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Some Reflections on the Question of the Goals of  
EU Competition Law

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## Some reflections on the question of the goals of EU Competition Law

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### I. Introduction

The literature on the goals of competition law has become a recurrent and rapidly expanding academic business. Since the well-known attack of Judge Robert Bork against the “populist” antitrust of the Warren Court in United States (US) and his assertion, along with other members of the Chicago school, that antitrust should have economic efficiency (what is considered now as a total welfare standard) as a single objective,<sup>2</sup> a plethora of academic articles and books in the US have challenged or supported this thesis and have advanced different theoretical frameworks on the goals of antitrust<sup>3</sup>. More recently, the debate has gained prominence in Europe, with a number of publications dedicated to this topic<sup>4</sup>. Although the debate in Europe is not as polarized as in the United States and has less

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<sup>2</sup> Bork, R.H. (1978), *The Antitrust Paradox: A Policy at War with Itself*, Basic Books; Posner, R.A. (2001), *Antitrust Law*, University of Chicago Press, 2<sup>nd</sup> ed.

<sup>3</sup> On some recent literature in the US on this topic see, among others, the contributions of: Blair, R. and D. Sokol (2012), ‘The Rule of Reason and the Goals of Antitrust: An Economic Approach’ *Antitrust Law Journal* **78(2)** 471-504; Hovenkamp, H. J., ‘Distributive Justice and Consumer Welfare in Antitrust’ (August 3, 2011). Available at SSRN: <http://ssrn.com/abstract=1873463> or <http://dx.doi.org/10.2139/ssrn.1873463>; Huffman, M., ‘Neo-Behavioralism?’ (December 23, 2010). Available at SSRN: <http://ssrn.com/abstract=1730365> or <http://dx.doi.org/10.2139/ssrn.1730365>; Kirkwood, J.B and R.H. Lande (2008), ‘The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency’, *Notre Dame Law Review* **84(1)** 191-243; Orbach, B. (2011), ‘The Antitrust Consumer Welfare paradox’ *Journal of Competition Law & Economics* **7** 133-164; Pitofsky, R. (2008) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press; Stucke, M. (2012) ‘Reconsidering Antitrust’s Goals’ *Boston College Law Review* **53(2)** 551-629; Wright, J. (2012), ‘Abandoning Antitrust Chicago Obsession: The Case for Evidence-Based Antitrust’, *Antitrust Law Journal* **78(1)** 241-271.

<sup>4</sup> See, for instance, among many excellent recent studies, Akman, P. (2009) ‘Consumer Welfare and Article 102 EC: Practice and Rhetoric’ *World Competition* **32** 71-90; Akman, P. (2009), ‘Searching for the Long-Lost Soul of Article 82EC’ *Oxford Journal of Legal Studies* **29(2)** 267-303; Andriychuk, O. (2010), ‘Dialectical Antitrust: An Alternative Insight into the Methodology of the EC Competition Law Analysis in a period of Economic Downturn’, *European Competition Law Review*, **31(4)** 155–164; Andriychuk, O. (2010), ‘Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process’ *European Competition Journal* **6(3)** 575-610; Buttigieg, E. (2009), *Competition Law: Safeguarding the Consumer Interest. A Comparative Analysis of US Antitrust Law and EC Competition Law*, Kluwer; Drexl, J., Kerber, W. Podszun, R. (eds.) (2010), *Competition Policy and the Economic Approach – Foundations and Limitations*, Cheltenham: Edward Elgar; Nihoul, P. (2012), ‘Freedom of Choice’: The Emergence of a Powerful Concept in European Competition Law’ *Concurrences* **3-2012** 55-70; Lovdahl-Gormsen, L. (2007), ‘The Conflict Between Economic Freedom and Consumer Welfare in the Modernization of Article 82 EC’ *European Competition Journal* **3(2)** 329-344; Odudu, O. (2010), ‘The Wider Concerns of Competition Law’ *Oxford Journal of Legal Studies* **30(3)** 599-613; Townley, C. (2009) *Article 81 EC and Public Policy*, Oxford: Hart Pub.; van Rompuy, B. (2012), *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-Efficiency Considerations under Article 101 TFEU*, Kluwer; Zimmer, D. (eds.) (2012), *The Goals of Competition Law*, Cheltenham: Edward Elgar (including many thoughtful contributions).

ideological connotations, probably as a result of the large political consensus in Europe on the benefits of active competition law enforcement, there is still disagreement over the role and extent of welfare analysis in EU competition law, as opposed to a rights and principles-based approach, and the interplay between the different goals of competition law, assuming that one adheres to goals pluralism. A related topic, which will not be examined systematically in this study, is the interplay between competition law and other policies of the European Union and that between competition law and public policy considerations at the level of Member States in the multi-level governance system of the EU, which may also raise the issue of the goals of EU competition law, albeit this time, from one external to competition law perspective.

The topic presents a theoretical interest, in view of the various normative perspectives advanced on the goals of competition law (II). The normative conundrum that follows is not clarified by positive EU competition law, as the EU Courts have embraced different goals and the drafting of the EU Treaties requires that EU competition law provisions should be interpreted in accordance with the rest of the EU Treaties' provisions, hence leading to the emergence a more holistic EU competition law (III). More importantly, contrary to what is often advanced in competition law literature, determining the goals of EU competition law will not necessarily provide any information on the content and evolution of competition law; hence the view defended in this study that the quest for the goals of competition law may prove in the end a meaningless exercise. Indeed, social goals affecting the interpretation and implementation of EU competition law are evolving and are highly dependent on the institutional and political context. Goals are intermediated through the mechanism of institutional choice: they involve decisions over the right institutional process, be this, the market, the political process, the courts and competition authorities, the EU or the national levels. In the end, decisions over goals are decisions over adequate institutions. The last part of this study examines the hidden institutional dimension of the quest for the objectives of EU competition law. I argue that the debate should refocus on the core issue of the adequate institutional framework, by employing the tool of comparative institutional analysis (IV).

## **II. A normative perspective on the objectives of EU competition law**

Most discussions on the goals of competition law take a normative perspective, based on some philosophical pre-commitment or prior beliefs on certain values and personal taste, occasionally taking support in the legislative history or the interpretation of the competition law provisions by the courts and competition authorities in past decisional practice. To summarize a long and complex debate there is an opposition between, on the one side, those advancing the existence of a plurality of objectives for competition law and, on the other side, those supporting the thesis of one aim/objective: economic welfare or more broadly welfare. The latter is based on the belief that the only thing we can be sure about people's preferences is that they want to maximize their utility, redefined as welfare in order to solve the measurability problem to which Pareto<sup>5</sup> and Robbins<sup>6</sup> hinted to, because of the difficulty of

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<sup>5</sup> Pareto, V. (1909), *Manuel d'Economie Politique*, Paris : Giard and Brière, Chapters IV-V

<sup>6</sup> Robbins, L. (1938), 'Inter-personal comparisons of utility', *Economic Journal*, 48 635–

inter-personal comparisons of utility<sup>7</sup>. New welfare economics attempted to construct a theoretical framework based on ordinal utility without relying on interpersonal utility comparisons. This provides, according to them, the soundest *ethical* basis for the organization and operation of social institutions<sup>8</sup>. Critics to this approach claim the weaknesses of the concept of economic welfare to comprehend all the dimensions of human motivation and choice and they advance various other objectives allegedly pursued by EU competition law. These two approaches are not as dramatically different as it is usually presented, for the simple reason that both views may be inspired by some form of utilitarian or welfarist argument and that, with some exceptions, non-economic welfare goals may be analysed in broader welfare or well-being terms. Finally, some authors oppose any approach that would assess the aims of EU competition law even in broadest welfarist terms, advancing a purely deontological argument for competition (regardless of outcomes) or arguing that all outcomes resulting from a spontaneous competitive order are, as a matter of principle, normatively superior than any other outcome. I will first examine the narrow economic welfare perspective, before delving into non-economic welfare or non-welfare oriented approaches to competition law.

### A. The economic welfare perspective

The view that competition law should aim to promote some form of economic welfare is intrinsically linked to the influence of economics and in particular welfare economics, consumer theory and related fields in competition law analysis. This influence may be explained by the more economics-oriented approach that has been gradually introduced in EU competition law with the implementation of the EU merger regulation in the 1990s, the reform of the law on vertical restraints and cooperation agreements in the late 1990s and early 2000s, and most recently the discussion over a more effects-based economic approach in the implementation of the abuse of dominance provisions of EU competition law<sup>9</sup>.

As it was the case in US antitrust law, the debate focuses on the importance of concepts such as “economic efficiency”, “total” or “consumer welfare” at the adjudicative, doctrinal and jurisprudential levels of legal reasoning in EU competition law<sup>10</sup>. The

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<sup>7</sup> For a critical analysis of the development of utility theory and interpersonal comparisons of utility, see, among others, Stigler, G. (1950), ‘The Development of Utility Theory I’ *The Journal of Political Economy* **58(4)** 307-327; Stigler, G. (1950), ‘The Development of Utility Theory II’ *The Journal of Political Economy* **58(5)** 373-396;

<sup>8</sup> See, for instance, the analysis of the utility theory of Marshall by Parsons, T. (1937), *The Structure of Social Action*, Vol. 1, New York: The Free Press, pp. 134-141 noting the ethical aims of the theory: “the development of character”.

<sup>9</sup> Starting with the EAGCP, Report on an Economic Approach to Article 82 EC (July 2005), [http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf)

<sup>10</sup> I follow here R. Dworkin’s categorization of four stages in legal reasoning: R. Dworkin, *Justice in Robes* (Harvard Univ. Press, 2006), pp. 9-21. Dworkin distinguishes the semantic stage (which relates to the general assumptions and practices people share over the concept of law- e.g. criterial, interpretive, natural kind), the jurisprudential stage (the development of a theory of law that is appropriate given the theorist’s answer at the semantic stage, in other words the values inspiring a specific legal practice), the doctrinal stage (constructing an account of the truth conditions of propositions of law in the light of the values identified in the jurisprudential stage) and the adjudicative stage (where judges or decision-makers adopt propositions of law based on the

proponents of an economic efficiency approach distinguish between Pareto efficiency and Kaldor-Hicks efficiency. If one focuses on efficiency in consumption<sup>11</sup>, Pareto efficiency requires allocating goods between consumers so that it would not be possible by any reallocation to make people better off without making anybody else worse off. The Potential Pareto Improvement Criterion (or Kaldor-Hicks efficiency) advances that if the magnitude of the gains from moving from one state of the economy to another is greater than the magnitude of the losses, then social welfare is increased by making the move even, if no actual compensation is made<sup>12</sup>. According to Kaldor-Hicks efficiency, an outcome is efficient if those that are made better off can, *potentially*, compensate those that were made worse off, with the resulting outcome still being Pareto optimal. The winners should, in theory, be able to compensate the losers, but there is no requirement that compensation should be effectively paid.

The Kaldor-Hicks efficiency is based on the following two fundamental theorems of welfare economics<sup>13</sup>:

*“The First Fundamental Theorem of Welfare Economics:* Assume that all individuals and firms are selfish price takers. Then a competitive equilibrium is Pareto optimal.

*The Second Fundamental Theorem of Welfare Economics:* Assume that all individuals and producers are selfish price takers. Then almost any Pareto optimal equilibrium

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conclusions reached at the doctrinal stage). For example, the economic efficiency versus justice debate that permeates the question of the objectives of competition law belongs to the jurisprudential stage as it refers to the values that should provide content to the principle of coherence in legal interpretation. We have focused elsewhere on the interaction of economics and the law at the doctrinal and adjudicative stage: Lianos, I. (2009) ‘Lost in translation? Towards a theory of economic transplants’, *Current Legal Problems* **62(1)** 346-404. This study will mainly focus on the jurisprudential stage, although as I will further explain, and probably contrary to Dworkin’s view, there is a considerable interplay and mutual dependence between the jurisprudential and adjudicative stages, as in reality the values pursued by the specific legal system are function of a comparative institutional analysis performed at the adjudicative stage. However, for the adepts of a normative perspective in EU competition law, the two stages are clearly separated, with the adjudicative stage being locked in to decisions made at the jurisprudential stage.

<sup>11</sup> One could advance a growth-related theory of competition law emphasizing the supply side, instead of the demand side (consumers). There is evidence that competition increases the chances of innovation and growth: Arrow, K (1962) ‘Economic Welfare and the Allocation of Resources for Inventions’, in (R. Nelson ed.) *The Rate and Direction of Inventive Activity: Economic and Social Factors*, NBER (noting that a monopolist that is not exposed to actual or potential competition has less incentive to invest in R&D than a firm in a competitive industry); Spence, M. (1984) ‘Cost Reduction, Competition, and Industry Performance’, *Econometrica* **52** 101-122; Dutz, M. & A. Hayri (2000) ‘Does More Intense Competition Lead to Higher Growth?’ (World Bank Working Paper No. 2320); Aghion, Ph. M. Dewatripont & P. Rey (1999), ‘Competition, Financial Discipline and Growth’, *Review of Economic Studies* **66** 825-852; On the contrary, Schumpeterian models of growth argue that competition does not lead to growth. There are a lot of variants of this doctrine from the narrower (that we need big firms to generate innovation) to the broader (that industrial policies should take precedence to competition policies or that too much competition is bad for growth). See, however, Aghion, Ph. & R. Griffith (2005), *Competition and Growth: Reconciling Theory and Evidence*, MIT Press (noting that the greatest rate of innovation is observed in industries where the two main firms are technologically neck-and-neck. In these instances the incentive to innovate and thus to escape competition is the greatest).

<sup>12</sup> Hicks, J.R. (1939). ‘The Foundations of Welfare Economics’ *Economic Journal* **49(196)** 696–712; Kaldor, N. (1939) ‘Welfare Propositions in Economics and Interpersonal Comparisons of Utility’ *Economic Journal* **49(145)** 549–52

<sup>13</sup> See, Blaug, M. (2007) ‘The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated’, *History of Political Economy* **39(2)** 185-207.

can be supported via the competitive mechanism, provided appropriate lump sum taxes and transfers are imposed on individuals and firms”.

Contemporary economists do not rely on the First Fundamental Theorem as externalities, market failures, and imperfect competition are almost universally recognized, yet, the Second Fundamental Theorem implies that if a particular state of the economy is judged to be desirable, it may be achieved through lump-sum transfers, hence separating efficiency from distributive justice. Following the Kaldor-Hicks criterion of efficiency, economic policy recommendations should be determined by efficiency, distribution remaining a problem for the political realm (the separability thesis)<sup>14</sup>.

The construction of welfare economics as a “scientific” discipline inspired by logical positivism led to some stark methodological choices and a narrowing down of the accepted methods of economic inquiry<sup>15</sup>. In contrast to the idea of utilitarianism that promoting the sum of pleasure of the many should become the aim of public policy and to its hopes that all experiences of pleasure would prove to be measurable on a single scale, valid for all people, such that pleasures could be added across different individuals and across time, welfarism abandoned the hedonic concept of utility for its representation as a preference ordering. The concept of preference is itself interpreted in terms of choice and represented by utility functions, a numerical representation of a preference ordering that attaches a number to each possible bundle of goods so that a higher number represents a higher rank of preference. In contrast to traditional utilitarianism, which had assumed the existence of an absolute cardinal measure of pleasure across individuals (making possible interpersonal comparisons of utility), expected utility functions are cardinal in so far as they measure the extent to which one bundle of goods is preferred to another for an individual (hence not providing an index that is interpersonally comparable).

As preferences represent comparative evaluations (choice), utility is deprived of substantive content: it does not denote, as in the utilitarian framework, an expected advantage or satisfaction of desire(s). It is instead purely formal and instrumental. Ordinal utility theory places restrictions on preference ordering with a number of axioms: (i) among the alternatives they believe to be available, it is assumed that agents will choose one that is at the top of their preference ranking, so that any two bundles of commodity can always be compared and ranked. It is also assumed that households have taken the time for evaluating alternative commodity bundles and can make decisions on the preference ordering of these bundles (completeness), (ii) if A is preferred to B and B to C, then A should be preferred to C. (transitivity), (iii) whether an agent prefers A to B remains stable across contexts (context-

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<sup>14</sup> The separability between questions of economic efficiency and issues of distribution has been criticized by L. Robbins who advanced the view that there is a distinction between normative and positive economics but that economists should avoid value-laden policy recommendations, without making explicit their normative predispositions: see, Robbins, L. (1981) ‘Economics and Political Economy’ *American Economic Review* 71 1-10. For a position justifying Kaldor-Hicks hypothetical compensation, and thus the separability thesis, from an ethical and political perspective, see, Posner, R.A. (1980), ‘The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication’, *Hofstra Law Review* 8 487-507 efficiency as a moral criterion); Posner, R.A. (1979) ‘Utilitarianism, Economics, and Legal Theory’, *Journal of Legal Studies* 8 103-140.

<sup>15</sup> Milonakis, D. and B. Fine (2009), *From Political Economy to Economics*, Routledge noting the implosion of principle in economics but the explosion of the application of their model in other social sciences.

independence). An additional axiom often invoked is that more of a commodity is preferred to less (*nonsatiation*), the assumption being that the commodity is desirable. In conclusion, preferences are always comparative and cannot be defined in terms of well-being.

