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Rethinking Competition Law within the European Economic Constitution*

ANNA GERBRANDY
Utrecht University, Utrecht, The Netherlands

Abstract

In light of re-conceptualizing a European social market economy, this contribution considers competition law's position in the European economic constitution. The economic constitution captures the economic foundation of European integration as based on the market mechanism. The contribution asks whether the change towards a 'more economic approach' to competition law implies an alienation of competition law from societal challenges. The contribution considers whether this interpretation, with competition law being such an integral part of the European economic constitution, should change in light of the constitutional goal of a European social market economy. To do so, the article sketches the fundamental place of competition law in the European economic constitution and shows how its interpretation has become more economics-based. It highlights some of the problematic aspects of this change and analyzes these findings from the perspective of an economic constitution serving a social market economy.

Keywords: competition law; economic constitution; goals of competition law

Introduction

This contribution considers the position of European competition law in the European economic constitution. It asks whether the change towards a 'more economic approach' to competition law, which came about in the 1990s, implies an alienation of competition law from societal concerns. As will be set out below, the more economic approach departed from 'old' competition law in which the rationale for countering economic power was found both in its impact on economic freedom and as leading to unfair societal outcomes, and fashioned competition law as focused on economic efficiencies and consumer welfare. This development can be said to have weakened the conceptual link between the market and its social setting. This contribution will highlight two developments in European competition law as illustrations of points of tension between the economic interpretation of competition law and wider societal concerns. The contribution is set in the wider framework of this Special Issue on the shape of the European Social Market Economy.[1] It poses a primarily *legal* question, based on the position of competition law in the European economic constitution: whether the current economics-based interpretation of competition law should change in light of the constitutional goal of a European social market economy.

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[1]See the Introduction to this Special Issue.

The notion of 'economic constitution' captures here the economic foundation of European integration. It can in general be understood as the combination of foundational principles and norms that govern the rights and obligations of both governments and economic actors in the (European) economic sphere. Norms relating to the relationship between economic actors and between the market and the state derive from these foundations. These norms guarantee fundamental economic rights for citizens and businesses, including private property rights and contractual freedom, and encompass obligations for the government (Gerber, 1994). Ultimately, the economic constitution protects individual economic freedom against both market-power and state-power.[2]

The economic constitution is linked to the idea of the market mechanism governing economic interactions. *European* integration also rests on the market mechanism, but adds the goal of the integration of member states' markets towards a European internal market. The norms of the European economic constitution also govern this process and thus have come to encompass (at minimum) the internal market-provisions and its diverse offspring, and competition law. This has been complemented with the monetary provisions of the EMU, the euro and the measures put in place to deal with the economic and financial crisis (Ioannidis, 2016; Joerges, 2016; Tuori, 2012). Therefore, the European economic constitution can now be said to have two parts: a micro-economic constitution which includes competition law and is the focus of this contribution, and a macro-economic constitution (Tuori and Tuori, 2014). This economic constitution is further conceptualized as one of the dimensions of European constitutionalism, which also includes a social dimension (Tuori, 2014).[3]

The proposition underlying this contribution is that for the social market economy-concept to have meaning, its constitutional building blocks ought to be (somehow) fitted together. This would mean an economic constitution that serves, or at very least does not contradict, the notion of a social market economy (as defined in the Introduction to this Special Issue); an economic constitution in which, in light of societal concerns, a balance between market interests and non-market interests can be struck. It is questionable whether current European competition law, as an important part of this economic constitution, delivers.

I will first set out the fundamental place of competition law in the European economic constitution, both at its inception and in the current set-up of the EU. I will then sketch the turn towards an economics-based interpretation of European competition law. Section II sets out two main illustrations of friction points between a current competition law and societal concerns, which will then be considered from the perspective of an economic constitution befitting a social market economy (section III). The final section concludes.

