3

Not-for-Profit Organisations and Competition Law

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3.1 INTRODUCTION

A not-for-profit organisation is one that is barred from distributing net earnings to individuals who exercise control over the organisation, such as members, officers, directors, or trustees.[1] The organisation may be funded by donors (philanthropists), government, service users, or a combination of all three and may benefit from charitable status, special tax advantages, or a special institutional status (e.g. be public body).[2] It is common for professional associations, healthcare service providers, and educational establishments to operate on a not-for-profit basis.[3] There are often claims that competition law *does not* or *should not* apply to entities that operate on a not-for-profit basis.[4] This chapter considers how competition law assesses the actions of entities operating on a not-for-profit basis. Implicit in this presentation is an assumption that similar concerns arise in all competition law jurisdictions. While the points made are thus of general application, they are illustrated with examples from the United States, EU, and United Kingdom. Section 3.2 explains why operating on a not-for-profit basis is not accepted as a reason to exclude an entities activities from the scope of competition law. Section 3.3 considers situations in which competition law is applied to non-profit providers and in which it is generally accepted that no modification is required. Section 3.4 considers situations in which competition law is applied to not-for-profit providers, but it is not applied

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1 H Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89 Yale LJ 835–901.

2 S Rose-Ackerman, 'Altruism, Nonprofits, and Economic Theory' (1996) 34 J Econ Lit 701, 723–725.

3 Ibid. at 701–728. Although both public (government) and private not for profit organisations are treated as equivalents in this chapter, there is some evidence that they may behave differently and thus warrant different treatment: D Almond, J Currie, and ESimeonova, 'Public vs Private Provision of Charity Care? Evidence from the Expiration of Hill-Burton Requirements in Florida' (2011) 30 J Health Econ 189–99

4 C Capps, D Carlton, and G David, 'Antitrust Treatment of Nonprofits: Should Hospitals Receive Special Care?' (2020) 58 Economic Inquiry 1183–1199; F Entin, T Fletcher, and J Teske, 'Hospital Collaboration: The Need for an Appropriate Antitrust Policy' (1994) 29 Wake Forest L Rev 107–68.

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in the same way as it is applied to for-profit providers – competition law is modified. The modification manifests itself as a heightened threshold for intervention; a reluctance to apply standard presumptions of harm and enhanced need for evidence to establish an infringement; an increased willingness to accept and a broader menu of acceptable justifications; and finally, a reluctance to impose sanctions on not-for-profit providers. Section 3.5 concludes by considering when and why competition law ought to be modified on account of the entity engaged in contested conduct operating on a not-for-profit basis.

3.2 THE RELEVANCE OF COMPETITION LAW IN MARKETS SERVED BY NON-PROFITS

Markets are relied on to produce sufficient quantities of desirable goods and services. The market is at is best when it is responsive to *voice*, *voice* involving patrons communicating their concerns to the provider of goods or services.[5] Providers of goods and services are most responsive to *voice* when it is possible for those exercising voice to *exit*, i.e. obtain goods or services from an alternative provider. Exit is important for two reasons. First, the possibility of *exit* reduces the cost of exercising voice. *Voice* is costly if patrons have no option but to continue receiving goods or services from the supplier after exercising voice, even if the patrons concerns are not addressed.[6] Secondly, the possibility of exit motivates suppliers to take the *voice* of patrons seriously.[7] When the possibility of exit exists, firms have incentives to continually improve the quality of their goods and services; provide new types of goods and services; and to minimise the resources consumed in the production of their goods and services.[8] In the absence of a possibility of exit, firms need not be responsive to voice and instead can be said to possess market power. Those with market power face a reduction in the incentives to improve, or to provide new offerings, or to minimise the resources being consumed.[9]

Competition law plays a central role in ensuring the effectiveness of voice in relation to entities operating on a for-profit basis. To what extent is competition law's role in ensuring that voice is effective, relevant to non-profit entities? Theories of the not-for-profit form suggest that such entities exist because the for-profit market will fail to provide the relevant goods and services[10]; because

[5] AO Hirschman, *Exit, Voice, and Loyalty; Responses to Decline in Firms, Organizations, and States* (Harvard UP 1970) 34. Voice is broader than complaints and is defined at page 30 as 'any attempt at all to change, rather than to escape from, an objectionable state of affairs.'

[6] *Ibid*. at 39.

[7] *Ibid*. at 82.

[8] Capps, Carlton, and David (n 4) 1183–99.

[9] F M Scherer, 'Schumpeter and Plausible Capitalism' (1992) 30 *J Econ Lit* 1416, 1425–30.

