Addressing the legitimacy-problem of competition authorities taking into account non-competition values[1]

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1. Introduction

In this paper we will address the problem of legitimacy of decisions of competition authorities where competition authorities would include non-competition elements, such as concerns for a sustainable society, in their assessment of co-operation agreements between companies. We will use shorthand to indicate this problem as 'the legitimacy-problem'. The non-competition elements are also called non-economic interests, public interests or public values. 'Sustainability-interests', or at least part of what is covered by the notion of sustainability is felt to be such a non-competition element.

We will first sketch the legitimacy-problem in the broader context of taking into account non-competition interests by competition authorities (subsection 2). We will then briefly discuss the concept of legitimacy, though without being able to do justice to the rich literature relating to this concept. We will also indicate why legitimacy in procedures of decision-making at competition authorities should be enhanced, specifically when dealing with non-competition interests (subsection 3). We will continue with a discussion of possible ways of addressing this problem, including some innovations to decision-making procedures (subsection 4), and take into consideration some problematic aspects of the solutions proposed (subsection 5). We will end with some concluding remarks (subsection 6).

2. The Legitimacy-problem

If changing towards a sustainable society is taken as a worthwhile goal, this means accommodating sustainability-focused cooperation between undertakings. Undertakings, however, are subject to competition law if they enter into anti-competitive agreements (or concerted practices/or party to decisions of associations of undertakings). This is true on both the European level – where the European Commission (the Commission) enforces European competition law (article 101 and article 102 TFEU) – and on national levels within the EU's member states. On the national level, as is well known, the competition authorities enforce both European competition law and the competition law of the member state in question.

The legitimacy-problem (as indicated, this is shorthand for the perceived lack of legitimacy when competition authorities take non-competition elements into account in their assessment under competition law) is tied to the current debate regarding the goals of competition law. This debate centres around the question of what competition law is for, sometimes veering off towards a discussion of the need for balance between competition goals and non-competition goals. For the purpose of this article it is not necessary to delve deeply into this debate as an abbreviated version seems sufficient. Generally the notion of competition interests relates to the goals of European competition law as they are embraced by the Commission in its current reincarnation. In its policy documents and decisions the Commission places heavy emphasis on consumer welfare and

1 Draft version for ACLE conference, 12 December 2013. References are mostly lacking from this version, as this draft constitutes a first laying down of ideas. Please do not quote this version. If you are interested in receiving the final version please contact: A.Gerbrandy@uu.nl

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economic efficiency, though the notion of an integrated internal market has never become non-existent. The European Court of Justice (the Court) – at the judicial pinnacle of EU hierarchy – has seemingly not fully embraced the view of the Commission though neither has it rejected it. The Court, at the very least, also endorses the process of competition as a goal of competition law. On a general level, competition law is currently seen as being tied to the idea that pursuing consumer welfare growth is best served by open markets and strong competition. This idea has been proven right, though neither its causality nor the value of growth is beyond criticism. But in what could be called the pre-historical times of European competition law (in the seventies and eighties of the twentieth century) both Commission and Court where inclined to take a somewhat broader view on the goals of competition law. The economization of European competition law – in itself a necessary move – changed this stance and the Commission has clearly waved goodbye to those times; national authorities in the EU generally following its position. The position of the Court is currently uncertain.

The above is intended to make clear that though the idea of consumer welfare itself is not generally contested, its meaning remains terribly unclear. Some would adopt a 'narrow' consumer welfare concept: increases in price, limitation in output or innovation are detrimental to consumer welfare. This is fairly short-term assessment and a longer-term view is not taken into account. Economists tend to want to calculate the loss of consumer welfare. Consumer welfare gains or benefits, resulting from co-operation between companies, can in a similar vein be calculated. The losses can then be off-set by the benefits: if costs are greater than benefits, the agreement is contrary to competition law. Others do advocate a broader consumer welfare concept in which a slightly broader view of welfare is taken: a lower energy bill, for example, may counter a higher price for an energy-friendly consumer good. And still other strands in economic thought will include the price of almost everything in the calculation, which however, raises the related question of whether we should want to express everything in terms of monetary costs and benefits. Anyhow, this latter concept seems not generally accepted in competition law. In neither view there is clear room to weigh the 'and now for something completely different'-type of benefits. To give an example: how is animal welfare to be calculated as something valuable existing outside of 'consumer preference'? How should we calculate the benefits of protection of the habitat of a species of birds that is not yet extinct or even specifically beautiful; or the an increase in social contact between the young and the old? These values and interests, then, are labelled 'non-economic', 'public-value', or 'non-competition' elements or interests and the question is whether, when assessing an agreement under competition law, these interests should play a role in deciding to allow or prohibit the co-operation between companies.

