Competition Law and Environmental Protection in Europe; Towards Sustainability?
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The Useful Effect Doctrine
II. I Introduction

In the previous chapters we have been looking at the rules that govern restrictions of competition by undertakings. Competition may, however, also be restricted or distorted by the member states acting in their public authority. Such government-induced restrictions and distortions are also within the ambit of Community competition law. The first instrument within this group of competition law that we will look at is the so-called useful effect rule.¹

As we will be seen in the following paragraph, the useful effect rule was a later, Court-made, addition to the Community's lists of competition instruments. Despite the fact that the existence of the useful effect rule was thus acknowledged at a later stage, is can be seen, as will also be shown below,² as a lex generalis with regard to Article 86 EC. Acknowledging this lex generalis character is a very helpful tool to understand the useful effect doctrine and relate its application to that of Article 86.

In this chapter we shall first have a look at the useful effect doctrine in general and secondly we will investigate the possibilities to take environmental considerations into account.

II. 2 A general outline of the useful effect doctrine

As we have seen the EC Treaty contains rules directed at both firms as well the member states. However, the latter set of rules (Articles 86 and 87-88 EC) contained a loophole in that certain forms of public-private cooperation were not covered by any particular competition rule. This loophole is of particular interest to, inter alia, the Netherlands where, for example, the Environmental Management Act provides for a possibility to declare an agreement between the majority of the members of an industry on a removal fee to be generally binding on the entire sector.³ Such removal fees show some

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¹ Because this rule was a later addition to the body of EC competition law it has also been called the 'new norm' (see, e.g., Mortelmans 2001, p. 619). Since this rule, at the moment, exists for over twenty years already and it can therefore hardly be called new, we will refer to it as the useful effect rule or doctrine. Cf. Buendia Sierra who refers in this respect to the 'effet utile principle', Buendia Sierra 1999, p. 263 et seq. Furthermore, by analogy to the U.S. doctrine, it also referred to as the 'state action doctrine' cf. Hoffman 1990, p. 12 and opinion of A-G Jacobs in Case C-198/01, C.I.F. Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato, opinion of 30 January 2003, n.y.r., to be found on www.curia.eu.int.

² Infra, paragraph 12.1.

³ Section 15.10 of the Environmental Management Act (Wet milieubeheer). Most recently amended by Stb. 1999, 208. See further on this possibility Vedder 2002, p. 33. Thus, the fact that, as Ritter, Braun &
resemblance to the privately agreed environmental surcharge that was under consideration in the VOTOB case and therefore, it cannot be ruled out that the agreement between the industry in itself is contrary to Article 81. However, in this scenario the government act does not fall within the scope of Article 86 or 87 since it involves neither the granting of a special or exclusive right nor the transfer of any public funds. Furthermore, the underlying agreement is no longer just an agreement between undertakings but has been taken out of the private sphere, soaked in public law and thus removed from the scope of Article 81. The Court subsequently plugged this loophole when it came up with the useful effect doctrine in the GB-Inno-BM v. ATAB case. In this case, the Court held that, although, Articles 81 and 82 are directed at undertakings, member state authorities are under an obligation not to detract from the useful effect of these provisions. This follows from Article 10 in connection with Article 81. Following this judgment, the most important question was what exactly was the scope of this obligation. Later case law has clarified this to some extent and has provided us with the following definition of the useful effect rule.

Although Article 85 [Now Article 81] of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation, the fact nevertheless remains that Article 85 of the Treaty, in conjunction with Article 5 [Now Article 10] requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.

