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SOCIALLY RESPONSIBLE COMPETITION:
Competition law in a changing society

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A transitional phase to a new era. A farewell to blind faith in the free market as the only healthy way to create prosperity. One-dimensional focus on efficiency and growth has become the subject of a critical reassessment. Concepts like sustainability and well-being have strongly gained significance as policy benchmarks, both for governments and corporations. Social and economic policy should aim at a broad concept of prosperity, one that includes besides material progress and productivity growth also "social progress" and the quality of the environment. How does this impact on competition law?

Introduction

In 1603 the English court was asked to shine its light on the following case[1]: Edward Darcy had received from Queen Elisabeth I the exclusive right to produce and import playing cards for a period of twelve years. Darcy claimed damages from Allein who, breaching Darcy's monopoly, had been buying and selling playing cards. A sensitive case, set against the background of the constitutional battle between Queen and Parliament over the separation of powers. The monopolist Darcy invoked a public interest to justify his exclusive right: playing cards, he argued, are contemptible products, which makes it preferable if one person only is concerned with their production and trade, so that all other people can exercise honourable professions. The Court rejected this view and held that the Queen's favour had been contrary to *common law* and therefore void. The argumentation is interesting because of the economic and social principles *avant la lettre*: a monopoly leads to unacceptably high prices and a reduced quality of the product, it also damages the interests of third parties, namely other craftsmen who are prevented from practising their trade. The fact that card games are an activity with all sorts of negative aspects does not entail that the same is true for the production of the cards itself.

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1 The text is also included in Thomas D. Morgan, "Modern Antitrust Law and its origins", West Group, 2nd edition (2000).

The notion that economic power is "suspicious" was not uncommon in those days. A few years after the judgment, Hugo de Groot (Grotius) fulminated against traders who drove up prices of goods, thus in fact acting contrary to Nature. Trade, he argued, had not been created for the benefit of a few only.[2] There is nothing new under the sun. Four hundred years later, all over Europe proceedings are being conducted, up to the level of the European Court of Justice, about the validity of monopolies granted by governments. Again, they are about exclusive rights, but this time not the *production* and *trade* in playing cards but the *commercial exploitation* of games of chance, including card games. To justify the restrictions that are an obvious result of such monopolies, Member States - as 400 years ago - invoke moral and cultural values. And indeed, protecting society against addiction and waste by compulsive gambling and against crime may, under circumstances, outweigh the interest of free trade.[3] At least: as long as the government does not merely serve its own interests – like trying to scoop in the revenues of state casinos itself – but aims to promote "higher" goals, like combating crime. The creation of the internal market is a means to promote prosperity and well-being, it is *not a purpose* in itself.

Thus, competition, too, is a means, subject to rules to ensure fairness, and made subordinate to "higher" targets. Competition is not *per se* beneficial or "socially responsible". On occasion, competition can have adverse consequences. Fierce competition between providers of the same sort of (legal) games of chance will, economic logic dictates, increase demand and breed gambling addiction.[4] So should the government step in? Or the industry itself? It is not always immediately clear whether competition is "good" or "bad". So what to make of global competition between shoes manufacturers, that unavoidably leads to production at ever lower wages, yes, even by increasingly young children; who, some would say, this way may be able to support themselves?[5] Should this be viewed as "socially responsible competition"? Or, suppose American banks ten years ago would have agreed not to sell complex mortgage products to certain population segments. The banks would have run the risk of being sued for such kind of coordinated, anticompetitive behaviour. But the arrangement, at least *with hindsight*, would certainly have been "socially responsible".

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2 "De Vrije Zee/Mare Liberum", (1609), G. 132, Translation Arthur Eyffinger, Jongbloed Juridische Boekhandel (2009).

3 A good example is the case Gambelli: ECJ 6.11.03, case C-243/01, Nara's 63-68

4 Conclusion A.G. Bot, 17 December 2009, Case C-203/08, the Sporting Exchange v. Minister of Justice ("… holds out the illusion of potential enrichment but leads to the impoverishment of those who indulge in it").

5 I am not referring to illegal activities here. Those are prohibited and can thus not be the object of competition. There is also a twilight zone, occupied by, for instance, Dutch style coffee shops and prostitution.

Question

Issues like the playing cards example in the 17th century or games of chance in the 21st century illustrate a continuous search in the area of economic regulation for the limits of powers between the various authorities (King versus Parliament; EU versus Member States). These matters also illustrate conflicting interests: "free competition" on the one hand, with its undeniable advantages for our standard of living, and "social values" on the other. These dynamics are typical of European law. They played an important role in the difficult political journey towards the Treaty of Lisbon.

