Beyond the European Community Treaty Provisions : A Need To Question the Cassis de Dijon Rule of Reason in Wouters?

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ARTICLE

Beyond the European Community Treaty Provisions
A Need to Question the *Cassis de Dijon* Rule of Reason in *Wouters*?

Steven Van Uytsel

I . INTRODUCTION

Cassis de Dijon[1] is regarded as one of the milestones in the interpretation of the free movement of goods provision (Article 28 EC) of the European Community Treaty (hereinafter "EC Treaty").[2] This ruling of the European Court of Justice (hereinafter "ECJ") has become famous for two different issues. First, the ECJ clarified in this ruling that national rules that qualify as measures equivalent to quantitative restrictions (hereinafter "MEQRs") and do not discriminate imported goods could fall under the application of Article 28 EC on the condition that they have exclusionary effect on the market access across national borders.[3] Second, the ruling stated that these national rules can be exempted, provided that the goods are lawfully produces elsewhere in the Community,[4] without relying on Article 30 EC, the actual provision in the EC Treaty prescribing the conditions for exemption.[5]

Recognizing that for the interpretation of EC Treaty provisions the "wider fabric of the Treaty"[6] is important to "draw in balancing factors,"[7] the ECJ has not hesitated to extend the principles of its landmark judgment *Cassis de Dijon* into other fields regulated by the EC Treaty.[8] One of the more recent exten-

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1 *See* Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter "*Cassis de Dijon*").

2 *See, e.g.*, WOLF SAUTER AND HARM SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW: THE PUBLIC AND PRIVATE SPHERES OF THE INTERNAL MARKET BEFORE THE EU COURTS 30 (2009); PAUL CRAIG AND GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 677 (4th ed., 2008); Lawrence W. Gormley, *The Genesis of the Rule of Reason in the Free Movement of Goods*, *in* ANNETTE SCHRAUWEN (ed.) RULE OF REASON: RETHINKING ANOTHER CLASSIC OF EUROPEAN LEGAL DOCTRINE 19, 21 (2005).

3 *See* Case 120/78, *Cassis de Dijon*, *supra* note 1, par. 8-14.

4 *See* id., par. 14 (4) (referred to as the principle of mutual recognition); *See also* Gormley, *supra* note 2, at 22.

5 *See* Case 120/78, *Cassis de Dijon* , *supra* note 1, par. 8; *See also* CRAING AND DE BÚRCA, *supra* note 2, at 679; JOSEPHINE STEINER, LORNA WOODS, AND CHRISTIAN TWIGG-FLESNER, EU LAW 378 (9th ed., 2006); Lawrence W. Gormley, *supra* note 2, at 21.

6 Stephen Weatherill, Book Review, at 2 (16 October 2006), *available at* http://www.europeanlawbooks.org/reviews/getFile.asp?id=239 (last visited May 14, 2009) (reviewing SYBE A. DE VRIES, TENSIONS WITHIN THE INTERNAL MARKET: FUNCTIONING OF THE INTERNAL MARKET AND THE DEVELOPMENT OF HORIZONTAL AND FLANKING POLICIES (2006)).

7 Id., at 2.

sions is within the field of competition law.[9] In *Wouters*, the ECJ had to consider the compatibility of a Dutch rule forbidding the creation of partnerships involving lawyers and accountants with Article 81 (1) EC. Even though the ECJ found that this rule restricted competition, the Court nevertheless concluded that there was no breach of Article 81 (1) EC.[10] It did not do so by making an analysis based on Article 81 (3) EC, which provided the conditions for exemption, but by adopting a line of reasoning similar to *Cassis de Dijon*.[11]

By embracing the rationale of *Cassis de Dijon* in its interpretation of Article 81 (1) EC, an argument could be made that strong parallels exist between the free movement provisions and the competition law provisions. In fact, *Wouters* has inspired several scholars to examine whether there is a converging trend between both areas of Community law.[12] In doing so, they updated the scarce literature either debating the feasibility of *Cassis de Dijon* exceptions within competition law,[13] discussing the common ancestry of competition and free movement,[14] focusing on the similarities within the interpretation of the prohibitions on the freedom of goods and on competition,[15] or a more general view on convergence.[16]

8 *See, e.g.*, Case C-76/90, *Säger v. Dennemeyer & Co. Ltd* [1991] ECR I-4165 (services); Case C-384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-607 (services); Case C-415/93, *Union Royal Belge des Sociétés de Football Association ASBL v. Jean Marc Bosman* [1995] ECR I-4921 (workers) (hereinafter "*Bosman*"); Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 (establishment); Case C-98/01, *Commission v. UK* [2003] ECR I-4641 (capital).

9 *See* Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 (hereinafter "*Wouters*").

10 *See* id., par. 97 and 109.

11 *See* id.

12 *See, e.g.*, Renato Nazzini, *Article 81 EC Between Time Present and Time Past: A Normative Critique of "Restrictions of Competition" in EU Law*, 43 CMLR 497, at 527-30 (2006); Rosemary O'Loughlin, *EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ Wouters Decision*, 24 ECLR 62, at 68-9 (2003); Giorgio Monti, *Article 81 EC and Public Policy*, 39 CMLR 1057, at 1086-90 (2002).

13 *See, e.g.*, Christoph U. Schmid, *Diagonal Competence Conflicts between European Competition Law and National Regulation – a Conflict of Laws Reconstruction of the Dispute on Book Price Fixing*, 8 EUR. REV. PR. L. 155 (2000).

14 *See, e.g.*, David O'Keeffe and Antonio F. Bavassa, *Four Freedoms, One Market and National Competence: in Search of a Dividing Line*, *in* DAVID O'KEEFFE AND ANTONIO F. BAVASSA (eds.) LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY 541 (2000).

This article will not dwell further on the convergence debate. Rather, this article will inquire into the necessity of introducing a *Cassis de Dijon* rule or reason into competition law. To formulate an answer, several other issues need to be resolved. Did the ECJ really extend the *Cassis de Dijon* rule of reason into competition law? This, in turn, implies a proper understanding of this rule in *Cassis de Dijon*. Therefore, this paper does not only require elucidating the position of *Cassis de Dijon* in Article 28 EC, but also its relationship to Article 30 EC. This analysis can then be compared with Article 81 (1) EC and Article 81 (3) EC respectively. Abstract parallels in the conceptualization of these articles could justify an extension of the *Cassis de Dijon* rule of reason into competition law, while in the absence of any parallel the extension could be questioned.

The paper is structured as follows. Section II will start by introducing *Wouters*, a case known for the introduction of the rule of reason as it has been developed in the free movement jurisprudence into competition law. To point out that *Wouters* has not been an accident on the road to interpret competition law, *Meca-Medina* will also be referred to. In order to make sure that these respective cases use free movement jurisprudence, Section III will deal with the free movement of goods jurisprudence, as this has been laying down the basics for the understanding of the free movement jurisprudence in the European Community. Once this has been done, a comparison will be drawn with the reasoning that has been developed in *Wouters*. Section IV will map out the reason why the ECJ had to create a rule of reason in *Cassis de Dijon*, and

[15] *See, e.g.*, Jules Stuyck, *Libre Circulation et Concurrence: Les Deux Piliers du Marché Commun, in* MARIANNE DONY AND ALINE DE WALSCHE (eds.) MÉLANGES EN HOMAGE À MICHEL WAELBROECK 1478 (1999); P. VerLoren van Themaat, *Gaat de Luxemburgse Rechtspraak over de Vier Vrijheden en die over het Mededingsbeleid Uiteenlopen?*, (1998) Sociaal-Economische Wetgeving 398.

[16] *See, e.g.*, Kamiel J. M. Mortelmans, *Towards a Convergence of the Application of the Rules on Free Movement and Competition*, 38 CMLR 613 (2001).

subsequently generalize this to the other free movement provisions. Before concluding that there may be strong arguments for transposing the *Cassis de Dijon* rule of reason, the result of such an analysis will be contrasted to the way how Article 81 EC has been constructed and understood by the ECJ.

II. THE *CASSIS DE DIJON* RULE OF REASON OUTSIDE THE FREE MOVEMENT JURISPRUDENCE

A. A Reference to *Reisebüro* in *Wouters*

In *Wouters*, the ECJ had to decide whether an agreement on professional ethics (deontological rules), adopted by the Bar Association of the Netherlands, forbidding lawyers practicing in the Netherlands from entering in multidisciplinary partnerships with accountants would infringe Article 81 (1) EC.[17] The initial view of the ECJ towards the prohibition within this agreement was quite negative.[18] The agreement was seen to prevent the establishment of partnerships that could offer a wider range of services, something consumers, especially in a business environment where there is an increasing interpenetration of several fields, may prefer.[19] They could turn to a single structure for a large part of their services needed for the organization, management and operation of their business.[20] Further, these partnerships can result in economies of scale, generating positive effects on the cost structure of these services.[21] Therefore, the ECJ held that the agreement is "liable to limit production and technical development within the meaning of Article [81] (1) (b) of the Treaty."[22]

Notwithstanding this finding, the ECJ continued by stating that "not every

[17] *See* Case C-309/99, *Wouters*, *supra* note 9.
[18] *See* id., par. 86.
[19] *See* id., par. 83 and 88.
[20] *See* id., par. 87.
[21] *See* id., par. 89.
[22] Id., par. 90.

agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81] (1) of the Treaty."[23] The application of Article 81 (1) EC depends on the overall context in which the agreement was taken or produces its effects. The agreement causing the restriction has to be assessed in the light of its objectives.[24] Subsequent to this assessment, it has to be considered "whether the consequential effects restrictive of competition are inherent in the pursuit of those objections."[25]

Acknowledging that in the absence of specific Community rules in the field each Member State in principle is free to regulate the exercise of the legal profession in its territory,[26] the ECJ examined whether the currently found restrictive agreement could be seen as inherent to the pursuit of the objectives connected with professional ethics.[27] The proper functioning of the legal profession in the Netherlands, the judgment teaches us, is the "duty to act for clients in complete independence and in their sole interest, the duty,..., to avoid all risk of conflict of interest and the duty to observe strict professional secrecy."[28] Hence, independence need to be guaranteed vis-à-vis the public authorities, but also vis-à-vis other operators or third parties.[29] If lawyers would enter into a partnership with a profession not bound by these principles, what is the case for accountants in the Netherlands, it will be no longer possible for these lawyers to advice and represent their clients independently and in

