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Non-competition interests are no competition for 'Market Europe': does EU competition law hamper the exercise of political rights?

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EXECUTIVE SUMMARY

This report has been drafted within the context of work package (WP) 8 of the bEUcitizen project. This WP focuses on political rights and thus aims to elaborate on the perceived tension between economic rights and political rights of European Union (EU) citizens. The present report contributes to this aim by providing an analysis of the tension between EU competition law and so-called Responsible Business Conduct (RBC) initiatives. The term RBC refers to initiatives of private businesses that do not solely aim at making profit, but also aim to achieve a wider social goal, such as environmental protection, protection of animal welfare or combatting low wages. In order to be effective, these RBC-initiatives are often carried out in cooperation between different private firms. This cooperative nature renders many RBC initiatives problematic from a competition law perspective, which prohibits anti-competitive agreements between undertakings.

The current report first provides an in-depth overview of what the authors refer to as the 'competition law problem' that often hinders these RBC-initiatives. The report then reflects at a more fundamental level on this competition law problem using three different lenses, which allow the reader to gain insights from different theoretical angles. Section 3 of the report places the competition law problem within the wider academic and political discussion on the 'dis-embeddedness' or 'decoupling' of the economic dimension side of EU integration (also called 'Market Europe') from the social dimension of EU integration (also called 'Social Europe'). Section 4 focuses on the position of private firms as political actors when engaging in RBC-initiatives. This section thus analyses the central issue for this report from the perspective of various theoretical outlooks on the (political) role of private firms, including the ethics of the firm and the notion of corporate citizenship. Subsequently, section 5 focuses on the vertical relationship between the EU member states and the EU, reflecting on the possibility of a divergence between the approaches pushed for at the European and national level respectively. In the analysis, the report focuses mostly on the Netherlands as the developments here seem to be at the forefront of this discussion. While the report thus provides a case-study, the analysis will also provide insights relevant within a wider context since the highlighted tensions stem from European law,.

The report concludes i.a. that the tension between EU competition law and RBC-initiatives correlates with more fundamental changes within society, most notably a shift in thinking about the place of 'the firm' in society. These changes have provided an impetus for the increased engagement with RBC. At the same time, non-economic public interests seem to remain foreign to EU competition law. Until now, institutions – such as the EU Commission and the Dutch national competition authority – remain largely unable to weigh these interests in their competition law analysis. On the basis of the analysis in the report, it is argued that this demonstrates the disembedded nature of EU competition law and provides an example of the rising asymmetry between so-called 'Social Europe' and 'Market Europe'. It is stressed that this tension seems problematic and could in the long run greaten the tensions between the EU and its member states. The report finally concludes that the problem might be solved by merging legal and political solutions at both the European level and the national level of the EU member states. However, these possible solutions deserve further scholarly attention.

1. INTRODUCTION

Private firms increasingly undertake quasi-governmental activities. This is true for cooperation between international firms, but also for various national initiatives involving inter-firm cooperation. Firms thus seem to have assumed quasi-political responsibilities and have, for example, played a role in environmental protection, protection of animal welfare and combatting low wages throughout the world. This is, of course, not a separate movement. Increasingly, national governments, regional unions, the OECD, and even the United Nations are engaging in a debate on the role of firms in society, and various parties have called for greater public engagement and Responsible Business Conduct (RBC) by private firms.[2] The same is true on the EU-level.[3] In analysing this shift some have even argued that business firms have become 'political actors'.[4]

Though this phenomenon is in itself interesting for the bEU-citizen work package on political rights, our contribution will focus on a specific issue that *results* from this shift: the tension that occurs between (semi-) political action of private firms on the one hand and European competition law on the other hand.[5] We will focus mostly on the Netherlands as the developments here seem to be at the forefront of this discussion. It provides a case-study but we also expect, because the highlighted tensions stem from European law, it will provide wider relevant insights.

This is the main tension at issue: RBC-initiatives, especially when coordinated between different firms, may well land firms into competition law trouble. European competition law – as one of the cornerstones of internal market law – protects the process of competition, the market mechanism, the free flow of goods and services and ultimately enhances (consumer) welfare through growth and innovation.[6] Therefore, competition law prohibits firms from entering into restrictive cartel agreements and it places a check on economic dominance, by articulating the special responsibility of dominant undertakings.[7] The developments relating to firms taking quasi-political responsibility has

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[2] See the UN Global Compact, calling for self-regulation as a means to fill the regulatory vacuum. While in general academic debate a major emphasis has been placed upon the role of Transnational Corporations (TNCs) or Multinational Corporations (MNCs), we will instead refer to (private) firms in order to able to cover not only transnational or major corporations, but also inter-firm cooperation within one EU Member State.

[3] See for instance the 2011 Communication from the Commission titled 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (COM/2011/0681), which discussed i.a. the role of public authorities. In 2011, the EC also published a renewed EU strategy 2011-2014 for CSR to support entrepreneurship and responsible business.

[4] See for instance: Detomasi, D., 'The Political Roots of Corporate Social Responsibility', *Journal of Business Ethics* (2008), Vol. 82, no. 4, pp. 807-819; Matten, D., Crane, A., 'Corporate Citizenship: Toward an Extended Theoretical Conceptualization', *Academy of Management Review (*2005), Vol. 30, No. 1, pp. 166-179; and Scherer, A., Palazzo, G., 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance and Democracy', *Journal of Management Studies* (2011), Vol. 48. No. 4, pp. 903-904.

[5] For this deliverable the task was set out to focus on the case in the Netherlands, therefore we will mainly draw upon issues and refer to specific examples from Netherlands.

[6] This contribution focuses on the workings of EU competition law, hereafter simply referred to as 'competition law'.

[7] Article 101 TFEU contains the prohibition on agreements and concerted practices restricting competition (known as the 'cartel prohibition', though the wording of the prohibition is much more careful and calibrated than the notion of cartels connotes. Article 102 TFEU contains the prohibition for companies with a dominant

resulted in a tension between, on the one hand, the aims of competition law, and, on the other hand, inter-firm agreements that pursue a more 'political' goal (to which we will refer as RBC-initiatives).[8] These goals are not generally recognised as relevant under a competition law assessment of such agreements. For example, sustainability agreements, agreements enhancing animal welfare and agreements relating to providing fair wages to factory workers outside the EU have been scrutinized under competition law. Some of these agreements have been held incompatible with internal market rules because the interests they pursue are difficult to express in the (economic) terms that are used to scrutinize restrictive agreements under competition law.[9]

For the purpose of our contribution, this inability of EU competition law to incorporate a balancing of different interests – the RBC-related interests versus the interests of the market – will be labelled as 'the competition law problem'. In usual competition law discourse the RBC-interests being pursued are generally labelled *public* or *non-competition* interests; this in contrast to the *economic* or *competition* interests that are protected by competition law. The problem is less recognized on the RBC-side of the table.[10] The general gist here is that 'in adopting socially and environmentally

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economic position to abuse that position. Merger control is also part of the competition regime, as are provisions dealing with the state in its relation to companies.

