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The Transformative Socio-Economic Effects of EU Competition Law

From Producerism to Consumerism

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I Introduction

In the following, I will explore how a certain economic rationality is created, entrenched, and mobilised through European competition law and policy. More particularly, I will explore a question regarding European competition law's role in the transformation of frameworks of knowledge in particular market contexts, and reflect critically on this from an (EU) constitutional perspective.[1] I will argue that EU competition law, particularly cartel prohibition as dominantly interpreted by the European Commission and many national competition authorities, nudges towards a socio-economic orientation within Member States, which structurally favours interests on the demand side of markets (consumers) over and above that of the supply side (producers). The so-called modernisation and economisation processes of European competition law entrench a framework of decision making in the Member States that structurally favours this demand side of markets.

Whereas this may seem the preferred 'state of being' in most consumer-centric market societies, many Member States may accord a social function to the supply side of market that goes beyond their purely economic function and serves a broader social function that is reflective of a culture, social heritage, and identity. Producers may be accorded a central organising function in society that enables them to provide a socio-economic identity.

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[1] See the research agenda of Andrew T.F. Lang, 'The Legal Construction of Economic Rationalities?' (2013) 40 *Journal of Law and Society*, 155–71.

The protection of guilds (lawyers, waiters in France, pharmacists), certain ways of making products (pasta, wine, *reinheitsgebot* (the German 'Beer Purity Law')), or the size of stores and their opening times may all fulfil such social functions. Consumerist prioritisation may therefore clash with systems of governance that have historically been organised on a more neo-corporatist basis and accordingly incorporate *producerist* objectives or interests.

Although the Court of Justice of the European Union (formerly the European Court of Justice) has explicitly created avenues to accommodate such *producerist* interests within European competition law, there is a clear (economic) *consumerist* orientation within the modernisation and economisation processes that have shaped the European competition rules over the last decade or so. The 'consumerist turn' in European competition policy focuses on purposive rights and interests on the demand side of the market, in particular, primarily as an interest in competitive prices and choice for consumers. The legitimacy of this turn can be debated from the perspective of the European constitutional framework, which allows for social diversity and incorporates an express commitment to the accommodation of various modes of governance logics at Member State level.

I shall illustrate the transformative potential of EU competition law upon the basis of the European Commission's approach towards the liberal professions and a more recent example in the Netherlands, which demonstrates how EU competition law may transform a system of governance towards a logic of (economic) consumer welfare as a primary principle of socio-economic organisation whenever firms cooperate to achieve public interest objectives. I shall reflect on this finding from a normative perspective that is informed by the constitutional principle that a liberal society, such as the European Union purports to be, contains – by its very nature – a diversity of social spheres, and hence its institutions should act carefully in situations in which choices are made that implement a specific one dimensional valuation of a social context that may eventually inhibit socio-economic plurality. This normative preference for plurality is embedded within the constitutional foundations of the Treaty of Lisbon and resonates strongly with the case law of the Court of Justice of the European Union.

II Transformative Effects of the Economisation and Modernisation of EU Competition Law

EU competition law consists of a system of open norms. Of most relevance here is the cartel prohibition (Article 101 of the Treaty on the

Functioning of the EU (TFEU)) which prohibits firms from entering into agreements that restrict competition, but may be exempted from the prohibition in cases where cooperation leads to efficiencies that are beneficial for consumer welfare. In particular, the meaning of consumer welfare is a highly contested legal category. Clearly, such a system of open 'neutral' norms can be seized by powerful actors in order to entrench and mobilise agendas, and, it is argued, this is what happened when the European Commission – gradually in the course of the 1990s – adopted its own particular version of a consumer welfare approach.[2]

In the late 1990s, the European Commission initiated a more economic approach in European competition law.[3] One of the policy effects of this approach implied that only 'economic efficiencies' or the 'pro-competitive effects' of competition-restrictive agreements between firms would be accepted in order to fulfil the exemption criteria of the cartel prohibition.[4] One of the important effects that this has had on the legal assessment of the restrictions on competition is that decisive value was now to be attached to the objective qualification and concretisation in economic terms of the benefits claimed, which may be effectuated by restrictive agreements in order to qualify for an exemption from the cartel prohibition in Article 101(1) TFEU.[5] Upon this basis, the exemption criteria of Article 101(3) TFEU provide a common 'monetised' scale to evaluate the restrictive objectives of competition law.[6] In principle, all competition-restrictive interests are to be evaluated upon the basis of Article 101(3) TFEU.

In addition, and importantly, what is known as the 'modernisation' of EU competition law has – since 2004 – involved a decentralisation of the

[2] Heike Schweitzer and Kiran Klaus Patel, 'EU Competition Law in Historical Context: Continuity and Change', in: Kiran Klaus Patel and Heike Schweitzer (eds.), *The Historical Foundations of EU Competition Law* (Oxford: Oxford University Press, 2013), pp. 207–30.

[3] See Anne C. Witt, *The More Economic Approach to EU Antitrust Law* (Oxford: Hart Publishing, 2016).

[4] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97; 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.

[5] Commission Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97; 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; Lars Kjølbye, 'The New Commission Guidelines on the Application of Article 81(3): an Economic Approach to Article 81' (2004) 25 *European Competition Law Review*, 566–77.

