FACULTY OF LAW
Lund University

The Role of Consumer Welfare in EU Competition Policy:

How Understanding the Priority Conferred Upon Competition Policy Objectives May Shed Light on Modern Day Inconsistencies

Emily Andersen

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Thesis Supervisor: Annegret Engel

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Summary

At the turn of the century the Commission announced its intention to introduce a 'more economic approach' to EU competition law. Beyond incorporating modern economic theory into its enforcement practices, such a modernised approach to competition law was also to entail bringing the Union's competition policy objectives in line with such modern economic theory. In particular, as expressed by Mario Monti, the Commissioner for Competition at the time, the competition policy of the Union was to undergo a shift towards a focus on the economic welfare of consumers. The question arises therefore, as to whether such a shift in focus has in fact taken place, as well as what consequences such a change in focus may have for the enforcement practices of both the Commission and the Court of Justice.

In light of the foregoing, this thesis examines the extent to which consumer welfare may be identified as the primary objective of contemporary EU competition policy. It seeks to define the concept of consumer welfare itself, as this has proven somewhat of an elusive concept despite its prominence in both competition law and economics. Moreover, it contextualises the consumer welfare objective within the multivalued tradition of Union competition policy by analysing the alternative objectives against which consumer welfare may be deemed as primary. Having analysed such alternative objectives, this thesis also evaluates the ways in which the enforcement practices of the Commission, especially following the aforementioned modernisation process, indicate that consumer welfare be given priority in EU competition law. However, the jurisprudence of the Court is also taken into account and utilised to highlight certain inconsistencies between the practices of each of these institutions as regards the objectives of competition policy.

Ultimately the conclusion of this thesis acknowledges that, from the point of view of the Commission, consumer welfare constitutes the primary objective of competition policy, followed closely by the market integration objective. However, the same may not be said of the Court. As a consequence, the thesis additionally makes clear that action is needed in order to address existing inconsistencies between the practices of the two institutions responsible for competition law enforcement.

Preface

When I told my grandmother that I would be attending Lund University she was overjoyed at the idea of me studying only ten minutes away from her hometown of Malmö. However, her joy was soon followed by concern as to whether I would find the 'small town' of Lund to be boring. After two years in Lund I can safely assure her that while I have felt a lot of things during my time in Lund, bored has not been one of them.

For this I would like to thank the intelligent, kind, and overall amazing women that I get to call my friends. Marie, Erika, Claudia, and Leslie, you have been there for me through both the ups and downs and I am forever grateful. Further, I would also like to thank my colleagues in the European Business law program as well as the teachers and staff at the faculty of law who have supported me throughout this degree. In particular, I would like to thank my supervisor Annegret Engel for her patience, insight, and help throughout the writing of this thesis.

A special thanks goes to my beloved family, my parents Suzi and Bjørn, my little sister Sofie, my grandmothers Phyl and Birgitta, and my grandfather Hans. To know that you all have been cheering me on throughout this degree has gotten me through many long study nights. I love you all.

Finally, thank you to Kiko for believing in me when I had a hard time doing so. You are my person and I love you.

While originally I had envisaged my time at Lund as a steppingstone on my way back home to Norway, I am leaving with a view of Skåne as the 'home away from home' that will forever have a place in my heart.

Lund, August 2020

Emily Andersen

Abbreviations

The Court	Court of Justice
CJEU	Court of Justice of the European Union
Commission	European Commission
DG	Directorate-General
EEC Treaty	Treaty Establishing the European Community
EU	The European Union
GC	General Court
I.e.	Id est (that is)
Ibid	Ibidem (in the same place)
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal
SME	Small and Medium Sized Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Union	The European Union

1. Introduction

1.1. Background

Over the course of recent years, the debate concerning the objective(s) of EU competition policy has gained prominence in the European legal discourse, with an increasing number of publications dedicated to the topic.[1] In particular, emphasis has been placed on the task of identifying which objectives are attributable to Union competition policy, classifying Union competition objectives as singular or pluralistic in nature, and evaluating the interrelation between the Union's competition objectives.

Importantly, however, despite the growing interest expressed by some scholars as to these issues, there are also those who question relevance and necessity for a debate about the objectives of Union competition at all. According to Professor Lianos, for instance "the quest for the goals of competition law may prove, in the end, a meaningless exercise", because of the limited information he believes such objectives may provide "on the content and evolution of competition law."[2] In essence, for those holding with Lianos' perspective, "attempting to capture the objectives of EU competition law appears as little more than a philosophical exercise without much practical relevance."[3] This, however, is not the case. Firstly, it must be kept in mind that "a clear understanding of the purpose a rule is supposed to achieve is (…) key during the drafting process."[4] Secondly, "when dealing with existing rules, a clear grasp of their objectives is essential for interpreting unclear terms in a coherent way and in establishing consistent enforcement priorities/practices."[5] Consequently, "policy objectives have a real impact in the design of competition policy and in the daily application and enforcement of competition provisions."[6]

Within the context of the Union this is all the more true considering the central role which teleology plays in the interpretation of EU law. As clarified by the Court, what such teleology

[1] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 2; P. Akman, 'Consumer Welfare and Article 102 EC: Practice and Rhetoric' [2009] 32 (1) World Competition, pp. 71-90; O. Andriychuk, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process' [2010] 6(3) European Competition Journal, pp. 575-610; O. Odudu, 'The Wider Concerns of Competition Law' [2010] 30(3) Oxford Journal of Legal Studies, pp. 599-613; B. van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-Efficiency Considerations under Article 101 TFEU* (1st edn., Kluwer Law International 2012); D. Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing 2012).

[2] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 3.

[3] A. Witt, *The More Economic Approach to EU Antitrust Law* (1st edn., Hart Publishing 2016), page 77.

[4] Ibid. at page 77.

[5] Ibid. at page 77.

[6] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 3.

entails is that "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the *objectives* thereof and to its state of evolution at the date on which the provision in question is to be applied."[7] In essence, the teleological approach prescribed in EU competition law *requires* that one possess an understanding of the objectives of competition policy so as to both understand and facilitate the application of EU competition law. In light of the foregoing, therefore, the significance of establishing the objectives of Union competition policy becomes evident.

Importantly, since the modernisation process undertaken within the Union between 1999 and 2009, one particular objective has figured more prominently in the discourse of the Union; namely consumer welfare. Indeed, as stated by former Commissioner for Competition, Neelie Kroes, "our main aim is simple: to protect competition in the market as a means of enhancing consumer welfare."[8] With this in mind, two intriguing matters to address are whether such consumer welfare indeed is distinguishable as the leading objective of Union competition policy, and, in turn, what this objective may teach us about the current state of EU competition law and competition law enforcement.

1.2. Purpose and Research Questions

The main purpose of this thesis is to evaluate whether the often-cited objective of consumer welfare may be identified as the primary objective of EU competition policy. In so doing this thesis additionally aims at clarifying whether a hierarchy, or another form of classification, may be applied to the objectives attributable to EU competition policy, so as to facilitate an understanding of each objectives' roles in EU competition law. Finally, as a corollary of the foregoing, this thesis additionally aims at utilising the discussion of the objectives of EU competition policy to highlight any potential shortcomings in the enforcement practices of the Commission or Court of Justice.

In light of the purpose of this thesis, the following research questions will be addressed:

- *To what extent may consumer welfare be identified as the primary objective of EU competition policy?*

[7] Case C-283/81, *CILFIT v Ministero della Sanità* [1982], ECLI:EU:C:1982:335, para. 20.
[8] N. Kroes, 'European Competition Policy: Delivering Better Markets and Better Choices' (Speech at European Consumer and Competition Day, London, 15 September 2005), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512

- *How may this identification highlight inconsistencies which exist in modern EU competition policy?*

1.3. Methodology and Materials

In order to address the aforementioned research questions, this thesis will employ multiple methods throughout its chapters and sections. Firstly, in light of the focus placed on the consumer welfare objective, an interdisciplinary approach, combining both microeconomics and competition law will be utilised so as to establish what the concept of consumer welfare should be understood to entail. Secondly, in order to ascertain the potential priority given to consumer welfare, the European legal method, or teleological interpretive method characteristic of the Court, will be employed. As already indicated above, this method requires that a comprehensive and holistic view of EU competition law be favoured over a purely textual approach. Arguably, this approach is most appropriate for addressing the question of whether a hierarchy of objectives exists within EU competition law, as it incorporates both the applicable competition law provisions and the legal and historical context within which such provisions operate. Finally, an evaluative approach will be taken in addressing both research questions at issue in this thesis. However, this approach is of particular relevance with regards to identifying potential inconsistencies in the enforcement of EU competition policy.

In line with the varying methods employed in thesis, also the materials used in addressing the aforementioned research questions are varied. Included in such materials are both primary and secondary sources of Union law, such as the Treaties, the jurisprudence of the Court, decision of the Commission relating to concentrations, and the interpretive guidelines of the Commission. Moreover, considering the multidisciplinary nature of consumer welfare, a number of economic publications will also be used.

1.4. Delimitations

As mentioned above, there are a number of publications already in existence which focus on the discussion of which objectives may be attributed to the Union and the validity or desirability of these objectives. Additionally, the question of whether Union competition policy may be characterised as singular or pluralistic in nature has been dealt with extensively. With this in mind, the focus of this thesis will not be on such theoretical questions regarding the fundamental nature of Union competition policy and its objectives. Instead, this thesis will elaborate upon such publications, so as to shed light on the current system or structure which Union competition policy objectives are subject to. In particular, this thesis will examine and compare

the competition enforcement practices of the Union over time so as to ascertain whether a hierarchy of objectives may be found in EU competition policy.

Ultimately, the hope is that, in ascertaining whether the objectives which have conclusively been attributed to the Union's competition policy are subject to a hierarchy, and examining whether such hierarchy has been consistently adhered to, this thesis may serve as a call to action to address any potential inconsistencies which may exist in the application of such a hierarchy of objectives.

1.5. Outline

Including this introductory chapter, this thesis is composed of five chapters. In order to facilitate the discussion of the research questions at issue in this thesis, the second chapter seeks to establish what the concept of consumer welfare is to entail and its relevance to Union competition policy. Chapter three then aims at contextualising the consumer welfare objective. To this end, the chapter outlines the alternative EU competition objectives in relation to which consumer welfare may be deemed as primary, and introduces a potential system through which such a classification may be made. Chapter four analyses the Commission's enforcement practices across all three pillars of Union competition law both prior to and following its modernisation project in order to substantiate the classifications discussed in the preceding chapter. Finally, chapter five addresses the jurisprudence of the Court with a view to conclusively determining that both institutions responsible for the enforcement of EU competition law demonstrate a tendency towards prioritising consumer welfare.

2. The Concept of Consumer Welfare

In addressing the question of whether consumer welfare may be identified as the primary objective of EU Competition Policy, one must first lay the groundwork in terms of understanding the concept of consumer welfare itself. Unfortunately, this is a task which, in and of itself, is challenging. Indeed, while the term 'consumer welfare' has arguably figured in the legal discourse of the Union for more than fifteen years,[9] there remains no clear definition of the concept or, at best, "conflicting ways in which the term is used."[10] As stated by V. Daskalova, "consumer welfare remains a vague term which arguably may generate more questions than it does answers."[11]

Among such questions are, for instance; *What does the term 'welfare' encompass? What is to be considered as 'consumer harm'? Who qualifies as the consumer whose welfare is to be taken into account? What role may consumer welfare have in competition policy?* In the following sections, each of these questions will be dealt with in turn, so as to provide a solid foundation upon which to address the research question at issue in this thesis.

2.1. Evaluating the Concept of Consumer Welfare

2.1.1. *What does the term 'welfare' encompass?*

As a preliminary point it must be noted that "consumer welfare is mostly known as a term from economics."[12] According to the definition found in the OECD glossary "consumer welfare refers to the *individual benefits* derived from the consumption of goods and services."[13] Importantly, such 'individual benefits' are dependent on the "individual's own assessment of his or her satisfaction," given considerations such as price relative to income.[14] In essence, therefore, consumer welfare may be highly subjective and the "exact measurement of consumer welfare requires information about individual preferences."[15] As with most matters which are

[9] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 133.
[10] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 25.
[11] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 134.
[12] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 133.
[13] R. S. Khemani and D. M. Shapiro (eds.), 'OECD Glossary of Industrial Organisation Economics and Competition Law' (OECD Glossary of Statistical Terms, 1993)
[14] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 136; R. S. Khemani and D. M. Shapiro (eds.), 'OECD Glossary of Industrial Organisation Economics and Competition Law' (OECD Glossary of Statistical Terms, 1993).
[15] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 136.

subjective in nature, one may easily imagine the difficulties one would face both in actually obtaining the information required to measure consumer welfare on the basis of subjective preferences, as well as in comparing each individual's utility from the consumption of a particular good or service.

In light of such difficulties, therefore, the common practice in welfare economics is rather to employ the notion of 'consumer surplus' as a 'stand-in' for the 'individual benefits' – or 'welfare' – which a consumer may have acquired.[16] As stated in the OECD Glossary, "consumer surplus (…) is defined as the excess social valuation of a product over the price actually paid."[17] Rephrased, it describes the difference between the "price which a consumer was willing to pay and the price which they were actually made to pay."[18] In essence, therefore, in utilising consumer surplus as a 'stand-in' for the 'individual benefits' which consumer welfare comprises, the concept of 'consumer surplus' in turn allows price to be utilised as a proxy for welfare.[19] In essence, therefore, "while in theory one aspires to maximize *welfare*," in practice, such welfare is "reduced to a price advantage."[20]

However, it should be kept in mind that "not everything that counts can be counted and not everything counted counts."[21] In other words, it is worth wondering what may be lost when welfare is reduced to such price advantages.[22] Indeed, while other 'parameters of competition' such as product quality, product variety or innovation are admittedly more difficult to quantify than consumer surplus, "some economists have cautioned that consumer surplus in and of itself should not be used as a sole consideration, as it may lead to undesirable results" such as stifling innovation or competitiveness.[23]

As a consequence of the foregoing, an alternative interpretation of 'welfare' associates it "with the concept of consumer sovereignty and takes explicit account of non-price criteria that shape

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[16] Ibid. at page 136.

[17] R. S. Khemani and D. M. Shapiro (eds.), '*OECD Glossary of Industrial Organisation Economics and Competition Law*' (OECD Glossary of Statistical Terms, 1993)

[18] S. Albæk, Consumer Welfare in EU Competition Policy, in; *Aims and Values in Competition Law* (DJØF Publishing 2013), page 70.

[19] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 137.

[20] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 137.

[21] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 138 – in this statement Daskalova is utilising a quote which has been attributed to Albert Einstein, though this quote has not been conclusively tied to him.

[22] Ibid. at page 137.

[23] Ibid. at pages 137-138; see also S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), pages 31-32; D. Carlton, 'Does Antitrust Need to be Modernized?' [2007] 21(3) Journal of Economic Perspectives, pp 155-157.

consumer choices", such as quality or variety.[24] Notably, however, this approach may mirror some of the shortcomings or challenges which arise when surplus or price advantages are exclusively used to indicate 'welfare'. For instance, "the 'consumer choice' criterion may generate perverse effects by ultimately protecting competitors rather than consumers, as the emphasis put on aspects such as variety may be abused to justify the survival of small, non-competitive companies which add to the variety of products offered."[25] Surely, "the number of competitors should not be seen as an exclusive indicator of the consumers' degree of happiness either."[26]

Essentially, neither an overly narrow interpretation of welfare as purely encompassing price and output, nor an overly broad interpretation modelled on consumer choice is preferable. Instead, what may generally be distinguished as the most practicable understanding of 'welfare' entails using "price effects as 'shorthand' for the various ways in which the parameters of competition"– such as price, output, innovation, the variety and quality of goods and services – "can be influenced" to the benefit of consumers. [27]

2.1.2. *What is to be considered as 'consumer harm'?*

As a corollary to the interpretation of 'welfare' as referring to reductions in price, increases in output and innovation, and improvements in the variety and quality of goods, one may reasonably conclude that 'consumer harm' will encompass the opposite effects on such parameters of competition.[28] In practice, such consumer harm may be prohibited by enforcement authorities as soon as the short-term welfare of consumers is jeopardised. Alternatively, however, certain reductions in the welfare of consumers may be tolerated in the short-term in favour of an improvement of overall or total welfare.[29]

Importantly, competition policies following this latter approach will generally only allow the "subordination of short-term consumer interests or welfare to the overall welfare of society" where the relevant competitive practice "increases total welfare by realising substantial production and innovation efficiencies, (…) is necessary, reasonable and proportionate so as to

[24] R. Van den Bergh, Comparative Competition Law and Economics (1st edn., Edward Elgar Publishing 2017), page 98.
[25] Ibid. at page 99; see also S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 13.
[26] R. Van den Bergh, Comparative Competition Law and Economics (1st edn., Edward Elgar Publishing 2017), page 99.
[27] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 148; Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08; para 16 and endnote 84.
[28] See to this effect Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, endnote 84.
[29] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 125; J.F. Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress', (1987) 62 New York University Law Review, page 1035.

harm consumers as little as possible, and (…) does not lastingly impair competition by ensuring that a fair share of efficiency gains are passed on to consumers."[30] As such, the short-term reduction of consumer welfare will generally only be tolerated where the long-term benefits to such welfare outweigh any detriment experienced.

