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Reasonableness and Law

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of equivalence and effectiveness. On this approach, the national procedures available under which to obtain judicial protection of rights conferred by EC provisions must "be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law."[55] The Court relies on these principles to assess whether a national procedure, such as a law fixing a limitation period, should be considered reasonable.[56] Reasonableness acts in this role to provide the Court with the discretion to ascertain whether a national law can adequately ensure the protection of rights conferred on citizens under EC legislation or under the Treaty.

The principle is further used to assess the conditions giving rise to responsibility for Member States due to a violation of EU law. In this role, reasonableness serves to raise the threshold for finding a violation of Community obligations giving rise to liability, and it also serves to assess whether an infringement of EU law is serious enough to produce certain consequences.[57]

6 Concluding Remarks

The above survey of EC caselaw and legislation points up the difficulty involved in finding a comprehensive interpretative scheme under which to work out the meaning of reasonableness in EU law. It seems, on the one hand, that if a sharp distinction is drawn between different methods of interpretation, in an effort to single out an autonomous role for the principle of reasonableness, the results produced will be scant. And yet the foregoing survey of caselaw suggests that the Court's entire legal reasoning is strongly influenced by a principle of reasonableness, even though the Court may wind up justifying on the basis of different principles or criteria what it decides on as a reasonable solution. It may thus be suggested, from a pragmatic point of view, that the Court once that it has settled on a solution it deems reasonable, ascribes such a solution to the EC legislator, or else rules that the solution is required under a general principle of law.

Reasonableness in EU law is a manifold principle playing different roles, and in playing these roles it changes its meaning and content, like a chameleon. As an interpretative principle of EC law, it works under the shadow of other principles,

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55 Case C-188/95, 2 December 1997, *Fantask, ECR*: I-6703ff. See Biondi (2005).

56 Case C-188/95, *Fantask*: "The five-year limitation period under Danish law must be considered to be reasonable [. . .]. Furthermore, it is apparent that that period applies without distinction to actions based on Community law and those based on national law" (par. 49). See also Case C-90/94, 17 July 1997, *Haahr Petroleum v. benrå Havn and Others, ECR*: I-4085ff., par. 49; Case C-255/00, 24 September 2002, *Grundig, ECR*: I-8003ff.; and Joined Cases C-216/99 and C-222/99, 10 September 2002, *Prisco, ECR*: I-6761ff.

57 As stated in Joined Cases C-46/93 and C-48/93, 5 March 1996, *Brasserie du Pêcheur and Factortame, ECR*: I-1029ff., "Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties" (par. 51).

while as a parameter of legitimacy, it may reinforce a presumption of lawfulness of EC legislation or it may constitute a criterion for review the validity of such legislation. In the monitoring of national law, the principle is expressed through a "rule of reason" that plays a crucial role in assessing whether Member States fulfil their EC obligations.

This lack of a rigorous construction in the Court's caselaw may seem surprising if compared with any domestic legal system or if considered from a legal-theoretical perspective. However, one should take into account the peculiar features of EU law: the EC Treaty is incomplete,[58] and the very technique used to confer legislative powers on the institutions implies the existence of significant gaps (see, among others, Bast and von Bogdandy 2002, and Michel 2003). For the Court, this implies a political role stronger than that played by national courts in European countries. Suffice it to recall here that the Court establishes the higher principles of EC law and their relative priority, striking a balance among different interests and values. Reasonableness thus seems likely to play a greater role in the absence of a written constitution; and it may be argued that if working out a ranking of values and rights in written constitutions is a difficult task,[59] this seems to become even more difficult when it is up to the courts to establish the higher principles of a legal system.[60]