[8] RBC, or Responsible Business Conduct, has been brought to the fore by the OECD and includes not only compliance with the applicable legal norms, but also 'involves responding to societal expectations communicated by channels other than the law, e.g. inter-governmental organisations, within the workplace, by local communities and trade unions, or via the press' (OECD, 'Chapter 7. Promoting Responsible Business Conduct', *Policy Framework for Investment - User's Toolkit* (2011), pp. 2). The voluntary part of the private initiatives are also often referred to as Corporate Social Responsibility (CSR).

[9] See for an introduction to the relevant literature e.g. Monti, G., 'Article 81 and Public Policy', *Common Market Law Review* (2002), Vol. 39, No. 5, pp. 1057–1099; Cseres, K., 'The controversies of the consumer welfare standard', *The Competition Law Review* (2007), Vol. 3, No. 2, pp. 121-173; Kingston, S., 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special, *European Law Journal* (2010), Vol. 16, No. 6, pp. 780-805. Also in general: T. Prosser, The Limits of Competition Law. *Markets and Public Services*, Oxford: Oxford University Press 2005; D. Zimmer (red.), *The Goals of Competition Law*, Cheltenham: Edward Elgar 2012; O. Budzinski, 'Monoculture versus Diversity in Competition Economics', *Cambridge Journal of Economics* (2008), Vol. 32, Issue 2, p. 295-324; C. Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 ERC)? Reflections of a Community Lawyer', *Cambridge Yearbook of European Legal Studies* (2008), Vol. 10, p. 345-381; C. Townley, *Article 81 EC and Public Policy*, Oxford: Hart Publishing 2009; A. Gerbrandy, 'Competition Law and Private-Sector Sustainability Initiatives. Government Action or Private Initiatives in Reaction to Science's Call for Sustainability', in: A.L.B. Colombi Ciacchi, M.A. Heldeweg, B.M.J. van der Meulen en A.R. Neerhof (red.), *Law & governance. Beyond the public-private law divide?*, Den Haag: Eleven International Publishing 2013, p. 81-104; O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 101*, Oxford: Oxford University Press 2006; W. Kerber, 'Should Competition law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law', in: J. Drexl, L. Idot en J. Moneger, *Economic Theory and Competition Law*, Cheltenham: Edward Elgar 2009; I. Lianos, 'Some reflections on the question of the goals of EU competition law', in: I. Lianos en D. Geradin (red.), *Handbook In EU Competition Law: Substantive Aspects*, Cheltenham: Edward Elgar 2013, p. 1-85; O. Andriychuck, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process', *European Competition Journal* (2010), Vol. 6, Issue 3, p. 575-610; O. Black, *Conceptual Foundations of Antitrust*, Cambridge: Cambridge University Press 2005.

[10] The purpose of the current report is not to analyse the development as such in the specific policy approaches on CSR and/or competition law at the EU level. This has been done elsewhere, see for instance: Kinderman, D. 'Corporate Social Responsibility in the EU, 1993–2013: Institutional Ambiguity, Economic Crises, Business Legitimacy and Bureaucratic Politics'. *Journal of Common Market Studies* (2013), Vol. 51, Issue 4, pp. 701–720; Fairbrass, J. 'Exploring Corporate Social Responsibility Policy in the European Union: A Discursive Institutionalist

responsible practices all companies […] have to respect the relevant rules of EU and national competition laws'.[11] But there is less attention to concrete tensions between competition law and the RBC-push.

Apart from the notion that *firms* arguably become (quasi-) political actors themselves, it is relevant for the discussion on political rights that NGOs and lobby groups play an active role in putting these interests on the agenda. Heftier RBC-initiatives often come into being as a result of pressure and involvement from *civil society*. Also, *governments* themselves may be involved. It can be a conscious choice of government not to legislate, but to push for self-regulation by firms instead. Alternatively, governments can enter into agreements with private industry for the regulation of specific standards, for example on human rights protection.[12]

Our competition law problem relates to the exercise of *political rights*. The term political rights covers, of course, clearly defined rights such as (European) citizen's voting rights or standing rights. However – in line with the description of work package 8 for the bEUcitizen project – we understand political rights in the broader sense: a category of capacities of citizens to participate in collective decision-making processes. Generally, such decision-making processes involve balancing and taking into account conflicting (public) interests. Participation can take many forms: firms can participate in rulemaking procedures; citizens can participate, not only through voting, but also by participation in pressure-groups and other forms of civil society. This influences the political debate. Thus, within the meaning of this report, the political process as a whole encompasses a metaphorical arena where the different values and public interests are debated and given weight. A balancing between competition interests and non-competition interests is, in this sense, inherently political in nature; citizens and firms exercise political participation rights when joining the arena in which this debate takes place.

Our aim in writing this report is to provide an analysis of the interplay between the competition law problem and the exercise of this broader category of political rights and political debate. This analysis will use several *lenses*, which each shine a light upon an element of the issues at stake. A first lens focuses, more abstractly, on the generally acknowledged tension between the economic focus of the European internal market[13] protected by European competition law, and the social sphere and non-economic elements of society.[14] This fits the narrative of the European Union's integration project

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Analysis'. *Journal of Common Market Studies* (2011), Vol. 49, Issue 5, pp. 949–970. See also more in general for an analysis of the EUs CSR policies and the specific problems in the French case: Delbard, O. 'CSR legislation in France and the European regulatory paradox: an analysis of EU CSR policy and sustainability reporting practice'. *Corporate Governance: The international journal of business in society* (2008), Vol. 8 no. 4, pp. 397 – 405.

[11] European Commission, 'Green Paper - Promoting a European framework for Corporate Social Responsibility' (COM/2001/0366), p. 12

[12] In the Netherlands such agreements, in which the government is either party or (more often) a broker/driver are quite wide-spread: see e.g. the Chicken of Tomorrow case (discussed below), but also the 'Convenanten' in which sectoral agreements are shaped by involvement through government.

[13] And the economic rights of companies, though we will not focus on a clashing of different types of rights.

[14] One could frame this as a clash of rights as well: the economic rights of current consumers (a high consumer welfare) against the non-economic rights (such as a healthy environment) of future citizens and non-citizens (such as animals and even the eco-system). Again, we will not focus on a clash of different types of rights, different generations of right-holders and the debate on the existence of rights of non-human species and non-species.

leading to a social deficit by placing more emphasis on economic integration than on embedding its agenda in the social structures of the member states (section 3).

A second lens focuses on the position of firms as political actors when engaging in RBC-initiatives: for example, section 4 elaborates on various theoretical outlooks on the (political) role of private firms, including the *ethics of the firm* and the notion of *corporate citizenship.*

Thirdly, the lens of the vertical relationship between the EU member states and the EU will be used to analyse the possible situation where the national political level may strike a different balance between the interests at stake than the European level would allow (section 5). However, before delving deeper into these different perspectives, it is important to provide a better understanding of what we refer to as the competition law problem. This is the subject of section 2.

2. The Competition Law Problem of RBC-initiatives[15]

European competition law prohibits anti-competitive agreements between 'undertakings'.[16] Usually these agreements are held to be anti-competitive, because they have a detrimental effect on consumer welfare. Such agreements generally result in an increase of (consumer) price or a restriction of innovation. However, article 101 of the Treaty on the Functioning of the European Union (TFEU), also provides for an exception: an agreement may be allowed if the benefits outweigh the negative effects.[17] For example, benefits that can result in higher production costs might include a better quality of service, a turn towards innovation, or savings of distribution costs that may accrue to consumers.