[10] B Weisbrod, *The Nonprofit Economy* (Harvard UP 1988); and R Steinberg, 'Economic Theories of Nonprofit Organizations' in W Powell and R Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (2nd ed, Yale UP 2006) 117–39.

they can be trusted to provide higher quality goods and services in situations of high information asymmetry between buyers and sellers[11]; or because they are trusted where contracts are difficult to monitor and enforce.[12] What is important is that not-for-profit entities are argued to exist for reasons that differ from the reasons for profit entities exist. This then gives rise to claims for different treatments under competition law on three distinct grounds. Firstly, on the idea that an inability to distribute profits removes the incentive (though crucially, not the ability) to restrict competition.[13] Second, there is an idea that not-for-profit organisations ought to be trusted not to act in a manner determinantal to their patrons.[14] A third basis for the claim of special treatment is that the specific regulatory oversight to which the not-for-profit entity is subject will either satisfy the concerns that competition law is designed to address or trump any obligation competition law would seek to impose.[15]

Philipson and Posner formalise a model in which not-for-profit providers are not responsive to voice, i.e. they not only exercise market power, but also do so in a manner that is harmful to patrons.[16] The empirical literature also supports the view of there being nothing inherent in the not-for-profit organisational form that would render the concerns of competition law otiose.[17] Since not-for-profit entities ***do*** exercise market power and the exercise of market power by not-for-profit entities does have at least the potential to be harmful, legislatures, competition authorities, and courts have concluded that operating on a not-for-profit basis is insufficient to

[11] HB Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89 Yale LJ 835–901.

[12] M Jegers, *Managerial Economics of Non-Profit Organizations* (Routledge 2008) 16–21.

[13] JP Newhouse, 'Toward a Theory of Nonprofit Institutions – Economic Model of a Hospital' (1970) 60 Am Econ Rev 64–74; W Lynk, 'Nonprofit Hospital Mergers and the Exercise of Market Power' (1995) 38 J Law and Econ 437–61. Lynk's article was then criticised in D Dranove and R Ludwick, 'Competition and Pricing by Nonprofit Hospitals: A Reassessment of Lynk's Analysis' (1995) 18 *J Health Econ* 87–98.

[14] P Francois, 'Not For Profit Provision of Public Services' (2003) 113 Economic Journal C53-C61. It is clear that such trust can be mis-placed: see R Herzlinger, 'Can Public Trust in Nonprofits Governments Be Restored?' (1996) 74 Harv Bus Rev 97–107.

[15] See Herzlinger and W Krasker, 'Who Profits from Nonprofits' (1987) 65 Harv Bus Rev 93–106 (summarizing and challenging the exceptionalism claimed by not for profit organizations); S Srikanth, 'College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity' (1994) 46 Stan L Rev 919, 936 (arguing that a restriction of competition may advance overall social welfare), and M Schlesinger, T Marmor, and R Smithey, 'Nonprofit and for-Profit Medical Care: Shifting Roles and Implications for Health Policy' (1987) 12 J Health Pol Pol'y L 427–457 (arguing for regulation based on type of organization)

[16] T Philipson and R Posner, 'Antitrust and the Not For Profit Sector' (2009) 52 JLE 1–18.

[17] D Haas-Wilson and C Garmon, 'Hospital Mergers and Competitive Effects: Two Retrospective Analyses' 2011 18 Int'l J Econ Bus 17–32; F Sloan, et al., 'Hospital Ownership and Cost and Quality of Care: Is There a Dime's Worth of Difference?' (2001) 20 J Health Econ 1–21 (finding not for profits may produce at lower cost, but do not offer greater quality); P Born and C Simon, 'Patients and Profits: The Relationship between Hmo Financial Performance and Quality of Care' (2001) 20 *Health Affairs* 167–174 (finding that for profit providers do not provide a higher nor lesser quality of care); Capps, Carlton, and David (n 4) 1183–1199 (find the mere fact that an entity operates on a not for profit basis does induce it to provide higher levels of public benefit)

warrant exclusion from competition law scrutiny.[18] Rather than the nature of the organisations operating in the market, focus is instead placed on the nature of the activities being performed – competition law being applied to all activities that can be described as economic or commercial in character.[19] After all, like all organisations, the not-for-profit organisation must decide whether to compete or cooperate with other organisations in the pursuit of its aims.[20]

3.3 COMPETITION LAW UNMODIFIED

What has been the experience of applying competition rules to entities operating on a not-for-profit basis? The most obvious examples arise in relation to self-regulatory bodies of the liberal professions.[21] Professional associations operating on a non-profit basis have been condemned for creating barriers that prevent non-members of the association from offering services competing with those offered by their members;[22] attempting to fix the price or other terms on which their members might

[18] Under US antitrust law see: *Goldfarb v Virginia State Bar*, 421 US 773, 786–787 (1975); *US v Brown University*, 5 F3d 658, 666 (3d Cir 1993). Under EU and UK competition law, see Case C-244/94 *Fédération Française des Sociétés d'assurance v Ministère de L'agriculture et de la Pêche* ECLI:EU:C:1995:392, para 21; Case CE/2890-03 *Exchange of Information on Future Fees by Certain Independent Fee–Paying Schools* [20 November 2006] Decision of the Office of Fair Trading, paras 1312–1316.

