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- Finding public interest, Wouters and the case of the Friesian horse –

1. Introduction

In this paper I relate some important points of the well known and ongoing topical debate on the harmful effects of increasing marketization of social relations to the operation of competition law frameworks when they deal with the balancing of public interest concerns and competition objectives. I conclude that there are some lessons to be learned from this debate and tentatively develop two of them. First, that the conventional framing of the conceptual dichotomy between the market on the one side and the public, political, social (the 'noneconomic') on the other is underdeveloped in competition law frameworks and fails to capture what is at stake when these spheres meet. Second, that clarity in the framing of market and nonmarket conflicts is needed to instruct balancing exercises in adjudication and tells something about how competition authorities should deal with (noneconomic) public interest objectives in their decision making process. Thereby, the paper seeks to contribute to the call for further exploration in the ACM position paper on sustainability & competition that explicitly leaves the question on the applicability of an inherent limitation on competition test on sustainability initiatives unanswered.[1] In fact, as I will argue further below, this question should have been the starting point for the application and integration of sustainability concerns in competition law and requires a refined understanding of what is market and what is not.

The paper starts out by discussing these issues on a conceptual level and then moves on to discuss the judgement of the Court of Arnhem in the case of the Friesian horse.[2] This judgment considers the legitimacy of rules of the Friesian pedigree that installed restrictions on the output of inseminations of studhorses. Disproportionate output of one stud in the pedigree could result in an increased risk of inbreeding related health issues for the horses. The main issue before the Court was whether an organization such as the Friesian pedigree should be allowed to restrict competition while pursuing the health of the Friesian horse and if so whether this should be assessed on the basis

* Thanks to Giorgio Monti for comments on an earlier draft. There are certainly still mistakes to be found in the draft paper and these are all my own.

1 Page 10 of the ACM position paper sustainability & competition July 2013.

2 Gerechtshof Arnhem 10-03-2010, zaaknr. 200.002.794.

of a Wouters like inherent restriction test or exclusively as an economic issue to be measured and balanced in terms of efficiency merits. The reasoning in the judgment is very weak and this is exactly why it is an interesting case. Its weakness indicates precisely what is lacking in balancing exercises that are concerned with competition and public interest clashes.

In short, the paper calls for a reconsideration of both the institutional organisation surrounding public interest vs. competition conflicts and the reasoning developed in adjudication that deals with such conflicts.

2. What is at stake in the dichotomy?

In simple terms, the theory of harm at the basis of the paper is part of a familiar narrative that goes something like this: Markets are not mere mechanisms but embody a specific normative order. Meaning that they presuppose – and promote – a specific way of valuing goods and services that are being exchanged and a specific idea about how particular sectors are to be organised.[3] The noneconomic is not necessarily best served within a normative order that is based on market principles. However, as argued, alongside many others, convincingly by Sandel, today social relations are often remade in the image of market relations and as "markets extend their reach into noneconomic spheres of life; the more entangled they become with moral questions".[4]

I will try to make this a bit more specific. The potential harm of applying market logic to noneconomic spheres rests on the assumption that people derive satisfaction not from goods and (the provision of) services as such but from the various properties or characteristics that they embody. Fred Hirsch developed the idea that utility derived from goods and services emanates not only from their embodied characteristics but *also from the environmental conditions in which they are used*.[5] He provides the example of services of a doctor that "may yield, besides a direct improvement in health, additional characteristics stemming from the patient's trust in the doctor's judgment, his assessment of the doctor's motivation, and his assurance or anxiety about his prospects of securing similar services in the future".[6] The doctor-patient *relationship* based on trust and a basic human relationship is an important part of the service that is provided and this relationship is fundamentally noneconomic. The thesis developed by Hirsch posits that these latter noneconomic characteristics can be influenced by the

[3] Hirsch, *Social Limits to Growth*, 36..
[4] Sandel, *What Money Can't Buy*.
[5] Hirsch, *Social Limits to Growth*.
[6] Ibid.

social basis under which medical services are supplied. Therefore, it matters whether the services are supplied as market transactions, forms of private insurance, or comprehensive public insurance.[7] It is the neglect of the social context in which the normative order of markets values goods, services and the organisation of sectors that can be of detriment to noneconomic objectives.[8] The detriment lies specifically in the potential effect on the characteristics of a product or activity of supplying it exclusively or predominantly on commercial terms rather than on some other basis.