Households act in order to maximize their utility. This involves the reconciliation of their preference ordering (or utility function) with their given budget (income). The budget constraint, along with the agent's preferences, provide the necessary information required to determine the consumption bundle that would maximize the agent's utility up to a tangency point, which indicates that there is no possibility of increasing utility by moving along the budget constraint. This theoretical maximum is however difficult to reach as consumers' tastes frequently change and prices as well; hence, the agents will constantly adjust their purchase to reflect these changes. It is important to note here that economists assume that decisions are always reached by comparing additional benefits to additional costs at each instance of decision-making, what is called marginal analysis or marginalism. Hence, the utility is only marginal, as the choice over this or other alternative of consumption is marginal. The utility maximization hypothesis is axiom-based, as it is assumed that choices will be determined by preferences and budget constraints.

An alternative way of looking to utility is to adopt a revealed preference theory approach, which infers the preferences of consumers from their actual choices. The welfare analysis usually performed in competition law links actions to choices, choices to preferences and preferences to welfare. Revealed preference theory assumes that the satisfaction of the actual preferences of agents for bundles of products, according to their preference ordering, constitutes well-being. From a welfarist approach to competition law, the goal of competition law enforcement should be to enable the agents/households to satisfy these (revealed) preferences at the lower cost for them. Assuming that households are consumers (final and intermediary) and producers/suppliers/shareholders, the objective should be to ensure the maximum level of efficiency for all these categories. This includes allocative efficiency, for example, the possibility for consumers to pay a price that corresponds to their willingness to pay or in some cases less than their willingness to pay (leading to consumer surplus). It should also include the possibility for producers to use production processes that yield the highest output levels for a given set of inputs or for consumers the possibility to enjoy innovative products and services, what is usually referred to as dynamic efficiency. Finally, one should take into account the scale efficiencies producers may enjoy, enabling them to reduce the production costs of a specific good (productive efficiency) and thus to raise their surplus in the sense that if a producer has a willingness to sell, and the market price for a good is above that price, then they would be able gain a surplus equal to the gap (producer surplus).

The application of the Kaldor-Hicks standard in judging the efficiency of a change from one competitive situation to another in competition law, takes the form of a "total welfare standard". The latter is a measure that aggregates the surplus of different groups in the economy (e.g. producers, consumers) and measures the welfare consequences of the change. It is important that total (consumer and producer) surplus increases, even if the surplus of one of the groups (consumers or producers) diminishes. In conformity to the



second fundamental theorem of welfare economics, only the size of the economic pie matters, not its distribution among each group. EU competition law seems, however, to emphasize more consumer surplus than producer surplus, and goes as far as accepting that wealth transfers from final consumers to producers might be a matter of concern for competition law enforcement<sup>16</sup>. Furthermore, article 101(3) TFEU provides that consumers/users should be awarded a fair share of the possible efficiency gains that are claimed by a producer and resulting from an anticompetitive agreement. For instance, it would be impossible to justify under Article 101(3) an agreement that affects consumers because it leads to higher prices, lower output, less innovation or less quality, even if on aggregate that agreement provides important efficiency gains to the producers enabling them to theoretically compensate the consumers for their losses<sup>17</sup>. This indicates that EU competition law may not adopt an economic efficiency-based approach (Kaldor-Hicks) and that issues of distribution play an important role in EU competition law.

In addition to the point previously made that EU competition law does not adhere to an economic efficiency/total welfare standard view, one may claim that there are strong normative arguments for opposing the implementation of such a standard in EU competition law.

First, the Kaldor-Hicks compensation approach suffers from various fundamental problems that may preclude its practical application. The separability thesis advanced may be criticized for not taking into account the inevitable distributive effects of an economic efficiency criterion. The Second welfare theorem of economics denotes a *status quo* bias for the existing allocation of resources, deemed efficient. Yet, the existing resource allocation may be the product of an unjust initial distribution of income that may contravene principles of social justice, as these are defined by non-utilitarian theories of justice<sup>18</sup>. The proponents of the economic efficiency approach often advance that inequalities in the initial distribution may be addressed by the political system, which might decide to impose a lump sum tax compensating the losers and ensuring an equality of opportunity. The implicit assumption is that the tax system is a more efficient way of engaging in redistribution than the regulatory system<sup>19</sup>. However, one may reverse the order of these arguments and suggest instead that it is *only* if the question of fair and equitable income distribution is addressed by the political system that it may be legitimate for competition law to focus exclusively on economic efficiency. It is also important to take into account the inability of the EU to employ fiscal instruments to redistribute wealth across the Union. EU member States differ greatly in their

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<sup>16</sup> See, our analysis, *infra*.

<sup>17</sup> The trade-off between dynamic efficiency gains and static allocative efficiency gains in a total welfare context might be complicated. See our analysis *infra*.

<sup>18</sup> See, for instance, the perspective of J. Rawls (1971), *A Theory of Justice*, Harvard University Press introducing the idea that society should be conceived as a system of cooperation designed to advance the mutual advantage of each members and of *each* of its members. Individuals should be recognized primary social goods, as rights and liberties, powers and opportunities, income and wealth, chosen by the parties to the social contract from an original position behind a veil of ignorance that prevents them from knowing anything about their future position.

<sup>19</sup> This is related to the discussion over the comparison between taxation by regulation and direct taxation, the latter being considered more efficient, *under* very specific conditions, see Atkinson, A. and J. Stiglitz (1976), 'The Design of Tax Structure: Direct versus Indirect Taxation' *Journal of Public Economics* 6 55-75.

levels of wealth, a disparity that is currently increasing as a result of the expansion of the EU to the east and the important economic crisis affecting southern Europe<sup>20</sup>. McDonnell and Faber also note that powerful firms are not randomly distributed across Europe, and hence “producer surplus is likely to accrue primarily to the most powerful and wealthy EU members, increasing existing wealth disparities at the margins”<sup>21</sup>. Efficient rules that would focus only on total surplus with no attention to the allocation of that surplus between producers and consumers (which is excluded by efficiency analysis as a distributive justice issue) will tend to pump wealth in the “wrong” direction<sup>22</sup>. In the absence of adequate resources and a competence for the EU to mitigate these distributional consequences across the Union [in view of the absence of an EU corporate income tax and the low wealth transfer from rich to poor Member States (assuming that the qualification of “rich” and “poor” States represents average disposable income for consumers)], there may be a less strong argument for the separability thesis in the EU than in jurisdictions, such as the United States, which dispose the adequate fiscal instruments to pursue redistribution at the federal level.

In addition to these practical difficulties for the application of a total welfare standard in EU competition law there are also a number of theoretical objections that raise doubts on the desirability of the Kaldor-Hicks economic efficiency total welfare standard.

Second, Scitovsky showed the cyclical (or double switching) problem faced by this type of economic efficiency analysis as the standard uses *ex post* results to evaluate policy changes: if a movement from one point to another in a utility space can be shown to be Pareto improving according to the Kaldor-Hicks criterion, then it may be shown that a movement back to the original point is also Pareto improving<sup>23</sup>. Policy options cannot therefore be ranked unambiguously, “because rankings depend upon the distribution of wealth, which in turn depends upon policy”<sup>24</sup>.

Third, the Kaldor-Hicks efficiency criterion relates to the preferences of each agent for different outcomes or states of affairs. Yet, the test only takes account of the preferences of the specific set of agents to which it is applied, by exploring their revealed preferences, without paying any attention to other affected parties. This is accentuated by the fact that competition analysis is limited to the participants of a relevant market (as a result of the partial equilibrium analysis performed) and does not include all the other markets or sectors of the economy that may be affected by the restriction of competition and/or the remedial action adopted by the competition authority<sup>25</sup>. This may be particularly important if the

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<sup>20</sup> McDonnell, B. & D.A. Farber (2003) ‘Are Efficient Antitrust Rules Always Optimal?’ *Antitrust Bulletin* **Fall 2003** 807-835, p. 825.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Cowen, T. (1993) ‘The Scope and Limits of Preference Sovereignty’ *Economics and Philosophy* **9** 253-269, spec. pp. 254-258.

<sup>24</sup> *Ibid.*, p. 255.

<sup>25</sup> The extreme version of this argument may take the form of the theory of second best: Lipsey, R.G. & K. Lancaster (1956-1957) ‘The General Theory of Second Best’ *The Review of Economic Studies*, 24(1) 11–32, suggesting that government interventions to make a market more competitive, may not make consumers better off, as if the first best solution is not realized (e.g. perfect competition), then there is nothing to choose between the second or the third best. This is contrary to the belief in welfare economics that if first best is unattainable,

change in the competitive conditions that has to be assessed may bring new parties into existence (consumers or firms), or exclude others in other relevant markets or economic sectors, for which there is no account of their preferences.

Fourth, the Potential Pareto Improvement criterion has been used to argue that increases in output (shifts in the production possibilities frontier) are an improvement because they are potentially welfare enhancing, assuming that the production (or consumption) of more commodities is welfare enhancing. Indeed, by definition, more production of something leads to more units of that something to be distributed (with the result that allocative efficiency is improved). Yet, the question arises if that increases the "right" output mix. The decision over the proper mix of goods and productive inputs involves some normative judgments over what constitutes "good" or "bad consumption". For example, producing more industrial waste might not be a "good" commodity for a welfare perspective, in view of the possible lasting effects of such waste on the environment and quality of life standards.

Fifth, revealed preferences theory assumes that preferences are always exogenous, hence they should be the starting point of the analysis. Yet, this view may be criticized. Preferences often depend on factors that should be irrelevant, such as how is the choice framed. Behavioural economics research provides evidence of biases<sup>26</sup>, indicating that the context of choice may have an important role to play in the way consumers develop their preferences (framing effects)<sup>27</sup>. Preferences may be based on imperfect information, such as the mis-estimation of small probability events or a tendency to over-estimate one's probability of success<sup>28</sup>. People may also prefer something they already have to something they do not have (endowment effect), they may discount the near future at a higher rate than the distant future, they may have different discount rates for different kinds of outcomes (hence affecting their consumption decisions), or they may be risk averse when they make decisions, preferring the *status quo* to a change that would promote their welfare<sup>29</sup>. Preferences are also formed within a specific social context and may be endogenous, in the sense that they depend on the individual's personal history and the social and cultural context in which the individual is integrated<sup>30</sup>. Furthermore, one should not exclude that a decision, even if *a priori* Pareto efficient, may lead to a change in the composition and/or preferences of the population or even of individual agents, thus leading to a new population or to an agent with a different set of preferences than those initially considered. Inter-generation effects

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then second best may be attained, even if some Pareto optimality conditions are not satisfied (Kaldor-Hicks efficiency). In view of the fact that the competition law assessment is partial and refers to a specific market, ignoring all other effects to non-relevant markets, the criticism of the theory of the second best may have a devastating effect in competition law.

<sup>26</sup> OFT 1224, What does Behavioral Economics Mean for Competition Policy?, March 2010, accessible at [http://www.of.gov.uk/shared\\_of/economic\\_research/of1224.pdf](http://www.of.gov.uk/shared_of/economic_research/of1224.pdf)

<sup>27</sup> Tversky, A. & Kahneman, D. (1986), Rational Choice and the Framing of Decisions, *Journal of Business Studies* **59** 251-278.

<sup>28</sup> Cowen, T. (1993), op. cit., p. 261.

<sup>29</sup> Kahneman, D. & Thaler, R.H. (2006) 'Anomalies: Utility Maximization and Experienced Utility' *Journal of Economic Perspectives* **20** 221-234; Samuelson, S. & R. Zeckhauser (1988), 'Status Quo Bias in Decision Making', *Journal of Risk and Uncertainty* **1** 7-59; see also Thaler, R. (1980) 'Toward a Positive Theory of Consumer Choice', *Journal of Economic Behaviour and Organization* **1** 39-60.

<sup>30</sup> For an interesting critique, based on the role of culture, see V.H. Storr (2013), *Understanding the Culture of Markets*, London & New York: Routledge.

should also be taken into account in cases involving some lasting effects (e.g. environmental or sustainable development objectives as opposed to lower prices for actual consumers), thus raising the complexity and difficulty of cost benefit analysis in this context<sup>31</sup>.

Sixth, preferences may not relate to outcomes (for example the quantity and quality of goods exchanged) but to the process of achieving these outcomes (e.g. fairness, competition). There is no doubt that sport fans would enjoy more a fair competition with no record performances than one profoundly distorted by doping competition, which will lead to record performances. The point made relates to the indifference of welfare economics on the content of preferences: “by taking preferences to be total comparative evaluations (as they must if preferences are to determine choices), economists allow preferences to be influenced by everything agents regard as relevant to their choices, whether these be moral or aesthetic considerations, ideals, whims, fantasies, or passions of all sorts”<sup>32</sup>. Yet, this ignores all instances in which preferences relate to a process rather than an outcome.

Seventh, there is an inherent problem in inferring preferences by choice, as standard revealed preference theory does. This limits preferences to those alternatives among which the agents choose in fact: when there is no choice, there is no preference<sup>33</sup>. This inference may prove far-fetched. Furthermore, as it has been noted by Daniel Hausman, “preferences cannot be defined by choice, because the same choice reflects different preferences when beliefs differ”<sup>34</sup>. Preferences can be inferred from choices *only given premises regarding beliefs*<sup>35</sup>. Inferences concerning preferences also depend on assumptions about the constraints faced by the particular agents and the way they would be able to individualize the alternatives. Expected utility theory relates preferences over payoffs of actions, enabling us to make inferences about preferences from expected advantage, under the assumption that the total subjective ranking of alternatives coincides with the agents’ ranking in terms of expected advantage. Yet, the idea that *one* preference ordering may reflect the person’s interests, represent her welfare and describe her actual choice and behaviour has been criticized for not accounting for situations when choice of alternatives can be explained by commitment, under which an agent acts without expecting a benefit (for example, she may be motivated by altruism or moved by malevolent purposes)<sup>36</sup>

Eighth, it is wrong to assume that the satisfaction of revealed preferences will necessarily promote welfare as people often prefer what is worse for their welfare in the long run because “their preferences are evil, ignorant, adaptive, or otherwise misshapen”<sup>37</sup>. Responding to this criticism some authors advanced the need for a laundered set of

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<sup>31</sup> Cowen, T. (1993), op. cit., pp. 258-260.

<sup>32</sup> Hausman D.M. (2012), *Preference, Value, Choice, and Welfare*, Cambridge University Press.

<sup>33</sup> Ibid., p. 27.

<sup>34</sup> Ibid., pp. 27-28. Hausman gives the example of Romeo choosing death to life under the mistaken belief that Juliet was dead. But of course, he does not prefer death to life with Juliet: “(h)is choice does not reveal his preference, because he is mistaken about what the alternatives are among which he is choosing”.

<sup>35</sup> Ibid., p. 28. Emphasis added.

<sup>36</sup> Sen, A. (1982), *Choice, Welfare and Measurement*, Harvard University Press.

<sup>37</sup> Adler M.D. and E.A. Posner (2006), *New Foundations of Cost Benefit Analysis*, Harvard University Press, p.

preferences, removing the lack of information, cognitive biases, or anti-social preferences (*non-ideal* preferences) from the welfare calculus<sup>38</sup>. However, if this is the case, actual preferences cannot be a proxy for informed and laundered self-interested preferences.

Ninth, some philosophers have criticized the implicit assumption of economists that satisfying preferences leads to welfare by distinguishing between welfare defined as a “wholehearted and successful pursuit of valuable relationships and goals”, and the agent’s feeling of satisfaction for achieving her preferences, whatever these might be<sup>39</sup>.

For these reasons, some recent studies have advanced the view that although welfare cannot be defined as the satisfaction of revealed preferences, preferences may be considered at least as *evidence* of well-being among other types of evidence<sup>40</sup>. This view recognizes that relying on people’s revealed preferences might be more informative on their well-being than relying on the judgment of government officials, judges, legislators or moral philosophers.

An alternative approach to that of actual or laundered revealed preferences is to construct an objective list of preferences (or capabilities) that might reasonably be expected to promote an agent’s well-being<sup>41</sup>. Some recent work of the OECD has taken a multi-dimensional view of well-being, adopting an objective-list approach identifying a number of dimensions of well-being, including material living standards (income, consumption and wealth), health, education, personal activities including work, political voice and governance, social connections and relationships, environment (present and future conditions) and insecurity of an economic or physical nature<sup>42</sup>. Although it is clear that wealth is only one factor among the many determining well-being, it is difficult to imagine how such an approach could be incorporated in competition law adjudication and how information on all these factors could be collected and assessed by competition authorities or courts on a case by case basis.

Other welfarist approaches question ordinalism and its insistence on the order of preferences, supporting instead a hedonic approach, close to that of the old utilitarianism of Bentham, that would measure the happiness of agents by evaluating the way that person feels throughout her life (subjective experience of life)<sup>43</sup>. However, the application of happiness

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<sup>38</sup> Ibid., p. 34.

<sup>39</sup> Raz, J. (2004), ‘The Role of Well Being’ *Ethics* **18** 269-294.

<sup>40</sup> Hausman D.M. (2012), op. cit., pp. 93-102.