[19] Under US antitrust law, see: *Goldfarb v Virginia State Bar*, 421 US 773, 786–787 (1975). Under EU competition law see: Case 155/73 *Giuseppe Sacchi* ECLI:EU:C:1974:40, para 14; *Case C-41/1990 Klaus Höfner and Fritz Elser v Macrotron Gmbh* ECLI:EU:C:1991:161, para 19.

[20] Note the general paradox that competition is designed to enhance cooperation: P Rubin 'Emporiophobia (Fear of Markets): Cooperation or Competition?' (2014) 80 South Econ J 876–889.

[21] See Commission, 'Report on Competition in Professional Services' (Communication) COM (2004) 83 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004DC0083; Commission, 'Professional Services – Scope for more reform: Follow-up to the Report on Competition in Professional Services (Communication) COM (2004) 83' COM (2005) 405 final https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:52005DC0405; OECD, 'Competition In Professional Services' DAFFE/CLP(2000)2; Monopolies Commission (UK), *Professional Services: a report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services* (Cmnd 4463, 1970); L Terry, 'The European Commission Project Regarding Competition in Professional Services' (2009) 29 Nw J Int'l L & Bus 1

[22] Office of Fair Trading, The control of entry regulations and retail pharmacy services in the UK para. 2.20–2.22, 3.8–3.12, 3.18–3.22; NMa Press Release, 'Pharmacies in Assen and Tilburg Must Lift Restrictions on Competition' (22 June 2004) www.acm.nl/en/publications/publication/5859/NMa-Pharmacies-in-Assen-and-Tilburg-Must-Lift-Restrictions-on-Competition; NMa Press Release, 'Suspects Pharmacies in Assen of Restricting Competition' (2 April 2003) www.acm.nl/en/publications/publication/5994/NMa-Suspects-Pharmacies-in-Assen-of-Restricting-Competition; NMa Press Release, 'NMa Suspects Pharmacies in Breda of Restricting Competition' (6 June 2003) www.acm.nl/en/publications/publication/5862/NMa-Suspects-Pharmacies-in-Breda-of-Restricting-Competition; NMa Press Release, 'NMa fines Dutch National Association of General Practitioners for Illegal Establishment Recommendations' (9 January 2012) www.acm.nl/en/publications/publication/6719/NMa-fines-Dutch-National-Association-of-General-Practitioners-for-illegal-establishment-recommendations; The Competition Authority (Ireland), 'Competition in Professional Services: general medical practitioners' (2010) paras 2.59, 3.3, 6.17–6.31, 7.1–7.20, 8.8–8.13

do business;[23] and for limiting the ability of members to promote their services as against other members.[24] Trade association's not representing professions, but operating on a not-for-profit basis, are also condemned if they play a role in fixing terms and conditions (including price and profit margins) on which their members will supply goods or services – matters which should be settled by competitive forces.[25]

Many examples can be found of competition law being applied to cooperatives and mutual organisations providing, for example, insurance and pensions.[26] Other prominent examples of not-for-profit entities being scrutinised under competition law involve state-owned enterprises operating on a not-for-profit basis being condemned for excluding others from the market or reserving the market to themselves.[27] Equally important is the role merger control has played in ensuring that the option for exit (and the role exit plays in strengthening voice) is preserved even when all in the market operate on a not-for-profit basis. So, for example, the *Bundeskartellamt* has prevented mergers between public hospitals operating on a not-for-profit basis.[28] In the UK, the competition authority reviewed a merger between two charities, which, though operating on a not-for-profit basis and primarily as a grant making body raising funds and distributing them to independent scientists, obtain intellectual property rights that result from the research it funds. The risk that the licensing of IPRs might not occur in a way beneficial to society was the focus of the competition authority's concern.

[23] Finnish Competition Authority, 'Finnish Competition Authority Yearbook 2003' www.kkv.fi/globalassets/kkv-suomi/julkaisut/vuosikirjat/kilpailuvirasto/2003/kivi-vuosikirja-2003-en.pdf accessed 24 November 2019; and respectively, see Co-operation & Competition Panel (UK), 'North Yorkshire and York PCT and York Hospitals NHS Foundation Trust Conduct Complaint' (22 March 2012) http://webarchive.nationalarchives.gov.uk/20130513202829/http://www.ccpanel.org.uk/content/cases/North_Yorkshire_and_York_PCT_and_York_Hospitals_NHS_Foundation_Trust_Conduct_Complaint/120322_York_PCT_Assura_conduct_complaint_PUBLISHED.pdf

[24] Monopolies and Mergers Commission (UK), *Services of Medical Practitioners: A report on the supply of the services of registered medical practitioners in relation to restrictions on advertising* (Cm 582, 1989) paras 7.6, 7.21, and 8.5 (action taken under section 7(1)(c) and (2) of the Fair Trading Act 1973). Consider also The Competition Authority (Ireland) (n 22) para 5.1–5.16; the Commission's approach: 'Professional Services: overview' (*European Commission*, 14 December 2012) https://ec.europa.eu/competition/sectors/professional_services/overview_en.html accessed 24 November 2019; F Miller, 'Competition Law and Anticompetitive Professional Behaviour Affecting Health Care' (1992) 55 *MLR* 453, 479; Monopolies Commission (n 21) para 214, 251–52 and 272.