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[23] Id., par. 97.
[24] *See* id. (providing that the objectives in the current case were connected to the organization, qualification, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of the legal services and the sound administration of justice)
[25] Id.
[26] *See* id., par. 99.
[27] *See* id.
[28] Id., par. 100.
[29] *See* id., par. 102.

observance of strict professional secrecy.[30] Moreover, the two professions have internally incompatible activities. Lawyers should advice, while accountants should supervise.[31]

The just-mentioned conflicts between the professional ethics of lawyers and accountants only allow for a conclusion that the prohibition on multi-disciplinary partnerships could "reasonably be considered to be necessary in order to ensure the proper functioning of the legal profession."[32] By referring then to *Reisebüro*,[33] a case dealing with the regulation of the legal profession in the context of Article 49 EC, a direct parallel with the free movement jurisprudence was made.[34] In the context of *Wouters*, the ECJ abstracted from this free movement case that even if a different approach in relation to multi-disciplinary partnerships is applicable in other Member States, such cannot mean that a prohibition is incompatible with Community law.[35] Moreover, even if these partnerships would have been allowed in other Member States, the Bar Association of the Netherlands did not have to consider that less restrictive means could have reached the same objectives.[36] In other words, the imposition of stricter rules in one Member State compared to another can, as such, not be explained as disproportionate.[37]

To conclude, the ECJ took all the forgoing into consideration and found that the prohibition on partnerships did not infringe Article 81 (1) EC, since the Bar Association of the Netherlands could "have reasonably considered that that

30 *See* id., par. 105.
31 *See* id., par. 104.
32 Id., par. 107.
33 *See* Case C-3/95, *Reisebüro Broede v. Gerd Sandker* [1996] ECR I-6511, par. 41 (hereinafter "*Reisebüro*").
34 *See* Case C-309/99, *Wouters*, *supra* note 9, par. 108.
35 *See* id.
36 *See* id.
37 *See* Rein Wesseling, *The Rule of Reason and Competition Law: Various Rules, Various Reasons*, *in* ANNETTE SCHRAUWEN (ed.) RULE OF REASON: RETHINKING ANOTHER CLASSIC OF EUROPEAN LEGAL DOCTRINE 59, at 73 (2005).

regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organized in the Member State concerned."[38]

B. *Meca-Medina* Confirms *Wouters*

Four years after *Wouters*, the ECJ rendered a decision in *Meca-Medina*, a case in appeal in which two swimmers originally sought to challenge the Anti-doping Code of the International Olympic Committee as being restrictive within the meaning of Article 81 EC.[39] The Court found that the Anti-doping Code could, in principle, constitute a restriction of competition in the meaning of Article 81 (1) EC,[40] but that legitimate objectives could justify the restrictive agreement as long as it was necessary to achieve these objectives.[41] Hence, this judgment placed sporting rules within the ambit of the European competition rules, "albeit that they may be permissible by virtue of the *Wouters*-doctrine."[42]

The assessment of the competition rules on the anti-doping rules started by looking at the overall context in which the latter rules were adopted.[43] The ECJ found that these rules fit within the objective of "combating doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport."[44] Further, limiting an athletes' freedom of action as a consequence of taking doping should be seen as inherent to anti-doping rules as this is the only way to ensure enforcement of these rules.[45] However, the ECJ also ruled that not any kind of limitation on

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38 Id., par. 109.
39 *See* Case C-519/04, *David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2006] ECR I-6991 (hereinafter "*Meca-Medina*").
40 *See* id., par. 47.
41 *See* id.
42 RICHARD WHISH, COMPETITION LAW, at 131 (6th ed., 2008).
43 *See* Case C-519/04, *Meca-Medina*, *supra* note 39, par. 42.
44 Id., par. 43.

athletes' freedom would fall aside the application of Article 81 (1) EC.[46]

More explicitly than in *Wouters*, *Meca-Medina* includes an extensive elaboration of the proportionality between the restrictive agreement and what is necessary to attain the objective justifying a restriction. The proportionality of the sanction compared to the objective is, at the end, questioned, making it necessary to further answer whether the limitations imposed are necessary to ensure the proper conduct of competitive sport. Two elements, according to the ECJ, have an influence on the proportionality in the current case: first, the threshold of a certain substance in order to determine the presence of doping[47] and second, the severity of the penalties imposed on exceeding the threshold.[48] Since only the former was contested, the ECJ, without having to deal with the severity of the penalties,[49] only held that it was to the parties challenging the proportionality to provide the substantial scientific documentation pointing out that at the material time other thresholds or exceptions could have been included to prevent innocent athletes of being unwarranted excluded from sporting events.[50]

C. The Importance of *Wouters'* Confirmation in *Meca-Medina*

Once rendered, *Wouters* stood pretty much alone. Quantitive irrelevance[51] or ancilarrity[52] determined the application of Article 81 (1) EC, but they were different in kind than the reasoning developed in *Wouters*. The former concept implies that the effect on competition is insubstantial due to the relatively small

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45 *See* id., par. 44.
46 *See* id., par. 47.
47 *See* id., par. 48.
48 *See* id.
49 *See* id., par. 55.
50 *See* id., par. 51-5.
51 *See* VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE, at 88-90 (9th ed., 2007).
52 *See* id., at 80-3; WHISH, *supra* note 42, at 126.

market power of the competitors engaging in the restrictive agreement. The latter concept refers to the necessity of a restrictive agreement to the implementation of a main operation that has a legitimate purpose.[53] Without really fitting either of these categories, some scholars criticized the ECJ's reasoning as going beyond the scope of Article 81 (1) EC,[54] and some were probably hoping that it was "a 'one-off', a special exception for the unique status of lawyers and the unique problems regulating them."[55] The explanations of *Wouters* put forward by the scholars unfavorable to the ECJ's action were then to minimize the impact of the rule of reason on competition law.

One view argues that *Wouters* has created a new concept of ancillarity.[56] Whereas in earlier case law restrictions on competition did not violate Article 81 (1) EC if they were necessary for the "execution of a commercial transaction or the achievement of a commercial outcome on the market,"[57] the restriction in *Wouters* did not violate Article 81 (1) EC because it was ancillary to a regulatory function.[58] This regulatory function was to "ensure that the ultimate consumers of the legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience."[59] As this concept of ancillarity applies in the regulatory sphere, it has been termed 'regulatory ancillarity' to distinguish it from the previously created concept of 'commercial ancillarity'.[60] Plausible as this reading of *Wouters* may be, it

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[53] *See* KORAH, *supra* note 51, at 89.

[54] *See, e.g.*, D. G. GOYDER, EC COMPETITION LAW, at 94 (4th ed., 2003) (holding that it was a combined reading of Article 81 (1) and (3) EC); Assimakis P. Komninos, *Non-Competition Concerns Resolution of Conflicts in the Integrated Article 81 EC*, at 10-1 (EUI-RSCAS/EU Competition 2004 Proceedings) (2004), *available at* http://www.iue.it/RSCAS/Research/Competition/2004/200409-compet-Komninos.pdf (last visited May 28, 2009) (arguing that *Wouters* should be placed in Article 81 EC as a whole).

[55] Ian S. Forrester, *Where Law Meets Competition: Is* Wouters *like a* Cassis de Dijon *or a Platypus?*, at 15 (EUI-RSCAS/EU Competition 2004 Proceedings) (2004), *available at* http://www.iue.it/RSCAS/Research/Competition/2004/200409-compet-Forrester.pdf (last visited May 28, 2009).

[56] *See* WHISH, *supra* note 42, at 126.

[57] Id., at 128.

[58] *See* id.

[59] *See* Case C-309/99, *Wouters*, *supra* note 9, par. 97.

should be mentioned that the ECJ did not refer to the earlier case law on ancillarity to reach the current outcome. Further, it remains unclear how the restrictive agreements are absolutely necessary to implement the regulatory rules.[61]

Another view holds that *Wouters* is an unsuccessful attempt to balance Article 81 EC as a whole against non-competition concerns. In this understanding, the non-economic concerns are not brought within Article 81 EC, but are taken in account at a preceding stage, subject to proportionality. This means that the non-competition concerns are an exception to Article 81 EC as a whole.[62] Closely related to this view is the approach to consider that two different parts of the Article 81 EC have been conflated and operated as if they were a single provision, something which, according to the proponent of this approach, may occur quite frequently once the modernization program is fully implemented.[63] Although compelling, the ECJ only dealt with the application of Article 81 (1) EC. Furthermore, national courts at the time of *Wouters* were not even allowed to consider Article 81 (3) EC.[64]

Still another view contends that the ECJ made a special application of Article 81 (1) EC to the regulation of the legal profession, or more generally, of the liberal professions.[65] The use of *Wouters* in *Meca-Medina*, and so expanding

[60] *See* WHISH, *supra* note 42, at 128.
[61] *See* ALISON JONES AND BRENDA SUFRIN, EC COMPETITION LAW: TEXT, CASES, AND MATERIALS, at 266 n. 228 (3rd ed., 2008) (indicating that "[t]he problem with this view is that as the restraint does not appear to be absolutely necessary to the implementation of the regulatory rules (multidisciplinary partnerships are permitted in other states) it does not seem to be truly ancillary in the sense described above (directly related and necessary to the implementation of the agreement). Further, it does still appear to involve the weighing of the impact of the restraint against the worthy objectives identified, something the CFI explicitly stated in *Métropole* should not be done under Article 81 (1).").
[62] *See* Komninos, *supra* note 54, at 9-11.
[63] *See* GOYDER, *supra* note 54, at 94-5.
[64] *See* JONES AND SUFRIN, *supra* note 61, at 265.
[65] *See* Pablo Ibáñez Colomo, *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the* Meca Medina *and* Piau *Cases*, 3 ENTERTAINMENT AND SPORT LAW JOURNAL 1, at 5 (2005).

into the field of sports, makes this view untenable.[66] A refinement of this view has then been elaborated by making an abstraction of the regulated profession. In doing so, it could be argued that *Meca-Medina* has been important to emphasize that *Wouters* should only cover acts of self-regulation, in the form of deontological rules, collective bodies restricting their respective members' freedom to compete.[67] The similarity being striking, there is however nothing in both judgments indicating that *Meca-Medina* limits *Wouters* to professional ethics developed by professional organizations with a public law character. As long as there is no sign to the contrary, the ECJ may extend the current ruling to agreements outside the professional ethics, such as agreements encountering environmental protection or cultural stimuli, eventually made by private parties.[68]

The importance of *Meca-Medina* must be on other points. Unfortunately, the so much awaited for outcome of *Oulmers*,[69] challenging the rule obliging clubs to release players for international duty, was settled out of court. Therefore, the ECJ was prevented from giving further insights into its intent with the *Wouters* reasoning.[70] Therefore, *Wouters* and *Meca-Medina* have to be looked

66 *See* RICHARD WHISH, COMPETITION LAW, at 122 (5th ed., 2003).

