.
[91] NMa, case 5196, Ziekenhuis Walcheren-Stichting Oosterscheldeziekenhuizen, with annotation by P.D. van den Berg (2009) *Markt & Mededinging* 153. See e.g. M. Snoep, D. Schrijvershof and S. Chamalaun, "Zorgfusies getoetst, een juridisch perspectief" (2009) *Markt & Mededinging* 62, M.F.M. Canoy and W. Sauter,

decision was controversial, as the new entity would gain a near monopoly position on the market for general in-patient and out-patient hospital care in the area of Midden-Zeeland. Although the merger would create a dominant position and thus significantly lessen competition, NMa approved it by accepting, under strict conditions, a non-competition argument related to maintaining the quality of the hospital services in the area.

In preparing the decision, NMa intensively consulted with all relevant market participants and other public authorities. The Healthcare Inspectorate (*Inspectie voor de Gezondheidszorg*, hereafter IGZ*),* an independent authority responsible for overseeing the quality of healthcare services, had to be consulted on the impact of the proposed merger on the quality of healthcare services.[92] Its opinion was decisive for NMa's final decision. According to the IGZ the proposed merger was necessary to guarantee the availability of good-quality hospital services in the area of Midden-Zeeland. Without the merger it could not be assured that the hospitals involved would have sufficient scale to continue to provide basic hospital care, such as high-level intensive care services, needed in Midden-Zeeland. The hospitals were simply too small to meet certain standards as to the necessary volume of treatment and surgery that had to be performed in order to guarantee its quality. If the types of treatment offered were too limited in scale, this would make it difficult for the hospitals to specialise in sub-disciplines, making it harder to attract specialists and to fill vacancies. Because the different functions of the hospitals were interrelated and interdependent, it would not be adequate for the hospitals merely to co-operate in providing certain services. In fact, the integration of certain functions of the two hospitals would also affect the provision of related services, leading to a domino effect. Therefore, in the opinion of the IGZ, the only way to guarantee the availability of basic hospital care in Midden-Zeeland would be to allow the proposed merger.

As far as was possible, NMa translated the non-competition interest into the economic criteria for accepting an efficiency claim as set out by the horizontal merger guidelines of the Commission.[93] In dealing with the first condition of the efficiency claim (benefits for consumers) put forward by the hospitals, NMa (and the IGZ) acknowledged that the expected quality improvements resulting from the merger had to be balanced against the interest of accessible healthcare. Indeed, the creation of a new entity could cause patients to travel longer distances for certain hospital services. In balancing these considerations, NMa explicitly referred to a policy document of the responsible minister which states that, taking into account certain minimum standards, the minister prioritizes the quality of healthcare services above their accessibility, to justify its decision to give greater weight to their quality. However, as a consequence of creating a near monopoly, the new entity would be able to raise the prices for hospital services. If these price increases were disproportionate to the increase in quality, it cannot be assumed that the efficiency improvements would benefit consumers. The parties offered remedies to NMa, including a price cap for the provision of liberalized hospital services (based on the national average in the competitive sector), which were accepted by NMa. On that basis NMa concluded that the first condition of the efficiency claim had been fulfilled. The second condition of the efficiency claim (merger specificity) in fact entails a proportionality test. As the parties did not provide detailed information on the necessity of the merger to realize the claimed efficiencies, NMa, with the help of an external consultancy, conducted a further investigation into alternative forms of co-operation between the two

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"Ziekenhuisfusies en publieke belangen" (2009) *Markt & Mededinging* 54 and M.C.W. Janssen, K. Schep and J. van Sinderen, "Fusies van ziekenhuizen" (2009) *Markt & Mededinging* 44.

[92] This advice is not binding, although NMa had to provide sufficient reasons as to how it took the advice into account in its final decision.