In this context, the recourse to reasonableness in the Court's caselaw gives expression in the EU legal system to two different needs: the need for flexibility in applying EC law, and the need for filling gaps in the legal system. The foregoing survey of caselaw shows that the Court relies on reasonableness in assessing whether EC political institutions and Member States alike are fulfilling their Treaty obligations. Thus, the Court applies a principle of reasonableness in assessing whether European institutions are acting lawfully, as well as in assessing whether Member States are acting in compliance with their EC Treaty obligations: when the conduct of EC institutions is at issue, reasonableness is often disguised by the Court under other principles and criteria, presumably to avoid criticism for exercising a too wide judicial power; when it comes to assessing whether national legislation complies with EC law, the principle's role becomes more evident, since the Court seems to have no hesitation in resorting to it in ascertaining whether a national measure constitutes a reasonable derogation from EC obligations or in verifying whether

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[58] This is a feature shared by all international treaties: see Petersman in this volume, who observes that "all international treaties remain incomplete and build on general principles of law." (p. 430).

[59] See Morrone in this volume for a discussion of this point where the Italian Constitution is concerned.

[60] The call for a codification of fundamental rights—such as is envisaged by the Constitutional Treaty, and also by the Treaty of Lisbon, albeit through a different technique—clearly aims at limiting judicial discretion, and this would seem to restrict the significance of the general criterion of reasonableness. But this effect may only be *apparent*, since codified general principles do not necessarily translate to a limitation on judicial activism: in fact a codification of this sort may make for a greater role of the Court in balancing the different values and interests explicitly so stated in a treaty, and such balancing is something the Court would have to do relying as well on reasonableness.

national legislation respects the principle in implementing or applying Community legislation.

Finally, there is the question of the balancing of interests, which appears to be an even more sensitive question in the EU system than in the single national legal systems, and this makes for a greater role of reasonableness in the EU system: when recourse is had to reasonableness in settling a dispute, the outcome may invest not only the interests of different actors in the market and in society (e.g., an interest in environmental protection as against one in competitive industry), but also the relation between Member States, since different States may have an interest in balancing conflicting values in different ways, especially for economic reasons.[61] Reasonableness thus plays a prominent role whenever a balancing approach is required and a cost-benefit analysis needs to be made: this might consist in balancing the need for environmental protection against the need to develop industry, or in balancing the free movement of goods against consumer protection, or the grant of an interim relief against the Community's interest in the application of EC legislation. In these cases, recourse to reasonableness clearly provides the Court with a criterion exceeding a strict legal perspective, and it involves a broad assessment of interests of the different actors.

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[61] One area where this happens is in the growth and use of genetically modified crops.

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An Evolving "Rule of Reason" in the European Market

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From a general point of view, it can be argued that legal reasoning encompasses the concept of reasonableness, since the establishment of a set of rules necessarily entails that a margin of flexibility be allowed. Such a margin may take one of several forms, ranging from exceptions and derogations to exemptions. Either way, the legislator, the executive, or the judiciary will have to make a determination by comparing and weighing different competing values.

As far as competition law is concerned, the so-called "rule of reason," a concept of elasticity making it possible to establish exceptions to a rigid rule, was developed in U.S. antitrust law long before the creation of the European Union.

The aim of this paper is to determine whether this concept can play a role in the EU internal market, and to this end we will consider if, and how, it has been applied in that context. In responding to this legal conundrum, we will carry out a comparative analysis of two distinct areas of application, namely, the market rules dealing with competition and those on the free movement of goods, persons, services, and capital.

As a starting point, however, a few introductory remarks will be made on the rule of reason in its American and European settings. In fact, considering that this rule was initially conceived under U.S. antitrust law, it is appropriate to discuss the U.S. system, drawing the necessary analogies with the European system and highlighting the inevitable differences.

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1 Comparing the American and the European Antitrust Systems

1.1 The American System

It is the well-known Sherman Antitrust Act (Sherman Act, July 2, 1890, Chap. 647, 26 Stat. 209, 15 U.S.C. § 1–7) that prohibits anti-competitive agreements in the U.S. Section 1 states that "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."

