Lobbying and Competition Law

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A. Introduction

One of the most pressing issues the fathers of the American Constitution had to address was the existence of special interest groups or factions. Organized lobbyists pose a threat to representative democracy, since they, more often than not, seem to get their way at the expense of the public interest. James Madison reached the following conclusion:

> The inference to which we are brought is that the *causes* of factions cannot be removed and that relief is only to be sought in the means of controlling its *effects*.[1]

In this article, one potential, at first sight somewhat peculiar means of curbing the power of factions is discussed: European competition law. The question is posed whether certain forms of lobbying may be at variance with Articles 81 and 82 (ex. Arts. 85 and 86) of the Treaty of Rome. The reader may wonder why there should be a link between lobbying, which is a political activity, and competition law, which governs cartels, mergers and acquisitions. Does it make sense to apply the tools of competition law to the political sphere? In this article, I set out to defend the thesis that there is a link and that it warrants further, detailed investigation. The existence of such a connection becomes more plausible if we take a look at a hand-book for lobbyists. One of the benefits lobbyists can obtain, we are told, consists in measures that impair the economic position of their competitors. As skilful lobbyists we can 'advance, faster and further, a dossier prejudicial to competitors or even let such a dossier arise'.[2] If the government is prepared to adopt measures impeding competitors, then lobbying for such legislation may be the cheapest way of improving one's own standing. Participants in a cartel have to monitor the activities of their partners – there is no trust in a trust. If, however, the government sanctions infringements of rules drafted by interest groups, only the government incurs monitoring costs. So the relation in which we are interested can be graphically represented as:

$$\text{company 1} \xrightarrow{\text{(lobby)}} \text{government} \xrightarrow{\text{(detrimental measure)}} \text{company 2.}$$

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[1] *The Federalist Papers* (London, Penguin, 1987), paper X at p. 125.
[2] Clamen, Michel, *Le Lobbying et ses secrets*, (Paris, Dunod 1995) at p. 39.

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It may thus be a cost efficient strategy to pressure the home government for legal action. But hasn't the introduction of the Common Market done away with protectionism in the Community? It is submitted that despite the establishment of the Common Market, there are ways for governments to lend a hand to domestic companies lobbying for certain measures. The means have merely become more subtle, as supervision has improved thanks to, *inter alia*, the amended Directive 83/189 on technical norms. But it still takes some time before the Commission will intervene on behalf of injured traders.

In order to make a case for the existence of a link between lobbying and European competition law, I first present the US doctrine on lobbying and competition (part B). In the US the question has already received substantial treatment in the legal and economic literature.[3] Hence the US doctrine may provide us with landmarks in an as yet not fully explored territory. In part C it is considered whether this doctrine could or should be applied in the European context. In part D I present the skeleton of a legal doctrine that would allow competition law to be applied to certain lobbying activities.

Before we start I would like to clarify the basic concepts. 'Lobbying'[4] means *any* activity undertaken with a view of obtaining favourable governmental action, in particular, favourable legislation. In their quest for such action, lobbyists can choose between direct and indirect means of achieving their ends. They may, for instance, start public relation campaigns in the media (indirect), issue more or less veiled threats that they would be forced to reduce production in the country unless the desired action is taken or simply file a petition (direct). Even though some of these activities may be perceived as morally suspect, 'lobbying' is used in an ethically neutral way in this article. Furthermore, I shall use the terms 'interest groups' or 'pressure groups' synonymously. Any group, however loose, of companies that co-ordinate their lobbying is referred to as a 'pressure' or 'interest group'. Finally, 'government' is also used in a fairly broad sense, covering all types of official institutions, including regulatory agencies. So is 'measure' or 'legislation': any governmental measure, regardless of scope or form, is intended to be covered. As a rule, the reader is not mistaken if he or she assumes that in this article any term is loosely used. One last *caveat lector*: the reader is asked to bear in mind that this article is just the beginning of the beginning. It offers no more than some propositions as to how this issue might be tackled. These suggestions are in no way definitive. The article should, nevertheless, at least convey the impression that it is worthwhile to pursue the issue further.[5]

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[3] For a survey of the economic debate from a lawyer's point of view: Stephen Croley, 'Incorporating the Administrative Process' in (1998) *Columbia Law Review* pp. 1–166.

[4] *Webster's New World Dictionary* offers the following definition for 'lobbying': 'to attempt to influence in favour of something'. The European Parliament has defined a lobbyist as anybody representing a third party's interests.

[5] I would like to thank some of those on whose ideas I have freely drawn: Professor Dr. Frank Emmert, Atila Boczak, Lukas Lusser and Andy Watt. Special thanks are due to James Flynn Esq.

B. *Noerr-Pennington*: Lobbying and Competition Law in the US

The US doctrine on lobbying and competition law has often been recommended as a model for a European solution.[6] To my knowledge, European legal systems do not offer us a similarly rich doctrine. It is perhaps no surprise, given the long history of lobbying activities in the US, that a doctrine on lobbying originated in the United States.[7] In this part, it is not my aim to present an in-depth analysis of the case law, but to interpret the leading cases and to discuss the cogency of the reasoning. For our limited purposes, it is sufficient to focus on the Sherman Act, the founding charter of competition law. The Act rules out any agreement or conspiracy in restraint of trade.[8] As such it is extremely general in nature and it has been for the Supreme Court to delimit the meaning of the Act. Part of this clarification has been the Supreme Court's endeavour to answer the question of whether the Sherman Act is applicable to measures enacted by federal states. Here the Supreme Court faced an intricate problem. In the aftermath of the New Deal it became increasingly popular to invite producers or retailers to regulate whole sectors of the economy. By delegating responsibility and 'co-opting' producers, states could cut implementation and monitoring costs. Thus the demarcation line separating state activities from private activities was blurred, and 'hybrid' arrangements involving public and private elements were riding high. In part C it will be shown that similar problems beset European jurisprudence.

The leading case is still *Parker*, concerning a Californian marketing programme for raisins.[9] The aim of this programme was the prevention of price competition among producers, thereby contributing to market stability. Owing to its market

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[6] Giuseppe Marenco has been one of the first to praise *Noerr-Pennington* (*Le traité CEE interdit-il aux Etats membres de restreindre la concurrence?* CDE (1986), pp. 285–308, at p. 306): 'Qu'il soit permis de penser que le raisonnement de la Cour Supreme est plus convaincant que celui de la Court de justice.' The cases referred to implicitly are the *BNIC* cases which are discussed in part C. Or *see* Pieter Jan Kuyper's essay ('Airline Fare-Fixing and Competition. An English Lord, Commission Proposals and US parallels' in (1993) *CMLR* pp. 203–226, in particular p. 203.) Kuyper bases his claim that the Supreme Court has provided a model solution on Human Rights grounds, a view criticized in part D.III.

[7] The reader interested in German law may consult Harald Heitmann's study, that offers a detailed account of the parallels between US doctrines on lobbying and sham-litigation and German law, *Interessenverbände und Wettbewerbsrecht: Ein deutsch-amerikanischer Vergleich zum Recht der unberechtigten Verfahrenseinleitung, Selbstbeschränkungsabkommen und Wettbewerbsregeln* (Baden-Baden, Nomos, 1984).

[8] Section 1: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' 15 U.S.C. 1.

[9] *Parker v. Brown* 317 U.S. 341. In this article, page references are references to the Supreme Court Reporter resp. The Federal Reporter for Circuit judgments.

restricting effect, the programme was challenged by a raisin producer as incompatible with the Sherman Act. On the one hand, the Supreme Court rejected the interpretation of the Sherman Act as extending to state legislation and based this rejection on two grounds. First, the legislative history of the Act clearly shows that only business combinations in the form of trusts were intended to be covered. Second, principles of US federalism might be endangered if the autonomy of states with respect to economic regulation were curtailed by the Sherman Act.[10] On the other hand, the Court emphasized that states were forbidden to shield cartels from the reach of anti-trust law. But as long as they meet this duty, they are allowed to enact legislation which distorts competition on the conditions that (a) the measure is clearly articulated; and (b) its implementation is actively supervised by the state in question. This final formulation of the *Parker* doctrine was given in *Midcal*.[11] Thus for any federal state legislation it should clearly be shown (a) that the distortion of competition is in line with the intentions of the state; and (b) that private parties are not, as a matter of fact, in charge of the implementation. A tacit *conditio sine qua non* of the *Parker* doctrine is that the measure is constitutional.[12]

The Court has granted federal states conditional immunity[13] from anti-trust prosecution. Does this doctrine imply that private parties seeking legislation in their favour are also immune from prosecution under the Sherman Act? One might argue that if governments are entitled to pass anti-competitive legislation, then private

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[10] 'In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress'. (*Parker*, p. 313) In US federalism, states may legislate as long as Congress has not expressly ruled out any deviant state laws. In *Parker*, the Court argued that an explicit legal measure could not be pre-empted by the vague, general Sherman Act. The reader interested in US federalism and European parallels should consult Koenraad Lenaerts, *Le Juge et la Constitution aux Etats d'Amerique* et *dans l'ordre juridique européen* (Brussells, Bruylant, 1988) in particular chap. III, paras. 5 and 6.

[11] First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself (*California Retail Liquor Dealers v. Midcal Aluminium*, 445 U.S. 97, L. Ed. 233, p. 934).

[12] Municipalities have been subjected to somewhat stricter standards (*City of Lafayette v. Louisiana Power* 471 U.S. 1985).

[13] The correct formulation would be that the Court has ruled that the Sherman Act does not *pre-empt* measures as long as they fulfil the *Parker-Midcal* criterion. 'Pre-emption' is the concept that governs the relation of federal to state legislation: if a state's measures conflict with federal law, they are overridden by the federal measures. As a matter of fact, the question as to how the Court viewed the relation between the Sherman Act and state measures has, according to commentators, not been clearly resolved. (For a discussion see Wiley, John, 'A Capture-Theory of Antitrust Federalism' in (1986) *Harvard Law Review* pp. 745–789.) It is not quite clear whether, under certain circumstances, the Sherman Act may apply directly to states, which would make it possible to sue states for treble damages. Under the pre-emption doctrine, the federal law would be quashed, but treble damages would not be imposed.

parties may also seek to induce the government to take such measures. It cannot be illegal to induce someone to take legal steps. This might be the prop on which such a lobbying immunity could rest. The first case in which the Court had to address this question was *Noerr*. The setting of this case was an economic war pitting the railroads against the road-transport business, which was eroding the economic basis of the railroad companies. Fighting a losing battle, the railroads resorted to seeking legislation in their favour. In this case, the applicants had charged the Eastern Railroad Presidents' Conference with having started a publicity campaign carrying the message that trucks were destroying highways and endangering traffic. Allegedly owing to the railroad's campaign, the governor of Pennsylvania vetoed a bill which would have improved the business conditions for trucking companies.