Much progress has been made in the EU in the area of the free movement of goods, services and persons. But, as demonstrated by the gambling cases, questions whether and under which circumstances public values claimed by the Member States should outweigh economic integration, arise time and again. So what about competition law? Does it leave room for the interests of the *citizen*, who is more than just a *consumer*? Can it adapt to new insights? Given the nature and background of this area of law, there is conceptually no reason to ignore the interests of society. But still, regulatory bodies shy away from taking them into account in their assessment. Out of fear of engaging in "politics" and out of fear of allowing disguised cartels. The courts have the last word on this matter.

Historical outline

Competition law is a legal translation of principles that have been conceived through the centuries in a search for the contours of a fair society. Aversion to concentration of economic power and distrust of the accumulation of wealth has been key in this. These principles were put into words in 1776 by the moral philosopher Adam Smith.[6] He turned strongly against the powers of governments, guilds and churches, against privileges and monopolies, trade restrictions and arrangements which, for instance, restricted membership of professional groups. Economic power leads to unacceptably high prices – and low wages – and should therefore be opposed. Let each man, Smith taught, pursue his own financial gains. If everyone would let himself be guided by rational considerations and "*romantic hopes*" then automatically, one way or the other, the public interest would be served: *led by an invisible hand*. This one – often quoted - reference to the "invisible hand" made him immortal with a broad audience. Smith was not a neoconservative. He

[6] "An Inquiry Into the Nature and Causes of the Wealth of Nations" (1776), Bantam Classics – Introduction by Alan B. Krueger (2003). The "invisible hand", incidentally, is mentioned only once in its 1,200 pages (p. 572), but appears for the first time in an earlier work, "The theory of moral sentiments" (1759).

was searching for the ideal society – an economic order subservient to justice, humanity and a "*public spirit*".

This ideal society was based on principles of equality and freedom.[7] It is a cooperative arrangement between people that puts the well-being of each individual as well as the joint prosperity of all, first. A free market economy, the argument goes, is best able to create an environment in which our democratic institutions are protected. Key in this is the concept "efficiency". This refers to the efficient use of scarce recources, an optimum price/quality ratio, the lowest possible production costs (for instance through innovation) but also a fair division of income and assets.[8] Competition, in short, via the road of economic efficiency, as a *means* to achieve a "higher" goal – democratic freedom.

What nowadays is being comprised in the term competition law goes back a long way. It finds its origins in old legal disputes about monopolies and issues that touch upon the essence of competition law: an entrepreneur who sells his business, for instance a bakery, and who undertakes not to work as a baker in the same neighbourhood for a certain number of years. A "non-compete", as it is called these days. In the old days, courts would annul such a provision on grounds of being contrary to entrepreneurial freedom; since the beginning of the 18th century the arrangement has become enforceable, provided "reasonable".[9]

The first competition legislation was introduced in the United States in 1890 : the Sherman Act. The aim was codification of old case law at federal level; another objective was to make it possible to file claims for damages and to impose fines. But more was playing by the end of the 19th century. A time characterized in America by rapid industrialisation, accompanied by unrestrained growth and an accumulation of wealth and, *last but not least*, the creation of joint ventures between competing businesses across the borders of the various States the so-called "trusts" (the beef trust, the steel trust, the barbed wire trust, the sugar trust, the whisky trust, the lucifer trust). The aversion against these "trusts" and their financiers was felt deeply. They would ruin the farmers and push small competitors from the market because they, unlike smaller businesses, received high discounts from the railway companies. This aversion too was a motive for the "antitrust" legislation, as is clear from stormy debates in the American Senate. Much has been written about the exact motives,[10] but

7 The vision of Smith and other philosophers was in conformity with the spirit of the times, which inspired the American and French revolutions; the same spirit that put an end to the guilds – cartels *par excellence.*

8 See also the standard work of John Rawls, "A theory of justice" (e.g. Chapter 2, para. 12).

9 Mitchel v Reynolds, 1711 – discussed by, among others, Areeda, "Antitrust Analysis", Little Brown & Company, 2nd edition.