Notwithstanding this general prohibition, the Sherman Antitrust Act does not provide for any sort of derogation and seems to disregard the fact that in certain circumstances an agreement between undertakings may increase market efficiency, entail benefits for consumers, or pursue other legitimate objectives. Considering the inherent necessity that all legal systems maintain a degree of flexibility, it was not long before a question arose as to whether the interdiction at issue was to be considered absolute (*per se* rule) or whether it could be subject to derogation.

It was the U.S. Supreme Court's judgment in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), that first attempted to define, and limit, the scope of the Sherman Antitrust Act by holding that only combinations and contracts unreasonably restraining trade were subject to actions under antitrust laws. Nevertheless, it is clear from that decision that U.S. courts remained competent to determine that certain restraints are unreasonable simply by virtue of their "nature and character," without having to evaluate their effects. It follows that, although the case provides a statement of principle from which one may infer the existence of a test of reasonableness, the large powers retained by the courts seemed to ensure the continued relevance of the per se rule.

Over the past four decades, however, the United States Supreme Court has narrowed the category of restraints deemed unlawful per se, thereby subjecting a greater number of restraints to a fact-based rule-of-reason analysis (e.g., *Continental TV v. GTE Sylvania*, 433 U.S. 36 [1977]). Such case-law explicitly implements the statement of principle made in *Standard Oil*, simultaneously confirming that the rule of reason should focus on economic, and not social, consequences of a restraint (see *National Society of Professional Engineers v. United States*, 435 U.S. 679 [1978]).[1]

The system described envisages the possibility of invoking exceptions to the general rule prohibiting "any restraint of trade." In fact, in interpreting the 1890 Sherman Antitrust Act, U.S. courts have given birth to an authentic reasonableness test under which they are entitled to employ an effects analysis, balancing the pro- and anti-competitive effects of an agreement. Contracts, combinations, and conspiracies will not be declared illegal if the positive effects on competition in a given market outweigh the negative ones. It follows that the application of such a test is to be understood as a sort of ex-post exception allowing a measure, otherwise in violation of the U.S. antitrust rules, to fall outside their scope.

[1] It must be noted that the U.S. Supreme Court still maintains the application of a per se rule in areas such as resale price maintenance and tying contracts.

Three points are particularly noteworthy against this background. Firstly, the "justification" provided by the rule of reason is exclusively based on a finding of positive *economic* effects. It is apparent that pursuing legitimate non-economic objectives will not suffice to guarantee compliance with antitrust laws. Secondly, the application of the stated doctrine is internal to antitrust reasoning. In fact, due to the absence of specific justificatory provisions in the Sherman Act, it has fallen to the U.S. Supreme Court to interpret the Act as containing an intrinsic limit, namely, the rule of reason, thus guaranteeing the necessary flexibility of the law. Finally, for the purposes of the present paper, one must not overlook the fact that in *Parker v. Brown*, 317 U.S. 341 (1943) the U.S. Supreme Court recognized the so-called "state action doctrine," limiting the extent to which state measures are reviewed in light of antitrust rules. Subsequent case-law clarifies that measures will be excluded from the scope of the Sherman Act where they amount to the exercise of a state's sovereign powers (i.e., a state measure) *and* if their implementation is supervised by the same state (see Delacourt and Zywicki 2005, 1075).

1.2 The EU System

The EU antitrust system is more complex than that applicable in the U.S. by reason of the Sherman Act. Articles 81 and 82 of the Treaty establishing the European Community (hereinafter the ECT), as given effect to by subsequent implementing regulations (adopted on the basis of Article 83 ECT), envisage a transfer of competences to the European Commission for such matters.

Moreover, with the entry into force of Council Regulation (EC) no. 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the old and cumbersome system established by Council Regulation No. 17 of 21 February 1962 (Official Journal 13, page 204) has been reformed. In particular, the so-called modernisation regulation has removed the need for authorisation and notification of agreements to the Commission and has rendered Article 81(3) directly applicable by national judges and administrative authorities (see footnote 2 below).