67 *See* id.

68 *See* WHISH, *supra* note 42, at 129 (indicating that *Meca-Medina* confirms the decision taken by the Commission in a case relating the restriction of ownership of shares in more than one football team competing in the Champions League. The Commission stated that this restriction, being part of the rules of UEFA, was necessary to protect the integrity of the tournament, and pursuant to *Wouters*, would then fall outside the scope of Article 81 (1) EC. Ownership and control of two opposing teams may affect the confidence of spectators in the genuineness of the results).

69 *See* WHISH, *supra* note 42, at 129; *See* Stephen Weatherill, *Anti-Doping Revisited - The Demise of the Rule of 'Purely Sporting Interest'*, 27 ECLR 645, at 654-6 (2006); *See also* Case C-243/06, *SA Sporting de Pays de Charleroi and Groupment des Clubs de Football Européens,* OJ C 212 (2 September 2006).

70 *See* Fédération Internationale de Football Association, *Victory for Football after All* (Press Release,15 January 2008), *available at* http://www.fifa.com/aboutfifa/federation/releases/newsid=672438.html (last visited May 28, 2009); *See also* Order of the President of the Court of 25 November 2008 (reference for a preliminary ruling from the Tribunal de commerce de Charleroi - Belgium), SA Sporting du Pays de Charleroi, G-14 Groupement des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA), OJ (2009/C 69/56) (indicating the removal of the decision).

at for what they are, without having to make either presumptions as to what the ECJ may have meant or limitations on what the ECJ has ruled. In *Wouters*, the ECJ referred directly to the free movement jurisprudence via *Reisebüro*.[71] By duplicating *Wouters* reasoning in *Meca-Medina*, the ECJ gave further weight to the transposition of its analysis in free movement cases to competition cases. In doing so, Article 81 (1) EC could weigh "non-discriminatory national rules against domestic mandatory requirements of public policy"[72] and allow "the Court to take account of non-competition factors which relate to domestic interests."[73]

The transposition of the free movement jurisprudence to competition law has been done via a case related to the free movement of services. The rule of reason did not originate within this field. It was rather elaborated under the provision on free movement of goods, Article 28 EC. Therefore, the next section will look at this jurisprudence and indicate that it has than further elaborated into other freedoms and even competition law.

III. *CASSIS DE DIJON* LINKED WITH *WOUTERS* VIA THE RULE OF REASON

A. Free Movement of Goods Jurisprudence Guiding the Interpretation

Article 3 (1) (c) EC lists, among the activities of the Community, the creation of an internal market. For the realization of this objective, four freedoms, formulated as prohibitions towards measures of Member States and thus aiming at a negative integration of the market,[74] have been inscribed within the EC Treaty.[75] These four freedoms encompass the free movement of goods (Arti-

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[71] *See* JONES AND SUFRIN, *supra* note 61, at 266.
[72] Id.
[73] Id.
[74] *See* Paul Craig, *The Evolution of the Single Market*, *in* CATHERINE BARNARD AND JOANNA SCOTT (eds.), THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 1, at 3 and 5 (2002).

cles 23-31 EC),[76] persons (Articles 39-48 EC),[77] services (Articles 49-55 EC),[78] and capital (Articles 56-60 EC).[79]

For a long time, the prevailing view has been that the "scope of these four freedoms should be drawn along different lines."[80] The Court used to adopt a wider reading of the free movement of goods compared to the one of the free movement of services. The language in *Dassonville* did not emphasize any restrictive approach.[81] On the contrary, it opened a leeway for a very broad interpretation, by allowing Article 28 EC to catch measures hindering directly and actually trade within the Community, but also measures having only an indirect and potential hindrance.[82] In the interpretation of the free movement of services, the ECJ tended to stress, like in *Binsbergen*,[83] the existence of discrimination as the limiting factor in the scope of application of Article 49 EC.[84]

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75 *See, e.g.*, SAUTER AND SCHEPEL, *supra* note 2, at 29; STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 309.

76 *See, e.g.*, CRAIG AND DE BÚRCA, *supra* note 2, at 668-722; STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 369-406; LORNA WOODS, FREE MOVEMENT OF GOODS AND SERVICES WITHIN THE EUROPEAN COMMUNITY, at 13-139 (2004).

77 *See, e.g.*, CRAIG AND DE BÚRCA, *supra* note 2, at 743-90; STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 407-45; FRIEDL WEISS AND FRANK WOOLDRIDGE, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY (2002).

78 *See, e.g.*, CRAIG AND DE BÚRCA, *supra* note 2, at 791-846; STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 447-93; WOODS, *supra* note 76, at 159-256.

79 *See, e.g.*, CRAIG AND DE BÚRCA, *supra* note 2, at 668-722; STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 344-54; Steve Peers, *Free Movement of Capital: Learning Lessons Slipping on Spilt Milk?*, *in* CATHERINE BARNARD AND JOANNA SCOTT (eds.), THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 333 (2002).

80 Peter Oliver and Wulf-Henning Roth, *The Internal Market and the Four Freedoms*, 41 CMLR 407, at 411 (2004) (arguing that the other freedoms were "generally regarded as an expression of the general principle of non-discrimination on grounds of nationality"); *See also* WOODS, *supra* note 76, at 185-93; JUKKA SNELL, GOODS AND SERVICES IN EC LAW: A STUDY OF THE RELATIONSHIP BETWEEN THE FREEDOMS, at 220 (2002); DERRICK WYATT AND ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC, at 134 (goods), 173 (workers), 203 (establishment) and 219 (services) (2nd ed., 1987).

81 *See* SNELL, *supra* note 80, at 220.

82 *See* Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837 (hereinafter "*Dassonville*").

83 *See* Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

84 *See* SNELL, *supra* note 80, at 220.

The divergence between the free movement of goods and the other freedoms became even bigger when the ECJ adopted its ruling in *Cassis de Dijon*.[85] Extending the scope of application of Article 28 EC to measures that indistinctly apply, and thus not discriminating between domestic and imported goods, the ECJ confirmed at the end of the 1970s once more the view that this freedom has to be considered as much more far-reaching than any of the other freedoms.

Once the ECJ had attributed direct effect to all the free movement provisions, and so emphasizing the importance of the judicial application of these provisions, this Court went on to generalize the *Dassonville* and *Cassis de Dijon* jurisprudence to the other free movement provisions.[86] The scope of application of the provisions dealing with the free movement of persons, services and capital aimed so for various regulatory measures regardless of their discriminatory character. Cruz points out that "[t]his development took place even in the presence of an express reference to discrimination in the text of the relevant provisions."[87] In doing so, the ECJ promoted the free movement of goods jurisprudence to be the standard to judge the economic freedoms.[88] However, the establishment of a single test did not extend beyond the *Dassonville* and *Cassis de Dijon* jurisprudence,[89] leaving *Keck* out of the scope of application of the three other freedoms.[90]

Due to the influence of the free movements of goods jurisprudence on the other

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85 *See* Case 120/78, *Cassis de Dijon*, *supra* note 1.

86 *See* JULIO BAQUERO CRUZ, BETWEEN COMPETITION AND FREE MOVEMENT: THE ECONOMIC CONSTITUTIONAL LAW OF THE EUROPEAN COMMUNITY, at 92 (2002) (stipulating that for reasons of specificity the direct effect was not recognized until 1995 and thus only after the Maastricht amendments.).

87 Id., at 92.

88 *See* Oliver and Roth, *supra* note 80, at 439 (indicating that the situation has changed with the wording that "[i]t is axiomatic that, whereas free movement of goods was once the trailblazer, the other freedoms have now caught up and in some cases even overtaken it. Thus it is widely considered that the provisions on workers and services have taken over the role of pioneer since the early 1990s and especially since *Keck*").

89 *See, e.g.*, SAUTER AND SCHEPEL, *supra* note 2, at 33-7; SNELL, *supra* note 23, at 220-2; CRUZ, *supra* note 86, at 92-5; Oliver and Roth, *supra* note 80, at 411-2.

free movement provisions, in particular the one related to services,[91] this jurisprudence has found its way to the field of competition law. In order to further analyze the extent and the rationale of this transposition, a deeper insight will be given both of the development and rationale of *Dassonville* and *Cassis de Dijon* in particular.

B. *Dassonville* as a Seedbed for *Cassis de Dijon*

Dassonville[92] has been one of the most important judgments of the ECJ specifying what should be understood under MEQRs, which, besides quantitative restrictions, Article 28 EC aims to prohibit. By defining the MEQRs as "[a]ll 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,"[93] the case does not seem to place any importance on the discriminatory or the non-discriminatory nature of the rules. Instead, the main emphasis was put on the effects of the MEQRs on trade between Member States.[94]

By emphasizing effects on the one hand and qualifying it with words like

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90 *See* Joined Cases C-267/91 and C-268/91, *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097 (this judgment aimed at clarifying the case law in relation to the free movement of goods. The *Cassis de Dijon* ruling made it possible to deploy internal market law to challenge various domestic measures that in fact had no impact whatsoever on intra-community trade. In order to deal with these cases that were clogging up the Community judicial system, the ECJ created the so-called Keck test. According to this test, product rules always create a double burden on importers and fall always within the scope of Article 28 EC. Rules on market circumstances, though, do not impose a heavier burden on importers and are therefore not automatically included). For the argument of this paper, the evolution of the *Keck* judgment is not important. This judgment is therefore not dealt with in detail.