One argument - there are other arguments that are interesting but less so for the topic of this paper[3] – against the competition authorities taking into account non-competition interests is that these authorities lack political and/or democratic legitimacy to do so. The argument runs along these lines: national competition authorities are generally mandated to undertake a competition law assessment only. The goal of competition law is (broad or small) consumer welfare/economic efficiency (and possibly internal market integration, though we leave that aside for now as a quirky EU-obsession). This means that the assessment of an agreement concerns an assessment of the effects on consumer welfare. Other values can indeed be very valuable and good, but they ought not to be included in the competition law assessment as the democratically elected legislator did not include such elements in the mandate of the competition authority. It is not for the clearly not-democratically elected competition authority to weigh competition values against other values. If society wants

3 Well, still interesting and relevant: weighing under the third paragraph of article 101 TFEU. There are fairly specific problems involved there, mostly related to the time-frame of sustainability-benefits in comparison to the 'normal' competition assessment time frame, the notion of the consumer (also in relation to the time-frame), and the not completely limiting competition requirement, whereas sometimes a market-covering agreement might suit the sustainability-goal best. We will leave these aside for now.

sustainability-focused co-operation, the legislator, of which part is democratically chosen and the whole has political legitimacy, should provide specific rules, regulations, or incentives in obliging or nudging companies to protect, let's say, the black-tailed godwit, animal welfare of chickens at poultry-farms, and investments in green energy production methods.

In this paper we will try to address this legitimacy-problem. To make thinking about the legitimacy problem slightly more concrete we will use sustainability-initiatives as our focus, but we will leave aside the normative question whether a sustainable society is a worthwhile goal. Sustainability itself is a very vague concept of course, and part of its content may easily coincide with competition interests; however, quite a bit that is covered by the sustainability idea seems outside the realm of a narrow competition law assessment. For now, we will assume that because of this normative foundation (a sustainable society is a societal goal) and for pragmatic reasons – national competition authorities are actually, really, confronted with these types of questions – it is at the competition authority were some sort of assessment, including some form of weighing values, should be done. That is, such a broader assessment is acceptable if the legitimacy-problem can be sufficiently addressed.

We will also leave aside the question of whether there is currently indeed no mandate for the European Commission or the national competition authorities to do so. This question ties in with the goals-debate and one could take the position that because the European Court of Justice has not fully embraced the narrow consumer-welfare approach of the Commission, there is still room for non-competition weighing within European competition law.[4] We are, however, not fully agreed on this point and it is beyond the scope of this article. Also, we would posit that even if there is a full legislative mandate, there are other valid reasons for enhancing legitimacy in concrete decision-making procedures at the level of the competition authority.

3. Political and Democratic Legitimacy

The issue of legitimacy has been at the centre of philosophical debates on the exercise of public power over individuals for a very long time. Over the decades, developments in the field of legal thought accumulated to there now being an abundance of views on the issue of why exactly public bodies are legitimised to take actions. Bearing in mind this plurality of concepts, it is more useful for the purpose of this paper to refer to several general strands of reasoning which emerged in the legal discourse rather than specific views held by legal and political thinkers. Such an outline, albeit very brief and obviously not exhaustive, will allow embedding the problem of legitimate decision-making in a broader context, but without prescribing any specific way of reasoning as the 'one right answer'.

