
THE COMPETITION LAW REVIEW

Volume 6 Issue 1 pp 51-75

December 2009

Of Jurisdiction and Justification. Why Competition is Good for 'Non-Economic' Goals, But May Need to be Restricted

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This paper investigates the role that competition law may play in increasing efficiency and ensuring better protection of non-economic objectives. It does so by identifying aspects of jurisdiction and justification in the application of EU competition law, and notably Articles 81, 86 and 87 EC and the useful effect-doctrine (Article 10 in connection with 81 EC), concerning these non-economic objectives concerning environmental protection, media markets and the liberal professions. The underlying thesis is that the application of competition law can expose instances of regulatory capture and thus increase efficiency as well result in a higher level of protection of the non-economic objective.

1. INTRODUCTION

In popular political thinking, competition and the so-called non-economic goals are often contrasted or even considered mutually exclusive. We see this in many instances where the Member States or private parties involved argue for a complete disapplication of the competition provisions because application of the competition rules would hamper the attainment of so-called non-economic goals.¹ Article 16 EC, the new Article 14 of the Treaty on the Functioning of the European Union² and the Protocol on services of general interest to the Treaty of Lisbon are just three high-profile manifestations of this sentiment on the political level.³

These politicians have, however, simultaneously introduced market-based mechanisms in various areas of society. It is, for example, quite common to find market-based mechanisms in the national organisation of health care⁴ and the European Community has actively introduced market mechanisms in many environmental protection

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¹ The outcry by Christine Denys that the judgment in Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV e.a. tegen Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Dusseldorp)* [1998] ECR I-4075, may have 'surrendered the environment to the merciless commercial logic of the internal market', C Denys, 'Case Note on Dusseldorp', 1999 *EELR*, p 21–30 at p 30, is just one example of this sentiment. See also the speech by Herbert Ungerer at the 1999 annual IBC Conference, available from: http://ec.europa.eu/competition/speeches/text/sp1999_018_en.html

² Hereafter abbreviated as TFEU.

³ Protocol on Services of General Economic Interest, OJ 2008, C115/306.

⁴ In the Netherlands, for example, hospitals are considered to be undertakings and must compete. Government intervention is minimal and agreements and concentrations between hospitals are subject to supervision on the basis of the Netherlands Competition Act, see <http://www.nma-org.nl/nederlands/home/Actueel/Themadossiers/Zorg/Index.asp>

schemes.⁵ Such markets, characterised not only by the presence of market mechanisms, but also by the fact that they serve non-economic objectives (such as environmental protection, adequate health care) are referred to in this paper as ‘quasi-markets’. In an ever more complex world where cost-efficiency is increasingly important, these two phenomena – less competition but more markets – may actually result in more inefficiency, neocorporatism and protectionism. EC competition law can play an important role in preventing this.

This paper argues that the first sentiment – asserting that competition is impossible and competition law should not apply at all – is misguided if only because competition law can serve a democratic purpose in the process ensuring the observance of the rule of law. This follows from the observation that many of the (quasi) markets subject to these sentiments are quite complex, subject to market failures and thus need intervention to ensure that they function optimally and in the public interest. The problem, however, is that these interventions rely on information, initiatives and, to a certain extent, self-regulation from the group that is regulated. No matter how competent an authority may be, it will never possess the knowledge of that industry itself and this holds equally true for the legislature. This brings with it the danger of regulatory capture. Such regulatory capture would normally not be open to challenge by a (potential) competitor or consumer before the judiciary in the member states as soon as it would involve an Act of Parliament.⁶ EC competition law, however, does allow such private parties to challenge such regulation that is not (completely) in the public interest. Instances of capture resulting in a failure to observe the public interest will inevitably be exposed in an appreciation of the proportionality of a national measure by the judiciary.⁷ This, however, requires the case to fall within the scope of EC competition law which has been construed rather extensively by the European Court of Justice,⁸ in particular where the competition rules addressed to the Member States are concerned. With regard to the application of competition law to quasi markets, the concepts of an ‘undertaking’ and ‘effect on trade between Member States’ constitute the most relevant elements of the scope.⁹ As a result, these have generated a significant body of case law. It is argued that the exceptions to such concepts should be construed (more) narrowly so as to enable supervision of such entities on the basis of EC competition law. However, similar reasoning can also be observed where justifications

⁵ The Emissions Trading Directive, Directive 2003/87, OJ 2003, L 275/32, concerning greenhouse gases is the most prominent example but other Directives also allow for market-based mechanisms in their implementation by the Member States, see for example, Directive 2001/81 on National Emissions Ceilings (NEC), OJ 2001, L 309/2, and Directive 94/62 on Packaging and Packaging Waste, OJ 1994, L 365/10.

⁶ Cf. J Holmes, ‘Fixing The Limits of EC Competition Law: State Action and the Accommodation of the Public Services’, (2004) *Current Legal Problems*, pp 149-174, at p 153.

⁷ It may be noted that this encompasses the European Court of Justice as well as the decentralised Community judges, *i.e.* the national judiciary.

⁸ Hereafter the Court or ECJ.

⁹ The concept of an ‘aid’ is similarly important in the context of Article 87 EC.

for e.g. ‘services of general economic interest’ or ‘inherent restrictions’ are concerned.¹⁰ These justifications have been the subject of similar activity on the part of the judiciary as well as the Commission.¹¹

This judicial activity has not gone unnoticed by the Member States and indeed the branch of EC law that deals with the relations between the market and public authorities¹² is consistently subject to controversy from the part of the Member States. For example, from early case law to more recent cases, the jurisprudence on Article 86 EC still deals with the fundamental question of Member State sovereignty and the appropriate level of EC intervention.¹³ Apart from these interventions, through the European judicial system, the Member States have also sought to exercise their powers, as in *Herren der Verträge*, in order to influence competition law through Treaty amendments. The ‘French’ removal of the ‘competition principle’ and the ‘Dutch’ Protocol on Services of General Interest in the Treaty of Lisbon are prominent examples. Apparently, these Member State influences have had an effect on the Court’s application of both concepts; relating to jurisdiction as well as those relating to justification.

This paper argues that EC competition law should shift its attention from the jurisdiction to the justification. This, in turn, will force Member States to think more carefully about the objectives of regulatory interventions and self-regulation, as failure to take into account the public interest will consequently be exposed. This places the European judiciary at a central point in the process of observance of the rule of law on a European basis. This judicial activity will be triggered by the involvement of European consumers. These may be final consumers, but also consumers of legislation who wish to shop around for the most convenient regulations and expose overly restrictive or protectionist regulation.

This paper will first analyse the so-called non-economic objectives to see the manner in which these relate to competition and markets (section 2). This will also involve a definition of what are considered to be ‘jurisdiction’ and ‘justification’. It will then examine cases and (national) regulation in environmental markets (section 3), markets

¹⁰ See also J Holmes, ‘Fixing The Limits of EC Competition Law: State Action and the Accommodation of the Public Services’, (2004) *Current Legal Problems*, pp 149 - 174, which distinguishes between scope, substance and justification, p 151; T Prosser, *The Limits of Competition Law*, Oxford: Oxford University Press 2005, p 127 and W Sauter & H Schepel, *State and Market in European Union Law*, Cambridge; Cambridge University Press 2009, p 23. This paper integrates the scope and substance issues identified by Holmes, and relates these to a wider concept of jurisdiction, as will be explained below.

¹¹ E.g. Case C-309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, (Wouters) [2002] ECR I-1577 and Decision 2005/8 *Belgian Architects Fees*, OJ 2005, L4/10. For an overview of cases see http://ec.europa.eu/competition/sectors/professional_services/cases/decisions.html

¹² Article 86, 87 and the *effet utile*-doctrine (Article 10 in connection with 81/82 EC).

¹³ Joined cases 188-190/80, *France, Italy and United Kingdom v Commission* (Transparency Directive) [1982] ECR 2545, and, more recently, Joined Cases T-309, 317, 329/04, *TV 2/Danmark A/S v Commission* (TV 2/Danmark) judgment of 22 October 2008, nyr, paras 101-113.

for the professions (section 4), and media markets (section 5) in order to establish that the European Courts have indeed shifted the focus from jurisdiction to justification. This study will also show that there are benefits arising from the application of the competition rules in terms of the ‘non-economic’ objectives involved. Finally, the conclusions will reveal that the European judiciary has recently become more reluctant to continue its focus on a serious review of the justification of national measures. This can be characterised as a restriction of the scope of judicial review; a question of jurisdiction relating to the remit for the Member States, the Commission and the judiciary. The ramifications of this restriction of the scope of judicial remit are examined and it will be demonstrated that these are damaging for the (non-economic) goals pursued by the national measures.