[6] Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law' (2017) 5 *European Law Review*, 635–56, at 635.

application of the competition rules.[7] This process had two significant and immediate effects. Firstly, the European competition rules were to be applied and enforced by both the national competition authorities and the European Commission simultaneously. This raised the need for uniform application of the competition rules and a subsequent explosion of instruments and knowledge-sharing instruments (such as the creation of the European Competition Network) in order to ensure that Article 101 TFEU would be applied by national competition authorities in congruence with the uniform guidelines of the European Commission. Secondly, undertakings themselves were, from now on, to 'self-assess' their status under the competition rules, whereas formerly they had been able to request official 'exemption decisions' from competition authorities. Again, to this end, the European Commission issued a plethora of guidelines, block exemptions and other soft law instruments to provide firms, and, in particular, their lawyers and economic consultants, with the tools to conduct such self-assessments.

The governance context that is of interest for the development of the argument that economisation and modernisation have potentially formative effects concerns that of (quasi) self-regulation. Competitors meet and may be stimulated, or sometimes required, to self-regulate within state governance systems in order to set standards for the pursuit of – sometimes deontological – objectives.[8] This may happen for technical standards, environmental objectives, labour conditions, minimum trade standards and so forth. Agreements that flow forth from the pursuit of such objectives may restrict competition, for example, through output restrictions, pricing agreements and prohibitions to trade in products that have been produced beneath certain trade standards.[9] Such private regulatory contexts raise competition law issues, since they are likely to restrict the independent operation of the undertakings in the markets concerned.[10]

[7] Rein Wesseling, *The Modernisation of EC Antitrust Law* (Oxford-Portland OR: Hart Publishing, 2000).

[8] See, for example, Laurens Ankersmit, 'Globalization and the Internal Market: Process-based Measures within the EU Legal Order' (2015, Ph.D. thesis, Vrije Universiteit Amsterdam); see, also, Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

[9] Schepel, ibid.

[10] Schepel, n. 8 above; Björn Lundqvist, *Standardization under EU Competition Rules and US Antitrust Laws: The Rise and Limits of Self-regulation* (Cheltenham: Edward Elgar Publishing, 2014); Mislav Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law* (Oxford: Oxford University

When self-regulation leads to restrictions on competition, there exist, roughly, two 'escapes' within the European competition rules. Firstly, this occurs on the supply side of the market in which the self-regulation takes place. The Court has decided, in different, albeit connected, lines of case law, that the supply side of a market may be organised in a manner such that the companies involved are sufficiently restricted in their ability to regulate in a self-serving manner. This may be because the public law framework installs sufficient oversight and thus channels the private decision makers towards exclusively serving public interests or because the objectives pursued are legitimate, and both necessitate and justify some restrictions on competition.[11] In this case, the restrictions on competition can be *excluded* from the scope of the cartel prohibition in Article 101(1) TFEU. Secondly, as discussed previously, the demand side of the market may be sufficiently 'compensated' for the resultant restrictions on competition due to an increase in consumer welfare. Certain minimum technical standards may restrict competition on those standards, but can lead to quality increases in products that consumers are willing to pay for and thus positively contribute to consumer surplus. In this case, the restrictions on competition can be exempted from the cartel prohibition upon the basis of Article 101(3) TFEU.

Two important effects can be expected from the dual development of the economisation and modernisation of EU competition law. Firstly, that competition authorities within Europe should pursue cases upon the basis of the idea that where competing firms jointly pursue, for example, fair trade standards, they should only do so if they can demonstrate efficiency, and that consumers will directly benefit from the potential restrictions on competition. Hence, their actions should be completely in accordance with an understanding of what matters and what can be validated in terms of the market's willingness to pay for certain restrictions on competition. Secondly, in the process of the self-assessments, informal opinions and individual guidance, the competition authorities aim to internalise this economic, consumer-led market rationale into the responsive minds and calculus of the undertakings themselves.

Press, 2016); Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2006), chapter 2, pp. 20–52; Renato Nazzini, 'Article 81 EC Between Time Present and Time Past – A Normative Critique of "Restriction of Competition" in EU Law' (2006) 43 *Common Market Law Review*, 497–536; Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review*, 1057–99.

[11] Based upon, for example, respectively Case C-185/91 *Reiff Bundesanstalt für den Güterfernverkehr* [1993] ECR I-5801 para. 22 and Case C-309/99 *Wouters* [2002] ECR I-1577.

The entrenchment of this economic rationality may have formative effects, in particular, given the fact that the importance of private regulation on the supply side of markets is increasing, and non-state actors determine a growing part of the conditions, rules and regulations that govern transnational trade.[12] In addition, and increasingly so, private regulatory initiatives pushed by NGOs and enhanced consumer awareness incorporates a responsiveness with respect to the pursuit of public – global – policy challenges, such as the protection of the environment, animal welfare, and human rights. Examples range from sustainability initiatives in the forestry sector to the setting of minimum standards for labour conditions in the clothing industry, and physical integrity rights in the extractive industry.[13] Such initiatives with wider welfare effects are costly and require investments that companies are often only willing to make if free-rider problems and first-mover disadvantages are resolved.[14] However, within this economic rationale, a group of companies that collectively adopt 'social objectives', such as a minimum fair-trade standard, will – within the framework of EU competition law – have to demonstrate that these measures are eventually beneficial for consumer welfare. For example, theoretically, a group of firms that collectively decide not to buy from suppliers that violate human rights is permitted only if consumer welfare increases in a quantifiable manner.[15]

Some (in particular, economists) will argue that this makes good sense, and posit that where pubic interests are at stake society wants to protect: and regulation is the answer.[16] The state can legislate, and, upon that basis,

[12] For example, Fabrizio Cafaggi, 'Transnational Private Regulation: Regulating Global Private Regulators', in: Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar Publishing, 2016), pp. 212–41.

[13] Respectively, the Forest Stewardship Council (FSC), the Bangladesh Accord, the Voluntary Principles on Security and Human Rights and the International Licensing Platform.