Were these joint lobbying efforts comparable to a restraint of trade in the sense of the Sherman Act? The intention fuelling these efforts seemed to be the containment of competitors by using the government as an agent. But the Supreme Court did not accept this description of the case and instead opted for a far-reaching lobbying immunity: all attempts at *soliciting* favourable legislation are exempt from anti-trust law.[14] The intention of the lobbyists may even be unequivocally anti-competitive, as the Court subsequently made plain in *Pennington*. In this case, unions and companies had allegedly conspired to have minimum wages set that would have driven small (non-union) competitors out of the market.[15] But although the Court ruled that the unions were not immune from the Sherman Act in general, the concerted lobbying effort targeted at public officials was protected.

The Court based its decision on three important arguments.

The first argument harks back to the *Parker* doctrine: the restraint of trade is brought about by valid governmental action, not by private parties. Governments are immune from the Act as long as they state their intentions unequivocally and supervise the realization of their measures and – this is a further important condition – respect the Constitution.[16]

The second argument consists of two parts: there is an essential difference between ordinary price-fixing cartels which are prohibited *per se* and concerted efforts to influence the government.[17] One could amplify this thesis by pointing out that ordinary cartels bring about a restriction of the economic freedom of the parties to the agreement. A lobbying effort, unlike a price-fixing cartel, does not foreclose free competition between the parties. The Supreme Court couples this observation

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[14] 'For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action'. *Eastern Railroad Presidents Conference v. Noerr* 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523, p. 530.

[15] Barry Costilo ('Antitrust's Newest Quagmire: The *Noerr-Pennington* Defense' in (1967) *Michigan Law Review* p. 333) provides information about the background of these important cases.

[16] *Noerr*, p. 530.

[17] Ibid.

with a more fundamental statement. If the Sherman Act were to extend to such lobbying activities, then the right to petition the government and the right of free expression in general might be severely curtailed. And it would be an incorrect reading of the Act if one attributed to Congress the intention of using this 'Magna Carta' of free competition as an instrument also tailored for the regulation of politics.[18] The Sherman Act is, after all, just a federal law and does not possess the constitutional status of the First Amendment, which protects the rights just mentioned.

The third argument could be called the political process argument: a representative democracy functions only on the condition that citizens can freely inform the government about their wishes or complaints. A restriction on lobbying would hamper this flow of information that is the essence of a democracy.[19]

In later cases, the Court set out the details of *Noerr-Pennington*, as the lobbying doctrine is now called. In *Omni Outdoor* the Court ruled that there is no such thing as a conspiracy exception to *Parker-Noerr* immunity.[20] This proposition entails that public officials and private groups cannot conspire together against third parties. In *Allied Tube* the Supreme Court ruled that lobbying in a regulatory agency might clash with the Sherman Act:

Unlike the publicity campaign in *Noerr*, the activity in question did not take place in the *open* political arena, where partisanship is the hallmark of decision making, but within the confines of a private standard-setting process.[21] (emphasis added)

In *Allied Tube* the Court made a point about the nature of the political process: lobbying activities taking place in the open public space are unproblematic, lobbying confined to a regulatory body is problematic.

One last and important refinement of *Noerr* needs mentioning. In *Noerr* itself the Court had introduced a *sham* exception to the immunity. This exception concerns attempts at abusing the legislative process itself, as opposed to abusing the outcome of the process. The Court has, to my knowledge, never illustrated this possibility with regard to lobbying.[22] But it has specified the exception with regard to abuse of

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[18] Ibid.

[19] '... the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives'. ibid.

[20] 'The situation would not be better, but arguably even worse, if the courts were to apply a subjective test (to discover a conspiracy, U.E.): not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid.' *City of Columbia v. Omni Outdoor Advertising* 499 U.S. 368, 111 S. Ct. 1344 (1991) p. 1352.

[21] *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 468 U.S. 501, 108 S. Ct. 1931 (1988), p. 1940.

[22] In Costilo (1967) the following example is given: If a public relations campaign is used in order to destroy the goodwill of competitors, then this campaign is unworthy of *Noerr* protection. In *Noerr*, the campaign had used certain deceptive means.

the judiciary process. In *Trucking Unlimited* [23] the Supreme Court dealt with a situation in which trucking companies had set up a fund for financing completely baseless lawsuits against newcomers. The administrative costs and inconvenience that go with such lawsuits were intended to harass competitors. Yet one should bear in mind that this sham exception is to be construed narrowly. It excludes merely the abuse of the *process*. Successful lobbying, on the contrary, is always protected. This is a position to which the Court has clung over recent decades, except for the case of regulatory agencies.

The reasoning that the Supreme Court has offered for *Noerr-Pennington* seems to me unpersuasive for the following reasons.

I. Human Rights and Political Process

It is hard to see why the information exchange between private parties and the government would break down or be seriously hampered because of an extension of competition law to lobbying activities. We can prevent any undue influence with this exchange if we manage to clearly define the problematic and, possibly, illegal ways of lobbying. The impossibility of separating the wheat from the chaff has not been proven. Such a clear demarcation line would also allay doubts that the substance of the right to petition or the right of free expression might be seriously affected. Besides, the Court itself has allowed for a certain restriction, namely in *Allied Tube* where it argued that the defendants had not really engaged in a political activity. Yet it failed to come forward with a convincing differentiation between commercial and political activities. Given this vagueness, it bears investigating whether certain varieties of supposedly political lobbying are not in fact commercial in character.

The transparency of governmental processes is nowadays so widely regarded as a fundamental principle that governments might be under an obligation to reveal the sponsors of a certain law.[24]

With respect to fundamental laws, the Court fails to consider whether it is too much to ask lobbyists to take into account the economic rights of their rivals when pressuring the government. It is widely agreed that the right of free expression does not automatically override other rights.

II. The Essential Dissimilarity

The Supreme Court mentions a dissimilarity between cartels and lobbying co-ordination. Yet the same Court ignores the dissimilarity when dealing with sham litigation. And joint litigation intended to harass competitors has, at first and second

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[23] *California Motor Trucking Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The sham-doctrine has received its authoritative formulation in*: Professional Real Estate Investors v. Columbia Pictures* 508 U.S. 49.

[24] Even in the EU, we are witnessing a change with respect to transparency. Art. 255 of the Treaty of Amsterdam grants Union citizens access to documents.

sight, not much in common with a price-fixing cartel. So some of the Court's later judgments are inconsistent with *Noerr*. In addition, it is submitted that lobbying co-operation has at least some elements in common with ordinary cartels. For lobbying co-ordination involves an exchange of information, a discussion of which prices would be most suitable, etc.

A thorough critique of the Court's reasoning is provided by David Fischel, who criticizes the arguments concerning the legal history of the Sherman Act, the coherence of the case law and further ambiguities.[25] The cogency of the Court's arguments does seem spurious. In part C it will be shown that there are further reasons why the doctrine would not fit the European legal context. The literature on the doctrine is extensive. In his competition law classic *The Paradox of Anti-Trust* Robert Bork discusses *Noerr-Pennington* in a section devoted to predation through governmental processes. Bork proposes that in four cases lobbying might be deemed problematic, among which I would like to mention the following two categories for future reference. Firstly, a situation in which a private party seeks to induce an official to go beyond his authority. Such an attempt also seems to transgress the limits of *Noerr-Pennington*, since the doctrine merely protects *solicitation* of valid governmental action, not its manipulation or improper use. Nor would attempts at obtaining unconstitutional or obviously unlawful measures deserve protection. And secondly, there might be cases in which a measure is *targeting* a particular competitor.[26] As long as measures are of a sufficiently general nature, they do not exclusively serve the purposes of one private party. Whenever they seem to single out one competitor, however, it becomes more difficult not to see them as unfair, and the lobbying that led to them as illegitimate. Despite these and similar suggestions, the Supreme Court has not been inclined to soften its approach. As Areeda and Hovenkamp state, the attempt to get legislation passed that turns out to be unconstitutional is not excluded from *Noerr* protection.[27] And the 'targeting' case would be excluded, because anti-competitive intent does not render *Noerr* inapplicable as *Pennington* has made plain.

One of the most recent and strident criticisms levelled at *Noerr* was raised by John S. Wiley,[28] who argues that the *Parker-Midca* test is no longer adequate in virtue of

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[25] Fischel, Daniel, 'Antitrust liability for Attempts to Influence Government Action: The Basis and Limits of the *Noerr-Pennington* doctrine' in (1977) *Columbia Law Review* pp. 81–121.

[26] Bork, Robert, *The Antitrust Paradox. A Policy at War with Itself* (New York, Basic Books, 1978) pp. 361–363.

[27] Areeda, Philip E.; Hovenkamp, Herbert, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (Boston, Little, Brown and Company, 1990), 203.2b. pp. 34–35. The leading case here is *Subscription Television*, in which theatre owners started a motion which was struck down as unconstitutional. *Subscription Television v. Southern California Theatre Owners Assn.* 576 F. 2d 230, 233 (9th Cir. 1978)

[28] Wiley, note 13.

new economic findings. Competition Courts should take into consideration whether legislative institutions have been 'captured' by private industries. 'Capture' simply means that the official institution serves the interests of producers or other interest groups and bolsters their economic position at the expense of the public interest. In such a case, the legislative measure should not be granted *Parker* immunity. Nor would the 'captors', i.e. the successful lobbyists, benefit from *Noerr* immunity. Unfortunately, Wiley's proposals cannot be discussed *in extenso* here. For our purposes, it is sufficient to remark that not only the internal coherence of the Court's approach has come in for criticism. Also the Court's possibly problematic reliance on concepts such as 'sovereign state', which suggest that states never fall prey to private interests, has been questioned.

Summing up the orthodox position, whilst acknowledging that it might be, as Wiley suggests, under review, we can state that lobbying is generally protected, at least as long as the *solicitation* of governmental action is concerned. Lobbyists' anti-competitive intent neither renders lobbying unworthy of protection nor leads to a conspiracy charge involving authorities and companies. Only abuse of the governmental process itself is exempted from protection, mainly in sham litigation cases. It does not matter whether lobbying is directed at states or municipal agencies. Regulatory agencies, however, are treated in a different fashion, even though the Court's distinction between *commercial*-political and *political*-commercial activities seems spurious (*Allied Tube*).