91 *See* Case C-3/95, *Reisebüro, supra* note 33 (this case was referred to in *Wouters* to establish the rule of reason).

92 *See* Case 8/74, *Dassonville, supra* note 82 (the case involved a regulation of the Belgian government to attach a British certificate of authenticity to all Scotch whisky that would be imported into Belgium. This document was easily obtainable for somebody importing directly from Britain. On the contrary, when somebody imported the whisky from a third country, *in casu* France, it was quite difficult to meet the requirement. Dassonville therefore neglected the Belgian legislation, which meant he was prosecuted in Belgium. His argument was that the Belgian legislation constituted a MEQR).

93 Id., par. 5.

94 *See, e.g.*, CRAIG AND DE BÚRCA, *supra* note 2, at 669; SNELL, *supra* note 80, at 50.

'direct or indirect' or 'actual or potential', the ECJ gave the MEQRs envisaged within Article 28 EC an exponentially broad meaning. It should not be forgotten, though, that the ECJ almost immediately softened its broad language defining MEQRs. "In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin," the ECJ acknowledged that Member States can take the necessary measures to prevent unfair practices on the condition that "these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should ... be accessible to all Community nationals."[95]

Both elements of *Dassonville*, the broad definition of MEQRs and the exception to it, have been further developed in *Cassis de Dijon*. This judgment resolved the issue of whether the broad *Dassonville* definition could also include measures which do not distinguish between domestic products and imports. It had been proven that measures not discriminating between goods dependent on the country of origin can hinder the flow of goods between Member States. Hence, it was not sufficient to focus solely on the removal of discriminatory measures erecting barriers for the movement of goods between Member States. Together with the clarification on the scope of Article 28 EC, the ECJ further developed the language of reasonable measures.

C. *Cassis de Dijon*, Beyond Discrimination

Cassis de Dijon is a case involving national rules related to the alcohol content of liqueurs. German law categorized alcoholic beverages and prescribed a minimum alcohol level for the different categories. These requirements applied both to locally brewed alcoholic beverages as well as to imported ones, forbidding the sales of alcoholic beverages that did not comply with the minimum

[95] *See* Case 8/74, *Dassonville*, *supra* note 82, par. 6.

alcohol requirement. The French traditionally brewed black-currant based drink, 'Cassis de Dijon', was categorized among the alcoholic beverages requiring 25 per cent alcohol. Having only an alcohol percentage between 15 and 20, Cassis de Dijon fell well below that requirement. Consequently, the German authorities prohibited its imports into Germany. The importer subsequently contested the validity of the German law requiring the minimum alcohol strength based on Article 28 EC.[96]

The ECJ began by affirming that Member States could regulate all matters related to the production and the marketing of products in the absence of common rules, indicating that without harmonization Member States enjoy freedom to regulate.[97] Inherent to this freedom to regulate is that disparities between national laws occur. As such, the ECJ does not see these disparities as a problem. They only become a problem in the framework of the single-market integration when they form obstacles to the movement of goods.[98] In the words of the ECJ,

> [o]bstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of consumer.[99]

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96 *See* Case 120/78, *Cassis de Dijon, supra* note 1.
97 *See* id., par. 8.
98 *See* id.; *See also* STEPHEN WEATHERILL AND PAUL BAUMONT, EC LAW, at 565-567 (3rd ed., 1999) (the obstacle exists out of the fact that the products have to comply with two sets of rules. This creates a double burden).
99 *See* Case 120/78, *Cassis de Dijon, supra* note 1, par. 8.

Even when it is found that an indistinctly applicable measure forms an obstacle to the movement of goods between Member States, Article 28 EC may still not be applicable. Rather than putting forward that the applicability is exempted on the basis of Article 30 EC, the ECJ conceptualized further the 'reasonable measures' mentioned in *Dassonville*.[100] Pursuing fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of consumer may, according to the ECJ, render a measure reasonable.[101] Of course, the proportionality requirement expressed by 'necessary,' would also have to be fulfilled.[102] All these elements are usually referred to as the rule of reason.[103]

D. The Rule of Reason in *Cassis de Dijon*

The rule of reason is comprised of several different steps. Each of these steps have to be fulfilled in order to prevent that a measure inhibiting the free movement of goods is caught by Article 28 EC. Once a measure complies with the different steps of the rule of reason it cannot be qualified as a measure equivalent to a quantitative restriction. Rather, it should be seen as a reasonable national measure.[104]

The different steps of the rule of reason as applied in the context of Article 28 EC are the following.[105] First, the national measure should be within the

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100 *See* Case 8/74, *Dassonville*, *supra* note 1, par. 6.
101 *See* Case 120/78 *Cassis de Dijon*, *supra* note 1, par. 8.
102 *See* id.
103 *See, e.g.*, CRAIG AND DE BÚRCA, *supra* note 2, at 706; WOODS, *supra* note 76, at 68; Nazzini, *supra* note 12, at 528; Gormley, *supra* note 2, at 21; Annette Schrauwen, *In Defence of Public Interest: The Rule of Reason*, *in* ANNETTE SCHRAUWEN (ed.) RULE OF REASON: RETHINKING ANOTHER CLASSIC OF EUROPEAN LEGAL DOCTRINE 1, at 4 (2005) (pointing out that *Cassis de Dijon* is considered as the actual birth of the rule of reason, even though the roots of this rule lie within *Dassonville*. In the latter judgment, the ECJ, after rendering its broad definition of prohibited MEQRs, remarked that reasonable measures would be allowed under certain circumstances and this in the absence of any legal action on the Community level); Catherine Barnard and Simon Deakin, *Market Access and Regulatory Competition*, *in* CATHERINE BARNARD AND JOANNA SCOTT (eds.), THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 196, at 204 (2002).
104 *See* Schrauwen, *supra* note 103, at 10.

competence of the Member State, enabling it to determine the criteria to put goods on their market. In other words, there should not be any EU legislation on the issue regulated by the national measure. Second, the national measure should apply indistinctly to domestic and foreign products. The national measure should thus not discriminate on the basis of nationality. Third, the national measure needs to be an expression of a mandatory requirement, which encompasses an overriding public interest. Fourth, the national measure has to be necessary to attain the public interest embodied in the mandatory requirement, which suggest the application of a proportionality requirement.

Two steps out of the rule of reason test have been further developed by the ECJ: the mandatory requirement and the proportionality. The ECJ mentioned originally three examples of mandatory requirements in *Cassis de Dijon*: consumer protection, public health and fairness of commercial transaction.[106] These three examples were preceded by the word 'in particular.'[107] This meant that other mandatory requirements exist, but that they were not of importance to *Cassis de Dijon*. The list of mandatory requirements should thus not be regarded as exhaustive.[108] In the absence of Community harmonization, other mandatory requirements may as well exist. The ECJ has, in its jurisprudence, identified the protection of the environment,[109] pluralism of the press,[110] fostering art[111] or protecting social and political choices[112] as other examples of

[105] *See* id, at 6; *Compare* Nazzini, *supra* note 12, at 528-529 (even though he mentions that he is going to describe the rule of reason, he rather elaborates the steps to apply Article 28 and 30 EC).
[106] *See* Case 120/78 *Cassis de Dijon*, *supra* note 1, par. 8.
[107] *See* id.
[108] *See* CRAIG AND DE BÚRCA, *supra* note 2, at 711-2; PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY, at 804 (3rd ed., 1996).
[109] *See, e.g.*, Case C-309/02, *Radberger Getränkegesellschaft GmbH and Co. and Spitz KG. vs. Land Baden-Württemberg* [2004] ECR I-11763, par. 75.
[110] *See, e.g.*, Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH vs. Heinrich Bauer Verlag* [1997] ECR I-368.
[111] *See, e.g.*, Cases 60 and 61/84, *Cinéthèque SA vs. Fédération Nationale des Cinémas Français* [1985] ECR 2605.
[112] *See, e.g.*, Case 145/88, *Trofaen BC vs. B&Q plc* [1989] ECR 3851.

mandatory requirements.

The word 'necessary' in *Cassis de Dijon* has been interpreted as "no more than necessary."[113] This can be deducted by combining the following elements in the ECJ's reasoning. On the one hand, the ECJ indicated that the mandatory fixing of minimum alcohol content is not an essential guarantee of the fairness of commercial transactions. On the other hand, the ECJ gave an example of how this goal could be reached much more easily by just displaying an indication of origin and of the alcohol content on the packaging of the product. In doing so, the ECJ has put forward a rigorous principle of proportionality. Disproportionate would be any "measure that goes beyond what is strictly necessary to achieve the desired end."[114] By looking for the less restrictive alternative, the ECJ was obviously inspired by the jurisprudence on Article 30 EC, which deals with the exceptions to Article 28 EC, to develop the proportionality test in the rule of reason developed in *Cassis de Dijon*.[115]

E. *Cassis de Dijon* and *Wouters*, Structural Similarity

Even though there is no general agreement among scholars,[116] the reasoning in *Wouters* has often been linked to the one developed in *Cassis de Dijon*.[117]

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[113] STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 379.
[114] Id., at 380.
[115] *See* id., at 389 (the enquiry under Article 30 is very similar to that conducted in applying the rule or reason); *See also* Gormley, *supra* note 2, at 25.
[116] *See, e.g.*, SAUTER AND SCHEPEL, *supra* note 2, at 91-2; RICHARD WHISH, *supra* note 42, at 126; Komninos, *supra* note 54, at 8-9; Pietro Manzini, *The European Rule of Reason – Crossing the Sea of Doubt*, 23 ECLR 392, at 397 n. 24 (2002).
[117] *See, e.g.*, GIORGI MONTI, EC COMPETITION LAW, at 110-3 (2007); SYBE A. DE VRIES, TENSIONS WITHIN THE INTERNAL MARKET: FUNCTIONING OF THE INTERNAL MARKET AND THE DEVELOPMENT OF HORIZONTAL AND FLANKING POLICIES, at 195 (2006); CRUZ, *supra* note 86, at 153 (2002); Johan W. van de Gronden, *Rule of Reason and Convergence in Internal Market and Competition Law*, *in* ANNETTE SCHRAUWEN (ed.) RULE OF REASON: RETHINKING ANOTHER CLASSIC OF EUROPEAN LEGAL DOCTRINE 79, at 82-8 (2005); Renato Nanzini, *Article 81 EC Between Time Present and Time Past: A Normative Critique of "Restriction of Competition" in EU Law*, 43 CMLR 497, at 527-30 (2006); O'Loughlin, *supra* note 12, at 68-9; Monti, *supra* note 12, at 1087-8; Heike Schweizer, *Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81*, at 3 (EUI Working Paper Law No. 2007/03), *available at* http://ssrn.com/abstract=1092883 (last visited May 14, 2009).