2. MARKETS AND NON-ECONOMIC OBJECTIVES

Many of the so-called non-economic objectives relate to market failures. This in turn refers to situations in which the market does not yield optimal outcomes. The externalities involved in environmental protection and information asymmetries connected with the liberal professions are just two examples. In a nutshell, the external nature of environmental costs means that use of the environment does not translate into costs incurred by the person using the environment. This results in an incentive to overexploit the environment. Similarly, the inability for the average consumer to judge quality in relation to price means that competition on the market for the liberal professions may focus exclusively on price,¹⁴ possibly to the detriment of quality. The solution to overcome this and in turn to ensure efficiently operating markets is for public authorities to regulate such markets.¹⁵

This response may take several forms, which would relate to the different levels on which decisions on the actual balance between markets and public intervention to promote non-economic objectives are taken. These may be taken at the abstract, legislative, level. More often, however, we see that the legislative level only stipulates the general framework (in a more or less detailed manner) and leaves the application to lower regulatory levels, such as authorities, agencies or (semi)-self regulatory entities.¹⁶ Given the complexity of the markets involved, such regulation may be of a highly technical and very complex nature. Calculating emissions allowances or abatement costs exactly is very difficult, as is finding out precisely how much competition can be allowed in a certain aspect of a liberal profession. This difficulty is overcome more easily by those actors who possess more experience with the activity at hand. In practice this boils down to the regulated entities having better knowledge than the

¹⁴ As consumers will not be able to judge quality, investing in and competing on quality will not be a distinguishing feature.

¹⁵ It may be noted that this definition would actually encompass nearly all markets, as completely liberal markets are a largely mythical beast.

¹⁶ See, for an example at the European Level, recital 36 of the preamble to Directive 2007/65, the Audiovisual Media Services Directive, OJ 2007, L332/27.

regulator, which in turn increases the risk of regulatory capture.¹⁷ The same probably holds true for complex financial structures used for cross-subsidisation and bottleneck infrastructure logistics.¹⁸ Where regulatory capture occurs, there is no guarantee that regulation enhances either efficiency or the non-economic objectives pertinent to that market, as the regulation basically becomes an agent for rent-seeking by (vested) interests in the market.¹⁹ This risk of regulatory capture may be reduced when the regulatory process employs competition between regulated entities. However, this requires an open and transparent regulatory process in which (contemplated) regulatory decisions clearly state who has submitted the views leading to it, as well as how these views were incorporated in the decision. Moreover, the triologue relationship between the regulator and two or more regulated entities must be open to judicial review.²⁰ Competition law provides this starting point for judicial review.

2.1. Competition Law and Quasi-Markets

Traditionally, instances of regulation would, depending on the level on which it takes place, not be open to judicial review or would only be subject to limited judicial review on the basis of general norms of administrative law. As regards the former: whenever regulation takes the form of an Act of Parliament the Constitution of the Netherlands, for example, rules out a judicial review.²¹ Concerning the latter, the general principles of administrative law hardly provide the basis for an in-depth review of the effects on competition of a certain regulatory decision.²²

¹⁷ For a lucid overview of agency or regulatory capture in the US, see: JQ Wilson, *Bureaucracy – what government agencies do and why they do it*, New York: Basic Books 1989, p 72 *et seq.* See furthermore: J-J Lafont & J Tirole, ‘The Politics of Government Decision-Making: A Theory of Regulatory Capture’, *The Quarterly Journal of Economics*, Vol 106 (4), pp 1089-1127 and GJ Stigler, ‘The Theory of Economic Regulation’, *Bell Journal of Economics and Management Science*, 1971 Vol 2, pp 3-21.

¹⁸ Such as railway capacity allocation schemes, see L Di Pietrantonio & J Pelkmans, *The Economics of EU Railway Reform*, BEEP Briefing No 8, p 16. Available from: <http://www.coleurop.be/content/studyprogrammes/eco/publications/BEEPs/BEEP8.pdf>.

¹⁹ See also J Holmes, ‘Fixing The Limits of EC Competition Law: State Action and the Accomodation of the Public Services’, (2004) *Current Legal Problems*, pp 149 – 174, who at p. 168 refers to ‘their [the undertakings] own conception of the public interest’.

²⁰ This refers to a triologue in the sense that regulated entities can be divided into two sides (*e.g.* an incumbent and a newcomer). Of course further distinctions between interests are possible as consumers may intervene and regulated entities may be divided into more than two groups that may have more or less concurrent or antagonistic objectives. For an applied game theory analysis to this bargaining process, see RF Baskerville, ‘A Game Theory Approach to Research on Lobbying Activities in Accounting Regulation: Benefits and Issues’ (2007) Victoria University Centre for Accounting, Governance and Taxation Research Working Paper No 42. Available at SSRN: <http://ssrn.com/abstract=1237738>.

²¹ Article 120 of the Constitution prohibits any review of the legality of Acts of Parliament or Treaties on the basis of the Constitution.

²² For an overview of these principles see: RJGH Seerden (ed), *Administrative Law Of The European Union, Its Member States And The United States*, Antwerp: Intersentia, 2007. For an analysis of the relation between these principles on the member state and European level, see: JH Jans *et al.*, *Europeanisation of Public Law*, Groningen: Europa Law Publishing, 2007.

EC competition law, however, does allow for such an in-depth review. The instruments that make up EC competition law are well-known and for the purpose of this article the focus is on those instruments that concern state intervention in (quasi-)markets. These are the useful effect doctrine (Article 10 in connection with Article 81 EC), Article 86 and Article 87 EC. All three instruments contain elements that relate to the scope, as well as elements that allow for a justification, and both elements have been used to accommodate the non-economic concerns involved in quasi-markets.

The applicability of all three instruments requires an effect on intra-community trade and the involvement of an ‘undertaking’. These concepts have been explored in myriad decisions and judgments. It is not the purpose of this article to analyse these cases as such. Rather, this article attempts to relate the decisions on the scope in quasi-markets to the decisions on the justification. A good example of the relation in point can be seen in *Albany*.²³ This case concerned Netherlands regulation of sectoral pension funds. The entity in charge of administering the sectoral funds was found to be engaged in an economic activity and thus qualified as an undertaking. However, the Court also admitted that the rules to which it was subject made it less competitive. According to the Court, this loss of competitiveness was not of a magnitude that would allow the Funds’ activities to be declared non-economic in nature, but they could perhaps justify an exclusive right.²⁴ This clearly demonstrates the link between Article 86(2) EC and the exceptions to the concept of an undertaking. To put it differently: the Court relates jurisdiction to justification.

The useful-effect doctrine has a further jurisdictional element, in that it does not apply to collectively negotiated labour agreements. According to the *Albany*-exception, such agreements are set outside the scope of Article 81 EC on the basis of an interpretation of the EC Treaty as a whole.²⁵ As far as justifications are concerned, the most obvious justification relates to Article 81(3) and the so-called rule of reason or the exception for inherent restrictions.²⁶

Concerning Article 86 EC, the required causal connection between the granting of the exclusive right and the infringement of the EC Treaty, most prominently in the form of abuse of a dominant position, constitutes an element that defines the scope of Article 86(1). This allows the Court to differentiate between various exclusive rights that, at least superficially, show a close resemblance. The striking difference in outcome between *Dusseldorp* and *Sydhavnens* provides a good example of just such

²³ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Albany)* [1999] ECR I-5751.

²⁴ Case C-67/97 *Albany* [1999] ECR I-5751, para 86.

²⁵ Case C-67/97 *Albany* [1999] ECR I-5751, paras 52-60. For a critical discussion, see HHB Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?*, Groningen: Europa Law Publishing, 2003, p 126 *et seq.*

²⁶ See Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh en Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten (Wouters)* [2002] ECR I-1577, paras 97-110.

differentiation.²⁷ In both cases, operators challenged exclusive rights that sought to ensure the profitability of a public undertaking charged with waste management obligations. Yet the fate that befell both exclusive rights was widely different even though the operator that started *Sydhavnens* essentially relied on *Dusseldorp*.²⁸ The justification in Article 86 can be found in the second paragraph, and can result in the non-applicability of the entire EC Treaty if this is necessary to ensure the fulfilment of a service of general economic interest.

The last panel in this triptych consists of Article 87 EC. As far as its scope is concerned, the requirement of an effect on trade between Member States is perhaps construed more widely in the context of this provision compared to the other competition provisions.²⁹

Furthermore, exceptions to the scope of Article 87(1) that are likely to be relevant for non-economic objectives can be found in the selectivity requirement,³⁰ the requirement that state funds must be involved,³¹ and finally, the requirement that the aid must result in an advantage for an undertaking. The last requirement refers to what is better known as the *Altmark Trans* exception. Again a justification can be found in Article 87(2) and (3), with the latter being predominantly used.