The idea then is that before we can decide whether market relations are appropriate to noneconomic domains, we have to figure out what norms should govern with respect to those areas. However, a basic problem with noneconomic objectives is to govern them in a clear and transparent manner. There is often no autonomous or self-sustainable rationale to support nonmarket objectives and it is much easier and seemingly transparent to connect them to market-based types of governmentality. In this process the nonmarket objective becomes either re-defined as a corrective to market processes (as an externality) or is completely translated within a market metric. Take, by way of illustration, the discourse on "sustainable development". A discourse that *re-contextualises* external nature, first, in terms of an ecosystem and, second, as an area in which rights to pollute can be traded. Thereby, previously untapped areas are being opened in the interest of capitalization and chances for commercial exploitation.[9]

It is not only nature that this discourse of re-contextualisation applies to. It is quite broad, for example, social cohesion as the idea to include as many people as active labourers in the market as possible. To dramatize things once could posit that, thereby, nature and life itself are being drawn into the economic discourse of efficient resource management. This process adopts primarily a shift in *representation* whereby, in this case, noneconomic aspects of society become *internal* to a process of marketization.[10] This is a, on first sight, clear and clean way of approaching otherwise complex objectives that are not easily translated into targets and means of achieving them. In other words, society might well be willing to protect a particular noneconomic issue

[7] One striking example of the accompanying diminution in trust….one in five of all physicians in the US had been or was being sued for malpractice. This in turn has stimulated the pursuit of legally defensive professional practice, marking a further twist in the diminution of trust between doctor and patient….The product or service that is supplied solely under the motive of satisfying private wants can be seen as different from the product or service supplied at least partly under the motive of satisfying the wants or needs of others, including society as a whole. Hirsch, *Social Limits to Growth*; Crouch, *Making Capitalism Fit For Society*.

[8] Similarly Crouch

[9] Lemke, *Foucault, Governmentality, and Critique*.

[10] Ibid

but also want a mechanism that allows the application of a clear and transparent standard of assessment. Thus, the use of a market rationale in order to evaluate market and noneconomic balancing is also partly about simplifying the application of the rules to account for the noneconomic objective, rather than a way of saying that noneconomic issues only count if they can be perceived in terms of the market.

The argument is therefore not that markets are inherently bad but that *if* competition law frameworks adopt a rationale that contextualises noneconomic objectives as externalities or calculable efficiency goals within a welfare maximising model, this potentially limits defining features of noneconomic objectives and a need for contestation arises when (i) discarded features of noneconomic objectives that are identifiable within these frameworks represent something worth caring about and (ii) if there exists a credible alternative of dealing with these objectives. Both will tentatively be explored below.

3. Towards an operational *substantive* definition of the noneconomic

An exercise of clarifying economic and noneconomic conflicts, in itself alone, would benefit the functioning of legal frameworks. For example, Hohfeld demonstrates how care with terminology may solve or render more understandable some *apparent* problems of norm conflict in legal systems.[11] Mainly, this arises through the use of the same term at cross-purposes in a variety of legal texts: if the terms are understood as meaning the same thing in all texts, then conflict may be more or less likely, whereas the possibility that the same term is used to describe different interests can at least clarify if *conflict is actually present*.[12] Often there is no real conflict of different norms but rather a disagreement over the construction of one norm. This has consequences with respect to the means through which such conflicts should be resolved but this is often not captured in market vs. nonmarket conflicts.

The noneconomic is a 'polluted' concept. This is because in many cases the objective at stake is not or no longer truly nonmarket, nor purely social, nor purely public. This can perhaps partly be explained by the wave of reforms undertaken in many OECD countries during the 1980's that were inspired by market informed measures and led to liberalization of labour markets, capital markets, deregulation of industry and the privatization of state enterprises.[13] Importantly, during this time, many public sector

[11] Hohfeld Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning.".
[12] *Ibid.,* 25.
[13] Toth, "Healthcare Policies over the Last 20 Years"; Judt, *Postwar*..