C. *Noerr-Pennington*: A Model for Europe?

In this part I would like to discuss whether, with slight modifications, the US doctrine can be applied to the European context. In addition, the meagre European case law on lobbying is reviewed. The question whether US competition law and European competition law can be fruitfully compared is one that can be endlessly discussed.[29] If one centres on the function of the two competition law systems, one should stress that they serve basically the same purposes, namely preventing distortion or restriction of competition. Both the Sherman Act, section 1, and Article 81[30] ban any agreement that has as its object or effect the restriction or distortion of competition (with respect to the anti-monopoly laws, the comparison would be more

[29] Perhaps the central issue of the debate concerns the per se/rule of reason distinction that lies at the bottom of US law. A *rule of reason* approach implies that the economic context of a particular agreement is taken into account. This distinction applies awkwardly to many European cases. For Art. 81(3) offers an exemption on certain conditions whereas s. 1 of the Sherman Act strikes down agreements categorically unless a rule of reason approach is chosen by the Supreme Court.

[30] All references are to the Treaty of Rome as subsequently amended.

complicated, but, in principle, run along the same lines).[31] On the other hand, one might call our attention to the fact that, unlike anti-trust law in the US, Articles 81 and 82 are also intended to abolish trade barriers obstructing the completion of the Single Market.[32] This is why business practices partitioning markets can be struck down in Europe though legal in the US.

I am going to base the following discussion on the assumption that such a comparison makes sense. Van der Esch's assessment[33] of the situation is recommendable, according to which imitation of US anti-trust law is – unlike its use as a source of inspiration – potentially misleading, because (a) some of the goals of the anti-trust systems are different; and (b) the two anti-trust laws enjoy a different legal status. European competition law enjoys, unlike any other competition code, a constitutional rank. This is due to the fact that it forms part of the Treaty of Rome, which has been interpreted by the European Court of Justice as making up a European constitution.[34] Van der Esch also discusses the question whether European law admits a *Parker* immunity for Member States: is a Member State allowed to enact measures which distort competition, on the condition that they are succinctly stated and actively supervised? By way of response, one merely has to stress that Member States are obliged to observe their duties under the Treaty, which prevent them from preserving or passing legislature that creates barriers to trade in goods or services. The criteria for *Parker* immunity is therefore not apposite in the European context.[35]

One might raise the objection that European competition rules apply, just like US competition law after *Parker*, only to private companies and not to states. But this objection is only partly correct. It is true that the rules address themselves primarily to companies or associations of companies. But from this starting point the Court of Justice has developed duties related to competition law that are binding on Member States. These duties are concrete examples of the general duty, enshrined in Article 10 (ex. Art. 5), not to take measures running counter to Community policies. This is why these duties are, almost ritually, described as stemming from the competition Articles read together with Articles 10 and 3(g). Article 3(g) mentions a 'system preventing the distortion of competition' as one

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[31] As Majone points out, the fathers of the Treaty took US competition law as a starting point. This bolsters the claim that a comparison makes sense owing to structural similarities (Majone, Giandomenico, 'Cross-National Sources of Regulatory Policy-Making in Europe and the US', EUI Working Paper SPS No. 90/6, p. 13).

[32] This theme is a thread that runs through the Court's decisions on exclusive distribution schemes.

[33] Van der Esch, 'EC Rules on Undistorted Competition and US Antitrust Laws: The Limits of Comparability' in (1989) *Fordham Corporate Law Institute*.

[34] This unprecedented step was taken in famous decisions such as *Van Gend en Loos*, *Costa v. ENEL*. The Court read the Treaty as the basis of an autonomous system of law. It is open to debate whether this step was a piece of unwarranted judicial activism.

[35] Ibid., paras. 18–26.

goal of the Community.[36] In the eighties, the question of how these duties could be spelt out was hotly debated.[37] The Court had already stated in *INNO*[38] that Member States were not allowed to detract from the efficiency of Article 82 by taking certain legal measures. But only in the late eighties was this general dictum turned into a workable formula. The Court explained that Member States were, firstly, allowed neither to *induce* or *oblige* companies to enter into cartels nor to *reinforce* the effects of illegal agreements.[39] Secondly, they were not allowed to *delegate* their regulatory authority to private parties (the 'state delegation test').

The first obligation is straightforward: Member States are not allowed to further the formation of agreements banned under Article 81. Reinforcing an illicit agreement is tantamount to adopting the agreement in part or in full as a legal measure. The second obligation rules out the delegation of competencies to regulate prices or production to private parties. To date the Court has not given a precise example illustrating the delegation scenario. It is hard, conceptually, to separate the case where a government forces or induces companies to enter into agreements from a situation in which it confers upon them the right to conclude illicit agreements.[40] These two obligations make up the two-pronged *Van Eycke* test.[41]

The central and most contested question was whether Member States, in the absence of illegal cartels, were allowed to enact legislative measures rendering such private cartels superfluous. Could Member States adopt measures restricting competition in a manner comparable to cartels provided that they did not reinforce

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[36] *See* Manfred Zuleeg's contribution in Groeben, Hans von der, *Kommentar zum EG-/EU – Vertrag* (Baden-Baden, Nomos, 1997) 1/194, para. 7 for an interpretation of this Article.

[37] The most detailed study of the matter is Albrecht Bach's (*Wettbewerbsrechtliche Schranken für mitgliedstaatliche Maßnahmen nach europäischem Gemeinschaftsrecht* (Tübingen, Siebeck, 1992), who argues against extending the duties to measures making cartels redundant. In Bach's book the reader can find further references.

[38] Case 13/77 *INNO v. ATAB* [1978] ECR 2115.

[39] Luc Gyselen ('Anti-competitive State Measures under the EC Treaty: Towards a Substantive Legality Standard' in (1993) E.L.R. *Competition Checklist*, pp. CC55–CC89) points out that the first part of this test is conceptually flawed, since it boils down to the obvious remark that Member States may not allow cartels that Art. 81 prohibits.

[40] As Bach points out (note 37 at p. 215), it is not quite as easy to see how the second branch of the *Van Eycke* test, the delegation rule, can be justified in terms of detracting from the utility of the competition rules. After all, the companies are not really entering into cartels, since the state does not oblige or induce them to collude. Bach suggests the answer that the delegation of economic competencies to companies violates the general *structure* of competition which the Treaty espouses. For it is only for states to set parameters for the level playing-field. This problem is still in need of clarification. The Court seems to accept situations in which *experts* agree on prices, provided that the state is on stand-by to intervene (*infra*). Experts nominated by industries are not acting on behalf of companies, hence not negotiating cartels. As we shall see, the case law itself has not yet yielded a clear picture.

[41] Case 267/86 *Van Eycke v. ASPA* [1988] ECR 4769.

the effects of existing cartels? The question was settled in *Meng*,[42] a case in which the Court dealt with a German law prohibiting insurance companies from passing commissions on to their customers. The Court queried whether there had been cartels in the relevant insurance sector prior to the German law. Because this was not the case and the state had not renounced its regulatory powers, the Court stated that the measure was licit. Consequently, legislative measures are permissible as long as they do not reinforce pre-existing cartels, prescribe the formation of cartels or delegate regulatory competencies to private parties.[43]

Do similar duties to abstain from the promotion of cartels also exist in US law? It is certainly correct that in *Parker* the Supreme Court had stated that states must not protect cartels. But in the US it is possible for a state to enact a regulatory programme that closely resembles the rules of an existing cartel which has been declared illegal by the competition authorities.[44] The programme would have to be sufficiently articulated and supervised but its origins would not matter as long as the state did not directly co-operate with cartel members. Under European law, however, such a reinforcement of a cartel would be contrary to a state's duty under Article 81 read together with Articles 10 and 3(g). So I conclude that there is indeed no space for a *Parker* immunity in current European law.

Having clarified this question we can now turn to the other side of the *Parker* coin, namely *Noerr* immunity. The reader may recall that the Supreme Court (*Omni Outdoor*) treated the two doctrines as parallel on the grounds that both prevented the deconstruction of governmental processes. If we look for European case law on lobbying we are going to be disappointed. To date the Court of Justice has not directly addressed the question.[45] Only one decision, potentially, has a bearing on lobbying activities. In the so-called *Cognac* cases,[46] the Court had to deal with questions concerning a French association of Cognac producers and retailers, called the two 'BNIC families'. The 'families' submitted proposals for prices and quotas to the ministry that were imposed on all producers by ministerial decree. The BNIC family members pleaded that their proposals were no more than proposals requiring the minister's agreement prior to entering into force. But the Court dismissed this

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[42] Case C-2/91 *Wolf Meng* ECR [1993] I–5751.

[43] The Court has developed rules with respect to public undertakings obliging Member States not to place such undertaking in positions in which they are liable to breach Art. 82. The leading case here is *ERT* (Case C-260/89 [1990] ECR I–2925). A thorough discussion of the problem concerning public enterprises is offered by Kelyn Bacon ('State Regulation of the Market and EC Competition Rules: Articles 85 and 86 compared' (1997) *ECLR* at p. 283).

[44] Valentine Korah has made a similar point (*EC Competition Law and Practice* (London, Sweet and Maxwell, 1994) para. 1.9.1.) In a similar vein, Luc Gyselen (note 39) argues that *Parker* is not appropriate, as the European parameters of competition law are different.

[45] In part D.II.2 I will discuss decisions of the Commission, which have a bearing on lobbying.

[46] C-123/83 *BNIC v. Clair* [1985] ECR 391, Case 136/86 *BNIC v. Aubert* [1988] ECR 4789.

argument, stating, in line with prior case law, that it sufficed for the agreement to fall under Article 81, that the *object* of the proposal was the restriction of competition.[47]

It seems possible to take the view that this rules out, on a larger scale, proposals companies put forth in lobbying for quotas or prices. For the intention of the lobbying companies would be to bring about a restriction of competition. Whether or not this proposal actually takes the form of a statutory measure is not considered decisive. As long as we can establish the anti-competitive *object* of the proposal, the effect of the proposal would not be taken into account. I would submit that it makes more sense to see the cartel here as consisting in the agreement *to convince the government* rather than in the agreement *on the proposed prices*. If companies jointly fix production quotas with the express reservation that these quotas are not to enter into force *until* the government has imposed them on all traders, then the object of the agreement is not a restriction of competition among the traders. Rather, the object is a distortion of competition brought about by the government.[48] How has the Court formulated this issue?