[25] Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck SARL v Commission* ECLI:EU:C:1980:248, para 85–89; Office of Fair Trading, 'Trade associations, professions and self-regulating bodies' (2004) OFT 408.

[26] Case C-244/94 *Fédération Française des Sociétés d'Assurance* ECLI:EU:C:1995:392, para 21; Case C-67/96 *Albany International BV v SBT* ECLI:EU:C:1999:430, para 85; See also Case C-250/92 *Gøttrup-Klim Grovvareforening v Dansk Landbrugs Growareselskab AmbA (DLG)* ECLI:EU:C:1994:413.

[27] Commission Decision 90/456/EEC of 1 August 1990 concerning the provision in Spain of international express courier services [1990] OJ L233/19; Case C-41/90 *Höfner and Elser v Macrotron* GmbH ECLI:EU:C:1991:161; Case C-475/99 Ambulanz Glöckner ECLI:EU:C:2001:577.

[28] 'Bundeskartellamt prohibits for the first time merger between public hospitals' (*Bundeskartellamt*, 13 December 2006) www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2006/13_12_2006_Krankenhausuntersagung_eng.html (last accessed 10 Nov 2021).

As with the for-profit sector, price-fixing, market sharing, and market foreclosure have been the main issues addressed. Harmful conduct has been found, notwithstanding the fact that the entities involved operate on a not-for-profit basis. And the need to ensure an environment in which the incentive to improve are maintained has remained paramount. Competition concerns are therefore to be addressed in the normal way, notwithstanding the fact that some entities to be scrutinised operate on a not-for-profit basis. What is also true is that not-for-profit entities have continued to operate, notwithstanding the need to comply with competition law and that competition law has been sufficiently flexible to take account of the not-for-profit form within the existing framework of the law.

3.4 COMPETITION LAW MODIFIED

Although it is the case that the standard competition law framework is applicable and applied to not-for-profit entities, it is not the case that operating on a not-for-profit basis does not matter. Competition law can be seen to be modified in four ways when courts and competition authorities are called on to assess the compatibility of a not-for-profit providers' conduct with the law. First, the court or authority may operate a heightened threshold for intervention. Second, the authority may modify the mode of assessment that it applies when it scrutinises not-for-profit entities. Third, the authority may admit or be amenable to a greater range of justifications than is otherwise the case. Finally, the authority may be influenced by the not-for-profit nature of the organisation when it comes to imposing sanctions.

3.4.1 *Threshold of Intervention*

One way in which not-for-profit providers are treated differently is that a higher threshold may be required to trigger intervention by a competition authority. A good example of this is the examination of the higher education market, in which the UK government has sought to harness the power of choice and competition.[29] To better understand how the market for undergraduate education in England functions, in October 2013, the competition authority launched a call for information.[30]

[29] Para 14 of Schedule 1 of The Restrictive Trade Practices Act 1976 had previously placed the provision of primary, secondary or further education, and university or other higher education beyond the reach of competition law. These exclusions are not carried over into the Competition Act 1998.

[30] Office of Fair Trading, 'Call for information on the undergraduate higher education sector in England' (October 2013) https://assets.publishing.service.gov.uk/media/533559bd40f0b62e99000015/HE-CFIs.pdf. The competition authority's interest in examining this market was motivated by 'changes to the financing of undergraduate courses (with an increase in the funding resulting from student fees and a decrease in direct funding from government)'; Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (March 2014) OFT 1529, para 1.3, note 5, para 2.4; para 3.11–3.14).

One question raised in the call for information was whether all institutions charging a uniform fee for all undergraduate courses resulted from either express or tacit collusion.[31] Is it is plausible for multi-product firms, in a non-concentrated market, to arrive at identical prices for undergraduate courses, when their cost structures differ and particularly when in relation to graduate courses there is wide price variation? This pattern of pricing would seem to provide reasonable grounds for suspecting an infringement.[32] In *Dyestuffs*, considering price increases applied by 10 firms to a small range of dyes, when each firm produced between 1,500 and 3,500 of some 6,000 dyes, the European Commission felt that:

> [i]t is not conceivable that without detailed prior agreement the principle producers … should several times increase by identical percentages the prices.[33]