2.1.3. *Who counts as a consumer?*

Keeping in mind the potential conceptions of both consumer welfare and 'consumer harm', an additional matter which must be addressed so as to fully understand the concept of consumer welfare is the question of who counts as the 'consumer' whose welfare is to be protected? According to the standard Oxford definition of 'consumer', the term refers to the purchaser of a good or service, without any distinction being made between individuals and companies.[31] As such, the term may encompass "all direct or indirect users of a product, including producers that use the product as input, wholesalers, retailers and final consumers."[32] However, there are also those who advance a more narrow interpretation of the term as exclusively encompassing the end-users of final consumers of a product.[33]

In general, competition policies tend to adopt the former, more conventional, definition of the term. Largely, this tendency may be explained on practical grounds; were competition policy to adopt a narrow interpretation of the term 'consumer', thereby focusing on the welfare of the end-user of a product, "most of the abuses occurring along the supply chain would be insulated from antitrust inquiry."[34] Indeed, the relevant competition authorities would have to examine whether either harm or benefits experienced by the direct buyers on the relevant supply chain properly 'trickle down' to the end-consumer and are not absorbed by parties along the supply chain.[35] This arguably imposes quite a heavy evidentiary burden which, "to potentially small or less wealthy claimants, may be prohibitively expensive."[36] Contrastingly, through adherence

[30] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 126.
[31] M. Waite (ed.), *Pocket Oxford English Dictionary* (Oxford University Press 2013), page 188.
[32] See, for instance, Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, para. 84; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24, Article 2(b); Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, footnote 105; and Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07, para. 16.
[33] G. J. Werden, 'Monopsony and the Sherman Act: Consumer Welfare in a New Light' [2007] 74(3) Antitrust Law Journal, pp. 707-737; see also J. Shively, 'When Does Buyer Power Become Monopsony Pricing' [2012] 27(1) Antitrust Magazine, pp. 87-94.
[34] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 140.
[35] S. Albæk, Consumer Welfare in EU Competition Policy, in; *Aims and Values in Competition Law* (DJØF Publishing 2013), page 76; K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 132.
[36] V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 140; Commission White Paper on Damages Actions for breach of the EC Antitrust Rules, COM (2008) 165, pages 7-8.

to a broader interpretation of which parties constitute 'consumers', competition authorities may alleviate this evidentiary burden by inferring from the harm or benefits experienced by direct buyers, that similar harm or benefits are passed through to the final consumer.[37]

2.1.4. *What role may consumer welfare have in competition policy?*

Having examined the components of consumer welfare, a final question remains of importance in fully grasping the concept of consumer welfare, namely what role such consumer welfare may have in competition policy. Chiefly, the answer to this question will depend on the welfare *standard* a given competition policy chooses to pursue.

Largely speaking, welfare economists advance that the relevant 'welfare standard' which competition policy should seek to maximize, or rather, adopt as its objective, is that of total welfare.[38] Importantly, total welfare may be considered as synonymous with total surplus. Such total surplus is the measure of "the aggregate sum of consumer surplus and producer surplus."[39] As such, total welfare will be considered as maximised where one can identify an increase in total surplus as a result of *either* consumer *or* producer surplus increasing. Keeping in mind that consumer surplus is synonymous with consumer welfare, the consequence of adherence to the total welfare standard therefore, is that, from the economists point of view, the role which consumer welfare should play in competition policy is limited.[40] In fact, according to the economic perspective, consumer welfare should figure in competition policy only to the extent that consumer surplus makes up a portion of the wider welfare standard which competition policy should seek to achieve, namely total welfare as represented by total surplus.

Indeed, this perception of the role which consumer welfare shall have in competition policy is further made evident when taking into account the way in which welfare economists propose measuring whether a change in competitive situation contributes towards the maximization of

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[37] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 132.

[38] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 5; see also K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 126; S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 24; Annette Jurgensen, 'The More Economic Approach: Efficiencies and Their Recognition within EU Competition Law' (Master Thesis, Lund University 2015), page 19. Retrieved via http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=7363159&fileOId=7363200, last accessed 30 August 2020

[39] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 7; for the definition of consumer and producer surplus see V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' [2015] 11(1) The Competition Law Review, page 136; and R. S. Khemani and D. M. Shapiro (eds.), 'OECD Glossary of Industrial Organisation Economics and Competition Law' (OECD Glossary of Statistical Terms, 1993); see also M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 18.

[40] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 8.

total surplus, that is through the application of the Kaldor-Hicks condition.[41] With its basis in the 'second fundamental theorem of welfare economics', which stipulates that one is to assume that all individuals are selfish price takers,[42] the Kaldor-Hicks condition posits that almost any change in competitive situation may be deemed as contributing towards the maximization of total surplus on the condition that those who have benefitted from such a change in competitive situation may *potentially* compensate those who have suffered.[43] Notably, with regards to the compensation to be made to those who have suffered losses, the Kaldor-Hicks condition does not stipulate a requirement "that compensation should be effectively paid."[44] Nor does the Kaldor-Hicks condition identify competition policy as the mechanism through which the relevant compensation is to be made. Instead, the crux of the Kaldor-Hicks condition is that the outcome of a change in competitive situation results in an increase in total surplus, even if the surplus of one group of actors (consumers or producers) diminishes.[45] In essence, therefore, the limited role of consumer welfare is reflected not only on the basis of the nature of total welfare as neutrally composed of varying levels of consumer and producer surplus, but also practically speaking through the lack of account taken in the application of the Kaldor-Hicks condition for both the composition of the total surplus achieved and the redistribution of such surplus between consumer and producers.

Importantly, this is not to say that economists, or proponents of total welfare, deem the matter of resource distribution as irrelevant, but rather is indicative of their perception of the matter as one which is separate from that of welfare.[46] "While the welfare measure is a summarizing measure of how efficient a given market is as a whole",[47] the implicit assumption of those who advance the total welfare standard is that the correction of any inequalities in the distribution of resources may best be made through the political system which "may decide to impose a

[41] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 7; J.R. Hicks, 'The Foundations of Welfare Economics' [1939] 49(196) The Economic Journal, pp. 696–712; N. Kaldor, 'Welfare Propositions in Economics and Interpersonal Comparisons of Utility' [1939] 49(145) The Economic Journal, pp. 549–52.

[42] See, M. Blaug, 'The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated' [2007] 39(2) History of Political Economy, pp. 185-207; see also I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 5.

[43] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 5; J.R. Hicks, 'The Foundations of Welfare Economics' [1939] 49(196) The Economic Journal, pp. 696–712; N. Kaldor, 'Welfare Propositions in Economics and Interpersonal Comparisons of Utility' [1939] 49(145) The Economic Journal, pp. 549–52.

[44] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 5.

[45] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 7; see also S. Albæk, Consumer Welfare in EU Competition Policy, in; *Aims and Values in Competition Law* (DJØF Publishing 2013), page 71; see also A. Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution Press 1975), page 2.

[46] M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 18.

[47] Ibid. at page 18.

lump sum tax compensating the 'losers' and ensuring an equality of opportunity."[48] Rephrased, welfare economists argue that competition policy should be viewed as "an economic efficiency-oriented policy apt to target and promote the overall economic welfare of society instead of making value judgements on how economic welfare should be distributed between different social group."[49] As such a 'separation thesis' is proposed with the tax system being advanced as "a more efficient way of engaging in redistribution than the regulatory system."[50] In doing so however, consumer welfare is arguably given somewhat of a 'backseat' in the competition policy envisioned.

Such an approach to the role of consumer welfare in competition policy is not universal however, with some instead advancing consumer welfare as the appropriate welfare standard to be pursued or maximised by competition policy. Indeed, as argued by proponents of consumer welfare as the relevant welfare standard in competition policy, it must be remembered that, contrary to what is proposed under the total welfare approach outlined above, "competition policy objectives," including the choice of welfare standard, "should not made on the basis of simple derivations from analytical models."[51] Instead, "competition policy objectives have to be transformed into feasible enforcement objectives on the basis of which clear benchmarks in competition cases can be put forward."[52] Among the influences on such objectives and resulting enforcement benchmarks, it may be argued, is "repeated interaction and coordination between two large interest groups", namely consumers and producers.[53] Importantly, within said bargaining process, "consumers will usually have a weaker bargaining, lobbying and litigation position."[54] Consequently, a "pro-consumer objective", or pro-consumer welfare standard, may seem justified as somewhat of a 'rebalancing measure'.[55] In essence, contrary to competition policies adhering to a total welfare standard, those competition policies which elect consumer welfare as its welfare standard conventionally accord a more prominent role to the issue of (re-) distribution and, in turn, the concept of consumer welfare itself. Instead of identifying competition policy as purely "efficiency based", competition policy is instead viewed as a

[48] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 8; see also A.B. Atkinson and J.E. Stiglitz, 'The Design of Tax Structure: Direct versus Indirect Taxation' [1976] 6(1-2) Journal of Public Economics, pp. 55-75.
[49] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 127.
[50] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 8.
[51] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 127.
[52] Ibid. at page 127.
[53] Ibid. at page 127; see also J.B. Baker, 'Competition Policy as a Political Bargain' [2005] 73 Antitrust Law Journal, page 2.
[54] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 127.
[55] Ibid., at pages 127-128.

suitable means for addressing potential inequalities amongst interest groups with particular significance being given to the welfare enjoyed by consumers.

Beyond serving as a means for protecting a, relatively speaking, 'weaker' interest group, the promotion of consumer welfare may also be explained on the basis of political considerations. In particular, the importance accorded the protection and promotion of consumer welfare may be attributed to the fact that enforcement authorities wish to ensure "political support for their work" and, as such, must recognise that consumers constitute a large societal group and voter base which, "by definition, includes us all."[56] Indeed, "any competition law enforcement which transfers wealth from consumers to firms, by allowing firms to adopt practices which generate efficiency benefits while reducing consumer surplus threatens to undermine consumer confidence" and, in turn, political support.[57]

As becomes clear from the discussion above, the choice of welfare standard essentially reflects the particular way in which a given competition policy has chosen to reconcile the overall or total interest of society with the particular interests of consumers.[58] It reflects the choice which has been made to either "strive to achieve purely economic goals" or whether competition policy has elected to also take into account "non-economic goals such as income or resource distribution and redistribution."[59] Most importantly, with regards to evaluating the concept of consumer welfare, it may shed light on the exact role which such consumer welfare is to play within competition policy.

2.1.5. *Interim Summary: Consumer Welfare*

As becomes evident from the preceding sections, consumer welfare, as argued by both legal and economic scholars, remains somewhat of an elusive concept. Indeed, while the economic definition of consumer welfare as "the individual benefits derived from the consumption of goods or services"[60] is widely adhered to both in economics and competition policy, a number of uncertainties surround the components of said definition. Firstly, for instance, with regards to the term 'welfare', the use which welfare economist make of consumer surplus and, in turn price advantages, as a proxy for welfare may be disputed by those competition authorities who,

[56] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 125 – citing President Kennedy's message to the United States Congress in 1962; see also J.B. Baker, 'Competition Policy as a Political Bargain' [2005] 73 Antitrust Law Journal, page 56; and, W.H. Rooney, 'Consumer Injury in Antitrust Litigation: Necessary, But By What Standard?' [2001] 75(4) St. John's Law Review, pp. 561-592.
[57] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' [2007] 3(2) The Competition Law Review, page 128.
[58] Ibid., at page 122.
[59] Ibid., at page 125.
[60] R. S. Khemani and D. M. Shapiro (eds.), 'OECD Glossary of Industrial Organisation Economics and Competition Law' (OECD Glossary of Statistical Terms, 1993).

in seeking to protect and promote consumer interests, also want to account for parameters of competition which are not easily quantifiable. Secondly, concerning 'consumer harm', while an antonymous understanding to 'welfare' is largely undisputed, varying approaches as to the point at which the prohibition of such consumer harm should be enforced will depend on the choice to focus on short or long term consumer interests. Thirdly, alternative interpretations may be attributed to the term 'consumer' itself. While it may simply refer to end-users of a product, a more practicable conception of the term would take it to encompass "all direct or indirect users of a product, including producers that use the product as input, wholesalers, retailers and final consumers."[61] Finally, and perhaps most decisively, many of the aforementioned alternatives, will, in the context of competition policy, primarily depend upon the welfare standard which has been selected. Ultimately, therefore, it may be surmised that to fully understand the concept of consumer welfare, one must also understand the specifics of the competition policy within which it figures.

2.2. Analysing the Concept of Consumer Welfare as it Figures in Union Competition Policy

Within the context of this thesis, the relevant competition policy which must be examined, so as to properly understand the concept of consumer welfare, is that of the European Union.

Within EU competition policy, it has been expressly acknowledged by both the Commission and the Court of Justice that the relevant welfare standard to be pursued is that of consumer welfare. During her speech at the 'European Consumer Competition Day' (2015), for instance, former Commissioner for Competition, Neelie Kroes, stated that "our main aim is simple: to protect competition in the market as a means of enhancing consumer welfare."[62] Such sentiment was reiterated by the Court of Justice in the judgement for Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse*, where it was clearly outlined that; "the ultimate purpose of the

[61] See, for instance, Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, para. 84; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24, Article 2(b); Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, footnote 105; and Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07, para. 16.

[62] N. Kroes, 'European Competition Policy: Delivering Better Markets and Better Choices' (Speech at European Consumer and Competition Day, London, 15 September 2005), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512; see also J. Almunia, 'Competition and Consumers: The Future of EU Competition Policy' (Speech at European Competition Day, Madrid, 12 May 2010): "competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions."

rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers."[63]

Moreover, evidence of the consumer welfare objective within the context of EU competition policy may additionally be found in the provisions of the Treaties and the enforcement practices of the Commission. Perhaps the clearest example in this regard is provided in the second condition of Article 101(3) which requires that consumers should be awarded a 'fair share' of the possible efficiency gains that are claimed to result from an anti-competitive agreement.[64] As clarified in the Commission's Guidelines on the application of Article 101(3) TFEU, "the concept of 'fair share' implies that the pass on benefits of an agreement must at least compensate consumers for any actual or likely negative impact caused to them by the restrictions of competition found under Article 101(1) TFEU."[65] Further, it is stated that the level of compensation required is one which would ensure that "the net effect of the relevant agreement is at least neutral from the point of view of the consumers (…) affected by the agreement."[66] In other words, the positive effects of the relevant agreement must be balanced against, and *actually* compensate for, any negative effects caused to *consumers* as a result of said agreement.[67] Importantly, it is expressly acknowledged by the Commission that the form which such compensation may take includes either "quality or other benefits."[68]

As a consequence of the foregoing, it becomes clear that, in selecting consumer welfare as the applicable welfare standard, distribution concerns remain important within EU competition policy. Indeed, keeping in mind that there are potentially large differences in the levels of wealth between EU Member States, coupled with a lack of competence at Union level to enable the EU to employ the necessary "fiscal instruments to redistribute wealth across the Union" – assuming that such instruments primarily include a system of taxation – there may be "a less strong argument for the separability thesis which strictly separates welfare and distribution concerns in the EU than in jurisdictions such as the United States which do dispose the adequate fiscal instruments."[69] Further, as evidenced by the requirement that consumers be compensated

[63] Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse v Commission* [2006], ECLI:EU:T:2006:151, para 115.
[64] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 20.
[65] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, paras. 85 and 86.
[66] Ibid. at paras. 85 and 86.
[67] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, paras. 85 and 86.
[68] Ibid. at para. 86; see similar statement with regards to Article 102 TFEU in Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, para. 6.
[69] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, pages 8-9; see also B. McDonnel and D.A. Farber, 'Are Efficient Antitrust Rules Always Optimal?' [2003] 48(3) Antitrust

through either 'quality or other benefits', the interpretation of 'welfare' within EU competition policy is broad, encompassing all parameters of competition and going beyond using consumer surplus as a proxy for 'price advantages'.[70] Finally, taking into account the requirement that consumer be granted a 'fair share' of the benefits or efficiencies flowing from an anticompetitive agreement, it is also clear that, when it comes to enforcing the prohibition of consumer harm within the Union, the subordination of short-term consumer interests to the overall welfare of society will only be tolerated where the long-term benefits to such welfare outweigh any detriment experienced by consumers. Importantly, also the definition of exactly whom will be considered as a 'consumer' within the Union has been expressly provided by the Commission. In paragraph 84 of its Guidelines on the application of Article 101(3) TFEU, for instance, the concept of consumers is stated to encompass "all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers."[71] As such, a broad interpretation of the concept of consumers is adhered to with the harm or benefits experienced by direct buyers being presumed to pass through to the final consumer.

3. The Pluralistic Objectives of EU Competition Policy

As becomes clear from the preceding chapter, consumer welfare constitutes a clear objective of EU competition policy due to the explicit acknowledgements both by the Commission and the Court as to its status as the applicable welfare standard within the Union. However, to date, it remains among a wide variety of both economic and political objectives which have been attributed to the Union's competition policy by both academics as well as the Union institutions themselves. Indeed, while the pluralistic nature of EU competition policy generally remains undisputed, there remains disagreement both as to the hierarchy which such competition policy objectives should be subject to, if any, as well as the position of consumer welfare therein. As such, before delving into the discussion of the extent to which consumer welfare may be identified as the primary objective of EU competition policy, one must, beyond understanding consumer welfare in isolation, address the alternative objectives in relation to which it may be deemed as primary.