While competition law has been part of the EU treaties from their inception and has gradually evolved into one of the cornerstones of the internal market regime, it is important to note that the interpretation of the Treaty provisions has changed during the decades. Since the nineties of the last century, a certain *economization* of competition law has been pushed for by the European

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[15] This paragraph builds on several articles/papers that Anna Gerbrandy has previously (co-)authored: See e.g. A. Gerbrandy, 'Addressing the Legitimacy-Problem for Competition Authorities Taking into Account Non-Economic Values. The position of the Dutch Competition Authority', *European Law Review* (2015) no. 5; R.J.G. Claassen & A. Gerbrandy, 'Doing good together. The Ethics and Politics in Competition Law', paper presented by Dr. Claassen at School of Philosophy Conference, University of Amsterdam, 2015; R.J.G. Claassen & A. Gerbrandy, 'Rethinking European Competition Law: from a consumer welfare to a capability approach', *Utrecht Law Review* (2016), Vol. 12, No. 1; A. Gerbrandy, Toekomstbestendig Mededingingsrecht, *Markt & Mededinging* (2016) no. 3, p. 102- 112.

[16] Often also referred to as 'companies'. The concept of undertaking is, however, broader.

[17] Article 101 (1) TFEU states: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…)." Article 101 (3) provides: "The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Commission – the main actor on the European competition law stage – thus bringing the economic notion of consumer welfare to a central position. Although the Court of Justice of the European Union arguably has not accepted consumer welfare as the sole object of European competition law,[18] this policy change has resulted in a general acceptance of the consumer welfare interpretation by the member states' national competition authorities (NCAs). This is logical as European competition law is directly applied also on the national level (conjointly with national competition law) by both NCAs and national courts. The notion of consumer welfare is not precisely delineated.[19] At its core however, the concept is mostly uncontested and is based on the insights of (neo-) classical (and neo-liberal) economic market theory. Within this paradigm, a well-functioning system of competition law is generally seen to be one of the basic necessities for economic growth and economic welfare.

The problem is then that from the perspective of this paradigm it is difficult to take into account *other* aspects of value within a competition law assessment of agreements. Non-competition interests relate to elements or values that are difficult to translate into the quantified analyses that competition economists tend to undertake (or to values that society might agree ought not to be quantified). Take for example an agreement between competitors to enhance animal welfare (of chickens or piglets) in intensive animal husbandry. This generally results in a higher consumer price, because of the higher production costs. The agreement would thus be prohibited under European competition law. For the agreement to benefit from the abovementioned exception of art. 101 TFEU and be allowed, its detrimental effects need to be offset by benefits for consumers. For this, the gains in *animal welfare* would normally have to be quantified. These benefits must offset the price increase resulting from the agreement for the agreement not to be caught by competition law. One can also consider the agreements between sportswear brands regarding the payment of wages (a 'living wage') and better working conditions for factory workers in the developing world. Should this agreement result in an (appreciable) increase of the consumer price within the EU, there is again a risk of an infringement of competition law. The benefits of such an agreement are hard to take into account in the analysis of the agreement from a competition law perspective, as they do not accrue to consumers in the EU but to factory workers in developing countries. From a competition law perspective, there is simply no (quantifiable) beneficial effect on consumer welfare in the EU.[20] In competition law as interpreted by the European Commission, these benefits would not be taken into account. The same goes for 'future benefits' that would accrue to future generations. In sum, we not only have the difficulty of 'pricing' the non-economic interests, but also the exclusion of benefits that do not accrue to 'current EU consumers' (those who pay the higher price).

Firms therefore face a dilemma: on one hand, competition law obliges them to compete and prohibits them from entering into RBC-initiatives as they may have a negative effect on consumer welfare. On the other hand, there are important (and interlinked) drivers that push towards these initiatives such as: the push towards the stakeholder model of corporate responsibilities and a stronger foundation for ethics of the firm; the pressure by national and international NGOs for firms to 'green' their supply; consumer/citizen demands; and the changing discourse on economic growth as the dominant

[18] See e.g. A. Gerbrandy, 'Een eigen rol voor de ACM ten aanzien van mededingingsrecht en duurzaamheid', *NTER* (2013) no. 10, pp. 326-332.

[19] Cseres (2007).

[20] See A. Gerbrandy, 'The Netherlands Move ahead with Competition and Sustainability', *RENFORCE Blog* (Spring 2016); which takes these two examples as a starting point (http://blog.renforce.eu/index.php/nl/author/anna-gerbrandy). These are actually examples, as will be discussed below.

model.[21] Firms can of course independently change their modes of production (the 'go at it alone'-route). Examples show that it is sometimes possible to change towards a more sustainable production mode without incurring a loss of market share. Governments can also choose to legislate. But neither option is always feasible or even preferred; sometimes for reasons of the slow pace of change. This is also one of the reasons why civil society tries to engage firms and opts for cooperation between them. And this is one of the reasons why governments might choose to stimulate cooperative RBC-initiatives as well.

In the Netherlands these colliding discourses are clearly visible where several high profile cases have played out publicly. Sector-wide agreements containing sustainability aims were held by the Dutch Competition Authority, the ACM, to be against competition law:

> The first case to take centre stage in the discussion on public interests and competition law was the Energy-agreement a sector-covering and widely supported agreement, brokered in typical Dutch polder-fashion on providing a more sustainable energy in 2020. Parties to the agreement include energy-producers, distributors, the Government, and advisory bodies to the Government (such as the Social Economic Council). Part of the agreement related to the (accelerated) closing down of five coal-fired power plants. This leads to less supply of electricity and to lower emissions of noxious gases and particulate matter. In an informal opinion (a non-binding preliminary assessment), the Dutch competition authority ACM labelled the closing of coal-fired power plants a restrictive production agreement in violation of competition law.[22]
>
> Another case relates to animal welfare, in an agreement relating to the intensive poultry-industry. Parties to the agreement include the provincial government, farmers, animal-fodder producers, veterinarians and supermarkets. The agreement would introduce a new type of chicken 'the chicken of tomorrow' that would provide the chicken with (a.o.) a slightly better – but still short – life. Such an agreement, the ACM posed in an informal opinion, would lead to a higher consumer price. To investigate possible consumer welfare gains, the ACM undertook a willingness-to-pay review, from which it deduced that consumers were not willing to pay this increased price.[23]
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> A final Dutch example can be found in the case of "blood-coal". At issue is an agreement between the Ministry of Foreign Affairs and energy production companies, signed under pressure from associations such as Amnesty International, stipulating that the energy production companies will individually provide transparency on where the coal used in production comes from. This includes coal from mines where workers' circumstances may be sub-optimal and where children may be involved in extraction. Coal from these mines is

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[21] See amongst others: J. Graafland, M. Kaptein en C. Mazereeuw, 'Motives for Socially Responsible Business Conduct' *Tilburg University CentER Discussion Paper Series* (2010) No. 2010-74; D. Baron, 'Morally Motivated Self-Regulation', *American Economic Review* (2010), Vol. 100, No. 4, pp. 1299-1329; D. Vogel, 'The Private Regulation of Global Corporate Conduct', *Business & Society* (2010), Volume 49, No. 1, pp. 68-87.