This does not mean that *Wouters* adopts a substantive free movement test under Article 81 (1) EC. There is not so much a convergence in the substance of the rules applicable to the free movement of goods, services, persons or capital on the one hand and to restrictions on competition on the other hand. It is rather the formal structure, the method of application, of the rules on free movement and restrictions of competition that are converging towards each other.[118]

The softening of the scope of application of Article 81 EC started with the observation that the organization of the legal profession is an expression of the residual competence of Member States. Notwithstanding the acknowledgement of the right to regulate the legal profession, a few lines down the reasoning, the ECJ made a shift by stating that a prohibition on multi-disciplinary partnerships between lawyers and accountants would be a restriction of competition in the sense of Article 81 (1) (b) EC. The ECJ then went further by making the Member State's freedom depended on the overall content in which the agreement was made. Something similar occurred in *Cassis de Dijon*, where the freedom of the Member State to regulate all matters related to the production and the marketing of alcohol was soon made dependent on mandatory requirements.

The overall context of the agreement in *Wouters* would be the objective of safeguarding the quality of the service and guaranteeing the sound administration of justice. This objective has, even though the judgment does not use the terminology, generally been referred to in the literature as 'public interest.' Whereas *Cassis de Dijon* required that a trade rule could only be justified in so far as it was necessary to satisfy a mandatory requirement, *Wouters* concluded that an agreement would not lead to an infringement if it was reasonably

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118 *See* Nazzini, *supra* note 12, at 527.

necessary for the pursuit of the public interest objectives.

The ECJ has limited the opportunity to challenge the reasonable necessity with a reasoning that was almost literally borrowed from *Reisebüro*.[119] The fact that Member States are entitled to determine what they consider to be their public interest and how this can be best attained in relation to the organization of the legal profession inherently carries the danger that differences in regulation may occur among Member States. These differences among Member States do not allow, according to the ECJ in both *Reisebüro* and *Wouters*, to challenge the necessity of the trade rule or the agreement respectively as disproportionate to the mandatory requirements or public interest objective respectively.

The above-developed explanation of the rule of reason as it exists in *Wouters* can be abstractly formulated in the following steps. First, the agreement has come into existence in a field where the Community has no competence. Second, the agreement has to be connected to a public interest able to override Community law. Third, the agreement needs to be necessary to attain the public interest. Notice that this nearly equals the rule of reason developed in *Cassis de Dijon*. Indeed, the *Wouters* rule of reason does not require the indistinct application of the agreement.

[119] *See supra* note 33 (indeed, the reference made in Wouters is not to *Cassis de Dijon* but to *Reisebüro*. This may explain why the proportionality test is a little different in the present case. In fact, the reasoning in *Wouters* may even allow for a broader category of national measures compared to what would be possible under the Cassis de Dijon rule of reason).

IV. THE RULE OF REASON JUSTIFIED

A. The Rule of Reason within the Free Movement Jurisprudence

1. Extending the Prohibitions' Scope of Application

For fleshing out the European single market, the rules on free movement were essential. By prescribing prohibitions on measures hindering the intra-Community movement of goods, service, persons and capital, they contributed in a negative way to the integration process.[120] This negative integration process was only one way to achieve the common market. The EC Treaty also promulgated measures directed towards positive integration by giving the Commission the power to harmonize laws of Member States via directives.[121]

The Commission faced particular problems with these directives. Besides the unanimity required within the Council to be adopted, the Commission needed to obtain agreement of the Member States on the issues to be legislated.[122] Even though the Member States were still few in the 1970s and early 1980s, it needs not to be said that this process of securing agreement was extremely slow.[123] Since each of the Member States have to agree on the issue, the drafting turned out to be extremely detailed, incorporating the different aspects of the to be regulated issue.[124] Pelkmans eloquently described it as follows:

> In the 'old' approach approximation of national economic regulation usually boiled down to extremely detailed lawmaking at the Community level. Partly, this was caused by unanimity – a recalcitrant Member State could insist on any detail. Partly, it reflected a lack of trust among

[120] *See* Craig, *supra* note 74, at 3; *See also* STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 369 (using the term negative harmonization instead of negative integration).
[121] *See* Article 100 EC; *See also* Craig, *supra* note 74, at 5.
[122] *See* Craig, *supra* note 74, at 5.
[123] *See* SNELL, *supra* note 81, at 185.
[124] *See* id.

Member States. The degree of decentralization under the Rome Treaty was still so great that approximation only of the objectives (so as to prevent market failure) would have required an enormous compliance machinery to verify implementation by the Member States. Thus, once the EC did regulate, it regulated all the details too, given insufficient monitoring and very slow and limited compliance machinery.[125]

A cumbersome procedure at the political level led to a stagnation of the process of integration. The harmonization by means of directives did barely progress.[126] The ECJ stepped in and radically altered the integration process.[127]

Enlarging the scope of application of Article 28 EC, followed by a generalization of this exercise for all the other free movement provisions, was a major judicial contribution to the creation of the common market.[128] More in specific, the scope of the free movement provisions was expanded to also include national measures which did not discriminate but nevertheless inhibited the free movement because of their difference from the measures applicable in the country of origin. The presumption was that Member States should not impose their trade rules on goods or services that were lawfully put on the market in another Member State.[129]

The effect of *Cassis de Dijon* was double. The ruling that what was acceptable in one Member State should also be so in another Member State, generally referred to as the principle of mutual recognition, limited the need for Community harmonization to those areas in which public interests are at stake.

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125 JACQUES PELKMANS, EUROPEAN INTEGRATION AND ECONOMIC ANALYSIS, at 38 (1997).
126 *See* WOODS, *supra* note 76, at 53.
127 *See* CRUZ, *supra* note 86, at 92; Craig, *supra* note 74, at 6-8.
128 *See* CRUZ, *supra* note 86, at 92; Craig, *supra* note 74, at 7 (both indicating that the other main step of the judicial intervention was according direct effect to the free movement provisions).
129 *See* Craig, *supra* note 74, at 7.

Indeed, Member States keep in these areas a limited form of discretion, with the result that potential barriers to free movement may arise.[130] Besides the re-orientation of the Commission's legislative program, it also stimulated de-regulation as Member States would compete with each other to attract enterprises. Due to the same principle of mutual recognition, these enterprises would choose for the Member State with the lowest standard and that would ensure them access to the Community market.[131]

2. The Limited Scope of Exceptions

The judicial contribution to the process of integration created some problems. Articles 30,[132] 39 (3),[133] 46,[134] 55[135] and 58 (1)[136] EC are seen as exception to a generally formulated prohibition. As these provisions are exceptions, the ECJ could, for reasons of consistency, only interpret them restrictively.[137] This

[130] *See* CRAIG AND DE BÚRCA, *supra* note 2, at 716; WOODS, *supra* note 76, at 257.

[131] *See* CRAIG AND DE BÚRCA, *supra* note 2, at 715.

[132] According to Article 30 EC the provisions of Article 28 and 29 EC shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy, public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archeological value, of the protection of industrial and commercial property.

[133] The grounds for justifying restriction on the free movement of persons and services are identical to the ones mentioned for goods. These restrictions can be justified on grounds of public policy, public security and public health. This has been stipulated in Article 39 (3) EC for the free movement of workers.

[134] Article 46 EC stipulates that public policy, public security and public health may be a ground for justifying restrictions on the freedom of establishment.

[135] By virtue of Article 55 EC, the justification grounds for restrictions on the free movement of persons as they are laid down in Article 46 EC apply also to the restrictions on the free movement of services.

[136] The exceptions towards the free movement of capital, on the contrary, have again their own structure. Article 58 (1) EC is the main exception to Article 56 EC, the provision forbidding all restrictions on the movement of capital. This exception is split into two sections. Paragraph (1) (a) of this article concerns the justification of rules on taxation that differ based upon the place of residence or capital investment, while paragraph (1) (b) deals on the one hand with measures aimed at the effective administration and enforcement of the tax system and the effective supervision of banks and insurance companies and on the other hand with measures that are part of the public policy or public security of the Member State.

[137] *See* Case 46/76 *Bauhuis vs. Netherlands* [1977] ECR 5 (article 30 EC "constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly); *See also* CRAIG AND DE BÚRCA, *supra* note 2, at 696; SYBE A. DE VRIES, TENSIONS WITHIN THE INTERNAL MARKET: FUNCTIONING OF THE INTERNAL MARKET AND THE DEVELOPMENT OF HORIZONTAL AND FLANKING POLICIES, at 50 (2006).

principle manifests itself in various ways. First, the exceptions have been interpreted narrowly.[138] Second, the list of exceptions is exhaustive.[139] Extending the list of exceptions requires treaty amendment.[140]

The narrow interpretation seemed to have driven the ECJ in the direction that Article 30 EC is only applicable to national measures that discriminate.[141] Indistinctly applicable national measures could only be justified on the basis of Article 30 EC if their effect on imports is clearly discriminatory.[142] Hence, most of the *Cassis de Dijon* like national measures forming an obstacle to free movement would fail to enjoy derogation for any of the reasons stipulated in Article 30 EC. Another instrument, *in casu* the rule of reason, became necessary to incorporate public interest concerns in the application of Article 28 EC regarding these indistinctively applied national measures and, as jurisprudence has pointed out, only for these measures.[143] Under this view, the rule of reason finds its application due to a dichotomy between distinctly applicable and indistinctly applicable national measures.