10 Also Milton Handler and others, "Trade Regulation, Cases & Materials", Foundation Press, 2nd edition (1983).

one recurring theme has been the freedom of trade and contract, *provided* that the entrepreneurial freedom of one party was not unreasonably hindered by the market power of the other with upward pressure on prices as a result.[11] They had no economic model in mind but were protecting the general interest of *peace* and *prosperity.*

European competition law has been introduced in economies of Member States that were much more developed and also more separated from each other than those of the American States more than 50 years earlier. Competition law is conceptually linked inextricably with those provisions in the Treaty that are aimed at the creation and proper functioning of the internal market. But there is more: competition was considered a prime source of economic progress and a safeguard for democratic freedom. Competition law, again, not as a *purpose* in itself but as a *means* for a fair society.

Competition rules are now in place in well over 120 nations. The introduction of competition regulation is often a condition when concluding bilateral investment treaties and for financial support from international institutions.[12] Its actual application varies from country to country, depending on its embedment into the local legal culture and diverging political-economic views on a market economy. There are already differences in application within the EU and between the EU and the U.S.[13]; and even more between the western industrialized world and countries in a different phase of their economic development, that also have different views on the structure of society and the role of the government.[14]

Social values

Competition law, in fact, is thus an old legal field, rooted in political-philosophical views. Its application depends on place and time. Insights into and value judgments on the operation of markets evolve, as do factors relevant to analyse the harmfulness of behaviour.[15]

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11 See also Standard Oil vs US, Supreme Court 1911-221 US 1; 31 S Ct. 502.

12 Often caused by Western economic imperialism – the U.S., followed by Europe, wants access to markets of third countries while it also does not want its internal market to be threatened by export by foreign cartels.

13 For instance the acceptability of the behaviour of dominant businesses, and some forms of distribution.

14 Henyy Ergas, "Should developed countries require developing countries to adopt competition laws?", European Competition Journal, August 2009.

15 There was, for instance, a time when governments encouraged cooperation between competitors to push back capacity in a coordinated manner so as to suppress the effects of a crisis; these days, this is looked upon entirely differently - both views, in my opinion, are too rigid. In many countries there is a permanent ideological debate about the desirability of the introduction of market forces in special sectors, and the question how to safeguard general interests. Culture, political affiliation and changing economic insights determine for each sector whether "more, or less" or "no" market force whatsoever, is being preferred.

The question whether social values should and can play a role in the application of competition law, arises in a great many areas. One example is development aid. Suppose: competing chocolate manufacturers agree to pay small farmers in developing countries a reasonable minimum price for the raw material cacao. This would affect competition in an essential way, namely: to realise cost gains on the purchase of the main raw material. Sharp purchasing is made impossible by the arrangement and the price for consumers may increase. Should we accept this? Would the answer perhaps depend on the question whether the higher price for the farmers will result in chocolate of better quality? Or would it depend on the question whether, thanks to the cooperation, a market continues to exist at all – for otherwise, farmers would switch to rubber, or cannabis? Or should we let the market do its work, accept the excesses and wait for government intervention? And from which government?

Many situations are conceivable where competition is affected for the sake of socially relevant goals: energy consumption, biodiversity, climate, human rights, scarcity of water and other natural resources. We see that private parties are increasingly willing to take responsibility for such kind of interests, which traditionally have always belonged to the domain of governments. Those governments largely fail in this respect, for whatever reason. The complexity is huge and most of the problems have cross-border dimensions. International treaties are in place, but they are without sanctions. Globalisation punches holes in the legal order; there is no international authority that can issue and enforce standards.

The theme "public interest" and competition law is not new in itself. But more than ever, it should be given attention to. Because of serious doubts about the blessings of the free market, and because of increasing concerns over scarcity of energy, water and raw materials, the climate, human rights and, related thereto, the phenomenon "*Corporate Social Responsibility*" (CSR). This concerns the integration of social responsibility into the core activities of enterprises, i.e. the purchasing process, the manufacturing process, as well as the commercialisation of the products. OECD Guidelines encourage businesses to contribute to economic as well as social and ecological progress, to respect human rights, to protect the environment, public health and safety, to respect the rights of workers to organise, to combat child labour and corruption, and much more. Recommendations, however, are insufficient to deal effectively with all those challenges. One of the characteristics of CSR is

that business activities are aimed at the creation of values in three dimensions: Profit, People, Planet – and thus aimed at making a contribution to social welfare in the longer term.[16]