From a legal point of view, a discussion of legitimacy as a normative concept would come naturally, since legal science seek answer to a question of why legal norms should (or rather 'ought' to) be followed. Under such normative strands of reasoning, legitimacy serves as a justification of the functioning of public authorities and of the obligation to obey commands of these authorities. Lockean philosophy provides an example of this type of reasoning. Under Lockean, and various other early modern views, political authority was once vested in every single individual, but at some point in time it was transferred to public bodies by means of social contract. In consequence, as long as these bodies act in accordance with the 'social contract' and as long as they do not attempt to contradict the natural rights of individuals, their functioning should be deemed to be legitimate. According to contemporary interpretations of legitimacy, more specific requirements are typically employed. For instance, compliance with the liberal principle of legitimacy under Rawlsian political

4 See A. Gerbrandy, NTER 10, 2013.

philosophy.[5] What holds the normative views of legitimacy as a concept together is that they envisage benchmarks against which the legitimacy of the functioning of given bodies, or of their actions, are tested. Unless the requirements of such test are met, the authority or its action cannot be held to be legitimate.

A different view on legitimacy can be found in the social sciences, such as sociology. These are mainly descriptive strands of reasoning which focus not on obligations ('ought'), but on observation of facts ('is'). A clear advantage of this kind of approach is its 'measurability'. Under descriptive approaches it can be established in a relatively easy way that certain types of authorities and their actions in given circumstances typically meet with the acceptance on the part of individuals. From the legal point of view this 'factual legitimacy' does not, however, provide any answer to the fundamental question of why given public authorities are acting legitimately and thus why their commands should be followed.[6]

Finally, a third group of views comprises interpretations of the legitimacy concept according to which normative and descriptive approaches are combined, since separately neither of them can fully address the problem of legitimate decision-making. This variety of views, which stems not only from the division between normative and descriptive concepts, but also further differentiation within these groups, requires a rather cautious approach towards the legitimacy problem identified in this paper. Therefore, rather than speak about 'legitimate' and 'not legitimate' authorities or decisions of authorities it seems easier, and equally valid, to refer to indicators of legitimacy. This means a discussion of certain actions or factors which, holding other things equal, would increase the probability of reaching a legitimate decision. Thus, we will discuss options for 'enhancing' legitimacy, instead of picturing a black-and-white situation.

Apart from the apparent perception that there is a legitimacy-problem in relation to competition authorities taking into account non-competition interests in their assessment under competition law (an somewhat empirical finding that such decisions would lack acceptance and therefore, legitimacy) there are good reasons to enhance legitimacy of competition authorities' decisions. Against the backdrop of the general legitimacy issue, the concept of democratic legitimacy becomes relevant. Democratic solutions can serve either as values indispensable to attain legitimacy or as a category which maybe is not irrelevant for the quality of governance, but not of crucial importance for legitimacy itself. Under the former of these views – a normative view of democratic legitimacy - authorities and their actions can only be held legitimate if they are 'democratically' legitimate; under the latter view – an instrumental view - democratic solutions are supposed to serve only an instrumental role in decision-making, by leading to 'better' outcomes.

The introduction of democratic values into the general legitimacy debate creates, however, further problems. It is very difficult to define in any clear-cut way what exactly the 'democratic values' are, and when it is justified to say that these values are respected. It seems, however, that at least some of such values can be considered to be intrinsic to the concept of democratic decision-making. One of these, for instance, is participation. Such participation of the *demos* can be organised indirectly, through elected officials (members of parliament) or directly. Assuming that participation of the *demos* in decision-making is an indicator of democratic legitimacy of the authority, creating more space for such participation could therefore possibly reinforce a competition authorities' mandate.

5 Rawlsian liberal principle of legitimacy envisages that: '(...) exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason'.

6 The difficulty comes from the fact that judgements on 'ought' (moral/normative judgements) cannot be inferred from observations on 'is' (observations on reality), *vide*: Hume's guillotine.

As for such democratic participation, this could be perceived in two distinct ways. On the one hand, allowing participation or deliberation could be perceived as sufficient and satisfactory no matter what result would be reached during this process. In this view it would be the bare deliberative process that would provide legitimacy. Or, on the other hand, it might be assumed that the decisions reached in a participatory or deliberative procedure occasionally turn out to be far from 'rational', feasible, or fair, and hence that they should be subject to further review by external parties. We will come back to these issues below, when we think of introducing innovative decision-making procedures at the competition authority.