Bulletin, page 825 who highlight that powerful firms are not randomly distributed across Europe with the consequence being that "producer surplus if likely to accrue primarily to the most powerful and wealthy EU member, increasing existing wealth disparities at the margins."

[70] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, para. 86.

[71] Ibid. at para 84.

Amongst the alternative objectives which are identified both by academics and the Union institutions themselves on a recurring bases are (1) economic efficiency; (2) the protection of small and medium sized enterprises; (3) the promotion of market integration; (4) the protection of the competitive process; and (5) the promotion of economic freedom.

3.1. The Main Objectives of Union Competition Policy

3.1.1. *Economic Efficiency*

In a similar fashion to consumer welfare, economic efficiency is frequently sighted as an undeniable objective of competition policy by both competition lawyers and economists.[72] Indeed, taking into account the conventional definition of economic efficiency as the state which an economy experiences when "all goods and factors of production in said economy are distributed or allocated to their most valuable uses and waste is eliminated or minimized",[73] it arguably makes intuitive sense that such a concept plays a central role within any given competition law regime.

Notably, economic efficiency may be achieved through varying compositions of what may be distinguished as its three components; allocative, productive and dynamic efficiency.[74] Allocative efficiency is defined as the situation where "goods and services are allocated between consumers according to their preferences or the prices which they are willing to pay, and prices never exceed the marginal cost of production",[75] that is "the cost added by producing one additional unit of a product or service."[76] Productive efficiency on the other hand is concerned with ensuring that "goods and services will be produced at the lowest possible cost."[77] The intention is that "output is maximised by using the most effective combination of inputs" so that, as a consequence, "as little of society's wealth is used in the production of the

[72] See for instance S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 5; G. Monti, 'Article 81 and Public Policy' [2002] 39(5) Common Market Law Review, page 1057; C. Ahlborn and A. J. Padilla, From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law, in; C. Ehlermann and M. Marquis (eds.), *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008), page 55; M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 15.

[73] M. Waite (ed.), *Pocket Oxford English Dictionary* (Oxford University Press 2013).

[74] R.J. Van den Bergh and P.D. Camesasca, *European Competition Law and Economics; A Comparative Perspective* (Intersentia 2001) , pages 5-6; D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

[75] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

[76] M. Waite (ed.), *Pocket Oxford English Dictionary* (Oxford University Press 2013).

[77] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

good or service concerned."[78] Finally, dynamic efficiency refers to the ability to improve productive efficiency over time by way of implementing innovative production processes and developing new products.[79]

Importantly, however, while allocative, productive and dynamic efficiencies may, as outlined above, contribute towards the goal of economic efficiency, "these three components of efficiency are not necessarily always consistent with one another" and, in the assessment of whether a given agreement or behaviour contributes towards the goal of economic efficiency, "tension may appear between them."[80] For instance, while "a merger may contribute towards the realization of greater productive efficiency" through the merged firms ability to utilise improved production processes to increase the output of multiple products while also reducing cost, "the merged entity might also have gained increased market power, and thus, a growing ability to impose supra-competitive prices, which run counter to allocative efficiency."[81] In essence, in assessing whether competitive agreements or behaviour contribute towards the goal of economic efficiency, a balance must be struck between which of the components of such economic efficiency will be prioritized.

It is in this regard that the close interrelation between the objective of economic efficiency and the chosen welfare standard of a given competition policy becomes apparent. Keeping in mind that "economically speaking, welfare is a means to determine how efficient a market is performing" [82] or rather "a summarizing measure of how efficient a given market is as a whole,"[83] the applicable welfare standard in a given competition policy may be distinguished as the determining factor for the "relative importance given to the different efficiency components."[84] Take for instance the example merger discussed above; while both the potential for an increase in productive efficiency as well as the risk for a decrease in allocative efficiency

[78] R. Whish, *Competition Law* (4th edn., Butterworths 2001), page3; D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

[79] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

[80] Ibid. at page 4.

[81] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020; R.J. Van den Bergh and P.D. Camesasca, *European Competition Law and Economics; A Comparative Perspective* (Intersentia 2001), page 5.

[82] Annette Jurgensen, 'The More Economic Approach: Efficiencies and Their Recognition within EU Competition Law' (Master Thesis, Lund University 2015), page 19. Retrieved via http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=7363159&fileOId=7363200, last accessed 30 August 2020.

[83] M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 18.

[84] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 5.

may be attributed to the merger outlined, the decisive question for whether the merger will be considered as 'economically efficient' within a competition policy, such as that of the Union, which has selected consumer welfare as its welfare standard, is whether the "cost savings realized by the merger will be passed on to the customers, thereby neutralising the price effects of a greater market concentration."[85] Rephrased, while economic efficiency remains a distinguishable objective of competition policy, the chosen welfare standard within the relevant competition policy ultimately determines which components of 'economic efficiency' shall be prioritized, or rather, what is to be understood by 'economically efficient'. In light of the foregoing, the objective of economic efficiency may arguably be termed as a necessary corollary, or practical expression, of the Union's commitment made to promote its chosen welfare standard.

3.1.2. *Protecting Small and Medium Sized Enterprises*

In addition to protecting the welfare of consumers, a further interest group which Union competition policy has committed itself to protect is that of small or medium sized enterprises (SMEs). Similarly to the consumer welfare objective, the reasoning relied upon to justify the protection of small and medium sized enterprises has it basis in the wish to protect the Union values of 'fairness and equity.'[86] Considering that "most small firms will not be able to match the prices or the services of big stores, and will therefore want to be shielded from the competition posed by stronger rivals," [87] SME protection may, in a similar fashion to consumer protection, be viewed as a means of 'rebalancing' or 'levelling the playing field' so as to allow for equal opportunities to participate in the competitive process. Moreover, it may also be argued that, as a corollary to defending smaller firms, the benefits conferred upon consumers in the form of 'quality of life' are increased as "it is believed that small shops, even if they may not be as cheap as the large department stores, have a higher quality in the products and better more direct treatment for customers."[88] Finally, keeping in mind the dynamism of SMEs, both consumer welfare, as well as competition within the Union as a whole, may positively profit from a competition policy which ensures that SMEs are given the opportunity to dedicate their efforts towards innovation.[89]

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[85] Ibid. at page 4.
[86] S. Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart Publishing 2009), page 33.
[87] Ibid. at page 33.
[88] Ibid. at page 32.
[89] Ibid. at page 33; see also M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 22.

Importantly, however, while both the objective of promoting consumer welfare and the protecting SMEs are similar in nature and certainly interlinked, compared to consumer welfare "there are not many specific instances, either in secondary legislation or individual cases where SME protection is explicitly mentioned."[90] Nevertheless, *indirect* indications as to the objective of protecting SMEs may be found in secondary legislation from quite early on.[91] Examples in this regard may be found in the Commission's De Minimis Notice and the Commission's Guidelines on the 'effect on trade' concept, where it is made clear that for a restriction of competition to be considered as 'appreciable' or capable of 'appreciably affecting trade', certain thresholds regarding both market shares and turnovers must be met.[92] In particular, as regards appreciable anticompetitive agreements under Article 101(1) TFEU, it is required either that the "aggregate market shares do not exceed 10% on any of the relevant markets affected by the agreement" or that "the market shares held by each of the parties to the agreement does not exceed 15% on any of the markets affected by the agreement." On the other hand, for such agreements to be 'capable of appreciably affecting trade', "a combination of a 5% market share and EUR 40 million turnover" will be required. Taking into account the definition of SMEs as enterprises "which have an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million,"[93] it may be assumed that, generally, agreements entered into by small and medium sized enterprises will not normally meet the required thresholds to be considered as 'appreciable' or 'capable of affecting trade' between Member States.[94] In essence, therefore there is somewhat of an exception, or 'negative presumption' applied to SMEs under the aforementioned notices which indicates the commitment to aid in their ability to compete.[95]

Finally, while rarely found in legislation, explicit indications of the objective of SME protection may in fact be found in Union policy documents such as the SME strategy paper entitled 'Unleashing the Full Potential of European SMEs', within which the Commission clearly stipulates both its recognition of SMEs as "essential to Europe's competitiveness and

[90] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 19.
[91] Ibid. at page 19.
[92] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/01, points 44 to 57.
[93] Commission Recommendation concerning the definition of micro, small and medium-sized enterprises [2003] OJ L 124/36, Article 2(1).
[94] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/01, footnote 5.
[95] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 19.

prosperity" and its intention to "support and empower SMEs of all sizes and sectors, from innovative tech start-ups to traditional crafts."[96]

3.1.3. *Promoting Market Integration*

While both the promotion of consumer welfare and protection small and medium sized enterprises are objectives which may be attributed to competition policies across of a variety of jurisdiction, an objective which may be distinguished as uniquely characteristic of EU competition policy is that of market integration. [97] Indeed, the objective of market integration has "marked considerably the history of EU competition law" [98] considering the role of the internal market as, arguably, the starting point and core of the Union.[99]

Following the unsuccessful attempts at European integration of the mid-1950s, the principal focus of the Treaty of Rome (1957) was economic rather than European integration.[100] Specifically, such economic integration was to be achieved though the establishment of a common market which would include not only a free trade area and customs union, but would also be characterised by the inclusion of provisions for the free movement of the factors of production: labour, goods, capital, establishment and services.[101] Ultimately, the hope was that "a common market would lead to political unification."[102]

Today, the EU remains continually committed by Article 3(3) TEU to the maintenance of such an internal market which, according to Article 26(2) TFEU "shall compromise an area without internal frontiers in which the free movement of goods, persons, services, and capital are ensured." [103] With this in mind, EU competition law must, in turn, be understood as a means to "break down the national boundaries between the Member States of the Union" which may hinder the proper functioning of the internal market, or rather, undermine the integration of the European market. [104] As such, "Member States shall not issue legislation which may hinder any

[96] European Commission, 'Unleashing the Full Potential of European SMEs' (EU Industrial Strategy, 2020), page 1. Retrieved via file:///C:/Users/Admin/Downloads/EU_SMEs_strategy_en.pdf.pdf, last accessed 30 August 2020.
[97] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 13.
[98] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 14.
[99] P. Craig, The Evolution of the Single Market, in; C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises* (Hart Publishing 2002), pages 1-40.
[100] I. Bache and Others, *Politics in the European Union* (4th edn., Oxford University Press 2015).
[101] P. Craig, The Evolution of the Single Market, in; C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises* (Hart Publishing 2002), pages 1-40.
[102] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] 3(1) CLES Working Paper Series, page 14.
[103] Consolidated version of the Treaty on the Functioning of the European Union [2012] O.J. 1 326/88.
[104] R. Van den Bergh, *Comparative Competition Law and Economics* (1st edn., Edward Elgar Publishing 2017), page 109; see also Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966], ECLI:EU:C:1966:41.

of the four freedoms, while private enterprises should refrain from restrictive business practices which could equally form effective barriers against competition originating in other Member States."[105] In essence, therefore, the rule of competition laid down in Article 101 and 102 TFEU may be regarded as "necessary complements to the Treaty rules on the four freedoms."[106]

With the explicit commitment outlined in Article 3(3) TEU there remains little doubt as to the role of market integration as an objective of EU competition policy. Nevertheless, for the sake of being complete, it must also be mentioned that one can also identify indications as to this objective through the enforcement practices of the Commission, in a similar fashion to the objectives of promoting consumer welfare and protecting small and medium sized enterprises, discussed above. For instance, in both the Commission's Guidelines on Vertical Restraints (Article 101 TFEU) and its Guidelines on Enforcement Practices (Article 102 TFEU), market integration is stated as a goal of competition policy and cited as the rationale behind the Commission's protection against vertical restraints and exclusionary conduct;

- *"Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. Market integration enhances competition in the European Union. Companies should not be allowed to recreate private barriers between Member State where state barriers have been successfully abolished."*[107]
- *"The Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits."*[108]

Further, also the Court has explicitly acknowledged the market integration objective, stating that "an agreement between producer and distributor might tend to restore the national division in trade between Member States and might be such as to frustrate the Treaty's objective of *achieving the integration of national markets through the establishment of a single market*."[109]

[105] R. Van den Bergh, *Comparative Competition Law and Economics* (1st edn., Edward Elgar Publishing 2017), page 109.
[106] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 13.
[107] Guidelines on Vertical Restraints [2010] OJ C 130/01, para. 7.
[108] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, paras. 6-7.
[109] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009], ECLI:EU:C:2009:610, para 61.

3.1.4. *Protecting the Competitive Process*

According to Article 3(3) TEU, as a corollary to the obligation to establish and maintain the internal market, Member States have additionally committed themselves to ensuring that such an internal market shall comprise 'a highly competitive social market economy.'[110] While the meaning of this concept has been the subject of debate, a thorough elaboration of the differing perceptions of this concept goes beyond the scope of this thesis. Instead, therefore, I will defer to the interpretation formulated by former Commissioner for Competition, Mario Monti, who stated that "the concept of 'social market economy' stands for reliance on the market mechanism. It is based on the experience that the market mechanism is the most efficient way to meet the demand from consumers for goods and services. That the market mechanism will bring companies to increase productivity, to expand, to innovate, and create jobs. In short, it recognizes that the market forces are the most efficient generators of prosperity. It therefore calls for a maximum of free market, for reliance on competition wherever possible."[111]

Arguably, in light of the foregoing, an additional objective may be derived from the wider objective of market integration, namely that of protecting the competitive structure, with the rationale behind such an objective behind that without protecting the competitive process, one cannot properly achieve the 'highly competitive social market economy' which the internal market is intended to comprise. Importantly, however, in addition to being a derivative of the objective of market integration, the protection of the competitive process may also be viewed as a "supplementary nuanced prism" to consumer welfare.[112] Indeed, "the European Courts have long held that competition law is not only aimed at practices which may cause damage to consumer directly, but also at those which are detrimental to them through their impact on an effective competition structure."[113] Ultimately, therefore, the significance of the objective of protecting the competitive structure may best be understood in light of the wish to prevent detriment to "the public interest, individual undertaking and consumers" and, by extension, the well-being of the European Union.[114]

Similarly to the objective of market integration, an indication that protecting the competitive structure constitutes an objective of EU competition policy may be inferred from the wording

[110] Consolidated version of the Treaty on European Union [2012] O J C 202/1, Article 3(3).
[111] M. Monti, 'Competition in a Social Market Economy' (Speech at Conference of the European Parliament and the European Commission on 'Reform of European Competition Law', Freiburg, 9-10 November 2000), available at http://ec.europa.eu/competition/speeches/text/sp2000_022_en.pdf, last accessed 30 August 2020.
[112] A. Ezrachi, 'EU Competition Law Goals and the Digital Economy' (Oxford Legal Studies Research Paper, 2010), page 7.
[113] Case C-6/72, *Europemballage Corporation and Continental Can Company v Commission* [1973], ECLI:EU:C:1973:22, para. 26.
[114] Case C-52/09, *TeliaSonera Sverige* [2011], ECLI:EU:C:2011:83, para. 22.

of Article 3(3) TEU. Nevertheless, there are additional indications to this effect in both the Commission's Guidelines as well as in a number of judgements of the Court of Justice. For instance, in its Guidelines on Enforcement Priorities the Commission has clearly stated that "what really matters is protecting an effective competitive process and not simply protecting competitors."[115] Further, in *GlaxoSmithKline* and *Intel* the Court stipulated that Article 101 and 102 TFEU "aim to protect not only the interest of competitors or of consumers, but also the structure of the market, and, in so doing, competition as such."[116]

3.1.5. *Protecting Economic Freedom*

As demonstrated in the preceding section, the objective of protecting the competitive process is best understood in light of the commitment outlined in Article 3(3) TEU for the internal market to comprise a 'highly competitive social market economy'. Notably, however, a further objective may arguably be derived from this commitment, namely the preservation of the freedom to compete. Indeed, one may posit that, in order to obtain a 'highly competitive social market economy', one requires that as many actors as possible be afforded the possibility to compete. As such, one may assert that "by protecting the competitive order, the Union, in turn, protects the freedom of self-responsible individuals to function on the market."[117]

Further, though the protection of economic freedom may be clearly connected to the pursuit of 'a highly competitive social market economy', "the significance of economic plurality also transcends the market economy and may be normatively connected to the broader concern of ensuring a healthy political process, unimpaired by distortions induced by powerful firms."[118] As such, the preservation of economic freedom has also been viewed as "creating the preconditions for democracy, and as safeguarding against political and regulatory capture."[119] On the basis of the foregoing, one may conclude that the "economic order should protect

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[115] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, para. 6.

[116] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009], ECLI:EU:C:2009:610, para 63; Case T-286/09, *Intel v Commission* [2014], ECLI:EU:T:2014:547, para 105.

[117] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 15; O. Odudu, *The boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006), page 14.

[118] A. Ezrachi, 'EU Competition Law Goals and the Digital Economy' (Oxford Legal Studies Research Paper, 2010), page 15; L. Zingales, *A Capitalism for the People: Recapturing the Lost Genius of American Prosperity* (Basic Books Inc 2012), page 38.