Apart from these elements of jurisdiction and justification inherent in the legal texts involved, there is a more profound aspect of jurisdiction to the competition law applicable to (quasi)-markets. This, however, requires a characterisation of EC competition law as an instrument dealing with regulatory competition between the Member States.

2.2. EC Competition Law as a Regulatory Instrument on the Regulatory Market

Notably in relation to Article 86, and certainly as regards Article 87 EC, enforcement is primarily within the domain of the Commission. This allows the Commission's position to be characterised as a regulator on the regulatory market, or the market for regulation. A company wishing to become active on the market of a Member State may encounter

²⁷ Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volksbuisvesting, Ruimtelijke Ordening en Milieubeheer (Dusseldorp)* [1999] ECR I-4075 and Case C-209/98 *Entreprenorforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune (Sydhavnens)* [2000] ECR I-3743.

²⁸ Compare the arguments brought forward by *Sydhavnens*, Case C-209/98 *Sydhavnens* [2000] ECR I-3743, para 72, with the Court's appreciation in *Dusseldorp*, Case C-203/96 *Dusseldorp* [1999] I-4075, para 63.

²⁹ For one, the Court has never been willing to accept a *de minimis* threshold under which aid would not have an effect on intracommunity trade, e.g. Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrs-gesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (Altmark)* [2003] ECR I-7747, para 77-82 and Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV (Essent Netwerk Noord)* n.y.r., para 76.

³⁰ See Case C-143/99 *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten (Adria Wien)* [2001] ECR I-8375, paras 41-54.

³¹ Case C-379/98 *PreussenElektra AG v Schleswig AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein (PreussenElektra)* [2001] ECR I-2099, paras 58-62.

regulatory barriers to entry. These may be barriers that restrict entry as such, but they may also be barriers that make entry less attractive. A good example of such regulatory barriers to entry can be seen in *BUPA*.³² Here BUPA, a new entrant on the market, was confronted with a risk equalisation fund that had the practical effect of imposing on BUPA an obligation to transfer funds to the incumbent competitor. This effect was so pervasive that, during the court case, BUPA stated that it would consider ceasing its activities within the Irish market.³³ As part of its attempt to challenge the Commission's decision to approve the risk equalisation fund, BUPA referred to the Netherlands risk equalisation fund that has less restrictive and distorting effects on competition. This demonstrates that BUPA was trying to induce regulatory competition leading to better regulation by creating, as it were, a dialogue between the Commission, the Irish and Netherlands authorities.

EC law can, on a more general level, be characterised as playing a regulatory role in a market for regulatory competition. The provisions on the fundamental freedoms, and in particular the rules on mutual recognition, clearly enable a comparison of different regulatory regimes and will stand in the way of overly restrictive regimes, unless this more restrictive regime is objectively justified.³⁴ This allows the EC law framework, and the actors playing a role in shaping this framework, to function as the touchstone for challenges to national regulatory regimes.³⁵ The Commission's central role in various liberalisation processes, both on the legislative and the administrative level, confirm this role for EC law in general and the Commission in particular.³⁶

The most important difference between the role of the Commission on the regulatory market and that of a normal regulator on a normal market is, of course, that the Commission is ultimately subject to the very entities it regulates: the Member States. Similarly, the touchstone of EC law is ultimately determined by the *Herren der Verträge*. This means that there is an increased risk of capture, if exercising sovereign rights can actually be likened to regulatory capture. Irrespective of the terminology used, regulatory capture is a powerful explanation for recent developments related to the application of EC competition law to certain quasi-markets.

As the various case studies in the following paragraphs show, the Commission has at times adopted decisions that entail a rather minimal standard for supervision. In these

³² An overview of the *BUPA* saga is provided in paragraph 6 *infra*.

³³ Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission* (BUPA) n.y.r., para 78. At this moment BUPA Ireland has been taken over by Quinn-healthcare.

³⁴ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ERR 649, para 8.

³⁵ See on this role: N Reich, 'Competition Between Legal Orders: A New Paradigm of EC Law?' (1992) 28 *CMLRev*, pp 861-896.

³⁶ *Cf.* the so-called Article 7 procedure, whereby National Regulatory Authorities have to inform the Commission in advance of regulatory measures pursuant to Article 7 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive"), OJ 2002 L 108/33. For an overview of this procedure in practice, see: Commission Communication on Article 7, COM (2007) 401.

cases it is for the European Courts to ensure an adequate standard of review as part of their duty to ensure the observance of the law in the application of the EC Treaty.³⁷ The rather open character of the norms involved, notably in EC competition law, place the Courts in a particularly important position in that they are able to exert considerable influence not just on EC competition law, but equally on EC competition policy.³⁸ In this regard, the regulatory role is not ascribed to an institution, such as the Commission or Court of First Instance, but rather to EC competition law (as it may be applied and interpreted by those institutions). As with any regulator, EC competition law may also be captured. It is submitted that this is reflected in the more profound jurisdictional element alluded to above. This is seen clearly in the judgment in *British Aggregates Association*,³⁹ which concerned an appeal against a judgment of the Court of First Instance⁴⁰ in which the British Aggregates Association's appeal against a Commission decision⁴¹ was dismissed. This case started with the Aggregates Levy, which amounts to a tax on virgin aggregates. Among others, secondary aggregates and aggregates that are a by-product are exempted with a view to encouraging their use, thus reducing the environmental impact of virgin aggregate production. The Commission took a particularly favourable view of the Aggregates Levy and decided that it did not constitute State Aid within the meaning of Article 87(1) because it did not constitute a selective advantage. This effectively means that the Commission reduced the scope of Article 87(1) using the more profound jurisdictional element.

The Court of Justice exposes these two (interlinked) aspects of jurisdiction very nicely. Firstly, the Court of First Instance's generous approach to the selectivity criterion, in light of the environmental objectives of the Aggregates Levy as well as the integration principle in Article 6 EC, is found to constitute an error in law.⁴² Pivotal to this finding was paragraph 115 of the judgment, in which the Court of First Instance held that "[it] must be emphasised in that regard that it is open to the Member States, which, in the current state of Community law, retain, in the absence of coordination in that field, their powers in relation to environmental policy, to introduce sectoral environmental levies in order to attain those environmental objectives referred to in the preceding paragraph. In particular, the Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy. It follows that, in principle, the mere fact that an environmental levy constitutes a specific measure, which extends to certain designated goods or

³⁷ Cf. Article 220 EC.

³⁸ Cf. M Monti, *EC Competition Law*, Cambridge: Cambridge University Press 2008, p 43, insofar as the Court's endorsement of Commission policy is concerned. On a more general level, judicial inventions such as the useful effect doctrine are a clear example of court-made competition policy.

³⁹ Case C-487/06 P *British Aggregates Association v. Commission* (British Aggregates Association II), n.y.r.

⁴⁰ Case T-210/02 *British Aggregates Association v. Commission* (British Aggregates Association I) [2006] ECR II-2789.

⁴¹ Decision C(2002) 1478 of 24 April 2004 in Case N 863/01.

⁴² Case C-487/06 P, *British Aggregates Association II*, paras 79-92.

services, and cannot be seen as part of an overall system of taxation which applies to all similar activities which have a comparable impact on the environment, does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage.” This paragraph breathes an amount of deference on the part of the Court of First Instance that is quite inapt within the confines of State Aid supervision. As a response to this the Court of Justice held that “[...] the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article 87(1) EC [...] as account may in any event usefully be taken of the environmental objectives when the compatibility of the State Aid measure with the common market is being assessed pursuant to Article 87(3) EC”.⁴³ Here we see the Court recognising the non-economic objective within the confines of the justification available in Article 87(3), whilst taking it out of the jurisdictional element of selectivity.

The more profound jurisdictional element is addressed explicitly a few paragraphs later in the judgment, where the scope of the judicial review carried out by the Court of First Instance is scrutinised. Here the Association submitted that the Court of First Instance erred in law when it looked only for manifest errors of appraisal, whereas it should have carried out a comprehensive review of the Commission’s findings concerning the applicability of Article 87(1) EC.⁴⁴ The Court concurs and finds that the Court of First Instance carried out a limited review.⁴⁵ According to the Court the “State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission’s assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC.”⁴⁶ Since no such technical or complex appraisals were established, a comprehensive review was in order. *British Aggregates Association* shows that both the Commission and the Court of First Instance restricted the scope of their review, thus shifting the focus of their supervision from justification to jurisdiction.