Considering not-for-profit providers of higher education, however, the UK competition authority declined to take further action on the basis that it 'has received no complaints or evidence of either explicit or tacit collusion between higher education institutions with respect to fee setting'.[34] The competition authority seems to set a high threshold for intervention, suggesting that in order to launch an investigation into collusion by not-for-profit entities, it would require 'evidence that would amount to *a compelling case of anti-competitive behaviour*'.[35]

A further example of the reluctance to intervene can be seen in the UK competition authorities open letter to the head teachers of almost 30,000 State schools. The letter draws attention to the high price of school uniforms, caused in part by 74% of schools requiring parents to purchase uniforms from a single, named retailer or from the school itself. This created a captive market for chosen suppliers, allowing them to charge an additional £52 million per year. The letter advises schools either to cease specifying from whom uniforms may be obtained, or to award the right to supply on a basis that takes into account the cost to parents. Further, the letter urges parents to complain to school governors if they are dissatisfied with the schools' decision to use an exclusive supplier. The letter does not however warn, as it could and arguably should, that the school's licencing of their logo, crest, or uniform design to a supplier or retailer is clearly subject to competition law and all the consequences that this entails.

[31] Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) para. 6.4

[32] The threshold for investigation set out in section 25 of the Competition Act 1998. The 'reasonable suspicion' threshold is not a high bar (see, by analogy, para 7 of the Competition Appeal Tribunal judgment in ACS v OFT).

[33] Re Cartel in Aniline Dyes, para 7; and Case 48/69 *Imperial Chemical Industries Ltd v Commission of the European Communities (Dyestuffs) ECLI:EU:C:1972:70*, para 1–6, 54, and 83–87.

[34] Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) paras 1.17, 6.5, and 6.7.

[35] *Ibid*. at paras 6.10 and 6.14 (emphasis added).

3.4.2 *Mode of Assessment*

One of the most celebrated illustrations of the mode of assessment being modified arose when a number of universities operating on a not-for-profit basis, including eight Ivy league schools, adopted a common policy on how to award financial aid.[36] The aim was to enable able students to access the best available education regardless of their ability to pay and to create a more diverse student body by making education available to the economically disadvantaged.[37] It was first agreed among the schools that each would cease to provide merit based aid.[38] Additionally, it was agreed that no student would be awarded more aid than was justified by financial need (determined by a common formula). By ensuring that aid was granted only to the extent that a student was needy, a greater number of needy students would benefit from financial aid.[39] To what extent is the granting of this eleemosynary support subject to antitrust scrutiny?

The US Department of Justice's essential objection was that the schools were effectively setting a maximum discount or a minimum price.[40] Such price restraints are among the more serious violations of competition law. Such conduct is ordinarily subject to a *per se* prohibition. Antitrust scrutiny is warranted notwithstanding that the entities operate on a not-for-profit basis.[41] Is a *per se* assessment warranted in relation to entities operating on a not-for-profit basis? As the presumption of harm underpinning the *per se* approach has developed in the context of ***for-profit*** firms, the argument has been made that the *per se* approach should not be invoked or relied on in relation to ***not-for-profit*** firms.[42] Consequently, there was great reluctance to

[36] An account and analysis is given in S Salop and L White, 'Policy Watch: Antitrust Goes to College' (1991) 5 J Econ Perspect 193–202; D Carlton, G Bamberger, and R Epstein 'Antitrust and Higher Education: Was There a Conspiracy to Restrict Finiancial Aid' (1995) 26 Rand J Econ 131–147.

[37] *US v Brown University*, 805 F Supp 288 (ED Pa 1992) 292; *US v Brown University*, 5 F3d at 664. Schools were concerned that hitherto admission had been determined by ability to pay rather than on merit-based criteria: *US v Brown University*, 805 F Supp 288 (ED Pa 1992) 304–305.

[38] *US v Brown University*, 805 F Supp at 293.

[39] Carlton, Bamberger, and Epstein (n 36) 142–144; Compare with the situation in the United Kingdom, in which the regulator sought to discourage Universities from offering discounts: Donald MacLeod, 'Universities warned against offering cash for places' (*Guardian*, 25 May 2006) www.theguardian.com/education/2006/may/25/highereducation.choosingadegree

[40] S Salop and L White, 'Policy Watch: Antitrust Goes to College' (1991) 5 J Econ Perspect 193, 194–195; Carlton, Bamberger, and Epstein (n 36) 132–133. A key element in the characterisation of the financial aid package is offered before the applicant accepts an offer of a place at the school. This may be distinguished from support that institutions offer to students that have already accepted offers or already commenced study at the school. This latter type of support is not available to prospective customers (students) but is limited to those already in receipt of the education service, cf Office of Fair Trading, 'Assessment of Market Power' (OFT 415, September 1999) 6.

[41] *US v Brown University*, 5 F3d at 667–668.