[119] A. Ezrachi, 'EU Competition Law Goals and the Digital Economy' (Oxford Legal Studies Research Paper, 2010), page 15; E. Deutscher and S. Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' [2016] 11(2) The Competition Law Review, pp. 181-214; D. J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' [1994] 42(1) American Journal of Comparative Law, pp. 25-84; S. W. Waller, 'Antitrust and Democracy: Democracy in Antitrust' [2019] 45(1) Florida State University Law Review: "A competitive market place and freedom of choice are both key to the realisation of the Union's undergirding democratic values and freedoms."

individual economic freedom and avoid the accrual of either strong private or political power amongst certain actors on the market."[120]

Importantly, while the protection of individual economic freedom has perhaps not been given the status of an objective of EU competition policy in as explicit a way as the objectives of promoting market integration and protecting the competitive structure, one may nonetheless find indications of such an objective through the enforcement practices of the Commission. For instance, the Commission has in its Guidance on Enforcement Priorities for Article 102 TFEU distinguished a 'special responsibility' for dominant firms "not to allow their conduct to impair genuine, undistorted competition on the common market."[121] Keeping in mind that the idea of preserving 'economic freedom' is based largely on the wish to ensure that power does not accrue with large firms who may exploit this power so as to prevent others from competing, the concept on 'special responsibility' for dominant firms arguably reflects the objective of promoting the freedom for as many actors as possible to compete.

Moreover, the classification of certain vertical agreements, such as exclusive distribution agreements, as 'hardcore restrictions' – that is, restrictions of competition by object, which may not be exempt by the block exemption regulation(s) – may be indicative of the wish to preserve economic freedom.[122] In essence, such agreements run the risk of causing input foreclosure and, as such, are diametrically opposed to the preservation of the economic freedom of those that do not belong to the relevant distribution network, but depend on the inputs which have been foreclosed.[123]

3.2. Classifying the Union's Competition Policy Objectives as Ultimate or Intermediate

In light of the foregoing section, it is evident that there is no single unifying objective to be found in EU competition policy. Instead, competition law and policy within the Union may be viewed as a means to pursue a number of both political and economic objectives. Add to this a lack of formal allocation of primacy to one of the objectives discussed, and there remains

[120] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 14.

[121] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, para 1; see also Case C-322/81, *Michelin v Commission* [1983], ECLI:EU:C:1983:313, para 57.

[122] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] O.J. L 102/01, Article 4.

[123] N. Petit and D. Henry, 'Vertical Restraints under EU Competition Law: Conceptual Foundations and Practical Framework' (The Social Science Research Network, 2010), page 10. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724891, last accessed 30 August 2020.

differing opinions amongst academics and economists as to the relevance and importance which is to be accorded to each of the cited objectives.

According to Bishop and Walker, for instance, the two *main* goals of EU competition policy are "the integration goal and the economic goal."[124] Similarly, Motta "assumes that economic efficiency and European market integration are probably the main objectives of Union competition policy but recognize that social and political reasons also have to be taken into account."[125] On the other hand, however, Ahlborn and Padilla instead distinguish between three groups of objectives: the fairness goals, welfare and efficiency goals, and market integration goals.[126] Likewise, G. Monti identifies "three core aims of competition law; the protection of economic freedom, market integration, and efficiency (in that order)."[127]

Arguably, in attempting to derive some kind of hierarchy from these commonly cited objectives of Union competition policy, one must begin by making a distinction between those objectives which may be regarded as intermediate and those which should be regarded as ultimate.[128] That is, one must make a distinction between those objectives which may be considered as fundamentally tied to the Union, and those whose existence is based mostly on their ability to contribute to the achievement of the objectives which have been classified as 'ultimate'.[129]

Perhaps the clearest objective to classify in this respect is consumer welfare. As discussed in the previous sections of this thesis there are multiple indications as to the fundamentality of consumer welfare to Union competition policy, both in Treaty provisions, such as the third condition of Article 101(3) TFEU, and the statements made by both the Commission and Court of Justice clarifying the role of consumer welfare as the applicable welfare standard within the Union.[130] Additionally, however, there are also examples where the classification of consumer

[124] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 12; S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 5.

[125] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 12; M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 15.

[126] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 12; C. Ahlborn and A. J. Padilla, From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law, in; C. Ehlermann and M. Marquis (eds.), *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008), page 55.

[127] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 12; G. Monti, 'Article 81 and Public Policy' [2002] 39(5) Common Market Law Review, page 1057.

[128] C. Ehlermann and L. Laudati, *European Competition Annual 1997: Objectives of Competition Policy* (Hart Publishing 1998), page 1; L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), pages 3-4.

[129] See to this effect the example of consumer welfare versus effective competition provided in L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 4.

[130] N. Kroes, 'European Competition Policy: Delivering Better Markets and Better Choices' (Speech at European Consumer and Competition Day, London, 15 September 2005), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512; see also Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse v Commission* [2006], ECLI:EU:T:2006:151, para. 115.

welfare as an ultimate objective of Union competition policy is explicitly confirmed by the Union's institutions. As mentioned previously, for instance, the Court of Justice plainly stated in Joined Cases T-213/01 and T-214/0, *Österreichische Postsparkasse* that "the *ultimate* purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers."[131] Moreover, former Commissioner for Competition, Joaquin Almunia, stated in a speech held shortly after his nomination to this position that "all of us here today know very well what our *ultimate* objective is: competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions."[132] As a consequence of the foregoing, there is little room left to doubt the classification of this objective as ultimate. However, that is not to say that one may as easily establish its primacy. Indeed, in light of the discussion of the first section of this chapter an additional objective may arguably also be identified as an ultimate objective of EU competition policy; namely market integration. This classification is based on the acknowledgement of the role of the internal market as the "starting point and core of the Union,"[133]as well as the explicit recognition of a continued commitment to ensuring its existence and maintenance outlined in Article 3(3) TEU.[134]

Importantly, the classification of both consumer welfare and market integration as ultimate objectives is further bolstered by the classification of the remaining objectives discussed above as intermediate. For instance, as already outlined, there is a clear relationship between economic efficiency and consumer welfare.[135] As previously demonstrated, the selection of consumer welfare as the relevant welfare standard of Union competition policy has a determinative effect on the prioritization of the three components of economic efficiency (allocative, productive, and dynamic efficiency) and, in turn, what is to be understood by the concept of 'economically efficient.'[136] Therefore, while the concept may objectively denote various compositions of efficiency gains, the assessment of the contribution of either competitive agreements or behaviours towards achieving 'economic efficiency' will ultimately depend upon whether the

[131] Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse v Commission* [2006], ECLI:EU:T:2006:151, para. 115.
[132] J. Almunia, 'Competition and Consumers: The Future of EU Competition Policy' (Speech at European Competition Day, Madrid, 12 May 2010)
[133] P. Craig and G. de Burca, *EU Law: Text, Cases, and Materials* (6th edn., Oxford University Press 2015), pages 1-40.
[134] Consolidated version of the Treaty on European Union [2012] OJ C 202/1, Article 3(3).
[135] See to this effect L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 4.
[136] R.J. Van den Bergh and P.D. Camesasca, *European Competition Law and Economics; A Comparative Perspective* (Intersentia 2001), pages 5-6; D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 4. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

net effect of such efficiency gains furthers consumer welfare.[137] Consequently, the objective of economic efficiency arguably exits as an intermediary in service of a wider policy objective. Rephrased, it is "only a goal because of the benefits it delivers to consumers."[138] Similarly, part of the justifications relied upon in defending the protection of small and medium sized enterprises is that they generate two of the 'parameters of competition' which 'welfare' comprises. Through their ability to provide more direct treatment for consumers, for instance, SMEs ensure better *quality* for said consumers, while their size enables them to both develop and implement innovative ideas, thereby providing *variety* for consumers.[139]

As regards the objective of protecting the competitive process, it has already been established that a derivative relationship exists between the Union's commitment to the creation and maintenance of its internal market and ensuring that the competitive process is protected. This is based on the fact that the 'highly competitive social market economy' which the internal market is intended to entail requires that one is confident in the ability to "rely on the competitive mechanism wherever possible."[140] Further, however, the objective of protecting the competitive process may be linked to consumer welfare, as without effective competition one would not reap the benefits of increased quality, variety, and innovation. Or rather, one would not generate the parameters of competition which welfare encompasses.

Finally, also the protection of economic freedom can be linked to the ultimate objective of market integration. This is so as the aforementioned 'highly competitive social market economy' which the Union has committed itself to through Article 3(3) TEU is best achieved when as many actors as possible are afforded the possibility to compete.[141]

As becomes evident from these classifications, while the competition policy of the Union is undeniably pluralistic in nature, and therefore lacks a clear unifying objective, one may arguably distinguish two *central* objectives in market integration and consumer welfare. With regards to the research question at issue in this thesis, the ability to isolate these two ultimate

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[137] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-Specific Regulation' (The Social Science Research Network, 2004), page 5. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922, last accessed 30 August 2020.

[138] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, para 9; see also S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 16.

[139] S. Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart Publishing 2009), page 32; see also M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), page 22.

[140] M. Monti, 'Competition in a Social Market Economy' (Speech at Conference of the European Parliament and the European Commission on 'Reform of European Competition Law', Freiburg, 9-10 November 2000), available at http://ec.europa.eu/competition/speeches/text/sp2000_022_en.pdf, last accessed 30 August 2020.

[141] L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 15; O. Odudu, *The boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006), page 14.

objectives is invaluable as it narrows the pool of objectives which must be accounted for in determining, firstly, whether primacy of a single objective exists, and secondly, whether consumer welfare is identifiable as such a primary objective. Importantly, however, while allowing for a reduction in the objectives which may realistically be considered as 'vying' for primacy, both consumer welfare and market integration have arguably earned their classification as 'ultimate objectives' on the basis of similar types of recognition by the Union's legislation and its institutions. The question remains therefore, as to whether both of these objectives should be considered as sharing primacy within EU competition policy, or whether there are other means for determining the prioritization of one the two ultimate objectives. With this in mind, the following chapter will focus on what the enforcement practices within EU competition law may tell us about a potential hierarchy between the goals of consumer welfare and market integration.

4. The Role of Consumer Welfare in the Development of the 'More Economic Approach'

4.1. The Commission's Enforcement Practices Prior to Modernisation

While there is little doubt as to the "multivalued tradition of European competition law,"[142] the question remains as to whether the varying objectives comprised within such a multivalued tradition are subject to a hierarchy. Indeed, as established above, while the numerous objectives of EU competition policy become apparent through their inclusion in, amongst others, the Treaties, secondary legislation, the jurisprudence, and various policy documents, there is no explicit indication as to the order in which these objectives will be prioritized in practice, beyond the distinction made between those objectives which are termed as intermediate and ultimate. Arguably, for indications in this regard, it is rather the enforcement practices of the Commission and the Court which are determinative. As stated by Bork, "antitrust policy cannot be made rational until we are able to give a firm answer to one question; what is the point of the law – what are its goals?"[143] Rephrased, it is only through understanding the goals which competition policy is seeking to achieve that one can make sense of the practices carried out to this end. In turn, however, one may also argue that it is only through analysing competition practices that one may establish the objective which lay at the foundation of competition policy.

[142] R.J. Van den Bergh and P.D. Camesasca, *European Competition Law and Economics; A Comparative Perspective* (Intersentia 2001), page 39; L. Parret, 'Do we (still) know what we are protecting?' (Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009), page 26.

[143] R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1st edn., Basic Books Inc 1978), page 50.

Therefore, the following section will, in analysing the enforcement practices of the Union, and the ways in which these practices have evolved over time, seek to determine whether there is a pattern of one objective being given priority over the other, indicating primacy.

4.1.1. *The Commission's Enforcement Practices in the Union's Formative Years*

Keeping in mind the central role which market integration played in the foundational years of the Union, it is perhaps not surprising that, in the formative years of the Union, the Commission gave precedence to this objective in its enforcement practices. A classic example in this respect is provided by the *Distillers Company Ltd.* case[144] in which the Commission, after having received a request to initiate the procedure to terminate an infringement of Article 85 EEC (currently Article 101 TFEU), "condemned a deterrent to exporting, created by a dual pricing scheme, under which British dealers were required to forego discounts of up to £5 per case of whisky that was exported."[145] While arguments were advanced outlining the necessity of such a deterrent for the protection of Distillers Company Ltd.'s exclusive distributors throughout the rest of Europe, especially in light of the considerable investments made by these distributors in promotions from which parallel importers could freeride, these arguments were not accepted by the Commission who emphasized the risks which such a deterrent to exporting would create for market integration.[146] Specifically, the Commission, in making its infringement decision, claimed that the relevant deterrent to exporting "was aimed at preventing and did prevent the United Kingdom trade customers of DCL's subsidiaries and their subsequent purchasers from reselling the DCL spirits and competing in the other common market countries."[147] In essence "the Commission equated restriction of competition with restriction of the commercial freedom or opportunity of those affected by the investigated practice."[148] Put differently, in establishing competitive harm under Article 85 EEC (currently Article 101 TFEU), the Commission focused on determining whether the practice at hand caused harm to *competitors*, as this was thought to best indicate risks to the objective of market integration.[149]

Importantly, such prioritization of protecting competitors, and, in turn, market integration, also permeated the Commissions assessments of competitive harm under the two remaining pillars

[144] Case No. IV/28.282, *The Distillers Company Limited* [1977], OJ L 50.
[145] S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 6.
[146] Case No. IV/28.282, *The Distillers Company Limited* [1977], OJ L 50, section 2.1 (c); See also discussion in S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 6.
[147] Case No. IV/28.282, *The Distillers Company Limited* [1977], OJ L 50, section 1.1 (a).
[148] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 114.
[149] S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 5.

of competition law; namely, Article 86 EEC (currently Article 102 TFEU) and Merger Regulation 4064/89.

With regards to the application of Merger Regulation 4064/89, for instance, it may be argued that the emphasis which the Commission placed on the criterion of dominance constituted another iteration of the priority which it granted the objective of protection market integration. In substantiating this argument, it should first be stated that, as established in *United Brands v Commission*, the term dominance refers to "a position of economic strength enjoyed by an undertaking which enables it to (…) behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[150] As was further clarified by the Commission, the ability of an undertaking to act 'independently to an appreciable extent' is considered as reflective of its market power which, in turn, is discernible through the market shares held by the undertaking.[151] With this in mind, therefore, the concept of dominance denotes the level of economic strength enjoyed by an undertaking, as represented by its market shares. Importantly, this criterion constituted a core part of the substantive test prescribed in Article 2(2) & (3) Merger Regulation 4064/89 for the assessment of mergers. Indeed, according to said provision the main concern for the Commission, when it came to assessing proposed mergers, was to be whether the relevant merger would "create or strengthen a *dominant position*, as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it."[152]

Significantly, this formulation opened the possibility for the concept of dominance to be *applied* in one of two ways.[153] Firstly, dominance could be regarded as a "necessary but not sufficient condition for the prohibition of a merger,"[154] if one where to infer from the wording of the regulation that a certain level of causality was required between the creation or strengthening of a dominant position and potentially adverse effects on competition.[155] Alternatively, the finding of dominance could be interpreted as both necessary and sufficient in itself, if Regulation 4064/89 were to be understood as implying that impediments to effective

[150] Case C-27/76, *United Brands v Commission* [1978], ECLI:EU:C:1978:22, para. 65

[151] Directorate-General for Competition, *Glossary of Terms Used in EU Competition Policy: Antitrust and Control of Concentrations* (Office for Official Publications of the European Communities 2002); see also discussion L.H. Roller and M. De La Mano, 'The Impact of the New Substantive Test on European Merger Control' [2006] 2(1) European Competition Journal, page 11; and L.F. la Cour and H.P. Møllegaard, 'Meaningful and Measurable Market Domination' [2003] 24(132) European Competition Law Review.

[152] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 257/90, Article 2(2) & (3).

[153] L.H. Roller and M. De La Mano, 'The Impact of the New Substantive Test on European Merger Control' [2006] 2(1) European Competition Journal, page 10.

[154] Ibid. at page 11.