As a result, the UK government’s Aggregates Levy needs to be scrutinised in more depth, thus introducing more supervision of this intervention in a (dysfunctioning) environmental market. Whilst this can be seen as another legal dam blocking the mainstream of life, it may be observed that the Court indicated the more proper place for environmental concerns may be within the confines of Article 87(3) EC. This would entail an enhanced role for EC competition law as a regulatory instrument on this particular market for regulation.⁴⁷

⁴³ Case C-487/06 P, *British Aggregates Association II*, para 92.

⁴⁴ Case C-487/06 P, *British Aggregates Association II*, para 102.

⁴⁵ Case C-487/06 P, *British Aggregates Association II*, para 110.

⁴⁶ Case C-487/06 P, *British Aggregates Association II*, para 111.

⁴⁷ Indeed, the exceptions to the Aggregates Levy’s scope appear to have been partly motivated by reasons of competitiveness, which, it is submitted, must be distinguished from the environmental protection reasons.

3. MARKETS FOR ENVIRONMENTAL PROTECTION

The most prominent example of a quasi market fraught with market failures is the market for environmental protection in the form of the EU Emissions Trading Scheme (hereafter: EU ETS). Although there are several environmental markets in existence, the market for greenhouse gas allowance trading is by far the biggest and most developed example. A quick glance at Directive 2003/87 immediately reveals it to be a highly regulated market, with a strong role for national governments and the Commission.⁴⁸ Moreover, it is a market with a serious risk of national regulatory capture in that the Member States involved possess an incentive not to impose strict, and thus expensive, emissions reductions standards upon their national industry. This can take place in the National Allocation Plans in which the Member States allocate the starting amount of allowances over the various sectors and undertakings active in the sectors.⁴⁹ Emissions trading can only work if there is no over-allocation and the amount of allowances on the market corresponds to the total amount of emissions. In this case ensuing reductions of the amount of allowances will mean the attainment of emissions abatement objectives, as well as the creation of the scarcity all markets need to function. In an environmental market, restrictions of emissions go hand in hand with distortions of competition. This is the primary reason why the necessity to check compatibility of National Allocation Plans with the rules on establishment and State Aids was recognised in the ETS Directive.⁵⁰

The Commission's review of National Allocation Plans, however, was in particular in the first (learning) phase clearly insufficient in that extensive lobbying from industry resulted in over-allocation across the board in many Member States. This type of over-allocation is not particularly damaging from a competition perspective.⁵¹ What is more damaging to competition is an allocation that benefits certain sectors of the industry, or certain companies within a sector.⁵² This is what Energie Baden-Württemberg argued as a response to the Commission's approval of the German National Allocation Plan.⁵³ In a nutshell, EnBW's argued that the German Plan contained a number of elements which entailed a competitive advantage for one of Germany's two largest energy

⁴⁸ Directive 2003/87, OJ 2003, L275/32. This Directive envisages so-called National Allocation Plans for the initial allocation of allowances to be drawn up by the Member States (Article 9(1)). However, such NAPs are subject to guidance (Article 9(1)) as well as scrutiny by the Commission (Article 9(1) and (3)).

⁴⁹ Interestingly, the ETS Directive only lays down a minimum amount of allowances to be grandfathered, Article 10. This in itself already allows for considerable differences in the costs imposed on industries by NAPs.

⁵⁰ Directive 2003/87, Annex III, point 5. See further: Commission Guidance, COM (2003) 830 final, point 47.

⁵¹ However this is not the case where international competition is taken into account. It does of course greatly reduce the environmental effectiveness of the trading scheme.

⁵² The exclusion of the aluminium packaging industry from the scope of the EU ETS can be seen as an example of such a distortion on the EU level. See further Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Écologie et du Développement durable, Ministre de l'Économie, des Finances et de l'Industrie* (Arcelor), judgment of 16 December 2008, n.y.r.

⁵³ Order in Case T-387/04 *EnBW Energie Baden-Württemberg v. Commission* (EnBW) [2007] ECR II-1195.

producing undertakings, RWE and E.ON.⁵⁴ As a result, the Commission's decision to approve the plan was said to be contrary to the Commission's obligation to check whether the plan was compatible with the State Aid provisions.⁵⁵ The Court of First Instance did not, however, rule on the substance of this case and declared EnBW's action to be inadmissible. In doing this, the Court also addressed the role of State Aid scrutiny in this procedure. The Court found that the Commission's decision contained only a preliminary appraisal of the State Aid aspects that would not stand in the way of the full State Aid investigation under Article 88(3) and (2) EC or the direct effect of the former provision.⁵⁶ As a result, EnBW now has an incentive to start a full State Aid procedure concerning the German National Allocation Plan in order to expose the possible selective over-allocation.

Whether this will be successful, however, remains to be seen in view of the Court of First Instance's judgment in the *Netherlands NOx* case.⁵⁷ This case concerned the Commission's appraisal under the State Aid rules of the Netherlands emissions trading scheme for nitrogen oxides.⁵⁸ This trading scheme is a so-called dynamic cap or Performance Standard Rate (PSR) trading scheme, whereby there is no absolute cap on emissions allowances (as in the EU ETS) but rather an environmental performance standard (the amount of NOx emitted per amount of energy used) that will decrease annually. An undertaking that increases the environmental performance to a level that exceeds the PSR (*i.e.* emits less NOx per unit of energy than prescribed by the PSR) will get NOx credits to be, for example, banked or sold to less environmentally efficient companies that did not meet the PSR. The Commission concluded that the scheme entailed a State Aid because the NOx credits are intangible assets that were handed out for free. As a result the Netherlands government foregoes revenues that could have been achieved in an auction or other form of sale of the NOx credits. However, the Commission considers the aid compatible with the common market on the basis of Article 87(3)(c) EC.

According to the Netherlands government, the NOx trading scheme did not constitute a State Aid within the meaning of Article 87(1) because it entailed no advantage financed through state resources and because it lacked selectivity. Regarding the former argument, the Court of First Instance sides with the Commission in finding that the tradability of the NOx credits constitutes an advantage. Moreover, by not auctioning or

⁵⁴ T-387/04 *EnBW* [2007] ECR II-1195, paras 36, 37.

⁵⁵ This is also interesting from the regulatory capture perspective in that the Commission admits that it relied on the explanations given by the German authorities, T-387/04 *EnBW* [2007] ECR II-1195, para 43. This relatively uncritical attitude towards arguments put forward by the Member States can be explained by the political pressure on the Commission as well as the strict time-limits that were imposed on the Commission.

⁵⁶ Case T-387/04 *EnBW* [2007] ECR II-1195, para. 133, 134.

⁵⁷ Case T-233/04 *Netherlands v. Commission (Netherlands Nox)*, judgment of 10 April 2008, n.y.r.

⁵⁸ Pursuant to the National Emissions Ceilings (NEC) Directive 2001/81, OJ 2001, L 309/22, the Member States must ensure that certain emissions ceilings are observed. The Netherlands decided that a market based mechanism was necessary to meet these targets efficiently, see explanatory statement for the proposal to this act: TK004-2005, 29766, nr. 3, at p 5 *et seq.*

otherwise selling them to the undertakings, the Netherlands government has foregone income and thus financed this advantage.⁵⁹ Whatever may be made of this,⁶⁰ the Court's findings concerning selectivity are more interesting for the purpose of this paper. In this connection the Court finds that the measure lacks selectivity because it is limited in its scope to installations with a certain thermal capacity.⁶¹ Moreover, even if the scope would entail a differentiation between those undertakings subject to a PSR and thus able to participate in the trading scheme and those who are out, this differentiation is considered objectively justified by the Court. The fact that those in the scheme are large emitters of NO_x, according to the Court, objectively justifies treating them differently on ecological grounds from those outside the scheme's scope. This is hardly sensible from an environmental perspective, as many small emissions will damage the environment just as much as a few large emissions.⁶² The result of *Netherlands NO_x* is that the trading scheme no longer constitutes State Aid and this in turn results in the disappearance of the reporting obligations that the Commission imposed in its decision ex Article 87(3)(c) EC. While this may *prima facie* seem like a good thing (why would anyone want burdensome reporting duties for something as laudable as environmental protection), second thoughts may be less optimistic. It appears that the Commission had imposed the reporting requirements partly because it doubted the environmental effectiveness of the NO_x trading scheme.⁶³ Just as with *EnBW*, State Aid supervision may very well enhance competition as well as the environmental effectiveness of the scheme.⁶⁴

The combined logic of *Netherlands NO_x* and the Commission's approach to State Aid supervision concerning the National Allocation Plans makes that there is less room for State Aid supervision as a result of the high(er) standard for proving selectivity in combination with the Commission's considerable deference to Member State National Allocation Plans. For the current trading period, that commenced in 2008 and will last until 2012, the scope of State Aid supervision has been significantly reduced to the detriment of both competition and the environment.