departments were restructured and downsized through outsourcing and installing so called New Public Management tools.[14] This basically installed a new discursive field with respect to public management, introducing a move towards entrepreneurial systems of public management that were largely market based. Although, over the course of the 1990s' this trend became less radical through counter-reforms, today, a lot of public policy is still informed by and measured in terms of success through a market based metric.[15] Simultaneously, the EU as discourse setter has enforced a narrative that often redefines social policy objectives as ancillary to economic objectives.[16] Therefore, social policy measures of the Member States can for a large part be qualified as a subsection of economic policy and is created mainly with the purpose of making markets work better by channelling social concerns within a model that renders the social *manageable*.[17] Hence, when one speaks about norm conflicts between economic and social policies, often this is not a conflict of different norms but, rather, disagreement with respect to the best design of one economic norm.[18] Take the example of limiting the amount of working hours of a labourer. One could posit that this *intervenes* with the free forces of the market and serves a social purpose because factories cannot use their labour force to the extent that they may want to. However, if limiting working hours of a labourer leads to increased productivity because labourers will be more rested and happy this qualifies as a beneficial constraint[19] on the market because it actually lets the market function better than it would function without the constraint. In other words, *not all measures that restrict* the market are based on nonmarket considerations. A lot of perceived norm conflicts actually remain within the economic/market realm. The same applies to, for example, strikes by trade unions, environmental regulation, integrity standards imposed by associations of undertakings, state aid in order to finance social objectives, public monopolies on gambling services. Initially these *interventions* in free trade and competition *present* themselves as a nonmarket objective. Quite soon it becomes clear, however, that relating the nonmarket *merely to the act of intervention* in these cases is unsatisfactory since not all interventions that restrict free trade and competition are pure manifestations of an objective that is not related to the functioning of markets. The right to strike can be

[14] Lane, *New Public Management*..
[15] Ibid.
[16] Ibid.
[17] Rose, *Governing the Present*.
[18] Kaupa in Witte, Muir, and Dawson, *Judicial Activism at the European Court of Justice*.
[19] Streeck, "Beneficial Constraints"; Dobbins, "The Case for 'beneficial Constraints'"; Streeck, "Educating Capitalists"; Tsakalotos, "Market Constraints, Economic Performance and Political Power.".

regulated in order to channel the interests of workers through institutional mechanisms that make these interests controllable, manageable and to a certain extent foreseeable and, thereby, allow sectors of an economy to perform better. Environmental regulation can be shaped as tradable rights to pollute, subjected to self-regulating market mechanisms. Etc. This is all more or less suggested by Colomo (2012) who argues that often nonmarket based interventions within the EU competition law framework are responses to market failures (externalities) and constructed in a way to make markets work better.[20] These instances represent examples of what I would gather under the label of *beneficial constraints* on the market[21] and hence essentially fulfilling a market objective. There is *no true conflict of norms* in these cases although it is of course highly questionable whether policy that is created on this market basis is not overly one sided. Overall, the side effect of this market-dominated thinking makes it difficult to conceptualise something that is purely noneconomic.

An exception to the mainstream narrative in the legal debates is provided by Kaupa who essentially calls for a clarification and re-consideration of the hegemonic economic theories that underlie the internal market rules (as a whole).[22] His argument is that heterodox economic theories tend not to share most implicit economic viewpoints that stand at the basis of the internal market and competition rules, starting with the traditional division between economic and the 'noneconomic' or 'social' issues:

> 'Equating the exercise of the rights granted by the market freedoms by individuals and companies with economic progress per se, and reducing public-interest regulation to non-economic, social goals is therefore based on assumptions that are not shared by all economists. This means that the market/social dichotomy is already an expression of a specific metatheory, namely neoclassical economic theory.'

Kaupa argues for an expression and possibility of dissent in legal discourse through subjecting it to a rational deliberation procedure. As such judicial objectivity within this argument requires the possibility for different readings of the market freedoms instead of exclusively following conventional wisdom[23] and calls for doctrinal strategies that allow Courts to continue to prevent protectionist or anti-competitive activities without

[20] Ibáñez Colomo, "Market Failures, Transaction Costs and Article 101(1) TFEU Case Law." .
[21] In the sense given to it by Streeck (n 68 above).
[22] Kaupa in Witte, Muir, and Dawson, *Judicial Activism at the European Court of Justice* (n 67)
[23] Kaupa in Ibid., 69.

enforcing an ideologically one-sided interpretation of the market.[24] As such, Kaupa envisages the regulatory conflict between the left and the right not at the intersection between economic and social goals but within the spectrum of economic goals itself. I strongly agree with the narrative started by Kaupa in the acknowledgement of the importance of an overarching approach to these types of regulatory conflicts. I part from this argument, however, at the moment that such conflicts are to be resolved exclusively within the spectrum of economic analysis. The argument of Kaupa is based on the assumption that an overarching principle of economic growth validates an approach that remains completely within the economic spectrum and ignores the possibility that economic based solutions to such regulatory conflicts could impede, as was illustrated previously, some of the broader less quantifiable objectives that are difficult to completely translate within the economic spectrum without losing something that actually matters.