[93] See footnote 67.

hospitals. This investigation showed that other hospitals in comparable situations had chosen for less far-reaching co-operation structures than a merger to maintain the quality of healthcare services. Without conducting an in-depth investigation into alternative co-operation arrangements, NMa concluded that in the specific situation of the hospitals involved, there was sufficient evidence for the necessity of the merger. In assessing whether the efficiencies were also verifiable (the third element of the efficiency claim), it appeared that the parties could not substantiate the efficiencies with adequate economic evidence, including quantitative information on the efficiencies. Nevertheless, NMa considered that the opinion of the IGZ on the quality improvements that would result from the merger provided an objective and adequate basis to verify that the efficiencies would be substantial. However, NMa found it necessary for the parties to offer some behavioural remedies, including solid commitments as to the realization of quality improvements, to guarantee that the efficiencies would in fact be achieved in full and in a timely manner.

Without thoroughly examining less restrictive alternatives, NMa conditionally approved the merger for reasons related to the quality of hospital services, despite the fact that adequate economic data on the impact of mergers on this quality was lacking.[94]

Observations

Though the empirical base is still limited, the policy documents and decisions discussed indicate that NMa is willing to adopt a broad welfare approach and, under certain conditions, give greater scope to non-competition interests in competition decisions. In the decision on the merger between the hospitals in Midden-Zeeland and the informal opinion on the piglets, NMa went beyond the internalization of non-competition arguments in a competition law assessment ('market balancing'). Non-competition arguments played an autonomous and core role ('mere balancing') in these decisions. NMa explicitly referred to different types of state measures, e.g. political declarations, legislative acts or the opinion of an expert authority, to justify the importance it attached to the non-competition factors in these cases. The decision on the cartels in the home-care sector shows that NMa is not inclined to take into account non-competition interests when undertakings enter into restrictive practices on their own initiative, without consulting NMa and without referring to state measures supporting the practices. In these types of cases NMa applies a strict proportionality test, leaving little or no room for non-competition interests.

The mixed approach of NMa means that it has to resort less often to the exception of Article 106(2) TFEU relating to Services of General Economic Interest, and the corresponding exceptions in the Dutch Competition Act (Articles 11 and 25 Mw). This is of special importance, since there are indications that NMa is reticent about accepting the presence of an SGEI, as the Dutch legislator has very often not explicitly charged the providers of social services with the performance of services of general economic interest.[95] For instance, the regulation for providers of healthcare services shows a fragmented and non-transparent picture with regard to the question whether they are charged with an SGEI in the sense of Article 106(2) TFEU.[96] Although NMa ought to consider the case law of the European courts which allows it to infer a task of general economic interest from a complex of restrictions and public service obligations to which providers are subjected by the

[94] Canoy & Sauter, n91 above, 56 ff.
[95] See e.g. NMa, 21 December 2001, case 2513/40, Landelijke Huisartsen Vereniging, and NMa, 13 December 2000, case 882/Amicon Zorgverzekeraar.
[96] See W. Sauter, "Diensten van algemeen economisch belang en universele dienstverplichtingen in de gezondheidszorg" (2008) *Markt en Mededinging* 4.

legislator, it is not eager to do so.[97] NMa seems to be unwilling to pre-empt the role of the legislator by deciding on the politically sensitive issue whether or not certain services should be qualified as services of general economic interest. However, it can and does circumvent this issue by involving the legal framework in which certain services are provided when it weighs the various considerations in applying the cartel prohibition.

NMa practice also shows that a clear legal framework to guide the balancing of conflicting interests is absent. The section "How to balance?" will provide some suggestions as to how such a framework can be developed. But first the advantages and disadvantages of the mixed approach will be discussed.

A mixed approach: some arguments for and against

A clear economic advantage of a mixed approach is that an NCA can allow restrictive practices which, despite their negative effects for competition, ultimately have a positive net effect on consumer welfare as a result of their positive effects on non-competition aspects such as the environment.[98] Moreover, it follows from modern economic theory that in several instances the market does not lead to efficient solutions for consumers. Information asymmetries and other types of market failures are widespread.[99] As a result consumers are not in a position to decide which economic transaction will be in their best interests. Due to the pervasiveness of information asymmetries and the complexity of modern economies, the legislator may also not be in the best position to intervene in markets and remedy market failures effectively and efficiently. This is one of the reasons that European and national governments now tend to urge undertakings to incorporate social and environmental standards in their business activities and promote Corporate Social Responsibility.[100] It would be irreconcilable with the calls for Corporate Social Responsibility if NCAs could not balance competition arguments with non-competition arguments in the search for decisions that are optimal from the perspective of consumer welfare.[101]