Such would be the case if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

The test thus laid down is threefold. Firstly, member states may not require or favour the adoption of agreements that are contrary to Article 81. Secondly, member states may not reinforce the effects of such agreements and, thirdly, member states may not delegate to economic operators the responsibility for decisions affecting the economic sphere. With regard to these three tests, essentially two branches can thus be discerned: on the one hand the requir-

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ing, favouring and reinforcing of an agreement and, on the other hand, the
delegation of powers. However, wide-ranging these three tests may seem, the
applicability of the first branch – i.e. requiring or favouring the adoption of an
agreement or reinforcing its effects – of the test still requires an ‘underlying’
agreement that is contrary to Article 81. This two-tier approach can be seen in
the Dutch pension funds cases where the court ruled out the applicability of the
useful effect doctrine to the member state action precisely because the underly-
ing agreement was not prohibited by Article 81. With regard to the third test
– delegating to economic operators the responsibility for decisions affecting the
economic sphere – there is no link with Article 81. The Court’s case law appears
to indicate that such a delegation can be said to exist in situations where a
regulation allows a private actor to take certain decisions without taking consid-
erations other than those of the industry concerned, into account. In Reiff, the
Court addressed this issue and considered whether a procedure whereby road
haulage tariffs were agreed by a committee consisting of, mostly, representatives
of the transport industry. In doing so it took into account the following factors.
Firstly, it looked at the objectives of the national laws in place and came to the
conclusion that these were not intended to serve the interests of the industry
but rather served the general interest. After that the Court looked at the way
the system operated in practice. The Court appeared to attach great weight to
the fact that the minister could participate in the discussions leading up to the
conclusion of the tariffs. Furthermore, the minister could replace a decision
by the committee with his own decision if the decision by the committee took
insufficient account of the general interests. As a result, it can be said that a
member state does not delegate its powers if it retains a decisive influence by
which it can ascertain that interests other than those of the industry concerned
are observed.

As may be expected, the Court’s useful effect doctrine was not been given an
equally warm welcome by everyone. The combined application of Article 10 and
81 has led to the addition of a new instrument to the EC’s arsenal of competition
law. Moreover, this instrument deeply encroaches upon the member state’s sove-
reignty to regulate (together with the industry) everyday life on markets. It has
therefore been argued that the useful effect doctrine is an undue extension of
the EC’s competition laws into the daily life of the modern corporatist state. 

ECR-6451, para. 58.
9 Ibid., para. 22. See also Case C-153/91, Germany v. Delta Schiffs fahrtsgesellschaft (Delta),
10 See, more extensively, Neergaard 1998.
These criticisms boil down to a subsidiarity type of reasoning whereby it is argued that member states should retain some powers to shape the day-to-day economic operation on their territories. It is submitted that such reasoning is flawed to some extent. To demonstrate this, the two branches of the useful effect doctrine should be separately looked at. For a member state to act in contravention of the first branch of the useful effect doctrine, the underlying cartel must of itself violate Article 81. Is widely accepted that the mere fact that an agreement is contrary to Article 81 is in itself sufficient for the Community to be able to oppose this agreement. The Community’s free market economy is inherently opposed to restrictions of competition and for this very reason agreements that are restrictive of competition are either prohibited or exempted by the Commission. If this is common ground, then why should the fact that an agreement is taken outside the private sphere and given some public law status suffice to bring it completely outside the scope of Community law? It is more than likely that conferring this public law status upon the agreement actually increases the restrictive effects of the agreement. Moreover, as the alternative ‘object’ and ‘effect’ tests in Article 81 already show, Community competition law will not content itself with legal formalism but also looks at the actual effects on competition. If we recognise this effects-based approach, should the useful effect doctrine then come as a surprise? The Treaty itself already provides evidence of an effects-based approach by not only governing more or less specific types of state action (e.g. the free movement provisions) but also by laying down a more general duty of loyalty to the Community in Article 10. Therefore, it is submitted that with regard to the first branch of the useful effect rule, criticisms that the EC is unduly extending the scope of its powers to govern also state actions, are flawed.