I. The Fundamental Role of Competition Law in the European Economic Constitution

The functioning of markets is generally based on the notion of competition (though not necessarily so (Graeber, 2011). The construction of a European internal *market* therefore

[2]Just as a *political* constitution governs political interaction between citizen and state, and includes fundamental rights of citizens and fundamental obligations for the government, and ultimately protects the citizen's freedom against the power of the state, so the *economic* constitution guarantees fundamental economic rights.
[3]Tuori and Tuori discern a social, political, security, juridical and economic constitution.

also needs provisions governing competition. Since the beginning, therefore, the European Treaties have included competition law.[4]

All competition law regimes are primarily concerned with market power, because it distorts the market mechanism. This is why 'cartels' (anti-competitive agreements) are prohibited, monopoly-positions are regarded with suspicion, and mergers and acquisitions are scrutinized. The EU added monitoring of state-aid granted by member states, because such aid may provide unfair advantages to certain (national) companies and hinder a European level market playing field. However, competition law is aimed primarily at *companies*, whereas state-aid law is aimed at *member states*.[5] The internal market, of course, is also shaped by the provisions on the four freedoms, which are also aimed at member states (prohibiting restrictions to the free movement of goods, services, establishment and capital). Conceptually, all these provisions are linked and share the same objective. As will be shown below, however, there are differences in allowing for a balancing between market-interests and non-market (or social) interests between the free movement and state aid provisions, with fairly generous exceptions, and the competition law provisions.

In this remainder of this section I will discuss the roots of European Competition law and contrast this with its current interpretation. From the perspective of its role in the economic constitution the differences are revealing.

The Ordo-liberal Roots of European Competition Law

The foundations of European Competition law can, at least for an important part, be traced back to ordo-liberalism (Gerber, 1998; Felice and Vatiero, 2015; Rousseva, 2005, 2006), as can the notion of the economic constitution (Bonefeld, 2012; Giocoli, 2009; see also Segers' and Warlouzet's contributions to this Special Issue).[6] A focus on the principle of freedom links the ordo-liberals with classical liberalism and neoclassical economics. They share the idea that individual freedom can be guaranteed best through the market mechanism. But the ordo-liberals understood the market as not necessarily forming spontaneously: an unregulated market does not necessarily lead to the optimal outcomes the market mechanism promises. At work is an underlying tension as companies strive to obtain market power, while market power inherently ruins the market's promises. Therefore, market power is not only a threat to society because it leads to suboptimal market outcomes, but also because it leads to limiting the freedom of economic actors and to unfair societal outcomes. Equally important, market power may also corrupt governments. Therefore, in a society based on competition and the market mechanism, 'fair' outcomes – as acceptable to society – will need to be guaranteed. Here the ordo-liberals conceived a link between the market and its social setting. Because of the self-destructive power of the market mechanism and to prevent its negative effects, ordo-liberals held that the *state* needs to order and structure

[4]Already in the Treaty establishing the European Coal and Steel Community (Article 65 and Article 66).

[5]Though the notion of loyalty (Article 4 TEU) prohibits member states to deprive competition law provisions of their 'useful effect'.

[6]The thesis that European competition law has been predominantly shaped by ordo-liberalism has recently been criticized. Clearly other influences can also be traced. In this debate, see, for example, Akman, 2014; Karagiannis, 2013, who argue that its influence has been exaggerated; and Bartalevich, 2016; Talbot, 2016; Warlouzet 2010 for the more nuanced view that ordo-liberalism has been influential, but that competition law has also been shaped by other factors. For the purpose of this contribution there is no need to precisely trace the exact impact.

the market. However, and importantly from a constitutional point of view, this is not an unlimited policy-power: governmental action is bound to norms of the economic constitution, directing and restraining government action. In such a system, competition law is concerned with market power not merely because of effects on market outcomes but also because of societal effects. This leads to an understanding that an unfettered market, without regard for societal concerns, will be ultimately untenable.[7]

Based on the understanding that competition and the market mechanism lead to social and economic optimal outcomes, competition law was thus perceived as an instrument for obtaining the constitutional principles of *fairness* and of *economic freedom*. At the same time, in the European setting, the competition provisions were *also* seen as instruments of creating an *internal market*, the cornerstone of European integration and thus of the European economic constitution. These twin goals – economic freedom and creating an internal market – existed alongside each other for many years (Mortelmans, 2001). But this – everything before the 1990s – is now called 'old' competition law (Schweitzer and Patel, 2013).