There are also some arguments against the power of NCAs to balance competition and non-competition interests.[102] An important argument against the mixed approach is that, since undertakings are purely driven by their own economic interests, it would be inappropriate for NCAs to take non-competition interests into account when applying competition law. Although it will certainly be true that in most cases undertakings act out of self-interest, this does not mean that the weighing of non-competition interests in competition cases is out of place. An agreement between undertakings that is concluded out of self-interest and that restricts competition may at the same time have positive effects on the promotion of non-competition interests.[103] The mere fact that these benefits were not the aim of the agreement does not render it inappropriate to take them into account when applying competition rules.[104]

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[97] *BUPA* (T-289/03) [2008] E.C.R. II-81.
[98] Townley, n6 above, 37-38.
[99] J. Stiglitz, "The Invisible Hand and Modern Welfare Economics", NBER Working Paper Series, no. 3641, pp. 16-18, Davies, n36 above, 577.
[100] Townley, n6 above, 35-37.
[101] Townley, n6 above, 41-43.
[102] For a discussion of the arguments against a mixed approach, see Odudu, n6 above, chapter 7. See also Townley, n6 above, 87-103.
[103] Townley, n6 above, 89-93.
[104] Townley, n6 above, 89-93.

However, NCAs should always be aware that private parties are driven by self-interest when assessing whether restrictive practices can be justified for non-competition reasons.

Another important objection against a mixed approach is that NCAs operate to some extent independently of the political arena.[105] According to this line of reasoning, they lack the democratic legitimacy to engage in balancing competition and non-competition interests. Their mandate should be restricted to the implementation of legal norms and should not involve policy-making. This objection is rebutted by existing legal and political research that shows that, in practice, it is difficult to make a distinction between policy-making and policy implementation. Even where decisions appear to be purely concerned with implementation, the complexity of the economic and legal analysis that must be carried out prior to adopting a decision on, for example, a research and development agreement, and the potentially conflicting interests of the different market parties, mean that an NCA often has to make difficult socio-economic choices.[106] Therefore, rather than deny that NCAs enjoy a degree of discretion - they do make complex economic and legal assessments and may make policy choices (e.g. when setting priorities) - it is more useful to accept this as a fact of life and search for the limits to this discretion and for mechanisms to ensure that NCAs exercise their powers in a way that is transparent and consistent.

Other objections would be that a mixed approach creates the danger that competition law is applied arbitrarily and subjectively or that competition law is not applied uniformly throughout the 27 Member States.[107] However, the fact that NCAs balance non-competition with competition interests does not mean that they cannot work objectively and impartially. Moreover, the case law of the ECJ requires the Commission and the NCAs to take into account the economic and legal context in which anti-competitive practices are manifested each time they make an assessment, and does not require NCAs to adopt uniform decisions irrespective of the relevant context. Indeed, what matters is that the Commission and the NCAs apply consistent legal and economic methodologies and fair procedures for weighing conflicting interests, ultimately resulting in decisions that prohibit practices not in the interests of consumers.

How to balance?

Balancing principles

Criticism citing the democratic illegitimacy of NCAs and the risk of arbitrariness in their decisions should be taken seriously. It is important to clarify the limits to the way the Commission and the NCAs can take into account non-competition interests and to develop a framework for balancing competition and non-competition interests. Guidelines should be formulated for this purpose, stating what legal and economic factors NCAs must consider, thus ensuring that they balance interests in a fair and transparent manner.

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[105] This objection is less relevant for the Commission, as the Commission is a collective body and its decisions are taken on behalf of all Commissioners, including those representing policy fields other than competition.
[106] For a discussion, see S. Lavrijssen & L. Hancher, "Networks on Track: From European Regulatory Networks to European Regulatory Network Agencies" (2009) 36 *Legal Issues of Economic Integration* 21.
[107] Townley, n6 above, 38-39.