[14] The first-mover disadvantage concerns a situation where just one company decides not to offer certain unsustainable (often cheaper) products and may consequently loose a critical amount of customers to its competitors which remain selling the cheaper product. Such 'coordination' problems can be resolved if companies pursue welfare initiatives collectively. The free-rider problem concerns a situation in which a company invests in sustainability – for example, by virtue of a marketing campaign intended to inform consumers of the importance of fair trade – that may, consequently, benefit competitors that do not make such investments but nevertheless do benefit from consumers who are more willing to purchase sustainable goods.

[15] Such concerns were voiced in the context of the Bangladesh accord, see, for example, https://friendsoftheoecdguidelines.wordpress.com/tag/bangladesh-accord.

[16] For example, Maarten Pieter Schinkel and Yossi Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 *International Journal of Industrial Organization*, 371–98.

take issues away from the market logic. However, regulation may not always be a realistic or feasible option. Moreover, as noted, governance structures may enable, stimulate or require the private sector explicitly to incorporate public interest objectives. Often, private regulation may also be a generic response from the private sector to a failure or unwillingness on the part of the nation state and conventional international law making to address cross-border challenges effectively.[17] It is suggested that, applied in this manner and context, the European competition rules have the potential to enforce and entrench a specific economic rationality that will have effects on the way in which undertakings pursue such interests.

It is illustrating, in this respect, to refer to two ideal type categories that can be used to point to the potential transformative effects of EU competition law. James Whitman introduced the ideal types of *consumerism* and *producerism* to discuss and compare the constitutive role of law in these respective imaginaries of society. A legal system orientated towards consumerism would be based around the idea that the individual as a consumer is primarily interested in low prices, product choice, and access to credit. The sovereignty of the consumer is prioritised within a legal system that structurally favours the demand side of a market. In contrast, the *producerist* legal system shifts attention to the supply side and focuses on the importance and centrality of the role of producers in society, combined with the dedication of a social function of *producer identity* in society. Clearly, any form of idealisation of the role of the producer within society risks being equated with a leaning towards fascism. However, producer identity has also been connected to positive social functions connected to culture, the arts and heritage, such as creating and retaining identity; modifying values and preferences for collective choice; building social cohesion; contributing to community development; and fostering civic participation.[18] These can all be seen as different stages in the appropriation of cultural content into the public life of members of society.

[17] Philip Schleifer, 'Creating Legitimacy for Private Rules: Explaining the Choice of Legitimation Strategies in Transnational Non-State Governance', EUI Working Paper 2015 RSCAS 2015/62.

[18] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (London: Routledge Kegan & Paul, 1984); M. Sharon Jeannotte, 'Singing Alone? The Contribution of Cultural Capital to Social Cohesion and Sustainable Communities' (2003) 9 *International Journal of Cultural Policy*, 35–49. Robert D. Putnam, *Making Democracy Work: Civic Institutions in Modern Italy* (Princeton NJ: Princeton University Press, 1993).

Whitman juxtaposes Europe (conflated with Germany and France) as traditionally perceived to be oriented more towards the supply side, with the United States as cultivating the more fundamental consumerist interest. He notes that, as with all ideal-type approaches, legal systems do not correspond fully in all their characteristics with the posited ideal types, but he identifies some fundamental choices within these legal systems that do demonstrate differences that can be explained, at least in part, by the dominance of the (economic) consumer or producer interests.

II.1 Moving towards Consumerism: Liberating the Liberal Professions

In the course of the 1990s, in parallel with developing the more economic approach, the European Commission adopted a new policy with respect to the liberal professions in the Member States.[19] The sector is usually characterised by a high level of regulation, in the form of either state regulation or self-regulation by professional bodies. This regulation can affect, *inter alia*, the numbers of entrants into the profession; the fees or prices that professionals may charge and the permitted charging arrangements (e.g. contingency fees); the organisational structure of professional service undertakings; their ability to advertise; and the tasks which are reserved for the members of the profession. The European Commission acknowledged early on that some regulation in this sector is justified, but, as part of the more economic approach, it started to pursue an agenda on the basis of the idea that, in some cases, more pro-competitive mechanisms can and should be used, instead of certain traditional restrictive rules.[20] Former Commissioner of Competition Mario Monti (2003) explains the liberalisation policy of the Commission in this regard as follows:

> The present level of rules and regulation of liberal professions owe some debt to historical convention. How many are still needed in the modem world? Do they hinder or favour the development of the sector? Let me be provocative: Do they protect the consumers or the professionals? I propose to assess whether existing rules and regulations, which, remember, were devised and enacted in a very different economic context to that

[19] Liberal professions are occupations requiring special training in the liberal arts or sciences, for example, lawyers, notaries, engineers, architects, accountants and pharmacists.

[20] See, further, Ida Wendt, *EU Competition Law and Liberal Professions: An Uneasy Relationship?* (Leiden: Brill, 2012).