Sometimes, smart businesses will succeed in putting themselves in the spotlight. For instance by introducing an innovative, energy-saving production method; or by the use of biologically grown raw materials; or by attracting new customers with better and cleaner products. This promotes competition, entirely in line with the "*two birds with one stone*" vision of Adam Smith, that the pursuit of one's *own* interest coincides with serving the *general* interest. Often, however, it is impossible for an individual company to stand out. The fierceness of competition simply won't allow taking the risk. The short-term costs of investing in a "socially responsible" product may be too high to make cost-efficient production possible without becoming too expensive for the market. An industry-wide approach is then the only solution. The care for people and a liveable planet, if companies would jointly take this seriously, will, however, quickly have consequences for the way they compete. And also for the position of third parties: if competing manufacturers collectively decide to impose conditions on their suppliers in terms of energy consumption or CO2 emissions or child labour, the whole chain will be affected. Then what?

Role of competition law

Is there room for "socially responsible competition", i.e. socially relevant, industry-wide initiatives by the business community? Initiatives that influence consumer behaviour quicker and more effectively than legislation? Such measures would be found mainly in areas such as sustainability, the quality of air and water, or human rights. Instinctively, everyone will answer this question in the affirmative. Attention for the "*common good*" as more than a sum of individual interests is, after all, in line with our European economic model. There are, however, also other views. On the one hand it is accepted more and more that businesses, too, can - and should – pay attention to broader social interests. But when competing firms join hands to address such issues, it is quickly viewed upon with suspicion. How should competition authorities and courts assess this situation? There are, in my opinion, various lines of approach.

To begin with, we can draw a parallel with professional sports, an economic activity. In sports, sports bodies draw up rules that limit competition between the sportsmen. These rules are necessary

[16] There are quite many initiatives in this area. Very successful has been the Global Reporting Initiative (GRI), which operates from the Netherlands – www.globalreporting.org.

to ensure fairness of the matches. This applies to the "offside" rule but also to anti-doping rules or the rule that a speed skater switches from inner lane to outer lane and back again. Unbridled competition leads to chaos and is therefore avoided. This is justified – the rules are necessary for a proper functioning of the game or, if you prefer, the market, and do not fall under the prohibition on restrictive practices.[17] Without rules of conduct, there would not be a market in the first place.

And isn't it the same outside the sports world? Unchecked competition, no matter how efficient, is damaging. Ruthless market mechanisms exhaust raw materials, pollute the air, while human rights are violated. Market forces have meaning as long as there is a market: if producers of deep-frozen fish, fiercely competing, empty the sees more and more efficiently with their high-tech equipment, there will be no more fish in the end – and no more market for fish fingers. Suppose governments fail to step in, and suppose the fish-processing industry itself sets up rules aimed at sustainable fishing to preserve fish stocks and thus the market, then such kind of arrangement, by definition, cannot be a bad thing. It is arguable that such rules, as in sports, are permitted. See also the example mentioned earlier of the chocolate industry that decides jointly to pay farmers a better price.

It will not always be conduct that is simply necessary to maintain certain activities. So let us also examine a different approach, namely the exemption contained in the TFEU. If cooperation with a sufficient degree of certainty[18] leads to an improvement of the production or to technical or economic progress, there is room for exception (Article 101(3)). The wording does not preclude a broad interpretation.[19] Neither does case law.[20] In the 1950s, economic progress undoubtedly was thought of in terms of relatively easily measurable economic growth in the classic sense. But "growth", like "progress" is a flexible concept. Meanwhile economists, too, think in terms like

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17 The case Meca vs. Medina concerned the anti-doping rules of the IOC. In its judgment of 18 July 2006 (case C-519/04) the Court considered that, to the extent competition was restricted within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, it was justified by the interest that competitive sports should be conducted fairly, as well as athletes' health and ethical values. Thus, these rules fall outside the prohibition of Article 101(1) of the TFEU. At first glance it does not concern the application of the exception of Article 101(3) of the TFEU, but what is essential is that the Court recognises that other interests can outweigh that of "competition" without it being considered whether efficiency gains are realised. There is, incidentally, some merit in the line of reasoning of the Court of First Instance in this case (T-313/02) - this Court took the same approach as the ECJ in Brentjens (C-115/97), namely that the prohibition of doping is based purely on sporting considerations (Brentjens: collective bargaining on employment conditions) and therefore does not fall within the scope of the Treaty provisions.