As mentioned above, the introduction of democratic values into decision-making can also be perceived in a more instrumental way: as a step that is irrelevant for the legitimacy of public bodies. Also in this view there are good reasons to believe that introducing democratic decision-making would lead to better decisions when competition authorities need to weigh different public values. A natural consequence of adopting procedures which are more democratic is that public participation can be reasonably expected to provide the competition authority with a better overview of possible solutions to a given case. Consequently, some sort of deliberation in decision-making can serve as a ground to confront opposing arguments. In further steps this confrontation would lead to adoption of a decision that would be qualitatively superior to that which could have been issued in purely 'authoritative' procedure. Such an instrumental view on democratic values in decision-making ignores the issue of democratic legitimacy, but nevertheless, in many instances can be still expected to result in having similar 'factual' effects.

From a practical point of view, the legitimacy-problem which is the topic of this paper can therefore be seen in the following way. As such determining whether an authority enjoys legitimacy is a difficult task, unless extreme situations are discussed. Consequently, for practical purposes it is easier to consider the problem as there being a sufficient number of indicators which typically lead to a conclusion that a given public body acts in legitimate way or that its mandate is strong enough to undertake actions. We will assume that currently competition authorities enjoy political mandate appropriate for the purpose of assessing competition cases. There is uncertainty relating to the reach of this mandate to cover including public values, such as sustainability values, in this assessment. It can also be assumed that a weighing of additional public values may distort the politically mandated balance and that consequently more indicators of legitimacy should be employed when competition authorities do undertake such a weighing of values.

This fairly theoretical exploration thus leads us to two possible results. First, democratic solutions are indispensable for the competition authorities' work in the revitalised environment of competition enforcement. Since ordinary legislative authorisation to take market decisions would be no longer sufficient in this new world, additional indicators of democratic legitimacy should be employed. Secondly, even though it might be held that for pure reasons of pure legitimacy of competition authorities' actions a stronger democratic mandate is not necessary. However, even then it is posited that the introduction of more democratically shaped procedures is a worthwhile goal, both for reasons of instrumentality and effectiveness and based on good governance arguments. The conclusion, therefore, inevitably seems to be that enhancing legitimacy is a sensible thing to do. Therefore, we now turn to an exploration of how to do just that.

4. Enhancing Legitimacy in Public-value Weighing by Competition Authorities

Several solutions for the legitimacy-problem relating to public-value weighing by competition authorities can be conceived. These should address the legitimacy-problem in relation to the explorations on the notion of legitimacy in general. In this section we will discuss four possibilities for enhancing legitimacy. We will relate them to the situation of the Dutch competition authority. This is

obviously a somewhat arbitrary choice (unless one is Dutch). But there are good reasons to choose the Dutch competition authority as it seems to be on the forefront of the discussion to include sustainability interests in a competition law framework. Also, though of course throughout the EU's member states the position of the competition authorities may be different, their general mandate as relating to European competition law is fairly similar.

Several institutional elements of the position of the Dutch competition authority, the ACM (Authority Consumer and Market), are relevant for our purposes:

- the ACM is an independent agency, which means that the *board* – taking the decisions - is independent from 'politics';
- this means that the second chamber of parliament (the 'house of commons') cannot discharge the board of ACM;
- the ACM has been charged with the enforcement of quite an impressive list of statutes, the Dutch Competition Law being an important one of them; the ACM is also a regulator in regulated markets, and combines that with a general consumer protection function;
- the ACM enforces national and European competition law, the national provisions being an (almost) identical copy of the European cartel-prohibition, the European prohibition of abuse of dominance and European merger control;
- however, national procedural law, of which some elements are quite different from European procedural law, governs the national decision-making and judicial review procedures;
- judicial review is undertaken by the district court of Rotterdam in first instance, and by the Tribunal on Tariffs and Trade in appeal. Both are courts of facts and law; there is – generally – no marginal review;
- the minister of Economic Affairs is responsible for competition policy, competition legislation, regulatory policy and regulation, and oversees – in a general way – the ACM;
- there is no direct relation between the second chamber of parliament (which is directly elected) and the ACM;
- there is a direct relation between the Minister of Economic Affairs and the second chamber;
- the legislator is comprised of the government (which is: the King and the cabinet of ministers) and the States-General (the second and first chamber of parliament).