[22] See ACM, *Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord* (2013), https://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord/.

[23] See ACM on this initiative: https://www.acm.nl/nl/publicaties/publicatie/13760/Afspraken-Kip-van-Morgen-beperken-concurrentie.

called “blood-coal”. Public awareness through transparency may lead energy companies not to cease involvement in these mines (which goal might have been reached by a flat-out legislative prohibition) but to ameliorate the circumstances there. The ACM, in an informal opinion, indicates that individual transparency is against competition law.[24]

These decisions – that the agreements were anti-competitive – were then subject of a lively political (and public) debate, to which we will return in section 5. To be sure, this situation and subsequent discussion in the Netherlands might seem *particular*, and in one sense it is: the debate so far has been mostly limited to the Netherlands (though this seems to be changing). The problem giving rise to the debate is, however, of *European* origin. As mentioned above, European competition law is applied to these cases (and in a small country such as the Netherlands, European competition law will be generally applicable to any initiative of weight). This means that neither ACM nor the government can resolve these cases by simply deviating from a European standard of interpretation.

The background of the competition law problem is tied to both legal notions, economic notions, and political processes. By taking the perspective of the exercise of *political rights* as the point of departure for a further analysis, we will try to bring out the political strands of the competition law problem in the next sections.

3. Dis-embedded EU Competition law?

In this section we aim to place the competition law problem within the wider academic and political discussion on the ‘*dis-embeddedness*’ or ‘*decoupling*’ of the economic dimension side of EU integration (also called ‘Market Europe’) from the social dimension of EU integration (also called ‘Social Europe’). The tension between competition law and RBC-initiatives seems to fit the narrative of dis-embeddedness quite well. In turn, this has implications for the impact of the exercise of political rights in the political arena – referred to above as the space where, through deliberation and participation of citizens and citizens’ representatives, different and colliding interests are mediated.

It is not easy to distinguish a sole meaning for the term ‘embeddedness’. The concept is used within various disciplines, where each scholar seems to add his own flavour at a risk of rendering the term as such completely elusive. At the core stands Polanyi’s work ‘*The Great Transformation*’.[25] In this influential book Polanyi argues for a ‘market society’ where liberal capitalism – in order to genuinely prosper – would require a social protectionist response to maintain the relationship between the free market and (what is often referred to as) the fabric of society.[26] Ruggie gave his own twist to the

[24] See ACM on this initiative: https://www.acm.nl/nl/publicaties/publicatie/13544/Advies-ACM-over-herkomsttransparantie-in-de-steenkolenketen/ .

[25] Polanyi, K., *The Great Transformation: The Political and Economic Origins of Our Time,* Beacon Press 1944.

[26] However, diverging interpretations of Polanyi’s arguments seem to prevail. Indeed, Polanyi seems to play both the role of a critic of liberal capitalism and an opponent of ‘capitalism *tout court*’.’ See: Lacher, H., ‘Embedded Liberalism, Disembedded Markets: Reconceptualising the Pax Americana’, *New Political Economy* (1999), Vol. 4, No. 3, pp. 343-360, cited here on 345p. Lacher draws himself upon his earlier work referenced to as Lacher, H., ‘The Politics of the Market: Re-Reading Karl Polanyi’, *Global Society* (1999), Vol. 13, no. 3. See furthermore for a critical approach: Caporaso, J., Tarrow, S., ‘Polanyi in Brussels: European Institutions and the Embedding of Markets in Society’, RECON Online Working Paper (2008) No. 01. In response see: Höpner, M. and Schäfer, A., ‘Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration’ MPIfG

term, famously arguing that the development in the balance between politics and economics in the post-war period could be labelled as a movement towards 'embedded liberalism'.[27] Linking the notion of embeddedness to the European process of integration, Scharpf added the idea of 'decoupling', describing the process of EU integration as decades of 'political decoupling of economic integration and social-protection issues'.[28] Others have labelled this tendency as a general 'social deficit' of the EU,[29] or have analysed the issue from a fundamental rights perspective.[30]

As a result of this decoupling, still according to Scharpf, a certain constitutional asymmetry would prevail between Market Europe and Social Europe. The increased harmonization between EU member states' (economic) regulatory regimes and the far-reaching power transfers towards Brussels in this regard, seem to have brought Market Europe to the fore. Indeed, notions of supremacy and the direct effect of EU law arising early in the EU integration process – with of course a glamorous role for the ECJ[31] – have created a situation in which policies and regulatory regimes at the EU level will take precedence over policies and rules produced at the national level. Given the far-reaching harmonization in the area of economic policies and competition law, the European Commission and the ECJ would – in case of conflict between EU competition law and national governance – in principle give precedence to the EU level competition rules.[32] In answer, some push for further EU-integration

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Discussion Paper 10/8; Köln Max Planck Institute for the Study of Societies, Cologne August 2010, p.3. Also Anderson argues along the same lines: Anderson, P., *The New Old World*, London: Verso, 2009, p. 541.

[27] Ruggie, J. International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', *International Organization* (1982), Vol. 36, no. 2.

[28] Quotation from Scharpf, F., 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* (2002), Vol. 40, No. 4, p. 646. See more elaborately: Scharpf, F.W. *Governing in Europe. Effective and Democratic?,* Oxford: Oxford University Press, 1999.

[29] Joerges, C., Rödl, F., 'On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project: Reflections after the Judgments of the ECJ in Viking and Laval', *Hanse Law Review* (2008), Vol. 4, no. 1, pp. 3-22.

[30] For instance, Asteriti (2013) has critically analysed the famous ECJ-judgement in the cases of Viking and Laval, warning against a precedence in principle of the (economic) freedom of establishment and freedom to provide services over the fundamental right of freedom of association and collective action: Asteriti, A,. 'Social Dialogue, Laval-Style', *European Journal of Legal Studies* (2013), Volume 5, Issue 2. Interesting to note furthermore is that this fundamental rights critique has also been voiced in relation to other countries (and not solely to the specific dynamics of EU integration). See for instance the report which has recently been presented to the Human Rights Council during its 32nd session by the UN Special Rapporteur on Freedom of Assembly and Association, which devotes specific attention to so-called 'free market fundamentalism' ('*the belief in the infallibility of free market economic policies*') which sometimes seems to trump fundamental rights.

[31] For a critical analysis consult for instance: Alter, K., Rabkin, J., 'Too Much Power for the Judges?', in: Zimmerman, H., Dür, A., (eds.) *Key Controversies in European Integration*, Palgrave MacMillan, 2012, pp.79-94.