> which exists today, continue to serve the legitimate purposes of the protection of the public interest. I would also like to assess whether they are the most efficient mechanisms available in the current market situation. It is clear that across the [European Union] there are different regulatory mixes. As the study shows, different regulatory choices produce different outcomes in the market and it is possible that some regulatory mixes have more beneficial market outcomes than others. *It should be difficult to argue against those that have the least distorting effect on the workings of the market, while delivering the same, or even higher, turnover.*[21]
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> (emphasis added)

On the one hand, in the first part of the speech, competition law is perceived as a constructive tool of European law, testing old conventions and requiring renewed articulation of the pursuit of public interests. On the other hand, in the second part of the speech, the idea emerges that self-regulatory systems should, however, be tested upon the basis of their 'efficiency' merits: 'It should be difficult to argue against those that have the least distorting effect on the workings of the market, *while delivering the same, or even higher, turnover.*'[22] As discussed, the competition rules, in particular, Article 101 TFEU as interpreted by the European Commission, place great emphasis on the benefits that consumers accrue from the process of competition. Solely by virtue of this fact, social relations between producers, which collectively pursue interests on the supply side of the market, are on a back footing. I argue that this amounts to a potentially significant formative effect of the competition rules with regard to governance structures in countries that, traditionally, have a more 'producerist' orientation.[23] The adoption of this efficiency-based rationale has been pushed in the incorporation and 'soft' review of national regulatory systems, which has largely been adopted by national competition authorities. Here, we see the beginnings of the mobilisation of a specific economic rationality – one that is capable of changing the socio-economic face of the Member States. The extent to which this push has resulted in structural reforms of (self-)regulatory systems is beyond the scope of this chapter, but two other case examples

[21] Mario Monti, Commissioner for Competition: European Commission, Competition in Professional Services: New Light and New Challenges; for Bundesanwaltskammer Berlin (2003), see: http://europa.eu/rapid/press-release_SPEECH-03-149_en.htm, last accessed 10 January 2019.

[22] Ibid.

[23] See James Q. Whitman, 'Consumerism versus Producerism: A Study in Comparative Law' (2007) 117 *Yale Law Journal*, 340–406, at 343.

from the Netherlands serve as an illustration of the potential formative effect this rationale may have on the pursuit of public interest objectives by private economic actors within a governance system that is traditionally focused on the supply side of markets.

II.2 Transforming Socio-Economic Regulation in the Netherlands

Competition law in the Netherlands is, today, completely based upon EU competition rules. Before its introduction in 1998, competition law was largely absent from the Dutch legal order and the Netherlands was often referred to as a 'cartel paradise' during that time. There were cartels in all sectors and branches of the economy, and it is estimated that there were as many unregistered cartels as there were registered cartels with the Ministry of Economic Affairs at the time.[24] Registered cartels ranged from dental prosthodontics, bailiffs, notaries, milk producers, and credit card companies. The relatively relaxed attitude towards cartelist behaviour can be explained because, historically, the Dutch system of social and economic policy making has been heavily consensus based, strongly reliant on the private sector, and often referred to as the 'polder' model.[25] This has been reflected in a plurality of advisory and consultative bodies that exist at all levels of policy making. Consensus-based policy making used to be most clearly reflected in so-called 'product boards' that would include all interested parties in a production chain within a public institutional framework that would be involved directly in the development of social and economic policy making, relevant to the economic sector involved. As such, policy concerning livestock would involve the product board for livestock, meat and eggs as an intermediary between government and industry in order to ensure a smooth transition between politics and industry interests. Consensus-based policy making remains a central feature of Dutch politics today.

However, whereas, before, the structures of policy making would only incorporate input from the industry within an otherwise traditional legislative procedure, recently, in contrast, the Dutch system of

[24] See www.volkskrant.nl/economie/zeshonderd-kartels-vragen-legale-status~a455732, last accessed 10 April 2018.

[25] Jaap Woldendorp, 'The Polder Model: From Disease to Miracle? Dutch Neo-corporatism 1965–2000', 2005 Ph.D. thesis, Vrije Universiteit Amsterdam, pp. 267–9. See, also, Bram Bouwens and Joost Dankers, 'Competition and Varieties of Coordination', in: Keetie E. Sluyterman (ed.), *Varieties of Capitalism and Business History: The Dutch Case* (Abingdon: Routledge, 2015), pp. 103–29.

governing has moved towards adopting governance structures which, as far as possible, outsource the pursuit of public-interest objectives to the private sector. The government coins this as a programme of so-called future-proof legislation that seeks to activate the 'self-organisational' potential of societal actors. This governmental approach is partly a response to the increasing complexities of societal challenges that often require transnational solutions and a recognition of the importance of creating regulatory flexibility towards innovation. In other words, this programme of future-proof legislation considers traditional legislation to be incapable of responding to the pace of change within society and is thus unable to respond fully to the needs of an innovation-based society. The main feature of the legislative reorientation as a whole is to stimulate development by virtue of which private actors increasingly incorporate public-interest objectives. In particular circumstances, this may lead to a clash with competition law. One field in which this has grown to be particularly visible is within the area of sustainability, specifically, the pursuit of social and green objectives upon the basis of industry initiatives.[26]

II.3 A Clash between Competition and Sustainability in the Netherlands

The first case that may illustrate this concerns the so-called Energy Agreement for Sustainable Growth (Energy Accord). The Energy Accord involved around forty organisations in the definition of a more sustainable energy and climate policy for the Netherlands.[27] The central government had organised so-called round tables with a wide array of

[26] A number of international publications have now looked at these Dutch cases. Monti and Mulder, n. 6 above, at 641; Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 *World Competition*, 539–62; Gerbrandy, 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority' (2015) 40 *European Law Review*, 769–81.