<sup>41</sup> See, for instance, Sen, A. (1985) *Commodities and Capabilities*, North-Holland advancing the moral significance of individuals’ capability of achieving the kind of lives they have reason to value. For a different objective list approach see, Nussbaum, M. (2011), *Creating Capabilities: The Human Development Approach*, Harvard University Press. For Sen, well-being depends on the agent using these capabilities, while for Nussbaum this is not essential.

<sup>42</sup> See, the OECD, Better Life Initiative, accessible at <http://www.oecdbetterlifeindex.org/>, last accessed on November 1<sup>st</sup>, 2012. The OECD’s work follows the work of the Commission on the Measurement of Economic Performance and Social Progress (J. Stiglitz, A. Sen, J.P. Fitoussi), Report by the Commission on the Measurement of Economic Performance and Social Progress, accessible at [http://www.stiglitz-sen-fitoussi.fr/documents/rapport\\_anglais.pdf](http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf), last accessed on November 1<sup>st</sup>, 2012.

<sup>43</sup> Layard, R (2005), *Happiness: Lessons from a New Science*. London: Allen Lane. On the measurement of happiness see, See, Kahneman, D. (1999) ‘Objective Happiness’, in *Kahneman, D. et al. (eds.), Well Being: The Foundations of Hedonic Psychology*, Russel Sage Foundation, pp. 3-25.

studies in the competition law context also runs to the same practical difficulties than the objective list multi-factored analysis, with the additional limitation that measuring the change in happiness following a specific anticompetitive conduct would prove an extremely difficult or almost impossible task, under the current circumstances, unless subjective well-being is determined by contingent valuation surveys, as it is the case in some procedures of cost benefit analysis. Yet, it would be very difficult to assess subjectively reported data on the moment-by-moment effect of a specific anticompetitive practice during the adjudicative process, as, by definition, competition law investigations are initiated many years after the specific conduct was implemented. One might also raise important objections to happiness surveys, including measurement problems in the multi-cultural environment of the EU, as the concept of “happiness” may not have the same meaning in all Member States. Additional concerns include the ethical problems raised by the “hedonic engineering” of the State required in this case, or because of the assumption of the “aggregative understanding of happiness” (the assumption that happiness of a whole life is “the sum of the happiness of its individual moments”), which is not a view shared by all cultures, and more generally the one-dimensional view of happiness advanced by these authors<sup>44</sup>. In any case, even if measuring happiness was practically possible and ethically acceptable, the decision-maker should also incorporate in the analysis the risk of forecasting errors, cognitive heuristics and the possible discrepancy between predicted happiness and experienced happiness or well-being.

In conclusion, an economic welfare criterion based on revealed preferences runs to a series of difficulties and moral objections. The effort to adopt a multi-factored conception of welfare, based on an objective list approach or on a hedonic welfare (happiness) perspective may push the adjudicative process beyond its limits and may also be, in some circumstances, ethically objectionable.

## **B. The non-economic welfare view**

Analysing in detail all the possible aims of EU competition law, other than economic welfare, considered by the competition authorities, courts and academic commentators is beyond the aims of this study<sup>45</sup>. Among these objectives, one may include economic democracy, fairness, the completion of the internal market, the principle of freedom of competition, the protection of a group of market actors, such as final consumers or small and medium undertakings. I will examine, among these objectives, those that have exercised a certain influence in EU competition law discourse. I will focus on the political (economy) objective of market integration, that of the protection of consumers and the principle of the freedom to compete. The discussion will show that these objectives may also be incorporated to a certain extent to an economic welfare/well-being approach. However, there is a residual non-welfare related view of the objectives of EU competition law that would value the

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<sup>44</sup> See, *inter alia*, the criticisms of Skidelsky, R. & E. Skidelsky (2012), *How Much is Enough?*, Allen Lane-Penguin Books, pp. 96-123.

<sup>45</sup> On the most popular objectives of competition law, see the survey of competition authorities prepared by the International Competition Network (2011), *Competition Enforcement and Consumer Welfare – Setting the Agenda*, accessible at <http://internationalcompetitionnetwork.org/uploads/library/doc857.pdf>, last accessed November 1<sup>st</sup>, 2012. For a recent thoughtful discussion of the survey and the question of the aims of competition law, from a US perspective, see Stucke, M. (2012), *op. cit.*

protection of the competitive process for deontological, rather than for consequentialist reasons.

## 1. The integration of the Internal Market

The objective of market integration has of course marked considerably the history of EU competition law, and still does to this day. It is well known that territorial allocation, restrictions to exports or more generally restrictions to parallel trade are classified as restrictions of competition by object under Article 101(1) TFEU, even if they do not produce any effects on final consumers<sup>46</sup>. They do not benefit from the *de minimis* rule<sup>47</sup>, they are excluded from the benefit of the block exemption regulations as hardcore restrictions and they have rarely been found to fulfil the conditions of the exception of article 101(3) TFEU<sup>48</sup>. A possible explanation of such a restrictive approach to any conduct that jeopardizes the principle of market integration is its significance as a political objective for the EU, the idea being that a common market will ultimately lead to political unification. Despite the important attraction of a deontological approach in this context, in recent years the EU courts have moved to a more pragmatic view of the objective of market integration and have employed reasoning that may be compatible with a welfare perspective.

In *Sot. Lélos Kai Sia v. GlaxoSmithKline*, the CJEU examined the consequences of restrictions of parallel trade to consumers, before finding that they could constitute a restriction of competition under Article 102 TFEU. The Court noted that parallel exports of medicinal products from a Member State where the prices are low to other Member States in which the prices are higher “open up in principle an alternative source of supply to buyers of the medicinal products in those latter States, *which necessarily brings some benefits to the final consumer of those products*”<sup>49</sup>. Indeed, “the attraction of the other source of supply which arises from parallel trade in the importing Member State lies precisely in the fact that that trade is capable of offering the same products on the market of that Member State *at lower prices* than those applied on the same market by the pharmaceuticals companies” and “(a)t the same time [...] parallel trade in medicines from one Member State to another is

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<sup>46</sup> In Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para. 118, the Court of First Instance highlighted that “the objective assigned to Article 101(1) TFEU, which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the *welfare of the final consumer* of the products in question”. The Court of Justice in Joined cases C-501/06 P, 513/06 P, 515/06 P and 519/06 P, *GlaxoSmithKline Services v. Commission* [2009] ECR I-9291, para. 59, 62-64, reversed the judgment of the General Court on this issue and maintained the traditional position of EU competition law that restrictions to parallel imports are restrictive to competition by object.

<sup>47</sup> Case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others* [December 13, 2012], not yet published, para. 37 (“an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition”).

<sup>48</sup> See, however, Joined cases C-501/06 P, 513/06 P, 515/06 P and 519/06 P, *GlaxoSmithKline Services v. Commission* [2009] ECR I-9291, where the Court accepted that restrictions to parallel trade may be justified by Article 101(3) TFEU.

<sup>49</sup> Joined Cases C-468/06 to 478/06, *Sot Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, para. 54

likely to *increase the choice* available to entities in the latter Member State”<sup>50</sup>. The CJEU has also implicitly recognized in this case that restrictions of parallel trade lead to a presumption of negative effects on consumers and hence shift the burden of proof to the defendant, in the context of Article 102 TFEU, without it being necessary for the claimant to bring additional evidence as to the causal link between the specific conduct and consumer harm<sup>51</sup>. The CJEU, however, accepted that a restriction to parallel trade does not amount to an absolute presumption of consumer harm or a *per se* prohibition rule. The presumption of anticompetitive effects may still be rebutted by the defendant in limited circumstances: a company must be ‘in a position to take steps that are reasonable and in proportion to the need to protect its own commercial interests’.<sup>52</sup> The full array of objective justifications may not apply in this case (only reasonable and proportionate protection of commercial interests)<sup>53</sup>, hence the possibility of dominant firms to justify restrictions on parallel trade is limited to circumstances where (a) State intervention is one of the factors liable to create the opportunities for parallel trade in the first place<sup>54</sup> and (b) where a different interpretation of Article 102, rejecting any possibility of justification, would have left dominant firms only the choice ‘not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level’.<sup>55</sup>

## 2. The protection of consumers

According to the case law of the European Courts, one of the principal functions of EU competition law is to prevent “consumer harm”<sup>56</sup>. The European Commission has inferred from the role of “consumer harm” in the case law of the European Courts with regard to identifying the existence of a restriction of competition, that the principal goal of EU competition law is the protection of final or intermediary consumers<sup>57</sup>. The terminology employed is not always clear-cut. For example, in the Commission’s Guidance on its Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by

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<sup>50</sup> Ibid., paras 55-56.

<sup>51</sup> Ibid, paras 56-57 & 66.

<sup>52</sup> Ibid, para 69.

<sup>53</sup> The content of this concept is unclear. A restrictive definition of the concept will cover only a meeting competition defense, thus excluding the consideration of efficiency gains. The interpretation of this expression is not clear. See, Rousseva, E. (2006) ‘The Concept of ‘Objective Justification’ of an Abuse of a Dominant Position: Can it Help to Modernise the Analysis under Article 82?’ *Competition Law Review* 2(2) 27-72, p 33-34 noting that “[...] the question is what a legitimate commercial interest of a dominant undertaking is: does this interest mean only a right of a dominant undertaking to survive on the market, i.e., to prevent its inefficient operation, or does it also mean a right to carry out a profit oriented policy? How does the prerogative of a dominant firm to protect its interest fit with the essential goal of competition to serve consumers’ interests? These are questions on which views diverge”.

<sup>54</sup> Joined Cases C-468/06 to 478/06, *Sot Lelos kai Sia v GlaxoSmithKline*, op. cit., para 67.

<sup>55</sup> Ibid, para 68.

<sup>56</sup> See, for instance, Case C-209/10, *Post Danmark A/S v. Konkurrencerådet* [March 27, 2012], not yet published, para. 20.

<sup>57</sup> Commission Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, para. 13, noting that “(t)he objective of Article [101 TFEU] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers” & para. 84 (observing that the concept of consumer encompasses both direct and indirect consumers).



Dominant Undertakings, the concept of “consumer harm” is defined broadly as covering all practices restricting competition in the form of higher prices, lower innovation, and/or narrower consumer choice<sup>58</sup>. The Commission’s approach remains impressionistic: sometimes the guidance refers to “consumer harm” or “detriment to consumers”, other times to “consumer welfare”<sup>59</sup>: no definition is provided. The concept of consumer welfare has never been explicitly endorsed by the Court of Justice of the EU, and the distinction between consumer welfare, consumer surplus and consumer choice has been a matter of theoretical speculation<sup>60</sup>. Some authors argue that although the concept of consumer harm is used as a proxy for anticompetitive effects, it does not follow that the protection of the final consumer becomes the principal goal of competition law, as the consumer harm standard would be also compatible with a total (social) welfare approach<sup>61</sup>.

The concept of “consumer harm” may include multiple dimensions, when one tries to extrapolate from it information on the goals of EU competition law:

(i). In the economic jargon, the protection of consumer surplus constitutes an important part of the total welfare standard test. In this context, consumer surplus denotes the consumer part of the deadweight loss suffered as a result of the restriction of competition. For example, a price increase might lead to a volume effect that would be suffered by a certain category of consumers: because of the price increase some consumers will not be able to buy the product anymore, although past consumption patterns (revealed preferences) indicate that they would have preferred to do so, if the price had not increased. Under this narrow definition of consumer surplus, the overcharge paid by the consumers as a result of the price increase should not be of concern for competition law enforcement, as it constitutes a wealth transfer from the buyers to the sellers. The suppliers may be in a position to compensate (hypothetically, not actually) the loss that consumers have suffered while still being able to compensate with this wealth transfer their own losses following the volume effect (producer surplus). In this configuration the situation will be Kaldor-Hicks efficient. I will call this view of consumer harm: the “consumer surplus standard”.

(ii). It is possible to decide that consumer surplus should be preserved at any cost and thus reject any compensation by the supplier that does not compensate actually and

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<sup>58</sup> Communication from the Commission — 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 45/7, para. 19 (“The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice”). The Commission also employs in this text the concepts of “consumer detriment” and “consumer harm”.

<sup>59</sup> *Ibid.*, paras 19, 30, 86 (referring to “consumer welfare”).

<sup>60</sup> See, for instance, the discussion in Orbach, B. (2011), ‘The Antitrust Consumer Welfare paradox’ *Journal of Competition Law & Economics* 7 133-164; Cseres, K. (2007), ‘The Controversies of the Consumer Welfare Standard’ *Competition Law Review* 3 121-173.

<sup>61</sup> Nazzini, R (2011), *The Foundations of European Union Competition Law – The Objective and Principles of Article 102*, Oxford University Press, p. 49.

effectively the losses incurred by these consumers as a result of the volume effect. For clarity purposes I will refer to this view as the “narrow consumer welfare standard”.

(iii). There is also an argument to move beyond consumer surplus and include in the analysis the wealth transfer that consumers have incurred because of the overcharges following the restriction of competition. These may not only relate to higher prices but could cover any other parameter of competition, such as quality, variety, innovation. In this case, both the loss of consumer surplus and wealth transfers will be compared to the total efficiency gains pertaining to the supplier(s), thus enabling a cost benefit analysis of the effect of the conduct on the welfare of a specific group of market actors, direct and indirect consumers (not all market actors). The idea is that following the change from an equilibrium situation to another, the consumers of the specific product will benefit from a surplus and/or wealth transfer, in the sense that their ability to satisfy their preferences will increase. Again, for clarity purposes this standard will be referred to as the “extended consumer welfare standard”.

(iv). Some authors also argue that competition authorities should aim to preserve an optimal level of “consumer choice”, defined as “the state of affairs where the consumer has the power to define his or her own wants and the ability to satisfy these wants at competitive prices”<sup>62</sup>. This concept seems broader than the concepts of “consumer surplus” and “consumer welfare” (the latter including consumer surplus + the wealth transfer because of the overcharge) as it may include other parameters than price, in particular “variety”. The same authors have used interchangeably the term of “consumer sovereignty”, which is defined as “the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses”<sup>63</sup>. Defining the “optimal degree” of consumer choice or consumer sovereignty and measuring it using some operational parameters seems however a daunting task. Consumer sovereignty may be conceptually appealing but may prove empirically weak to implement in competition law enforcement<sup>64</sup>. One might be obliged to go a step further and claim that consumer sovereignty can be preserved by the ability of consumers to influence the characteristics of the product bundle according to their own hypothetical revealed preferences. Hypothetical revealed preference theory defines an agent’s preferences in terms of what she would choose if she were able to choose, thus switching from actual to hypothetical choice<sup>65</sup>. The way this theory will work in practice is still a matter of speculation. It is clear that consumers are influenced in their decisions by “the context of choice, defined by the set of options under consideration. In

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<sup>62</sup> Lande, R.H. (2001) ‘Consumer Choice as the Ultimate Goal of Antitrust’ *University of Pittsburgh Law Review* **62**(3) 503-525, p. 503. For an application of this approach in EU competition law, see, Nihoul, P. (2012), op. cit.

<sup>63</sup> Averitt, N.W. & R. H. Lande (1997), ‘Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law’, *Antitrust Law Journal* **65** 713-756, 715 .

<sup>64</sup> See also, Nazzini, R (2011), op. cit., pp. 30-32, p. 31 (noting that “when consumer choice is seen as an objective in its own right, it may become a disguised form of competitor protection: a competitor deserves to be protected solely on the basis that it offers a differentiated product”).

<sup>65</sup> For a critical analysis see, Hausman D.M. (2012), *Preference, Value, Choice, and Welfare*, Cambridge University Press, pp. 31-33, citing as the main proponent of this theory Binmore, K (1994), *Playing Fair*, Cambridge, MA: MIT Press.

particular, the addition and removal of options from the offered set can influence people's preferences among options that were available all along"<sup>66</sup>. The firms with their marketing activities may, for example, shape endogenously consumer preferences by establishing an artificial selection process, "preferences are actually constructed—not merely revealed"<sup>67</sup>. A greater focus on consumer sovereignty may thus, in some cases, lead to more intensive competition law intervention to establish the parameters of independent consumer choice and specific presumptions against commercial practices that deny the sovereignty of consumer choice. Open and contestable markets are a prerequisite for the empowerment of consumers. The consumer choice or consumer sovereignty standard may also accommodate the psychological aspect of the formation of these preferences, which is usually ignored in neoclassical price theory. The integration of behavioural economics and neuro-economics evidence in order to understand the consumers' behaviour and build counterfactuals of hypothetical choice, based on predictions about what someone would choose in a specific choice context may also be one of the implications of this theory.

It is also important to acknowledge the difficulty of engaging in the analysis of the long-term interest of the consumers for innovation and dynamic efficiency, as opposed to their short-term interest on lower prices and allocative efficiency. As it is explained in a Canadian Bureau of Competition commissioned report on *Innovation and Dynamic Efficiencies*,

"(t)o sustain innovative efforts, and thus support dynamic efficiency, firms do not expect to price at short-run marginal cost at every point in time and as a result some degree of allocative inefficiency may be inevitable. Motivating firms to make costly investments in R&D requires some prospect of "profit," which as noted above is in the form of quasi-rents. In the absence of this positive return per unit of output sold, a firm would never be able to recoup its up-front investment in R&D, and would therefore have no incentive to undertake this investment. In other words, innovating firms anticipate a period of "incumbency" during which they are able to sell a product at a price exceeding not only the short-run marginal cost of production, but potentially also the price of existing products (if any) that do not incorporate the innovation. Consumers are willing to pay the higher price because they value the additional attributes embodied in the new or improved product sufficiently to pay a premium for it over other firms' products"<sup>68</sup>.