[42] See *Arizona v Maricopa County* 457 US 322 (1982) and *California Dental Association v FTC*, 526 US 756, 771 (1999) n 10; *Goss v Memorial Hosp System*, 789 F2d 353 (5th Cir 1986); *Northwest Wholesale*

subject the arrangement to the *per se* mode of analysis and instead the court wished for a more in-depth examination to be conducted and harm to be more specifically articulated and demonstrated.[43]

3.4.3 *Range of Justifications*

The fact that the entities operate on a not-for-profit basis can encourage courts and agencies to accept a broader range of justifications than is generally available.[44] In relation to not-for-profit providers, there is much sympathetic commentary advocating the inclusion of a broader range of considerations in the competition law assessment than is typically admitted.[45] In the Ivy league financial aid case, it was not unarguable that promoting economic diversity and educational access on a not-for-profit basis may justify any harm arising from a restriction of competition.[46] This reflects a general tendency to at least listen to arguments that harm arising from a restriction imposed by not-for-profit providers are necessary to achieve a greater good. Accepting this argument forces competition law to confront a number of issues. What types of benefit or value are acceptable for a not-for-profit organisation to pursue when those benefits or values conflict with those promoted by competition law?[47] Who must be the beneficiary of the conduct and what justifies those harmed by the anti-competitive conduct being compelled to pay for that benefit?[48]

An opportunity to confront these issues arose when the competition authority in the United Kingdom considered whether the centralised system used to apply for places at higher education institutions could harm competition between institutions, to the detriment of students.[49] Both the limit on the number of courses a

Stationers, Inc v Pac Stationery & Printing Co, 472 US 284, 105 S Ct 2613, 86 L Ed 2d 202 (1985); *Wright v Southern Mono Hosp Dist*, 631 F Supp 1294 (ED Cal 1986); *Everhart v Jane C Stormont Hosp*, 1982-1 Trade Cas (CCH) 64703, 1982 WL 1833 (D Kan 1982); Srikanth (n 15) 938–39; Notes 'Antitrust and Nonprofit Entities' (1981) 94 *Harv L Rev* 802–820, 808–814.; Carlton, Bamberger, and Epstein (n 36) 144–46; P Kolovos 'Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case' 71 NYU L Rev (1996) 689–731; 'Notes: United Charities and the Sherman Act' (1982) 91 Yale LJ 1593, 1597 fn 25; and T Greaney, 'Antitrust and Hospital Mergers: Does the Nonprofit Form Affect Competitive Substance?' (2006) 31 J Health Pol Pol'y L 511, 521–25. Improving Healthcare: A Dose of Competition A Report by The Federal Trade Commission and Department of Justice (July, 2004), chapter 4: www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf

43 US v Brown University, 805 F Supp 288, 300–301 (ED Pa 1992); *US v Brown University*, 5 F3d at 672.

44 *US v Brown University*, 5 F3d at 675–678.

45 Srikanth (n 15) 940–43.

46 *US v Brown University*, 805 F Supp at 678. The Ivy league schools entered settlement agreements so there is no final judgment.

47 See 'Notes: United Charities and the Sherman Act' (n 42) 1603–1611.

48 C Cicoria, 'European Competition Law and Nonprofit Organizations: A Law and Economics Analysis' (2006) 6 Global Jurist Topics 1, 40–42.

49 Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) para 6.24–6.30.

student may apply for and the inability to apply to both the University of Oxford and the University of Cambridge can be described as restrictions of choice.[50] Yet, if these restrictions could be cognised as restrictions of competition, the competition authority seemed willing to accept that the restriction could be justified on the ground that it enabled 'a more in-depth assessment of each candidate'.[51] Such a justification was put forward in a letter published in the Times Higher Education Supplement to justify the prohibition on applying to both Oxford and Cambridge, claiming:

> If a significant proportion of the applicants to whom [Oxford] offered places were liable to go instead to Cambridge, then to avoid lots of places going to waste, we would have to treat admissions as a central university process, playing the statistics of large numbers rather than selecting the students for our own colleges.[52]

The competition authority seemingly accepts that 'since each additional choice that an applicant makes puts a cost on the institution, it may be efficient to restrict the number of choices that each applicant can make'.[53] What is unusual about such an approach is that the identified benefits would appear to accrue to the institutions rather than to the students and so there appears to be an acceptance that benefits to not-for-profit institutions may offset harm to the users such institutions are intended to serve.[54]

3.4.4 *Sanctions*

Even when an unjustified restriction of competition is identified, competition authorities might be reluctant to impose sanctions on entities operating on a not-for-profit basis. The not-for-profit organisation may thus be said to benefit from what might be described as 'soft' enforcement. Two examples can be offered. In England and Wales, an infringement of competition law was committed when six State-owned health care providers exchanged information about the price each would charge for privately funded health care services.[55] No sanction was imposed notwithstanding the fact that information exchange relating to price ranks among the most egregious of competition law infringements. Instead, the competition authority was

[50] The importance of choice has also been emphasised by the UK Competition Appeal Tribunal: see, for example, Genzyme v OFT [2004] CAT 4, paras 255, 468 and 585.