[27] The plan can be found at www.ser.nl/nl/publicaties/overige/2010-2019/2013/energieakkoord-duurzame-groei.aspx, last accessed 10 April 2018). See, for the preliminary competition law assessment by the Dutch competition authorities ACM: ACM, 'Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord', available at: www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord/, last accessed 10 December 2018). See, also, Erik Kloosterhuis and Machiel Mulder, 'Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants' (2015) 11 *Journal of Competition Law & Economics*, 855–88.

organisations. These included regional and local government, employers' associations and trade unions, nature conservation and environmental organisations, and civil society organisations and financial institutions.[28] The Dutch government has framed these round-table negotiations and the outcomes at the time as 'agreements' both with and amongst the private sector with respect to the pursuit and attainment of sustainability objectives. Obviously, where such agreements include private actors that also compete in their respective market, issues with competition law may arise. From a competition law perspective, a problematic aspect of the early parts of the agreement concerned the closing down of coal-fuelled power plants from the 1980s. The energy companies that took part in the negotiations decided to close down the plants as part of an incentive path that would encourage the development of more sustainable energy sources in the long run. The trade association of the Dutch energy industry, *Energie Nederland* (EN) asked for an analysis from the Dutch Competition Authority (ACM) on whether the planned agreement on closing down coal power plants could be reconciled with Article 101 TFEU (and its equivalent in Article 6 of the Dutch Competition Act). The ACM qualified it simply as an agreement between undertakings within the meaning of the competition rules. The assessment of the ACM concluded that, firstly, the closure of coal power plants constituted an output restriction that would fall within Article 101(1) TFEU. By reducing production capacity, the undertakings involved would have less capacity to produce energy than they would have had without the agreement.[29] Secondly, it could not be exempted upon the basis of the exemption criteria of Article 101(3) TFEU.[30] For the latter analysis, the authority conducted an extensive cost-benefit analysis in accordance with the more economic approach set out by the European Commission. The value of the agreement's benefits was determined upon the basis of the costs of other (efficient) measures which, as a consequence, would not have to be taken (i.e. avoided costs). The ACM concluded that comparing the estimated price increase with the

[28] Interestingly, consumer interests were not represented.

[29] The production capacity that was to be closed under the agreement represented approximately 10 per cent of total production capacity available in the Netherlands.

[30] The criteria are: (1) The agreement contributes to an improvement of the production or distribution of goods or to the promotion of technical or economic progress; (2) The agreement allows consumers a fair share of the resulting benefit; (3) No restrictions that are not indispensable are imposed on the undertaking involved; (4) Competition is not eliminated in respect of a substantial part of the products or goods in question.

environmental benefits revealed that the agreement's expected drawbacks to consumers in terms of price for electricity would be substantially higher than the estimated value of the positive effects in terms of avoided costs. Subsequently, the closure of coal-fuelled power plants was removed from the accord.

The second case concerns the production of chicken meat. At the beginning of 2013, the main branch organisation on foodstuffs in the Netherlands announced that 'another chicken' would be introduced into Dutch supermarkets. Most of the organisations from the poultry sector, the chicken-meat producing industry and the supermarkets came together during a round-table meeting to discuss a more sustainable production of chicken meat ('the Chicken of Tomorrow'). The aim of these negotiations was to introduce a sectorwide sustainability impulse upon the basis of the introduction of a minimum standard for animal welfare. Dutch livestock holders responded to the increased attention within Dutch society to animal welfare and the explicit request from the Dutch government to incorporate animal-welfare objectives within the supply chain.[31] The Dutch government had indicated that the policy in this area should be informed and guided on the basis of sectorwide initiatives.[32] A sectorwide statement of intent was signed which committed the livestock sector, the meat-producing industry and retailers to move towards a *status quo* in which only sustainable produced meat would be sold from 2020 onwards. The 'Chicken of Tomorrow' initiative was introduced within this context.[33] Again, the ACM was invited to

[31] See in Dutch: Commissie van Doorn, 'Al het vlees Duurzaam: De doorbraak naar een gezonde, veilige en gewaardeerde veehouderij in 2020', 2 September 2011, available at: www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2011/11/23/al-het-vlees-duurzaam-de-doorbraak-naar-een-gezonde-veilige-en-gewaardeerde-veehouderij-in-2020/al-het-vlees-duurzaam.pdf, last accessed 10 December 2018. The case has led to some debate in the Netherlands: Laurens Ankersmit, 'Het einde van de kiloknallers? De grenzen aan zelfregulering van duurzaam vlees onder het kartelverbod' (2011) 23 *Actualiteiten Mededingingsrecht*, 149–55; Jotte Mulder, 'Een duurzame maatschappij, wat mag dat kosten?' (2015) 28 *NJB* (*Nederlands Juristenblad*), 1912–1920.

[32] Letter with the position of the Dutch government, 'Toekomst van de intensieve veehouderij' Official parliamentary documents: 28973 nr. 134, accessible at: https://zoek.officielebekendmakingen.nl/kst-28973-137.html, last accessed 10 April 2018.

[33] ACM assessment of the sustainability agreements 'Chicken of Tomorrow' (ACM/DM/2014/206028), January 2015, p. 2. The minimum standards that were part of the 'Chicken of Tomorrow' initiative concerned agreements on the keeping of a slower growing breed of chickens, more space for chickens upon the basis of a reduction of the number of chickens in a set space, improved conditions within the coops, stricter controls on animal-welfare standards, a more natural day-night rhythm, lowering of the use of antibiotics, the use of 100 per cent sustainable soya food and a number of other

assess this cooperation from a competition law perspective. The assessment of the ACM concluded that the sustainability initiative qualified as a restriction on competition in the retail market for chicken meat because 'regularly' produced chicken meat would no longer be for sale in Dutch supermarkets.

The ACM concluded that the initiative limited choice for consumers and removed a competitive benchmark. The analysis of the ACM aimed to provide guidance to companies that would want to implement such sustainability initiatives in the future as part of their self-assessment. For this purpose, the ACM, by way of 'guidance', conducted a 'willingness to pay' analysis.[34] It considered that the first condition of Article 101(3) TFEU (i.e. the contribution to the production or distribution of goods or to the promoting of technical or economic progress), would only be fulfilled if the measure would eventually lead to a higher consumer surplus, which was to be determined upon the basis of the willingness of consumers to pay more for the 'added' animal welfare. Consumer panels were asked to choose between different types of chicken meat that differed with regard to the level of animal welfare that was taken into account in the production of the meat. The economic analysis of the ACM concluded that the willingness to pay for the new chicken was not enough to justify the increase in the consumer price.[35] On balance, according to the study, there would be a negative effect on consumer surplus of 0.64 euro per kilogram of chicken

environmental measures. The initiative met with a lot of criticism, which, according to animal welfare organisations, would improve the conditions of chickens only marginally. Indeed, at first sight, the measures do look minimal and the improvements in chicken welfare would not be ground-breaking.