It follows that firms engaged in considerable research and development and other innovative activity may have low marginal costs but large fixed costs, which would lead them to price significantly above marginal costs in order to earn a competitive return in the long run. This might at first sight seem in contradiction with the static allocative efficiency concern for lower prices and will certainly deviate from the model of perfect competition. From a dynamic *total welfare* (Kaldor-Hicks) perspective, this sacrifice in static allocative efficiency

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<sup>66</sup> Shafir, E, I. Simonson & A. Tversky (1993), 'Reason-Based Choice', *Cognition* **49** 11-36, p. 21.

<sup>67</sup> *Ibid.*, p. 34.

<sup>68</sup> A. Tepperman and M. Sanderson, *Innovation and Dynamic Efficiencies in Merger Review* (Canada, Competition Bureau, 2007), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02378.html#key\\_concepts](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02378.html#key_concepts), pp. 6-7.

may be compensated by the benefits flowing from dynamic efficiency: higher profitability for the undertakings and new or better quality products for the consumers in the long run. However, increasing R&D does not necessarily lead to socially optimal innovation, as firms might have an excessive incentive (relative to that which is socially optimal) to seek to replace other firms (“the business stealing effect”)<sup>69</sup>. As it is noted by the same report, “consumers do not derive benefits from an additional dollar of R&D spending unless that dollar results in an increased likelihood of either a new product being developed or an existing product being made available for a lower price”<sup>70</sup>. In other words, from a non-total welfare (Kaldor-Hicks perspective) what is important is not to focus on R&D but on the innovation process and its outcomes. If only the welfare (short and long term) of consumers matters, then it is important to engage to a difficult exercise of distinguishing between R&D investment from which consumer will ultimately benefit from R&D investment, which will cost consumers more (in terms of allocative efficiency) than what it will provide them in terms of dynamic efficiency. Remote dynamic efficiencies may be discounted to some extent against short-term allocative efficiency losses (greater weight will be given to relatively more certain, short run, effects than uncertain dynamic efficiencies), thus leading to some bias in favour of allocative efficiency. In contrast, from a total welfare perspective, the cost to consumers of the increase of innovative activity is only one component of the analysis, the other being the profits that undertakings derive from the R&D activity long run. A change will thus be deemed Kaldor-Hicks efficient, even if there is over-investment on R&D, with regard to what is socially optimal, should the firms’s profitability increase as a result of this R&D effort, enabling it to potentially compensate the consumers’ loss. A Kaldor-Hicks total welfare approach could also look to the possible effects of innovation across markets, so not only the effects on consumers present in the specific relevant market, but also the effects on suppliers and consumers in other markets that will be affected by the innovative process, hence performing some form of general equilibrium analysis. General equilibrium analysis focuses on the economy as a whole and studies economic changes in *all* the markets of an economy simultaneously.

In competition law, the aim of protecting consumers implies that the outcome/consequences of a specific practice on consumers matters, before any decision on the lawfulness or unlawfulness of this practice has been reached. A reduction of competitive rivalry, following the exclusion of a competitor or an agreement between two competitors to cooperate with each other, will not be found unlawful, if they do not also lead to a likely consumer harm or consumer detriment. A different approach would take a deontological perspective emphasizing competitive rivalry, irrespective of any actual or potential consequences of the specific practice/conduct on consumers. Effects may indicate empirical observable findings on the worsening, in terms of price or quality, of the situation of specific groups of consumers, following the adoption of the anticompetitive practice (actual effects). It may also refer to situations where there are no observable findings of effects on these groups of consumers but there is “a consistent theory of consumer harm” which is empirically validated: that is, “the theory of harm should be consistent with factual observations” (*ex ante* validation) and “that the market outcomes should be consistent with the predictions of the

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<sup>69</sup> Ibid., p. 8.

<sup>70</sup> Ibid., p. 9.

theory” (ex post validation).<sup>71</sup> The theory of harm has the objective to establish a relation of causality between the specific practice and the consumer detriment. One could think in terms of a probability-statement, that is, an evaluation of the “inferential soundness” of this relationship<sup>72</sup>, or in terms of relative plausibility of the specific consumer harm story<sup>73</sup>.

It should be by now clear that some of the dimensions of consumer harm that we have previously examined are only concerned with efficiency or wealth maximization and adopt a Kaldor-Hicks total welfare standard [dimension (i) and (ii)], while others seem to go beyond efficiency and wealth maximization and integrate distributive justice concerns.

The concept of distributive justice has multiple dimensions and its meaning has evolved through time<sup>74</sup>, but it is possible to define it as referring to the morally required distribution of shares of resources among members of a given group, either because of their membership to that group or in accordance with some measure of entitlement which applies to them in virtue of their membership. This is understood dynamically, that is across various situations in the specific jurisdiction. Rights and duties in distributive justice are thus “agent-general”<sup>75</sup>, as they relate to a specific category of actors or group.

As it was previously explained, the problem of distribution was relegated, because of the Kaldor-Hicks separability thesis, outside the realm of economics<sup>76</sup>. Hence, it may not constitute an objective for EU competition law for those advocating as its sole aim total welfare. The concept of “consumer harm” breaks with this tradition as it advances a view of competition law that would promote the interest of a group, consumers, to the detriment of other groups of actors (e.g. managers, shareholders, employees). According to the second condition of Article 101(3), “consumers”, a concept encompassing all direct and indirect users of the product, should receive a “fair share” of the efficiencies generated by the restrictive agreements in order for the agreement to benefit from the exception provided by article 101(3) TFEU. According to the Commission’s Guidelines on the application of Article 101(3),

“The concept of ‘*fair share*’ implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article [101(1)]. In line with the overall objective of Article [101] to prevent anti-competitive agreements, the net effect of the

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<sup>71</sup> Papandropoulos, P. (2008), ‘Implementing an effects-based approach under Article 82’, *Concurrences* **1-2008** 1-5, p. 3.

<sup>72</sup> Cohen, J (1977) *The Probable and the Provable*, Clarendon Press, p. 27

<sup>73</sup> Allen, R.J. (1991), ‘The Nature of Juridical proof’ *Cardozo L Rev*, **13** 373-422.; Pardo, M.S. & R. J. Allen (2008), ‘Juridical Proof and the Best Explanation’ *Law and Philosophy*, **27** 223-268.

<sup>74</sup> Fleischacker, S. (2005) *A Short History of Distributive Justice*, Harvard University Press.

<sup>75</sup> Perry, S. (2000), ‘On the Relationship between Corrective and Distributive Justice’ in Horder, J. (eds.), *Oxford Essays in Jurisprudence*, Oxford: OUP, 237, p.238

<sup>76</sup> Okun, A.M. (1975) *Equality and Efficiency: The Big Tradeoff*, Brookings Institution Press. See most recently, however, Kaplow, L. & Shavell, S. (2002), *Fairness versus Welfare*, Cambridge Mass: Harvard University Press, arguing for an incorporation of distributive justice concerns in defining individual well-being, although advancing that no independent weight should be accorded to notions of fairness that are not concerned exclusively with individuals’ well-being

agreement must *at least be neutral from the point of view of those consumers directly or likely affected by the agreement*. If such consumers are worse off following the agreement, the second condition of Article 101(3) is not fulfilled. The positive effects of an agreement must be balanced against and *compensate* for its negative effects on consumers. When that is the case consumers are not harmed by the agreement [...]. It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits. If a restrictive agreement is likely to lead to higher prices, *consumers must be fully compensated* through increased quality or other benefits. If not, the second condition of Article [101(3)] is not fulfilled<sup>77</sup>.

Although the Commission accepts that consumer harm assessed under Article 101(1) TFEU (e.g. higher prices) might be compensated by some benefits provided by the anticompetitive agreement assessed under Article 101(3) (“efficiency gains”), they require that these benefits *effectively* (and not only hypothetically) and *fully* compensate the consumer harm in a way or another<sup>78</sup>. This does not amount to a Kaldor-Hicks efficiency standard but to a distributive justice standard. If the aim of EU competition law was to protect small and medium enterprises, we would have arrived to the same conclusion, in the sense that in this case small and medium firms’ owners would be favoured in relation to other groups of market actors.

Protecting a specific group of market actors, such as consumers, may be supported by different theoretical foundations. Some have advanced an “original intent” style of argument, based on an historical analysis of the negotiation process of the European Treaties<sup>79</sup>. Others argue a public choice/political economy view based on the relative weakness of consumers’ lobbying compared to firms’ lobbying<sup>80</sup> or the existence of biases against competition law enforcement action because of the institutional design of competition agencies (including how cases are brought to their attention)<sup>81</sup>. I have advanced elsewhere an argument in favour of a distributive justice objective in EU competition law based on the political and moral

<sup>77</sup> Commission Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, paras 85 and 86.

<sup>78</sup> The compensation must take a form that is axiomatically valued by consumers, such as innovation or higher quality. The last condition of Article 101(3) preserves consumer choice and enables the consumers to indicate their preferences, as competition should not be substantially eliminated. Hence, it is always possible for consumers to indicate that they value lower prices than higher quality or innovation.

<sup>79</sup> Akman, P. (2009), ‘Searching for the Long-Lost Soul of Article 82EC’ *Oxford Journal of Legal Studies* **29**(2) 267-303.

<sup>80</sup> Neven, D. & L.-Hendrik Röller (2005) ‘Consumer surplus vs. Welfare Standard in a Political Economy Model of Merger Control’, *International Journal of Industrial Organization* **23** 829-848.

<sup>81</sup> Lyons, B (2002) ‘Could Politicians be More Right than Economists? A Theory of Merger standards’, Revised CCR Working Paper CCR 02-1, available at <http://ccpweb.mgt.uea.ac.uk/publicfiles/workingpapers/ccr02-1revised.pdf>; Farrell, J. & M. Katz, (2006) ‘The Economics of Welfare Standards in Antitrust’, *Competition Policy International*, **2**(2) available at <http://www.globalcompetitionpolicy.org/index.php?id=77&action=907>.

philosophy of John Rawls<sup>82</sup>. Putting the argument simply, Rawls' second principle of social justice advances that social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the Difference Principle)<sup>83</sup>. His justification of this principle of justice makes use of a thought experiment, an hypothetical situation called the "original position", where individuals choose the basic principles of the society behind a "veil of ignorance", that is without knowing their own position in the resulting social order as well as being ignorant of their personal identities. Under the Difference Principle, Rawls favours the establishment of institutions that would maximize the improvement of the "least-advantaged" group in society, by enabling these individuals to exercise control of wealth and other economic resources. By "least advantaged" group Rawls refers to "those belonging to the income class with the lowest expectations"<sup>84</sup>. Certainly, Rawls' theory needs to be adjusted to the context of competition law. If one takes the criterion of income, it would not necessarily mean that competition law should protect consumers as opposed to shareholders or employees: in some circumstances (e.g. a luxury good market), final consumers may have a higher on average income than the suppliers of these goods, in particular if the latter are small and medium firms. Yet, in most circumstances, this is not the case. It may also be argued that final consumers are the "least advantaged" group when thinking about the competitive process, as they may be exploited by intermediary consumers (e.g. retailers) or suppliers, without the possibility for them to pass on these losses to anyone else in the market chain (unless, for example, in their capacity as suppliers in other relevant markets). All market actors are to a certain extent final consumers, while not all of them are necessarily suppliers, competition law being non-applicable to employment relations. Hence, the category of "final consumer" would be the one whose interests market actors would decide to promote in their original position, when designing the desirable social order behind a veil of ignorance. Notwithstanding this theoretical justification for a distributive justice principle that would promote the interest of final consumers, it is possible to weigh more the effects of an anticompetitive conduct on low income categories of final consumers, as opposed to efficiency gains passed on to a more wealthy category of final consumers (typically this may take the form of a price versus quality trade-off). This type of analysis of distributional effects is standard procedure in the context of regulatory impact assessments and could also be conducted in principle within the context of a competition law case<sup>85</sup>.

An alternative distributive justice approach (this time not attached to the objective of protecting final consumers) would be to take a "egalitarian asset-based redistribution idea", which would aim to enhance productivity by fixing a concentrated ownership of assets leading to perverse incentives, costly enforcement strategies and coordination failures, as it

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<sup>82</sup> Lianos, I. (2007), *La Transformation du droit de la concurrence par le recours à l'analyse économique*, Brussels : Bruylant.

<sup>83</sup> Rawls, J. (1999, first published 1971) *A Theory of Justice* (Revised Edition), Cambridge, Mass: Harvard University Press, pp. 63-73

<sup>84</sup> Rawls, J. (2001), *Justice as Fairness: A Restatement*, Cambridge, Mass: Harvard University Press, p. 59.

<sup>85</sup> See, HM Treasury (2011), *The Green Book- Appraisal and Evaluation in Central Government*, London: Treasury Guidance, pp. 91-96.

has been recently advanced by theorists of the “new economics of inequality”<sup>86</sup>. Such an approach might involve active competition law enforcement in order to protect small and medium productive and innovative firms from being excluded from the market, with the aim to deconcentrate the use of productive assets in a market.

There is also a distinct tradition in welfare economics that incorporates explicitly distributive justice concerns<sup>87</sup>. Bergson and Samuelson advanced a social welfare function which is understood to depend on all the variables that might be considered as affecting welfare. The Social Welfare Function (SWF) does not take the strong moral/value judgment of Kaldor-Hicks, in that compensation is only hypothetical and does not provide a complete social ordering. It offers a more complete analysis, which is devised as means to weigh the utilities of different agents. The SWF framework is thus sensitive to fairness considerations. Economists who use the SWF approach are comfortable with interpersonal utility comparisons. Under normal conditions, they can estimate individuals’ “extended preferences” by looking to the ordinary preference data and use behavior or surveys to infer individuals’ preferences over bundles of attributes such as health, income, leisure, or environmental goods, hence making inferences about their “extended preferences”. From then on, they employ a “prioritarian social welfare function” in order to compare different arrangements of individual utility<sup>88</sup>. A “*prioritarian*” SWF gives greater weight to utility changes affecting individuals at lower utility levels, as compared to individuals at higher utility levels<sup>89</sup>. A cost benefit analysis with *distributional weights* would sum individual willingness to pay or willingness to accept amounts adjusted by weighting factors.

### 3. Freedom to compete

A number of authors have recently examined the principle of “freedom to compete” as a distinct aim of EU competition law, in particular in the context of Article 102 TFEU<sup>90</sup>. Commentators analysing the case law of the EU Courts on Article 102 TFEU have employed different narratives in their attempt to synthesize the concept of abuse and explain the past case law and the trends of EU competition law enforcement in this area. Some oppose the old case law of the European Courts, which relies on the principle of the “freedom to compete” and the need to preserve a competitive market structure, to the more economics and welfare oriented approach chosen by the European Commission in its *Enforcement Priorities*

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<sup>86</sup> Bowls, S. (2012), *The New Economics of Inequality and Redistribution*, Cambridge University Press, pp. 18-19.

<sup>87</sup> Bergson, A. (1938), ‘A Reformulation of Certain Aspects of Welfare Economics’ *The Quarterly Journal of Economics* **52**(2) 310-334; Samuelson, P. (1947) *Foundations of Economic Analysis*, Cambridge, MA: Harvard University Press.

<sup>88</sup> Adler, M.D. (2009) ‘Future Generations: A Prioritarian View’ *The George Washington Law Review* **77**(5/6) 1478-1520.

<sup>89</sup> On the operation of concept of “social welfare function” and the prioritarian view, see Adler, M.D. & C. W. Sanchirico (2006), ‘Inequality and Uncertainty: Theory and Legal Applications’, *University of Pennsylvania Law Review* **155** 279-377; Adler, M.D. (2009) ‘Future Generations: A Prioritarian View’, *George Washington Law Review* **77** 1478-1520.

<sup>90</sup> See, for instance, the recent contributions by Lovdahl Gormsen, L. (2010) *A Principle Approach to Abuse of Dominance*, Cambridge: Cambridge University Press; For a critical perspective, see Akman, P. (2013) ‘The Role of Freedom in EU Competition Law’ (forth. 2013) *Legal Studies* (on file with the author).



*Guidance*. The idea is that the turn of the Commission towards a “more economics approach” is antithetical to the case law and thus not legitimate<sup>91</sup>. The underlying assumption is that the principle of freedom of competition does not accommodate the “economic”, “effects-based” approach of the Commission’s Priorities Guidance, as (i) it is more “forms-based”, (ii) it does not look to economic efficiency and the possible efficiency gains resulting from the dominant undertaking’s conduct, (iii) it perceives the objective of the law as the protection of the interests of the competitors of the dominant undertaking, rather than the interests of the consumers, (iv) it does not require evidence of “consumer harm” for the application of Article 102 TFEU, but rather relies on the likely exclusion of competitors for the finding of an abuse. This is often opposed to the “economics” “effects-based” approach, which (i) requires evidence of consumer harm (directly or indirectly) for the application of Article 102 TFEU, (ii) focuses on the likely anticompetitive effects of the conduct, rather than on its form, (iii) integrates efficiency considerations as a possible justification of the anticompetitive effects of consumers and (iv) perceives the objective of the law as the promotion of “consumer welfare”.