[51] Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) para 6.29.

[52] Letters, Dangerous combination, September 5, 2013

[53] Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) para 6.35.

[54] This contradicts the identified limitation that even, in public service markets, any restriction must be 'to the benefit of students' or users: Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) para 6.35.

[55] See Letter to NHS Trusts with Private Patient Units enclosing competition law compliance guidance http://webarchive.nationalarchives.gov.uk/20140402161850/http://www.oft.gov.uk/shared_oft/public-markets/PPUs.pdf and Press release: NHS Trusts with Private Patient Units provide assurances to OFT to ensure competition compliance (16 August 2012) https://webarchive.nationalarchives.gov.uk/ukgwa/20121003141315/http://www.oft.gov.uk/news-and-updates/press/2012/71-12.

satisfied by assurances that the information exchange had ceased and that the parties would provide their staff with training on competition law compliance.

An even more striking example is the investigation into the operation of 50 schools that operate on a not-for-profit basis.[56] The schools had exchange detailed information about the fees that they intended to charge for their education services. The information exchange was organised by the bursar of Sevenoaks School, to whom the participant schools submitted details of their current fee levels, proposed fee increases (expressed as a percentage), and the resulting intended fee levels. The Sevenoaks bursar subsequently circulated this information among the Participant schools in tabular form. The information exchanges resulted in higher fees being charged than would otherwise have been the case and the procedure in force at the time meant that it was not possible to consider whether the arrangement was justifiable.[57] Although the regular and systematic exchange among competitors of each other's pricing intentions is a serious infringement, the competition authority decided to limit the penalties to £10,000. Such lenient treatment of such a serious violation was based in part in recognition that 'the Participant schools are all non-profit making charitable bodies'.[58]

3.5 WHY MODIFY?

Although not-for-profit entities may enter the market with a sense of or commitment to public service, there is nothing inherent in the organisational form to ensure this outcome. Do effective alternatives to voice, reinforced by the possibility of exit exist in relation to not-for-profit providers? Is competition law the best mechanism to ensure the effectiveness of voice and exit in the non-profit context and are competition authorities best placed to ensure compliance by not-for-profit entities? In a market occupied exclusively by not-for-profit entities, it may be that a regulatory regime exits in which the concerns of competition law are already accounted for or in which the concerns can be decentralised by granting concurrent powers. An important consideration, however, is that not-for-profit entities operate in markets that are also served by for-profit entities – the so-called, mixed markets. Some of the claims of non-profit exceptionalism apply only when a market is served exclusively by not-for-profit entities.[59] Exit and voice therefore remain important mechanisms through which patrons maximise the benefit they obtain from service provision by non-profit entities. It is for this reason that the actions of not-for-profit entities remain within the scope of competition law. Though competition law applies and has been applied to the activities

[56] Office of Fair Trading Press Release, 'OFT issues statement of objections against 50 independent schools' (9 November 2005) https://webarchive.nationalarchives.gov.uk/20080908111732/http://www.oft.gov.uk/news/press/2005/214-05.

[57] *Exchange of Information on Future Fees by Certain Independent Fee–Paying Schools* (n 18) paras 1359–1375, 1381–1383 [See SI 2004/1261 of UK Competition Act 1998].

[58] *Ibid*. at para 1427.

[59] E Searing, 'Charitable (Anti)Trust: The Role of Antitrust Regulation in the Nonprofit Sector' (2014) 5 Nonprofit Policy Forum 261, 262; Srikanth (n 15) 948, 955.

of not-for-profit providers, a reluctance to apply competition law full bloodied can be observed. What explains the reluctance to apply and tendency to modify the law?

A first point is that the extent to which *activities* of not-for-profit organisations, as distinct from the organisations themselves, fall within the scope of competition law can at times be difficult to determine. A case in point is the raising of funds to finance activities that each organisation will separately provide free at point of use. Can it be argued that fundraisers are selling something tangible to donors (separate from the services offered free at point of use) such that fundraising itself warrants competition law scrutiny?[60] There is undoubtedly competition for donations, since there are more organisations and causes seeking funds than there are funds.[61] The economic literature shows that competition for donations increases the cost of raising funds (and by a greater amount than the increase in total funds raised).[62] Suppressing competition can therefore reduce the cost of fundraising and leave more resources available to promote the organisations mission.[63] Is it objectionable for competition to be suppressed?[64]

In *Dedication & Everlasting Love to Animal v. Humane Society of the United States*, in which it was alleged that the Humane Society of the United States monopolised the market for donations to support of animal welfare, fundraising by not-for-profit organisations was not considered to be an antitrust issue.[65] At the same time, it has been recognised that collective fundraising or a fundraising monopoly may make it more difficult for those not part of the collective effort to raise funds and it may be difficult for them to gain an allocation of the funds raised – the ability of new organisations to raise funds for new causes may be impacted.[66] Can it be right that no antitrust scrutiny is possible when the impact on competition is not necessarily beneficial or benign?