[32] Scharpf refers to what he calls the EU's *'logic of lexicographic ordering'* in this context. See Scharpf, F., 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* (2002), Vol. 40, No. 4, p. 648; pp. 657-658.

by elevating clashing political interests (those belonging to Social Europe) towards the EU level. This would allow these interests to be balanced on an equal footing with the economic interests.[33]

If we now return to our competition law problem, we see that the tension between RBC-initiatives and EU competition law – and generally speaking the tension between economic and non-economic interests within competition law – fits the narrative of the decoupling or dis-embeddedness of the 'social side' of EU integration quite well.[34] The competition law problem means that the role private firms play in promoting and protecting public interests through RBC-initiatives can be hampered by the EU's prominent regulatory presence within the economic realm (more specifically for our purposes: by competition law). It should therefore be no surprise that the increased engagement with RBC – by private firms, NGOs and governmental authorities – has been explained by Midttun et al (2006) as an attempt to 're-embed the economy in a wider societal context, following a period of neoliberal market exposure, deregulation, and separation of commercial and societal concerns'.[35] In line with this – they continue their argument – a distinction seems to prevail between 'the old' politically driven embeddedness (e.g. the classic model of a socialist state) and the 'new' industry-driven embeddedness (e.g. RBC-initiatives).[36]

How private business and governmental authorities relate to one another may, of course, differ fundamentally between countries. Within developed economies, scholars usually distinguish two different political-economical traditions: liberal market economies and coordinated market economies.[37] More specifically in relation to the coming-into-being of national social policies across the EU member states, Van Waarden has distinguished three different traditions of origin: (1) the liberalist regime (e.g. the United Kingdom), which strictly follows the rules of supply and demand; (2) the statist or étatist tradition (e.g. France), where social policies are essentially set up by the state and (3) the so-called corporatist regime (e.g. the Netherlands), which is known for its bottom-up process of civil society engagement in drafting policies that are ultimately 'legalised' by the state.[38] If we

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[33] See for instance Scharpf, F., 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* (2002), Vol. 40, No. 4, p. 659. A discussion of the realism of this push upwards is obviously beyond the scope and purpose of this report, but we will briefly return to this possibility in section 6.

[34] Also: Mulder, J., *Social legitimacy in the internal market - a dialogue of mutual responsiveness* (diss. Florence), Florence: European University Institute, 2016.

[35] Midttun, A., Gautesen, K, Gjølberg, M. 'The political economy of CSR in Western Europe', *Corporate Governance: The international journal of business in society* (2006), Vol. 6, No. 4 p. 369.

[36] Midttun, A., Gautesen, K, Gjølberg, M. 'The political economy of CSR in Western Europe', *Corporate Governance: The international journal of business in society* (2006), Vol. 6, No. 4 p. 369.

[37] Hall P., Soskice, D., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press: Oxford 2001.

[38] Van Waarden, F., 'A 'Poldermodel' For The EU?', *Social Europe Journal* (2013), p. 108. Scholars from various backgrounds (e.g. sociologists, historians and political scientists) have also sought to explain the origin of the different traditions across Europe in the state-market relationship, mainly focused on the question why these different political arrangements emerged. See: Hall, P., Soskice, D., (Eds.), *Varieties of Capitalism: The Institutional foundations of comparative advantage',* Oxford: Oxford University Press 2001. See furthermore Crouch, C. '*Industrial relations and European State Traditions*', Oxford: Oxford Clarendon Press 1993; Ebbinghaus, B., Visser, J., '*Trade Unions in Western Europe since 1945*, Basingstoke: Palgrave 2000. Also Hoogenboom et al. (2016) have studied, as part of the *bEU Citizenproject,* the Guild traditions, economic development and the formation of national political economies in Germany, the United Kingdom and the Netherlands in the 19th and early 20th centuries: Hoogenboom, M., Kissane, C., Prak, M., Wallis, P. Minns, C., *'Guild Traditions, economic*

analyse the EU's mode of governance in these terms, we might conclude that the EU itself tends to follow more the liberal tradition and, if necessary, resorts to a somewhat statist-like regime. Indeed, Van Waarden argues that the EU tries to follow the market as much as possible (he points out: 'whatever can be commodified should be'), but if an EU intervention is required then it will do so mostly in 'the étatist tradition by public regulations, directives, and case law'.[39]

However, as a result of the asymmetry between the economic side of EU integration (Market Europe) and the social side of EU integration (Social Europe), some of these political-economic traditions are at a risk of becoming unbalanced. Where traditionally both social and economic interests had to compete at the same political level within the individual member states' national politics, this relationship has now – in the words of Scharpf – 'become asymmetric as economic policies have been progressively Europeanized, while social-protection policies remained at the national level.'[40] This development has increasingly narrowed down the EU member states' room for manoeuvre in the regulation of their national social policies. The political-economic traditions are thus being influenced by the hierarchical application of EU internal market law, including competition law. This applies to all member states, but there might be differences in how this impacts the social fabric. It has been noted that the corporatist system has especially become unbalanced as a result of the increased capital mobility and financial integration within the EU.[41] Indeed, the process of deregulation has 'loosened the ties' that traditionally bound business and national governments. Corporatist national regimes,

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development and the formation of national political economies in Germany, The United Kingdom and the Netherlands in the 19th and early 20th centuries', Work Package 3, Submission Date 19-2-2016.

[39] Van Waarden, F., 'A 'Poldermodel' For The EU?', *Social Europe Journal* (2013), p. 108. Also authors such as Höpner & Schäfer (2007) have studied specific case files and have argued on this basis that the European Commission seems to pressure national economic traditions which have been coined as 'organized capitalism' (Höpner, M., Schäfer A., 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe', *West European Politics* (2010) no. 33, 344–368); Hall, P., Soskice, D., (Eds.), *Varieties of Capitalism: The Institutional foundations of comparative advantage',* Oxford: Oxford University Press 2001. We will come back to Hall & Soskice under section 3.3. Schmidt (1987) has argued along the same lines, in a more specific analysis of the effect of EU integration on both the corporatist model and the étatist tradition while using the terms employed by van Waarden: Schmidt, V., 'The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State', Daedalus (1995) Vol. 124, No. 2, pp. 75-106; cited here on p. 87.

[40] Scharpf, F., 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* (2002), Vol. 40, No. 4, pp. 665-666. As Scharpf notes, this divergence between the different policy areas, also relates to the difference between what has been labelled 'positive' and 'negative' forms of EU integration. Those measures that merely seek to eliminate national barriers to the internal market (negative integration) indeed tend to be considerably less politically sensitive than those measures that seek to impose the (positive) 'conditions under which markets operate', see furthermore: Scharpf, F., 'Negative and Positive Integration in the Political Economy of European Welfare States, Chapter 2 in: Marks, G., Scharpf, F., Schmitter, P., Streeck, W. (eds.), *Governance in the European Union* London: Sage Publications 1996, p. 15. See furthermore Tinbergen, J. *'International economic integration*' Amsterdam: Elsevier 1965, also Rehbinder, E. and Stewart. R., *'Environmental Protection Policy: Integration Through Law Europe and the American Federal Experience'* Vol. 2. Berlin: Walter de Gruyter 1984.

[41] Schmidt, V., 'The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State', *Daedalus,* (1995) Vol. 124, No. 2, pp. 75-106; cited here on p. 87. Also the typically French model of drafting policies would be pushed against the wall by the processes of EU integration.

such as the Netherlands, have thus lost quite some autonomy in the formulation of new governance and rules, together with the private business sector, to incorporate, for instance, societal interests.[42]

But the statist model is also affected by this development. As Schmidt has noted, countries such as France – of course also bound by EU competition law – cannot be as flexible as they used to be in the earlier implementation stages of EU development. Indeed, given the highly harmonized and uniform nature of competition law, for example; it is also difficult to imagine how more statist EU member states (such as France) could continue to make exceptions for certain RBC-initiatives in the implementation of such law. Though the impact of these developments may differ by country, in essence what we seek to stress here is that the competition law problem touches the very core of the political-economic traditions of the EU member states and that this development may affect countries even though their models of governance differ.