The “freedom to compete” (*Wettbewerbsfreiheit*) view is often credited to the ideas of the ordoliberal school of thought<sup>92</sup>. The thesis advanced by some authors is that ordoliberal ideas influenced the drafting of the EC Treaty and the case law of the European Courts on the concept of abuse under Article 102 TFEU<sup>93</sup>. It is frequently alleged that the importance given to the concept of “economic freedom” in subsequent cases of the European Courts illustrates the influence of ordoliberal thought<sup>94</sup>. In essence, according to this view, for ordoliberals the principal aim of competition law is to protect the economic freedom of undertakings to compete on the marketplace.

This is often interpreted as a deontological standpoint: the competitive process and the economic freedom of undertakings to participate to this competitive process must be preserved, irrespective of the effects of such competition on social welfare<sup>95</sup>. According to this view, the ordoliberals value individual economic freedom as an accompaniment of political freedom and autonomy. Their objective is to achieve an economic order, based on

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<sup>91</sup> Lovdahl Gormsen, L (2010) ‘Why the European Commission’s Enforcement Priorities on Article 82 EC should be Withdrawn’, *European Competition Law Review* **31(2)** 45-51; For a different perspective, see Akman, P (2010) ‘The European Commission’s Guidance on Article 102 TFEU: From Inferno to Paradiso?’ *Modern Law Review*, **73(4)** 605-630.

<sup>92</sup> For a discussion see, Gerber, D.J, (1994) ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe’, *American Journal of Comparative Law* **42** 25-84; Rieter H. & M. Schmolz (1993), ‘The ideas of German Ordoliberalism 1938-45: pointing the way to a new economic order’, *European Journal of the History of Economic Thought*, **1(1)** 87-114; Möschel, W (1989) ‘Competition policy from an Ordo point of view’, in Peacock, A & H. Willgerodt (eds.), *German Neo-Liberals and the Social Market Economy*, London: Macmillan, pp. 142-159. For a translation in English of the views of one of the principal authors of the ordo-liberal group, see Eucken, W. (1992, first published in 1939), *The Foundations of Economics – History and Theory in the Analysis of Economic Reality*, Berlin & New York: Springer.

<sup>93</sup> Gerber, D (1994), op. cit., pp. 71-74; Gerber, D. (1998) *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Clarendon Press.

<sup>94</sup> Lovdahl Gormsen, L. (2007) ‘The Concept between Economic freedom and consumer welfare in the modernisation of Article 82 EC’, *European Competition Journal* **3(2)** 329-344.

<sup>95</sup> Andriychuk, O. (2010) ‘Rediscovering the spirit of competition: on the normative value of the competitive process’, *European Competition Journal*, **6(3)** 575-610.

the principle of competition, task which requires a positive agenda by the State to protect the competitive process from private economic power and political power. For these authors, the main concern for ordoliberalism is “complete competition”, “that is competition in which no firm in a market has power to coerce other firms in that market”<sup>96</sup>. The model of “complete competition” provides “the substantive standards for competition law, requiring that law be used to prevent the creation of monopolistic power, abolish existing monopoly positions where possible, and where this was not possible, control the conduct of monopolies”<sup>97</sup>. State interventions in the market would aim to remove market disruptions by breaking up “avoidable monopolies” and regulating “unavoidable monopolies” (natural monopolies)<sup>98</sup>. Competition law has thus to provide a standard of conduct for dominant firms. The “as if” competition standard applies to all kinds of exclusionary practices and requires dominant firms to behave as if they are subject to competition<sup>99</sup>. It is conceived “as an objectively applicable measure that in most cases would provide clear guidance” to dominant firms<sup>100</sup>. The concept embodied in this standard is based on the distinction between “performance competition” and “impediment competition”: dominant firms are able to do the former but not the latter. The categorisation of a specific business practice as being performance or impediment competition depends on the ability of an undertaking to perform them in the absence of market power. Several categories of conduct, such as predatory pricing, boycotts and loyalty rebates, are considered as inconsistent with the as if standard, “because a firm would not be able to engage in such practices unless it had monopolistic power”<sup>101</sup>. One could thus classify certain commercial practices as falling *a priori* within the category of impediment competition, and thus suspect if adopted by dominant firms, without any *ad hoc* analysis of their specific effects on the relevant market.

However, this is not the only view on the meaning of the principle of free (complete) competition advocated by ordoliberals. Their model of neoliberalism is certainly different from that of the Chicago school, yet it presents many similarities with the Virginia school of constitutional economics, as some well-known commentators of ordoliberal thinking have noted<sup>102</sup>. Certainly, for ordo-liberal writers, the objective of competition law, as well as of all state regulation, is to promote the competitive process, perceived as an institution (*Institutionsschutztheorie*), and not to protect individuals or specific groups (*Individualschutztheorie*), such as consumers or the competitors of the dominant firm. Yet a

<sup>96</sup> Akman, P. (2012) *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, Hart Pub., p. 58

<sup>97</sup> Gerber, D. (1994) ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe’, op. cit, pp. 50-51.

<sup>98</sup> Akman, P. (2012) *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, op. cit., p. 59. See also, Ahlborn, C. & A. J. Padilla (2008), ‘From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law’, in Ehlermann, C.D. & M. Marquis (eds.), *European Competition Law Annual 2007*, Hart Pub., pp. 55-101.

<sup>99</sup> Gerber, D. (1994) ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe’, op. cit, p. 52.

<sup>100</sup> Ibid., p. 53.

<sup>101</sup> Ibid., p. 53.

<sup>102</sup> See, for instance, Vanberg, V. J. (2004) ‘The Freiburg School: Walter Eucken and Ordoliberalism’, Freiburg discussion papers on constitutional economics, No. 04/11, accessible at <http://hdl.handle.net/10419/4343> (last accessed November 1<sup>st</sup>, 2012); Vanberg, V. (2005) ‘Market and state: the perspective of constitutional political economy’ *Journal of Institutional Economics* 1 (1), pp. 23-49.

strand of exegesis on ordoliberalism takes a perspective which is more compatible with a welfare approach. According to this view, “[...] the introduction of a more economic approach with the explicit aim of increasing economic efficiency is not necessarily incompatible with the original goals of ordoliberal competition policy as long as the primary goal of ordoliberal competition policy is not endangered”<sup>103</sup>. Indeed, “ordoliberals never attached intrinsic value to economic freedom and that although the concept was important to them, this importance was embedded in the overall purpose of finding a humane order for society [...]”<sup>104</sup>. Competition law and the preservation of the “freedom to compete” is an instrument to dethrone economic power, and thus lead to deconcentrated markets and economic democracy. Thus, from this perspective, the ordoliberal point of view is not deontological, but consequentialist, albeit at a broader level than the welfarist approach. Their aim is to control entrenched market power, not only for its negative economic aspects, but also in order to preserve political democracy.

Yet, “complete competition” was not to be used as an empirical benchmark to guide state intervention in the economy but as an overall *constitutional* principle to design the rules that would govern the appropriate market order (as opposed to a *laissez-faire* market order)<sup>105</sup>. Contrary to what is frequently thought, the “as if” competition standard should only apply to natural monopolies. Certainly not, to all kinds of exclusionary conduct<sup>106</sup>. The principle of “freedom to compete” can at most be perceived as a principle governing interest balancing in cases of exclusionary conduct, *rather than as an operational standard for adjudication*<sup>107</sup>. For this view, the original ordo-liberal thought would not object to “efficiency considerations based on modern economic tools when such considerations are used to inform and guide the framework within which market transactions take place”<sup>108</sup>

It is not the place here to examine in detail how representative of the ordoliberal thought each of these two views is. It is also true that ordoliberal thought contains many different strands and has evolved in ways that its original inceptors would not necessarily recognize today. One could however make the following remarks:

(i). The decoupling of economic (e.g. efficiency, consumer welfare) and non-economic or non-welfare (e.g. fairness, freedom, economic democracy) objectives, which for some authors explain the assumed opposition of ordoliberal thought to efficiency<sup>109</sup>, does not

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<sup>103</sup> Maier-Rigaux, F (2012) ‘On the normative foundations of competition law – efficiency, political freedom and the freedom to compete’, in D. Zimmer (ed.), *The Goals of Competition Law*, Cheltenham: Edward Elgar, pp. 132-168, p. 137.

<sup>104</sup> Ibid., p. 139.

<sup>105</sup> Mestmäcker, E.J. (2011) ‘The development of German and European competition law with special reference to the EU Commission’s Article 82 Guidance of 2008’, in L.F. Pace (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar, pp. 25-62, p. 41, noting that for ordoliberals, “the legal environment of the economic constitution are the institutions of private law and their adaptation to the requirements of competition”.

<sup>106</sup> Ibid., p. 43.

<sup>107</sup> Ibid.

<sup>108</sup> Maier-Rigaux, F (2012), op. cit., p 163.

<sup>109</sup> See, for instance, Nazzini, R (2011) *The Foundations of European Union Competition Law – The Objective and Principles of Article 102*, Oxford University Press, chapter 2.

hold. On the contrary, for early ordoliberals, the legal, economic and the social dimensions were integrated into an *ethical*, economic and juridical order, the competitive market order<sup>110</sup>. Certainly, the “outcome oriented flavour” of the concept of “Social Market Economy” requires some supplementary social policies to be implemented, and thus suggests a decoupling of the efficiency dimension of the market from social policy, the latter aiming to make the market order more ethically appealing<sup>111</sup>. However, this concept was introduced in ordoliberal thought after the Second World War, as a result of a political consensus with social-democrats,<sup>112</sup> and does not necessarily affect the core emphasis of the ordoliberal thought on competitive order.

(ii). One should distinguish between the constitutional level and the sub-constitutional level. For ordoliberals, the competitive market order is a constitutional order and relates to the choice of the rules of the game, the question of how market processes are institutionally framed, rather than perceived as a policy intervening in market processes<sup>113</sup>. J. Vanberg observes that the concept of “*Leistungswettbewerb*”

“denotes the ideal of a market order framed by rules that aim at making producers responsive to consumer interests [...] To establish an order of *Leistungswettbewerb* means to adopt rules for the market game that make consumer preferences the ultimate controlling force in the process of production”<sup>114</sup>.

According to this view, the principle of consumer sovereignty offers a clear answer to the question of how disputes ought to be decided: “[...] adopting rules for the market game that promote consumer sovereignty is to the mutual advantage of citizens because, even though there will always be occasions in which they will be harmed in their interests as producers, the benefits they will realize as consumers over the course of the market game will assure them “general compensation”<sup>115</sup>. One should, however, distinguish this constitutional level question, indicating where the rules of the market game are chosen and which can integrate economic and welfarist considerations, from assessing the welfare consequences of alternative options at a sub-constitutional or adjudicative level, that of everyday decision-making. At this level, it is clear that ordoliberals conceived the concept of consumer sovereignty as requiring the *a priori* setting of fixed rules or adequate decision procedures but they did not expect that these rules will be rectified by reference to the effects produced to

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<sup>110</sup> See, Vanberg, V.J. (2004) *The Freiburg School: Walter Eucken and Ordoliberalism*, 04/11, Walter Eucken Institut, p. 2. See also, Foucault, M. (2004) *The Birth of Biopolitics – Lectures at the Collège de France*, Palgrave/Macmillan, pp. 162-163, “(t)he economy does not purely and simply determine a juridical order that would both serve it and be constrained by it. The juridical gives form to the economic, and the economic would not be what it is without the juridical”.

<sup>111</sup> Vanberg, V.J. (2004) *The Freiburg School: Walter Eucken and Ordoliberalism*, op. cit., p. 2.

<sup>112</sup> Tribe, K. (1995) *Strategies of Economic Order – German Economic Discourse 1750-1950*, Cambridge: Cambridge University Press, pp. 203-240.

<sup>113</sup> Vanberg, V.J. (2004) *The Freiburg School: Walter Eucken and Ordoliberalism*, op. cit., p. 4; Vanberg, V.J. (2009) *Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*, 09/3, Walter Eucken Institut, accessible at [http://www.walter-eucken-institut.de/fileadmin/bilder/Publikationen/Diskussionspapiere/09\\_03bw.pdf](http://www.walter-eucken-institut.de/fileadmin/bilder/Publikationen/Diskussionspapiere/09_03bw.pdf) (last accessed November 1st, 2012).

<sup>114</sup> Ibid., p. 15.

<sup>115</sup> Ibid., at 17.

consumer welfare of each individual case examined: the rules must “define a framework within which economic agents can freely make their decisions, inasmuch as, precisely, every agent knows that the legal framework is fixed and its action and will not change”<sup>116</sup> and thus cannot depend on an *ad hoc* analysis of predicted welfare effects for each individual case. Market actors should preserve their autonomy in framing their strategies *a priori* in accordance to the rules of the game.

Ordoliberalism thus essentially consists in the application of the rule of law in the economy. Contrary to central planning or laissez faire liberalism, it does not rely on state intervention on the market through regulation, but on *judicially enforceable* rules, courts being transformed to “organs of national economic policy”<sup>117</sup>. This opposition to state interventionism and this preference for judicially enforceable rules also changes the role of economic analysis. There is a difference between the situation where economists assist the courts in deciding how existing legal rules are applied to particular cases and one where the courts make their decisions to permit or prohibit a business practice “contingent on how economists assess their welfare effects in particular cases”<sup>118</sup>. This distinction does not necessarily reproduce that between positive and normative economics, but obviously the two issues are interrelated<sup>119</sup>.

#### 4. The competitive process as an intrinsic normative value

Some authors value the competitive process irrespective of the consequences that this might have for welfare. There are different intellectual premises for such an approach. Some might go as far as advocating a natural right to participate to the competitive process, a right that others (including the State) should respect: it is only within the constraints imposed by other people’s right to participate to the competitive process that anyone is entitled to pursue his self-interest. Nozick has famously claimed that it is only if we have an eye on the process that we can conclude that a distribution of resources in society is just<sup>120</sup>. This is a process in which no-one’s rights, in our context the right to participate to the competitive process, have been violated. Whatever results are produced from such process, are presumed to be just. This view would provide a different perspective than the concept of distributive justice as a utilitarian principle (e.g. see our developments on the social welfare function). A distribution of resources will not be just by virtue of conforming to some *structural* principle(s) of just distribution or some pattern which would rely on natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions<sup>121</sup> (e.g. maximizing utility or ensuring the acquisition and use of capabilities for all), but we will assume that the exercise

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<sup>116</sup> Foucault, M. (2004) *The Birth of Biopolitics – Lectures at the Collège de France*, Palgrave/Macmillan, p. 173.

<sup>117</sup> Röpke, W. (1942) *The Social Crisis of Our Times*, Transaction Publishers, Part II, chapter 2, p. 193.

<sup>118</sup> Vanberg, V.J. (2009) ‘Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy’, 09/3, Walter Eucken Institut, p. 24.

<sup>119</sup> Gerber, D.J. (2008) ‘The Future of Article 82: Dissecting the Conflict’, in Ehlermann, C.D. & M. Marquis (eds.), *European Competition Law Annual 2007*, Hart Pub., pp. 37-54, pp. 48-49 distinguishing the “fact-intensive role of economics” from that of economics providing the “norms of conduct” under Article 102 TFEU.

<sup>120</sup> Nozick, R. (1974) *Anarchy, State and Utopia*, Basic Books.

<sup>121</sup> *Ibid.*, pp. 153-156.

of freedom (here to compete), under of course the constraint of preserving the freedom of others, will produce the desirable pattern.

A different, although related, approach of Hayekian inspiration, would advance that the concept of economic efficiency or more broadly welfare is a “mirage”<sup>122</sup>, because of the problem of dispersed and subjective knowledge, which seriously compromises the idea of an efficient decision-making in the sense of an accurate balancing of social costs and benefits<sup>123</sup>. We can only assess the actions of individuals by inquiring if they conform to prescribed rules of conduct or process, not in assessing their outcomes<sup>124</sup>. It is clear that the attraction of the “spontaneous order” has been particularly important for authors claiming the Austrian or the Ordoliberal schools of thought, although of course the two may be distinguished as forming two distinct intellectual traditions in the Continental post-war development of the stream of neoliberal thought, marked by its opposition to central planning and Keynesian economics<sup>125</sup>.

Although the content of ordoliberal thinking has been the object of many efforts of exegesis, one may argue that ordo-liberal authors do not focus on specific market outcomes but on the protection of the competitive process from abuse of (economic) power. The concept of “complete competition” (*vollständige Konkurrenz*), which forms the foundation of their analysis, precisely aims to characterize a market situation where no market participant (firms, consumers) has the power to coerce others. Nevertheless, this concept somehow creates an anomaly in the ordo-liberal setting, as it might give the impression that the ordoliberals take an outcomes-driven perspective and thus require the intervention of competition law each time the market situation is not compatible with the ideal of “complete competition”, more or less like a neoclassical price theorist would perceive the ideal of “perfect competition”. The use of the concept of “performance competition” (*Leistungswettbewerb*), by some of these authors, might be a source of additional ambiguity as it also seems to refer to outcomes, rather than the competitive process as such. Yet, it is meant in a process-oriented way, as requiring the preservation of competition on the merits.