This is, in a very brief version, the framework in which the proposed solutions should work. The possibilities that we will discuss here are: a) providing political legitimacy by legal mandate; b) enhancing democratic legitimacy by including democratic deliberation in the decision-making procedure at the ACM; c) enhancing democratic legitimacy by introducing cabinet/minster control; d) strengthen democratic accountability by introducing direct democratic control of the ACM by the second chamber.

a) providing political legitimacy by legal mandate

If it is agreed that the current legislation provides only for an intra-competition law assessment, which excludes taking into account of non-economic interests by the ACM en precludes the ACM from taking these into account as not covered by legislative mandate, the obvious route to address this problem is by changing the legislative mandate. This is no new point of view, of course. One reaction to this solution though, as pointed out above, might be that this is not necessary, as competition law does include the goal of protecting non-competition interest; to which it might be countered that the competition law does not. This conundrum could be solved by an explicit change of legislation which would, at the very least, clear up that discussion. The advantage of changing legislation is, of course, that there can be no doubt as to the powers of the competition authority. There is, however, a difficult problem involved in the relationship between the European competition law and national competition law, as it is not the national legislation that can (easily) change

European competition law. A legislative fix of the legitimacy problem will therefore, by necessity, only relate to the national legal regime. Another disadvantage to this possibility is that it is difficult to predict *ex ante* in which cases which public values would play a role and that a drawback of general legislation (logically) is that it provides general rules. The result of such legislation would be a very powerful competition authority as it will be given a very wide mandate, including a broad margin of discretion. Providing an independent authority, placed at arm's length of political influence, such a very wide margin of policy discretion may prove difficult even though administrative courts will provide for judicial review.

Though a legislative mandate will provide clear legality to a competition authorities action - though we are doubtful of its necessity – changing the 'law in books' might prove difficult. And even so, to enhance not only political but also democratic legitimacy such a changing mandate could easily be coupled with innovative forms of decision-making at the ACM. We will discuss two of such possibilities next.

b) enhancing democratic legitimacy by including democratic deliberation

Deliberative democracy entails including direct democratic participation of citizens in administrative decision-making. This notion is heralded by some as the future of democracy. It would include a forum of debate, where all points of view are discussed and weighed on their merits, without the power-base of the discussant being the defining factor of acceptance. As explained above, democratic legitimacy is both valued in itself (democracy as normative value) and lauded for providing for better outcomes (deliberation as instrument). Therefore, including deliberative democracy in the decision-making procedures at the ACM would enhance the democratic legitimacy of its decisions. On a fairly abstract level it is quite easily envisaged how during the ACM's decision-making procedure deliberative democracy could be introduced: by making use of panels to provide input to and/or deliberate with the competition authority.

There are several important questions to be addressed though.

First, what type of panel would be suitable? One idea would be to include consumer panels. The competition authority is indeed charged with protecting consumer welfare, so who better to ask than the consumers themselves to weigh a lower consumer welfare against benefits that are less easily calculated in those terms? Of course, instead of individual consumers, it might be preferable to have professional consumer organizations involved (such as the *Consumentenbond* in the Netherlands), with the added advantage of more institutionally held knowledge. However, as the cases in which the democratic deliberation process is used are precisely those cases in which more than a threat to consumer welfare is at stake, it would be better to include a panel of citizens. Consumers are obviously citizens as well, but the call upon them as part of the *demos* (as citizen) is a much broader call than the call upon them as consumer. Still better might be to organize deliberative input from a stakeholder-panel: this would also include organizations active in Big Society (the '*maatschappelijk middenveld*' in Dutch), non-for profit organizations, citizens' initiatives, business' representative organizations and other stakeholders. Such a model might fit the consensus-aimed *Poldermodel* of the Netherlands very well, of course.