Current European Competition Law

Fast forward to the EU's current competition regime. Though the relevant Treaty provisions have remained fundamentally the same, their interpretation has changed quite dramatically. The idea of unhindered free markets and competition as leading to efficiency and overall economic welfare gained in force during the 1990s and heavily influenced European competition law. Thus, the Commission instigated a reform of European competition law in a process of *economization* and *modernization* (Monti, 2000; Vogelaar, 2002).

The process of *economization* has placed economics at the heart of European competition law. This includes perceiving competition law as instrument to protect consumer-welfare and focuses on economic efficiencies.[8] This same focus on economic efficiencies, simultaneously informed the process of liberalization and privatization of many sectors and public services, such as energy, transport and post & (tele) communications, which extended the reach of competition law. The process of *modernization* also deepened its reach: all member states now have national competition rules that are generally finely attuned to European competition law. On the national level, European competition law provisions must be applied fully and conjointly with the national provisions (as soon as there is an 'interstate effect').[9] The result is that even where European competition law does not reach, 'Europeanized' national competition law most often does.

[7]The ultimate conclusion would be to prohibit monopoly power altogether, but European competition law (as other regimes) opted for monitoring the *behaviour* of monopolists to behave *as if* it were subject to market pressures. See discussion in Gerber, 1994, pp. 50–53.

[8]See Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/08; Commission, Guidelines on Vertical Restraints [2010] OJ C131/01; Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1; and Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/03.

[9]European competition law provisions apply only where the behaviour of companies have an effect on interstate trade. As soon as European competition law applies, national competition authorities and courts must apply the European provisions when they apply their national competition regimes. Thus, a uniform system of competition law has been created throughout the internal market

Though it is questionable whether the Court of Justice has fully embraced the focus on consumer welfare and economic efficiencies (see also section I), both the economics-based interpretation and the widening and deepening reach of European competition law is held, by many, to be a welcome change, leaving the 'irrationalities and distortions of "old" competition law behind' (Schweitzer and Patel, 2013, p. 107). The effectiveness of competition law in the European Union is not generally disputed and within this system, the European Commission's functioning as a competition authority is well-established.

However, there is a criticism: by focusing *only* on the tools of economics, has not something been lost? Yes, the economists offer a set of tools, instead of mere abstract legal principles, to be used to solve concrete competition problems: theories, models of supply and demand and pricing behaviour, mathematics and statistics (Bishop and Walker, 2010; Tirole, 1988). This has made competition analysis, in many cases, more predictable and perhaps indeed more rational. But it has also created a system that might be so determinedly focused on efficiencies that it turns a blind eye to some pressing societal concerns (as the next section will show). This criticism of the economic foundation of competition law is tied to a long-standing debate on the *why* of competition law more generally. The debate covers descriptive (which goals are taken into account by authorities and courts) and normative positions (which – multiple, possibly conflicting – goals ought to be taken on board); as indeed does this contribution (Budzinski, 2008; Lianos, 2013; Odudu, 2006; Prosser, 2005; Townley, 2009; Zimmer, 2012). The discussion covers different welfare-standards, but also extends to issues of fairness, access, justice and solidarity. In this setting, European competition law now finds itself 'at a crossroads' where 'current battles (…) reflect conflicting visions of a future EU' (Schweitzer and Patel, 2013, p. 225). It is to two examples where these conflicting visions might become visible that I will turn next.

II. Friction Points between Market and Non-market Interests

As stepping stones in the endeavour to conclude on whether the current economic interpretation of European competition law should change in light of the constitutional goal of a European social market economy (as laid down in Article 3 TEU), this section provides two illustrations of friction points between urgent societal concerns and competition law.