With regard to the second branch of the useful effect rule the criticisms appear to be well founded. In these cases there is no underlying cartel that violates a Treaty provision. It may therefore be asked whether the effects-based approach has not been taken too far in this context. The rationale behind the delegation of certain decision-making powers to representations of industry is often one that hinges on the need to make use of the industry’s expertise. In the environmental context this is explicitly recognised by the Community and national policies with regard to environmental agreements and so-called ‘flexible regulation’ as opposed to so-called ‘command and control’ type of instruments. It is often considered that such agreements are more efficient means to attain certain environmental goals since industry knows much better than the government how to attain these goals at minimum costs. Taking into account these legitimate reasons for cooperation between the state and industry, an unmitigated application of the useful effect doctrine seems unnecessary and

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indeed an undue extension of the Community's competences to review acts of the member states. However, the test adopted under the second branch reflects these concerns in that a delegation of powers is allowed insofar as this is in the public interest and the state ensures compliance with this public interest. It will be seen below that the Court takes these considerations into account in its recent case law on the useful effect doctrine.

In sum, the two branches of the useful effect doctrine still allow the national authorities considerable room. The first branch requires an underlying agreement contrary to Article 81. As Albany and Pavlov have shown, instances can certainly be conceived where the underlying agreement is simply not contrary to Article 81. In chapter 3 we have seen a number of possibilities for an agreement to either fall outside the scope of Article 81(1) in the first place or to be justified by an exemption. In either case the agreement will not be contrary to Article 81 so that any government action with regard to this agreement will escape the useful effect rule. The second branch essentially requires that member states retain some power to ascertain that the general interest is indeed taken into account.12

### 11.3 Exceptions to the useful effect doctrine

In the light of what has been said in the preceding paragraph, the two branches of the useful effect doctrine seem to allow member states a sufficient margin to conduct national policy. This begs the question of whether and to what extent these exceptions can function in an environmental setting. In other words: can environmental concerns be integrated into the application of the useful effect doctrine? In this respect it must be said that, as far as we are aware, there are no decisions or judgments on the application of the useful effect doctrine in an environmental context.13

With regard to the first branch of the useful effect rule, the interpretation of Article 81 in itself allows for sufficient room to integrate environmental concerns as was shown above. Many environmental agreements may, for example, be considered to restrict competition only to an extent that is non appreciable. Similarly, an agreement that benefits from an exemption will not, for the duration of the exemption, be contrary to Article 81. At the moment, this effectively means that such agreements have to be notified with the Commission in order to obtain an exemption before a member state can, for example, declare

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13 The Commission, however, has hinted at the possibility of applying this rule to environmental regulations on a few occasions, Commission, XXIInd. Competition Report (1992), para. 77.
such an agreement generally binding without violating the useful effect rule. As there is no block exemption for environmental agreements and the existing block exemptions do not apply, any agreement that falls within the scope of Article 81(1) can only not be contrary to Article 81 if it benefits from an individual exemption. Irrespective of the practical difficulties involved in obtaining an exemption, this should not prove to be a stumbling block.

However, with regard to the need to obtain an exemption the following can be said. In the introductory paragraph we have already noted the fact that the useful effect rule can be seen a *lex generalis* with regard to Article 86. With regard to this provision, Article 86(2) allows member states to justify possible incursions on Article 86(1). Although it is not entirely certain, there are reasons to assume that the applicability of Article 86(2) may also make it unnecessary to obtain an exemption.

It is submitted that insofar as the possibility to justify actions that fall within the scope of Article 86 on the basis of Article 86(2) may obviate the necessity of an exemption pursuant to Article 81(3), that a similar possibility should exist with regard to useful effect doctrine.

After the entry into force of Regulation 1/2003, Article 81(3) will have become directly applicable. As a result, the notification procedure as well as the Commission’s monopoly to grant exemptions will also cease to exist. With regard to the useful effect doctrine this will not lead to any particular difficulties. A (national) court before which the useful effect doctrine is invoked can simply rule on the applicability of Article 81 as a whole. If it considers Article 81 not to apply to the underlying agreement (either because Article 81(1) does not apply or because the conditions of Article 81(3) are fulfilled), the useful effect doctrine will not apply to the government’s action with regard to that agreement.

Similarly, the second branch of the useful effect rule will not necessarily prove to be an insurmountable obstacle to government action. Essentially, it only requires that the public authorities possess and actively use their supervisory powers to ascertain that an agreement indeed serves the objective of the protection of the environment. In the context of the example of the possibility to declare an agreement on removal fees generally binding, the Environment minister should actively supervise the amount of the removal fee in order to ascertain that it does not exceed the costs incurred in the collection and treatment of the products concerned.