[60] S Rose-Ackerman, 'Charitable Giving and "Excessive" Fundraising' (1982) 97 Q J Econ 193–212; S Rose-Ackerman, 'Altruism, Nonprofits, and Economic Theory' (n 2) 710–15; T Norgard, 'How Charitable Is the Sherman Act?' (1999) 83 Minn L Rev 1515, 1533–34, 1543–45; 'Notes: United Charities and the Sherman Act' (n 42) 1598–1600.

[61] J Saxton and M Guild, 'It's Competition, but Not as We Know It' (*nfpSynergy*, October 2010) 4–6, 10–11, 25–28.

[62] See for example Rose-Ackerman, 'Charitable Giving and Excessive Fundraising' (n 60) 193–212.

[63] Philipson and Posner, 'Antitrust and the Not For profit Sector' (n 16) 7–9.

[64] See 'Notes: United Charities and the Sherman Act' (n 42); Office of Fair Trading, 'Assessment of Market Power' (n 40) 8.

[65] 50 F3d 710 (9th Cir 1995). See also Charitable Donation Antitrust Immunity Act of 1997, Pub L No 105-26, 111 Stat 241 (1997). The decision is often contrasted with that of *Virginia Vermiculite v WR Grace Co* 156 F 3d 535 (4th Cir 1998). However in this later case it is the conduct or the donor rather than the not for profit recipient that is being challenged. In the UK, see ME/1074/02 Completed merger between the Imperial Cancer Research Fund and the Cancer Research Campaign (https://webarchive.nationalarchives.gov.uk/ukgwa/20090903210627/http://www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/mergers_fta/2002/imperial-cancer); ME/4034/09 Seniorlink Eldercare/ Aid Call resulting from the completed merger between Help the Aged and Age Concern, para 10 (https://webarchive.nationalarchives.gov.uk/ukgwa/20161129204513/https://assets.publishing.service.gov.uk/media/555de35440f0b669c4000091/Seniorlink.pdf)

[66] 'Notes: United Charities and the Sherman Act' (n 42) 1603–1605.

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A second point is that the modifying tendencies are not always triggered. This then makes it clear that something other than non-for-profit status is at work. Operating on a not-for-profit basis could function as a proxy for trustworthiness or selflessness and so it remains the case that 'those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not'.[67] If the non-distribution constraint does not exclude the possibility of an entity acting in the interests of the organisation or its members rather than the consumer, it would seem that competition law is applied unmodified. This would account for the sustained scrutiny applied to self-regulatory bodies and cooperatives, notwithstanding that they operate on a not-for-profit basis.

A third point is that there remains a lingering sense that competition law does not provide an appropriate frame of reference with which to view the activities of not-for-profit entities.[68] The sense that competition law is somehow trespassing motivates the imposition of high evidential burdens, not only to establish violations but also to even launch an investigation. Recognising that being subject to a competition law investigation is not costless, even in relation to compliant behaviour, justifies the increased thresholds, particularly when bearing such cost necessarily results in reduced resources being available for activities in the general interest.[69] The same may be true of the modified approach to sanctions. The modifying tendencies are to be understood as simple recognition that it is not in the public interest to enforce competition laws against all conduct falling within the literal scope of the prohibition.

3.6 CONCLUSION

While there will always be claims that competition law *does not* or *should not* apply, there is nothing inherent in the not-for-profit form to justify this claim. Particularly, there is nothing to indicate that applying competition law has been harmful to the causes served by non-profit providers; there are clear indications that competition law has been applied in a way that addresses real harm to patrons; and modifications are made, when appropriate, to ensure that the mission served by not-for-profit entities is not harmed by the application of competition law. All this should leave us confident that competition law can pierce the veil of the not-for-profit form and examine (in its own small way) whether the public interest is genuinely being served.

[67] E Elhauge, 'The Scope of Antitrust Process' (1991) 104 Harv L Rev 667, 672.

[68] Office of Fair Trading, 'Higher Education in England: An OFT Call for Information' (n 30) paras 1.15, 6.15–6.23; Department for Business, Innovation and Skills, 'Competition Issues in the Further Education Sector' (October 2013) BIS Research Paper Number 141, 5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/248707/bis-13-1235-competition-issues-in-the-further-education-sector.pdf, noting that 'The strong focus on social obligations means that many providers need to work closely with other local stakeholders and providers to develop a comprehensive skills offer that meets the needs of their community. While there can be important efficiency gains from working together, cooperation can provide an opportunity for anti-competitive agreements to be made.'

[69] *Exchange of Information on Future Fees by Certain Independent Fee–Paying Schools* (n 18) para 36

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