Public Interest Agreements, including on Sustainability, between Companies

It is disputed whether, in a competition law assessment of agreements between companies, interests that are not generally included because of a focus on consumer-welfare, *ought* to be considered too. Competition lawyers call these interests 'non-economic interests' or 'public interests', but in the setting of discussing the social market economy, these might also be labelled 'societal' or 'non-market' interests, as opposed to 'market' interests (Baarsma and Rosenboom, 2015). The main issue is that if the consumer-welfare goal, which focuses on efficiencies the market-mechanism brings, is the single measuring stick for assessing agreements between companies, then the non-market interests that these companies (say they) are protecting will be difficult to take into account. For example, sustainability-focused agreements, initiatives to improve animal welfare, to prevent

deforestation, to provide 'living wages', or to protect the balance in the ecological system in the long term, might lead to a higher consumer price.[10] Therefore they lead to consumer-welfare loss and would be prohibited by the cartel-prohibition (Article 101 par. 1 TFEU).[11]

In the EU system, a specific exception (Article 101 par. 3 TFEU) can be relied upon by taking into account benefits that follow from an agreement. These benefits need to offset the consumer-welfare loss. However, in this assessment it is difficult to take into account non-quantifiable benefits,[12] benefits that accrue (mostly) to society at large (and not to consumers), benefits that accrue to a different group than the consumers suffering the consumer-welfare loss, or benefits that occur in the long(er) term. One of the reasons for these difficulties is a restrictive reading of the exception clause.[13] Another is the economics-informed notion of quantification of positive and negative effects. This is a very different exercise from using a form of balancing through reasoning and weighing the respective importance of, say, combatting binge-drinking or protection of human rights against a higher consumer price (Richardson, 2000).[14]

The aim of a sustainable society can also be linked to the increasing attention to a shift towards a circular economy, which 'implies reducing waste to a minimum as well as reusing, repairing, refurbishing and recycling existing materials and products' (European Parliament, 2016).[15] Though the organization of a circular economy does not necessarily conflict with the market mechanism, tensions occur at the level of the foundations of an economic order. A circular economy is based more on co-operation between economic agents, holds a long-term view on economic relations, and rests on a notion of corporate responsibility that is wider than economic profit (Gerbrandy, 2017a, 2017b). Thus, it seems inevitable that the organization of circularity will lead to tensions with competition law.

The discussion on the relationship between competition interests and non-economic interests is not limited to sustainability. Take, for example, the position of professional service providers (such as lawyers or accountants) and the question of whether these now mostly liberalized professions need some special consideration as they provide a service that is also in the public interest.[16] More specifically, the consequences of the introduction of market principles in the healthcare sector raise questions on the interplay between competition and, *inter alia*, access to care, and the possibility of allowing co-operation between individual healthcare providers for care-related reasons (Hatzopoulos, 2011).

[10]The problems surrounding sustainability initiatives have, especially in the Netherlands but increasingly also elsewhere, led to the blocking of several market-based initiatives, in which the government *itself* was involved; thus leading to (ongoing) political debate (Gerbrandy, 2017a; Monti and Mulder, 2017).

[11]Article 101 TFEU is structured as a prohibition (of agreements and concerted practices with anticompetitive goal or effect), and an exception (for agreements that – shortly put – on balance have a positive effect). The prohibition is laid down in Article 101(1) TFEU; the exception in Article 101(3) TFEU. Para. 2 provides for the nullity of agreements infringing the prohibition.

[12]Reasons for non-quantifiability range from the practical to the normative.

[13]Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ 1 101/1.

[14]The example of binge-drinking comes from Townley, 2008. Human rights protection is for example inherent in the initiative to provide living wages (Fairtrade International, Workers Rights and Trade Union Relations, available online at: https://www.fairtrade.net/programmes/workers-rights.html Accessed 26 January 2018).

[15]See also EC Circular Economy http://ec.europa.eu/environment/circular-economy/index_en.htm.

[16]Case 309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECR 1577. On Wouters and more recent cases in this vein see Janssen and Kloosterhuis, 2016.