3. Positioning the Rule of Reason: Article 28 EC or Article 30 EC?

Oliver has challenged this view. Rather than constructing the rule of reason and Article 30 EC separately from each other, he regards the rule of reason as subsumed under Article 30 EC and thus providing additional grounds of justification to the ones that are explicitly mentioned in the latter Article. His arguments go as follows:

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[138] *See* STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 397.
[139] *See* CRAIG AND DE BÚRCA, *supra* note 2, at 703 (note, however, that the authors question this view).
[140] *See* WOODS, *supra* note 76, at 110.
[141] *See* Case 113/80 *Commission vs. Ireland* [1981] ECR 1625 par. 5-8; *See also* STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 397.
[142] *See* STEINER, WOODS, AND TWIGG-FLESNER, *supra* note 5, at 397.
[143] *See* Case 788/79 *Gilli & Andres* [1980] ECR 2071 par. 6; Case 113/80 *Commission vs. Ireland* [1981] ECR 1625 par. 5-8.

(a) This theory avoids the undue harshness resulting from the first theory with respect to 'distinctly applicable' measures on, for instance, consumer protection grounds. According to the first theory, even though they are necessary, such measures are contrary to Article [28]. According to the second theory, such measures are considered to fall under Article [28], but they may be justified under Article [30].

(b) The 'mandatory requirements' have the same properties as the grounds of justification in Article [30]. Thus, for instance, the Member State bears the burden of proof that its measure is justified as with Article [30]. Also, as the Court expressly stated in 'Cassis' in the passage quoted above, a measure will only be justified by a 'mandatory requirement' if it is necessary to attain that end just as with Article [30]. Again, it is submitted that the 'mandatory requirements' cannot justify a national measure where Community legislation containing sufficient guarantees with respect to those requirements has come into force, just as with Article [30].[144]

Craig and de Búrca, not necessarily agreeing with the rebuttal of the traditional view but questioning that view and arguing for simplification, refine Oliver's arguments.[145] Agreeing with the latter's first point, they add that it is not always easy to make the distinction between indirect discrimination and indistinctly applicable national measures. Further, *Keck and Mithouard* has complicated the issue even more. Indistinctly applicable selling arrangements are in principle outside the application of Article 28 EC, unless they have a potential differential impact. As both elements of indistinctly applicable and discrimination are present, the ECJ equivocated that in this kind of cases both Article 30 EC and the rule of reason applies.[146]

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[144] OLIVER, *supra* note 108, at 112; *See also* Oliver and Roth, *supra* note 80, at 434-6.
[145] *See* CRAIG AND DE BÚRCA, *supra* note 2, at 706-7.

Little support can be given to an argument rebutting the traditional view. Jurisprudence clearly points in the direction of the traditional view.[147] There is much more to be said in favor of an argument for simplification. Does the whole process of derogating certain national measures need to be this confusing and complicated? Wouldn't it be possible that the ECJ, with a little creativity, could reach a test in which does not require scholars to quibble about? That the ECJ has engaged in judicial creativity has been proven by the rule of reason in *Cassis de Dijon* itself, a concept of which the basis cannot be found in the EC Treaty.[148] However, a request for simplification and, indirectly, Oliver's view do not really contribute to the argument why the rule of reason has been developed in the first place.

The development of the rule of reason has to be seen against a failing integration policy. To solve this problem, the ECJ constructed a broader scope of application for Article 28 EC and generalized that in a later stage to the other free movement provisions. It is essential to see that the rule of reason links up with a *lacunae* in Community law. The analysis in both *Dassonville* and *Cassis de Dijon* is preceded with the observation that the national measures were regulating issues which had not yet been subjected to Community harmonization.[149] In the absence of Community law, certain interests and values may not be guaranteed at the Community level, even though they are worth protecting. To use Gormley's words, "[a]ccordingly, in the *lacunae* pending the adoption of legislation at the Community level, the Court, in the interest of reasonable and appropriate application of the law, upholds national guarantees that the Commu-

[146] *See* Cases C-34-36/95, *Konsummentsombudsmannen (KO) vs. De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843, par. 45-47.
[147] *See* Gormley, *supra* note 2, at 25-7.
[148] *See* id., at 22.
[149] *See* Case 8/74, *Dassonville*, *supra* note 82, par. 6. "[i]n the absence of a Community system guaranteeing for consumers..."; Case 120/78, *Cassis de Dijon* , *supra* note 1, par. 8. "[i]n the absence of common rules relating to the production and marketing of alcohol..."

nity legislator does not yet afford to Community citizens."[150] Hence, justifications for the rule of reason do not need to be discussed within the context of categorization within the EC Treaty provisions, but rather against the background for which it has been adopted.

B. Free Movement Jurisprudence within Article 81 (1) EC Necessary?

1. Article 81 EC, Prohibitions and Exceptions

Cassis de Dijon and its subsequent produced case law in all the different freedoms, has been explained against the background of a rigid regulatory system of exception to prohibitions that have been stipulated in the free movement rules. None of the exception inscribed in the EC Treaty allow for justifying restrictions that apply indistinctly. Due to this structure, the indistinctly applicable national measures were not eligible for exemption of Article 28 EC anymore. To soften this harsh consequence for Article 28 EC, the ECJ created a rule of reason to keep certain measures removed from the scope of Article 28 EC.[151] It has thus to be further investigated whether similar structural reasons could be advanced within competition law to explain the need to transpose the free movement jurisprudence.

Article 81 (1) EC contains in its first paragraph a general prohibition for all agreements that restrict competition either as of its object or its effect. Similar as in the free movement provisions, the prohibition is followed by an exemption. Even if an agreement restricts competition, the agreement serving objectives

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[150] Gormley, *supra* note 2, at 24 (stating a similar idea in somewhat different wording on page 32: "The closed class of the Treaty-based justifications is supplemented by the interim acceptance of other justifications in the case law, pending Community action to remove any justified barrier to intra-Community trade. If the Court decides to remove the policy requirement that measures must be equally applicable (in law and in fact) to benefit from the rule of reason, it ought to say so clearly and unambiguously, not seek to slip slippery scope exceptions in for apparently political motives. In any event, there should be a firm distinction between Treaty-based and case law based justifications for departures from the free movement principle, so that all concerned may ascertain the origin of and basis for the justifications for the measure concerned").

[151] *See, e.g.*, WOODS, *supra* note 76, at 68.

that satisfy the conditions of Article 81 (3) EC can be exempted from the application of Article 81 (1) EC.

Granting exemption on the basis of Article 81 (3) EC for agreements that restrict competition, four cumulative conditions have to be met. First, the agreement has to contribute to the improvement of the production of goods, or the promotion of technical or economic progress. Second, consumers need to be able to enjoy a fair share of the resulting benefit. Third, without restricting competition, the objective cannot be attained. Fourth, competition shall not be eliminated in respect of a substantial part of the products in question.

None of the conditions mentioned above refer to discrimination, the element that trigged the ECJ to develop the rule of reason within the free movement jurisprudence. This is explainable by the different goals of both fields of law. Whereas free movement provisions mainly aim at prohibiting national measures hindering intra-Community trade, competition law consists of much more than the realization of a common market. Even though the primary aim of EC competition law may have been the elimination of private agreements that interfere with market integration, the competition law provisions have also focused on forbidding the prevention, restriction or distortion of competition.[152] In this regard, there has been neither a demand nor a need to construct the scope of application of Article 81 EC with any reference to distinct or indistinct applicable agreements with the European Community. A direct consequence of the discourse regarding the reason to introduce a rule of reason within competition law is that an analysis has to be made of whether the mandatory requirements expressing a public interest can be brought under the conditions of Article 83 (3) EC.

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152 *See* CRUZ, *supra* note 86, at 89 and 99.

2. Article 81 (3) EC and Public Interest Considerations

The application of Article 81 (3) EC has long been the prerogative of the Commission, either by granting individual exemption[153] or determining block exemptions.[154] Over the years, the Commission has used this competence to extend the application of Article 81 (3) EC to improvements far beyond achieving economic efficiency, without really being challenged.[155] Stability in the labor market was taken into account to satisfy the condition of improvement of production.[156] A mixture of social and industrial policy goals, such as the creation of a number of jobs and substantial foreign investment in one of the poorest regions of the Community, could positively contribute to technical and economic progress and thus enjoy an exemption.[157] Reduction of pollution, and thus environmental policy goals, has equally been put forward to fulfill the condition of technological improvement.[158] Under the same condition, restrictive agreements increasing consumer safety have been exempted by using Article 81 EC.[159]

The accumulation of case law in which non-competition considerations have played a role in the assessment of Article 81 (3) EC, made the Court of First Instance (hereinafter "CFI") decide that "in the context of an overall assessment,

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[153] *See* WHISH, *supra* note 42, at 149.
[154] *See* id.
[155] *See* Case C-26/76, *Metro-SB-Grossmärkte GmbH v. Commission of the European Community* [1977] ECR 1875, par. 21 (stating that "[t]he powers conferred upon the Commission under Art. [81] (3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.")
[156] *See* id. (a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavorable, comes within the framework of the objective to which reference may be had pursuant to Article 85 (3) *[81(3)]*)
[157] *See* Commission, Decision 23 December 1992, *Ford/Volkswagen* [1993] OJ L20/14.
[158] *See* Commission, Decision 24 January 1999, *European Council of Manufacturers of Domestic Appliances (CECED)* [2000] OJ L187/47.
[159] *See* Commission, Decision 23 December 1977, *BMW Belgium NV and Belgian BMW Dealers* [1978] OJ L46/33.