It must be pointed out in that respect that for the purposes of Article 81(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for the minimum price so that it becomes binding on all traders on the market in question, is intended to distort competition on that market.[49]

This passage admits the interpretation that the Court merely focused on the price fixing agreement. Still, as the Court *should* have stated, in my opinion, the intention of the parties is not to fix prices among themselves, but to stamp out competition by having prices fixed across the board. So the cartel consists in an *agreement to propose* fixed prices (or quotas) to the government, not in the actual fixation of prices. To this potentially far-reaching reading one might, however, object that the Court in the *BNIC* cases paid due attention to the privileged position of the BNIC group that occupied a monopoly position with respect to price proposals. The Court would not have come to the same conclusion had the BNIC group just been one group among many groups competing for the attention of the authorities. In such a 'pluralistic' context, the Court of Justice would have indubitably taken into consideration the unwarranted restrictive effect a general anti-lobbying ruling would have on the

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[47] The landmark case *Grundig* drove this point home; Cases 56 & 58/64 *Etablissements Consten SA and Grundig -Verkaufs-GmbH v. Commission* [1966] ECR 299.

[48] Cartels that are of the form: If X happens, then we shall restrict prices, are prohibited, even though it may be the case that X never happens (for a similar position: Volker Emmerich in Immenga, Ulrich; Mestmäcker, Ernst-Joachim (eds.), *EG-Wettbewerbsrecht* (München, C. H. Beck 1997) at p. 155). But our situation is different: the parties are never going to voluntarily restrict their economic autonomy, but are in the future going to follow governmental prescriptions.

[49] *BNIC v. Clair*, para. 22.

exchange of information between citizens and governmental institutions. The supporter of such a view could also refer to subsequent cases involving close co-operation between business and the state, in particular *Reiff*, *Delta* or *DIP*.[50] In *Reiff* and *Delta*, the Court stated that tariff-fixing proposals submitted by *experts* are not cartels in the sense of Article 81. Besides, when investigating whether the government had delegated regulatory powers to the private sector, the Court emphasized the active role of the government in this process of fixing tariffs and the obligation to consider the public interest. In *Reiff* the government could reject the tariff proposals that were formulated by experts nominated by concerned undertakings.[51] The Court concluded that the German government had neither delegated authority to private parties nor had it reinforced existing cartels. *DIP* dealt with a city planning committee which was entitled to issue permissions to newcomers who intended setting up retail stores. On the committee, the representatives of business interests held a minority position. In all of these cases, according to the German and Italian legal texts, the respective industry interests had to be balanced against the interests of other groups such as consumers or environmental interests. This element of competition was lacking in the *BNIC* cases.[52] One could argue that this element would normally be present in any situation in which lobby groups propose prices or quotas. Hence *BNIC* should be deemed exceptional, not a European rejection of *Noerr-Pennington*.[53] This is a forceful counter-argument.

As already emphasized, the Court justified its positions quite tersely in the *Cognac* cases. Consequently, it is hard to identify the decisive elements. In *Reiff* and *Delta*, the Court was willing to accept the German version that the representatives of the road transport business, and the shipper's representatives in *Delta*, were not the industry's mouthpieces but acting as independent experts. Nor did it matter that only five of 500 proposals had been rejected by the governmental agent. This lack of intervention could have created the impression that the government rubber-stamped the wishes of the business groups (*Reiff*). So I submit that the reading of *BNIC* as potentially extendible to lobbying proposals is tenable as long as these proposals are submitted by industry representatives and not by 'experts' as in *Reiff*. The question

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[50] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff* [1993] ECR I–5801, Case C-153/94 *Germany v. Delta Schiffahrts Speditionsgesellschaft* [1994] ECR I–2517, Cases C-140-142/94 *DIP SpA v. Comune di Bassano del Grappa* [1995] ECR I–3257. In *Sodemara v. Regione Lombardia* C-70/95 [1997] ECR I–3396 the doctrine was recently reiterated.

[51] Gyselen (note 39 at p. 73) speculates that, after *Reiff*, even *BNIC* might no longer be considered an infringement of Art. 81. I would hold that this is unlikely, since in *BNIC* Cognac producers and retailers had made the mistake of not delegating their task to 'experts'.

[52] A.G. Fennelly stated that the *BNIC* traders, unlike the trading representatives in the subsequent cases, could count on succeeding (*see* his opinion in *DIP*, at para. 59).

[53] Joliet, René, 'National Anti-competitive Legislation and Community Law' in (1989) 163 *Fordham International Law Journal* pp. 16–18.

whether the minority position of business members (*DIP*, *Spediporto*[54]) is taken into consideration and, if so, to what extent, is almost impossible to resolve. In *DIP*, the Court refers to the expert status, the minority position and to the fact that the interest groups have a say only in special situations to justify the conclusion that the first part of the *Van Eycke test is not met*.[55]

Other statements of relevance to lobbying refer to the 'state delegation test'. In *Van Eycke* the Court emphasized that *consultations* with private parties prior to the decision on interest rates did not necessarily lead to the conclusion that the state was no longer in charge of the decision-making process. Consultation does not mean delegation. This argument makes perfect sense: we ascribe a measure to the government even though it has consulted with interested parties. One should reserve the term 'delegation' for cases in which the government invites companies to regulate the industries, e.g., when an association of companies or a group of professionals determines the rules of the game without governmental supervision. The question that we will now address is whether the government may act on behalf of private parties, as it were, rather than in the public interest. Private parties may demand governmental action in their favour. In supplying these measures the government does not *eo ipso* delegate its competencies to the private sector. In pursuing this question, we extrapolate from *BNIC*, not from (hypothetical) delegation cases.

Hopefully, it has become plain that a more thorough discussion of the lobbying issue is of some interest. Firstly, it would contribute to a clarification of the scope of decisions such as *BNIC*. Secondly, European law does not grant Member States *Parker* immunity. Hence, given that *Noerr* is, according to the Supreme Court, the other side of the *Parker* coin, there is at least a *prima facie* case for asking whether *Noerr* is apposite in the European context. But in investigating this question we also have to address the potentially restrictive effect on fundamental rights, that was pivotal for the Supreme Court's reasoning in *Noerr*. So the argument based on the absence of *Parker* does not prove that *Noerr* immunity does not fit the European context, only that it cannot be based on *Parker* immunity. Thirdly and lastly, it is important to answer the question whether lobbying activities might be considered infractions of competition rules, if only to better understand the function of the competition rules in the Treaty and the structure of the Treaty itself.

In the following part, I am going to discuss a possible framework for a European position on lobbying, drawing upon insights offered by the US discussion. The lobbying issue is discussed for its own sake and not as an interpretation of the case law that still seems to be in a state of flux.

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[54] Case C-96/94 *Centro Servizi Spediporto v. Spedizioni marittima del Golfo* [1995] ECR I–2883. This is the Italian pendant to *Reiff* and concerned tariff fixing involving several groups.

[55] *DIP*, paras. 17–19.

D. A Framework for Discussion: Lobbying under Articles 81 and 82

Among the sparse contributions to our topic Joliet's assessment of the implications of *BNIC* stands out:

> In my view, it is wrong to attempt to infer from *BNIC v. Clair* that, according to the Court, *any* concerted action intended to influence the public authorities would constitute an agreement or concerted practice prohibited by Article 81(1). The agreements which had been concluded within the Board (the BNIC board, U.E.) were designed to regulate the behaviour of traders on the market, which is not the case with regard to ordinary conduct that is simply intended to influence the law-making activity of the State (emphasis added).[56]

Joliet's rejection of the thesis that *BNIC* would ban all forms of lobbying is correct.[57] Reading this paragraph one might ask whether there is a distinction between lobbying co-ordination potentially falling under Article 81(1) and truly 'innocent' lobbying. Joliet treats *BNIC* as a special case pertinent only to agreements that are supposed to regulate the behaviour of traders on the market. But what about agreements to lobby the state for legislation that makes it harder for foreign competitors to enter the market? Such legislation might also *de facto* regulate the behaviour of traders, even though other objectives are mentioned in the preamble of the measure.

The plan of this part is the following. We need to draw a line between lobbying activities which are indispensable in a democratic society and lobbying which is potentially illegal. No smooth and natural line is going to emerge, but fragments of such a line are discernible as we scrutinize Articles 81 and 82.

I. Article 81: What is the Object of Lobby Co-ordination?

Article 81(1) states that agreements between companies or associations of companies with the *object* or *effect* of a restriction or distortion of competition are not compatible with the Common Market if they have an impact on intra-community trade. As such it applies automatically to price or quota-fixing agreements. The essence of such agreements, according to Emmerich, is the *restriction* of commercial autonomy.[58] Parties to the cartel agreement may no longer follow the strategies they would have pursued in the absence of their obligations under the agreement. Hence one could argue that an agreement to lobby the government is *per se* not captured by Article 81 considering that

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[56] Joliet (1989) 16–18.
[57] Marenco had drawn this dire consequence in 1986, note 6 at p. 62.
[58] Emmerich (1997) at p. 164, paras. 155–157.

it does not bring about a restriction of the commercial autonomy of the parties. Companies may come to the conclusion that it would be beneficial for the industry as a whole to obtain governmental protection and thereupon co-ordinate their initiatives. And yet this co-operation would leave their hands untied with respect to economic decisions. The lobbyists might not even be mutual competitors. This essential dissimilarity between ordinary cartels and lobby efforts has already figured among the US Court's arguments against subsuming lobbying under the Sherman Act.

But it has only been a (weak) ancillary argument and there is another way around the obstacle. It makes sense to distinguish *restriction* of competition from *distortion* of competition,[59] both of which are mentioned in Article 81. Agreements between companies might mainly affect third parties without restraining the economic autonomy of the cartel partners.[60] Cases might include attempts by companies to urge affiliated companies to boycott a third party. In this situation it is hard to argue that the restriction of competition between the parties to the agreement is the essence of the agreement. What matters here is the distortion of competition that is brought about by the boycott attempt.[61] The exclusion of a foreign competitor from a trade association might also be considered an attempt to make it harder for a competitor to enter the domestic market. German commentators have coined the expression *Behinderungsmissbrauch* (obstruction abuse) which fits the situation.[62]

As Emmerich points out, the distinction between restriction and distortion of competition might give rise to unintended extensions of the Article.[63] What we are investigating is exactly the possibility of extending the scope of the Article to lobby agreements: can it be ensured that the Article, once extended, does not rule out *any* kind of lobbying, an altogether unacceptable consequence? To set the field for this discussion, I would like to invite the reader to consider the following agreement between companies to lobby the government: The government is pressed to ban foreign imports under the pretext of upholding safety standards. If the Commission is willing to bring the case to Luxembourg by means of a 226 (ex. Art. 169)

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[59] Emmerich (1997) at p. 166, para. 161.