4. Responsible Business Conduct as an exercise of political rights

This section aims to discuss the specific dynamics of the interplay between the competition law problem and political rights from the point of view of the private firm as political actor. This perspective builds upon the idea that a shift in thinking about the place of the firm in society has occurred. Whereas in classical liberal theory the firm's primary duty is to enhance shareholder value,[43] by many this is now recognized as a view that is too limited. Instead, stakeholder theories have taken root: both to explain how companies function (empirical) and how they should function (normative). The starting premise for these stakeholder theories of the firm is the fundamental idea that firms do not operate in a vacuum, but are an essential part of society at large. Therefore, firms need to take account of their impact on stakeholders, which may be – depending on the specifics of the theoretical framework – more or less broadly defined. A normative implication of this idea would be that the firm is *morally* obliged to act in this way. This development has been extensively discussed within academia and has resulted in a vast amount of literature on the topic, including on the normative foundations of these obligations.[44]

The increased engagement with stakeholder theories and, ultimately, the political understanding of the position of the firm within society is an interesting shift in our understanding of the competition law problem, as it brings *public interests* into the sphere of the decision-making influence of the firm. While shareholder value connotes a limited set of values that are intrinsic to the *market* and thus merely connects to the private interests of the firm and its shareholders, stakeholder theory encompasses those interests which are both in the public realm and within the firm's sphere of influence. NGOs have also noticed this shifting dynamic and increasingly try to set the agenda of not only governments, but also of private firms.[45] From here, it is not such a big step to conceptualise the

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[42] Schmidt, V., 'The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State', *Daedalus,* (1995) Vol. 124, No. 2, pp. 75-106; cited here on p. 90-91.

[43] Friedman, M., 'The social responsibility of business is to increase its profits', *The New York Times Magazine* (1970), pp. 122-124.

[44] See especially Heath, Morality, Competition and the Firm, 2014.

[45] See for instance in this regard Doh, J., Guay, T., 'Corporate social responsibility, public policy, and NGO activism in Europe and the United States: an institutional-stakeholder perspective', *Journal of Management Studies* (2006), Vol. 43, Issue 1, pp. 47-73, Den Hond, F., De Bakker, F. 'Ideologically motivated activism: how activist

RBC-initiatives and the firm as political actors within the notion of (European) citizenship. Taking citizenship as a starting premise one could argue that *firms*, especially when undertaking actions on this level, act as (corporate) citizens themselves.[46]

The increased engagement with RBC has also not gone unnoticed within the field of sociology. Indeed, the changing perspective on the position of private firms connects to a more fundamental shift in society as described by the thinkers of new modernity, notably Beck and Giddens. German sociologist Beck has described a 'dissolution of the political boundaries', where sub-political arenas ('power positions outside of the existing political frame') increasingly gain influence.[47] In the same vein, the general trend towards RBC also illustrates the decentralisation of authority and 'an emergence of political power and authority for originally non-political and non-state actors'.[48] Similar developments have been discussed in a slightly different setting under the label of an increased 'disembeddedness' of the 'political decision-making processes […] from traditional sources of legitimacy'.[49] Following Beck's argumentation, one might better understand the fundamentally *political* character of RBC-initiatives. By cooperatively changing the level playing field, devising the rules of the game, private firms strike a balance between different public values and public interests and propose a different set of rules; indeed, quite a few have argued for a 'political understanding' of the popular notion of CSR.[50]

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groups influence corporate social change activities', *Academy of Management Review* (2007), Volume 32, Issue 3, pp. 901-924.

[46] See for an overview Matten, D., Crane, A., 'Corporate Citizenship: Toward an Extended Theoretical Conceptualization', *Academy of Management Review (*2005), Vol. 30, No. 1, pp. 166-179; A. Carroll, 'The Pyramid of Corporate Social Responsibility. Towards the Moral Management of Organizational Stakeholders', *Business Horizons* (1991) Vol. 34, Issue 4, pp. 39-48; A. Carroll, 'The four Faces of Corporate Citizenship', *Business and Society Review* (1998) Vol. 100-101, Issue 1, pp. 1-7; D. Windsor, 'The Future of Corporate Social Responsibility', *International Journal of Organizational Analysis* (2001) Vol. 9, Issue 3, pp. 225-256; D. Birch, 'Corporate Citizenship – Rethinking Business beyond Social Responsibility', in: J. Andriof, M. McIntosh, *Perspectives on Corporate Citizenship*, Sheffield: Greenleaf 2001, pp. 53-65; J. Moon, A. Crane en D. Matten 'Can Corporations be Citizens? Corporate citizenship as a Metaphor for Business Participation in Society', *Business Ethic Quarterly* (2005) Vol. 15, Issue 3, pp. 419-453. On the related concept of 'global citizenship': D.J. Wood en J.M. Logsdon, 'Business Citizenship: From Individuals to Organizations', *Business Ethics Quarterly* (2001) Vol. 3, Issue 3, p. 59-94.

[47] Beck, U. (1994), *Politik in der Risikogesellschaft,* English Translation by Ritter, M.A., *Ecological Enlightenment: Essays on the Politics of the Risk Society,* New York: Humanity Books, 1995, pp. 72-73.

[48] Scherer, A., Palazzo, G., 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance and Democracy', *Journal of Management Studies* (2011), Vol. 48. No. 4, pp. 903-904.

[49] Dunkerly, D., Fudge, S., 'The role of civil society in European integration: A framework for analysis', *European Societies*, (2004) Vol. 6, Issue 2, pp. 237-254, see p. 240.

[50] See for a political analysis of the notion of Corporate Social Responsibility, inter alia Scherer, A., Palazzo, G., 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance and Democracy', *Journal of Management Studies* (2011), Vol. 48. No. 4, pp. 899-931; Bendell, J., Kearins, K., 'The Political Bottom Line: the Emerging Dimension to Corporate Responsibility for Sustainable Development', *Business Strategy and the Environment*, (2005), Vol. 14, pp. 372-383; Detomasi, D., 'The Political Roots of Corporate Social Responsibility', *Journal of Business Ethics* (2008), Vol. 82, no. 4, pp. 807-819 and Kourula, A., Mäkinen, J., 'Pluralism in Political Corporate Social Responsibility', *Business Ethics Quarterly* (2012), Vol. 22, No. 4, pp. 649-678. More generally, authors have argued for a political theory of firms, see

If we indeed frame RBC (or CSR for that matter) in *political* terms, critical questions arise regarding the legitimacy of both the initiative itself and the limitation thereof by a national competition authority or even the European Commission. Within modern representative democracy, it seems generally accepted that political power needs legitimacy. Building upon this thought, the question becomes first of all whether firms can *legitimately* decide amongst themselves that certain values weigh more than others (and agree for instance that animal welfare is in the end more important than consumer welfare). Though this question seems somewhat outside the scope of our contribution we have argued that private firms can indeed justify their 'political power' in terms of legitimacy.[51] A second question would focus on the role of the competition authorities, charged with enforcement of the (European) competition rules. The point here is on which grounds these authorities can legitimately decide upon the weight of the different interests as stake. This legitimacy problem can be solved; either by instituting a relationship between the competition authority and Parliament (which is, however, at odds with the requirement of independence), or by increasing participation of stakeholders in the decision-making procedure.[52] The latter argument could equally apply to decision-making by businesses.