Other concerns can be added to this discussion. For example, protecting the position of precarious workers: should low-income individual freelancers be allowed to agree on minimum-tariffs in a similar vein as workers are protected through collective labour agreements (which fall outside the scope of competition law)?[17] In the current socio-economic context, warnings against a 'race to the bottom' or commodification of labour lead to defending a socially accepted income minimum (De Stefano, 2016; Frade and Darmon, 2003, 2005), but this lies at odds with competition law. Problems also arise from possible imbalances in negotiating power. The individual psychologist, against the might of health insurance companies, the individual journalist or violinist against publishers or orchestras suffer from a disadvantaged position (though, of course, these markets do not all function in the same way). Some would add farmers, who struggle against the might of supermarkets (though the relationship between agriculture and competition law adds complexities here).[18] Should competition law allow for co-operation to provide for a counterbalance in these unequal relationships? And more in general: ought not competition law include these non-market interests in its assessments in response to societal concerns?

Power in the Platform Economy and Democracy

The economic constitution also created a conceptual link between market freedom and democratic societies: the ordo-liberals brought forward the notion that market-power might also constitute a danger to a free and democratic society (Deutscher and Makris, 2017; Felice and Vatiero, 2015; Maier-Rigaud, 2012). Clearly, current economics-based European competition law cannot encompass protection of a free democratic society as a concern. However, the recent debate focusing on (the application of competition law to) big technology companies may revive this link between competition law and democracy.

Indeed, the question of whether competition law should scrutinize more intensely – possibly leading to breaking up – powerfully big technological companies is raised on both sides of the Atlantic.[19] The context of this question lies in societal concerns about the consequences of the reordering of our society into a 'platform society', in which (specifically) the platforms of the Big Five form the core of a 'platform ecosystem' (Van Dijck *et al.,* 2016). The pivotal platforms (of these companies) are internet intermediaries, exercising control over the functioning of the ecosystem and, as a consequence, over much of societal interaction, both online and off (Lasserre and Mundth, 2017). European competition law of course prohibits *abuse* of a dominant economic position. This means that market *behaviour* of (quasi) monopolists can be scrutinized, but not the monopoly itself. In relation to big technological corporations highly visible cases have indeed been brought forward, such as a fine for Microsoft for not granting access to its interoperability

[17]Case 67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR 5751. The Court has recently held that workers that are, in essence, not self-employed also benefit from this exception: Case 413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] (nyr).

[18]See Velázquez, Buffaria, and European Commission, 2016; Chauve *et al.,* 2014.

[19]Historically, the American anti-trust rules were also aimed at breaking the yoke of the increasingly powerful trusts (Adams and Brock, 2004), as threatening a free and democratic society. Senator Sherman himself reportedly noted: 'If we will not endure a king as political power we should not endure a king over production, transportation, and sale of any of the necessaries of life', but also see for example, Justice William Douglas, in *United States v. Columbia Steel Corp*. 334 U. S. 495, 436; and former FTC chairman Pitofsky (1979).

information to a competitor, and more recently, a record-high fine for Google for preferential treatment of its own Google-shopping service.[20] Though the appropriateness of using competition law as an instrument in these instances has been critiqued, as it can be unclear whether there is actual *consumer* harm, these are examples of using a consumer-welfare focus, in which specific behaviour of the monopolists is tackled.

The increasing pivotal position of certain big corporations in the platform-economy – labelled 'data-opolies' (Stucke, 2018) – gives rise to wider concerns. These concerns relate to the impact on fundamental rights, such as privacy, and the non-transparency of algorithmic decision-making (Binns, 2017; De Laat, 2017; O'Neil, 2016; Schepp and Wambach, 2016), but also to the role as internet information gatekeepers (Lynskey, 2017), influence on democratic opinion-forming (see the Cambridge Analytica case),[21] the use of 'hypernudging' (Yeung, 2017), the creation of filter bubbles (Pariser, 2011), fake news (Persily, 2017; Zuiderveen Borgesius *et al.,* 2016), and the development of 'digital butlers' (Ezrachi and Stucke, 2017). They relate to the growing potential for direct and indirect influence on politics and democracy.