A "true" nonmarket objective is something that is concerned with pursuing an objective that falls outside of concerns that are related with the functioning of markets – *it is residual in that sense*. Hence, a fuller recognition of nonmarket objectives within market based governance frameworks such as competition law frameworks requires an identification of instances where something of value is actually lost in the market method of dealing with nonmarket objectives. The primary purpose of an exercise that tries to clarify the nonmarket objective is therefore to provide an *operational conceptualisation* that *allows* these 'things' to be distinguished from market objectives.[25] Indeed, this approach accepts the primacy of the market but then allows the nonmarket to be identified as a *residual* and *conflicting* objective*.* Meaning that the nonmarket is to be found in features of values that get lost, are not addressed or are negatively impacted within market based governance styles. Second, features of nonmarket values can be found in *the way that certain objectives are pursued*. Nonmarket objectives tend to share or should share *a social and political pact* that *underlies* the objectives that are pursued. As such, even if, theoretically speaking, a market approach towards social inclusion would address all of the features of this value, there may be something lost in the process of pursuing the value. This is a common feature that is related to the discursive process through which social rights are normally created on a national level. The idea behind such a discursive process is

[24] Kaupa in Ibid., 75.

[25] Putnam, "Meaning and Reference," 11.: 'no operational definition does provide a necessary and sufficient condition for the application of any such word. We may give an "operational definition" […] but the intention is never "to make the name synonymous with the description". Rather "we use the name rigidly" to refer to whatever things share the nature that things satisfying the description normally possess'.

that through the exercise of political processes citizens become somehow co-responsible for these objectives and, thereby, mutual obligations are created to ensure that they operate according to the social value attached to these particular objectives.[26] Access to important social and economic benefits is normally associated to such discursive processes.

Lastly, it is *dynamic* and *derogable* because nonmarket interests can develop and evolve. This can be illustrated with the example of child labour as state 'intervention' that restricts access to labour markets of economic operators and the choice of companies to employ whomever they want. Chang (2002) discusses how in 'advanced' societies, the ban on child labour is no longer a legitimate policy debate but that this differs from the situation in developing countries.[27] In developing countries, a state ban on child labour may still be considered to be an 'intervention' with market forces and the impact on economic efficiency remains a legitimate subject of policy debate.[28] Obviously, within the EU legal framework that promotes free trade, a ban on child labour is not seen as an *intervention* and hence a restriction to freedom of trade. Rather, you could say, it has *evolved* into a necessary pre-condition of the concept of free trade instead of something that would 'intervene' and restrict with free trade. Chang argues that once a right or obligation (such as a ban on child labour) is accepted as one of the *fundamental rights* of all members of a society, the ban will not be considered as intervening with free trade any more. So depending on which rights and obligations are regarded legitimate and what kind of hierarchy between these rights and obligations are accepted by the members of a society, an intervention could be considered as intervening trade in one (time rate of) society and not in another. Similarly, for example, AG Cruz Villalón, in his opinion of 5 May 2010 (in Case C-515/08, Vítor Manuel dos Santos Palhota and Others) argues that social protection should not be seen as an intervention to free trade anymore but as a commitment of general validity. As such, the legal qualification of an act as an intervention to free trade tells something about the rights and obligations that are regarded legitimate and of the hierarchy between these rights and obligations as they are accepted by the members of a society.

It follows from these considerations that the noneconomic is far from a fixed idea that can be determined *ex ante* or on the basis of a form of dominance reasoning. That is to say a type of reasoning that says 'x is better than y in all respects' so if conflicts arise in practice, x will always be put above y. This type of reasoning is unlikely to

[26] Bellamy, "The Liberty of the Moderns."
[27] Chang Chang, "Breaking the Mould," 542. .
[28] Ibid., p. 543.

reflect societal consensus. The nonmarket is a dynamic and residual concept that forces an open and inclusive outlook *beyond* market considerations in governance frameworks. This has consequences for the means through which governance rationales that affect nonmarket objectives should operate. The qualification of 'intervention' or 'restriction' to free trade or competition tells something about the rights and obligations that are regarded legitimate and the hierarchy between these rights and obligations that are accepted by the members of a society. Therefore, a *public value choice* is made every time a qualification is made that a noneconomic objective restricts competition.

The institutional design consequence of this is that whenever a public interest objective can be voiced and weighed as a market objective, e.g. an externality, without losing anything of the public interest that is being pursued, competition authorities appear well placed to deal with resolving types of conflicts that require public interest versus competition balancing. In contrast, where a public interest objective represents more than can be reasonably captured within competition based rationalities, the setting should change towards an institutional domain beyond efficiency logic and managerial forms of decision making and conflicts should be resolved on the basis of a process of negotiated coordination that involves more public stakeholders.