Considering the firm as a political actor and its relationship with the competition law problem, it should be remembered from ethics of the firm-theories that it does not necessarily follow that firms need to act *together.* Under competition law the 'go it alone'-route is usually not problematic. In some instances there are, however, overriding reasons to cooperate. Heath, for example, has brought forward that firms – in certain market conditions - have a duty to not only behave ethically for their own sakes, but also to jointly step outside the market-game and form the rules of play.[53] Here, companies end up drafting their own rules, which are aimed at redressing the negative effects of market failures.[54] The collective-action problem can form another reason for inter-firm cooperation. Indeed, the success of certain RBC-initiatives might well depend on the number of firms that are involved in the initiative in the first place. In doing so, firms can be labelled political actors and in the terms of this report, they are participants in the political arena, and are thus exercising political rights.

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notably Ciepley, D. 'Beyond Public and Private: Toward a Political Theory of the Corporation', *American Political Science Review* (2013) Vol. 107, no. 1, pp 139-158.

[51] Claassen & Gerbrandy, 'Doing Good Together' (2015); Gerbrandy, 'Toekomstbestendig Mededingingsrecht' (2016). See also Suchman, M. C. 'Managing legitimacy: strategic and institutional approaches'. *Academy of Management Review*, (1995) Vol. 20, pp. 571–610; Parker, C. *The Open Corporation*. Cambridge, UK: Cambridge University Press 2002; Palazzo, G. and Scherer, A. G. 'Corporate legitimacy as deliberation. A communicative framework', *Journal of Business Ethics* (2006) Volume 66, pp. 71–88; Scherer, A., Palazzo, G., 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance and Democracy', *Journal of Management Studies* (2011), Vol. 48. No. 4, pp. 899–931.

[52] Gerbrandy, A., 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority', *European Law Review* (2015), Vol. 40, no. 5, pp. 769-781.

[53] Heath 2014.

[54] On 'transnational private regulation' – the cooperative route – see (without a competiton law perspective generally).: F. Cafaggi, 'New Foundations of Transnational Private Regulation', *Journal of Law and Society* (2011) Vol. 38, Issue 1, pp. 20-49; J. Gond, N. Kang en J. Moon, 'The government of self-regulation. On the comparative dynamics of corporate social responsibility', *Economy and Society* (2011) Vol. 40, Issue 4, pp. 640-671.

EU competition law, with its focus only on the market-interests, then imposes limits on this exercise of political rights.

5. The vertical relationship between member states and the EU

In the sections above, the limits on (the exercise of) political rights have been looked at through the lenses of the theory of disembeddedness and theories relating to the firm as a political actor. These limits ultimately flow from EU law. Thus, we will also need to consider the repercussions this might have on the vertical relationship between the EU and political processes in (certain) member states.

To do so, in this section we will focus specifically on the Dutch situation. The Dutch situation is particularly relevant because it is here that cases concerning RBC-initiatives have actually been brought before the national competition authority (the ACM). It is also in the Netherlands that – in response to these competition law cases – national politics and the national political debate has come into action. There is a real risk of conflict, both on the legal level – a diverging interpretation of European competition law on the national level – and on the political level – a diverging outcome of the weighing of competing interests within the competition law problem. Thus we will now focus more specifically on the role and position of national parliaments, national governments and national civil society.

The relevant competition law cases were described above (in section 2) where we set out the competition law problem. In summary, several inter-firm initiatives were (provisionally) deemed anti-competitive by the Dutch competition authority. The political debate ultimately led to demands from (national) Parliament to the Minister of Economic Affairs. The Minister of Economic Affairs is responsible for competition policy and – in a political sense – for the organisationally independent competition authority (ACM). In essence, the Dutch parliament asked: how is it possible that these broadly-supported agreements in which our government has been so very much involved, can simply be halted by the competition authority? Is it not strange that on the one side of government a minister sits at the table negotiating an agreement with a business sector, which on the other side of government the competition agency authority can block? Could not the Minister of Economic Affairs stop the ACM from doing this?

In response, the Minister of Economic Affairs explained first that he could not simply block the ACM from doing what it did, especially because the ACM had only issued a preliminary opinion and in doing so was applying European competition law. ACM is of course provided with independent powers, *precisely* to have it somewhat bolstered against political whims. However, in spite of this complex legal background, the Dutch Minister of Economic Affairs promised to do what national parliament asked for: to look for room for improvement in the context of sustainability cooperation.[55] The Ministry of Economic Affairs then published a draft for new policy guidelines on Competition and Sustainability for consultation, with the view that the ACM would follow these policy guidelines when assessing individual cases.[56] This type of guideline (legally) obviously applies only to national competition law. But because national and European competition law are very much intertwined, the guidelines implicitly also relate to the application of European competition law. If there is no wiggle

[55] This type of 'sustainability cooperation' is what we cover with the notion of RBC-initiatives. The Dutch discourse centers more on sustainability, though that concept is left (deliberately) vague.

[56] See https://www.internetconsultatie.nl/mededingingenduurzaamheid.

room in European law, for a country as small as the Netherlands, there is not much sense in providing a diverging interpretation of national law. As part of the official public consultation procedure, several reactions were received on the draft guidelines. These included reactions from the European Commission and ACM.[57] These reactions – and presumably especially the latter two – led the Minister to inform Parliament (in spring 2016) of the latest developments: it had become clear that, although the Minister had wanted to take concrete steps towards integrating the non-economic interests into the competition law framework, he was seriously urged by both the European Commission and ACM that such an integration would violate EU competition law. Therefore, the Ministry proposed to incorporate only slight changes to the existing guidelines and to focus on other legal and political routes instead.[58]

We think the Dutch situation provides an interesting example both from a legal point of view and from a political rights perspective. As for the legal point of view, firstly it must be pointed out that there is really no final consensus on the 'correct' interpretation of EU competition law. The European Commission, as mentioned above, has committed to a more economic approach towards competition law: it applies EU competition law in this manner and has published several guidelines on its position. But the Commission's position is not uncontested – though the voices arguing against the economic interpretation are not an overwhelming majority. More importantly, however, is the position of the European Court of Justice in this debate. The CJEU has indeed accepted consumer welfare as a relevant factor for competition law, but it has (so far) not explicitly ruled against including the type of public interests at stake in RBC-initiatives in a competition law framework. From a *legal* point of view, the Commission is 'merely' an administrative body, which applies EU competition law in specific cases. It is up to the CJEU to give a final ruling on the correct interpretation of this body of law. Secondly, the Dutch government also does not have a direct say in how EU competition law should be interpreted and applied. But national competition authorities are legally obliged (by *EU* law) to apply EU competition law to cases simultaneously with their national competition rules. In practice, the guidelines of the Dutch Minister of Economic Affairs can thus hardly be separated from the application of EU law. But, again, *legally* the advice of the Commission cannot be binding for the national Minister of Economic Affairs, as the Ministry's guidelines formally only relate to national competition law.

