



## **Arbitrating between competition and other social aims – a fairness dilemma?**

**Brussels 2018**

[A.Gerbrandy@uu.nl](mailto:A.Gerbrandy@uu.nl)



**Universiteit Utrecht**



# Outline

**I**

**The issue**

**II**

**An issue of what?**

**III**

**Possible solutions**



**Universiteit Utrecht**



## I. The issue (1)

- Dairy farmers protecting the black tailed godwit
- Marble importers & retailers to protect workers' rights





## I. The issue (2)

Assessment under article 101 TFEU:  
balancing positive and negative effects





## I. The issue (3)

... but difficulties for non-economic benefits





## I. The issue (4)

Result: agreements not allowed under competition law

Is this (un)fair?





## II. An issue of fairness?

Many different meanings of fairness...

I.

Fairness within  
competition

- competition on the merits
- consumers' choice
- consumer welfare

II.

Fairness as overarching  
concept/  
theory of justice

- rights to equal basic liberties
- fair equality of opportunity
- advantages ought to benefit the least-advantaged

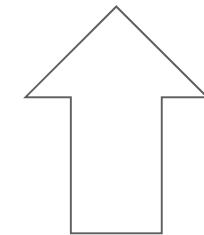
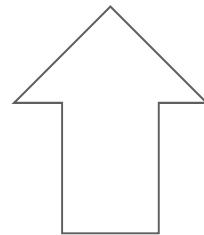


## II. An issue of competition law?

Different answers

I. Fairness within  
competition/consumer  
welfare

II. Fairness as overarching  
concept/theory of justice



descriptive & normative answers





### III. Could we solve the problem?

#### Outside 101 (1) TFEU

- Wouters-doctrine (inherent restrictions)
- solidarity-type exceptions
- government involvement as legitimizing factor?

#### Article 101 (3) TFEU

- wider range of benefits count
- qualitative approach to benefits
- a 'fair' share for consumers
- Commission: efficiencies-centred
- but pre-modernisation cases more flexible





### III. Could we solve the problem?

But:

- this leads to less certainty for companies
- problem of legitimacy for (national) agencies

However:

- EU competition law part of a constitutional system
- within that system: multiple goals

And also:

- competition law ought not to be isolated from society





### III. Could we solve the problem?

Meanwhile, in the Netherlands:

- informal non-enforcement
- legislative proposal for 'sustainability initiatives'





## Conclusions

- Issue of balancing competition interests with non-competition interests is a problem
- Fairness, when encompassing more than consumer-welfare, could help shape solutions
- Responsive competition law is necessary



- A. Gerbrandy, Futureproof Competition Law (inaugural lecture), Eleven Publishing 2018 (*forthcoming*)
- R.J.G. Claassen & A. Gerbrandy, Doing Good Together, BEQ 2018 (*forthcoming*)
- A. Gerbrandy, Solving a Sustainability-Deficit in European Competition Law, World Competition 2017
- A. Gerbrandy, Addressing the Legitimacy Problem (...), European Law Review 2015



**Universiteit Utrecht**



**Universiteit Utrecht**

Institutions for Open Societies