Some authors have recently advanced an “Ordo-Austrian” approach to competition law that would rely on the “normative value of the competitive process”<sup>126</sup>. They oppose both utilitarian/consequentialist and deontological approaches and claim value pluralism. More concretely, they suggest a “methodological unbundling” of the concept of competition from

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<sup>122</sup> Rizzo, M. (1980) ‘The Mirage of Efficiency’ *Hofstra Law Review* 8 641-658.

<sup>123</sup> Kirzner, I.M. (2000) *The Driving Force of the Market – Essays in Austrian Economics*, London and New York: Routledge.

<sup>124</sup> Hayek, F.A. (1967), *Studies in Philosophy, Politics and Economics*, Chicago: University of Chicago Press, p. 90, noting that “the only manner in which we can in fact give our lives some order [in the face of new and unforeseeable circumstances] is to adopt certain abstract rules or principles for guidance, and then strictly adhere to the rules we have adopted in our dealing with the new situations as they arise”.

<sup>125</sup> The first Mont Pelerin Society meeting in 1947 initiated by F.A. Hayek included well-known ordoliberal authors, such as Walter Eucken and Wilhelm Röpke.

<sup>126</sup> See, Andriychuk, O. (2012) ‘The Dialectics of Competition Law: Sketching the Ordo-Austrian Approach to Antitrust’ *World Competition* 35(2) 355–384; Andriychuk, O. (2010) ‘Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process’ *European Competition Journal* 6(3) 575-610.

economic values and its constitutional status<sup>127</sup>. The recognition of the constitutional status of competition “by no means implies its hierarchical superiority to other societal values such as consumer welfare” and does not guarantee absolute protection<sup>128</sup>. They propose a two-steps methodology of balancing these conflicting values, the first one “isolating each value from all others in order to undertake (its) independent analysis” and understand its “internal essence”, the second one re-contextualising “previously isolated values into the main regulatory agenda”<sup>129</sup>, the regulator developing “an inductive algorithm of priorities” that would establish a “dialectic interplay” between these different values<sup>130</sup>.

In essence, this dialectical approach attempts to avoid the usual criticism made to utilitarian approaches, the incommensurability of the different values in conflict and the tendency of the value of utility to dominate, while it claims to offer a practical way out to the paradox of freedom, by enabling some form of trade-off to take place at the second step of the inquiry. It remains, however, unclear what is the added value (other than theoretical) offered by the first step of the analysis and how the interplay between the two steps could operationalize in practice. Furthermore, one might oppose a “dialectical logic” that would put to work contradictory terms within the homogenous, even if some effort is made to assess conflicting values within the context of utility *and* that of competition, as it is suggested by the proponents of “dialectical antitrust”, for a “strategic logic” that would “not stress contradictory terms within a homogeneity that promises their resolution in a unity” (that of welfare and/or that of competition), but will aim instead “to establish the possible connections between disparate terms that remain disparate”, thus preferring “the logic of connections between the heterogenous and not the logic of homogenization of the contradictory”<sup>131</sup>.

In conclusion, the analysis of these non-economic welfare objectives has shown that some of them might be related and/or taken into account by the concept of welfare or well-being, if welfare and well-being are interpreted more broadly than what is usually the case in neoclassical price theory.

For example, the market integration objective might have various interpretations- it might be that we value volumes of trade even if this is not efficient (from the point of view of the welfare of the citizens/consumers – e.g. increased volumes of trade in drugs and other dangerous products affecting health) or we can take as our aim to promote “efficient trade”, thus adopting a holistic perspective on the internal market objective that would incorporate the citizen’s preferences for environmental protection, public health, the protection of

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<sup>127</sup> For a similar position see, Zäch, R. and A Künzler (2010), ‘Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law’ in Zäch, R., A. Heinemann and A Kellerhals (eds), *The Development of Competition Law—Global Perspective*, London: Edward Elgar, 61-83.

<sup>128</sup> Andriychuk, O. (2010), *op. cit.*, p. 586.

<sup>129</sup> *Ibid.*, p. 577.

<sup>130</sup> Andriychuk, O. (2010), ‘Economic Virtue as Political Virtue: An Insight from the Perspective of Value Pluralism’, *European Journal of Legal Studies* **3**(1) 129-144.

<sup>131</sup> Foucault, M. (2008), *The Birth of Biopolitics – Lectures at the Collège de France 1978-1979*, Palgrave/Macmillan, p. 42.

consumers<sup>132</sup>. The Treaty actually favours the efficient trade thesis as it incorporates these public interest objectives as an exception to the principle of free trade. So it is possible to take a welfarist perspective on the objective of Internal market integration as well in the context of EU competition law.

A similar approach may also apply to a certain extent to the principle of fairness or distributive justice. Fairness might mean different things (equality of opportunities, a fair distribution of outputs or of capabilities etc)<sup>133</sup> but if someone defines it as distributive justice, a social welfare function or a distributionally weighted cost benefit analysis could incorporate distributive justice concerns. To a certain extent, a broader consumer welfare standard (which would include not just the loss of consumer surplus but also the wealth transfers from consumers to producers/suppliers and which would require that countervailing efficiency gains compensate fully consumers for their losses) might be a way to take into account some of the distributive justice effects of anticompetitive practices. Also, recall the efforts I mentioned previously to broaden the view of well-being by adopting an extended objective list approach that would incorporate a number of values<sup>134</sup>.

In conclusion, we are left with some contested and ambiguous principles, which raise the limitations of economic methodology to resolve all issues. This excursion to the normative underpinnings of theories on the goals of competition law also indicates that basing our analysis on external (to the legal system) and ambiguous sources of authority, such as economic efficiency or consumer welfare, without proper discussion of their genesis and evolution and an informed translation of their meaning in the legal context they are incorporated to<sup>135</sup>, might lead to bad public policy and bad law. For this reason I would be critical to the efforts by some authors to advance a normative argument in favour of an efficiency/total welfare standard or a distributive justice/consumer welfare standard, without a proper consideration of these factors.

Instead, I would advance an *evidence perspective*. To explain the difference between the normative and the evidence approach I would stress the ability of the legal sub-system to select its cognitive sources (e.g. what can constitute evidence), which implies that it can also exclude some other sources of knowledge. The legal sub-system is certainly cognitively open, but not all knowledge may be taken as evidence, nor does it impact in the same way the decision-making process. In other words, the fact that a source external to the legal system might provide information on what is efficient or just, through an array of methodologies (e.g. revealed preferences theory), may be of little value, unless the legal system calls for this external expertise in the task of interpreting legal norms or delegates the task of interpreting

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<sup>132</sup> For a sketch of the theory see, Lianos I (2010), Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of Economic Integration”, *European Business Law Review* **21(5)** 705-760.

<sup>133</sup> For an analysis of different conceptions of distributive justice, see, Fleischacker, S. (2004), *A Short History of Distributive Justice*, Cambridge, MA: Harvard University Press.

<sup>134</sup> See, our developments earlier on the work of J. Stiglitz, A. Sen and J.P. Fitoussi or M. Nussbaum.

<sup>135</sup> For a discussion, see Lianos, I. (2009) ‘Transplants économiques en droit communautaire et le paradigme de la traduction : une approche paradigmatique’, in Bayeux, A., Y. Cartuyvels, H. Dumont & F. Ost (eds.), *Traduction et Droits Européens : Enjeux d'une Rencontre*, Brussels : Publications des Facultés universitaires Saint-Louis, Brussels, pp. 355-385



legal norms to non-legal experts (e.g. welfare economists) and disposes the tools to assess it. In any case, even if there is delegation, this should not lead to the risk of “hegemonic” or “deferential translations”<sup>136</sup>. I have argued elsewhere that the economic concepts introduced in legal discourse (most often through soft law instruments, such as guidelines) lose their nature of pure economic concepts and become by their integration also part of the legal conversation/legal “way of talk” – they get their meaning by the new normative context to which they have been integrated. Indeed, it is ludicrous to think that the standards of validity (internal or external) applied in academic economics would be the same than those practised by forensic economists in competition litigation, although there is certainly an effort made by the latter to be inspired by academic practices in the way their expertise is presented and assessed<sup>137</sup>. However, there are serious differences, such as administrability concerns, time and complexity. This does not mean that economic welfare considerations are useless, rather that economics should take a positive rather than a normative perspective and constitute one of the possible sources of evidence for the resolution of legal disputes, should the specific legal system decide, for a reason, to include them among its sources of wisdom.

### III. A positive law perspective on the objectives of EU competition law

#### A. A view from the bench

The current state of the case law of the European Courts (General Court and the Court of Justice of the EU) may cast doubt on the appeal of the theory of a unitary objective (welfare or the protection of the competitive process) and may indicate that EU competition law adheres to goals pluralism. This may be contrasted to the rule-making activity of the European Commission, which has been moving in recent years towards an “economic approach” that would value, probably higher than other objectives, the goal of “consumer welfare” or the protection of consumers<sup>138</sup>.

<sup>136</sup> Lianos, I. (2009) ‘Lost in translation? Towards a theory of economic transplants’, *Current Legal Problems* **62(1)** 346-404

<sup>137</sup> Lianos, I (2012) ‘The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis’ . CLES Working Paper No. 5/2012, accessible at SSRN: <http://ssrn.com/abstract=2197025> or <http://dx.doi.org/10.2139/ssrn.2197025> (last accessed November 1st, 2012); Lianos, I. (2009) ‘Judging Economists’: Economic expertise in competition litigation: a European view’, in Lianos, I. and I. Kokkoris (eds.), *The Reform of EC Competition Law*, The Hague: Kluwer International, pp. 185-320

<sup>138</sup> See, EAGCP, Report on an Economic Approach to Article 82 EC (July 2005), [http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf) (last accessed November 1st, 2012); European Commission, Vertical Restraints Guidelines [2010] OJ C 130/1, para. 7 (“(t)he objective of Article 101 is to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market to the detriment of consumers. Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market”); European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, op. cit., para. 5 (“In applying Article [102] to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services”); European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/7, para. 13, (“The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers”).

If we focus for illustration purposes at the jurisprudence of the European Courts on the interpretation of Article 102 TFEU<sup>139</sup>, it would be difficult to find a clear trend towards one objective<sup>140</sup>. One might argue that there is a tendency for the aim of the protection of consumers to become the “apple of discord” between those advancing the view that the aim of this provision is the protection of the competitive process, the institution of competition, and others arguing for a “more economic approach” that would interpret Article 102 TFEU in conformity with neoclassical price theory and the overall objective of the protection of the consumers. Both groups, however, recognize the importance of the objective of market integration in the interpretation and application of Article 102 TFEU<sup>141</sup>. The first view was merely advanced by authors inspired by the “ordoliberal” approach. In her Opinion in *British Airways*, Advocate General Kokott provides a succinct summary of the main message of ordoliberalism with regard to the interpretation of Article 102 TFEU:

“[Article 102] forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared”<sup>142</sup>.

As it has been argued by some authors adopting this intellectual tradition, the focus on competition as such may be explained by the need to ensure a wide scope for the application of the principle of competition:

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<sup>139</sup> For an excellent analysis of the objectives of EU Competition Law in the context of Article 101 TFEU, see van Rompuy, B. (2012), *Economic Efficiency: The sole Concern of Modern Antitrust Policy? – Non-efficiency Considerations under Article 101 TFEU*, The Hague: Wolters Kluwer.

<sup>140</sup> This is not only the case in Europe but characterizes most jurisdictions. See, the recent survey by the International Competition Network of 33 competition authorities, ICN, Unilateral Conduct Working Group, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, Doc. No. 353 (2007), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>, noting that “(r)espondents identified ten different objectives of unilateral conduct laws, regulations, and policies, with all but one member agency identifying more than one objective as relevant to their unilateral conduct regimes. [...] (T)hese objectives (listed in order of the number of times cited by respondents) include: ensuring an effective competitive process; promoting consumer welfare; maximizing efficiency; ensuring economic freedom; ensuring a level playing field for small and medium size enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and promoting competitiveness in international markets”.

<sup>141</sup> For a discussion, see Schweitzer, H. (2008) ‘The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC’, in Ehlermann, C.D. & M. Marquis, *European Competition Annual 2007*, Hart Pub., pp. 120-164, spec. pp. 128-138.

<sup>142</sup> Opinion AG J. Kokott, in Case C-95/04, *British Airways plc v. Comm’n*, 2007 E.C.R. I-2331, para 68. See also, in the context of Article 101 TFEU for a similar formulation, Opinion AG J. Kokott, in Case C-8/08, *T-Mobile Netherlands BV and Others* [2009] ECR I-4529, para. 71.

“(t)o concentrate on a single aim, namely that of consumer welfare, would reduce the scope of competition law significantly. The current law protects not only consumers but also producers. [...] Why does the law protect producers and not only consumers? Producers have the same rights as anyone else in a market economy. In particular, they enjoy property rights. If we wish, and this seems to be the most important point, to encourage people to commit themselves to an activity on a market, we ought to protect them from expropriation. This includes protection against expropriation by way of cartelization or abuse of dominance. If we took the view that it is acceptable for a purchasing cartel to deny a manufacturer the possibility of earning revenues on a previous investment, we would create a disincentive to market participation”<sup>143</sup>.

Recent case law has confirmed the importance of the protection of the structure of competition or competition as such, in the context of Article 102 as well as for Article 101 TFEU<sup>144</sup>.

Influenced by the aim to protect the competitive process and the structure of competition, the EU Courts have also proclaimed the “special responsibility” of the dominant undertakings to protect the competitive process. Based on this “special responsibility”, the case law has frequently found (i) an inference of consumer harm from the fact that the structure of the market has been affected or from the fact that competitors have been excluded and (ii) has developed rather strict burden of proof rules for dominant undertakings, shifting the burden of production of exculpatory evidence of an abuse to the dominant undertaking once some inference of likely anticompetitive effect is made. The Court of Justice first employed this concept in *Michelin I*, where it noted that a dominant undertaking “has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market”<sup>145</sup>. Since then, the term has been repeated a number of times by the Court of Justice<sup>146</sup> and the Commission referred to it in its *Enforcement Priorities Guidance*<sup>147</sup>.

The case law does not make explicit the theoretical and practical reasons that impose this special responsibility on dominant firms. The likelihood of anticompetitive effects does not seem to be the main reason for this special responsibility. If this were the case, all firms holding market power, not just dominant firms, would bear a special responsibility to preserve the competitive process. The concept of special responsibility restricts the dominant

<sup>143</sup> Zimmer, D (2007) ‘On Fairness and Welfare: The Objectives of Competition Policy’, in C.-D. Ehlermann & M. Marquis, *European Competition Annual 2007*, Oxford: Hart Pub., pp. 103-107.

<sup>144</sup> See, for instance, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited, v. Commission*, [2009] ECR I-9291, para 63 (“Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims 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”)

<sup>145</sup> Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461, para. 57.

<sup>146</sup> Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 775; Case T-203/01 *Michelin II* [2003] ECR II-4071, para 97. Most recently, Case C-280/08, *Deutsche Telekom AG v. European Commission* [2010] ECR I-9555, para 176; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [February 17, 2011], not yet published, para 24.

<sup>147</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, op. cit., paras 1 and 9.

firms' commercial freedom in comparison to non-dominant undertakings. The latter remain free to use commercial practices that are different from those governing normal competition<sup>148</sup>. The focus of the test seems to be the protection of "free competition" or "complete competition" and "open markets"<sup>149</sup>. The concept of special responsibility of dominant firms may also be explained by the emphasis of EU competition law on consumer sovereignty, rather than on the concept of consumer welfare as such. Consumer sovereignty can be preserved by the ability of consumers to influence price, quality, variety, and subsequently the competitive (or innovation) process according to their own preferences. This is directly linked to the definition of dominance in EU competition law, which appears to contain two conditions: the ability to prevent effective competition being maintained on the relevant market, *but also*, the "power to *behave to an appreciable extent independently* of competitors, customers and consumers"<sup>150</sup>. The emphasis on the special responsibility of dominant firms to protect the competitive process should therefore be understood as a proxy for consumer sovereignty.

In other cases, EU Courts have taken a different perspective emphasizing the aim of the protection of the interest of final consumers. For example in *Konkurrenverket v. TeliaSonera Sverige AB*, the Court of Justice held with regard to the objectives of Article 102:

"Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market [...]

The function of those rules is precisely to prevent competition from being distorted to the *detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union*. [...]

Accordingly, Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental *to them* through their impact on competition"<sup>151</sup>.

An adept of the economic efficiency approach can of course find satisfaction in the reference to the concept of public interest (consumers and undertakings) thus indicating that the Court adopts a total welfare standard approach. The Court does not also refer to the structure of competition but to impact on competition, thus indicating that this term might be interpreted as the appropriate degree of competition for the achievement of the objectives of a total welfare standard. It is also clear that harm to consumers is a crucial element of a competition law case, although consumers are not the primary focus of the Court (which also

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<sup>148</sup> This may be seen as the "system of variable thresholds" ("*System beweglicher Schranken*," i.e., the concept that behavior which may be unproblematic for competition law purposes in the hands of a firm in a competitive market need not be harmless in the hands of a dominant firm). See Möschel, M (2007) 'Art. 82 EGV', in WETTBEWERBSRECHT EG TEIL I 534, Ulrich Immenga & Ernst-Joachim Mestmäcker (eds.), 4th ed. ¶ 120; Möschel, W. (2006) '*GWB § 19*', in WETTBEWERBSRECHT EG TEIL I, op. cit.