4. Implication for competition law public interest conflict resolution: Wouters and the case of the Friesian horse

The conventional framing of "economic vs. noneconomic objective" or within the typical competition law framework "competition vs. noncompetition objective" fails to capture what is at stake in the dichotomy because of an underdeveloped *conceptual* understanding of the noneconomic. Consequently, the rationale adopted within legal frameworks fails to distinguish between true and false norm conflicts. False norm conflicts arise when the public objective is not at odds with economic/competition interests. That is to say that the public (social, nonmarket) interest is often (more or less covertly) voicing a market related interest and conflicts can be addressed through a market-based model such as an externalities based approach. That is not to say that there is no such thing as public interest that is distinguishable from a market interest but merely to point to the fact that the conflicts that are captured within the current legal frameworks are not sufficiently disentangled. A better conceptual understanding of the noneconomic objective may solve or render more understandable some of the *apparent* problems of market and nonmarket norm conflicts by clarifying whether a

conflict is actually present. A disentanglement of this kind could often show that there is no real conflict of norms but rather a disagreement *over the construction of one norm*. This has consequences for both the legal reasoning and the institutional means through which such conflicts would have to be resolved.

There are several instances where the introduced theoretical debate becomes relevant for how competition law reasoning incorporates public interest objectives. For example with respect to the question of what concerns an economic activity and the legitimate reach of the EU competition law provisions,[29] or the way that EU competition law should deal with public policy concerns that limit competition[30]. Within the state aid rules the discussion on the distinction between services of general economic interest versus services of general interest.[31] I will now discuss some competition law consequences of the theoretical issue presented above in the context of the case of the Friesian horse.

The Friesian is a horse breed originating in Friesland, Netherlands. Most often recognized by its black coat color and long, thick mane and tail, wavy, and "feathers"– long, silky hair on the lower legs, deliberately left untrimmed. The breed has faced extinction many times and is considered one of the oldest breeds ever to be recorded. The Friesh Paarden-Stamboek (FPS Studbook) is traced as far back as 1879. Cross breeding is not allowed and only the off-spring of approved stallions can be entered into the main studbook registry. Stallions must be approved for breeding in order for their off-spring to be eligible for registration with the FPS. A stallion's breeding approval is always conditional. His offspring must possess 'sufficient quality and sport aptitude' to prove that the stallion makes sufficient impact on the breed. Historically, the Friesian horse has issues with inbreeding because the population of the Friesian went through a few so called 'bottle necks' where the impact of just a few male horses was very big in the growth of the population. According to legend, in 1879 there was only one remaining purebred stallion left and all purebreds today can be traced back to him. There exists therefore a relatively high percentage on inbreeding within the Friesian horse breed. The FPS therefore strictly regulates the number of inseminations that the approved studs are allowed and forbids them to go above 180 per year until the offspring has been approved by the FPS. Members that go above the 180 per year

[29] Odudu, "Interpreting Article 81 (1)"; Odudu, *The Boundaries of EC Competition Law*; Odudu, "The Wider Concerns of Competition Law.".

[30] Ibáñez Colomo, 'Market failures, transaction costs and Article 101(1) TFEU case law' (n 69); Christopher Townley, 'Article 81 EC and public policy' [2009].

[31] Davies, "Article 86 EC, the EC's Economic Approach to Competition Law, and the General Interest"; Davies, "The Process and Side-Effects of the Harmonisation of European Welfare States.".

can be sanctioned. In 2006, two of the approved studs that were owned by the same party, were particularly popular and surpassed the limit by 156. The owner objected to the sanctions, arguing that the restrictions qualified as hardcore output restrictions on competition that could not be justified on the basis (of the Dutch equivalent) of article 101 (3) TFEU. The question put on the table of the appellate court in Arnhem was whether the FPS had unduly restricted competition of its members by setting limits to the output of approved studhorses. In other words, the question was whether the health of the Friesian horse qualified as a legitimate noneconomic objective or whether it had to fulfil the efficiency requirements of 101(3) TFEU. I will explore this question first by connecting some of the standing case law to the theoretical issues introduced above.