⁵⁹ Case T-233/04 *Netherlands NO_x* paras 74, 75.

⁶⁰ It is submitted that this argument is fundamentally flawed because it is simply impossible to auction such credits in a PSR system, if only because the exact amount of available credits cannot be known in advance. As a result, scarcity cannot be known in advance and this makes it impossible to bid or otherwise come to a price for such credits. This is also why PSR-trading schemes entail a far lower risk of resulting in competitive distortions. Over allocation (selective or not) is simply impossible and a PSR that is too lenient will only detract from the scheme's environmental effectiveness, see further HHB Vedder, 'Annotatie bij Zaak T-233/04', *Nederlands Tijdschrift voor Energierecht* 2008, pp 116-124.

⁶¹ Case T-233/04 *Netherlands NO_x* paras 87-96. This is comparable to the reasoning adopted by the Court of Justice in Case C-127/07 *Arcelor* concerning the scope of the EU ETS.

⁶² In this regard the reference to *Adria-Wien* is particularly objectionable as this was exactly the case in which the Court of Justice held that from an environmental perspective it is irrelevant whether pollution results from the production of goods or the provision of services, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke (Adria-Wien)* [2001] ECR I-8365, para 52.

⁶³ Cf. the penultimate bullet point in paragraph 3.3 of the contested Decision C (2003) 1761 relating to measure N 35/2003.

⁶⁴ It may be noted that the Commission has appealed this judgment, OJ 2008, C 223/30, Case C-279/08 P.

The solution to this conundrum has been a radical one. The post 2012 climate change package envisages a new emissions trading directive that entails a much more harmonised regime.⁶⁵ For one, National Allocation Plans and their scrutiny by the Commission have been replaced with allocations fixed on the Community level.⁶⁶ Furthermore, the Member States' discretion concerning the choice between auctioning and grandfathering is reduced. From a regulatory competition and capture perspective, this is interesting to note. What is more interesting is that this higher degree of harmonisation and the resulting centralisation of decision making was actually the result of the Member States themselves.⁶⁷ In a way, they restricted the room for regulatory competition and capture by submitting themselves to a stricter regulatory regime. This obviates the need for State Aid supervision, except for the Commission's supervision of the more traditional State Aids in the form of subsidies etc. Concerning these forms of State Aids, supervision remains strict and takes account of the environmental effectiveness as well.⁶⁸ The centralisation of regulation, however, means that the risk of competitive distortions that detract from the environmental effectiveness is similarly centralised.⁶⁹ This is reflected in the rules on carbon leakage. Carbon leakage relates to the 'export' of greenhouse gas emissions as a result of the higher carbon price in the EU. This undermines the environmental integrity of the emissions trading directive as well as the competitive position of the EU industry. The logical complement of the centralised and harmonised rules on allocation and auctioning is therefore a centralised regime on carbon leakage.⁷⁰ This, however, presupposes that, for example, the exact rules for determining the industries exposed to a significant risk of carbon leakage are sufficiently clear so as to avoid regulatory competition. In this regard, the result of the negotiations does not look that promising. For one, the definition of industries exposed to carbon leakage takes place at NACE-3 level and *where appropriate and where the relevant data are available*, at NACE-4 level.⁷¹ Leaving aside the discretion inherent in making NACE-4 level disaggregation dependent on appropriateness and availability of data, it is submitted that an adequate appraisal of competitive forces requires a market definition, which cannot be equated to a NACE determination.⁷² Moreover, the methodology used to determine exposure to carbon leakage is all but clear and free

⁶⁵ Directive 2009/29 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Post 2012 ETS Directive), OJ 2009 L 140/63. For a critical discussion of this Directive see S Cló, 'The ETS Reform and Carbon Leakage: Economic Analysis of the New ETS Directive' (April 9, 2009), available at SSRN: <http://ssrn.com/abstract=1375544>.

⁶⁶ Articles 9, 9a and 10 of the Post 2012 ETS Directive.

⁶⁷ Given that the December 2008 climate package was actually adopted in the European Council, it can be said that it were the *Herren der Verträge* who decided this.

⁶⁸ Cf. Commission Guidelines on State Aid for Environmental Protection, OJ 2008, C 82/1, para 6.

⁶⁹ See Recital 23 of the Preamble to the Post 2012 ETS Directive.

⁷⁰ Recital 24 of the Preamble and Articles 10a, 10b and 10c of the Post 2012 ETS Directive.

⁷¹ Recital 24 of the Preamble of the Post 2012 ETS Directive.

⁷² Cf. Case T-27/02 *Kronofrance SA v Commission* (Kronofrance) [2004] ECR II-4177, paras 82-84.

from discretion and thus entails a risk of regulatory competition to the detriment of the environmental effectiveness of the scheme as well as the level playing field.⁷³

4. MARKETS FOR THE PROFESSIONS

Liberal professional services are provided on markets similarly fraught with market failures, mostly relating to information asymmetries and positive externalities. Moreover, many governments have allowed for (semi) self-regulation by those professions. This will frequently take the form of the public authorities only laying down the framework of general rules; the members of the profession are then responsible for further elaborating and enforcing these rules. This situation has the potential to result in overly restrictive rules that benefit neither competition nor the consumer.⁷⁴ As a result, consumers may complain or members of the profession may want to challenge rules in order to expose overly anticompetitive regulations. Again, EC competition law, and notably the useful effect doctrine, allows these consumers and members of the profession to do exactly that.

The useful effect doctrine was developed in connection with (semi) self-regulation by private parties. Generally this (semi) self-regulation takes the form of a private initiative (self-regulation) that was later formalised or otherwise received a seal of approval by public authorities. Whereas pure self-regulation could fall under Article 81 EC,⁷⁵ public authorities' involvement in such semi self-regulation is governed by the useful effect doctrine. Such (semi) self-regulation is particularly prominent in the professions, where governments need to reconcile public tasks with the fact they are administered by private parties operating partly in their own interest. The results are considerable inefficiencies, resulting to a large degree from barriers to entry, tariff regulations and regulation of market conduct.⁷⁶ One explanation for these inefficiencies can be regulatory capture. The fact is that a transfer of consumer welfare to the producers and deadweight loss cannot be explained through democratic mechanisms, if only for the simple reason that the number of consumers by far exceeds the number of producers in this market, which would result in the latter having a negligible democratic impact.

The useful effect doctrine and Article 81 EC have been instrumental in discovering such inefficient (semi) self-regulation and separating the chaff from the wheat. Plainly

⁷³ For a critical analysis of this regime, see S Cló, 'The ETS Reform and Carbon Leakage: Economic Analysis of the New ETS Directive', p 21 *et seq* (April 9, 2009), available at SSRN: <http://ssrn.com/abstract=1375544>.

⁷⁴ See also European Parliament Resolution on the follow-up to the report on Competition in Professional Services, adopted 12 October 2006, A6-0272/2006.

⁷⁵ Cf. Belgian Architects Decision, IP/04/800.

⁷⁶ I Paterson, M Fink, A Ogus, *Economic impact of regulation in the field of liberal professions in different Member States - Regulation of Professional Services*, Vienna: Institute for Advanced Studies, 2003, report for the European Commission. See further: Ch U Schmid (ZERP), *Conveyancing Services Market*, report for the European Commission, both reports are available on the DG-Comp website: http://ec.europa.eu/comm/competition/sectors/professional_services/studies/studies.html

appalling cases such as *CNSD*⁷⁷ and *CIF*⁷⁸ apart, there have been numerous cases that deal with much less far-going restrictions of competition. These cases have allowed the Court to develop an approach, particularly in the second wave of cases that started from the mid 1990s onwards, which is quite balanced.⁷⁹ *Wouters*, for example, deals with a self-regulation by the Netherlands Bar Association which prohibited structural cooperation between members of the bar and accountants.⁸⁰ According to the Court, this rule does not go beyond what is reasonable to ensure the proper practice of the legal profession.⁸¹ Again, there is considerable deference on the part of the Court, particularly when the contested rule is put into perspective. Essentially, the rule attempts to protect the advisory nature of the activities of the members of the bar from the supervisory nature of accountancy activities. The judgment indicates the possible pro- and anticompetitive effects of so-called multidisciplinary partnerships and then juxtaposes the independence required of accountant with the partisan nature of the members of the bar. This appears to be like a great many little ducklings all agreeing that they will not be eaten by four foxes because otherwise no one would eat the duckweed, which would be bad for the foxes as well.⁸² If one thinks that an abundance of duckweed is something to be avoided, an agreement between four foxes not to eat ducklings would seem more logical or, in legal terms, proportionate. *Arduino*, delivered on the same day as *Wouters*, shows identical reticence on the part of the Court.⁸³ This case concerned the way in which fees charged by members of the Italian bar were determined. In a nutshell this procedure involved a draft tariff drawn up by a committee consisting of representatives from the bar association. Moreover, this committee was not under any particular duty to take general interests into account.⁸⁴ This, however, did not keep the Court from finding the situation compatible with the useful effect doctrine. The Court came to this decision because of the role played by the Minister and Italian courts. The former would have to approve the tariffs⁸⁵ and could do so only after having obtained the advice from the Council of State and the Interministerial Committee on Prices. Apart from the fact that the Court does not

⁷⁷ Case C-35/96 *Commission v Italy* (CNSD) [1998] ECR I-3851. The semi self-regulation in this case amounted to little more than a government sponsored price fixing cartel.