<sup>149</sup> Eucken, W. (2006) 'The Competitive Order and Its Implementation', op. cit.

<sup>150</sup> Emphasis added. Case 27/76, *United Brands v Commission*, [1978] ECR 207 at para. 65; and Case 85/76, *Hoffman-La Roche & Co v Commission* [1979] ECR 461 at para. 38. According to the case law of the Court of Justice, "such a position does not preclude some competition [...] but enables the undertaking [...] if not to determine, at least to have an *appreciable influence on the conditions under which that competition will develop*, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment": Case 27/76, *United Brands v Commission*, para. 113 (emphasis added).

<sup>151</sup> Case C-52/09, *Konkurrenverket v. TeliaSonera Sverige AB* [2011] ECR 527, paras 21-24.

refers to individual undertakings, unless this concept is to be interpreted as intermediary consumers), thus implicitly rejecting a consumer welfare standard (widely or narrowly defined).

Yet, although recent, the case law of the Court is not without ambiguities. In *Post Danmark v. Konkurrecerådet*, the Court held that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market<sup>152</sup>. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. The Court seems not to grant importance to inefficient competitors because competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation. This approach could be in opposition to the wider concept of consumer welfare (that would include transfers of wealth) as in this case the Court would have considered the constraint that even non efficient competitors may set to the pricing practices of dominant firms. Yet, it might be compatible with a narrow view of consumer welfare (that of consumer surplus). It is noteworthy that the protection of the “buyer’s freedom as regards choice of sources of supply” or the protection of competitors’ access to the market, were also among the elements examined by the Court in the following paragraphs of the case<sup>153</sup>. Some recent case law of the General Court has also explicitly referred to the importance of the objective to protect the final consumers<sup>154</sup>.

In other recent cases the Court has emphasized other objectives. In *MOTOE*, the Court and Advocate General identified “equality of opportunity” as an aim pursued by EU competition law<sup>155</sup>. In *Deutsche Telekom*, the General Court asserted that a margin squeeze by a dominant telecoms operator was abusive because it unfairly limited access by downstream competitors to the market, violating Article 102(a)<sup>156</sup>. In *British Airways* and *Michelin II*, confirmed by the European Courts, the European Commission’s decisions both found that rebate schemes (as well as being exclusionary and discriminatory) were “unfair” to the affected travel agents and dealers<sup>157</sup>.

<sup>152</sup> Case C-209/10, *Post Danmark A/S v. Konkurrecerådet* [March 27, 2012], not yet published.

<sup>153</sup> *Ibid.*, para. 26.

<sup>154</sup> Case T-321/05, *AstraZeneca AB and AstraZeneca plc v European Commission*, [2010] ECR II-2805, para. 804; Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR 2969, para. 118; Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v. Commission* [2006] ECR II-1601, para. 115 (“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 [...] Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods or services. Recognition that such customers – who show that they have suffered economic damage as a result of an agreement or conduct liable to restrict or distort competition – have a legitimate interest in seeking from the Commission a declaration that Articles 81 EC and 82 EC have been infringed contributes to the attainment of the objectives of competition law.”)

<sup>155</sup> C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008] ECR I-4863, para. 51 (“A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators”); Opinion of AG J. Kokott, Case C-49/07, para. 100

<sup>156</sup> C-280/08, *Deutsche Telekom v. European Commission* [2010] ECR I-9555.

<sup>157</sup> Case C-95/04 P, *British Airways plc v. Commission* [2007] ECR I-2331; See also, Opinion of AG Kokott in C-95/04P; Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission (Michelin II)*

In conclusion, positive law supports the view that EU competition law pursues multiple goals. To this case law, one might add the drafting of the Treaty of Lisbon, which sets the broader framework of competition law and policy in the EU and advances the idea of a more holistic competition law.

## **B. A view from the Treaty: towards a holistic EU competition law**

### **1. The evolving legal framework of the Treaty for competition law**

Despite the relative minor modifications brought in the substantive provisions of EU competition law, the negotiation and the conclusion of the Treaty of Lisbon marked the first time in the chronicles of European integration that the role of competition law in the structure of the Treaties has been questioned. The debate was ignited by the attempt of the president of France, Nicolas Sarkozy, to abolish any reference to competition law as an objective of the Union, competition law being rather considered as a means to accomplish the broader tasks of the Union<sup>158</sup>. Article 3(1)g of the Treaty of European Communities recognized the vital importance of establishing “a system ensuring that competition in the internal market is not distorted”. Based on a contextual and teleological interpretation of this provision, the Court of Justice of the EU was able to extend the application of Article 102 TFEU to exclusionary conduct that harms the effective competition structure and prejudices consumers in an indirect way<sup>159</sup>. The first merger regulation in 1989<sup>160</sup>, as well as the new one in 2004, also make reference to Article 3(1)g in their first recitals<sup>161</sup>. The Court of Justice relied on this provision to apply the principle of free competition to State measures in a number of cases<sup>162</sup>, as well as to put in place EU remedies for the effective enforcement of competition law<sup>163</sup>. Furthermore, the Court has placed particular emphasis on Article 3(1)g when confronted with

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[2003] ECR II-4071, paras 110 and 240 (noting that as a result of its loyalty-inducing character, the quantity rebate scheme “limited the dealers’ choice of supplier and made access to the market more difficult for competitors”).

<sup>158</sup> The tension between the conception of competition law as an end in itself and as a means for the completion of other objectives has been noted by French competition literature: see, Bonassies, P. (1983) ‘Les fondements du droit communautaire de la concurrence : la théorie de la concurrence-moyen’, in *Études dédiées à Alex Weill*, Paris: Dalloz-Litec, pp. 51-68.

<sup>159</sup> Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, para. 23-26; Joined cases 6/73 & 7/73, *Instituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission* [1974] ECR 223, para. 32; Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR 461, paras 38 & 125; Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission* [1978] ECR 207, paras 63 and 183.

<sup>160</sup> Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1989], above, recital 1.

<sup>161</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1, recital 2.

<sup>162</sup> See, e.g. Case 13/77, *SA GB-Inno BM v. Association des détaillants en tabac (ATAB)* [1977] ECR 2115, para. 29; C-260/89, *Elliniki Radiophonia Tileorasi AE & Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis et al.* [1991] ECR I-2925, para. 27; Case 229/83, *Association des Centres distributeurs Edouard Leclerc v. SARL ‘Au blé vert’* [1985] ECR 1, para. 9

<sup>163</sup> Case 453/99, *Courage Ltd v Bernard Crehan* [2001] ECR I-6297, para. 20.

a conflict between competition rules and other policies and objectives<sup>164</sup> and has pronounced, on the basis of this provision, that competition law constitutes a “fundamental objective of the Community”<sup>165</sup>. Finally, the Court referred to this article when it granted to national competition authorities the power to set aside provisions of domestic legislation that jeopardize the “*effet utile*” of Article 101 TFEU<sup>166</sup>.

The existence of a specific provision emphasizing the role of competition law in the text of the so called “principles” part of the founding treaty, led to specific implications as to the interpretation of this provision and its relation with other Community activities. This was reinforced by Article 4 TEC, introduced by the Maastricht Treaty in 1992, adding a new joint action of the Community and the Member States in the “adoption of an economic policy, which is based on the close coordination of Member States' economic policies, on the Internal Market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition”. The scope of the principle of “free competition” was thus extended beyond the narrow confines of the competences of the Community (although these were already broadly defined). The Member States should be inspired by this principle in conducting their economic policies. In a similar vein, “competitiveness” was also added as an aim of the Community by the Treaty of Amsterdam in 1997. The distinction between “aims” and “activities” did not adequately represent the role of competition law in the legal framework put in place by the successive European treaties. In reality, competition was conceived as an important intermediate objective, the aims of Article 2 being more difficult to assess and representing long term aims. Progressively, the role of competition law evolved from an instrument for the completion of broader aims to an important objective of the Community. Indeed, as the Court of Justice recognized in *Continental Can*, the objectives pursued by Article 3(1)g were “indispensable” for the achievement of the Community’s tasks.

This upgraded role was reflected in the ill-fated Constitutional Treaty, which listed competition not only as one of the guiding principles, but also as one of the “objectives” of the EU. According to Article I-3(2) of the Constitutional Treaty, “the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted”. Competition policy was portrayed as the “fifth freedom” and included in the chapter on the Internal Market, thus linking competition to the aim of market integration and raising the rank of competition law to that of the fundamental freedoms of movement (free movement of goods, services, persons and capital). These were interpreted by the jurisprudence of the Court of Justice at the time as equivalent to fundamental rights, at the core of the European constitutional project<sup>167</sup>. It is noteworthy

<sup>164</sup> Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751; Case C-309/99 *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

<sup>165</sup> Case C-289/04 P, *Showa Denko KK v. Commission* [2006] ECR I-5859, para. 55; Joined cases T-259-264 & 271/02, *Raiffeisen Zentralbank Österreich AG & Others v. Commission* [2006] ECR II-5169, para. 255.

<sup>166</sup> Case C-198/01, *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, para. 54-55.

<sup>167</sup> Case C-112/00, *Schmidberger (Eugen), Internationale Transporte und Planzüge v. Republic of Austria*, [2003] ECR I-5659; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609; Case C-438/05, *International Transport Workers' Federation & Finish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-

that, almost during the same period, the jurisprudence of the Court recognized that the principle of free movement constitutes a source of individual rights that may be granted against public powers<sup>168</sup>. For example, an individual has the right to exercise an economic activity by selling products or services across borders.

This constitutionalisation process bestows to the provisions on free movement and consequently the “fifth freedom” of competition law a normative status equivalent to that of fundamental rights. Adopting such an approach would have significant consequences to the substance and central role of competition law in the architecture of EU law, because of the following two major changes introduced by the Treaty of Lisbon: Article 6-1 TEU, provides that the Charter has the same legal value as the Treaties. Furthermore, Article 6-2 stipulates that the EU can accede to the European Convention of Human Rights (ECHR). According to Protocol 8 and Declaration n° 2, the accession “shall make provision for preserving the special characteristics of the Union and Union law” or to preserve the “specific features” of Union law. Once the EU becomes a member of the ECHR, the ECHR will be binding upon the Union and will enable undertakings to challenge in front of the European Court of Human Rights in Strasbourg decisions by EU institutions on the ground that these violate specific ECHR provisions<sup>169</sup>. This pre-supposes, of course, exhaustion of all EU remedies. The existing case law of the Court of Justice on fundamental rights is certainly inspired by that of the ECHR. Furthermore, according to the homogeneity clause included in the first instance of Article 52(3) of the Charter, the fundamental rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. This is an important evolution as there are some differences between the two Courts with regard to the interpretation of the protected rights, as well as relating to the degree of convergence to the ECHR standards of the different areas and sources of EU law<sup>170</sup>. Certainly, the fundamental rights recognized by the EU are already enjoying constitutional status<sup>171</sup>. The inclusion of the Charter in the Treaties would thus not bring any change to the legal value of the Charter. It might produce, however, important practical implications, if interpreted in conjunction with the repeal of Article 3(1)g, the broader horizontal integration provisions introduced by the Lisbon Treaty and the emphasis

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1077; Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989.

<sup>168</sup> See, Case C-265/95, *Commission v. France* [1997] ECR I-6959, para. 24; Case C-320/03, *Commission v. Austria* [2005] ECR I-7929, para. 63. Opinion AG Trstenjak, Case C-445/06, *Danske Slagterier*, [2009] ECR I-2119, para 83.

<sup>169</sup> On the accession of the EU to the ECHR, see Lock, T. (2010) ‘EU Accession to the ECHR: Implications for Judicial Review in Strasbourg’, *European Law Review* **35(6)** 777-798.

<sup>170</sup> E.g. compare the application of the principle of *ne bis in idem* in the context of Article 54 of the Schengen Convention Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333, para. 27-28 and 30-32 and Case C-367/05 *Norma Kraaijenbrink* [2007] ECR I-6619, para. 26 with Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others v Commission* [2004] ECR I-123, para. 338, in the context of EU competition law. In EU competition law, the Court of Justice has held that the application of the principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Accordingly, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal interest. Article 54 of the Schengen agreement does not require identity of the legal interest protected but only identity of the facts. Consequently, the Court of Justice has given a different interpretation to the principle under Article 54 of the Schengen Convention compared to competition law as it has only required identity of the facts.

<sup>171</sup> Case C-101/08 *Audiolux* [2009] ECR I-9823, para. 63.



on the concept of “social market economy”. One could argue that, relying on these provisions, the courts may develop a more holistic approach in their interpretation of the competition law provisions of the Treaty, in particular in order to guarantee the attainment of other objectives, public policies and occasionally the EU protected fundamental rights that might be frustrated by the application of competition law.

The new Article 3 introduced by the TEU merges the old Articles 2 and 3 TEC into an integrated framework that includes the broad economic and non-economic objectives and tasks of the Union. There is no reference to the principle of “undistorted competition” or “free competition”. Article 3(3) TEU provides that the Union shall establish an internal market with the goal to achieve “a highly competitive social market economy”, aiming at full employment and social progress. As it was previously mentioned, the concept of “social market economy” replaces the expression “open market economy with free competition” in former Article 4(1) TEC. Competition law in the EU is thus inexorably linked to the objectives of the Internal Market and the establishment of a “social market economy”. It gets transformed from an objective (under the draft Constitutional Treaty) to a means for the completion of other objectives. These are much more precise than the ones mentioned in former Article 2 TEC and consist in the following two: the Internal Market and “Social Market Economy”. Furthermore, contrary to the Constitutional Treaty, competition law is not considered as a “fifth freedom”, nor has it been moved to the Internal Market chapter of the TFEU. Article 3(c) TFEU indicates that competition law is, as before, one of the EU’s exclusive competences confined to the establishment of competition rules “necessary for the functioning of the Internal Market”. The link to the Internal Market objective becomes even more explicit in Protocol No. 27 on “the Internal market and competition”, annexed to the TEU and TFEU with the aim to neutralize the repeal of former Article 3(1)g. The Protocol provides that “the Internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted”. Interestingly, the Protocol does not include any reference to the concept of “social market economy” and merely reproduces the text of the old Article 3(1)g.

The concept of “social market economy” rests undefined in the Lisbon Treaty, as it was the case for the draft constitutional treaty where it first made its appearance in the context of EU primary law<sup>172</sup>. The concept has certainly German origins<sup>173</sup>. One could also advance that it might refer to a specific variety of capitalism linked to the “coordinated market economies” model of Continental Europe, as opposed to the “liberal market economy” model<sup>174</sup>. Alternatively, it is possible to infer from this juxtaposition of the concept of “social market economy” with that of free competition, the opposition between the “two organizing principles in society”, from one side, economic liberalism with the establishment

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<sup>172</sup> For a commentary, see Joerges C. & F. Rödl, *Social Market Economy” as Europe’s Social Model?*, EUI Working Paper LAW No. 2004/8.

<sup>173</sup> Peacock A.T. & H. Willgerodt (eds.) (1989), *German Neo-liberals and the Social Market Economy*, London: Macmillan; Vanberg, V. (1998) ‘Freiburg School of Law and Economics’, in P. Newman (ed.) *The New Palgrave Dictionary of Economics and the Law*, London: MacMillan, vol. 2, pp. 172–179.

<sup>174</sup> See, on this opposition Hall P.A. & D. Soskice (2001), “An Introduction to Varieties of Capitalism” in P. A. Hall & D. Soskice (ed.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press, Chapter 1.

and institutionalization of markets, and, from the other side, the principle of social protection<sup>175</sup>.

## 2. Implications for the role of competition law

What are the implications of this new drafting for the role of competition law in the Union's constitutional framework and, more generally, in its competition policy substance?

First, the conceptualization of competition law as a means to achieve the Internal Market *as well as* the other objectives of the Treaty, offers discrete interpretive choices to courts. One of them consists in rejecting the theory that competition is valued "as such", because of its constitutional dimension or its nature of fundamental freedom or right. Losing its character of being an objective and becoming simply a means to achieve *other* objectives implies that if any argument is made for the principle of free competition, this cannot be deontological, but surely consequentialist, as the desirability of competition is assessed with regard to the completion of the broader aims it endeavours to achieve. In other words, competition is perceived as an efficient mechanism to achieve the objectives of the EU. The implicit assumption is that competitive markets are the best mechanism to allocate resources and to achieve the aims of the Union at the lowest cost. Its role is, however, incidental to the completion of those objectives. Such an interpretation of the text and the new structure of the Treaty might give a different meaning to the recent emphasis of the jurisprudence of the Court of Justice of the EU on the protection of "competition as such"<sup>176</sup>. One could be tempted to re-interpret this formula from a consequentialist perspective, as either expressing the preferences "of the public at large" for the preservation of the competitive process and competitive markets or, arguably, the preferences of the consumers, in the long run<sup>177</sup>. This is of importance, in particular in view of the recent "more economic approach" adopted by EU competition law, which focuses on the effects of the restrictions of competition on consumers. I will discuss the potential effects of such an interpretive choice in the relation between competition law and the Internal Market objective.