The Dutch situation is also compelling from an institutional perspective, especially with a view to political rights and interests. Both in the realisation of RBC-agreements – which resulted in the competition cases where ACM ultimately concluded that the agreements were anti-competitive – and in the ensuing political debate civil society organisations – NGOs, but also the National Social and Economic Council - were heavily involved. It was ultimately the Dutch national Parliament that urged the Minister to try to provide for more room for RBC-initiatives within the framework of competition law. Within Dutch political society a strong voice thus sounded for a diverging interpretation of competition law.[59] Although it is too early to tell with any certainty, this situation could be interpreted

[57] See https://www.internetconsultatie.nl/mededingingenduurzaamheid/reacties.

[58] See https://www.rijksoverheid.nl/documenten/kamerstukken/2016/06/23/mededinging-en-duurzaamheid. For the competition law readers of this report: the Minister proposes to use a procedure of 'algemene bindendheid' (making limited agreements sector binding) of agreements reached between some of the firms involved in the sector and is investigating the boundaries of this option by the useful-effect doctrine. The Minister also proposes to try to influence the Brussels debate, not only at DG Comp, but also at other Directorates-General of the European Commission.

[59] This is not to say that this voice is unanimous. Obviously not.

as that 'Dutch politics' – through parliament – called for a different interpretation of these RBC-initiatives from a competition law perspective; different from the European Commission, that is. If we would try and express this – again – in the language of decoupling and disembedding, one might argue that the 'technocratic' and Market Europe-focused European Commission hinders the member states (in this case the Netherlands) from pursuing a social goal. This could, ultimately, lead to a further disembedding of competition law from the national social fabric. This is all the more troubling because *on the legal level* it is ultimately not clear whether the Commission's interpretation is accepted fully by the Court of Justice.

6. FINAL REMARKS: WHAT WAY FORWARD?

In this report the tension between European competition law and RBC-initiatives has been analysed from different points of view. Our analysis points towards a deeper tension between the economic and the social side of the EU, which builds upon an existing discussion within academia around the idea of 'disembeddedness of the EU integration process'. The competition law problem placed central in this report seems to fit well within this narrative: while national political preferences in the member states might call for private firms to cooperate for the sake of certain public interests, EU competition law does not allow for the member states to strike a diverging balance between economic and non-economic interests.

Though in this report we have so far shied away from taking a more normative view, one might argue that this issue should be taken seriously at the European level. Not so much because the goals pursued by RBC-initiatives are in themselves worthwhile goals (though we would support this normative position, this is in the end a political call to make), but because EU competition law bears the risk of further disembedding the EU integration process from all sorts of social public interests. The way in which European competition law currently deals with RBC-initiatives in a way de-politicises the underlying tension in these cases.[60] Indeed, it is relatively easy to see public interests as inherently foreign to competition law, and thus to keep competition law hermetically sealed from these 'pollutants'. However, through the perspectives outlined in this report, due regard should also be given to possible political consequences, also at the European level. The competition law problem as described in this report could ultimately lead to an increase in the tension between the EU and its member states. The outcome of competition law analyses of RBC-initiatives should therefore not be a merely technocratic exercise in the application of harmonized rules, nor should it be framed as such.

Bearing in mind the critique of authors (e.g. Scharpf) on the asymmetry between Market Europe and Social Europe a possible way forward could be to elevate clashing political interests (those 'belonging' to the 'social Europe') towards the EU level. This would allow them to be balanced on an equal footing with the economic interests. In the context of the competition law problem this could mean, in practice, that more attention would be given to the public interests pursued by RBC-initiatives in the European Commission's assessment of competition law cases on the EU level. While this might seem an attractive way out from a legal point of view, in essence it boils down to re-politicising the conflicting interests of competition and non-economic public interests (e.g. sustainability and animal welfare). This idea provokes several questions to which we cannot provide an answer here. Indeed, one may wonder: which EU institution would be legitimized to make such a (political) judgement call?

[60] See also Mulder (2016) on a mutual dialogue as a way of entering into this debate.

Would it be the European Commission? And if so, what if member states still do not agree with the outcome of the European Commission's decision?

In the existing literature, scholars have also provided for several legal solutions. There is no space here to fully discuss these solutions so we will merely point them out as possible ways forward that deserve further attention. First, as to legal solutions, it has been put forward that there is actually enough room in the current Treaty provisions to provide a somewhat broader interpretation than the one adopted by the European Commission. The provisions would allow the weighing of conflicting interests for instance, via article 101 (1) TFEU (through the concept of inherent restrictions for example), or via article 101 (3) TFEU (through a different kind of balancing). It might also be possible to use the doctrine of useful effect, where the government 'takes over' an RBC-initiative and declares it binding on all parties and which is currently under scrutiny by the Dutch Minister of Economic Affairs as a possible solution to this problem. One might furthermore use the (underdeveloped) notion of the solidarity exception to take RBC-initiatives outside the range of the competition law provisions.[61] These different 'legal routes' are currently under discussion and even today their limits and possibilities remain unclear. To be sure, these are not easy exercises to undertake, as the legal framework is not fully developed and – in certain aspects – unclear. Neither has the remit on RBC-initiatives been fully explored. However, these are options that, for example, the Dutch Minister of Economic Affairs might want to exhaust before even contemplating a possibility of a Treaty-change.

Legal and political solutions are not to be separated, of course: it is usually through the exercise of political rights that the law adapts itself, though it is also possible that a fully legal 'solution' is reached through court intervention, in this case by the CJEU.[62] When 'new' legal routes are tried in response to political pressure, these routes usually tend to merge both a legal and a political approach. As to the political arena, it has become clear that though the Dutch situation might be particular in the sense of fierce and public debate, that debate has now been taken up in other member states as well, as it is in Brussels. Civil society organisations – and even the OECD – have put the tension between RBC-initiatives and competition law on their agenda, and European policy makers are also in a process of discussing the matter. Meanwhile, the Dutch government has urged the European Commission to provide more clarity. Indubitably, the tension between RBC-initiatives and competition law and possible solutions to this problem require further scrutiny.

CONCLUSION

This report has analysed the tension between EU competition law and RBC-initiatives. The current analysis points towards a conclusion that this tension correlates with more fundamental changes within society, most notably a shift in thinking about the place of the firm in society. These changes have provided an impetus for the increased engagement with RBC. At the same time, non-economic public interests seem to remain foreign to EU competition law. And until now, institutions, such as the EU Commission and the Dutch national competition authority, remain largely unable to weigh these interests in their competition law analysis. The way in which European competition law currently deals with RBC-initiatives, thus demonstrates the disembedded nature of EU competition law and provides an example of the rising asymmetry between so-called 'Social Europe' and 'Market Europe'.

[61] See Gerbrandy, Toekomstbestendig Mededingingsrecht.

[62] Through the careful and balanced approach insisted upon by e.g. Mulder (2016).

This report has stressed that this tension seems problematic and could in the long run greaten the tensions between the EU and its member states. The problem might be solved by merging legal and political solutions on both the level of the member states and the European level. However, these possible solutions deserve further scholarly attention.