⁷⁸ Case C-198/01 *Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato (CIF)* [2003] ECR I-8055.

⁷⁹ For an overview see: I Forrester, 'Where Law Meets Competition: Is *Wouters* Like a *Cassis de Dijon* or a *Platypus*?' in, CD Ehlermann & I Atanasiu (eds), *European Competition Law Annual 2004*, Oxford: Hart Publishing 2006, p 271 *et seq.*

⁸⁰ Case C-309/99 *Wouters* [2002] ECR I-1577.

⁸¹ Case C-309/99 *Wouters* [2002] ECR I-1577, para 109.

⁸² In accountancy there are four big firms (*Wouters*, para 91, still refers to the 'big five'), but subsequent mergers have reduced this number to four.

⁸³ Case C-35/99 *Manuele Arduino v Compagnia Assicuratrice RAS SpA (Arduino)* [2002] ECR I-1529.

⁸⁴ Case C-35/99 *Arduino* [2002] ECR I-1529, paras 37 – 39.

⁸⁵ The Court infers from this that the 'Minister has the power to have the draft amended by the CNF', para 41. Notice that the Minister cannot amend the draft independently, but rather must rely on the bar association to do so.

address the extent to which these entities actually represent the general interest, it may be noted that their powers are only advisory. In this regard it may be pointed out that the Interministerial Committee on Prices consists of representatives of the various ministries, producers and trade unions, *i.e.* the supply side of the industry.⁸⁶ As regards the role of the Italian courts, they settle the tariffs on the basis of the seriousness and number of issues dealt with. Moreover, they could set aside the tariffs in exceptional cases. In sum, the Minister's involvement offers little guarantees for the protection of the general interest and the Court's role may reduce, but certainly does not rule out price fixing effects of the binding tariffs.⁸⁷

Italian lawyers' semi self-regulation continues to generate case law, as *Cipolla*⁸⁸ and *Mauri*⁸⁹ show. *Mauri* deals with access to the legal profession. This case is the result of Mr Mauri's failure to pass part of the bar exam. He appealed against this decision and, before the administrative judge, he objected to the composition of the examination committee, which consisted of two judges, a law professor and two members of the bar, elected by the bar association. The presence of the latter two could, in theory, allow for the bar exam to be used as a means not only to control the quality but also the quantity of those admitted to the bar.⁹⁰ The Court noticed that the members of the bar only made up two fifths of the committee as well as the possibility of an appeal against the decisions of the committee and the possibility for ministerial intervention. As a result, the examination committee was found to have sufficient guarantees to operate in the general interest so as to prevent it from acting only in the interests of the bar association; which seems a sensible decision in light of the facts.

Cipolla, on the other hand, seems more controversial. Again, the Italian lawyers' tariffs were at stake. Unsurprisingly, the judgment in *Cipolla* closely follows that in *Arduino*, with the Court focussing on the procedural guarantees that ensure that the tariffs are in the general interest, and not just in the interest of the bar association that fixes the draft tariff. This mere repetition of *Arduino* may be disappointing, but predictable. More controversial is the Court's appreciation of the tariffs under the free movement rules.⁹¹ Here the Court adopts the ruinous competition doctrine when it states that:⁹²

⁸⁶ D.Lgs.Lgt. 19 October 1944, n. 347.

⁸⁷ This situation may be compared to that in ECJ Case 240/82 *Stichting Sigarettenindustrie and others v Commission* [1985] ECR 3831, paras 23-29, where cigarette retailers had reduced the amount of competition that was already reduced as a result of government interference.

⁸⁸ Joined Cases C-94/04 and C-202/04 *Federico Cipolla v Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v Roberto Meloni (Cipolla)* [2006] ECR I-11421.

⁸⁹ Case C-250/03 *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano (Mauri)* [2005] ECR I-1267.

⁹⁰ Case C-250/03 *Mauri* [2005] ECR I-1267, para 10.

⁹¹ The Court deals with the case on the basis of Article 49 EC. Given the assimilation and convergence between the free movement rules and the competition rules (section 3.1.1), the Court's reasoning concerning Article 49 EC can be *applied mutatis mutandis* to the useful effect doctrine.

⁹² Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, para 67.

Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.

The Court's Grand Chamber essentially states that price competition may be bad for the quality of services provided, but at the same time recognises that minimum fees cannot guarantee good quality services.⁹³ This level of respect for tariff regulations is quite inappropriate and can possibly be explained from a legal policy perspective.⁹⁴ This becomes clear when the Commission's arguments in *Cipolla* are examined. Whereas these arguments remain obscure in the judgment, A-G Poiares-Maduro's opinion sheds more light on the inter-institutional debate underlying this case. The Commission in particular asked for a reconsideration of *Arduino*,⁹⁵ amongst others, in light of the opinions of Advocates General Jacobs⁹⁶ and Léger⁹⁷ who suggest a three-fold test for an exception to the useful effect doctrine. The requirements for such an exception are that (1) the public authorities of the Member State concerned exercise effective control over the content of the agreement; (2) the State measure pursues a legitimate aim in the public interest, and (3) the State measure is proportionate to the aim which it pursues. It may be noted that the current case law as it stands does not include the proportionality test put forward by Jacobs and Léger. As a result the Court is unable to conduct a serious review of the proportionality of the tariff rules. This appears to be the trade-off for relatively more legal certainty, as adopting the proportionality test would invariably open up the debate on the proportionality of the regulation of not just lawyers' tariffs.⁹⁸

5. MEDIA MARKETS

The media also constitutes a sector of the economy that suffers from market failure. At the time of writing, dealing with the issue of positive externalities arising from quality investigative journalism in a democracy is particularly topical in the Netherlands, given that a committee has just advised that a levy on internet access be raised to subsidise

⁹³ Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, paras 85, 86 of the Opinion.

⁹⁴ M Amorese, 'Cases C-94/04, *Cipolla* & *Macrino*: The Emergence of a Political Approach to the Regulation of Professionals in Europe?', (2007) 13 Colum JEL 733.

⁹⁵ Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, para 27 of the Opinion.

⁹⁶ Opinion in Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

⁹⁷ Opinion in Case C-35/99 *Arduino* [2002] ECR I-1529.

⁹⁸ Joined cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, paras 28 - 30 of the Opinion. For a critical analysis of overly restrictive (semi) self-regulation and its supervision, see J Kwoka, 'The Federal Trade Commission and the professions: a quarter century of accomplishments and some new challenges', [2005] *Antitrust Law Journal*, Vol. 72, 997-1012.

newspapers.⁹⁹ On a more general note, we have already observed that, in the US, extensive research has been undertaken into the regulation of broadcasting services.¹⁰⁰ Whereas this research concerns broadcasting regulations and more particularly frequency allocation, current practice in the EU focuses on the public service broadcasting function of the media, and notably the funding of this obligation.¹⁰¹ Again, the exact definition of the public service remit or the service of general economic interest involved is very much at the centre of the debate. In particular this concerns the situation in which a public service obligation is (partly) subsidised whereas the entity in charge of the public service also performs commercial activities.¹⁰² This has resulted in the recommendation that ‘regulations governing State Aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency’.¹⁰³ It is submitted that EC competition law and the rules on State Aid in particular have an important role to play in this regard. This becomes all the more true when we realise that media markets are highly competitive and subject to considerable regulatory competition.¹⁰⁴

In relation to the public financing of public service obligations, the last few years have resulted in a considerable degree of innovative case law. The initial stance of the Court of First Instance and Court was that such compensation amounted to State Aid within the meaning of Article 87 EC, irrespective of the possible applicability of Article 86(2) EC.¹⁰⁵ In *Ferring* the Court of Justice reversed this approach, holding that compensation

⁹⁹ Adviesrapport Tijdelijke Commissie Innovatie en Toekomst Pers, p 60, available from http://www.commissiebrinkman.nl/download/TCITP_rapport_23-06-09_LR.pdf. In addition, this committee has also suggested that competition-based objections to setting up one distribution network for newspapers should be set aside, p 43.