Interestingly, the recent case law of the Court pursuant to the useful effect doctrine appears to allow for the possibility to justify member state actions that fall within the scope of the useful effect doctrine. This justification seems to find its origin in the opinion of A-G Jacobs in the *Pavlov* case. In his opinion the Advocate-General argued that the link between, on the one hand, the fact that the underlying agreement must be contrary to Article 81 and, on the other hand,

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14 Infra. paragraph 12.5.
the government act is unsatisfactory.\textsuperscript{15} He considers this because the underlying decision in \textit{Pavlov} was of itself not restrictive enough and therefore falls outside Article 81 whereas the government intervention, which increases the restrictive effects, also falls outside the scope of the useful effect doctrine precisely because of the insufficiently restrictive effects of the underlying agreement.\textsuperscript{16} Instead he proposes to opt for a presumption of illegality that can be justified on public interest grounds.\textsuperscript{17} More precisely, he proposes an alternative test whereby state measures that are taken in pursuit of a legitimate and clearly defined public interest objective are allowed when the member state also actively supervises the underlying concertation even if this state measure reinforces the restrictive effects. The Court appears to have adopted this test to some extent in paragraphs 98 and 100 of its ruling.\textsuperscript{18}

'As for the request, made to the public authorities by an organisation representing the members of a profession, to make membership of the occupational pension fund it has set up compulsory, it is made under a scheme identical to those existing under the national law of a number of countries concerning the exercise of regulatory authority in the social domain. Such regimes are designed to promote the creation of supplementary pensions of the second type and include a number of safeguards whose observance the competent Minister must ensure, so that a request by the members of a profession for membership to be made compulsory cannot constitute an infringement of Article 85(1) [Now Article 81(1)] of the Treaty. [...] Thus, for the same reasons, a decision by the Member State in question to make membership of such a fund compulsory for all members of the profession is not contrary to Articles 5 [Now Article 10] and 85 of the Treaty either.' [Emphasis added]

The Court, in short, comes to the conclusion that the member state action in this case is designed to provide, put simply, social protection (i.e. pensions) and it is for the Minister to ascertain that the underlying agreement only serves that social purpose. This apparently takes the government action outside the scope of the useful effect doctrine. The exception thus created shows a striking resemblance to the test adopted by the Court under the second branch of the useful effect doctrine. This is also apparent in the opinion of Advocate General Léger

\textsuperscript{15} Buendia Sierra is a bit more outspoken and considers that it 'is bordering on the infantile in its formalism', Buendia Sierra 1999, p. 265.


\textsuperscript{17} Ibid., para. 163, Jacobs speaks of 'prima facie infringement' in his opinion.

\textsuperscript{18} Cf. Loozen 2000, p. 305 and Mortelmans 2001, p. 643 et seq.
In the Wouters case,\textsuperscript{19} in its judgment in Wouters, the Court also appears to have adopted this test to the extent that it considers the restrictive regulation by the Bar of the Netherlands, to fall outside Article 81(1) because it was necessary for the proper practice of the legal profession.\textsuperscript{20} Although the test adopted by him is quite the same as the one adopted by the Court in Pavlov the idea underlying both exceptions appears to be identical and has, with regard to the professions, been brought to the fore by Advocate-General Jacobs in Pavlov.\textsuperscript{21} Basically, the idea is that on the one hand the increased efficiency of self-regulation compared to command-and-control government regulation must be balanced with, on the other hand, the need to maintain control in order to ensure that the self-regulation does not turn into self-enrichment. The main elements are therefore the need to ascertain that the general interest is and will remain the prime objective. Below we shall refer to the exception thus created as the general interest exception. The addition, by the Court, of a possibility for a general interest exception with regard to the useful effect doctrine should not come as a surprise. As will be seen below, the relation between the useful effect rule and Article 86 is one of \textit{lex generalis} and \textit{lex specialis}. With regard to a more or less defined area of application, the two rules address the same point: member states may not restrict or distort competition by using private firms. This relation between Article 86 and the useful effect doctrine has a number of consequences. Firstly, the substantive legality standards (i.e. in how far is a member state allowed to cooperate with industry and restrict competition to attain general interest objectives?) must be identical. Secondly, the essential procedural aspects (most importantly the burden of proof) should also be identical under both provisions.