[34] Economic assessment ACM, *Effects of the Chicken of Tomorrow – Costs and Benefits for Consumers* –Machiel Mulder, Sebastiaan Zomer (ACM) and Thomas Benning, Johan Leenheer (CentERdata), October 2014, available at: www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition, last accessed on 8 February 2019]). See, also, Kloosterhuis and Mulder, n. 28 above.

[35] Ibid., p. 26. On balance, according to the study, there would be a negative effect on consumer surplus of 0.64 euro per kilogram of chicken breast. Moreover, the ACM considered that it would be preferable if, instead of introducing a minimum standard, consumers would be better informed about animal welfare upon the basis of labels. This could then also become part of a broader commercial strategy of a supermarket to attract consumers who value these sustainable products. According to the ACM, it would therefore be more appropriate if sustainability initiatives were to focus on measures to improve animal welfare by educating consumers and stimulating consumer confidence in other types of production, as part of a competitive process eventually leading to increases in consumer surplus.

breast.[36] Moreover, the ACM considered that it would be preferable if, instead of introducing a minimum standard, consumers were better informed about animal welfare upon the basis of labels. This could then also become part of a broader commercial strategy of a supermarket to attract consumers who value these sustainable products. According to the ACM, it would therefore be more appropriate if sustainability initiatives were to focus on measures to improve animal welfare by educating consumers and stimulating consumer confidence in other types of production, as part of a competitive process.[37] The initiative was, subsequently, abandoned.

The outcome in the two cases led to calls from civil society actors and the economic sectors concerned for a reconsideration of the constraints of competition law with respect to sustainability initiatives. It initiated a broader debate within the Netherlands regarding the right balance between EU competition law and sustainability. Importantly, the Dutch government considered the way in which the competition law framework was applied to be an ongoing obstruction to its ambition to involve non-state actors increasingly in the formulation of socio-economic policy as part of the earlier discussed future-proofing of its legislative agenda. Subsequently, the Ministry of Economic Affairs was tasked with the challenge of resolving this tension.

II.4 The Position of the European Commission

This initially resulted in a legislative instruction document that set out some amended conditions for the ACM to take into account in its assessment. The main changes concerned, firstly, the fact that the positive long-term effects of the initiatives would have to be considered with respect to the agreement, in so far as it was part of a wider package of measures, *as a whole.* Secondly, the potential positive effects would not only have to take into account the long-term – future – users, but also the positive effects for *society as a whole*. These two criteria can be seen as a direct response to the two cases that were highlighted above, potentially leading to different outcomes of the ACM assessment.[38]

[36] Ibid., p. 26.

[37] ACM assessment of the sustainability agreements 'Chicken of Tomorrow' (ACM/DM/2014/206028), January 2015, p. 7.

[38] Arguably, if the Energy Accord would have been considered as a whole and, consequently, if the closing down of the coal plants would not have been considered in isolation, the outcome of the assessment may have been different. Perhaps, the fact that

However, when the draft instruction was put up for a so-called internet consultation, in which interested parties could provide comments on the draft proposal, the European Commission intervened.[39] The Commission objected to the new criteria and considered them to be contrary to European Competition law. In its letter to the Dutch government, the Commission emphasised that it considered the assessments of the ACM with respect to the two cases to be fully in accordance with EU competition law. Firstly, the Commission considered that the requirement to take into account the agreement as a whole was potentially confusing. The Commission acknowledged that it might be necessary to assess an entire package of agreements but posited that this was already part of the third condition of Article 101(3), which deals with the indispensability of the restrictions. Where an agreement that restricts competition is necessary for the benefits accrued by other parts of a package of an agreement, it may already fulfil the 'indispensability' condition of Article 101(3). This, of course, assumes that those benefits have been monetised. What is more interesting is that, with regard to the new instruction, the Commission also considered that it was not possible to consider the potential positive effects for society as a whole. This would be contrary to the text of Article 101(3) TFEU which explicitly refers to the positive advantages for the 'users' of the products or services:

> If certain policy goals are considered valuable for society as a whole, while not by the consumers in the relevant market, *regulation* is the right tool to safeguard them and not competition law. In other words, competition law does not stand in the way of regulation to achieve these goals, but cannot substitute for the absence of such regulation.
>
> (emphasis added)

Therefore, the Commission urged the government not to install the legislative instruction. In other words, the Dutch government could not simply ask or agree with the private sector in order to pursue

the closing down of the coal plants was an inherent part of a wider agreement, concerned with bringing together various societal actors with the intention of creating co-responsibility for the objective of a sustainable environment, could then have influenced the assessment. Moreover, with respect to the 'Chicken of Tomorrow', the willingness to pay assessment conducted by the ACM would have to be considered insufficient since the potential positive benefits for society as a whole would also have to be considered.