[60] The Commission and the Courts have, to my knowledge, never been in a situation in which a differentiation between restriction and distortion would have been useful. Interestingly, in *Tiercé Ladbroke* (T–504/93 [1995] ECR II–923) the CFI made plain that an infringement of Art. 81 could have taken place even though the plaintiff and the companies were not competing. The Commission had dismissed this possibility beforehand. For a concurrent opinion *see also* Bellamy, C. and Child, G., *Common Market Law of Competition* (London, Sweet and Maxwell, 1993) at para. 2-102.

[61] I am not sure whether this example is in line with Emmerich's interpretation. Kuyper has suggested that one should construe 'object' in Art. 81 as follows: 'as intent which in principle *can* be realized by the contracting parties themselves.' (Kuyper (1983) at p. 225) But this would also exclude from the scope of competition law, as pointed out in the text, attempts to compel third parties to boycott competitors: it is thus over-inclusive.

[62] Admittedly, this term has, for the most part, been used in the context of Art. 82, but it is submitted that it applies just as well to Art. 81.

[63] Emmerich (1997) at p. 165, para. 159.

procedure, the government might get away with it by producing reasonable statistics. If the government loses its case, it alone has to bear the financial burden whilst the companies have taken advantage of the temporary[64] import ban. Considering this 'case', it is tempting to argue that the companies should shoulder their share of the financial burden instead of comfortably free riding on the government. This seems to be a matter of fairness. But what kinds of agreements should be considered to fall under Article 81? Most proposals submitted by business groups have as their object the improvement of their economic position. Legal certainty would be at stake if companies were told that they might infringe Article 81 by lobbying for *certain* legislative measures.

As a source of inspiration I would like to recall Robert Bork's suggestions for rethinking *Noerr*. If companies urge an official to take steps that he or she is not entitled to take, it seems problematic to offer them immunity. This is merely an intuition. But it might be refined in such a way as to make the distinction justiciable. When dealing with the details of this refinement, we have to keep in mind that Article 81 is not meant to interfere with internal competition problems of the Member States. There has to be a 'Community dimension' otherwise one cannot draw upon the provisions.[65] Such a situation exists, in particular, if the contracting parties reside in different Member States, if a cartel effectively seals off a home market, or if the agreement is such that it may have a potentially negative impact on trade flows in the community.[66]

As a starting point I suggest distinguishing between two types of situation:

1. Companies urging governments to take measures.
2. Companies urging the government not to take measures.

This distinction has the virtue of logical simplicity. Companies may ask for legislation or they may try to prevent legislation impairing their market position. There may, however, be situations in which companies aim at having *certain* provisions of a governmental proposal deleted whilst urging the government to *amend* the proposal in a way that is more beneficial. But this possibility does not force us to modify the distinction. For we have the choice of proceeding in two steps: first, by studying the amendments proposed and, second, the blocking of the provisions. Theoretically, both steps might yield the result that competition law has been infringed. Generally speaking, 'blocking' refers exclusively to the companies' attempt at bringing down legislative projects the government has

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[64] As Emmert remarks, a 226 procedure can take up to five years (*Der Europäische Gerichtshof in Luxemburg als Garant der Rechtsgemeinschaft*, PdD-Thesis Maastricht (to be published), 1998, p. 124).

[65] Cf. Emmerich (1997) at p. 175, para. 201.

[66] The case law suggests that we can assume a generous reading of the Community dimension. It suffices that the effect is foreseeable. For references to cases consult Emmerich (1997) at p. 175, at paras. 199–200, Bellamy (1993), at para. 2-129.

drafted. So we say that a company proposes a measure (first case) even though the measure consists of a refusal to allow access to competitors. A further borderline case suggests itself: how should one describe the situation in which companies lobby for an *exception/waiver* from existing law? It is submitted that in this situation the government enacts a *measure* bestowing a privilege on the company. Hence the first criterion applies.

In what follows, the types of measures demanded are specified. It is the advantage of this, at first sight probably artificial, approach that one can classify the lobbying activities by drawing up a typology of the measures demanded. This offers or seems to offer a more concrete way of dealing with the lobbying issue. It compares favourably with the criteria that lobbyists are not allowed to submit proposals injuring particular competitors or reducing general welfare. Both criteria would be too vague and would obviously not cover cases in which no competitor is targeted or general welfare hard to gauge. This is why we follow a different tack and focus on the measures themselves.

1. Companies Urge the Government to Take Measures

We can now classify the types of measures for which companies may ask. The measures the companies propose can consist of two kinds: they may infringe primary or secondary Community law or they may be compatible with the body of European law. They may also infringe domestic law. But, for reasons explained later, this case can be ignored.

(A) PROPOSED MEASURES INFRINGE COMMUNITY LAW

Companies or trade associations may propose measures constituting violations of Community law. As we are interested in lobbying contributing to distortions of *competition*, it is obvious that proposals aiming at violations of Community law unrelated to competition, broadly construed, are to be excluded. Hence we have to confine violations to infringements of Community norms governing trade and competition.[67] Admittedly, borderline cases may arise in which it is unclear whether a measure has a bearing on competition, broadly construed, or, e.g., mainly on health issues. Still, the existence of borderline cases does not mean that there is no point in selecting Community norms related to the parameters of competition.

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[67] I mention trade *and* competition. For measures companies request as conducive to their competitive situations are enacted by the government as trade-related measures. Thus, it depends on the *perspective* chosen whether measures are to be described as concerning primarily trade or rather competition. Measures which for the lobbying companies affect primarily competition may be considered trade regulations from the point of view of the government. In the Treaty, Arts. 23, 25, 28 (ex. Arts. 9, 12, 30) concern trade whilst 81, 82, etc. concern competition. In this essay, the dogmatic distinctions are broken down in favour of a pragmatic appraisal of how tariff barriers come into being.

Primary Community rules governing trade and competition comprise, in particular, of the Articles on the free movement of goods (Arts. 23, 25, 28), the freedom of establishment (Art. 43 (ex. Art. 52)), the freedom to provide services (Art. 49 (ex. Art. 59)) or the rules on state aid (Art. 87 (ex. Art. 92)). These rules are supposed to ensure that Member States abstain from artificially interfering with trade flows. In our situation – the proposal aims at a breach of European law – it makes sense to claim that the lobbying agreement runs foul of Article 81 and is a cartel. For the companies effectively ask the government, in particular, to restrict or distort trade flows and thus, incidentally, competition. From the point of view of the companies – and this is the perspective we have to assume when dealing with Article 81 – the measures in question bolster their own economic position by impeding competitors. The enactment, e.g., of a non-tariff trade barrier in breach of Article 28, is for companies a most welcome means of securing their market share. State subsidies in breach of Article 87 might be decisive when it comes to making the winning bid. Thanks to the action taken by the government the lobbyists do not have to resort to *per se* illegal agreements such as price-fixing. These are some of the reasons why they submit such proposals.[68] In conclusion, the object or intention of the lobbyists can be said to consist in bringing about a distortion of competition by submitting proposals or legislative drafts incompatible with Community law related to trade and competition. As most of the measures contribute to isolating the home market of the companies or associations, the European dimension of the cartel agreement is not hard to establish.[69]

Furthermore, the Court has consistently stated that it is sufficient to prove that the *object* of an agreement is contrary to free competition.[70] Therefore, we do not need to take into account the probability of the proposal surviving the legislative process. It suffices that there is a chance of it being adopted. Such a chance is to be reckoned with whenever the companies possess a certain economic weight or

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[68] Harold Demsetz puts this succinctly as follows: 'The tendency will be (among firms tired of entering into cartels because of monitoring problems, U.E.) to let someone else discipline the deviate (cartel partners, U.E). But there is no legal barrier to petitioning a democratic government for aid. Producers who combine forces to secure protection from competition through government regulation, therefore, may do so without fear of violating antitrust-laws. Such protection, if they secure it, is enforced by the government at taxpayer expense, and enforced with much more coercive power than the colluders would exercise privately.' (Demsetz, Harold, *Economic, Legal, and Political Dimensions of Competition* (Amsterdam, North-Holland 1982) at p. 99) The author explains the growth of governments in terms of increased pressure for regulations.

[69] In 'standard' cases under Art. 81 one has, firstly, to determine the relevant product-market in order to decide whether there is a 'European dimension'. The European dimension exists provided that market shares pass a certain threshold. Secondly, the market has to be defined if one is to ascertain whether an agreement might have a trade restricting *effect*. It is necessary to compare competition in the relevant market under normal conditions with competition after the agreement under consideration has entered into force.

[70] Bellamy note 60, para. 2-099 quoting *Consten and Grundig*.

bargaining power.[71] One might retort that the true object of the companies is not the distortion of competition, but informing the government about the needs of the industry; in modern societies, governments depend on information provided by industries, lest their work load becomes unmanageable. Yet this is not a valid description of what the companies are after. Rather governmental action to the prejudice of competitors is envisaged. Part and parcel of such lobbying for governmental action is, indubitably, to supply a certain amount of information. But the governmental action matters, the information is purely incidental to the ultimate purpose. If the reader still has misgivings about this characterization of the lobbyists' intention, then one could, in the last resort, argue that the lobbying companies may infringe Article 81 even though their motives are impeccable.[72] For the *effect* on competition is also to be taken into consideration, according to settled case law. And the effect is a distortion of competition if the government acts in line with the requests which the companies presented, even if these were genuinely made for information purposes only.

But is it not true that it is always for the government to take measures, not for companies? Is it therefore not impossible to establish a *link* between the proposal and the final measure?[73] Is it not possible, to compound this difficulty, that various groups suggest a certain measure, and that some of them represent environmental interests, others consumers, etc.? How should one isolate the 'first mover' in this complicated situation? One rejoinder could consist in proposing the following differentiation: when asking this question we are already dealing with the problem of *proving* such an infringement of Article 81. Interpreting the law and proving infractions of the law are, however, two distinct matters. It is one thing to find out what the law tells us objectively. Its objective interpretation precedes its implementation. There is no denying that this issue of proof is thorny indeed. One would have to draft the standards of proof in such a fashion that the onus is on the plaintiff to show that the measure can only be understood as a consequence of industry influence. Then the burden of proof shifts onto the government to demonstrate that the measure has been formulated in the public interest. This 'public interest defence' is unlikely to carry the day if the measure is, as we have assumed all along, at variance with Community law.