¹⁰⁰ *Supra*, n 17, notably the work of JQ Wilson.

¹⁰¹ See further on this the Amsterdam Protocol on the system of public broadcasting in the Member States, the 1999 resolution concerning public service broadcasting, OJ 1999 C 30/1, the 2001 communication on the application of State Aid rules to public service broadcasting, OJ 2001 C 320/5 and the 2008 draft communication, IP/08/1626 and MEMO/08/671.

¹⁰² The 2001 communication on the application of State Aid rules to public service broadcasting, OJ 2001, C 320/5, explicitly allows for this, para 36.

¹⁰³ 2008 European Parliament Resolution on concentration and pluralism in the media in the European Union, 2007/2253(INI), recommendation 37.

¹⁰⁴ In the Netherlands, for example, the Television without Frontiers Directive, Directive 89/552, later amended, OJ 1989 L 298/23, has led to considerable competitive pressure from Luxemburg-based commercial broadcasters. Ultimately this has resulted in the Netherlands regulatory regime being amended so as to make it less stringent and thus bring it in line with the regime applicable in Luxemburg. See Parliamentary Documentation TK 2007/2008 31 356, nr. 3, at p 14.

¹⁰⁵ Case T-106/95 *Fédération française des sociétés d'assurances (FFSA), Union des sociétés étrangères d'assurances (USEA), Groupe des assurances mutuelles agricoles (Groupama), Fédération nationale des syndicats d'agents généraux d'assurances (FNSAGA), Fédération française des courtiers d'assurances et de réassurances (FCA) and Bureau international des producteurs d'assurances et de réassurances (BIPAR) v Commission (FFSA)* [1997] ECR II-229, para 172 and Case T-

for the extra costs incurred in discharging a public service obligation did not constitute State Aid.¹⁰⁶ This has as the effect that the duty to notify and the stand-still obligation no longer apply to such compensation, whilst the Commission will no longer be able to attach any conditions to decisions declaring such aid compatible with the common market. This judgment was met with considerable criticism, particularly from the side of legal and economic scholars.¹⁰⁷ To a large extent this disapproval finds its roots in the perceived lack of guarantees for cost-effectiveness in this approach. For one, the Court did not apply or prescribe a cost-standard (benchmark) in its judgment, which would make it possible for a subsidy for an inefficient public undertaking to completely escape competition scrutiny.¹⁰⁸ This would entail a transfer of consumer welfare to an inefficient firm; such a transfer cannot possibly be in the public interest.¹⁰⁹ Furthermore, the judgment left Member States a considerable amount of discretion in designing and limiting the public service obligation, potentially allowing for subsidisation of other costs made in the name of public interest. Under *Ferring*, such a situation would be immune from judicial review, as the lack of State Aid also renders inapplicable the notification duty and thus scrutiny by the Commission.

The later *Altmark* judgment addresses these criticisms by rephrasing the criteria and adding two new criteria to those found in *Ferring*.¹¹⁰ First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed

46/97 *SIC - Sociedade Independente de Comunicação SA v Commission (SIC)* [2000] ECR II-2125, para 84 and ECJ Case C-332/98 *France v Commission (CELF)* [2000] I-4833, paras 28-33.

¹⁰⁶ Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS) (Ferring)* [2001] ECR I-9067.

¹⁰⁷ P Nicolaidis, 'The Distortive Effects of Compensatory Aid Measures: A Note on the Economics of the 'Ferring' Judgement' 2002 *ECLR* 313-319. P Nicolaidis, 'Compensation for Public Service Obligations: Opening the Floodgates of State Aid?' 2003 *ECLR*, p. 561 – 573 and P. Nicolaidis, 'Competition and Services of General Economic Interest in the EU: Reconciling Economics and Law', 2003 *ESLAL*, 2, p 183 – 209.

¹⁰⁸ As acknowledged by the Court of First Instance in *BUPA*, CFI Case T-289/03 *British United Provident Association Ltd. (BUPA), BUPA Insurance Ltd., BUPA Ireland Ltd. V Commission (BUPA)* judgment of 12 February 2008, n.y.r., para. 246.

¹⁰⁹ P Nicolaidis, 'Compensation for Public Service Obligations: Opening the Floodgates of State Aid?' 2003 *ECLR*, at p. 571.

¹¹⁰ Case C-280/00 *Altmark* [2003] ECR I-7747, paras 88-93. See also Joined Cases C-34-38/01 *Enirisorse SpA v Ministero delle Finanze (Enirisorse)* [2003] ECR I-14243.

must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The effect of *Altmark* is a significant strengthening of the conditions that must be satisfied for the inapplicability of the State Aid rules.¹¹¹ Several more recent judgments and decisions clarify, and to a certain degree further strengthen the *Altmark* conditions. Decision 2005/842 contains a block exemption for such compensation and slightly widens the scope of *Altmark*, where overcompensation up to 20% of the costs is allowed for the social housing sector, provided that this is deducted from next years' compensation.¹¹² Further operationalisation of *Altmark* takes place in the Community framework for State Aid in the form of public service compensation.¹¹³

Fairly recent in this series of cases and decisions is *SIC II*, an appeal by a commercial broadcaster against a decision declaring certain measures by the Portuguese authorities vis a vis RTP, the public service broadcaster, not to be State Aid.¹¹⁴ In *SIC II*, the Court of First Instance held that the fourth *Altmark* criterion does not require the undertaking that discharges the public service obligations to be chosen by means of a tender or public procurement procedure.¹¹⁵ This may seem a severe setback for private parties who want to challenge the way a service of general economic interest is operated in a Member State. Nevertheless, *SIC II* holds a surprise in that the Court of First Instance seriously checks the Commission's appraisal of the compensation in question. In the contested decision the Commission concluded that, on the one hand, there was a verification system that ensures observance of the public service remit and the costs arising there from, whilst on the other hand it identifies that there were doubts regarding the functioning of this system.¹¹⁶ As a result, even though the decision was annulled on procedural grounds because the Commission had failed to undertake 'a diligent and *impartial* investigation',¹¹⁷ the Commission is under a strict duty to investigate the documents furnished by the Member State in order to establish that the public funds amount only to a compensation of costs. This shows that even the Commission is under scrutiny in order to avoid capture. Such capture is highly likely, particularly in the public broadcasting sector where the political stakes are high. For

¹¹¹ P Nicolaidis, 'Compensation for Public Service Obligations: Opening The Floodgates of State Aid?' 2003 *ECLR*, at p. 572.

¹¹² Decision 2005/842, OJ [2005] L 312/67, Article 6. Note that overcompensation is only allowed up to 10% for companies providing both public service obligations and commercial activities.

¹¹³ OJ 2005, C297/4.

¹¹⁴ Case T-442/03 *SIC - Sociedade Independente de Comunicaç o, SA v Commission (SIC II)* judgment of 26 June 2008, n.y.r.

¹¹⁵ Case T-442/03 *SIC II* judgment of 26 June 2008, n.y.r., paras 145-156.

¹¹⁶ Case T-442/03 *SIC II* judgment of 26 June 2008, n.y.r., paras 225-255.

¹¹⁷ Emphasis added, Case T-442/03 *SIC II* judgment of 26 June 2008, n.y.r., para 254.

one, national measures in this sector are quickly brought under the guise of cultural policy, an area where the EC has very limited competence.¹¹⁸ To further raise the stakes, the Member States included Article 16 EC as well as a Protocol on the system of public broadcasting attached to the EC Treaty by the Treaty of Amsterdam. Political pressure from the Member States only increased with the preparations for the European Convention and resulted in a plethora of documents concerning these services of general economic interest and non-economic services of general interest.¹¹⁹ In view of so much political pressure from the Member States as well as the European Parliament, a change in attitude from the side of the Commission may not come as a surprise. However the fact is that, from a strictly legal perspective, nothing has changed. The only legal novelty in this regard is the introduction of Article 16 EC, and this provision explicitly states that it is ‘without prejudice to Articles 73, 86 and 87’, thus leaving the major legal components of the abovementioned debate untouched. The Protocol on Services of General Interest attached to the Treaty of Lisbon has a similar political character without actually changing the legal framework.¹²⁰ Finally, the review of the Guidelines on State Aid for Public Service Broadcasting also takes place in a similar cautious manner, with a third round of consultations currently under way.¹²¹ Notably, the observations of the Association of Commercial Television Broadcasters in Europe make for an interesting read, particularly when compared to the observations submitted by the European Broadcasting Union.¹²² Much of the debate centres on the exact definition of the public service remit, as this defines the public service obligation and thus the possibility for compensation. It is with regard to this that the Commission’s decisions, as well as the Court of First Instance’s case law, show that effective supervision results in a more effective and efficient public broadcasting organisation. In *RTVE*, which concerned the Spanish public broadcasting organisation, State Aid supervision triggered a study which revealed that the workforce employed by RTVE exceeded what was necessary for the public service obligation, resulting in a more efficient public broadcasting organisation.¹²³ Similarly, the definition of the public service remit for German public broadcasters ARD and ZDF was insufficiently defined.¹²⁴ In this case the Commission confirmed the technology neutrality of the

¹¹⁸ Article 151(5) second indent, EC. See further S.A. 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 2006.