Keeping the aforesaid developments in mind, it must be noted that the EC antitrust system revolves around Article 81 of the ECT. It is to this article that we shall turn our attention in an attempt to determine whether the rule of reason can play a role in the EU.

Article 81 ECT, as defined and implemented by several EC regulations, involves a three-pronged analysis. First of all, Subsection 1 requires the determination of whether an agreement is anti-competitive. In this sense it prohibits

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (Article 81[1] ECT).

Secondly, by virtue of Article 81(2), all agreements that fall within the prohibition set by Article 81 subsection 1, are to be considered null and void, and have no

effect between contracting parties (see Case C-22/71, *Béguelin Import Co.*, in ECR 1971 page 949, paragraph 29, and Case C-319/82, *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen*, in ECR 1983 page 04173, paragraph 11). Finally, Article 81(3) endows undertakings with the possibility of obtaining an individual exemption if an agreement helps to improve the production or distribution of goods or to promote technical or economic progress (efficiency gain), if it ensures a fair share of the resulting benefit for consumers (fair share for consumers), and if it does not impose unnecessary restrictions or if it aims to eliminate competition for a substantial part of the products concerned (indispensability).[2]

It must be pointed out that the interests protected by Article 81(3) ECT are of an economic nature. Moreover, the system of exemptions it creates does not exactly involve a balancing of interests but, on the contrary, seems to be a mere sequence of filters guiding the implementing authority towards a decision (see Nicolaides 2005, 123). Agreements that fulfil all the conditions set will be deemed legitimate regardless of their anti-competitive nature and/or effects.

It follows that Article 81(3) ECT must be distinguished from the "American" rule of reason, insofar as it allows derogations from the general rule rather than an evaluation of the rule's applicability. Furthermore, until recently article 81(3) involved an *ex ante* balancing of the interests at stake rather than an *ex post* analysis of an agreement's effects on market efficiency. With the entry into force of Regulation 1/2003 and a legal-exception system, however, it is clear that analysis under Article 81(3) ECT is also carried out *ex post*.

In light of the above, it has been questioned whether the "American" rule of reason can be transposed to Article 81 ECT. Such reasoning would mean that Article 81(1) be interpreted as not embracing those agreements which satisfy an effects analysis, i.e., where the pro-competitive effects outweigh the anti-competitive ones. In order to answer such a question an analysis of the system of exceptions developed by the European Court of Justice (hereinafter the ECJ) for the rules on free movement, which constitute the core of the internal market, appears necessary. It should be noted that in this context it is to Member States, and not to undertakings, that the ECT prohibitions are directed.

2 Free Movement in the EC: Mandatory Requirements, Proportionality, and the "European" Rule of Reason

It is generally acknowledged that the ECJ has adopted a genus of rule of reason in its case-law concerning the European internal market. This approach is especially

[2] Whilst the first two subsections of Article 81 ECT are of mixed competence and fall to be applied by the EC Commission and national judges alike—application of the third subsection was until recently a prerogative of the former. It is to this division of competences that we shall return to in our conclusions to this paper in an attempt to determine whether the rule of reason can play a role in EC competition law following the entry into force of Reg. 1/2003.

apparent in the framework of norms governing the free movement of goods, where the Treaty structure is particularly suitable for such a development.

In fact, whilst Article 28 ECT prohibits Member States from introducing quantitative restrictions on imports or "measures having equivalent effect," Article 30 ECT provides a list of interests that may be invoked to justify national measures otherwise subject to the prohibition.[3] In light of the exhaustive character of the latter Article, and the fact that decades of case-law emphasize the need to interpret it restrictively (see, e.g., Case C-177/83, *Kohll v. Ringelhan & Rennett SA*, in ECR 1984 page 03651, paragraph 19), it is not surprising that the ECJ has developed an "innovative" rule of reason allowing measures which pursue legitimate interests not expressly provided for in the Treaty (such as environmental and consumer protection) to escape the prohibition in Article 28. This reasoning originated in the seminal *Cassis de Dijon* judgment (Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, in ECR 1979 page 00649), in which the so-called "mandatory requirements" were created.