Here we face a continuum of possible cases. Two types of cases are easy to decide.[74] A first group encompasses cases in which a norm is adopted without prior

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[71] A *de minimis* exception is assumed to hold, i.e. small companies are not in a position to infringe European competition law, although they may break domestic competition rules. *See* Bellamy (1993) para. 2-139 et seq., Immenga in Immenga (1997) at p. 59, para. 20 et seq.

[72] Bellamy (1993) at para. 2-099.

[73] In the US, the Ninth Circuit has stressed this difficulty in: *Sessions Tank Liners, INC. v. Joor MFG., Inc.* 827 T. 2d 458 (1987).

[74] The classification of cases is in line with the predictions of public-choice theory, which explains the circumstances under which the government supplies measures demanded by private interest groups. The difficult case – different groups lobby the government – is dealt

public debate. Technical norms, for instance, do not lend themselves to political debates. In such a case, companies interested in the norm may have a monopoly with respect to the input of information, being better equipped than other interest groups to make their case.

Cases in which industries pressure a government by, for instance, arguing that they are going to shift production sites abroad unless action is taken belong in a second group. But there are other cases which do not involve such 'threats' that also fall under Article 81, *BNIC* being one example. The reader may wonder whether it is imperative that 'threats' accompany the lobbying or whether an infringement of Article 81 might consist of 'simple' proposals. For including threats militates the consideration that a link between the agreement to lobby and the governmental output is easier to prove if pressure is exercised. On the other hand it is difficult to circumscribe the notion of 'threat'. A threat might be formulated in an indirect fashion, e.g. by pointing out that certain steps are forced upon the companies in case the government turns down the proposals. In light of their elusive nature, I prefer to exclude the concept of threats. Normally, a more or less subtle form of pressure is going to be part and parcel of the lobbying.[75] Companies will not casually send a letter to the government, but find ways to make their case in a more persuasive manner. Accepting the outlined interpretation of Article 81, it is better not to confine infringements to proposals backed up by unveiled threats.

Thus, it seems possible, in a circumscribed set of cases, to prove the existence of a link. The charge that our interpretation creates a scope for making unfounded allegations against lobbying companies can be parried. Only in these relatively obvious cases is an injured competitor going to file a complaint with the competition authorities. A fairly reasonable case can be made for the following thesis: companies *proposing* a measure in breach of Community law[76] are themselves infringing Article 81.

I would like to offer the reader some hypothetical examples to shed more light on the thesis. A poultry producer group presses the government for a ban on poultry imports. Shortly before Christmas, the government adopts a new licence system, bringing imports to an abrupt end and offering domestic producers a welcome Christmas present. The criterion set out above is fulfilled – it is not hard to see that the measure amounts to a non-tariff-barrier at variance with Article

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cont.

with by a rival theory, pluralism, in a more convincing fashion (cf. Croley (1998) for references).

[75] A good overview of modern lobbying is offered in Michel Clamen's (1995) book. Clamen presents rather polite ways of lobbying, stressing that heavy-handed tactics are not going to improve one's position. Examples include, nevertheless, threats to bring an issue into the courts, expert-opinions sponsored by interest groups, subtle ways of manipulating the agenda, etc.

[76] The rider 'related to trade and competition' is henceforth omitted.

28.[77] Here one might, with good reason, inquire whether the infringement of Community law has to be *obvious* or whether any infraction suffices no matter how contentious the infringement might be. This question recalls the state liability doctrine, which the Court of Justice has developed in the wake of *Francovich*. In post *Francovich* case law, the Court has stated that the infringement committed by a Member State has to be *sufficiently serious*. Consequently, in *British Telecommunications*[78] the Court held the UK not to be liable in damages, acknowledging that the UK had transposed a directive in a reasonable, if incorrect way. Considering that a government is able to muster considerable resources to find out beforehand whether a measure would be contrary to the Treaty, resources even large companies might lack, the infringements should be relatively obvious. An infringement of Article 28 would meet this 'clear breach' doctrine. Breaches of general principles such as proportionality would also be sufficient on account of the extensive literature on these principles.

But not only companies would have to heed the lobbying doctrine, as the next example is intended to show. A lawyers' association might ask the government to enact new measures that make it harder for foreign lawyers to offer legal services or to establish law firms in the country in question. Such a measure would also violate the Treaty, running contrary to the Articles on the freedom of establishment. Trade associations come within the scope of Article 81,[79] hence the lobby proposal would fall under the Article, according to part D.I. The following variation on this theme would be interesting: companies or associations merely lobby to obtain a *waiver* from the application of an existing law. By way of example, they might lobby for being offered an extension of a grace period in order to get an edge on European competitors. Such an exception would be, where the law itself is a European measure, a breach of European law and hence covered by our doctrine. If the law is a national law without a European pedigree, then the situation is more difficult to tackle. One might consider comparing the exception to a subsidy granted to companies. According to our lobbying framework, companies have to refrain from demanding subsidies. For the Member State that succumbs to these suggestions breaks Article 87's prohibition of state aid, and the breach is obvious enough: consequently, the companies have infringed Article 81.

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[77] An excellent interpretation of Art. 28 is provided by Müller-Graff in Groeben (1997). The reader should note that it has not been submitted that *companies* breach Art. 28. The companies have breached Art. 81 whereas the government has flouted Art. 28. Consult Müller-Graff's discussion of the question whether private parties may infringe Art. 28 – *supra* note 77 at p. 743, para. 301 et seq. Breaches of Art. 28 by private parties would, if admitted, concern mainly measures issued by certain bodies that exhaustively govern a sector of the economy, as in *Bosman*.

[78] Case C-392/93 *British Telecommunications* [1996] ECR I–1631.

[79] Consult the excellent discussions of competition law and trade associations in Watson, Philippa, Williams, Karen 'The Application of the EEC Competition Rules to Trade Associations' (1988) *Y.E.L.*

Further discussion of this variant is clearly needed. The set of examples is far from exhaustive.[80]

(B) PROPOSED MEASURES DO *NOT* INFRINGE COMMUNITY LAW

In cases where proposed measures do not infringe Community law, the lobbyists should not be taken to task. *Meng*, a true Pandora's box, is not re-opened.[81] Hence the charge that the doctrine discussed here would hinder companies from venting their grievances or from making informed suggestions to governmental bodies does not hold. The reader may now wonder whether the proposed doctrine entails that companies and governments can jointly enter into cartels. The US Court had rejected this idea in *Omni Outdoor*. We concur, if for different reasons. It has *not* been argued in this article that Member States and private companies may, after a 'meeting of minds', decide that it is in everybody's interest to inflict damage upon foreign companies. Such a reading does not square with the text of Article 81, that mentions only enterprises. The Court has, admittedly, construed 'enterprise' in a functional way, so that even non-profit organizations and, arguably, trade unions can be addressees of competition rules.[82] Similarly, public enterprises fall under the competition rules. But it would go too far to subsume the government itself. Although tough-minded public choice theorists might advocate this extension.

2. *Companies Veto Governmental Measures*

The situation in which companies do not draft legislative proposals, but urge the government to prevent (parts of) measures improving the market situation of potential competitors is more difficult to reconcile with Article 81. We should give this problem some thought, though, if only because *Noerr* was precisely about such a 'veto'. And clearly companies are in a better position to prevent proposals being introduced than to ensure that proposals are implemented, not least because of the fact that drafting requires more expertise and considerable resources. So, can one convincingly argue that the *object* of a concerted lobbying effort to bring down

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[80] Additional interesting possibilities include a case in which companies press the competition authorities to turn a blind eye on anti-competitive practices. Or in which they ask the government to exert influence on the Commission to ensure that mergers may go ahead that would be incompatible with the Merger Regulation.

[81] This is not to say that it might not be worthwhile to re-discuss *Meng* in the light of the framework. But it would be time-consuming and complicated.

[82] For an exposition of the case law consult Emmerich, *supra* at p. 127 et seq. A recent case of interest is *Cali* (Case C-343/*95 Cali & Figli v. Servizi ecologici di Genova* ECR I–1547) in which the standard doctrine prevailed. For a discussion of the application of competition law to trade unions *see* Sebastian Graf von Walwitz (*Tarifverträge und die Wettbe-werbs-ordnung des EG-Vertrages*, (Frankfurt, Peter Lang, 1997), who argues that unions and companies may violate competition rules (the Supreme Court developed a similar doctrine in *Pennington*).

proposals opening up the home market, to present a hypothetical example, is a restriction or distortion of competition? After all, if the lobbyists succeed, the market situation has not deteriorated for their competitors. It is merely not as good as it would have been had the government realized its proposals. The competitors might forego profits, but the structure of competition is not necessarily negatively affected. There is no easy way of showing that the measure would have contributed to bringing the existing situation closer to a situation of 'perfect competition'. Moreover, the companies might have a legitimate interest in preventing the measure in question, in particular in cases in which the foreign company resorts to 'unfair' business methods, although it is not easy to define the meaning of 'unfairness' in the European setting. The companies might then argue that it is not for them to sanction their competitors, but for the government to prevent the entry of the competitor.[83]

One might suggest a 'rule of reason' approach here arguing that there may indeed be situations in which a veto is not allowed. For instance, if companies enjoying exclusive contracts with the government veto the government's proposal to invite other companies to tender, then this veto seems to be aiming at the distortion of competition or, even worse, the prevention of competition. If successful, it effectively perpetuates a monopolistic situation detrimental to consumers. Such a case-by-case approach is definitely not an optimal solution. We shall see that the situation is somewhat easier to tackle in the context of Article 82.

3. Legal Consequences of Lobby Cartels

To date the legal consequences of cartel under Article 81 have not been clarified. This is another quandary, since the appropriate fine is hard to determine. Normally a cartel is null and void under Article 81(2). In German law companies forming a cartel have broken Article 823(2) of the Civil Code and are bound to compensate competitors for profits forgone owing to the anti-competitive effects of the cartel.[84] Does it make sense to argue that the lobbying companies must recompense their competitors, presumably foreign companies? Under *Francovich* rules, the responsible government is obliged to indemnify the injured companies. Would the harmed companies thus receive double compensation? Or would the law be fulfilled if the companies were, by means of an injunction, enjoined not to lobby for similar acts in the future? The reader is asked to ponder the issue.

Finally, one should consider the possibility of granting an exemption under Article 81(3) for all the types of lobbying discussed in the preceding paragraphs. Article 81(3) offers a means of exempting infringements that improve consumer

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[83] This argument harks back to *Hilti* (Case T–30/89 *Hilti v. Commission* [1991] ECR II–1439, paras. 118–119), where the CFI ruled that a company is forbidden to sanction a competitor on the ground that the competitor's products are allegedly unsafe. Hilti should have taken legal action instead of taking justice into its own hands.