Second, in which cases should the stakeholder panel be asked to provide input? Considering that quite a few cases before the competition authority do not involve other public values than the competition value, we can envisage two scenario's, which we will sketch:

i) The stakeholder panel only plays a role where the sustainability gains cannot be (validly) calculated or where it is unethical to make such a calculation. In this scenario it is first the

competition authority who decides that it is impossible to calculate sustainability gains. For example, there may be a lack of useful or valid economic models or theories available, or because the time-frame of a competition law calculation does not fit the time-frame in which the sustainability benefits will play out . It is also possible that benefits should not be calculated at all, for example when human dignity – think of cases regarding workers' rights - is at stake. It is clear that in such cases the analysis then moves beyond the general competition law frame of analysis. The stakeholder panel should be asked to deliberate on weighing the competition gains/losses against the sustainability gains/losses.

ii) The second scenario is the same as the first, but adds a layer: the stakeholder panel is *also* tasked in cases where the outcome of a 'pure' consumer-welfare economic analysis leads to the conclusion that the consumer-welfare loss is in balance greater than the benefits. In these cases it is possible to calculate costs and benefits using a consumer welfare economic assessment of the effects of the co-operation. But the outcome of the calculation is that the co-operation should be prohibited, as not leading to a greater consumer welfare. This means, for example, that the price-increase that is the result of greater environmental protection, is greater than the calculated environmental gain. It is, to us, an open question whether in such instances a stake-holder panel should not also be asked to deliberate the weighing of the interests involved: should the consumer not be asked to pay more because the value of growth of consumer welfare is less important than the value of protecting the environment?

Third, a matter of procedure: what would be the exact procedural role of the stakeholder panel? Would it be an integral part of the decision-making procedure of the competition authority? Would it function as an advisory body? Is the deliberative outcome binding on the competition authority or would the authority (or the court, in judicial review) be asked to do a final 'fairness of outcomes' test? On the one hand, these are very important questions; on the other hand, we feel safe to leave them outside of consideration in this paper, as these questions only become relevant after agreeing on principle.

c) enhancing democratic legitimacy by introducing cabinet or Minister control;

Another possibility for countering the legitimacy-problem and enhancing democratic legitimacy of competition authorities' decisions when taking into account non-competition interests under a competition law assessment would be to introduce an internal review procedure. This procedure adds a step in the decision-making tree between the competition authority and (a member of) the Cabinet of Ministers. Such a procedure would provide for indirect democratic participation. For example, it could be envisaged that the ACM - in such cases as defined above - after having undertaken the competition assessment, but before taking a final decision, refers the file to the Minister of Economic Affairs for advisement or value-assessment. It is also feasible that *parties* could ask for such a referral (conform a possibility in merger cases under the Dutch merger control regime).[7] It could be useful to not only include the Minster of Economic Affairs, but also other 'interested' Ministers ('*de minster die het aangaat'* is the Dutch clause often used). That might mean, for example, including the Minister of Infrastructure and Environment, or the Minister of Social Policy, depending on the substance of the case. The ministers, of course, do have political legitimacy by way of democratic elections and their direct relation with the house of commons. Democratic legitimacy is reached through the accountability of Minister to the second chamber, to account for actions and decisions taken.

7 Article 47 of the Competition Act provides for a possibility to ask for a review on grounds of public interest by the Minister of Economic Affairs after the ACM has *prohibited* a merger. Our proposal is slightly different in that this possibility is included *during* the assessment by the ACM.

d) strengthen democratic accountability by introducing direct democratic control

A fourth possibility to address the legitimacy-problem is by introducing direct democratic control. This would mean creating a direct relationship between the parliament (more precisely: the second chamber of parliament) and the ACM. Such a direct relationship, of course, is difficult to square with the requirement of independence of the competition authority even if limited to the cases in which non-competition interests are at stake. Therefore, instead of having a 'full' relation between the ACM and the house of commons, it might be useful to form a 'light version' of such a relationship. That would mean not bypassing the fact that it is the Minster of Economic Affairs who is politically accountable for the competition authorities actions and not impinging on the independence of the ACM. For example, the board of the ACM could be asked to appear before the house of commons to provide information and to enter into an informed discussion about the topic of interest in this paper: the weighing competition interests with non-competition interests. However, such a solution, it is expected, might not work in every constitutional setting, as it hinges upon informal relations more than on formal relations.