Without being drawn into debates not consonant to the present paper, it is sufficient to recall that, in *Dassonville*, the European Court of Justice, in exercising the powers of interpretation granted to it under Article 220 ECT, broadly construed the notion of "measures having equivalent effect."[4] Subsequently, in *Cassis de Dijon*, the Court attempted to limit this interpretation by drawing what seemed to be, and was later confirmed as, a distinction between distinctly and indistinctly applicable measures.[5] Whilst the former automatically entail a measure having equivalent effect, and as such contravene Article 28 ECT, the latter are not to be so considered insofar as they pursue "mandatory requirements." It follows that whilst distinctly applicable measures can only be justified by an explicit derogation provided by the Treaty itself, indistinctly applicable measures may also benefit from an added category of "justifications" which allows them to fall *outside* the scope of Article 28 ECT.[6]

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[3] Under Article 30 ECT, "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[4] See Case C-8/70, *Procureur du Roi contro Benoît e Gustave Dassonville*, in ECR 1974 page 00837, paragraph 5: "All trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

[5] *Distinctly* applicable measures are loosely associated with discriminatory measures, i.e., those that treat imported goods less favourably than domestic ones. *Indistinctly* applicable measures, on the other hand, include those rules and practices which apply "equally" in law but in fact place added burdens on imported products.

[6] Although such a distinction is firmly established in the Court's "classic" case-law (see Case C-113/80 *Commission of the European Communities v. Ireland*, in ECR 1981 page 01625, paragraph 10), numerous recent judgements have applied mandatory requirements regardless of the nature of the measure in issue, seemingly extending the scope of the rule of reason. See, for

Although in so doing the Court has created an open-ended list of justifications, which has progressively been expanded over the years, this does not connote the possibility of justifying indistinctly applicable measures on the basis of any interest whatsoever. First of all, it is well established case-law that mandatory requirements, like Treaty justifications, must *not* have an *exclusively* economic character (see Snell 2005, 36) and are thus to be considered as non-market values (see Case C-398/95, *SETTG*, in ECR 1997, page 03091, paragraph 23). Secondly, such judge-made exceptions are limited to legitimate *Community* interests. In fact, by instating a system of coordination between Articles 28 and 94 ECT, the *Cassis de Dijon* judgment aimed to ensure that mandatory requirements safeguard those objectives that should have been protected by EC harmonization measures. Thus, when a Member State invokes what it deems to be a general (national) interest as justification for a violation of free-movement rules, it is for the ECJ to determine whether the interest in question is compatible with the aims of the ECT (see Opinion of Advocate General Van Gerven, Case C-304/90, *Rochdale Borough Council*, in ECR 1992 page 06457, paragraph 23). Only if such conformity subsists will the ECJ acknowledge the existence of a general Community interest, i.e., a mandatory requirement, which may prevail over EC Treaty rules.

That being so, when assessing whether an indistinctly applicable national measure can successfully escape the Treaty provisions on free movement, it is not sufficient for a Member State to claim that it is based on a legitimate mandatory requirement. On the contrary, the ECJ has shown it will engage in an actual balancing of interests, determining whether the adverse effects of the Member State's legislation on free movement can be justified in light of its stated goal. To this end, the ECJ applies the test of proportionality in which it examines whether the national measure is *suitable* to achieve its objective and *necessary* for such a purpose, i.e., whether the Member State could have adopted less restrictive measures to guarantee the same outcome.[7]

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example, Case C-120/95, *Nicolas Decker v. Caisse de maladie des employés privés*, in ECR 1998 page 01831; Case C-379/98, *PreussenElektra AG v. Schhleswag AG*, in ECR 2001 page 02099; and Case C-443/06, *Erika Waltraud Ilse Hollmann v. Fazenda Pública*, in ECR 2007. In *doctrina*, see Spaventa (2001, 457) and Shuibhne (2002, 408).