[84] Schmidt in Immenga (1997) at p. 319 para. 76.

welfare. But such an exemption is not in the offing. In the first scenario (infringement of European law), the conditions for an exemption are clearly not fulfilled: market conditions have been distorted and consumer welfare has not been improved. In the difficult case of a 'veto', such an exemption might be taken into consideration, although only under special circumstances. This discussion needs to be continued.

II. Article 82 and Predation through the Government

So far we have focused on the concerted action of several companies that agree to align their lobbying efforts. The focus of this part is on the behaviour of a single firm or the behaviour of firms in a position of 'joint-dominance'. Thus we turn to Article 82, which governs the behaviour of dominant enterprises. Does it make sense to subsume the efforts of dominant companies to obtain favourable legislation under this Article? Or would this lead to an undesirable 'overkill' of lobbying efforts, to echo Justice White in *Allied Tube*? After the preliminary discussion, hopefully to the reader's relief, a real world case, namely *Cewal*, is presented, that raises some interesting questions concerning Article 82 and lobbying.

Article 82 quite simply forbids the abuse of a dominant position by a company or by companies. The application of the Article presupposes that the company holds a dominant position, which means that it can, to a certain extent, act without considering the reactions of its competitors. There is no easy way of proving market dominance except for cases in which companies possess extremely high market shares. It is not the dominance itself that is outlawed, though, but the abuse of the market power that goes with it.[85] Such abuse can consist in the imposition of unfair trading conditions, price-discrimination, etc. German commentators have distinguished between three types of abuse, namely, *Ausbeutungsmissbrauch* (exploitation abuse), *Behinderungsmissbrauch* (suggested translation: obstruction abuse) and *Marktstrukturmissbrauch* (market structure abuse).[86]

Exploitation abuse consists of taking advantage of the weaker position of traders by charging them higher prices or imposing unfair business conditions. Prima facie, this type of abuse does not cover the possible attempt at obtaining favourable legislation. *Behinderungsmissbrauch* is a concept we have already discussed in the context of Article 81. It means that a company tries to aggravate the competitive situation of its competitors. It may, for example, oblige its distributors not to trade with rivals. Or it may cease to supply a rival company that is dependent on these supplies, thereby making it hard or impossible for the rival to sustain production.[87] The general formulas defining this type of abuse are relatively vague and, from an

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[85] This is common knowledge: Bellamy (1993) 9-003.
[86] Cf. Möschel in Immenga (1997) at p. 723, para. 129.
[87] Cases 6 & 7/73 *Instituto Chemioterapico Italiana 7 Commercial Solvents v. Commission* [1974] ECR 223.

economic point of view, not unproblematic. In *Hoffmann-La Roche*, the Court stated that behaviour deviant from ordinary competition (in the German original: *Leistungswettbewerb*) could be considered abusive if it prejudices the maintenance of competition or its development.[88] But, of course, it is anything but easy to distinguish abnormal from normal price-competition (one merely has to recall the difficulties shrouding the concept of predatory pricing). To clarify the scope of the doctrine, the Court has adopted the formulation that a dominant company has a certain *responsibility*[89] for safeguarding the remaining competition. Hence even perfectly legitimate business strategies in the case of medium-sized companies may be abusive in the case of a large company. The example concerning the abrupt termination of supplies fulfils this criterion. In *Continental Can*[90] the acquisition of another company was held to be, in principle, abusive if the acquisition would have resulted in the complete elimination of competition. *Continental Can* is an interesting case in point, since the Court held an extension of Article 82 to mergers and acquisitions to be possible: we are discussing an extension to lobbying.

Finally, market structure abuse is rather an ancillary concept. Owing to the fact that this kind of abuse has, to date, not been extensively studied, I turn to the second, more common type. It could offer us what we are looking for, if there is any chance at all of subsuming certain types of lobbying under Article 82. For one might argue that a dominant company seeking legislation that strengthens its dominant position or prevents its erosion is indirectly impeding competitors. It is important to bear in mind that, unlike in the case of Article 81, we do not have to probe the *object* of the dominant company. The Court has unmistakably ruled that abuse of a dominant position is an *objective* concept. Consequently, a company can have the very best of motives and still abuse its dominant position if it maintains or strengthens it by 'abnormal' means.[91] Even if, for example, it is a customer that requests a certain discount, granting the discount may be abusive. Besides, the Court has stated that we do not have to ask whether the anti-competitive behaviour was possible only thanks to the dominance or market power of the company. Hence a company can abuse its dominance even if it acts in a market in which it is not the market leader (*Continental Can, Tetra Pak II*[92]). In other words, we do not have to show that dominance and behaviour are causally

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[88] Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, 541.

[89] Case 322/81 *Michelin v. Commission* [1983] ECR 3461, para. 57.

[90] Case 6/72R *Europemballage and Continental Can v. Commission* [1972] ECR 157. Case T–83/91 *Tetra Pak Rausing v. Commission*.

[91] Möschel *supra* at p. 722, para. 125.

[92] In a perceptive study, Romano Subiotto has analysed the weakening of the link between dominance and abuse in: 'The Special Responsibility of Dominant Undertakings not to Impair Genuine Undistorted Competition' (1994/95) 3 *World Competition* at p. 6. Admittedly, the lobbying account could be read as furthering the erosion of any causal link, thus opening the door for prosecuting 'bigness' per se instead of abuses. The criteria suggested here are meant to prevent such an erosion. It is an open question whether the lobbying has to have an impact on the market in which the company is dominant. This restriction seems equitable.

linked.[93] This is good news for our project. As to the difficulties shrouding the proof of a link between lobbying and measure, I refer the reader to part D.I.1(a).

One might claim that there is a good prima facie case for the thesis that an attempt to obtain favourable legislation can be an abuse of a dominant position, if the legislation contributes to the market power of the dominant company. However, to simply argue that the legislation, which dominant companies must *not* even have demanded, would somehow strengthen their dominant positions is, in my opinion, too general a statement. We should not throw out the baby with the bath water. Hence I suggest that we classify, once again, the types of measures for which dominant companies may lobby. Focusing on the measures themselves facilitates the analysis. For alternative criteria, such as a criterion according to which companies should not seek legislation disregarding the *public interest*, lack satisfactory precision and are couched in ideological terms. As to the type of legislation that the companies may seek, I suggest recycling the framework developed in part D.I.1. As in the case of Article 81, a company may seek measures contrary to European law related to the parameters of competition. The effect of such a measure might be that entry barriers to the company's home market are henceforth more difficult to overcome. This would conceivably contribute to a comfortable maintenance or to a strengthening of the company's dominant position. By way of example, companies might urge the government to grant them the exclusive permission to carry out certain services. As in the case of Article 81, mutatis mutandis, governments are not entitled to reinforce or induce abuses of dominant positions under Article 82 on pain of breaching their duties. Analogously, the duty not to 'sabotage' the competition rules emanates from Article 82 read together with Article 10 and Article 3(g). So a government may not sanction, for instance, a foreign company unwilling to pay discriminatory fees that have been levied by a dominant company. Some of the port-related cases the Court has had to deal with (*Corsica Ferries*[94]) provide interesting examples.

In analogy with part D.I.2 we now turn the situation in which companies veto measures that would improve the competitive situation of rival companies. In the case of Article 82 the argument runs somewhat more smoothly, since we no longer have to prove that the company *intended* a distortion of competition. It is enough if its lobbying contributes to the maintenance or defence of its dominance. Vetoing a measure intended to break down entry barriers would contribute to a perpetuation of market dominance. Nonetheless, we should allow for an objective justification of the veto.[95] For it could be the case that the competitor's methods are in some way dubious. By intervening with the government to prevent the entry of the competitor, the dominant company could have been defending the public interest, unlikely as this may be.

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[93] Ibid., para. 123. Nor do we have to show that the efforts are crowned with success. The mere possibility of such success is a sufficient condition: ibid., para. 126.

[94] Case 49/89 *Corsica Ferries France v. Direction Générale des Douanes* [1991] ECR 4441.

[95] A 'rule of reason' approach might be chosen, i.e. the context and the content of the measure are taken into account.

1. Cewal: *Lobbying in Africa*

Cewal[96] is a case pending in the European Court of Justice that raises intriguing questions with respect to lobbying. Cewal is a shipping-conference, i.e. a forum in which shipping companies meet to fix prices and other modalities.[97] It had entered into an exclusive agreement with the Zairian shipping authority, Ogefrem, that granted the company a veto power with respect to the admission of competitors. The agreement concerned rights to ship goods between Europe and Zaire. Two European contenders, Grimaldi & Cobelfret (G&C) were seeking permission to enter into the market. Cewal seems to have gone out of its way to prevent the entrance of the competitors by threatening to withdraw certain favourable financial conditions. Ignoring these threats, Ogefrem granted transport rights to the competitors. The Commission described Cewal as being in a position of *joint dominance*. This means that Cewal's members are, through various financial ties, so closely connected that they operate on the market as one economic and dominant unit. The Court of First Instance upheld the Commission's assessment of Cewal's joint dominance even though applicants had argued that the economic ties had not been succinctly described. Therefore, the case has to be dealt with also under Article 82. The scene is now set for a discussion of the lobbying issue.

During the proceedings before the CFI, counsellors for the applicant proffered as one argument that one could not describe the relation between Cewal and the authorities as one of contract. The Zairian authorities acted more than once as if the right to veto conferred upon Cewal did not exist. Rather, one should describe the situation as one of a lobbyist with Cewal seeking to obtain favourable business conditions. Lobbying efforts, it was argued, should be protected under a European version of *Noerr-Pennington*. The Commission submitted that Cewal enjoyed a concession granted by Ogefrem. By pressing for the exclusion of G&C, Cewal had infringed Article 82 in order to strengthen its dominance. The CFI, without addressing the lobbying defence, enjoined the Commission's assessment of the situation. Thus, applicants asked the ECJ for a proper evaluation of the lobbying defence, claiming that either the CFI had changed the nature of the accusation or mistakenly ignored the force of *Noerr-Pennington*. In my opinion this a cogently construed dilemma.

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[96] The ECJ has now to assess the CFI's judgment in the Joined Cases T–24/93, T–25/93, T–26/93 and T–28/93, [1996] ECR II–1201.The case has been assigned the number C-395/96 and 396/96. Pat Treacy and Trudy Feaster review the judgment of the CFI in *Compagnie Maritime Belge SA & Others v. Comm*ission ECLR (1997) at p. 467. According to the most recent information at my disposal the AG Fenelly has invited the ECJ to reject Cewal's arguments.