[155] Ibid. at page 11.

competition are considered as an automatic consequence of a merger which creates or strengthens such a dominant position.[156] Were the former interpretation to be adhered to merger control would, to a certain extent, take into account the potentially adverse effects to competition attributable to the merged entities dominant position.[157] However, under the latter interpretation, "merger control would focus solely on the impact on market structure, not on competitive effects."[158]

Arguably, the former interpretation figured most frequently in the enforcement practices of the Commission. An example in this respect was provided in the proposed merger between General Electric – "an industrial company which carried out operations in power systems, financial services, aircraft engines and transport systems"[159] – and Honeywell International Inc. which dealt in, amongst others, aerospace products and services as well as transport and power systems.[160]

Prior to the proposed merger "GE held a dominant position on the market for large jet aircraft engines,"[161] while "Honeywell held a leading position in the avionics and non-avionics aerospace component markets."[162] Therefore, in light of the appraisal procedure prescribed by Articles 2(2) & (3) of Regulation 4064/89, discussed above, the Commission's assessment of the proposed merger, and ultimately its prohibition thereof, focused largely on the potential anticompetitive effect which may have resulted from the strengthening of each entity's position of dominance. [163]

In particular, the Commission reasoned in its decision that the dominant position held by GE in the market for large jet engines would, as a consequence of the merger, be further strengthened by the incorporation of Honeywell's competing business on the same market.[164] Moreover, the Commission argued that the acquisition of Honeywell's dominant position in the supply of

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[156] Ibid. at page 11.
[157] Ibid. at page 11.
[158] L.H. Roller and M. De La Mano, 'The Impact of the New Substantive Test on European Merger Control' [2006] 2(1) European Competition Journal, page 12.
[159] L. Urombo, 'The Importance of GE/Honeywell in the Development of the European Commission Approach to Non-Horizontal Mergers' (Academia, 2019), page 3. Retrieved via https://www.academia.edu/39555907/IMPORTANCE_OF_GE_HONEYWELL_IN_THE_DEVELOPMENT_OF_THE_EUROPEAN_COMMISSION_APPROACH_TO_NON_HORIZONTAL_MERGERS, last accessed 30 August 2020.
[160] Ibid. at page 3.
[161] J. Grant and D.J. Neven, 'The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict' [2005] 1(3) Journal of Competition Law and Economics, page 4.
[162] Ibid. at page 4.
[163] Ibid. at page 5.
[164] U. E. Inyang, 'The Contributory Effect of GE/Honeywell on the European Commission's Approach to Non-Horizontal Mergers' (Academia, 2019), page 5. Retrieved via https://www.academia.edu/40032415/THE_CONTRIBUTORY_EFFECT_OF_GE_HONEYWELL_ON_THE_EUROPEAN_COMMISSIONS_APPROACH_TO_NON_HORIZONTAL_MERGERS, last accessed 30 August 2020.

avionic components, such as engine starters, would further strengthen GE's already existing dominance in the market for large commercial jet engines. This is so, as it would allow GE the potential to foreclose its competitors by refusing to supply them with the necessary avionic products.[165] Finally, the Commission was concerned that the "broad range of complementary products controlled by the merged entity would lead it to bundle equipment."[166] While this may, in the short-term have led to price reductions, it would drive out competitors who were unable to match the products offered by the merged entity in the long-term.[167]

As becomes clear from each of the grounds presented by the Commission, the role of dominance was considered as sufficient in itself for the prohibition of the merger. Consequently, the Commission's analysis remained largely based on the mergers potential impact on market structure with little substantiation of the claimed anti-competitive effects. Indeed, the majority of the Commission's arguments were, as outlined above, based on speculations as to the future conduct to be adopted by the merged entity *to the detriment of its competitors*.[168] In this way, the decision in this case, provides a concrete example of the Commission's tendency to equate dominance with potential restrictions on competition or competitive harm also under its appraisal of mergers. As with the *Distillers Company Ltd*. Case,[169] this tendency is made rational when one remembers that harm to competitors was considered as the biggest risk to the objective of market integration. Consequently, this case may be distinguished as yet another illustration of how the enforcement practices of the Commission seemed to indicate that priority be given to the objective of market integration.

Finally, keeping in mind the integral nature of dominance in the application of Article 86 EEC (currently Article 102 TFEU), and the Commission's use of this concept as an indication of the potential for competitive harm, it is not surprising that the Commission's enforcement practices also under this final pillar of competition law is linked to the objective of market integration. Indeed, the Commission has itself acknowledged as much in its Guidance on Enforcement Priorities where it states that "the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and

[165] Ibid at page 5.
[166] A. Weitbrecht and R. Flanagan, 'The Control of Vertical and Conglomerate Mergers Before and After GE/Honeywell: The Commission's Draft Guidelines for Non-Horizontal Mergers' [2007] 1(294) Bloomberg European Business Law Journal, page 299.
[167] Ibid. at page 299.
[168] Ibid. at, page 299.
[169] Case No. IV/28.282, *The Distillers Company Limited* [1977], OJ L 50.

ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits."[170]

4.1.2. *Planting Seeds of Change; The Influence of the US Antitrust Revolution*

With regards to the aforementioned precedence given to the objective of market integration, it is important to note that the approach adhered to by the Commission in its enforcement practices was largely in line with majority opinion at the time. In fact, in the formative years of the Union "there was little questioning of the goals of competition law and frequent praise for the European Court of Justice and the Commission for the way in which they developed the role for competition law as a means to support and enhance integration in Europe."[171] However, such support arguably began to waver in light of what has been designated as the 'US Antitrust Revolution'.[172]

In essence, while "during the 1940s and 1960s, US courts often defined the primary aim of the antitrust rules as protecting the freedom of small companies to compete, both in the interest of the individual, the economy and society in general,"[173] the late 1970s was characterized by a major shift in this understanding of the purpose of competition rules.[174] At the helm of this change were the young scholars attributed to the University of Chicago who "argued that antitrust law should be interpreted and applied in holding with economic theory."[175] To this end, they contended the objectives of competition law was to be aligned with that of economic theory; i.e. the maximisation of economic welfare, and competitive practices were to be assessed as to their actual effects on the achievement of such objectives. [176]

While the US Supreme Court "adopted a more limited 'consumer welfare' standard in the late 1970s, which does not take into account the welfare gains of producers but only considers consumer welfare relevant,"[177] the majority of the change envisaged by the Chicago School was realized. As such, as of the 1980s a new understanding of competitive harm was adhered to in US antitrust policy which entailed that only those competitive practices which resulted in

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[170] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, paras. 6-7.
[171] D. J. Gerber, 'Two Forms of Modernization in European Competition Law' (The Social Science Research Network, 2007), page 1246. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317007, last accessed 30 August.
[172] Ibid. at page 1248.
[173] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 62.
[174] Ibid. at page 63.
[175] Ibid. at page 63.
[176] Ibid. at page 63; see also R.H. Bork, 'The Goals of Antitrust Policy' [1967] 57(2) American Economic Review, pp. 242-253; R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1st edn., Basic Books Inc 1978); and R. Posner, *Antitrust Law* (2nd edn., University of Chicago Press 2001).
[177] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 64.

"higher prices, reduced output, less innovation or other forms of harm to consumers" were deemed as anticompetitive.[178] Additionally, in assessing the existence of such competitive harm, *per se* illegality was replaced by an examination of both the pro- and anti- competitive effects of the relevant competitive practice.[179] In other words, a more in-depth economic analysis of the relevant competitive behaviour was introduced.

Associated with this 'US Antitrust Revolution', was "the relatively stronger economic performance of the United States compared to Europe in the 1990s."[180] While the United States had experienced "dramatic economic growth" in this decade, the European economic performance lagged behind, with it being reported that "if the EU had achieved the same rate of growth as the US" within this period, "its total GDP would have been roughly 17% higher in 2001 than what it actually was."[181] Additionally, increasing academic criticism of the certain elements of the Commission's enforcement practices, most notably as regards vertical agreements and merger assessments, are attributable to this 'US Antitrust Revolution', and of in importance in understanding the changing perception within the Union of the appropriateness of the priority given to the market integration objective.

(a) Academic Criticism

As already outlined, the core of the 'revolution' which US antitrust policy underwent in the late 1970s revolved around the reorientation of its competition policy objectives to ones which were consistent with economic theory. Specifically, the scholars of the Chicago School successfully fought for the incorporation of economic analyses into the assessment of competitive behaviour, in service of the objective of consumer welfare. As a consequence of the incorporation of such economic analyses, also the legal attitudes towards certain competitive practices shifted within US antitrust law. As stated by Hawk, for instance, the "economic analysis of vertical arrangements (…) profoundly affected legal attitudes toward such (vertical) arrangements."[182]

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[178] Ibid. at page 65; See also US Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines 08/19/2010, section 1; and Federal Trade Commission and US Department of Justice, Antitrust Guidelines for Collaborations Among Competitors 04/01/2000, section 2.2.

[179] D. Schmidtchen, Introduction, in; D. Schmidtchen, M. Albert and S. Voigt (eds.), *The More Economic Approach to European Competition Law* (Mohr Siebeck 2007), page 1; see also D. Zimmer, Consumer Welfare, Economic Freedom and the Moral Quality of Competition Law, in; Drexl and Others (eds.), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing 2011), page 66; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), pages 65-66.

[180] D. J. Gerber, 'Two Forms of Modernization in European Competition Law' (The Social Science Research Network, 2007), page 1250. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317007, last accessed 30 August 2020.

[181] Union of Industry and Employers' Confederation of Europe, 'European Business Says: Barcelona Must Revitalize the Lisbon Process' (UNICE, 2002); D. J. Gerber, 'Two Forms of Modernization in European Competition Law' (The Social Science Research Network, 2007), page 1250. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317007, last accessed 30 August 2020.

[182] B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' [1995] 32(4) Common Market Law Review, page 976.

Importantly, it was vertical agreements in particular which ultimately became the focal point of the increasing criticism directed at the Commission's enforcement practices throughout the 1980-1990s.

As asserted above, the traditional practice of EU competition law enforcement was to emphasize the prevention of harm to competitors, in light of its interrelation with the objective of market integration. The method employed to this end was a largely structural or form-based approach, rather than one which took into account potential harm to competition itself and the actual effects of a given practice. Within the field of vertical agreements, therefore, the early case law and regulations focused primarily on prohibiting "restrictions of intra-brand competition", that is competition between distributors of the same goods or services, "and condemned many contractual clauses *per se*, regardless of their actual effect."[183] Significantly, this was despite the fact that, "for a long time, legal and economic studies had cast light on the fact that vertical agreements had virtually as many pro-competitive effects as anti-competitive."[184] Perhaps the most striking example of this practice was "the Commission's almost automatic placement of exclusive distributorship or exclusive supply obligations under the prohibition stipulated in Article 85(1) EEC (currently Article 101(1)TFEU), without any inquiry into actual anticompetitive effects or market power."[185] Indeed, this has already been illustrated above in regard to the *Distillers Company Ltd*. case.[186] While the Commission had in this case emphasized the effects of the exclusive distributorship to potential competitors, attention was not paid to the fact that "exclusive distributorships ordinarily pose no risk to anticompetitive effects where inter-brand competition is healthy (i.e. the supplier lacks significant market power and there is competition between suppliers of the same or similar brands), and distributors and consumers have a range of similar products from which to choose."[187] Moreover, little to no attention was paid to the "broad variety of efficiencies that can result from exclusive distribution,"[188] such as the incentive which such exclusive

[183] N. Petit and D. Henry, 'Vertical Restraints under EU Competition Law: Conceptual Foundations and Practical Framework' (The Social Science Research Network, 2010), page 2. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724891, last accessed 30 August 2020.
[184] Ibid. at page 2; see also J. W. Burns, 'Vertical Restraints, Efficiency and the Real World' [1993] 62(3) Fordham Law Review, page 598.
[185] B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' [1995] 32(4) Common Market Law Review, page 975.
[186] Case No. IV/28.282, *The Distillers Company Limited* [1977], OJ L 50.
[187] B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' [1995] 32(4) Common Market Law Review, page 975.
[188] Ibid. at page 975.

distributorship can provide distributors to promote the relevant product and provide better services to consumers (i.e. produce dynamic or allocative efficiencies).

Accordingly, with its treatment of vertical agreements as the ultimate example, the Commission faced mounting accusations from academics across the Atlantic as to its overly broad application of the prohibition under Article 85(1) EEC (currently Article 101(1) TFEU), and it's inadequate economic analysis under the same provision.[189] Importantly, according to perhaps one of the most vocal critics of the time, Barry E. Hawk, the root cause of this shortcoming was traceable to the "Commission's stubborn (…) adherence to the definition of a restriction on competition as a restriction on the 'economic freedom' of operators in the marketplace."[190] In essence, Hawk argued, the Commission's propensity for equating harm to competitors as competitive harm led to the undesirable "capture under Article 85(1) EEC of totally innocuous contract provisions having no anti-competitive effects in an economic sense."[191] Indeed, one may argue that "the restriction on economic freedom notion could literally cover most, if not all, contractual agreements on the reasoning that the contract contains provisions which limit or 'restrict' the freedom of the parties as it existed prior to the contract."[192] Additionally, Hawk attributed "the frequently sparse economic analysis under Article 85 EEC" to the "market integration goal which impels both the Commission and the Community courts (…) to emasculate the economic analysis by rejecting, in principle, efficiency arguments or justifications, and by favouring intra-brand competition over inter-brand competition," especially with respect to territorial restraints.[193]

In essence, what became evident was that there existed a clear difference in the jurisdictions' understanding of the purpose of competition policy, and in each jurisdictions assumption about the effect of vertical agreements on the market. Most importantly, through the criticism presented by academics, the potentially undesirable or unfortunate effects which may result from the Commission's staunch adherence to the market integration objective were highlighted. As a consequence, seeds of doubt were planted, at least among academics, as to the suitability of such devoted promotion of the goal of market integration, especially in relation to other objectives of relevance to the Union.

[189] B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' [1995] 32(4) Common Market Law Review, page 975.
[190] Ibid. at page 977.
[191] Ibid. at page 978.
[192] Ibid. at page 978.
[193] Ibid. at page 981; see also L. Gyselen, 'Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law' [1984] 21 Common Market Law Review.

(b) Conflicting Merger Decisions

Importantly, what a number of academics had detected and started to raise doubts about in the 1980s became evident to the wider public when, in the late 1990s, the US and EU competition authorities reached opposite conclusions in a number of proposed transatlantic mergers.[194] Amongst such mergers was the aforementioned merger between GE and Honeywell.[195] In line with the substantive test stipulated in Article 2(2) & (3) of Regulation 4064/89, the Commission examined whether the merger would have had the effect of creating or strengthening a 'dominant position', as discussed above.[196] As such, the Commission "relied largely on structural considerations such as the division of market shares,"[197] and comparisons of "how much competition would potentially be left after a merger as opposed to how much had been lost" ('speculative forecasting model') in reaching its decision to prohibit the merger.[198] "By contrast, the US antitrust authorities had assessed whether the merger would result in the creation of market power, which would result in higher prices, lower quality and reduced innovation for *consumers*," in reaching their decision to approve the merger.[199]

As a result of the diverging decisions reached, and in a similar fashion to the condemnation voiced in relation to its treatment of vertical agreements, the Commission faced mounting criticism by the public for its approach to merger assessments.[200] Most notably, such criticism focused on the Commission's reliance on outdated economic theories in service of the protection of market integration.[201] In particular, the potential for an enforcement gap to form through over- and under- enforcement, or rather the generation of 'false positives' and 'false negatives', was emphasized.[202] With regards to the latter, for instance, it was argued that the undue importance conferred upon the mere existence of dominance in the prohibition of mergers may lead to the undesirable consequence of there being a lack of "legal basis to

[194] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 11.
[195] Case T-210/01, *General Electric v Commission* [2005], ECLI:EU:T:2005:456
[196] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 15.
[197] J. Tirole, P. Rey, B. Jullien, P. Seabright, and M. Ivaldi, 'The Economics of Unilateral Effects', IDEI Working Paper No 222 (DG Competition, European Commission, 2003).
[198] L.H. Roller and M. De La Mano, 'The Impact of the New Substantive Test on European Merger Control' [2006] 2(1) European Competition Journal, page 20; D.S. Evans, 'The New Trustbusters, Brussels and Washington May Part Ways' (Foreign Affairs, 2002)
[199] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 17.
[200] See for example Unknown, 'Europe to GE: Go Home' (Wall Street Journal, 2001); H.R. Varian, 'Economic Scene: In Europe, GE and Honeywell Ran Afoul of 19th Century Thinking' (New York Times, 2001); G. Becker, 'Economic View Point: What US Courts Could Teach Europe's Trust Busters' (Business Week, 2001).
[201] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 17; H.R. Varian, 'Economic Scene: In Europe, GE and Honeywell Ran Afoul of 19th Century Thinking' (New York Times, 2001); G.L. Priest and F. Romani, 'Antique Antitrust: The GE/Honeywell Precedent' (The Wall Street Journal, 2001).
[202] L.H. Roller and M. De La Mano, 'The Impact of the New Substantive Test on European Merger Control' [2006] 2(1) European Competition Journal, page 17.

challenge anticompetitive mergers (…) where the merged entity was not the market leader."[203] In this respect, the example of a merged entity's ability to, in an oligopolistic market, "raise prices above the competitive level irrespective of whether it has gained a dominant position on the relevant market, based on the fact that customers may have no other close substitute to turn to," was raised.[204]

With regards to the potential for over-enforcement, or 'false positives', the core criticism revolved around the lack of account taken for the potential for efficiencies. Indeed, it was contended that "the incentive for a merged entity to raise prices above competitive level may be fully offset by the opposite incentive to lower prices, resulting from, for instance, the merged entity's ability to attain efficiencies such as marginal cost reductions."[205] Moreover, "a merger may allow input suppliers to attain sufficient market power which may enhance countervailing seller power vis-à-vis a dominant buyer."[206] In turn, "this may lead to increase input and lower output prices."[207]

What is significant to note with regards to the criticism directed at the practices of the Commission, is that the beyond pointing out the outdated nature of economic theory relied upon by the Commission for the sake of purely being contentious, these admonishments reflected the view that such outdated economic theory ultimately represented the incorrect means to an incorrect end.[208] Indeed, the core of the different outcomes in the assessment of the GE/Honeywell merger had not come from a disagreement as to the results of the merger, but instead were rooted in the *perception* of such results. For instance while "the Americans saw the potential price reductions" which may result from the merger "as an unmitigated benefit, the Europeans viewed it as a detriment because they speculated that it would make it harder for other firms to compete and perhaps allow GE and Honeywell to raise prices in the future."[209] Again, therefore, the core criticism with regards to yet another pillar of competition policy had to do with the priority granted to the objective of market integration, and the growing uncertainty as to the desirability or practicability of such priority.