Although the exact role of non-competition interests depends on the legal provisions at issue, the non-competition interest concerned and the relevant legal and economic context, a few general principles can be formulated that can be laid down in Policy Guidelines of the European Commission. These principles - *Legality, Transparency, Proportionality, Consistency, Accountability* – are comparable to the principles that were identified by the European Commission as good governance principles in its White Paper on European governance.[108] They can largely be traced back to binding legal principles and can be seen as beacons to guide NCAs in exercising their powers to ensure good market supervision.[109] Actual experiences with the balancing of conflicting interests under the various competition provisions can be used to update the Guidelines at regular intervals and to specify the principles for different practices and non-competition interests.

Legality

The starting point is that the balancing act should respect the principle of legality, meaning that it should be conducted on the basis of and in accordance with the relevant competition provisions.[110] Accordingly, the European Commission and the NCAs cannot intervene in a case to protect non-competition interests on the basis of competition provisions if there is no competition problem.[111] In the situation that a competition problem arises, non-competition interests can, under certain conditions, be taken into consideration within the competition provisions. However, their role is limited. The NCAs should acknowledge the limits of the law each time they decide on non-competition interests. Although the specific substantive tests differ depending on the behaviour at issue, generally it is required that the benefits of the non-competition interests sufficiently compensate for the restrictions of competition, in that it is likely that they are passed on to consumers and do not result in disproportionate restrictions of competition. Moreover, the European Commission and the NCAs should consider in what way and with what means the European and/or national legislators have protected a certain non-competition interest. Townley rightly points out that NCAs may be less open to public policy balancing where the legislator has recently intervened in the specific balance, or explicitly decided not to do so, because it thought that the current balance was appropriate.[112]

Transparency

The balancing act should respect the principle of transparency.[113] This principle is multi-faceted. First, it implies that the Commission and the NCAs should make transparent the central objectives which guide the balancing of competition and non-competition interests.[114] It should make clear when it has to deal with conflicting objectives of competition policy and other policy areas and how it will resolve them. In resolving these conflicts it

[108] European Commission, European governance, A White Paper, COM(2001) 428 def. See also UK Better Regulation Task Force, *Principles of Good Regulation,* http://www.brtf.gov.uk. These good regulation principles are laid down e.g. in the UK Communications Act 2003 (Article 3(3)(a).
[109] L. Hancher, P. Larouche and S. Lavrijssen, 'Principles of good market governance', (2003) *Journal of Network Industries* 355.
[110] See J.H. Jans et al., *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2007), p. 23.
[111] Townley, n6 above, 42.
[112] Townley, n6 above, 42-43.
[113] Hancher et al., n109 above, 355 ff.
[114] Townley, n6 above, 288.

should take into account the central goals of the EU Treaty as laid down in Article 3 TEU, including the importance of sustainable development. Moreover, it should make transparent the role of competition law in protecting non-competition interests and how the interests of competition can be traded off against other interests in pursuing the ultimate goals of Article 3 TEU.

This leads us to the second aspect of the transparency principle. The Commission should make clear which legal and economic factors should be considered when competition and non-competition interests have to be balanced in the light of the ultimate goals of the EU. The Commission should clarify the role of the policy-linking clauses and their impact on the weight to be attached to the relevant non-competition interests when balancing the different interests.[115] Moreover, within the context of an impact analysis, the Commission and the NCAs should try to qualify and quantify the costs and benefits of the restrictive measures for both the competition and non-competition interests on the basis of sound economic evidence.[116] This analysis also deals with the questions of the likely impact of the practices on the different interests and when the claimed benefits for the non-competition interests will materialize.[117] An impact analysis could also compare alternative measures. Although an impact analysis does not spell out the correct answer as to which decision is optimal in the light of consumer well-being[118], it enables the authorities to follow a transparent procedure, to discuss the impact of different alternatives and to take a well-informed decision.