[97] Such conferences, at first sight in blatant contradiction with Art. 81, are exempted from competition law, which does not mean that abusive behaviour of conference participants might not be prosecuted (cf. Bellamy (1993) 15-022 or Clough, Mark: Randolph, Fergus, *Shipping and EC Competition Law* (London, Butterworth, 1991). The French–West Africa agreement raised similar questions, which are briefly discussed after *Cewal*.

So, side-stepping the question whether Cewal's submissions are admissible, how would you decide? According to the position laid out in this article, the applicants' lobby argument is an invalid attempt to imitate American law. Differences between the legal systems should be given their due respect. A dominant company or companies in a position of joint dominance has to refrain from inducing the government to strengthen its position. This case lends itself to the solution expounded in part D.II, since Cewal seems to have taken to threats to inflict economic damage on the Zairian government. But note that threats themselves are not indispensable for the solution proposed here. Even in their absence, Cewal would have abused its position of joint dominance. Instead of *Cewal*, a closely related case could have been discussed, namely the *French–West African Shipowners' Committees*.[98] The conference was held to have infringed Article 82 by, *inter alia*, inducing authorities to sanction competitors that did not possess a certificate issued by the conference. The Commission came, in line with the interpretation suggested in this paper, to the conclusion that such inducements are to be considered abusive.[99] The criterion the Commission applied could be summarized as follows – demanding governmental action that would strengthen a dominant position is problematic. This rule of thumb is, however, as a basis of a general European lobbying doctrine, over-inclusive and hence unsuitable. It might rule out any lobbying proposal submitted by dominant companies. This is why I have suggested a somewhat more refined, if perhaps more artificial approach.

Two apparent shortcomings of these conference cases should be mentioned. First, they concern a fairly special topic, namely pressure on the governments of developing countries. These governments are not in a strong bargaining position vis-à-vis mighty ship conferences. Hence it might be possible to argue that, owing to the weakness of African governments, the case is not analogous to the situation of a company lobbying a European government: a European government is always able to turn down companies' proposals, being impervious to financial inducements. Hence to ask for competition-distorting legislation is to ask for the impossible. This argument is not persuasive, if only for the reason that Ogefrem, for instance, did not defer to Cewal's wishes. Were space not a scarce good, it would be possible to adduce economic evidence to buttress the claim that *any* government may be tempted to defer to interest group pressure.

Second, the conference cases seem especially difficult to handle, since they involve the thorny issue of the extraterritorial application of competition law.[100] Therefore, the second case is more difficult to analyse within our framework, since the African government is not bound to fulfil obligations under European law. Were we dealing with a European government, it would have infringed its duties under Articles 82 and 10 read together with 3(g), since it reinforced abuses

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98 (92/262/EEC) 1 April 1992 OJ 1992, L 134/1.
99 Para. 68.
100 Cf. Rehbinder in Immenga (1997) at p. 70 et seq.

of a dominant position. For extraterritorial cases one might introduce the special rule that companies may not ask for legislation detrimental to competitors nor prevent measures encouraging competition. As stated above, this statement is too blunt for a European solution. In the next part we shall turn to the question whether our embryonic solution runs foul of the European Convention on Human Rights

III. Lobby against the Lobbying Doctrine with the Human Rights Argument?

In the few contributions to the lobbying topic, the argument that the European Convention on Human Rights prevents a restriction of lobbying has held centre-stage.[101] In Article 10 the European Convention protects the freedom of expression and allows only for derogations that are explicitly formulated as a law and necessary in a democratic society. It not only protects political but also commercial free speech, including advertising. Hence one might argue that it covers lobbying regardless of the intent of the parties. For companies merely express their opinions about what they see fit. Furthermore, one might refer to the Constitutions of various Member States that protect the freedom of expression and the right to petition.[102]

Nevertheless, the argument based on Human Rights is not persuasive. Companies urging the government (first situation) to adopt measures incompatible with European Law are trying to obtain measures that violate the rights of other companies. The injured rivals are entitled to rely on the fundamental freedoms enshrined in the Treaty, such as the right of establishment or the right to freely compete with other companies in an arena of undistorted competition.[103] This description also fits the second situation in which companies block measures that would make it easier for their competitors to avail themselves of the fundamental freedoms.

BNIC could be called upon to buttress this position. We have already seen that companies are not allowed to submit price fixing proposals, even though they could be described as expressing their opinion. In this case, the rights of other companies override BNIC's right to submit its proposals. Nor would it be permissible that

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[101] The first clear statement to that effect seems to be Kuyper (1983). Bach, in his excellent study, argues analogously (Bach (1992) at pp. 209–210).

[102] *See* Finer, S.E. et al. (ed.), *Comparing Constitutions* (Oxford, Clarendon, 1995) at p. 134 for Germany: Art. 17 of the Basic Law, for the EC: p. 312, Art. 8d.

[103] For an illuminating discussion as to how one should best describe the fundamental freedoms: Miguel Poiares Maduro: 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedoms and Political Rights' (1997) *ELR* at p. 55. The gist of the essay consists in the thesis that these rights are meant to ensure that the interests of fellow Europeans have to be taken into consideration when Member States legislate. This account differs from the current doctrine according to which the freedoms are freedoms protecting European citizens from the intrusions of the state.

companies set up a cartel or organize a boycott in order to express their dissatisfaction with the existing economic situation in the Community.[104] The limits of fundamental rights are the rights of others, herein included the economic rights of others. This seems to me the correct conclusion, provided we accept that the lobbying proposal aiming at a distortion of competition falls under the right of free expression (or petition[105]).

One might, however, argue that this is already too generous a reading of the Convention, since the aim of the companies is not to express a *political* opinion,[106] but to ride roughshod over a competitor. They are pursuing a commercial strategy rather than truly engaging in political activities. It is hard for the companies to pretend that they are acting in the public interest when lobbying for a measure in conflict with European Law. Here we might be forced to consider the *context* in which the lobbying takes place. Thus we might come to different conclusions depending on whether we are dealing with speech in the *open* political arena (including petitions) or with conversations that took place in the cloakrooms or in the setting of a regulatory agency. When following such a context-sensitive approach we would be walking in the Supreme Court's footsteps (*Allied Tube*). On the balance, the first variant seems to me to rest on a sounder footing.

Regarding the case law of the Human Rights Court, one might point out that the Strasbourg Court has offered Member States a considerable discretion. In *Markt Intern Verlag*,[107] the German law of unfair competition prevailed over the right of free expression, though the plaintiff had merely expressed his opinion that a large company (with which he was not competing) had used unfair business techniques.[108] The same margin should be granted to the European Community, when Articles 81 and 82 are extended to lobbying activities. But even if the Human Rights Court reinforced the scope of Article 10,[109] the situation would not appreciably change: we

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104 This idea is taken from *Allied Tube*.

105 The right to petition has been construed broadly by German legal doctrine (cf. Dürig in Maunz-Dürig, *Kommentar zum Grundgesetz*, Commentary on Art. 17, para. 36 et seq.) As a petition, apart from direct insults, *any* expressions of wishes, complaints, etc. are accepted. In the text, though, we have argued that European law, in case of conflict with national law, overrides national provisions, including fundamental rights. This is a consequence of the *supremacy* of Community law. Thus, petitions aiming at obvious distortions in line with section D are not protected by the right.

106 Here the question crops up how to define 'political'. This is extremely difficult. One suggestion might be that political opinions are meant to benefit not just one individual, but, in principle, a (large) group of individuals. Here law gives way to political philosophy.

107 *Markt Intern Verlag GmBH und Klaus Beermann v. Germany*, Judgment of 20 November 1989, Series A, No. 165; (1990) 12 EHRR 161.

108 This decision has been widely criticized as undermining the kernel of the right, e.g. in: Petiti, Decaux and Imbret (eds.), *La Convention Européenne des Droits de l'homme, Commentaire Article par Article* (Paris, Economica, 1995) at pp. 405–406.

109 Jacob, Francis, White, Robin, *The European Convention on Human Rights*, (Oxford, Clarendon Press, 1996) at p. 236.

face here a conflict between the fundamental rights of any European company and the right of free expression. Consequently, one has to strike a balance between the competing norms, keeping in mind that the right of free expression does not necessarily override the fundamental economic rights stemming from the Treaty. Finally, in line with the requirements of Article 10, our interpretation of Articles 81 and 82 is also the interpretation of a *law*, that is necessary in a democratic society, since consumer welfare would be reduced in the absence of cartel laws. And the interpretation sketched here reduces potential distortions of competition by deterring *certain* lobbying proposals. It thus contributes to the maintenance of a 'level-playing field' in Europe.

E. Summary

In this article more questions have been raised than answered. Nevertheless, it should have become plain that *Noerr-Pennington* is not a good candidate for a European lobbying doctrine. Neither the Human Rights argument nor an analogy of *Parker* can be invoked as justifying the doctrine. The central result of this article is that Articles 81 and 82 *can* be read as ruling out certain forms of lobbying. Such a competition lobbying doctrine might contribute to a reduction of protectionist measures, thereby bringing us one step closer to the envisioned European-wide system of undistorted competition. The doctrine meshes well with our notion of fairness in so far as henceforth not only governments would be faced with liability claims because of protectionist measures, but also those who, as it were, ordered them. Thus a *teleological* reasoning supports the literal reading. But it bears repeating that the doctrine only works in fairly special cases in which the premises of capture theory are easily verified: an interest group or company has a, as it were, monopoly with respect to legislative proposals. Besides, one should bear in mind that the application of Article 82 presupposes that we are dealing with dominant companies. Hence an influential company that happens to be the second largest player in various markets is able to pressure the government without running afoul of this Article. The limitations of the doctrine are thus stark. Paradoxically, this weakness is also its strength. For the doctrine does not lend itself to a general crusade against capture, for which, as the American discussion has shown, a normative basis is hard to discover.[110]

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[110] The discussion of Wiley's capture theory has turned on the problem of a possible over-extension of the theory. For a critical discussion consult: Elhauge, Einer, 'The Scope of Antitrust Process' in (1991) *Harvard Law Review* pp. 667–742 and 'Does Interest Group Theory Justify More Intrusive Judicial Review?' in (1991) *Yale Law Journal* pp. 31–110.

The possibility of extending the doctrine to lobbying in Brussels with the Community is an interesting question not covered in this article. After all, it can be argued that, after the completion of the Common Market, lobbying is shifting towards the European level, though it would be too hasty a conclusion to argue that lobbying at the Member State level has lost all importance. Such an extension needs further treatment. This article has merely lobbied for a reconsideration of the connection between lobbying and competition law.