With regard to the first consequence, it cannot be accepted that the substantive legality standards under the useful effect rule and Article 86 diverge. In other words, it should not matter whether a member state grants exclusive rights (a practice governed by Article 86) or whether it opts for self-regulation to attain the objectives of general interest. It is therefore submitted that, essentially, the legality standards as far as the \textit{prohibitions} in both norms is concerned, Article 86(1) and the useful effect doctrine are comparable. However, as we will see below, Article 86(2) provides for a potentially wide-ranging possibility to justify actions that may fall within the scope of Article 86(1). The standards of legality under the useful effect doctrine and Article 86 as a whole would diverge if the useful effect rule would not allow for a justification or an exception similar to Article 86(2). It is submitted that in Pavlov the Court acknowledged this


\textsuperscript{20} Case C-309/99, Wouters, [2002] ECR, I-1577, para. 109. Note that this relates to Article 81(1) not read in conjunction with Article 10 EC. See further, supra, paragraph 8.4.2.4 with regard to the the European Rule of Reason.

\textsuperscript{21} \textit{Ibid.}, para. 209.
discrepancy and addressed it by providing for the exception possibility with regard to actions that fall within the scope of the useful effect doctrine. As regards the remarks made above with regard to the need to obtain an exemption if a member state wants to avoid breaching the first branch of the useful effect doctrine, it is submitted that, insofar as Article 86(2) obviates the need for an exemption, the applicability of the general interest exception should also make an exemption superfluous.

With regard to the second consequence, the existence of a general interest exception to the useful effect doctrine restricts the scope of application of this doctrine as a tool to maintain or bring about effective competition. The dilemma is therefore identical to that existing with regard to Article 86(2) which also balances the need to maintain undistorted competition with the legitimate interest that member states may have in ‘steering the economy’ through distortions of competition. With regard to Article 86(2) the burden of proof lies primarily with the member state or the firm that benefits from the exclusive right. By analogy, it should be for the parties to the underlying agreement and the member state to establish, firstly, that the agreement indeed serves the general interest and, secondly, that there is active supervision to ensure that this is indeed the prime objective for the general interest exception to apply.

Let us now consider the question of whether or not the general interest exception could apply in an environmental context. Prima facie there is nothing to prevent the reasoning underlying the general interest exception from applying with regard to environmental agreements. In fact, A-G Jacobs explicitly refers to the possibility that member states may want to extend the effects in the environmental sphere to more actors than just the parties to the underlying agreement. If the new escape route from the useful effect doctrine is to be seen as an indication that the Court is more reluctant to apply the doctrine without any reservations, then this refining of the doctrine addresses the concerns mentioned above. In that case, the fact that the Court’s reluctance to apply the useful effect doctrine can be explained by reasons of subsidiarity, should also not stand in the way of applying this reasoning to government measures in the environmental context. If the general interest exception, as is submitted, is all about striking the right balance between the freedom that member states should have to efficiently organise their economies and the need to maintain competition, then this should also not keep it from applying to environmental agreements. Particularly, in a highly technical area of law such as environmental law, self-regulation is considered to bring with it clear efficiency gains. It is precisely through the general interest exception that such efficiencies should be taken

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23 As would seem to be the rationale. cf. Neergaard 1998.
into account in creating an exception for government action with regard to self-regulation provided that the authorities ascertain (supervise) that environmental protection remains the prime objective.

As a final means to escape from the useful effect doctrine, it is possible that the parties to an agreement that is subject to government involvement may benefit from the exception offered by Article 86(2) EC. We shall be looking closer at this provision and its application in the context of environmental protection below.\textsuperscript{34}

\textsuperscript{34} \textit{Infra} chapter 12.