[7] Although beyond the scope of this paper, it should be noted that the ECJ's use of the proportionality test is not always consistent. In certain cases it has adopted a "soft" approach, granting Member States a margin for manoeuvre (as in Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, in ECR 2004 page 09609; Case C-124/97, *Läärä*, in ECR 1999 page 06067), whilst in others it has followed a more "stringent" approach. The latter is particularly evident where it has applied an analysis of proportionality *stricto sensu*, also known as "true proportionality," finding a national measure not to be proportional where its negative effects on the damaged parties were excessive when compared to the *intrinsic* value of the measure itself (see Case C-302/86, *Commission of European Communities v. Denkmark*, in ECR 1998, page 04607).

Originally developed for the free movement of goods, the notion of mandatory requirements is now firmly established in all the fundamental economic freedoms,[8] and a similar instrument is in its embryonic stage in the field of procedural law (see Joined Cases C-430-431/93, *Jeroen van Schijndel*, in ECR 1995 page 04705; Case C-312/93, *Peterbroeck*, in ECR 1995 page 04599). The basic idea behind such developments is the need to balance rules and exceptions, giving adequate flexibility to the law and consideration to the different interests involved. In this sense, it is not inconceivable to draw an analogy with the "American" rule of reason, been as the outcome of both is a reasonable exception to the rule. Nonetheless, it is important to note that, unlike the "American" rule of reason, which allows the weighing of economic effects on the relevant market, the notion of mandatory requirements ensures the taking into account of non-economic general interests such as the protection of the environment, consumer protection, cultural diversity, public health, and more.[9]

It follows from the above that, if the mandatory requirements doctrine were transposed to EC antitrust law, the latter's rules could be overridden, subject to proportionality, whenever contrary or harmful to a legitimate non-economic general interest pursued by an agreement.[10] This would stand in stark contrast with the effects that would ensue from the application of the "American" rule of reason, and could allow interests not contemplated by Article 81(3) ECT (economic effects) to be taken into account.). However, it must be emphasised that this reasoning may conflict with the wording of Article 10 of Regulation 1/2003 and relevant guidance letters. In fact, although the latter grant the European Commission the power to declare that an agreement does not conflict with competition rules, it seems that only economic factors can be considered for this purpose.

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[8] For application in the free movement of services, see Case C-76/90, *Manfred Säger*, in ECR 1991, page 04221; for the free movement of workers, see Case C-415/93, *Jean-Marc Bosman*, in ECR 1995, page 04921; for the freedom of establishment, see Case C-55/94, *Reinhard Gebhard*, in ECR 1995 page 04165; for the free movement of capital, see Case C-503/99, *Commission of the European Communities v. Kingdom of Belgium*, in ECR 2002, page 04809.

[9] It must also be noted that an increasingly important role seems to be accorded to fundamental rights. This is apparent in Cases C-112/00, *Eugen Schmidberger, Internationale Transporte und Planziige and Republic of Austria*, in ECR 2003 page 05659 and C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, in ECR 2004 page 09609.

[10] Such an approach has been proposed by Advocates General Jacobs and Leger in their opinions in *Pavlov* (Case C-180-184/98, *Pavlov*, in ECR 2000 page 06451, paragraph 163) and *Arduino* (Case C-35/99, *Arduino*, in ECR 2002 page 01529, paragraphs 89–91) respectively. Both seemed to accept that, in cases involving a *State* measure infringing Articles 81(1) and 10 ECT, it is appropriate to allow the Member State to justify its conduct on grounds of public interest, so long as the principle of proportionality is respected. A similar logic was also defended by the European Commission in its observations on *Macrino et Capodarte* (Case 202/04, *Macrino et Capodarte*, in ECR 2006, page 11421), where it argued that an anti-competitive State measure infringes Articles 10 and 82 ECT unless it is justified by public-interest objectives and proportionate to such goals. On the more general issue of the relationship between national legislation and EC law, see Triantafyllou (1996, 57).