[203] L.H. Roller and M. De La Mano, 'The Impact of the New Substantive Test on European Merger Control' [2006] 2(1) European Competition Journal, page 15.
[204] Ibid. at page 15.
[205] Ibid. at page 13.
[206] Ibid. at page 13.
[207] Ibid. at page 13.
[208] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 33.
[209] D.S. Evans, 'The New Trustbusters, Brussels and Washington May Part Ways' (Foreign Affairs, 2002), page 14.

(c) Criticism from the Union Court

While the aforementioned criticisms may largely be connected to the 'US Antitrust Revolution', also the Union's own institutions began to voice their disagreement with certain practices of the Commission around the late 1990s and early 2000s. Most notably, the General Court, having found that the Commission "ignored fundamental economic reasoning" in its merger assessments, annulled a number of its prohibition decisions.[210] In the attempted merger between "two UK tour operators; Airtours and First Choice", for instance, the Commission had prohibited the merger "on the grounds that it would create a collective dominant position in the UK market for short-haul foreign package holidays, as a result of which competition would be significantly impeded on this market."[211] However, as was highlighted by the General Court, such a collective dominant position would require that (1) the relevant market "is sufficiently transparent for each member to know how the other members are behaving" and "monitor whether they are adopting the agreed common policy"; (2) "the situation of tacit coordination us sustainable over time, i.e. there had to be an incentive to not depart from the common policy, which is only the case if there is sufficient deterrent to not depart from the common course of conduct"; and (3) that the Commission "established that the foreseeable reaction of current and future competitors, as well as consumers, would not jeopardise the results expected from the common policy."[212]

In the view of the General Court, "the Commission had failed to prove any of these conditions to the required legal standard in this case."[213] Specifically, "the Court found that the Commission had been wrong to, amongst others, infer (…) from the fact that the same institutional investors were found to some extent in the three major market players (…) that there was already a tendency to collective dominance prior to the merger."[214] In essence, the Court contended, the Commission had "mis-interpreted the available data and (…) ignored economic theory."[215]

A similar conclusion was reached by the General Court in the proposed merger between the electrical companies Schneider Electric and Legrand. While the Commission had, once more

[210] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 33.
[211] Ibid. at page 28; Case No. IV/M.1524, *Airtours/First Choice* [2000], OJ L 93.
[212] Case T-342/99, *Airtours v Commission* [2002], ECLI:EU:T:2002:146, para. 61; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 28.
[213] Case T-342/99, *Airtours v Commission* [2002], ECLI:EU:T:2002:146, para 294; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 28.
[214] Case T-342/99, *Airtours v Commission* [2002], ECLI:EU:T:2002:146, paras. 91- 92; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 28.
[215] Case T-342/99, *Airtours v Commission* [2002], ECLI:EU:T:2002:146, paras. 133, 172 – 80, and 147; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 29.

"prohibited the merger on the basis that it would create new dominant positions in certain markets (…) and would strengthen pre-existing dominant positions in others"[216], "the Court found that, like in Airtours, the Commission had committed serious errors in its assessment of the mergers likely impact that by far exceeded the permissible margin of discretion."[217] In particular, the Court "took the view that the data contained in the Commission's decision was at odds with the Commission's own findings, and criticised the Commission for imputing specific future market conduct on the part of the merged entity without providing any evidence in support of this critical assumption."[218]

What the Commission had faced criticism for by the both its counterpart in the US and by the public, namely its 'speculative forecasting model',[219] had also led to disagreement within the Union, therefore. Importantly, it should be noted that the crux of the Court's criticism was not as explicitly focused as that of academics on the Commission relying on the wrong type of effects or asking the wrong questions in service of what was viewed as the incorrect objective to pursue or prioritise in competition policy.[220] Instead, the Court's main issue concerned the Commission's failure "to support its key assumptions with sufficiently convincing evidence" and, as mentioned above, it's disregard for "fundamental economic reasoning in its conjecture."[221] Despite this fact, however, it should be kept in mind that, as claimed by Bork, it is only through understanding the goals which competition policy is seeking to achieve that one can make sense of the practices carried out.[222] As such there arguably exist an extricable link between the practice of the Commission, including those for which it received criticism by the Court, and the objective which such practices were serving. Consequently, one may also deduce that despite the focus of the Court's disagreement, such disagreement played a contributory role in the increasing calls for review of the prioritization of competition policy objectives within the Union.

[216] Case T-310/01, *Schneider Electric v Commission* [2002], ECLI:EU:T:2002:254, recitals 782 and 783; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 29.
[217] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 29.
[218] Case T-310/01, *Schneider Electric v Commission* [2002], ECLI:EU:T:2002:254, paras 152–191; A. Witt, The More Economic Approach to EU Antitrust Law, (1st edn., Hart Publishing 2016), page 30.
[219] D.S. Evans, 'The New Trustbusters, Brussels and Washington May Part Ways' (Foreign Affairs, 2002), page 18
[220] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 33.
[221] Ibid. at page 33.
[222] R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1st edn., Basic Books Inc 1978), page 50.

4.1.3. *Interim Summary: The Priority Granted to Market Integration*

As demonstrated in the preceding sections, the formative years of Union competition policy where arguably characterized by enforcement practices which had as their main objective the promotion of market integration. As both a consequence and an indication of said objective, the Commission's notion of consumer harm was that of harm to competitors rather than harm to competition itself. This was reflected in, amongst others, the importance it granted the criterion of dominance in both merger assessments and under Article 86 EEC (currently Article 102 TFEU), as well as through its almost automatic prohibition of certain vertical agreements without consideration of their production of countervailing effects such as dynamic or allocative efficiencies.

In light of the foregoing, it would seem that, in the formative years of the Union, the ultimate objective of market integration was placed at the top of any potential hierarchy applied to the objectives of Union competition policy with little attention being paid to consumer welfare. However, as became evident in the wake of the 'US Antitrust Revolution', the public support which had previously been given to the Commission's approach arguably began to shift. As a result of both its practices under Article 85(1) EEC and the repeated clashes seen in a number of transatlantic merger decisions, the Commission faced criticism from both its counterparts across the Atlantic and the Union Court itself.[223] In particular, questions began to arise "as to whether the objective of competition law may best be achieved and protected through a determination of whether a given competitive practice causes harm to competitors."[224] In essence, questions began to arise as to whether the Commission was being guided by the correct objectives and applying the most practicable economics in its competition policies. While the criticism did not aim at removing the objective of market integration from Union competition policy as a whole, the main qualm seemed to be the methods which the Commission would apply, and the length to which it would go, in its prioritization of this objective. This was especially so considering that "in the early 1990s, the internal market had been completed and the market integration aim had lost somewhat of its urgency."[225]

[223] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 39.
[224] S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2002), page 5.
[225] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 39.

4.2. Examining the Commission's Motives for Modernising Union Competition Policy

It was against the backdrop of the aforementioned criticism that, between 1999 and 2004, Mario Monti, the first economist to hold the position of 'Commissioner for Competition', "spoke and wrote extensively about his mission to introduce a 'more economic approach' to EU competition law and policy."[226] As clarified in his guest editorial for World Competition in 2000, what stood behind the concept of a 'more economic approach' was the intention to "give the European Union's cumbersome and complicated competition provisions a radical overhaul in order to bring them into holding with modern economic thinking,"[227] to "recognised the importance that economic arguments and considerations should have in a competition assessment,"[228] and to move away from "a legalistic based approach, to an interpretation of the rules based on sound economic principles."[229] In essence, the main aim of DG Competition was to become the placement of economics in a much more central role than it had had previously.

While the pronouncements made by Commissioner Monti to this effect arguably lacked "a definitive conclusion as to what the new approach was to look like *in practice,*"[230] a speech given towards the end of Monti's term as Commissioner for Competition "suggests that the more economic approach amounted to more than the adoption of a new methodology or policy that favoured the use economic tools in competitive assessments under the otherwise unchanged competition rules:"[231]

"Th[e] focus on ensuring that competition enforcement in Europe is grounded in sound economics is one that I cannot over-emphasise. It is fair to say that the far-reaching policy shift which occurred in US antitrust enforcement during the 1980s—namely, the shift towards a focus on the economic welfare of consumers—has been mirrored in the policy priorities of the European Commission during the 1990's."[232]

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[226] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 54.
[227] M. Monti, 'A Competition Policy for Today and Tomorrow ' [2000] 23(2) World Competition; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 54.
[228] M. Monti, 'The New EU Policy on Technology Transfer Agreement' (Speech at École des Mines, Paris, 16 January 2004).
[229] M. Monti, 'EU Competition Policy after May 2004' (Speech at the Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003).
[230] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 55.
[231] Ibid. at page 56.
[232] M. Monti, 'Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: an EU Perspective' (Speech at the UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles, 28 February 2004).

Arguably, through this reference to and comparison with the 'US Antitrust Revolution' discussed above, it is clear that the 'more economic approach' was intended to encompass substantive change.[233] Indeed, keeping in mind that the 'US Antitrust Revolution' referenced had involved the incorporation of economic theory as a means to promote the economic objective of consumer welfare, one may equally surmise from the mirroring alluded to in the statement that also the intention behind the introduction of economic theory or 'a more economic approach' in Union competition policy was in service of this same objective.

In support of this argument, the following sections will take a closer look at the exact changes introduced to the enforcement of Union competition law as part of the 'more economic approach', with a view to identifying a reprioritization of Union competition policy objectives.

4.3. What Enforcement Practices After Modernisation May tell us about the Priority of Consumer Welfare

4.3.1. *The Commission's Enforcement Practices following Modernisation*

(a) Article 101 TFEU

The incorporation of a 'more economic approach' into all three pillars of Union competition law was by no means carried out overnight.[234] Instead the "legal provisions of the Union were brought into line with contemporary economic thinking" through a lengthy and multistage process which took place between 1999 and 2009.[235] Perhaps unsurprisingly in light of the vociferous criticism which the Commission had received regarding its assessment of vertical agreements, Article 101 TFEU was the first pillar to be addressed in this modernization process. While Article 101 TFEU itself was not formally amended, its wording "remain(ing) essentially the same since the signature of the Treaty of Rome in 1957,"[236] the Commission introduced the key principles of its more economic approach to Article 101 TFEU by means of four sets of interpretative guidelines.[237] These include the Guidelines on Vertical Restraints,[238] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European

[233] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 56.
[234] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 40.
[235] Ibid. at page 40.
[236] Ibid. at page 40.
[237] Ibid. at page 40; European Commission, Guidelines on Vertical Restraints [2000] OJ C291/1 , para 7; Guidelines on the applicability of Article 81 to horizontal cooperation agreements [2001] OJ C3/2 ; Guidelines on the Application of Article 81 of the Treaty to Technology Transfer Agreements [2004] OJ C101/2 , para 5; Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97, para 13.
[238] Guidelines on Vertical Restraints [2010] OJ C 130/01; previously Guidelines on Vertical Restraints [2000] O J C 291/01.

Union to Horizontal Cooperation Agreements,[239] Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements,[240] and Guidelines on the Application of Article 101(3) of the Treaty.[241]

With regards to the question of whether the changes introduced encompassed a shift in the prioritization of competition policy objectives, it is particularly the Guidelines on Vertical Restraints and the Guidelines on the Application of Article 101(3) of the Treaty that are significant. Concerning the former, for instance, beyond constituting the "first set of guidelines based on the 'more economic approach'", the introductory statement of these Guidelines represent the first instance of the Commission recognizing that priority be given to a new competition policy objective.[242] While, as outlined above, the Commission had previously demonstrated through its enforcement practices that it attributed great importance to the promotion of market integration, the new Guidelines clearly state that, though market integration remains identifiable as "an additional goal of EU competition policy", under the 'more economic approach', "the protection of competition is the *primary* objective of EU competition policy."[243] The rationale behind this classification, it is stated, lies in the fact that competition "enhances *consumer welfare* and creates an efficient allocation of resources."[244] True to the 'mirroring' alluded to by Monti, therefore, at least as regards its enforcement under Article 101 TFEU, the Guidelines point to the fact that the Commission has shifted priority onto the objective of consumer welfare.

As both a necessary corollary and further proof of such a shift in objective, the concept of competitive harm under the more economic approach has also been amended. This is demonstrated most clearly and systematically in the Commission's Guidelines on the Application of Article 101 (3) of the Treaty.[245] While these Guidelines have maintained the distinction between "restrictions by object, the anticompetitive nature of which is presumed, and restrictions by effect, the anticompetitive nature of which must be established by way of an

[239] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements [2011] OJ C 11/01; previously Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C 3/02.
[240] Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements [2014] OJ C 89/03); previously Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements [2004] OJ C 101/2.
[241] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08
[242] Guidelines on Vertical Restraints [2010] OJ C 130/01, para 7.
[243] Ibid. at para.7.
[244] Ibid. at para. 7.
[245] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 119.

individual assessment,"[246] the "types of effects" which are to be considered as "relevant for competitive assessments" have changed with the introduction of the more economic approach.[247] As a consequence of the shift in its prioritisation of the objectives of competition policy, it is the possible negative effects on consumer welfare in particular that are now determinative towards the finding of a 'restriction by object.' An indication to this effect is provided in the Commission's Guidelines on the Application of Article 101 (3) of the Treaty, where it is explained that "the presumption of illegality of object restrictions is based on the presumption that they are likely to produce *negative effects 'on the market'* and to *jeopardise the objectives pursued by the EU competition rules.*"[248]

Further, a more practical example of the relationship between the consumer welfare objective and the types of effects considered as indicative of competitive harm is also provided in the Guidelines. Using the practices of price fixing and market sharing, the guidelines illustrate that their classification as 'restrictions by object' is based on their ability to reduce output and raise prices. Specifically, it is stated that these practices may "lead to a misallocation of resources, because goods and services demanded by customers are not produced", and reduced consumer welfare "because consumers have to pay higher prices for the goods and services in question."[249] Essentially, therefore, the Guidelines illustrate how, while the Commission had previously focused on the prohibition of competitive practices or behaviour that had the potential to jeopardise the economic freedom or ability of competitors to compete,[250] the focus under the 'more economic approach' is rather on the relevant practices harmful effects on competition. In particular, the ability to negatively affect *parameters of competition* like price or choice, is emphasized in the Guidelines and indicative of the prioritization of the consumer welfare objective, considering that, as discussed in chapter one of this thesis, such parameters of competition are components of the notion of 'welfare' within the Union.[251]

Finally, that the objective of consumer welfare serves as the rationale behind the notion of competitive harm as harm to competition rather than competitors under the 'more economic approach' is further highlighted through the requirements which the Guidelines on the Application of Article 101(3) stipulate are necessary for finding a restriction by effect. As stated in paragraph 24 of the Guidelines, "for an agreement to be restrictive by effect, it must affect

[246] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, paras. 20-21.
[247] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 119.
[248] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08, para. 21.
[249] Ibid. at para. 21.
[250] See the earlier example Case No. IV/28.282, *The Distillers Company Limited* [1977], OJ L 50
[251] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08; para. 16.

actual or potential competition to such an extent that negative effects on prices, output, innovation or the variety or quality of goods and services on the relevant market can be expected with a reasonable degree of probability."[252] Once more, through its emphasis on the parameters of competition which have already been established as components of consumer welfare, "the guidelines suggest that restrictions of competition (…) are only prohibited by Article 101(1) TFEU if they also affect consumer welfare negatively."[253]

In sum, as its first step in the introduction of a 'more economic approach', the Commission introduced significant change to its interpretation of competitive harm under Article 101 TFEU which is inextricably linked to the reprioritization of its objectives.