Proportionality

Varying intensities of the proportionality test

The principle of proportionality entails that regulatory or enforcement action is only taken when necessary, that the measures chosen are appropriate and necessary to achieve their goals and that the measures chosen are proportionate to the objectives.[119] This principle is crucial to the balancing act performed by the European Commission and the NCAs. In practice it means that the Commission and the NCAs should investigate whether there are less restrictive means by which to realize the non-competition interests and whether the relevant measures do not result in disproportionate harm to the competition interests. The proportionality test can be assessed on a sliding scale, from more to less intensive, depending on the behaviour at issue. There are indications from ECJ case law and the practices of the Commission and the NCAs that the proportionality test will be applied in a less intensive way (moderately or marginally) when some type of state supervision or state measure is in place that supports or requires the restrictive practice.[120] Arguably, in the absence of a state measure the parties will find it more difficult to demonstrate that their behaviour is in the public interest, and that it does not merely serve their own commercial interests. The extent to which such state support is required has not yet been clearly elaborated in ECJ case law.[121]

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[115] Townley, n6 above, 294 ff.
[116] For some suggestions on how a cost-benefit analysis can be made in practice, see Townley, n6 above, 294.
[117] Townley, n6 above, 298 ff.
[118] When adopting a broad welfare approach one refers to consumer well-being rather than consumer welfare, See footnote 22.
[119] See *Fedesa* (C-331/88) [1991] E.C.R. I-4023.
[120] Kalbfleisch, n6 above, 472.
[121] Kablfleisch, n6 above, 472 and Davies, n36 above, 570.

Moreover, only state measures that have not been captured by private interests should play a role in a competition law assessment.[122] The following sections will provide some suggestions for the development of procedural and substantive safeguards to assess whether state measures legitimately express the value attached by society to a certain non-competition interest.

No state support

In the absence of a state measure supporting restrictive practices, there is limited leeway for non-competition arguments. They can only play a role if they can be translated into the economic criteria of the competition provisions and be substantiated with convincing objective economic evidence, e.g. economic evidence quantifying and qualifying the costs and benefits of the agreement. An NCA should critically assess the proportionality of measures proposed to achieve the non-competition interest. In the absence of state measures and adequate economic evidence to substantiate the value of non-competition interests, there will only be a role for non-competition arguments in a limited category of cases. In these cases restrictive practices can be justified on the basis of some type of overriding public concern related to the ethics and morals of certain activities.[123] It is submitted that an NCA should search for some type of overriding objective proof (e.g. qualitative scientific reports) that the restrictive behaviour is inherent in and proportionate for the protection of a certain non-competition interest.[124] Moreover, it should apply an intensive proportionality test, conducting an in-depth assessment of different restrictive measures that will protect the non-competition interest involved.[125]

State support

In principle an NCA should substantiate the costs and benefits of the agreement to the extent possible with adequate economic evidence in the light of the conditions of the competition provisions. If there are practical limits to determining the economic value of the non-competition interests, state measures may, under certain conditions (together with other scientific evidence), complement or reinforce the economic evidence in a balancing act. In the view of Kalbfleisch this is a situation in which the budget mechanism may take over the role of the market mechanism.[126] As it is practically impossible to measure directly what value society attaches to a certain non-competition interest, the NCA should carefully consider whether there are state measures expressing the value attached by society to the interests concerned and weigh them in the competition law assessment.

Two categories of state measures can be distinguished that may support the argument of private parties that their behaviour will serve a non-competition interest that should prevail above the interests of competition. The first category concerns legal or political documents that express at an abstract level the value attached by society to a certain non-competition

[122] Cf. Baquero Cruz, n73 above, 589.
[123] Cf. *Meca Medina* (C-519/04P) [2006] E.C.R. I-6991, where it was not clear whether the alleged restrictive practices of the IOC, that served the ethics of the sports activity concerned, were supported by a state measure.
[124] Kablfleisch, n6 above, 472.
[125] Cf. *Meca Medina* (C-519/04P) [2006] E.C.R. I-6991, where the ECJ did not apply a strict proportionality test, but where it did examine scientific studies to see whether the restrictive effects of the practice concerned were proportional.
[126] Kalbfleisch, n6 above, 470.