Now, as the case law stands, what is to be considered economic or noneconomic cannot be given a priori status and requires a case-by-case analysis. Furthermore, it is not the sector or the status of an entity carrying out a service (e.g. whether the body is a public undertaking, private undertaking, association of undertakings or part of the administration of the State), nor the way in which it is funded, which determines whether its activities are deemed economic or non-economic; *it is the nature of the activity itself*.[32] In practice, this means that a single entity may well be engaged in both economic and noneconomic activities and therefore be subject to competition rules for parts of its activities but not for others.[33]

The nature of the activity has both a formal and substantive component in the case law of the Court. The formal conditions relate to the existence of a market, state prerogatives or obligations of solidarity.[34] Most importantly, the formal notion of the noneconomic determines that some rules or regulations do not enter 'the sphere of economic activity' because the State defines the public-interest criteria and the essential principles with which its rules must comply and retains the power to adopt decisions. In that situation rules adopted by private associations remain within State primacy and are not covered by the Treaty rules applicable to undertakings.[35] Other Treaty articles could of course then be triggered (internal market rules or article 106 TFEU).[36] The substantial component of the noneconomic sphere enters the legal

[32] Case C-82/01 Aéroports de Paris [2002].

[33] Case C-222/04 Cassa di Risparmio di Firenze [2006] Case C-118/85 Commission v Italy [1987]. Compare also Cases C-205/03 P. Fenin [2006] and T-155/04- Selex [2006] for a situation where different activities could not be analysed separately

[34] Case C-222/04 Cassa di Risparmio di Firenze [2006].

[35]

[36] For a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service is that it must be provided for remuneration. The service does not, however, necessarily have to be

analysis only after it has been determined that the formal characteristics of the nature of the activity are not of a sort to exclude the application of the competition rules. Therefore, after it has been established that the competition rules apply on the basis of some formal consideration it is necessary to consider the noneconomic objective on the basis of substantive conditions. This is however underdeveloped in the case law.

The question that should be answered at this point is to what extent and under what circumstances (associations of) undertakings can legitimately formulate noneconomic objectives as a public interest that can be pursued to the detriment of another public objective (effective competition) and, secondly, what the intensity of judicial review should be of such decisions. It is clear that the answer to this question requires a substantial understanding of a legitimate noneconomic objective. It cannot completely be a matter of procedure, e.g. the extent to which the objective is made in alignment with objectives within a public law framework. At this part of the legal analysis the formal component of the noneconomic sphere already established that there is space for (associations of) undertakings to define these objectives themselves – that is the reason the competition framework was applicable in the first place. This is exactly the question that the appellate court in Arnhem struggled and failed with in the Friesian horse case.

Before entering into the specifics of the ruling I will discuss shortly how standing case law deals with this question. Here we enter into the domain of the Wouters case.[37] In Wouters the Court qualified a decision of the Dutch Bar to prohibit multi-disciplinary partnerships between attorneys and accountants as not infringing article 101 (1) TFEU. The Bar was charged by law with adopting deontological rules that assured the correct exercise of the attorneys profession. The Court first established that the regulatory powers that were provided to the Bar were not strictly supervised by the State and there was scope for the Bar to define public-interest criteria and the way to pursue them.[38] Consequently, the competition rules applied. However, the CJEU introduced a possibility to escape the application of the competition rules by considering that not

paid by those benefiting from it. The economic nature of a service does not depend on the legal status of the service provider (such as a non-profit making body) or on the nature of service, but rather on the way a given activity is actually provided, organised and financed. In practice, apart from activities in relation to the exercise of public authority, to which internal market rules do not apply, it follows that the vast majority of services can be considered as "economic activities" For article 106 it all depends on a procedural review of the organisation of the public service concerned.

[37] Case C-309/99 19 februari 2002.

[38] Para 68

every restriction of competition necessarily falls within the prohibition laid down in Article 101(1) TFEU.[39] The overall context of the restriction matters:

> "More particularly, account must be taken of its *objectives*, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to *integrity and experience* (…). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives." [emphasis added]

The Court did not consider possible efficiencies of the restrictive agreements. The decisive question was whether the prohibition was necessary for the proper practice of the legal profession. Whether or not Dutch attorneys could provide more efficient advice to companies if one entity could provide legal and accounting services at the same time was not an issue. In stead, the CJEU created a possibility to lift a restriction from the application of the competition rules to a domain beyond efficiency logic. The objective of integrity was considered a legitimate objective and able to pull inherent restrictions on competition out of the efficiency ruled legal domain. Although not explicitly stated, the inherent logic at work here appears obvious. That is that integrity is not an objective that can be translated within the efficiency targets of the exemption conditions of article 101 (3) TFEU and hence merits an existence outside of this framework. The Bar of the Netherlands was *substantively entitled* to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts. In other words, setting up a body with commercial interests in common with members of the professional category of accountants poses the risk of tempting lawyers to take account of considerations other than those exclusively linked to their clients' interests.[40] Once members of the two professional categories have undertaken to share the profits, losses and financial risks connected with their association, they will have a financial interest in exchanging information about the clients they have in common. An accountant may be tempted to ask for and obtain information from a lawyer relating to, for example, negotiations conducted by the latter in a certain dispute. A lawyer may, vice versa, be tempted to ask questions of