(b) EU Merger Control

Having completed its reform of Article 101 TFEU, the Commission turned its attention to the second pillar of competition law under which it had received substantial criticism, namely merger control. Unlike the reform seen with regards to Article 101 TFEU, the Commission's reform of merger control in fact included a formal revision of the applicable legislation, in the form of Regulation 139/2004.[254] Keeping in mind the criticism which the Commission had faced with regards to the undue importance it granted to the criterion of dominance under the previous regulation, the main novelty of the new regulation was that it introduced a revised substantive test for the assessment of mergers.[255] According to Article 2(3) of the new regulation, the applicable criterion for finding a merger "incompatible with the common market" is that such a merger "would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."[256] While the concept of dominance remained within the wording of the substantive test, therefore, the particular way in which the concept is included suggests that dominance is no longer an essential or sufficient condition in itself for a merger's incompatibility.[257] Instead, the revised substantive test "primarily enquires whether the relevant merger will lead to a significant impediment to competition", with dominance merely

[252] Guidelines on the Application of Article 81 (3) of the Treaty [2004] OJ C 101/08; para 24.
[253] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 121.
[254] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24
[255] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 41.
[256] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24, Article 2(2) & (3).
[257] See to this effect the statements of the CFI in its review of the Commission's decision in GE/Honeywell; Case T-210/01, *General Electric v Commission* [2005], ECLI:EU:T:2005:456, paras. 327 and 405; see also A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 134.

functioning as "an example of a situation in which the merger is likely to lead to such a significant impediment to competition."[258]

Just as with Article 101 TFEU, the reformed substantive test introduced to EU merger control indicated that also within this pillar a new concept of competitive harm was applicable under the 'more economic approach', namely 'a significant impediment to competition.'[259] With regards to exactly what such significant impediments to competition may entail, it is not the Regulation in itself that is instructive, but rather its accompanying Guidelines; that is the Guidelines on the assessment of horizontal mergers[260] and the Guidelines on the assessment of non-horizontal mergers.[261] In both of the Guidelines, the specific types of significant impediments which may result from each type of mergers are clearly set out under the categories of coordinated and non-coordinated effects.[262] For horizontal mergers, for instance, the Guidelines outline that, as regards non-coordinated effects, significant impediments may result from a horizontal mergers ability to "eliminate important competitive constraints on firms, which consequently would have increased market power without having to resort to coordinated behaviours."[263] Such market power is defined in the Guidelines as "the ability of one or more firms to profitably increase price, reduce output, choice or quality of goods and services, diminish innovation or otherwise influence parameters of competition."[264] As regards coordinated effects, the Guidelines stipulate that anticompetitive effects may result from a horizontal merger due to their ability to "change the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition."[265]

In the context of non-horizontal mergers, the Guidelines outline that significant impediments to effective competition in the form of non-coordinated effects arise when the merger "gives rise to foreclosure," and, "as a result of such foreclosure, the merging companies (…) are able

[258] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 159; see also Case T-210/01, *General Electric v Commission* [2005], ECLI:EU:T:2005:456, para. 68-69.
[259] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 140.
[260] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03.
[261] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07.
[262] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, para 22; Commission Notice, Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07, para 17.
[263] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, para 22 (a); A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 135.
[264] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, para 8
[265] Ibid. at para. 22(b).

to profitably increase the price charged to consumers."[266] On the other hand, coordinated effects are said to "arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour are now significantly more likely to coordinate to raise prices or otherwise harm effective competition."[267]

Importantly, with regards to both horizontal and non-horizontal mergers, the types of anticompetitive effects or impediments to competition highlighted under both the categories of coordinated and non-coordinated effects, are tied to the potential for the relevant merger to result in "an increase in price, a reduction in output, choice or quality of goods or services."[268] In other words, what is considered to make non-horizontal or horizontal mergers anticompetitive, or rather what is considered as competitive harm, under the new merger regulation is a reduction in the parameters of consumer welfare.[269] Once more, therefore, the reprioritization of EU competition objectives is reflected in the shift which the 'more economic approach' has brought about in the Commissions concept of competitive harm under EU merger law. While the Commission had previously focused on the potential negative effects which competitors may experience as a result of a merger, and in particular, as a result of the finding of dominance, it now focuses on potential impediments to competition which may lead to reductions in consumer welfare.

(c) Article 102 TFEU

As the final step in its modernisation process, the Commission also released a soft law instrument delineating its 'more economic approach' to Article 102 TFEU. Unlike the Guidelines released for both Article 101 TFEU and EU merger control, however, the soft law instrument issued for Article 102 TFEU was not an interpretive guideline but rather one which outlines the *enforcement priorities* of the Commission under this new approach.[270] Consequently, "the Commission did not formally change its interpretation of Article 102"[271] in quite as explicit a fashion as with the other pillars of competition law, instead refraining from defining the legal objective of Article 102 TFEU as the protection of consumer welfare.[272] Despite this fact, however, in redefining the Commission's enforcement priorities as being

[266] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07, para. 18.
[267] Ibid, at para. 19.
[268] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 136.
[269] Ibid. at pages 136 and 140.
[270] Ibid. at page 147; Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03.
[271] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 47.
[272] Ibid. at pages 147-148; Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, para. 6.

directed against 'those types of conduct that are most harmful to consumers', the practical outcome under this final pillar of competition is virtually "the same as if the Commission had reinterpreted the provision on the basis of consumer welfare."[273]

Indeed, also in its elaboration of its enforcement priorities, the Commission uses jargon similar to that seen in the interpretive guidelines discussed above, further indicating the role of consumer welfare also under this pillar of competition policy. Again, for instance, reference is made to the parameters of competition which make up the notion of welfare ('lower price, better quality and wider choice of new or improved goods and services') and their interrelation with healthy and effective competition.[274] In fact, the Commission explicitly outlines this interrelation as the rationale behind its choice to pursue behaviour that may jeopardise the proper functioning of markets to the detriment of consumers.[275] As such, while the reprioritization of EU competition objectives took somewhat of a different form under Article 102 TFEU, it is based on the same shift away from the protection of competitors to the protection of competition, in service of the consumer welfare objective.

4.3.2. *Interim Summary: The Priority Granted to Consumer Welfare*

As becomes evident from the sections above, a comparison between the Commission's enforcement practices prior to and after the introduction of the 'more economic approach' "allows for the conclusion that some form of overhaul has taken place."[276] Indeed, in light of the enforcement practices of the Commission under the 'more economic approach' it is clear that, in particular, the "far reaching policy shift towards a focus on the welfare of consumers" described by Monti has been actualized.[277] Illustrations to this effect are identifiable in various formats throughout the three pillars of Union competition law, ranging from the explicit acknowledgement of the priority of the consumer welfare objective in the Guidelines on Article 101 TFEU, to the consistent definition across all three pillars of competitive harm as possible negative effects on the parameters of competition which such consumer welfare encompasses. Even within its more tentative amendments, such as the slight rephrasing of the substantive test under Regulation 139/2004 and the introduction of enforcement priorities for Article 102 TFEU

[273] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 148; Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, para. 7.

[274] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, para. 5.

[275] Ibid. at paras. 5-7.

[276] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 1.

[277] M. Monti, 'Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: an EU Perspective' (Speech at the UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles, 28 February 2004).

rather than amended legislative interpretations, the prioritization of consumer welfare is evident.

Notably, an argument can further be made that also the extent to which economics is relied upon under the 'more economic approach' is traceable to the reprioritization of the Union's competition policy objectives. In fact, while the Commission had previously not required substantial economic analyses for the protection of market integration, one of the core notions of the 'more economic approach' was that economics itself "furnishes the principle methods" for pursuing consumer welfare.[278] In its shift from focusing on whether competitive behaviour may cause harm to competitors to whether harm may be caused to competition itself, therefore, the Commission necessarily also shifted the methods thorough which it would assess such behaviours. Indeed, in order to properly make determination as to the existence of this new notion of competitive harm , the form-based approach and 'per se' rules which had traditionally characterized EU competition law enforcement were to be replaced by an effects-based approach which would take into account modern economic theory and "require European competition authorities to prove a causal link between a particular practice and its effects on competition and welfare."[279] Once more, therefore, the statement by Bork to the effect that policies adopted can only be made rational when one takes into account the objective which they are seeking to achieve rings true.[280]

In light of the foregoing, and with regards to the research question at issue in this thesis, it may safely be stated that beyond having recognized consumer welfare as *one* of the ultimate objectives of EU competition policy alongside market integration, the Commission has also demonstrated through its recent enforcement practices that consumer welfare serves as the primary objective of its competition policy following its substantive modernization process.

Despite the clear indications in the Commission's enforcement practices as to the role of consumer welfare, however, the answer to the research question(s) at hand in this thesis would not be complete without attention also being given to the practices of the second institution

[278] D. J. Gerber, 'Two Forms of Modernization in European Competition Law' (The Social Science Research Network, 2007), page 1247. Retrieved via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317007, last accessed 30 August 2020.
[279] N.M. Theron and W.H. Boshoff, 'When do Vertical Restraints Harm Competition? The Economics-Based Approach and Its Application in the BATSA Case' [2011] 79(3) South African Journal of Economics, page 331; see also E. Arezzo, Is there a Role for Market Definition and Dominance in an Effects-Based Approach?, in; Mackenrodt and Others (eds.), *Abuse of a Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008), pages 21-54.
[280] R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1st edn., Basic Books Inc 1978), page 50.

relevant to competition law enforcement within the Union; namely, the Court of Justice of the European Union. [281]

5. Inconsistencies in the Prioritization of the Consumer Welfare Objective

5.1. Comparing the Practices of the Commission and the Court

As demonstrated in the preceding chapters, there is little doubt as to the priority which the Commission grants to the consumer welfare objective under its 'more economic approach' to competition law. However, considering the competences granted to the Court of Justice allowing it to "review and strike down Commission decisions in individual actions for annulment"[282] and to provide "preliminary rulings on the correct interpretation of EU law at the request of national courts,"[283] the practices of the Commission are not the only practices of relevance for determining the prioritization of Union competition objectives. Indeed, in light of the aforementioned competences granted to the Court, they constitute another integral part of the Union's competition law enforcement.[284]

The following section therefore focuses on whether the Court's perceptions both of the objectives of competition policy and the notion of competitive harm align with those of the Commission, allowing for the final conclusion to be drawn that consumer welfare indeed constitutes the primary objective of Union competition policy.

5.1.1. *The Objective(s) of Union Competition Policy According to the Court*

With regards to determining the Court's perception of the objective(s) of Union competition policy, it must be noted that the formative years of Union competition law lacked "cases in which the definition of the legal objective was the main issue."[285] Nevertheless, the judgements of the Court during this period are instructive. In the *Walt Willem* case[286] for instance, the Court addressed the question of "whether national competition authorities were allowed to apply their national competition provisions to a situation that the Commission was already investigating under EU competition law."[287] It outlined that due to the differences which existed between the rationales relied upon by national competition authorities and the Court in assessing cartels,

[281] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 261.
[282] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 261; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 1 326/88, Article 263.
[283] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 261; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 1 326/88, Article 267.
[284] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 261.
[285] Ibid. at page 262.
[286] Case C-14/68, *Walt Wilhelm and Others v Bundeskartellamt* [1969], ECLI:EU:C:1969:4.
[287] Ibid. at pages 3-4; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 263.

nothing precluded such parallel assessments.[288] According to the Court, while national authorities assessed cartels on the basis of "considerations peculiar to it", "Union law regarded cartels in light of obstacles that could result for trade between Member States."[289] This was so, considering that "Article 101's primary objective was to eliminate the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market."[290] Essentially, therefore, the Court made clear that is main focus was connected to the market integration objective.

Indeed, this focus was confirmed in a number of its following judgements.[291] In both *Commercial Solvents*[292] and in *Hoffmann-La Roche*[293] the Court emphasized that the Union's competition law provisions had to be interpreted and applied in the light of the Union's commitment to the creation of an internal market (Article 3 EEC) characterised by the "harmonious development of economic activities throughout the Union."[294] Such a market, and the effective competition which was to characterize it, was to be for the benefit of "the public interest, individual undertakings, consumers,"[295] and ultimately "the economic well-being of the Union."[296] Rephrased, according to the Court, the objective of Union competition policy was to "protect competition as such in the interests of a broad range of actors."[297]

As becomes clear from the decision practices of the Court in the formative years of the Union, therefore, the focus of the Court was largely in line with that of the Commission. Both institutions focused on protecting competition, or the competitive process, in service of market integration. However, the same may not as easily be said currently. While, as demonstrated in the previous chapters, the Commission has moved away from prioritizing market integration to primarily focusing on consumer welfare, the Court has not followed suit. This was made clear

[288] Case C-14/68, *Walt Wilhelm and Others v Bundeskartellamt* [1969], ECLI:EU:C:1969:4, para 3; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 263.
[289] Case C-14/68, *Walt Wilhelm and Others v Bundeskartellamt* [1969], ECLI:EU:C:1969:4, para 3; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 263.
[290] Case C-14/68, *Walt Wilhelm and Others v Bundeskartellamt* [1969], ECLI:EU:C:1969:4, para 5; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 263.
[291] Case C-6/72, *Europemballage Corporation and Continental Can Company v Commission* [1973], ECLI:EU:C:1973:22, paras. 23–25; Case C-27/76, *United Brands v Commission* [1978], ECLI:EU:C:1978:22, para. 63; Case 85/76, *Hoffmann-La Roche v Commission* [1979], ECLI:EU:C:1979:36, para. 38; Case C-322/81, *Michelin v Commission* [1983], ECLI:EU:C:1983:313, para. 29; Case T-102/96, *Gencor Ltd v Commission* [1999], ECLI:EU:T:1999:65, para. 8.
[292] Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974], ECLI:EU:C:1974:18
[293] Case 85/76, *Hoffmann-La Roche v Commission* [1979], ECLI:EU:C:1979:36
[294] Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974], ECLI:EU:C:1974:18, para 32; Case 85/76, *Hoffmann-La Roche v Commission* [1979], ECLI:EU:C:1979:36, para. 125.
[295] Case C-136/79, *National Panasonic v Commission* [1980], ECLI:EU:C:1980:169, para. 20.
[296] Case C-94/00, *Roquette Frères* [2002], ECLI:EU:C:2002:603, para. 42; Case C-52/09, *TeliaSonera Sverige* [2011], ECLI:EU:C:2011:83, para. 22.
[297] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 266.

in, for instance, the *GlaxoSmithKline* case.[298] While both the General Court and the Court of Justice had in this case recognized that the competition law provisions of the Union are intended to protect the welfare or interests of consumers, the Court of Justice's final judgement clarifies that such consumer interests was only *one* of the rationales behind these provision. According the Court of Justice "the objective(s) of the competition law provisions is to protect *not only* the interests of competitors or of consumers but also the structure of the market and, in so doing, competition as such."[299] With this in mind, it is clear that "the Court does not consider consumer welfare their exclusive purpose."[300] Unlike the Commission, they have not moved away from the view that the objectives of competition policy are primarily aimed at the protection of competition and, in turn, the internal market.

5.1.2. *The Concept of Competitive Harm According to the Court*

In light of the Court's continued perception of market integration as the leading objective of Union competition policy both prior to and after the Commission's introduction of a 'more economic approach', it is not surprising that also the level of alignment between the two institution's concepts of competitive harm has shifted over the years.

Indeed with regards to the Court's concept of competitive harm under Article 101 TFEU, for instance, one may infer from a number of the Court's earlier judgements, in which it reviewed and upheld the Commission's decisions, that prior to the modernisation process it shared the Commission's understanding of competitive harm.[301] This is especially so considering that, in the Commission decisions which it had upheld, the Commission had "equated restrictions of the contracting parties' or third parties' economic autonomy or opportunity with a restriction of competition."[302] Importantly however, despite the Court having had limited opportunities to provide an insight into its concept of competitive harm following the introduction of a 'more economic approach' to EU competition law,[303] its ruling in the aforementioned *GlaxoSmithKline* case makes clear that its interpretation of competitive harm has remained the

[298] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009], ECLI:EU:C:2009:610.
[299] Ibid. at para. 63.
[300] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 266.
[301] Ibid. at page 268; see, for example Case No. IV/324, *Vereeniging van Cementhandelaren* [1972], OJ L 13, recital 15: upheld in Case C-8/72, *Vereeniging van Cementhandelaren v Commission* [1972], ECLI:EU:C:1972:84, paras 24 and 25; Case No. IV/30.696, *Distribution System of Ford Werke AG* [1983], OJ L 327/31, recital 30: upheld Joined Cases C-25/84 and 26/84, *Ford-Werke AG and Ford of Europe Inc v Commission* [1985], ECLI:EU:C:1985:340; Case No. IV/25.757, *Hasselblad* [1982], OJ L 161/18, recital 59: upheld in Case C-86/82, *Hasselblad (GB) Limited v Commission* [1984], ECLI:EU:C:1984:65, para 46.
[302] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 268.
[303] Ibid. at page 269: "The great majority of non-cartel cases over the past 10 years have been solved by means of commitments decisions that contain no formal legal assessment. This trend has greatly reduced the likelihood of the Court being asked to pronounce itself on the concept of competitive harm under Article 101 TFEU"

same despite modernisation, and thus currently differs from that of the Commission.[304] Indeed, in holding that "there was nothing in the provision of Article 101 to indicate that only those agreements that deprived consumers of certain advantages" may be deemed as anticompetitive, the Court confirmed its view that the competition law provisions of the Treaties did not only aim to protect the interests of consumers but also "the structure of the market and competition as such."[305] In sum, therefore, the Court's focus under Article 101 TFEU remains on potential harm to the market as a whole and lacks the Commission's current emphasis on consumers.