the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [81] (3) of the Treaty."[160] This became quite problematic once it was decided to modernize the system of Article 81 (3) EC.[161] The incorporation of public interest considerations as grounds for justifying restrictive agreements in Article 81 (3) could make this Article less justiciable for national competition law authorities and national courts. These institutions may, after all, be ill placed to balance various conflicting public policies absent of a clear hierarchy of goals.[162]

Aware of this problem, the Commission has indicated twice that a much narrower view of Article 81 (3) EC would be desirable. The White Paper on Modernization of the Commission advocated that Article 81 (3) EC in intended "to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations."[163] In its Guidelines for Article 81 (3) EC, the Commission discusses the first condition under the heading of "Efficiency gains."[164] The title already makes it clear. Only efficiency gains are described in detail under that title.[165] Nevertheless, the Commission did not completely close the door for non-competition goals, giving effect to a request of several scholars closely following the modernization debate.[166] With reference to *Metro I* and *Matra*, the Guideline stipulates that "[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be

[160] Cases T-528/93, T-543/93 and T-546/93, *Métropole and Others v. Commission* [1996] ECR II-649, par. 118.
[161] *See* JONES AND SUFRIN, *supra* note 61, at 273; Monti, *supra* note 12, at 1090-4; Schweizer, *supra* note 117, at 9-10.
[162] *See* Schweizer, *supra* note 117, at 10.
[163] White Paper on Modernization [1999] OJ C132/1, par 56.
[164] *See* Commission Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C101/97, par. 233.
[165] *See* id., par. 233-307.
[166] *See, e.g.*, WHISH, *supra* note 66, at 155 (2003); REIN WESSELING, THE MODERNIZATION OF EC ANTITRUST LAW, at 105-12 (2000); Monti, *supra* note 12, at 1092-4.

subsumed under the four conditions of Article 81 (3)."[167]

The reliance on *Mantra* suggest that public interest concerns can only be taken into consideration insofar that they supplement or are translated into the economic benefits generated by the agreement.[168] In a recent study, Schweizer points out that in a majority of the cases under consideration,[169] public interest considerations have been taken into consideration in a supplementary way.[170] Rather than being in direct conflict with competition and so jeopardizing the system in its core, the public interest considerations were helpful to specify the efficiency benefits of the restrictive agreements. The complementary character of these considerations with economic efficiency would thus imply that the national competition authorities or national courts do not have to choose in favor of one particular policy if they are confronted with a question in this regard. This perception, which was also favored by Monti when he came to the conclusion that earlier case law did not reveal anything else than that non-competition law goals specify the economic benefits of the restrictive agreement,[171] implies that a broad view on the application of Article 81 (3) EC would be possible.

The fear that the Commission was introducing a subtle substantive change in EC competition law via the modernization,[172] coupled with eventually a necessity for an "*ex post* rationalization of earlier judgments of the Community Courts such as *Metro* and *Remia and Nutricia*,"[173] seems to be unfounded. Even though

[167] Commission Guidelines, *supra* note 164, par. 242.
[168] *See* Case T-17/93, *Matra Hachette v. Commission* [1994] ECR II-595, par. 139; *See also* JONATHAN FAULL AND ALI NIKPAY, THE EC LAW OF COMPETITION, par. 3.406 (2007); Schweizer, *supra* note 117, at 10.
[169] *See* Schweizer, *supra* note 117, at 11 (indicating that the exemptions of the so-called crisis cartels would fall outside the case law using non-competition goals to supplement the economic efficiency arguments. Rather, the non-competition goals would run counter to the economic efficiency in these cases).
[170] *See* id.
[171] *See* id.
[172] *See* Monti, *supra* note 12, at 1091.

nothing definite can be said until there is case law to the contrary, a majority of the scholars share the positive view that Article 81 (3) EC may be interpreted against the backdrop of policy goals beyond economic efficiency.[174] The remaining question is whether the policies taken into account under Article 81 (3) EC extend or can extend to what is envisaged in *Wouters* or *Meca-Medina*.

3. *Wouters* and *Meca-Medina* under Article 81 (3) EC?

The public interest affected by the cooperation between lawyers and accountants is clearly spelled out by the ECJ. Avoiding conflicts of interests and keeping independence have been identified as the reason why a lawyer should refrain from cooperating within a multi-disciplinary association with accountants.[175] Similarly in *Meca-Medina*, the ECJ clarified that the public interest involved is the integrity of sport, both from the perspective of the athletes and the supporters.[176] To generalize these public interests, both cases can be linked up with consumer protection. *Meca-Medina* would also connect with stability within the labor market for athletes and health protection. The ECJ has referred to all of this kind of public interests in its previous jurisprudence.[177] Nevertheless, Article 81 (3) EC has neither been used in *Wouters* nor *Meca-Medina*.

Among the few authors discussing the possibility of achieving the same by applying Article 81 (3) EC,[178] Whish concludes that it would have been possible were it not that a legal-technical impediment prevented the ECJ from doing so.[179] If the national courts would have been able to apply Article 81 (3) EC at

173 WHISH, *supra* note 66, at 155 (2003).
174 *See, e.g.*, JONES AND SUFRIN, *supra* note 61, at 274-7; Schweizer, *supra* note 46, at 11; *But see* Wesseling, *supra* note 37, at 73 (believing that the Commission has closed the door including non-competition goals in Article 81 (3) EC.)
175 *See* Case C-309/99, *Wouters*, *supra* note 9, par. 100-2.
176 *See* Case C-519/04, Meca-Medina, *supra* note 39, par. 43-4.
177 *See supra* Section IV.B.2. n. 157-60; *See also* JONES AND SUFRIN, *supra* note 61, at 274.
178 *See, e.g.*, WHISH, *supra* note 42, at 129-30; GOYDER, *supra* note 54, at 94-5.

the relevant time,[180] they could have argued, according to Whish, that the disputed agreement limiting the production and technical development under Article 81 (1) (b) EC could have been justified as it satisfied the conditions of Article 81 (3) EC. How these conditions would have been satisfied, Whish leaves this issue open.[181]

Compliance with Article 81 (3) EC would have been difficult since the ECJ explicitly ruled that cooperation between the lawyers and accountants would in various ways contribute to efficiency.[182] Cost efficiencies were mentioned in terms of economies of scale or a synergy arising from the integration of different services. From a qualitative efficiency perspective, the cooperation would enable a better coordination of the services provided. Given that the first condition of Article 81 (3) EC aims at these efficiencies, how can than an agreement falling foul of achieving them ever been exempted from the application of Article 81 (1) EC. The situation in *Wouters* is such that there are no efficiency benefits that can be further supported by public interests. Based upon the analysis related to the incorporation of public interests in Article 81 (3) EC,[183] the use of public interests would extend beyond what had been the practice.

A similar conclusion may not be drawn for *Meca-Medina*. Even though the wording is not explicit at all in this case, it could be deducted from the ECJ's reasoning that the Anti-doping agreement and the foreclosure of athletes who have been found in breach of the Anti-doping agreement improves the service, *in casu* sport events, provided to the consumer.[184] Whereas the agreement in

[179] *See* WHISH, *supra* note 42, at 130.
[180] *See* Section IV.B.2.
[181] *See* WHISH, *supra* note 42, at 130.
[182] *See* Case C-309/99, *Wouters*, *supra* note 9, par. 83, 87, 88 and 89.
[183] *See supra* Section IV.B.2.
[184] *See* Case C-519/04, *Meca-Medina, supra* note 39, par. 43-4.

Wouters opts against efficiency, the agreement in *Meca-Medina* rather creates efficiency. In principle, this efficiency enhancing effects could trigger the application of Article 81 (3) EC. A further consequence hereof is that these efficiencies could be supplemented by other public interest goals, such as consumer protection or health reasons.[185] Even though it would have been possible to apply Article 81 (3) EC to *Meca-Medina* in order to exempt the Anti-doping agreement, the ECJ opted for reasoning similar to *Wouters*.

If *Wouters* would have been a case on its own, the use of the free movement rule of reason within the context of competition law would be easy to explain. Just like in the free movement jurisprudence, the competition law provisions were not constructed in such a way to allow national interests to be exempted from the EC Treaty rules on competition. However, given the different outcome in *Meca-Medina*, the transposition of the rule of reason into competition law must have another rationale.

4. Making Sense out of *Wouters* and *Meca-Medina*

Before entering into an analysis of the issue at stake in *Wouters* and *Meca-Medina*, the ECJ explicitly stated that there was an absence of Community rules in the field of the regulation of liberal professions, specifically lawyers.[186] The ECJ is less explicit in stating that there is no Community regulation regarding anti-doping rules as a part of sport rules in *Meca-Medina*. Rather, the discussion in this case was on whether these rules could fall under the EC Treaty.[187] Out of the conclusion that the EC Treaty can only apply to sport in so far as its economic provisions crosscut the practice of sport as an economic activity, it is possible to deduct that, similar as in *Wouters*, the EC Treaty does not directly

185 *See supra* Section IV.B.2.
186 *See* Case C-309/99, *Wouters*, *supra* note 9, par. 99.
187 *See* Case C-519/04, *Meca-Medina*, *supra* note 39.

regulate sport.[188] Hence, *Wouters* and *Meca-Medina* have in common that Community legislation is silent regarding the legal profession and sport.

The shared silence means that "the Community lacks competence under the Treaty to usurp national regulatory choices by acting as a substitute legislator"[189] in the realm of the organization of the legal profession or sport. This constitutional restraint on the competence of the Community does not exclude the Community of taking action against rules or agreements that impede achieving the core goal of an integrated and competitive market. The autonomy left to the national governments of the Member States or other institutions is conditioned in so far as their regulations or agreements impede cross-border trade within the Community. At that moment, the institutions of the Community can review either the regulations or the agreements.