¹¹⁹ A wealth of documents dealing with this topic can be found on http://ec.europa.eu/services_general_interest/documents_en.htm

¹²⁰ *Supra* paragraph 1. For an assessment of the impact of this protocol see: F. Amttenbrink & J.W. van de Gronden, ‘Economisch recht en het Verdrag van Lissabon I: mededinging en interne markt’, [2008] *SEW*, p 323–329.

¹²¹ See: http://ec.europa.eu/competition/sectors/media/overview_en.html.

¹²² All available from: http://ec.europa.eu/competition/consultations/2009_broadcasting_review/index.html

¹²³ See Commission decision of 7 March 2007 in case NN/8/2007, OJ 2007 C 109/2. See also press release IP/07/291.

¹²⁴ Commission decision of 24 April 2007 in case E/3/2005, OJ 2007 C 185/1. See also press release IP/07/543.

public service obligation, which means that a public service obligation can also exist for non-linear broadcasting on, for example, the internet.¹²⁵ At the same time the Commission insisted that this public service character would be examined in advance¹²⁶ and that the rules on transparency be applied without mitigation.¹²⁷

At this moment, *TV2 Danmark* is the most recent case where public service obligations are applied.¹²⁸ In this case, *inter alia*, a number of commercial broadcasters active on the Danish market argued that the Commission had acted contrary to Article 86 and 87 in authorising an aid scheme for TV 2 Danmark, a public service broadcaster. The Court of First Instance commenced its appraisal of the Commission decision with an overview of the various protocols and resolutions on public service broadcasting.¹²⁹ Having thus set the scene, the Court then held that the exact definition of the public service remit is for the Member States. True as this may be, in light of the Court's case law, the fact remains that *Altmark* requires an exactly defined public service obligation. Indeed, the basic argument put forward by the commercial broadcasters – our programming isn't that different from that of the public broadcaster – appears convincing. Nevertheless the Court of First Instance rejects it, holding that this would effectively deprive the Member States of their power to define the public service remit.¹³⁰ It is submitted that this fails to take into account exactly what the public service obligation encompasses: an obligation to deliver services that would not be provided in the absence of state intervention. This means that public service broadcasters could certainly provide non-public services in the form of programmes that are barely different from those offered by commercial broadcasters, but that such programmes would have to be provided in fair and undistorted competition with the commercial broadcasters. The State Aid thus saved can then be put to good use compensating actual public service broadcasting. Of course it would be for the Member States themselves to define what constitutes actual public service broadcasting; however, a commercial broadcaster should be able to effectively invoke a legal instrument to ensure that the public service remit is adequately defined and redefined to take account of technical, economic, political and societal changes.

¹²⁵This is reflected in the amendments to the Television without Frontiers Directive by Directive 2007/65 on audiovisual media services, OJ 2007 L 332/27.

¹²⁶Commission decision of 24 April 2007 in case E/3/2005, OJ 2007 C 185/1, paras 225-236 and 359-374.

¹²⁷Directive 2006/111 on transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings OJ 2006 L 318/17.

¹²⁸Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark* judgment of 22 October 2008, n.y.r.

¹²⁹Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark* judgment of 22 October 2008, n.y.r., paras 101 – 106.

¹³⁰Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark* judgment of 22 October 2008, n.y.r., para 123.

6. CONCLUSIONS

In light of the political fireworks identified above in the form of myriad protocols, resolutions and declarations, the question becomes when and to what extent legal rules and judicial bodies become captured by politics to the extent where they no longer fulfil their regulatory role. The judgment in *BUPA*, similar to that in *TV 2 Danmark*, shows great deference, on the part of the Court of First Instance, in applying the *Altmark* criteria to the Commission decision; declaring that the Irish risk equalisation scheme (RES)-payments did not constitute State Aid because they satisfied the *Ferring* criteria.¹³¹ The RES payments are a means to equalise risks between medical insurance companies that have a relatively 'bad' risk population in comparison to the average insured population, thus ensuring solidarity between insurance schemes and ultimately consumers. In *BUPA* the effect of the RES payments was that BUPA, a private medical insurance company with a market share of 15%, would have to transfer funds to VHI - the incumbent undertaking with an 80% market share.¹³² Unsurprisingly, the Court of First Instance accepted that the *Altmark* criteria should be applied to the Commission's decision.¹³³ The Court then went on to apply a marginal test in view of the complex economic facts. As a result a specific public service obligation is distilled from nothing more than general requirements imposed on all companies offering private medical insurance, such as BUPA and VHI.¹³⁴ On a similar note the requirements concerning the prevention of overcompensation and proportionality are glossed over by the Court with remarkable ease.¹³⁵ *BUPA* raises a fundamental point concerning the intensity of judicial review, where the Court of First Instance states that its review is limited to manifest errors of appraisal in view of the complex economic facts.¹³⁶ If *BUPA* is anything to go by *Altmark* type cases will invariably involve complex economic facts – in fact it makes one wonder whether there will ever be a case involving simple economic facts. This in turn begs the question of what role the Community judiciary actually envisages for itself in judicial review of competition cases. Moreover, is *BUPA* the result of capture of both the Commission and the Court of First Instance? The answer to this question depends on the role attributed to players in the 'market for European norm setting'. Although regulatory competition regarding health care insurance is difficult to envisage, BUPA's reference to the Netherlands RES is telling

¹³¹ CFI Case T-289/03 *BUPA* judgment of 12 February 2008, n.y.r. It may be noted that the contested Commission decision predates *Altmark*.

¹³² Actually BUPA stated that it would consider withdrawing from the Irish market for private medical insurance as a result of the RES payments, T-289/03 *BUPA* judgment of 12 February 2008, n.y.r., para 78.

¹³³ Case T-289/03 *BUPA* judgment of 12 February 2008, n.y.r., para 159.

¹³⁴ Case T-289/03 *BUPA* judgment of 12 February 2008, n.y.r. paras 182, 183.

¹³⁵ Case T-289/03 *BUPA* judgment of 12 February 2008, n.y.r. paras. 224 *et seq.* and notably paras 234-238. In this regard, it is particularly poignant that BUPA actually pointed at the Netherlands RES, where such guarantees were in place, para 123. For a critical appraisal of *BUPA*, see: W Sauter, 'Risk Equalisation in Health Insurance and the New Standard for Public Service Compensation in the Context of State Aid and Services of General Economic Interest', *TILEC Discussion Paper* 2008-42, <http://ssrn.com/abstract=1310673>.

¹³⁶ Case T-289/03 *BUPA* judgment of 12 February 2008, n.y.r., paras 220-222.

and shows that, short of regulatory competition, there are benchmarks.¹³⁷ So, if there are benchmarks in a ‘market for health care insurance regulation’, what are we to think of the numerous attempts to influence and steer the rules of the game from the side of the major players on this market? It is, of course, the Member States’ prerogative to amend the primary law of the Community in order for it to better take account of their national needs. This, however, is something that the Member States have not done for the simple reason that they trust each other even less than they trust the Commission and Community Courts. These observations should not divert attention from the underlying issue in *BUPA*, which is the existence of a rule that – depending on whether *BUPA* or the Irish government is right – requires risk compensation or the compensation of inefficiency and overconsumption. The latter cannot be good for competition or the level of health care. Similarly, over-allocation of emission allowances, or an excessively lenient application of the provisions on carbon leakage, benefit neither the level playing field nor the fight against climate change. A strict and thorough application of EC competition law is an important instrument to help both competition and these non-economic objectives.

¹³⁷Case T-289/03 *BUPA* judgment of 12 February 2008, n.y.r., paras 123, 124 and 130.