The discussion on a possible role of competition law links back to the fundamental question of why competition law exists. As indicated, current economics-based competition law would not easily consider protection of democracy – or of fundamental rights – its concern. In this light, the case of the *German* competition authority, which opened an abuse of dominance investigation against Facebook for inappropriate use of personal data, is seen as quite pivotal. In this case, the German authority applies European competition law (as it is under a European law-obligation to do) and has indicated that it expects the infringement of data-protection laws to *also* constitute an infringement of competition law.[22] Perhaps this is an example of a competition authority trying to fit 'alternative dimensions of competition' (OECD, 2017) into its analysis framework, which is interesting enough. But beyond this, there are calls to 'break up' Google (*New York Times*, 2017) or to regulate access to algorithms (Powell, 2016); calls which are at least in part aimed at competition law.

As competition law *is* an instrument to curb monopolistic power of companies, this is not illogical. Many of the concerns fall outside its current scope, however, as extending beyond concerns of 'mere' market power. Thus, it has been argued that competition law does not need (and should not) move away from its economics-informed basis (Kennedy, 2017; Langlois, 2018; Petit, 2016); the (consumer-welfare) benefits of the platforms have been pointed out in this context (Birkinshaw and Laurance, 2018). And while competition authorities are trying to gain an understanding of the specific (market) issues involved (Autorité & Bundeskartellamt, 2016; D-G for Internal Policies, 2015; Monopolkommission, 2015; OECD, 2016),[23] it has in the meantime also been argued that

[20]See Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2004] ECR 3601. See on the Google investigation: European Commission, 39740 Google Search (Shopping). Available online at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740. Accessed 28 January 2018. European Commission (2017) AT.39740 - Google Search (Shopping), 27 June. Available online at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf. Accessed 28 January 2018.

[21]*The Guardian* (2018). 'The Cambridge Analytica Files: The Story So Far', 26 March.

[22]See Bundeskartellamt (2017) Preliminary assessment in the Facebook proceeding: 'Facebook's collection and use of data from third-party sources is abusive'. Available online at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html.

[23]Note also the change in language of Commissioner Vestager, who mentions 'fairness' quite a bit (Rivas, 2015), though it is questionable whether this actually indicates substantive change.

competition law needs to urgently adapt (Khan, 2017; Stucke, 2018). The latter would mean a move away from a purely economics-based competition law and would perhaps be easier if the market is again conceptualized as being embedded in society and if market freedom and democracy are seen to be linked.

The Market and the Non-market: Actors and Interests

From the above it cannot be concluded that the market mechanism as such is under attack. Nor is that true for the pivotal position of the principle of competition within the European Union. However, these frictions points can be seen as showing a lack of balance between market and non-market interests in current competition law, at least in relation to these specific societal challenges.[24] When considering these friction points more closely, they both seem to occur where the market meets the state. It might be that it is precisely because of this locus that the economics-based focus on consumer-welfare and an exclusion of non-market interests from competition law falls short.

As indicated above, friction points between societal concerns and competition law occur in markets where the state has introduced competition (such as health care), where the market has gained powers that were previously the prerogative of the state (governing democratic societies; gathering data), where the market takes on the responsibility for public interests that are generally conceived as belonging to the state (protection of public interests, such as sustainability), or where the state considers an economic system that may inherently raise tensions with the market principle (such as in a circular economy).

The Treaty, of course, provides for balancing mechanisms. This is true for competition law: the exception for 'services of general economic interest' (Article 106(2) TFEU) is a case in point. It provides that though competition law applies to all sectors of the economy, it will take second place where it hinders the provision of 'services of general economic interest', a concept which now has been given constitutional status (Wehlander, 2016).[25] A proportionality test is involved, so that a balance can be struck between full-blown application of competition law and the protection of services that member states find important enough to have regulated for reasons of public service.[26] Furthermore, the Court of Justice has developed several balancing doctrines in its case law[27]: as indicated above, it has held that competition law does not apply to collective labour agreements; that competition law does not apply to restrictions that are inherently necessary to fulfill a public function; and also that entities that are based purely on the notion of 'solidarity' – redistribution within the group, such as in pension funds or health care funds – are placed outside the scope of competition law.[28] Thus, within the economic

[24]This can also be fitted in the EU-integration narrative of 'Market Europe' and the relative weaker position of 'Social Europe' (Scharpf, 2002; Joerges, 1997; see the Introduction to this Special Issue, Monti and Mulder, 2017).