[39] para 97
[40] See also AG opinion

an accountant in order to obtain evidence, which would help him to make a better presentation of his client's case in court. In other words, on the basis of 'Hirsch' type of argument, the noneconomic dimension of the lawyer-client relationship may be negatively impacted if the social basis under which these services are supplied changes. In this case the CJEU took account of the context and the potential negative impact of changing that context to the benefit of efficiency considerations. However, a substantive conception of the *legitimate* noneconomic objective was not developed but rather implicitly assumed, thereby leaving room for conceptual confusion. Why is the objective at stake in Wouters a nonmarket issue? The implicit logic at work within this methodology is that the inherent restrictions test should apply only to those objectives that can indeed not be translated within the exemption framework of 101 (3) TFEU.[41] I will develop this tentatively further below. Not developing this question invites contextualising everything into market by simply slotting it within an economic welfare analysis. However, as was discussed above, some things are just not market and the challenge is to develop a legal methodology that allows a decision on this. That this is a bit complex is illustrated in the ACM position paper that notes under section 3.4 that:

> 'In a few cases, the European Court of Justice accepted that a competition restriction was acceptable in view of the legitimate public interest served. The competition restrictin was considered to be 'inherent' to the public interest served, and, for that reason, the cartel

[41] The room for conceptual confusion is very clear in Case C-1/12 (Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência). This most recent application of the Wouters framework shows that the Court has lost sight of the suggested logic that was at work in Wouters. The measure in question concerned a regulation adopted by the Portuguese Order of Chartered Accountants ("OTOC") in relation to its members' professional education. It required chartered accountants to obtain a number of training credits each year, a third of which had to be obtained through training provided by the OTOC itself, with the remainder obtained through training approved by it. The anticompetitive effects of the regulation were obvious. A third of the market was artificially closed to competitors, and the requirement of advance approval meant that competitors were hindered from providing training on up-to-date issues while also having to reveal the details of their proposed training to the OTOC. According to OTOC the purpose of these rules was to protect the public by guaranteeing the quality of professional services. OTOC argued that this was a similar situation as in the Wouters case. In stead of questioning whether guaranteeing the quality of professional services is a economic or noneconomic objective (it is of course quite obviously an economic objective), the Court started applying the Wouters framework by considering that "account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives. " The Court recognised the applicability of the Wouters principle and concluded that the measure was aimed at guaranteeing the quality of services offered by chartered accountants, that compulsory training did effectively contribute to the pursuit of that objective, but that these particular measures imposed restrictions beyond what was necessary [94-100]. The CJEU also dismissed, shortly, the argument that the measures fell within the exemption in Article 101(3), for the similar reason that the restrictions imposed were not essential. Thereby the CJEU completely dismissed the relevance of the Wouters framework as a framework that applies to actual conflicts of normative orders whereas this was a case that was without such a conflict and completely economic in nature.

> prohibition did not apply. In the literature on this European case law, it has been suggested that this principle of inherent restrictions may also be applied to sustainability initiatives. In principle, ACM does not rule this out. However, ACM believes this question has been insufficiently explored yet in order to be able to make statements on its application in this position paper.'

The argument under development in this paper claims that if this question is left unanswered, competition authorities are working with an insufficiently developed understanding of what is market and what is not market. Consequently any competition policy that wants to integrate sustainability in competition analyses without this understanding is necessarily incomplete.