Also with regards to merger control, the earlier judgements of the Court illustrate that prior to the modernisation project undertaken by the Commission, the two institutions' concepts of competitive harm aligned. More specifically, in light of the emphasis placed on the market integration objective, both institutions "considered the likely foreclosure of competition sufficient to find a merger anticompetitive."[306] An example to this effect was provided in the *GE/Honeywell* case discussed in the previous chapter of this thesis.[307] While the General Court had criticised the Commission for its failure to meet the standard of proof required for predicting uncertain future events that may result from the merger, it had seemingly agreed with, or at least refrained from criticising, the Commission's view that consumer harm was not a prerequisite of competitive harm under Regulation 4064/89.[308]

However, though the Commission has since amended its concept of competitive harm and consequently only deems those mergers which are likely to reduce consumer welfare as anticompetitive, the Court's current concept of competitive harm remains unclear.[309] As with Article 101 TFEU, one of the reasons for this uncertainty is attributable to the fact that the Court has not been presented with a sufficient amount of cases concerning the amended Merger Regulation.[310] Indeed, the (General) Court has reviewed less than a handful of Commission decisions on the basis of Regulation 139/2004.[311] In such decisions the clearest indication as to the Court's concept of competitive harm is provided not through what the Court has explicitly said but what it has refrained from commenting on. In *Deutsche Börse/NYSE Euronext*,[312] for

[304] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009], ECLI:EU:C:2009:610
[305] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 270.
[306] Ibid. at page 272.
[307] Case T-210/01, *General Electric v Commission* [2005], ECLI:EU:T:2005:456
[308] Ibid. at para. 312.
[309] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 272.
[310] Ibid. at page 272.
[311] For instance, Case No. COMP/M.4439, *Ryanair/Aer Lingus* [2006], OJ C 47; Case No. COMP/M.5830, *Olympic/Aegean Airlines* [2011], OJ C 195; Case No. COMP/M.6663, *Ryanair/Aer Lingus III* [2013], OJ C 231; Case No. COMP/M.6166, *Deutsche Börse/NYSE Euronext* [2012], OJ C 199; Case No. COMP/M.6570, *UPS/TNT Express* [2013], OJ C 186.
[312] Case No. COMP/M.6166, *Deutsche Börse/NYSE Euronext* [2012], OJ C 199.

instance, one may infer form the fact that the Court did "not engage with or even mention any possible effects on consumers in its review of the Commission's assessment of the merger's anticompetitive effects", that the Court continues to consider likely foreclosure of competition as sufficient in finding a merger anticompetitive.[313] Further, as argued by A. Witt, "what speaks against the assumption that the Court considers consumer harm a prerequisite of anticompetitive foreclosure is that this would result in it having a different concept of competitive harm under Regulation 139/2004 than it does under Articles 101 and 102 TFEU."[314]

Indeed, while the Court's position under the new merger regulation remains unclear, its "position on the necessity of consumer harm under Article 102 TFEU does not leave much room for speculation."[315] In essence, the Court has neither prior to nor following the modernisation process undertaken by the Commission viewed consumer harm as a necessary requirement for competitive harm. While it recognizes consumer harm as *one possible form* of competitive harm under Article 102 TFEU, due to its inherent role in the definition of exploitative abuses, it is not considered the *exclusive* form of competitive harm.[316] Indeed, another formulation of the Court's concept of competitive harm is provided within the context of exclusionary abuses. In *Hoffmann-La Roche*, the Court defined exclusionary abusive behaviour as "the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[317] In essence, as regards the second type of abuse prohibited under Article 102 TFEU, namely exclusionary abuses, consumer harm was not even mentioned. Instead, the Court's definition suggests that the relevant type of harm under exclusionary abuses is related to the 'structure of the market', more specifically as a result of "methods different from those governing normal competition."[318] Once more, this approach was largely in line with the earlier practices of the Commission. For while the Commission had expressed its "concern about exclusionary effects under Article 102 (…) in terms of the effects on individuals' opportunities and economic

[313] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 273.
[314] Ibid. at page 274.
[315] Ibid. at page 274.
[316] Ibid. at pages 274-275.
[317] Case 85/76, *Hoffmann-La Roche v Commission* [1979], ECLI:EU:C:1979:36, para. 91.
[318] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 276.

freedoms, rather than safeguarding a competitive market structure", both institutions agreed that there was "no need for consumers to be affected as a consequence of such exclusion."[319] What was determinative for finding a dominant undertaking's conduct as anticompetitive for both institutions was "the exclusion of a competitor by means other than those of competition on the merits."[320]

As demonstrated in the chapters above, the Commission has changed its approach to exclusionary abuses, and now only considering exclusionary practices as anticompetitive if they result in consumer harm. However, while undertakings have attempted on multiple occasions to "challenge Article 102 TFEU prohibitions on the grounds that the Commission had failed to prove that the allegedly exclusionary conduct was likely to result in consumer harm,"[321] the Court has maintained the definition of abuse which it established in *Hoffman/La Roche*, and as a result its stance that the exclusion of competitors as such is sufficient for finding conduct to be anticompetitive.[322] While it should be noted that the *Post Denmark* cases represented one instance in which the Court did hint at reforming the applicable test to also take into account consumer harm, it has later clarified that it's position remains the same. Specifically, the Court had in *Post Denmark I* "defined exclusionary abuses as conduct that caused harm to consumers indirectly through their impact on competition"[323] and, in service of this definition of harm, hinted at incorporating the criterion that the relevant competitors who may be subject to exclusion are deemed 'as efficient' as the undertaking whose conduct is under review for finding exclusionary abuses.[324] Importantly said condition was to be established through an individual assessment of the potential effects caused in the relevant case.[325] However, its later judgement in *Post Denmark III* clarified that not only did Article 102 TFEU not require the enforcement authorities to apply an 'as efficient competitor' test, but that in certain cases such a test would be inappropriate.[326] In essence, it was the Court's view that if the market structure prevented the emergence of equally efficient competitors, a less efficient competitor had to be

[319] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 277.
[320] Ibid. at page 277.
[321] Ibid. at page 277.
[322] See, for instance Case T-219/99, *British Airways v Commission* [2003], ECLI:EU:T:2003:343, para. 106; Case T-340/03, *France Télécom v Commission* [2007], ECLI:EU:T:2007:22, para. 105; Case T-321/05, *AstraZeneca v Commission* [2010], ECLI:EU:T:2010:266, para. 353; Case C-52/09, *TeliaSonera Sverige* [2011], ECLI:EU:C:2011:83, para. 24; Case T-286/09, *Intel v Commission* [2014], ECLI:EU:T:2014:547, para. 105.
[323] Case C-209/10, *Post Danmark I* [2012], ECLI:EU:C:2012:172, para. 24; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 279.
[324] Case C-209/10, *Post Danmark I* [2012], ECLI:EU:C:2012:172, para. 25.
[325] Ibid. at paras. 26-28.
[326] Case C-23/14, *Post Danmark III* [2015], ECLI:EU:C:2015:651, para. 59; A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 281.

considered better than none.[327] The individual assessment of the potential anticompetitive effects was not required with the form of the conduct being determinative in itself.[328] In sum, therefore, the Court has maintained throughout its case law that consumer harm is not "an essential precondition of exclusionary abusive conduct under Article 102 TFEU."[329]

5.1.3. *Point of Divergence and their Consequences*

As becomes clear from the discussion above, the understanding held by the Commission and the Court both as regards the objective of Union competition policy and the concept of competitive harm may largely be said to have aligned before the modernisation process. For both institutions, the primary objective of the Union was the protection and promotion of the internal market. To this effect, both institutions focused on prohibiting practices that had the potential to negatively affect such market integration either directly or indirectly through harming the competitive process. Phrased differently, both institutions adopted a concept of competitive harm centred upon ensuring that effective competition and economic freedom were maintained, and foreclosure of competitors avoided. While the Commission has since shifted both its understanding of the primary objective of Union competition policy, as well as its accompanying concept of competitive harm, to emphasizing the protection of consumer welfare, the Court has maintained its previous interpretation of Union competition law. Essentially therefore, two diverging approaches characterise the institutions' current practices. On the one hand the Commission has narrowed its focus as regards its competition objective to consumer welfare, and as a result has also limited its understanding of competitive harm to equal consumer harm.[330] On the other, however, the Court's focus remains rather broad.[331]

Most importantly, what becomes apparent is that the approaches are at odds with one another. Indeed, it is safe to say that "the Commission's position appears clearly incompatible with the case law."[332] While the contradiction is perhaps less apparent with regards to Article 101 TFEU and mergers, keeping in mind the fact that the Court has had limited opportunities to clarify and update its opinion under these two pillars, the contradiction is quite clear under Article 102 TFEU. Indeed, the Court has made its position under this pillar clear in no uncertain terms. Instead, what complicates matter under this final pillar is the indirect way in which the

[327] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 281.
[328] Case C-23/14, *Post Danmark III* [2015], ECLI:EU:C:2015:651, para. 17.
[329] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 281.
[330] Ibid. at pages 289-290.
[331] Ibid. at pages 289-290.
[332] Ibid. at page 290.

Commission has introduced its modernised approach.[333] As outlined previously, the Commission has, rather cleverly, chosen to introduce its 'more economic approach' to Article 102 TFEU through the publication of a guidance paper on its enforcement priorities.[334] In essence, rather than "formally reinterpret the provision as only prohibiting exclusionary conduct likely to result in consumer harm and prescribing an assessment of the investigated conducts likely effects in every case", the Commission has instead simply redefined its enforcement priorities.[335] According to the Guidance Paper, the Commission will now "only consider a case a priority if an individual assessment of its effects shows that the exclusionary conduct is likely to result in anticompetitive foreclosure."[336] Where this is not shown, it will "not consider the case a priority and simply not enforce Article 102 TFEU."[337] In essence, while refraining from "formally contradicting and disregarding the Court's interpretation of the law", the Commission has practically speaking still ensured the same result as if it would have done exactly this.[338]

While one may instinctually question the legality of this approach, the Court has in fact itself confirmed that it remains within the Commission's remit to set its own enforcement priorities. As outlined in *Automec II*, for instance, "an inherent feature of administrative activity for an authority entrusted with a public service task is to take all the organisational measures necessary for the performance of that task, including priority setting within the limits prescribed by the law where those priorities have not been determined by the legislature."[339] Indeed, this was considered as "particularly necessary where an authority had been entrusted with a supervisory and regulatory task as extensive and general as that assigned to the Commission in the field of competition."[340] Consequently, therefore, the key question seems to be whether the particular enforcement priorities set out in the Guidance Paper exceed the limit of the law, rather than whether the Guidance Paper as a communication is legal in and of itself.

As already outlined, the practical effect or outcome of the Commissions choice to "lay down in a general and abstract manner that it shall no longer pursue conduct that does not result in

[333] Ibid. at page 290.
[334] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03
[335] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 290.
[336] Ibid. at page 291; Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, paras. 19-20.
[337] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 291; Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/03, paras 19-20.
[338] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 291.
[339] Ibid. at page 291; Case T-24/90, *Automec Srl v Commission* [1992], ECLI:EU:T:1992:97, para. 77.
[340] Case T-24/90, *Automec Srl v Commission* [1992], ECLI:EU:T:1992:97, para. 77.

consumer harm" is the same as if the Commission had "formally reinterpreted the wording of Article 102 TFEU."[341] As such, the Commission's revised approach to this pillar of competition law is largely comparable with that see under the remaining pillars, and in turn in direct contradiction of the Court. Beyond this fact, it may be argued that the language, structure and style used in the guidance paper "is indistinguishable from that used in the interpretive guidelines on Article 101 and the Merger Regulation."[342] Indeed, with the exception of its title and opening statements the guidance paper "no longer mentions enforcement priorities", and "reads exactly like interpretative guidelines."[343] As a consequence of this fact and in light of the regular use which undertakings make of "the Guidance Paper's principles as the relevant authority in proceedings before the European Court of Justice and also in national proceedings", in the eyes of the stakeholders, "the Guidance Paper is likely to carry the same weight and fulfil the same function as the Commission's interpretative guidelines."[344] Indeed, this conclusion is arguably bolstered by the fact that "the Commission's soft law in the area of EU antitrust law generally carries considerable weight, and has a strong persuasive effect both for individuals and national courts."[345] "Although formally the Court has the ultimate word in matters of legal interpretation, only few undertakings will in reality consider it worth their while to run counter to the Commission's express recommendations in order to challenge its policy in lengthy, costly and risky appeal proceedings."[346] In sum, there are practical textual and interpretive indications that the particular enforcement priorities established in the Commission's enforcement practices may exceed the limits of the law.

As a final point it should additionally be noted that "even if one takes the view that the enforcement priorities laid out in the guidance paper remains within the limits of the law, and that the Commission is not overstepping its powers by persisting with an interpretation of Article 102 that the Court consistently opposes, the situation is not desirable from the point of view of legal certainty."[347] While the principle of legal certainty requires that the law be clear, the current situation is characterised by the two key institutions responsible for competition law enforcement having "different concepts of competitive harm and a different understanding of whether harmful effects, however defined, may be inferred or should be established in the

[341] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 292.
[342] Ibid. at page 292.
[343] Ibid. at page 292.
[344] Ibid. at page 292.
[345] See for example Opinion of Advocate General Kokott in Case C-109/10, *Solvay v Commission* [2011] ECLI:EU:C:2011:256, para 20; Opinion of Advocate General Mazák in Case C-549/10, *Tomra and Others v Commission* [2012] ECLI:EU:C:2012:55, para 36.
[346] A. Witt, *The More Economic Approach to EU Antitrust Law*, (1st edn., Hart Publishing 2016), page 293.
[347] Ibid. at page 294.

individual case."[348] In fact, considering that the Commission simply "pays lips service to the case law of the Court", but "operates on a completely different interpretation in practice" not only legal certainty but also the credibility of the institutions is undermined.[349]

In light of the divergences discussed above, as well as their demonstrated consequences for legal certainty and consistency, one may conclude that an analysis of the objectives of Union competition policy highlights the existence of inconsistencies in the enforcement practices of the Union's institutions. While the analysis of the Commission's enforcement practices undertaken above allows for the conclusion that consumer welfare is identifiable as the primary objective of Union competition policy, these practices are in direct contravention of the jurisprudence of the Court. As such, it becomes evident that for a definitive conclusion to be made regarding the status of consumer welfare within the Union's competition policy, existing inconsistencies must first be addressed.

[348] Ibid. at page 294.
[349] Ibid. at page 294.

6. Conclusion

At the turn of the century the Commission announced its intention to introduce a 'more economic approach' to EU competition law. Apart from incorporating modern economic theory into its enforcement practices, such a modernised approach to competition law was also to entail bringing the Union's competition policy objectives in line with modern economic theory. In particular, as expressed by Mario Monti, the Commissioner for Competition at the time, the competition policy of the Union was to undergo a shift towards a focus on the economic welfare of consumers. As established in the preceding chapters of this thesis, what such a shift in focus was to involve specifically was the adoption of a welfare standard aimed at maximising the individual benefits derived by both direct and indirect consumers from the consumption of goods or services. Such benefits were in particular to include reduced prices, increased outputs, innovation, and variety, as well as improved quality of goods and services.

Beyond the introduction of a new welfare standard, however, the modernisation process undertaken by the Commission also represents a watershed moment for the prioritization of the multiple objectives which characterise Union competition policy. Indeed, with increasing clarity as to the welfare standard of the Union, it also became increasingly clear that besides the market integration goal which had played a fundamental role in the shaping of the Union, consumer welfare was to be considered as at least equally fundamental to Union competition policy. Rephrased, the two objectives became distinguishable as the ultimate or central objectives of Union competition policy. The question, therefore, instead became whether a hierarchy may be distinguished between these ultimate objectives. In particular, the question arose as to the extent to which consumer welfare may be identified as the primary objective of competition policy.

As illustrated in this thesis, it is the comparative analysis of the Commission's enforcement practices both prior to and following the modernisation process which is most instructive in addressing this question. As analysed above, the enforcement practices of the Commission prior to the modernisation process reveal that out of the two ultimate objectives of market integration and consumer welfare, the former was given priority. Indeed, across all three pillars of competition law, the Commission equated harm to competitors with competitive harm, relying upon the rationale that this approach would best serve the market integration objective. However, with the driving force behind the modernisation process having been the desire to

bring the economic welfare of consumers into focus, it is perhaps not surprising that following this process consumer welfare is arguably given priority.

As demonstrated in the chapters above, illustrations to this effect are identifiable in various formats throughout the three pillars of Union competition law, ranging from the explicit acknowledgements of the priority of the consumer welfare objective in the Guidelines on Article 101 TFEU, to the consistent definition across all three pillars of competitive harm as possible negative effects on the parameters of competition which such consumer welfare encompasses. Indeed, as has been argued, even the move away from the application of *per se* rules and a traditionally structural approach, to one which relied upon modern economics is indicative of the prioritisation of consumer welfare. This is so as it is arguably the amended concept of competitive harm which has necessitated a change in the methods for appraising whether competitive practices may result in such harm.

In sum, through analysing and evaluating the Commission's publications and enforcement practices it seems evident that consumer welfare may be identified as the primary objective of EU competition policy. However, there are important caveats to this conclusion. As examined in the final chapter of this thesis, the Court has not followed the Commission's shift in perception of the objectives of Union competition policy, nor has it altered its concept of competitive harm. Adhering to the prioritisation of market integration and the view that harm to competitors is sufficient for deeming practices as anticompetitive, the Court still clearly sees the promotion of market integration as its main priority. Consequently, there exists a clear divergence between the two institutions responsible for the enforcement of EU competition law. Importantly, this divergence calls into question not only the status of the consumer welfare objective, but also the legality of the Commission's approach to said objective. In essence, therefore, one must instead conclude that for a definitive decision to be made regarding the status of consumer welfare within the Union's competition policy as a whole, existing inconsistencies between the institutions must first be addressed.

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