interest by stating and specifying the importance of the interest concerned, such as the TFEU, national constitutions and political declarations. The way the NCA should consider a certain non-competition interest depends on the exact formulation of the duty to integrate this interest in its decisions. Moreover, it could be argued that the weight to be given to such an interest depends on the constitutional status and the legal force of the documents involved. Accordingly, interests that are explicitly embedded in the TFEU, such as policy-linking clauses, or in national constitutions, generally deserve more weight than interests laid down in a ministerial regulation, for instance. However, in practice it has proven difficult for NCAs to decide exactly how much weight should be given to different legal documents. It might therefore be more practical to adopt a procedural test.[127] Under this test NCAs may give weight to legal or political documents expressing the value of non-competition interests, provided these documents were adopted through transparent and democratic processes, in that they were adopted by elected bodies or bodies that can be held accountable by elected bodies. The first category of state measures will help undertakings to provide objective proof that the non-competition interest they cite is valued by society and deserves to be given weight in a competition decision. The presence of this type of state measure would justify the application of a less intensive (moderate) proportionality test, provided an NCA critically assesses whether the restrictive practices do indeed pursue the non-competition interest claimed.

The second category concerns state measures that actually promote or reinforce certain restrictive agreements or delegate regulatory powers to private parties to realize a certain non-competition interest. An NCA may give the necessary weight to these measures in a balancing act, provided they have been adopted via transparent and democratic procedures. It is submitted that NCAs may only give significant weight to these measures, and apply a marginal proportionality test, if and when an additional substantive test is met. The state measure should provide sufficient reasoning as to what type of market failure the private practices are meant to remedy, and what are necessary and proportionate practices to remedy the market failure identified. In the absence of such reasoning an NCA should remain more critical in assessing the restrictive practices and, depending on the exact legal and economic context, should apply at least a moderate proportionality test.

If the foregoing procedural and substantive safeguards are complied with, the state measures are more likely to comply with the requirements following from the state action doctrine (Articles 4 TEU and 101 TFEU).[128] If the state measures do not satisfy these articles, NCAs must respect the primacy of EU law and are obliged not to apply national legislation that contravenes EU law.[129]

Consistency

The principle of consistency entails, among other things, that an NCA ensures that the substance of its decisions is as much as possible consistent with the central goals of the EU and other policy areas.[130] In the event of a conflict, it must make transparent how it has reconciled the different interests in the light of the goals of the EU. The principle of consistency also means that the authorities apply consistent legal and economic methodologies in balancing competition and non-competition arguments, such as the

[127] Cf. Cruz 2007, n73 above, 589.
[128] Cruz, n73 above, 589.
[129] *CIF* (C-198/01) [2003] E.C.R. I-8055 at [48]-[50].
[130] See also Article 7 TFEU.

formulation of balancing principles and the use of impact assessments and cost-benefit analyses. Although this article has taken some initial steps towards the development of a balancing framework, NCAs should apply these principles in practice and further develop economic and legal methodologies on the basis of practical experiences.

Accountability

Apart from regular political and judicial accountability processes, the NCAs should formulate general guidelines that explain to the stakeholders and the political arena how they integrate non-competition interests in the application of competition law, and ask the stakeholders for feedback via public consultations before adopting the guidelines. They should provide insights into the effects of their policy on the protection of non-competition and competition interests by means of regular evaluations. They should also regularly evaluate their own practical experiences to decide when it is necessary to update and revise existing guidelines.

Conclusion

This article shows that strong arguments can be derived from EU law and modern economic theory in favour of a mixed approach with regard to the protection of non-competition interests. Some suggestions are made as to how this mixed approach can be legitimately integrated in the practice of the competition authorities, including the adoption of principles on the balancing of competition and non-competition interests**.** These principles need to be developed and specified for different provisions, restrictive practices and non-competition interests on the basis of practical experiences. The Commission and the NCAs should exchange views and best practices for the implementation of these principles, for instance within the context of the European Competition Network, and request feedback from the stakeholders through public consultations. The principles do not provide a recipe for the correct decision. However, they do offer a safeguard that the authorities will not act arbitrarily but will balance conflicting interests consistently and transparently, respecting the boundaries of the EU Treaty and contributing to the realization of its central goals.