[39] Commission letter, attachment to Government Letter of Ministry of Economic Affairs to Parliament of 23 June 2016 (Kamerstukken II 2015/16, 30196, 463). The letter is accessible at: https://zoek.officielebekendmakingen.nl/blg-775505, last accessed 17 April 2018.

public-interest objectives if this would negatively impact on competition. Such competition-restrictive interests would have to be more actively regulated if they were to serve wider societal objectives. The rationale that underlies this response is concerned with a question of accountability. The competition rules provide accountability by way of the market. Private measures that aspire to the achievement of public interest are provided with legitimacy because they can be accounted for in terms of the market. This is to say, if the measures on balance manage to achieve an outcome that leads to an increase in consumer welfare, then there is no need for the political sphere to become involved and provide legitimacy to the development of measures that aspire to serve a public interest. If there is no such accountability for measures that aspire to serve the public interest, but which, in the process, limit competition, then they require another source of legitimacy in the form of direct government regulation.

The response of the Dutch government to this stance from the Commission has been to introduce a legislative proposal that has since been developed and now exists in draft form and creates the option of a so-called *declaration of general effect* with respect to private sustainability initiatives that meet certain criteria. Upon this basis, private sustainability proposals are turned into legislation and, this is the assumption, potential problems with EU competition law can be circumvented. This is the underlying rationale of this proposal, which aligns, for example, with the system of collective labour negotiations that operates upon the basis of a similar process of declarations of general effect. The main condition for eligibility for a declaration of general application is that there is a public sustainability interest involved. Accordingly, the proposed law seeks to incorporate mechanisms that ensure that, eventually, the government and parliament can weigh the involved interests and decide whether or not to provide an initiative with general binding effect. Upon this basis, the proposal seeks to resolve the tension with competition law by introducing a framework that structures private decision-making procedures in such a way that they will result in outcomes that serve the 'public interest' and can subsequently be turned into legislation. This is a highly interesting proposal which is currently still under consideration and harbours many potential issues from a EU law perspective, issues which I have discussed elsewhere.[40]

[40] See, further on this, Monti and Mulder, n. 6 above, at 642.

III An EU Constitutional Reflection on the Dutch Sustainability Saga

The Dutch sustainability saga revealed that the European Commission takes a position that is reflective of a rather traditional command and control 'state-centred' perspective with respect to state-market-society relationships. That is to say, the Commission in its communication to the Dutch state emphasised that Article 101 should not be interpreted so as to allow private entities to pursue objectives beyond consumer welfare whilst restricting competition in the process. For this scenario, regulation would be the preferred route to take. However, the position of the European Commission is not fully in accordance with the case law of the European Court of Justice. The Court of Justice has created avenues in its case law that do allow for private deontological structures – pursuing objectives going beyond consumer welfare – to be excepted from the scope of Article 101.[41]

This is understandable foremost because the European Union contains, by its very nature, a diversity of socio-economic models. With this, I mean to say, models to organise society in accordance with a certain normative governing principle that is related to a type of social ordering. A useful distinction is sometimes found in juxtaposing socio-economic models to align closer with market or non-market enabling principles. For example, labour market rules may sometimes fulfil a purely market-enabling function by reducing transaction costs and information asymmetries in wage-setting, and, consequently, can be said to be organised around a socio-economic organising principle that is essentially market enabling. However, this is, of course, not the rule; a major tension may exist between, for example, the right to strike and market interests. Depending on the normative orientation of a socio-economic paradigm, the right to strike may be institutionalised precisely to shield workers from the power that capital owners can exercise as the holders of capital. The underlying normative principle of organisation of both types of labour market rules are fundamentally different. One may be qualified as being embedded within a market logic since the underlying rationale follows the allocative logic of the market whilst the other is entrenched in non-market rationales and enables a structure of negotiated deliberative coordination, outside of the logic of wealth maximisation.[42]

[41] Ca4se C-209/07 *Competition Authority* v. *Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, paras. 34–6 and Case C-309/99 *Wouters* [2002] ECR I-1577.

[42] See Alexander Ebner, 'Transnational Markets and the Polanyi Problem', in: Christian Joerges and Josef Falke (eds.), *Karl Polanyi: Globalisation and the Potential of*

One of the main objectives of European law is to create an internal market, and, consequently, the rules may be set up to change or modify the behaviour of a profession or style of government, and, consequently, influence the normative orientation of a socio-economic paradigm within a Member State. It may confront embedded conventions, value systems and understandings within a Member State. European competition law is an excellent example of this, gradually having evolved from a contested policy to a dominant legal system that is largely applied uniformly in all the Member States.[43] In some cases, EU law will therefore render a choice for a certain socio-economic model compatible, re-enforcing the conventions and understandings in a Member State, for example, by holding that competition-restrictive practices of law associations may be considered legitimate when the integrity of the law profession is at stake.[44] In other cases, the object of internal market law may expressly be to change the conventions and understandings, for example, by holding that the right to strike within a Member State is only allowed if it is exercised within a transparent system of governance and abides by the principle of proportionality.[45]

Between these two examples, there exist different shades of compatibility and incompatibility, depending eventually on the normative interpretation of the law. One of the major challenges for European legislators and adjudicators is to find the right balance. To what extent can European law legitimately influence the socio-economic orientations of the Member States towards one particular model and to what extent should it allow or even stimulate diversity in socio-economic outcomes?

The claim in this chapter rehashes a point made strikingly by Miguel Poiares Maduro and more recently by Clemens Kaupa that the *European economic constitution* is, in principle, neutral in this respect.[46] European

Law in Transnational Markets (Oxford-Portland OR: Hart Publishing, 2011), pp. 19–40, at 28.

[43] For example, Adrian Kuenzler and Laurent Warlouzet, 'Traditions of Competition Law: Europeanization through Convergence?', in: Kiran Klaus Patel and Heike Schweitzer (eds.), *The Historical Foundations of EU Competition Law* (Oxford: Oxford University Press, 2014), pp. 89–124.