5. The Way Forward

It is clear that the options for change to address the legitimacy-problem as discussed above are not all easily implemented. Even if one holds that competition authorities can take non-competition interests into account under current European competition law there are good arguments to make in favour of strengthening the legitimacy of such decisions. If value-weighing is perceived as non-legitimate, the legitimacy becomes an almost automatically problematic even if the legal mandate would back the inclusion of such interests into a competition law assessment. Of course, a counter-argument might be that outcome-legitimacy is enhanced by taking into account broader societal goals and interests, as being more acceptable to the citizens. Whatever one's opinion on this matter, as indicated above, democratic procedures might provide for better quality outcomes and enhances democratic legitimacy of these outcomes.

In reviewing our options, we feel that either the second and third options, or a combination thereof, are to be preferred, at least in the Dutch system. Including a process of deliberative democracy into the decision-making procedure at the ACM not only enhances democratic legitimacy immediately, by involving the *demos* directly, it also fits a society that brought forth the *poldermodel.* There is also a historical semi-precedent in the old system of the *Commissie Economische Mededinging,* though that Commission consisted of experts, not of representatives of stakeholders and citizens. Intuitively we tend towards wanting to include a final fairness-review of the outcome, before accepting as binding the outcome of the deliberative process. This system, however, does quite depart from the current decision-making procedures and would involve a major overhaul of procedures.

The third option – providing for an internal review mechanism in which a cabinet Minister (the Minister of Economic Affairs) or several Ministers are involved in weighing the non-competition interests against the competition assessment - might be more easily construed. The added bonus here is that in the Dutch merger control system there is already such a possibility, though we would like to tweak that procedure just a little bit to fit an *ex ante* control better. The Minister is, of course, fully politically legitimized, and has a direct relationship to the Parliament, the locus of democratic control and accountability. Such a change in the procedure is much more easily designed and implemented.

Both these options do not detract from the independence of the Competition Authority. However, neither possibility allows for taking into account the fact that it is fairly difficult to obtain an *ex ante* decision by the ACM. Not only are not all agreements related to sustainability brought before the

ACM, the ACM reviews these agreements generally only *informally.* That means that the agreement can be changed after receiving a view of the ACM, but that the view of the ACM is not the final view, nor is it reviewed in administrative review procedures by a court. Therefore, an *ex ante*, final and reviewable decision by the ACM is a necessary requirement in these cases. Knowing the history of competition law, this could be termed, an exemption on non-competition interests if you will.[8]

6. Concluding Remarks

In this paper we started by explain the 'legitimacy-problem': the problem that national competition authorities include in their competition law assessment of agreements between undertakings foreign elements, that is, elements relating to non-competition interests or public values. The argument runs that competition law does not provide a mandate for the competition authority to do so. To counter this argument – which we have taken at face value in this paper, though one might question its validity – we have discussed several possibilities for greater democratic legitimacy of competition authorities' including non-competition elements in a competition law assessment. As added bonus, the arguments for greater democratic legitimacy are valid, even if one disagrees with the basic proposition as well.

The options we feel are most fruitful for further discussion are, first, introducing a form of deliberative democracy at the decision-making procedure at the competition authority, by using stakeholder-panels to provide input in this procedure. Second, a form of internal review by being able to call upon the Minister of Economic Affairs (and possibly one or more of his colleagues) is a possibility to redress the legitimacy problem. The first introduces a direct say of the *demos* on the outcome of weighing non-competition with competition elements, the second introduces a direct relationship between the decision-maker, the minister of Economic Affairs, and the second chamber of parliament to whom the minister is accountable.

Though many details would needed to detail the sketch provided in this paper, these decision-making innovations would greatly enhance the democratic legitimacy of decisions of the competition authority when taking into account non-competition values.

8 Another missing link is the positions of civil courts. Obviously quite a few cases are brought before civil courts. At the level of the court it is quite difficult to devise a procedure to include deliberative democracy. The legitimacy of court-judgments opens up a whole new can of worms, which is beyond the scope of this paper. It is imaginable, however, that precisely in this type of cases – if a substantive judgment related to a weighing of competition interests and public values is called for – the *amicus curiae* role of the ACM might become alive. If the decision-making novelties, explored above, can be merged with such a procedure, this might just prove to provide legitimacy to the judicial outcome.