The autonomy vested in the Netherlands Bar Association or the International Olympic Committee has a public component.[190] This is quite clear in the context of *Wouters*. The organization of the legal profession is provided in the Dutch legislation of 23 June 1952, called the *Advocatenwet*. This law, translated as the 'Law on the Bar', provided that a private law association of undertakings would be responsible for the proper practice of the profession. To achieve this end, this association of undertakings was given the power to adopt all necessary measures.[191] Even though Whish points out that the public international law basis of the International Olympic Committee may explain the ECJ's willingness to extend *Wouters* to *Meca-Medina*,[192] the ruling of the Commission in *UEFA*,[193]

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[188] *See* Stephen Weatherill, *Anti-Doping Revisited - The Demise of the Rule of 'Purely Sporting Interest'*, 27 ECLR 645, at 646 (2006).
[189] *See* id.
[190] See WHISH, *supra* note 42, at 129 (linking the public component to a link with a delegation of power by law to the private law organization); Van de Gronden, *supra* note 117, at 86 (making reference to treatment as public in free movement jurisprudence).
[191] *See* Case C-309/99, *Wouters*, *supra* note 9, par. 3-6.
[192] See WHISH, *supra* note 42, at 129.

a purely private organization occupied with football at the European level, would fall short of this kind of public law characteristic.

In order to overcome the characterization of the public component in the to *Wouters* linked jurisprudence by the endowment of powers through a legislative body, there is a need to look at how the ECJ positions the above-mentioned institutions within its legal framework.[194] The traditional distinction between the free movement provisions and the competition law provisions was the divide between government regulation and agreements among private undertakings.[195] The ECJ has gradually diminished this strict divide, allowing, among others, for regulating private actors under the free movement provisions or exempting restrictive agreements from the application of the competition law provisions.[196]

By extending the free movement provisions to private actors, the ECJ has indicated that, to use the words in *Walrave*, "[t] he abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3 (c) of the Treaty, would be comprised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law."[197] Concerns of effectiveness and coherentness of the free movement provisions for the completion of market integration, the ECJ treated the private actors as having power with "functional equivalence to public authority in terms of regulatory competence."[198]

193 Case 37.632, *UEFA Rule on Integrity of the UEFA Club Competition: Independence of Clubs*, OJ, 1999, C 363/2.
194 Cf. Van de Gronden, *supra* note 117, at 86.
195 *See* SAUTER AND SCHEPEL, *supra* note 2, at 43 and 66.
196 Id., at 98-103 and 90-3.
197 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and others* [1974] ECR 1405, par. 17-8.

The autonomy of the Netherlands Bar Association and the International Olympic Committee in *Wouters* and *Meca-Medina* respectively reflects their power to regulate various issues concerning their members. In this way, these organizations have power functionally equivalent to public authority, constituting the public component in both cases. In this regard, both *Wouters* and *Meca-Medina* are within the lines of previous jurisprudence. *Wouters* was preceded by *Klopp*[199] and, in extension to other professions, by *Reisebüro*.[200] Besides *Meca-Medina*, the ECJ has dealt with measures taken by sports associations in *Bosman*,[201] *Deliège*[202] and *Lehtonen*[203] in the context of free movement provisions. In doing so, the ECJ acknowledged that they are operating in a public context.[204]

Equaling the autonomy of the private actors with powers functionally equivalent to public authority carries the danger that, if the ECJ would pursue the effectiveness of the free movement rules at all costs, it would "inevitably lead to an unwarranted intrusion into the private sphere."[205] A doomsday scenario has been projected in the work of Kluth, who saw the application of the free movement provisions to private conduct as an important degree of socialization of private law, eventually leading to the end of the private law society and a departure from the liberal law concept of the single market.[206] Van den Bogaert, supported by Sauter and Schepel, stipulates that it will probably not

198 *See* SAUTER AND SCHEPEL, *supra* note 2, at 101 and 45 (referring to it as the functional approach); *See also* Oliver and Roth, *supra* note 80, at 425 (the justification of the application of the freedoms may be derived from the quasi-legislative character of the regulations of the private organizations)

199 *See* Case 107/83, *Avocat de Paris v. Klopp* [1984] ECR 2971, par. 17.

200 *See* Case C-3/95, *Reisebüro Broede v. Gerd Sandker* [1996] ECR I-6511, par. 37.

201 *See* Case C-415/93, *Bosman supra* note 8.

202 *See* Joined Cases C-51/96 and 191/97, *Christelle Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549.

203 *See* Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine SBL v. Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681.

204 Cf. Van de Gronden, *supra* note 117, at 85.

205 Stefaan Van den Bogaert, *Horizontality: The Courts Attacks?*, *in* CATHERINE BARNARD AND JOANNA SCOTT (eds.), THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 121, at 136 (2002); *See also* Roth and Oliver, *supra* note 80, at 426-7.

take this proportion. The ECJ has been showing its "willingness and determination to limit the scope of application of the free movement provisions."[207] Even though the author has in mind, when making the just-mentioned observation, the developments of *Keck* in the free movement of goods jurisprudence and the ECJ's attempts to introduce similar thresholds in the other free movement provisions,[208] he could have paid more attention to the role the rule of reason could play within this balancing exercise.

The rule of reason in the field of the free movement has been developed within the context of autonomy. In principle, the EC Treaty did not extend to national measures not discriminating according to the nationality of origin. In order to attain the integration into a single market, the ECJ had to take active steps in order to broaden the provisions of the EC Treaty related to free movement. In doing so, the ECJ intruded in the regulating autonomy of the Member States. To avoid that the free movement rules would have a too pervasive impact on the autonomy, the ECJ constructed the rule of reason allowing for the autonomy to prevail over the free movement provisions. Prevalence would be given if the autonomy is used to set out measures linked to the public interest and under the condition that that measure is necessary to achieve that public interest. This public interest constitutes another dimension of the public component in which the autonomy is vested.

The recognition that public interests can set aside the application of the free movement provisions has not been denied for private actors dealing. In *Bosman*, the ECJ in response to the UEFA held that "[t]here is nothing to preclude

[206] Winfried Kluth, *Die Bindung privater Wirtschaftsteilnehmer an die Grundfreiheiten des EG-Vertrags: Eine Analyse am Beispiel des Bosmans-Urteils des EuGH*, 122 ARCHIV DES ÖFFENTLICHEN RECHTS 557 (1997); *See also* SAUTER AND SCHEPEL, *supra* note 2, at 103; Van den Bogaert, *supra* note 205, at 131.
[207] Van den Bogaert, *supra* note 205, at 141; *See also* SAUTER AND SCHEPEL, *supra* note 2, at 103.
[208] *See* Van den Bogaert, *supra* note 205, at 141.

individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question."[209] The operations of private actors could thus be situated within the public interest. Whereas it may not be too difficult to grasp the public interest regarding the organization of the legal profession, it may be harder to see what the public interest is in the case of sports. In this regard, the ECJ has stated that the considerable social importance of sporting activities in the Community could allow for the legitimization of measures taken by sport associations but that in principle infringe upon the free movement provisions.[210]

Private actors pursuing "legitimate objectives of considerable social importance"[211] may be excluded out of the scope of the free movement provisions. However, the fact that the actors are private ones, competition law provisions may apply as well. Would there be any reason to include these private actors via the competition law provisions within the scope of the EC Treaty, while the ECJ has allowed them to escape the application of the free movement provisions? The ECJ obviously saw no reason to act this way. To avoid that an agreement, exempted out of the application of one provision of the EC Treaty, would be caught by another, the ECJ looked for a solution. This solution consisted of the transposition of the free movement rule of reason as an exception to Article 81 (1) EC. Wesseling states that "in establishing this exception, the court explicitly referred to the recognized exceptions in the application of the Treaty's free movement principles, thus bridging this form of the rule of reason in EC competition law with the rule of reason in the free movement

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[209] *See* Case C-415/93, *Bosman supra* note 8, par. 86; *See also* Van den Bogaert, *supra* note 205, at 127.

[210] *See* Stephen Weatherill, *Sport as Culture in EC Law*, *in* RACHAEL CRAUFURD SMITH (ed.) CULTURE AND EUROPEAN UNION LAW 111, at 115 (2004, reprinted 2007); *See also* Wesseling, *supra* note 37, at 68 (transposing the terminology to competition law).

[211] Wesseling, *supra* note 37, at 68.

domain."[212] Arguably, other activities of considerable social importance may profit from this exception too.[213]

V. CONCLUSION

The transposition of the rule of reason developed in *Cassis de Dijon*, and thus applicable within the free movement of goods provision of the EC Treaty, to the field of competition law in *Wouters* has triggered considerable debate among scholars of what the ECJ actually meant to do.[124] It is possible to split the debate into two groups. On the one hand, the competition law scholars have been trying to fit *Wouters* within the existing interpretations of the competition law. The tendency of their view has been to neglect the reference made the free movement provisions. On the other hand, the free movement law scholars saw this transposition as a further proof of the convergence between the two areas of law.

By pointing out that a close reading of *Wouters* can only lead to the understanding that the ECJ has transposed the free movement rule of reason into competition law rather than trying to reason closely related to the existing interpretations of competition law, this paper may have chosen the side of the free movement scholars. However, the argument in this paper has not necessarily been developed to conclude that there is a convergence between these two fields. Even though this may be an underlying conclusion of the argument made, the main purpose of the paper was to find out whether the transposition was really necessary.

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212 *See* Wesseling, *supra* note 37, at 75.
213 *See* id., at 71.
214 *See supra* Section II.C.

In order to answer that question, the *raison d'être* of the rule of reason within the free movement jurisprudence has been analyzed. This was found in the broadening of the scope of application of the free movement provisions from applicable to only discriminatory national measures to non-discriminatory ones. The strict interpretation of the existing derogatory provisions prevented that this broadened scope of application could be tempered. Hence, another way to exempt national measures from the extended scope of application had to be developed and this was the rule of reason.

A similar reasoning could not be made for the rule of reason under the competition law provisions. Rather than rejecting the necessity of the transposition at this point, the paper went on to look at the reason why competition law would need a rule of reason. The extension of the free movement provisions to private actors can be pointed at as the underlying cause for the transposition. Without such a transposition, the competition law provisions may strike down an agreement that might have been exempted out of the free movement provisions because of public interest reasons. To avoid this kind of contradictory outcome, a uniform application of the rule of reason in both fields, free movement and competition, may be justified.