[44] For example, Adrian Kuenzler and Laurent Warlouzet, 'Traditions of Competition Law: Europeanization through Convergence?', in: Kiran Klaus Patel and Heike Schweitzer (eds.), *The Historical Foundations of EU Competition Law* (Oxford: Oxford University Press, 2014), pp. 89–124.

[45] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-438/05 *Viking Line* [2007] ECR I-10779.

[46] Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998); Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford: Hart Publishing, 2016).

law should not therefore be applied so as to force a normative direction for a socio-economic paradigm. This can be argued based upon the fact that the TFEU incorporates an explicit concern for reconciling freedom of (economic) movement with the social structures of the Member States. It does so, specifically, by integrating a *dual commitment* within its legal infrastructure. The internal market laws determine that, although there is a commitment to intra-European free trade within open competitive markets that accommodate the free movement of goods, capital, services and workers, the Member States themselves retain control over domestic social interests that are able to override these market integration objectives. In fact, it could be argued that European law should strive to accommodate various socio-economic models. A multitude of socio-economic projects may be pursued within the framework of the Treaty. From a doctrinal perspective, such openness can be derived from enabling provisions (such as Article 114 TFEU) as well as from the fact that the Treaty provisions are often ambivalent, and allow for different interpretations. In addition, there exists the obligation based upon Article 4 TEU to respect national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Indeed, the European Court of Justice has provided abundant interpretations of internal market rules that allow for various socio-economic paradigms to exist within the internal market, depending on the social system that it has chosen to implement in segments of its economy. For example, social schemes designed upon the basis of the principles of solidarity, have been considered by the Court to be incompatible with the functioning of a sector upon the basis of a normative principle of capitalisation. Therefore, EU competition rules do not apply in full to sectors that are primarily organised upon the basis of solidarity principles, provided that there are some guarantees of institutional design that guarantee transparency and a coherent, active form of state supervision. In these cases, the Court explicitly recognises legitimate social structures at Member State level that do not 'fit' within the normative order of the competition.[47]

This builds on the idea that the diversity of preferences and orientations in the EU is the product of specific historical experiences, political contestation, societal learning and continuous political decision

[47] Case law starting with Case ECLI:EU:C:1993:63 (*Poucet Pistre*). See, for an overview, Tamara K. Hervey, 'Social Solidarity: A Buttress against Internal Market Law', in: Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000), pp. 31–47.

making.[48] As such, despite globalising trends, the Member States vary greatly in terms of institutional preferences and structural policy differences.[49] In similar terms, the economic historian Werner Abelshauser, has, for example, underlined the resistance of the varieties of capitalism against economic integration, and argued that this resistance is an asset. Diversity is economically beneficial, rather than detrimental.[50] Within this perspective, law's expressive role is underlined in the sense of institutionalising normative preferences and reflecting – to some extent – a shared morality of a community at a given point of time.

IV Conclusion

There is a clear and sensible reason as to why competition law is sceptical of forms of private 'producerist' regulation. Most economic theory tells us that commercial entities operate upon the basis of incentives and as a rule, undertakings may therefore be presumed to act only in their self-interest. A collective pursuit of proclaimed wider societal objectives should therefore always be met with a healthy level of suspicion.

However, by installing the current interpretation of consumer welfare as an economic rationality, the European Commission should be aware that it contributes to the cognitive infrastructures of markets. In structuring the way that self-regulatory objectives are accorded relative value within the framework of competition law, this affects the way in which those resources are distributed between the supply and demand sides of markets, which, in turn, can transform the nature of governance within the Member States. It is constitutive of the way firms are to approach

[48] As submitted by Christian Joerges, 'Market Integration and Europeanisation of Private Law', Jean Monnet Project Conference Paper (May 2015), on file with author.

[49] These can for example be classified in benefit structures, methods of financing, service intensity, family policy, employment regulation, logic of governance and the regulation of industrial relations in Anton Hemerijck, 'The Self-Transformation of the European Social Model(s)', in: Gøsta Esping-Andersen (ed.), *Why we Need a New Welfare State* (Oxford: Oxford University Press, 2002), pp. 173–214, at 178. See, also, Pablo Beramendi, 'Inequality and the Territorial Fragmentation of Solidarity' (2007) 61 *International Organization*, 783–820.

[50] See Werner Abelshauser, 'Ricardo neu gedacht. Komparative institutionelle Vorteile von Wirtschaftskulturen', in: Werner Abelshauser, David Gilgen and Andreas Leutzsch (eds.), *Kulturen der Weltwirtschaft: Geschichte und Gesellschaft* (Sonderheft 2012), pp. 29–38; Werner Abelshauser (2014), 'Europa in Vielfalt einigen. Eine Denkschrift', available at: wwwhomes.uni-bielefeld.de/wabelsha/Denkschrift.pdf, last accessed 8 February 2018. On this topic, see, also, Giandomenico Majone, 'The Deeper Euro-Crisis or: The Collapse of the EU Political Culture of Total Optimism', EUI Working Paper LAW 2015/10.

objectives such as sustainability in the future and, to some extent, constitutive of a market economy that prioritises consumerist interests over sustainable producer identity. This may give rise to governance reorientations where national governance structures that are set up to allow the supply side of a market to develop standards and self-define to be reorganised towards consumerist interests. However, it is clear that primary law and the case law of the European Court of Justice allow and, arguably, prescribe that competition law has to be applied in the context of the liberal society that the European Union purports to be. Because societies and forms of governance evolve, it can be argued that competition law is infused with a constitutional requirement to accommodate the existing or evolving notions of the legitimate exercise of regulatory power that constitute a genuine, systematic and coherent part of the socio-economic model of a system of governance within a Member State.