18 Judgment ECJ 6.10.09, case C-501/06 P (and others), GlaxoSmithKline vs Commission.

19 See Chr. Townley, "Article 81 EC and Public Policy", Hart Publishing (2009). Townley, with various economists, essentially argues that the concept "restriction in competition" of Article 101(1) TFEU should be construed as a restriction of consumer welfare. In his vision, considerations of general interests play no role in the assessment of the applicability. Those are dealt with in full in Article 101(3) TFEU. This debate goes too far for now. Essential is that the 2004 guidelines on the application of Article 101(3) of the Treaty, which also deal with the interpretation of paragraph 1, in both paragraphs see no room for public interests that do not fit in with a restricted "efficiency" dogma. The Commission in those guidelines firmly tightens the reins on the interpretation of paragraph 3 – as of 2004 the application of the exception is no longer its prerogative, it is no longer one of its policy instruments. It is true that the reins of the first paragraph are loosened, but, as noted, no room is created to weigh in the general interest.

20 In case T-528/93 (Metropole vs Commission) the Court explicit held that that the Commission, pursuant to Article 101(3) TFEU "…. sure (could) base it on considerations concerning the general interest".

sustainability and solidarity and the quality of life[21] And why should a more sustainable production process, or one that respects human rights, not be considered an improvement, or progress?

The European Commission has rejected this view. It has, at least since 2004, when it tightened the reins and published policy rules, been very firm in its belief: competitive restrictions can only be justified by efficiency gains. Those efficiency gains may be a reduction of the cost price, improved quality, or innovations. Other objectives pursued by competitors, no matter how noble in the longer term for employment, the environment, public health or the "third world", are subordinate to the dogma of "efficiency gains".[22]

The focus on "efficiency" comes from the notion that competition law serves one purpose only: to protect competition as a means to increase consumer welfare. Maximising welfare by pursuing efficiency is, in the eyes of some, even the quintessence of major parts of the law. Where one person speaks of welfare in terms of the greatest happiness for the greatest group, another will mention the most efficient solution that should determine the content of a legal rule, unless – and this is the point – justice requires another solution.[23] Efficiency is thus never an end in itself.

The choice for "efficiency" en "consumer welfare" as the sole ground for exceptions to cooperation between competitors is a political one.[24] The choice is debatable. Competition law does not stand on its own. It is traditionally a means, as outlined above, to create a fair and democratic society. In the EU, competition law is only one of the building blocks to realise the ultimate goals of European cooperation. Those goals reside in the area of freedom and democracy, sustainable development of social and economic activities, the quality of existence. The competition rules are complementary to other rules, such as those relating to the free movement of goods and services. Where formerly a term as the "open market economy" would be used, the buzz word these days[25] is the "social market economy"[26]; the principle that the internal market comprises a system for genuine competition has been relegated to a Protocol, mainly out of French fears that public interests would be sacrificed at

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21 Interesting in relation to this issue is the annual Dutch-Flemish "Tilburg Conference" which has as its theme the change towards a "another (new) economy" that focuses on sustainability.

22 Guidelines on the application of Article 101(3) TFEU. OJ L 1, 4.1.03; also para. 33, 43 and 50.

23 J.W. Harris, Legal Philosophies, ch. 4, Oxford (1997). Harris discussed well-known works from leading writers such as Coase and Posner.

24 Economic science does not dictate the choice. There is no unequivocal value judgment on the most desirable model of order. The common welfare of a society is the object of the study of the "welfare economy"". A source of theories - - that I, not an economist, will not discuss – about the optimum division of welfare, models for competition, the role of market forces and market failures, government intervention and government failure and the question how various kinds of "efficiency" improvement can lead to higher consumer welfare. These issues were, in a broader context, discussed frequently in the recent preliminary advice from the Koninklijke Vereniging voor de Staathuishoudkunde (Royal Netherlands Economic Association), "Marktwerking en Publieke Belangen" (2009).

25 Since 1 December 2009, when the Treaty of Lisbon came into effect.

26 Article 3 TFEU; Article 119 (in de Title on Economic and Monetary Policy) still mentions an "open market economy with free competition".

the altar of the free market. Legally, this is only symbolic - the Protocol has the same legal effect as a provision of a Treaty, but still…

European Treaties are coloured by a range of diverging interests. Everything about them breathes the atmosphere of a mixed economic order. There is no purely free market economy. Ever since the establishment of the European Union, tensions have existed between the protection of general interests, deemed important by national governments, and the creation of one internal market. In the event of conflicts, issues like consumer protection, public health, safety, energy provision can prevail. Although governments, as the protectors of general interests, have more of a margin than the business community, there is, as a matter of principle, no reason to judge any differently concerning the application of the competition rules.[27] The new Treaty, after "Lisbon" more than before, emphasizes the *cohesion* between the various activities and the objectives of the EU – which vary from the creation of one internal market to animal welfare, culture, public health and the fight against climate change. It is true that there is no hierarchy between all those policy fields, but it is obvious that competition policy has to take those other objectives into account. The operation of the market is certainly not superior to other values.