[25]For notices and documents further refining the use of the concept, see European Commission, 'Services of general economic interest (public interest)'. Available online at: http://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

[26]For example, competition can be excluded from the market of non-urgent ambulance services (a profitable market segment) by granting a combined exclusive right to the company charged with providing urgent ambulance services (with a public service obligation).

[27]But much of this case-law predates economization so that it is uncertain how the Court itself views these judgments now. Some have re-appeared (such as the Wouters-doctrine), others linger in relative obscurity.

[28]See Joined Cases C-159 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR 637. On this case law see Boeger, 2007.

constitution of the European Union, there is already room for balancing different values and interests.

However, it is questionable whether this is enough as these balancing-mechanisms are not easy to use with regard to the friction points. Fundamentally, both Article 106 (2) TFEU and the Court-developed doctrines are based on a classic understanding of the delineation between 'market' and 'state'. For Article 106 (2), for example, it is the state that defines, and charges the company involved with, a public service obligation, not the company itself. The underlying idea is that the market operates to protect the private interest, and that the state acts in the public interest. But as a result of, amongst other processes, the decline of state intervention in the market and liberalization (Crouch, 2011; Majone, 1994), this classic division is less tenable today.[29] This is visible in the data-driven economy, where it is not the state that gathers (most) its citizens' data (with the implicit implication that it would only use these data for the common good), but private parties that gather their consumers' data (Einav and Levin, 2014), and where the pivotal platform companies have gathered a power that extends beyond the market sphere (see above). It is also visible now that corporate social responsibility has become an important driver in the private sphere, for protection of non-market interests (Perrini *et al.,* 2006).

Fitting the classic divide is a competition law focused on the efficiencies of the market-mechanism: a focus on consumer-welfare and efficiencies befits an analysis of pro- and anti-competitive effects in the market sphere; balancing is possible, but only where the state (acting in the public interest) is involved in shaping this public interest. The friction points show that where the classic dichotomy breaks down a purely economics-based competition law cannot provide an adequate response. It leaves little room to consider non-market interests pursued by private parties and, at the same time, leaves little room for competition law-based acting upon market power used beyond the market-realm.

III. Competition Law in the Economic Constitution

The friction points provide stepping stones for considering whether competition law fits the EU's constitutional set-up, now including the social market economy concept. The analysis so far has started from the premise that to support a social market economy, the economic constitution needs to provide balancing mechanisms between the market and the non-market. It has shown that competition law is an important building block of the European economic constitution, and it has provided illustrations where, in competition law, a mere focus on market interests falls short as a response to societal concerns.

But before considering whether competition is the best place (in the economic constitution) to provide a balancing of different concerns it must be considered whether competition law's current economics-based focus *necessarily* follows from its constitutional context. Supporting that view is that the 'consumer' is alluded to in the exception to the cartel prohibition. From this, however, it does not necessarily follow that competition law is an instrument *only* to protect consumer welfare, though it does seem to exclude (in the context of Article 101 TFEU) competition law as an instrument to protect producers. So, there is a hint here, but not a final answer. A first argument to the contrary lies in the consideration that competition law does not function in isolation. As part of the

[29]For a general discussion see Weintraub, 1997; for a USA perspective, see Stark, 2010.

wider European constitutional context, the goals of the European Union itself are relevant. These, now, encompass (amongst others) sustainable development and a social market economy (Article 3 TEU). Furthermore, the Treaty provides 'linking clauses' – one of them relating to environmental protection. This leads, at the very least, to the conclusion that there is no hierarchy between on the one hand competition concerns, and on the other, environmental protection and sustainable development in the Treaty system (Kingston, 2011; Monti, 2000).