In the Friesian horse case the appellate court of Arnhem tried to qualify the relationship between economic and noneconomic objectives and, in particular, the question when noneconomic objectives can be legitimately pursued to the detriment of competition interests. The issue of whether the health of the Friesian horse could be qualified as an economic issue was not a matter of debate in this case although the argument that the health of the Friesian horse was translatable within an efficiency based framework could have been made. The 'Hirsch' based argument against such a suggestion would posit that the translation of health within an efficiency based decision model risks inhibiting the noneconomic autonomous value of life itself by making the legitimate pursuit of the health dependent on the question whether it can be proven that it is done in an efficient manner. As said this was not debated, in stead the appellate court focussed on the 'legitimacy' question and posited in that respect that the noneconomic objectives pursued in Wouters were of a special and exceptional kind. The appellate court considered that the noneconomic objectives at stake in that case were to be considered as 'weighty public interests' defined within a clear and narrow public law framework. The pursuit of the health of the Friesian horse was not considered to be comparable as a public interest and qualified it as insufficient to be considered capable to pull the inherent restriction outside of the competition law framework. The appellate court did not expand on its reasoning and this makes the judgment weak but the judgment's interest lies exactly in this weakness as it indicates what is lacking in these balancing exercises. Essentially what is lacking is a clear understanding of how the procedural and substantial components of the noneconomic objective interact.

Simply put, the formal/procedural component of the nonmarket objective determines first of all whether the (association of) undertaking(s) concerned is sufficiently embedded in a public law framework to be considered *enabled* to define the public interest it pursues and in what way. The substantial component of the

nonmarket objective should then be developed to consider if the objective pursued is an objective that can be translated within the efficiency targets of the exemption conditions of article 101 (3) TFEU to determine whether the perceived conflict concerns a conflict of different normative orders or a conflict over the construction of one norm. Therefore, the question to what extent and under what circumstances (associations of) undertakings can legitimately formulate noneconomic objectives as a public interest to be pursued to the detriment of another public objective depends on both formal and substantial conditions related to the concept of a noneconomic objective.

5. Conclusion

I related some key points of the topical debate on the potential harmful effects of increasing marketization of social relations to the operation of competition law frameworks when they deal with the balancing of public interest concerns and competition objectives. I conclude that there are two main implication of this debate for the operation of competition law in the presence of noneconomic public objectives. The first is that the dichotomy between market and nonmarket or economic and noneconomic is there to allow or even force a deliberative space for broader than monetary or efficiency based considerations of what matters in social relations. The doctor-client relationship, the lawyer-client relationship or the way animals are treated harbour important noneconomic elements that not necessarily speak market talk. A *public value choice* is therefore made every time a qualification is made that a noneconomic objective restricts competition. The institutional design consequence of this is that whenever a public interest objective can be voiced and weighed as a market objective, e.g. an externality, without losing anything of the public interest that is being pursued, competition authorities appear well placed to deal with resolving types of conflicts that require public interest versus competition balancing. In contrast, where a public interest objective represents more than can be reasonably captured within competition based rationalities, the setting should change towards an institutional domain beyond efficiency logic or managerial forms of decision making and conflicts should be resolved on the basis of a process of negotiated coordination that includes public stakeholders reflective of the different normative orders and a political decision should eventually provide guidance as to which normative order takes precedence. As such, the identification of noneconomic spaces could be structured as entrance points for forms of democratic deliberation procedures in order to incorporate the idea that

certain values should be protected and kept sustainable independently of efficiency logic. This type of governance rationality involves a reinstitution of economic activity in ways that subject it to social control in specific situations, enabling mediation between economic and noneconomic thinking on the basis of a system of participatory planning.[42] In its ideal form this system envisages situations of self-government in which those affected by a decision participate in making the decision, in proportion to the extent to which they are affected by it.[43] Thereby a governance rationale that incorporates a substantive notion of the noneconomic would be grounded in an idea of social ownership. Simply put, competition and public interest conflicts fall either *within* the scope of a competition rule, after which the method to resolve a conflict should be based on a weighing of efficiency merits, or *outside* the scope of the competition rule and the outcome should be based on a procedural review of the *quality* of the process that restricts competition.

Such institutional framework is obviously lacking at the moment. This is illustrated by the Friesian horse case that shows it is not possible for (associations of) undertakings to develop noneconomic objectives within a framework that provides some certainty and calculability as to potential competition law liability. The reasoning in the case law is furthermore insufficiently developed because of an underdevelopment of the interplay between a procedural and substantive understanding of the noneconomic sphere. The procedural component of the nonmarket should determine whether the (association of) undertaking(s) concerned is sufficiently embedded in a public law framework to be considered *enabled* to define which public interest it pursues and in what way. The substantial component of the nonmarket objective should then be developed to consider if the objective that is pursued concerns an objective that can be translated within efficiency framework of article 101 (3) TFEU to determine whether the perceived conflict concerns a conflict of different normative orders or a conflict over the construction of one norm.

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Comments most welcome!

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[42] Harvey, Ramlogan, and Randles, *Karl Polanyi*.
[43] Ibid.

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