"Efficiency" in the short term as the *sole* justification to allow cooperation between competing companies, is dangerous. Society does not benefit from an efficient depletion of raw materials for the benefit of a consumer for whom price is still the main criterion. The test of efficiency is, by the way, also not that easy to apply. Economic literature shows it is not always that clear whose welfare effects (which efficiencies) are being considered. These effects, no matter how defined, are also difficult to quantify. And "how much" efficiency gains are needed to outweigh competitive restrictions? This will also depend on the *nature* of the restriction. Added to this, economic assumptions and models are subject to change and predictive powers are very limited.

It is remarkable that the European Commission in its policy documents has emphasized the shortcomings of the market economy. It has passionately argued in favour of a "green economy", as well as Corporate Social Responsibility[28] – which it calls "welfare in the longer term"[29]; at the same

[27] See on this issue also K. Mortelmans, "Towards convergence in the application of the rules on free movement and on competition", CMLR 2001, 613-649. An obstacle, in his view, for convergence is the fact that exceptions in competition law cannot pertain to non-economic grounds (although he does perceive a shift). As appearing from the 2004 guidelines, the Commission shares this view – I have my doubts about the accuracy of this view.

[28] Recently: Commission Staff Working Document: Lisbon Strategy evaluation document, SEC (2010) 114 final. Lecture Commissioner Verheugen "Corporate Social Responsibility Essential for Public Trust in Business" (speech/09/53) – he argues in favour of CSR as a "voluntary concept", with the Commission having a facilitating role.

[29] Communication from the Commission on "Implementation of the partnership for growth and employment – Europe should become an example in the area of Corporate Social Responsibility", COM (2006) 136 def.

time it (at least: DG Competition) links economic progress in competition law solely to consumer welfare in the short term. Should we not consider the term "consumer welfare" much broader? President Sarkozy in January 2010 at the World Economic Forum argued that the world of the 21st century cannot be governed by principles from the 20th century. He is not the only one who advocates a broad concept of welfare – welfare that comprises more than consumer satisfaction with goods and services, and that also provides for safety, clean air, the fight against poverty, and so on.

We do not have to abandon the market as a leading planning principle, nor the test of efficiency. But where governments fail to find solutions for urgent problems and companies join hands industry-wide, would it be acceptable if competition law were to obstruct this *a priori*? Considering the origins, ratio and the place of competition law, there is no need for a narrow interpretation. Self-regulation by the industry is, however, not something regulators are fond of. They fear it results in allowing disguised cartels. Cooperation will indeed have to be *proportional* – the end does not justify all the means. Regulators will also not wish to get involved with politics. Is this justified? The European Commission is a body that engages in politics on a broad range of subjects.

The appraisal of the benefits and the drawbacks can, of course, be difficult. The benefits for the "planet" of a "socially responsible" agreement between competitors, for instance, only to purchase certified raw materials or to charge on the costs of measures taken in connection with animal welfare or the environment. Set against the drawback that, to some extent, competition is being restricted. How much tonnes of toxic emission reduction justify a price increase? Not an easy assessment but not *per se* more difficult than one that focuses on efficiency gains – a notion which just as well harbours diverging value opinions and, thus, unpredictability. And besides, the fact that values like welfare and nature are difficult to quantify does not constitute a reason to negate those values.

And let us also not forget that conflicting principles are not an unusual phenomenon in the law. Striking a balance is the essence of law. Competition law is not an exception. The courts of Member States for 50 years now have had to weigh public interests when applying the rules on free movement. And regulators, often administrative authorities, are just as capable of doing so.

Conclusion

The challenges in the years ahead, a new vision on the market economy and growth as well as the cohesion of policy objectives within the European Union require a more sophisticated approach. An approach that leaves room to social interests. Sometimes, certain behaviour will be necessary to maintain a market, and competition law does not apply. Other times, the interests outweigh the restrictions. This kind of approach may be controversial, but it is supported by the nature and background of competition law.