The economic constitution provides additional support. As indicated above, it not only consists of competition law, but also encompasses free movement rules. In this context, let me recall that a legal system is perceived to be 'better' if its constituting parts are coherent (as mathematical proofs are 'better' the more elegant they are). If both competition law and the free movement provisions are part of constituting the internal market, they ought to fit together in a systemic, coherent way. But they have diverged: in contrast to competition law, free movement and state aid law have remained quite flexible in balancing between market interests and social interests. This flexibility was present in pre-economization assessments in competition law as well; a more generous balancing between market and non-market interests used to be visible.[30] From the choice of the European Commission to focus its enforcement efforts on cases with detrimental effect on consumer welfare it does not follow that convergence with the free movement provisions would not now be possible. Competition provisions are flexible, and can encompass a more generous approach. Importantly, the case-law of the Court of Justice, where it is emphasized that European competition law can have several goals, supports this conclusion.[31] Thus, a different balance between market and non-market interests within competition law is, at very least, constitutionally possible.

This does not necessarily mean that competition law is also the *best* place to provide balancing between market and non-market interests. Competition law could, of course, remain isolated from non-market concerns. Indeed, legislation can provide for social protection, protection of privacy, sustainability, democracy and other public interests. The balance between market and non-market interests could be found in the *other* building blocks of the economic constitution, especially in the free movement provisions, where such a balance is more easily achieved. However, there are limits to this approach. Of course the legislative process provides legitimacy to a balancing of different interests, but the European process in general favours market-integrating tendencies and is less concerned with nation-bound social concerns (see Nic Shuibhne's contribution to this Special Issue). Furthermore, legislation is also not always feasible and might lack flexibility.

Another, fairly radical, option is to throw out competition law altogether. But that is both unnecessary and does not rest well with the internal market concept and with the market as a non-contested basis for the economic constitution. Society agrees on the market mechanism as currently the best available option to create welfare; in many markets competition (law) works just fine. This contribution has shown friction points – and has posited that these occur primarily where the market meets the state – but from these it cannot be inferred that in general the market mechanism ought to be replaced with a different way of ordering economic relations.

[30]See, for example, the *CECED*-case: Case IV.F.1/36.718, Commission Decision 2000/475/EC [2000] OJ L 187.
[31]Most importantly: Case 8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR 4529.

The preferred option must be, therefore, *recalibration* within European competition law, in which the role of the market in society is considered. The market itself and, therefore, also competition law, can and *ought* to provide for a well-designed balancing of market interests and non-market interests. Current balancing mechanisms fall short, at very least in the instances pointed to above, and a well-informed balance between the market and the non-market has been lost.

Competition Law, the Economic Constitution and a Social Market Economy

This contribution has shown that there are friction points between European competition law and societal concerns. Examples of these friction points are public-interest focused co-operation between private actors and the protection of public interests in some liberalized markets, and the impact on democracy of pivotal platform-corporations. The friction points seem to occur where the classic dichotomy between market and state weakens. In these instances an economics-based approach to competition law falls short of providing an adequate response to societal concerns. As shown, European competition law is one of the important building blocks of the European economic constitution, a concept that – in its origin – encompassed a clear link between the market and democracy and between the market and its societal context. An economic constitution that serves a social market economy, now embedded in the constitutional set-up of the EU itself, calls for European competition law to move towards a more fine-tuned approach to counter this disconnect from society.

Such a more fine-tuned approach can be achieved along the lines sketched in the previous section, and is based on fundamental reconsiderations. (Re) conceptualize the economic constitution as part of furthering the EU's goal of a social market economy. Re-embed competition law in its social context. Be responsive to the changed reality of the interplay between the state and the market. Re-connect to the other building blocks of the internal market. Use the legal tools present in European competition law to come to an actual balancing (Gerbrandy, 2017a, 2017b). Sure, on a concrete level – the level of actual cases – this might be messier than using a consumer welfare standard across the board. It means that in some cases, the economics toolbox must be let go as falling short of providing answers. It means allowing multiple goals of competition law. In that way competition law can be linked back to notions of sustainability and solidarity, and ultimately, freedom and democracy, and serve a social market economy.

Correspondence:
Anna Gerbrandy
Competition Law at Utrecht University
School of Law, Newtonlaan 201, 3A.31
3584 BH, Utrecht
Netherlands
email: a.gerbrandy@uu.nl

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