EU competition law has indeed followed, during the last twenty years, the path of economic analysis, either by adopting more economically-oriented block exemption regulations and guidelines or by using more economic and empirical evidence in the competition law decisions, at least at the European Commission's level<sup>178</sup>. There exist, nevertheless, situations where the concept of "consumer welfare" or "consumer harm", for example, comes to a collision course with the policy of market integration, as the highly mediatised cases on the parallel import of pharmaceuticals (the *Glaxo* saga) may illustrate.

<sup>175</sup> Polanyi, K. (2001, first published 1957), *The Great Transformation*, Boston: Beacon Press, 2<sup>nd</sup> ed., p. 138.

<sup>176</sup> See, for instance, Case C-8/08 *T-Mobile Netherlands BV and Others* [2009] ECR I-4529, para 38 where the Court of Justice of the EU accepted that "Article 81 EC [now Article 101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such".

<sup>177</sup> Note that Advocate General Kokott in her Opinion in Case C-8/08 *T-Mobile Netherlands BV and Others*, [2009] ECR I-4529, para 58 & 71 defended the view that the objective of EU competition law is to "protect competition as such" because this is of benefit, not only for consumers but for "the public at large".

<sup>178</sup> For a recent discussion see, Drexl, J., W. Kerber & R. Posdzun (eds.) (2011), *Competition policy and the economic approach : foundations and limitations*, Cheltenham : Edward Elgar.

The Court had to compare the possible benefits for consumers of restrictions to parallel trade with a possible encroachment to the Internal Market principle. After some initial hesitations generated by the case law of the General Court<sup>179</sup>, the Court of Justice seems to have re-affirmed the (primary) role of the Internal Market objective<sup>180</sup>. The modifications introduced by the TEU and the TFEU seem to confirm the importance of market integration in EU competition law. It is also true that the protection of the competitive process, in this case intrabrand competition between various pharmaceutical wholesalers across the Union, may also enhance the objective of the Internal market, if the latter objective is conceived as an elimination of public *and* private barriers to trade. However, as the judgment of the General Court in this case illustrates, there is tension between the protection of the Internal Market and the welfare of final consumers: because of the intense price regulation of pharmaceuticals and the involvement of state actors, enhancing parallel trade does not necessarily lead to lower prices for final consumers but, on the contrary, to the enrichment of intermediaries, such as parallel importers, which do not participate to the research and development effort in the industry. Consequently, there is less innovation from which may benefit consumers in the long run. A pro-consumer welfare perspective would thus lead to finding that restrictions to parallel imports should not be prohibited, if this could encourage innovation benefiting consumers sufficiently in the long run so as to outweigh the short run effects to allocative efficiency of such prohibition.

The protection of consumers figures also as an important objective of the Union, following the Treaty of Lisbon. Article 12 TFEU provides that “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”. This article may be interpreted as requiring that the protection of the interest of the consumer should be an integral part of EU competition law and policy<sup>181</sup>, as it should be for any other policy of the Union. The interpretive outcome would therefore depend on the balance between allocative efficiency (the price of pharmaceuticals is lower with parallel imports) and dynamic efficiency (there is more innovation by the pharmaceutical industry if parallel restrictions are restricted). Protocol no. 27 stresses that the “system” of competition law is part of the broader Internal Market objective. By doing so, it clarifies that market integration constitutes the specific aim of competition law, meaning that in case of conflict between this aim and other more general aims followed by the Treaty, such as the protection of the interest of consumers, the objective of the Internal Market should take priority. Certainly, the repeal of Article 3(1)g raises the issue of the rank of competition law and its relation to other provisions of the Treaty, in case of conflict. In terms of legal effect, pursuant to Article 51 TEU, Protocol no. 27 has, however, clearly the same legal status as the TEU and the TFEU. The Courts maintain their ability to ensure the “*effet utile*” of this provision, as it was previously the case with Article 3(1)g.

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<sup>179</sup> Case T-168/01, *GlaxoSmithKline Unlimited v Commission* [2006] ECR II-2969, para 118 (the protection of the welfare of final consumers constitutes the objective of Article 101(1) TFEU).

<sup>180</sup> Joined Cases C-468/06 to 478/06, *Sot Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, paras 56-57.; Joined Cases C-501, 513, 515 & 519/06P, *GlaxoSmithKline Services Unlimited v. Commission*, [2009] ECR I-9291, para. 63

<sup>181</sup> For a strong correlation between competition law and consumer policy see, Stuyck, J. (2005) ‘EC competition policy after modernisation: more than ever in the interest of consumers’, *Journal of Consumer Policy*, 28 1-30.

Secondly, the inclusion in Article 3(3) of the concept of “a highly competitive social market economy” might influence the Courts when deciding on the interaction of competition law with other policies pursued by the Treaty<sup>182</sup>. This situation should be distinguished from that relating to the existence of a specific objective of EU competition law, the Internal Market, following Protocol no. 27. One could analyse the inclusion of the concept of “social market economy” in the text of the Treaties as profoundly interlinked with the addition of broad horizontal integration provisions with the aim to manage the interaction between the different policies pursued by the Treaty, included in Title II of the TFEU entitled “Provisions having general application”<sup>183</sup>. The concept of “social market economy” operates more as an interpretive principle, rather than as an objective of EU competition law. The idea is to transform the Union to some form of holistic polity with competence to act, or at least to consider, all aspects of the welfare of its citizens. Article 9 of the TFEU states that “(i)n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”<sup>184</sup>. As discussed above, one could also add Article 12 on consumer protection. Such broad policy integration provisions did not exist in the general principles part of the previous Treaties, albeit in some specific areas, such as the protection of the environment<sup>185</sup>. The inclusion of these provisions will inevitably lead the Commission and arguably the Courts to grant more importance to broader public interest concerns in some circumstances.

Would this bring any change to current practice? The Commission has a clear stance against aggregating effects across markets<sup>186</sup> and balancing competition with other public

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<sup>182</sup> It is interesting to note that Europe is not the only major competition law jurisdiction attempting to reconcile the concept of “market” with the “social” dimension, perceived, at least if one follows Polanyi as two opposing organizing principles of the society. Article 1 of the Chinese Anti-Monopoly Law enacted in 2007 provides that the law is enacted with the purpose of “enhancing economic efficiency, safeguarding the interests of consumers and social public interest”, as well as “promoting the healthy development of the *socialist market economy*”. Of course, the exact meaning and degree of difference between what is conceived as the “social” and the “socialist” dimension of a “market economy” is a matter for speculation...

<sup>183</sup> See, for instance, the new general integration clause at Article 7 TFEU, “(t)he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”.

<sup>184</sup> Article 9 TFEU.

<sup>185</sup> Article 6 TEC, now Article 11 TFEU. One could note the difference in the terms employed in article 11 TFEU in comparison to Articles 9 and 12: “Environmental protection requirements *must* be integrated into the definition and implementation of the Union’s policies and activities”, while “a high level of employment”, “the guarantee of adequate social protection”, “consumer protection requirements” “*shall be taken into account*”. It is not clear if this different formulation suggests a difference in the degree of legal effect of these provisions.

<sup>186</sup> See, Commission, Notice - Guidelines on the application of article 81(3) [2004] OJ C 101/7, para. 43, “The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related,

interests, to the extent that these public interest objectives cannot be taken into account in the competition assessment<sup>187</sup>. The Commission takes into account the positive welfare effects of an agreement as long as “the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same”<sup>188</sup>. Had the Commission taken a positive view towards aggregation across markets (and not only related relevant markets, such as downstream markets, where one can assume that the consumers affected would be substantially the same), this would have led to quantification problems and difficult distributional choices between various categories of consumers<sup>189</sup>. The Court’s position on this issue seems more liberal. In a number of cases on the application of Article 101(3) the Court had regard to advantages arising from the agreement, not only for the specific relevant market but also for “every other market on which the agreement in question might have beneficial effects”<sup>190</sup>. Public interest objectives have occasionally outweighed the finding of a restriction of competition in the context of Article 101(1), when an activity is (self-)regulated and the restraints are ancillary for its organization and operation<sup>191</sup>. To this, one could add the interpretation of the concept of “undertaking” by the Commission and the courts with the aim to exclude from the scope of the competition law provisions of the Treaty certain activities, when applying competition law might jeopardize the public interest pursued<sup>192</sup>. The Court

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efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same”.

<sup>187</sup> *Ibid.*, para. 42: “Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3) [now Article 101(3)]”. In some cases, the Commission has managed to integrate the public interest objectives to the competition assessment under Article 101(3). See, Commission Decision no. 2000/475/EC, *CECED* [1999] OJ L187/47, para. 55-57, taking into account collective benefits to the environment and balancing them against the restriction to competition, thus extending the competition assessment outside of the boundaries of the specific relevant market. For a critical analysis see, Townley, C. (2011) ‘The Relevant Market: an acceptable limit to competition analysis?’, *European Competition Law Review*, **10** 490-499

<sup>188</sup> Commission, Notice - Guidelines on the application of article 81(3) [2004] OJ C 101/7, para. 43.

<sup>189</sup> See the comments by OFT, *Article 101(3) – A Discussion of Narrow versus Broad Definition of Benefits* (2010), available at [http://www.of.gov.uk/shared\\_of/events/Article101%283%29-discussionnote.pdf](http://www.of.gov.uk/shared_of/events/Article101%283%29-discussionnote.pdf), pp. 37-41. One could, however, oppose to this argument that the definition of a relevant market involves also distributional choices, in defining the category of consumers “worthy” of competition law protection. See, Lianos, I. (2009) ‘Judging Economists’: Economic expertise in competition litigation: a European view’, in I. Lianos & I. Kokkoris (eds.), *The Reform of EC Competition Law - Towards an Optimal Competition law System*, The Hague: Kluwer International, pp. 185-320, pp. 216-217. In any case, applying economic welfare analysis carries in itself a distributional choice in favour of the existing allocation of resources, following the second theorem of welfare economics.

<sup>190</sup> Case T-86/95, *Compagnie générale maritime and others v. Commission* [2002] ECR II-2011, para. 130. It should be noted, however, that the Court also mentions Article 5 of Regulation 1017/68, specifying that any benefit or economic advantage should be assessed with regard to “the interest of the transport users”, thus restricting the type of consumers/users considered. See, Case T-213/00, *CMA GCM & Others v. Commission* [2003] ECR II-913, para. 227, where the Court notes that “both Article 81(3) EC [now Article 101(3)] and Article 5 of Regulation No 1017/68 envisage the possibility of exemption for, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market” (emphasis added).

<sup>191</sup> Case C-309/99, *Wouters and Others* [2002] ECR I-1557; Case C-519/04, *Meca-Medina and Majcen* [2006] ECR I-6991. For an analysis of this issue in the context of Article 101 TFEU, see Townley, C. (2011), ‘Which Goals Count in Article 101 TFEU?: public policy and its discontents’, *European Competition Law Review* **9** 441-448

<sup>192</sup> For instance, solidarity between generations and the social security system: Joined Cases C-159/91 & 160/91, *Poucet v. Assurances Générales de France* [1993] ECR I-637; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband* [2004] ECR I-2493.

has also recognized the discretion of the Commission in balancing public interest objectives with the restriction to competition in a small number of cases regarding the enforcement of Article 101(3)<sup>193</sup>.

The Commission has taken into account public interest considerations, such as employment policy<sup>194</sup>, cultural policy<sup>195</sup>, environmental policy<sup>196</sup>, the protection of public health<sup>197</sup>, among others in enforcing Article 101 TFEU. The drafting of the Treaty of Lisbon might accentuate that trend and lead to a more explicit consideration of public policy concerns, thus aligning the competition assessment under Article 101 TFEU with the European Merger Control Regulation, which allows for the consideration of public interest objectives<sup>198</sup>. It appears therefore that the Commission and the courts dispose of various instruments to integrate public interest concerns, in order to manage conflicts between the application of competition law and the completion of the wider objectives of the EU: they can exclude its application, finding that there is no economic activity and consequently an “undertaking”; they can perform some form of intuitive balancing, based on the proportionality test<sup>199</sup>; they might resort to a sort of quantitative cost benefit analysis, similar to the instrument of impact assessment (or Cost Benefit Analysis – CBA) employed for other governmental policies<sup>200</sup>, in case benefits brought for the public interests are quantifiable<sup>201</sup>.

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<sup>193</sup> Case C-26/76, *Metro v. Commission* (Metro I) [1977] ECR 1875, para. 21: “The powers conferred upon the Commission under Art. 85(3) [now Article 101(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of *objectives of different nature* and to this end *certain restrictions of competition are permissible, provided they are essential to the attainment of those objectives* and they do not result in the elimination of competition for a substantial part of the common market”; Joined cases T-538/93, 542/93, 543/93 and 546/93, *Métropole Télévision v. Commission* [1996] ECR II-649, para. 118: “in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty”.

<sup>194</sup> Commission Decision no. 93/49/EEC, *Ford/Volkswagen* [1992] OJ L 20/14, para. 23 (considering the employment implications in the context of Article 101(3), although with additional efficiency gains); Commission Decision no. 94/296/EC, *Stichting Baksteen* [1994] L 131/15, para. 27.

<sup>195</sup> Commission Decision no. 82/123/EEC, *VBBB/VBVB* [1982] OJ L 54/36, para. 49-63 (the resale price maintenance agreement was not accepted).

<sup>196</sup> Commission Decision no. 94/986/EC, *Philips/Osram* [1994] OJ L 378/37, para. 27 “The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities”; Commission Decision no. 2000/475/EC, *CECED* [1999] OJ L187/47, para. 55-57; Commission Decision 2001/837/EC, *DSD* [2001] L 319/1, para. 148: “consumers will likewise benefit as a result of the improvement in environmental quality sought, essentially the reduction in the volume of packaging”.

<sup>197</sup> Commission Decision 94/770/EC, *Pasteur-Mérieux/Merck* [1994] OJ L 309/1, para. 89 & 108 (noting that the technical progress and improvements in distribution achieved by the anticompetitive agreement responded on top to “a genuine public health concern”).

<sup>198</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1, recital 23 (requiring the Commission to place its appraisal within the general framework of the fundamental objectives of the Treaties), thus allowing broader public interest concerns to be taken into account in the appraisal process); See also, Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel v. Commission* [1995] ECR II-1247, paras. 38-40 (taking into account the collective interest of employees – social protection).

<sup>199</sup> See, for instance, Case C-309/99, *Wouters*, above, with regard to Article 101(1) TFEU.

<sup>200</sup> OFT, *Article 101(3) – A Discussion of Narrow versus Broad Definition of Benefits* (2010), above, pp. 21-22 (noting that “aligning the competition assessment under Article 101(3) with the standard cost-benefit analysis used in government policy would reduce the likelihood of competition analysis being out of step with wider government analysis or being seen as a block to desirable government policy”). One might, however, object to this extension of the cost benefit analysis approach in competition law by alleging the need to distinguish

Based on the horizontal integration clauses of the Treaty, perceived as indicating the preferences of EU citizens, the competition law decision-makers may also devise a social welfare function that takes into account additional dimensions of welfare, than price and quality<sup>202</sup>.

### 3. Obstacles to a holistic EU competition law

Moving to a holistic approach that would rely on a social welfare function faces, nevertheless, two important obstacles. First, contrary to Articles 101 and 102 TFEU, the horizontal integration clauses do not produce any direct effect<sup>203</sup>. Their formulation is vague and inconclusive as to the legal effects produced to Member States and undertakings. The clauses seem to address themselves to the EU Institutions. Nevertheless, it is possible, as with the EU Directives, that integration clauses may produce indirect effects, including the duty of conform interpretation for the authorities in charge of their enforcement<sup>204</sup>. Facing a choice between two possible interpretations of Articles 101 or 102 TFEU, the Commission and the courts should make efforts to select the option that maximizes the policy aim stated in the integration clause, while preserving the competitive process<sup>205</sup>. This form of legal pluralism enables the EU Institutions to connect the different spheres of their action and to ensure policy coherence between them. Second, a further difficulty for adopting a social welfare function model is the increasing involvement of national courts in the interpretation and application of Articles 101 and 102 TFEU. The decentralization of the decision-making process and the inevitable focus of national courts on local costs and benefits, as opposed to inter-Member State effects, makes any effort to broaden the competition assessment under Articles 101 and 102 profoundly problematic. One could also add the complexity of performing the sophisticated quantitative analysis required by CBA for non-specialized courts. The Commission and National Competition Authorities (NCAs) are better equipped

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between the decision to subject to cost benefit analysis state action restricting competition and that of subjecting to cost benefit analysis private action, claiming that applying the same approach would jeopardise the principle of individual autonomy and the right of every economic agent to choose its trading partners and to dispose freely of its property. Yet, these rights are curtailed in presence of a restriction of competition, but only to the extent required for addressing this specific restriction of competition.

<sup>201</sup> The *CECED* case constitutes an illustration of this approach: Commission Decision no. 2000/475/EC, above.

<sup>202</sup> See, our developments above.

<sup>203</sup> See, for instance, concerning Article 6 TEC (now Article 11 TFEU), the Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 231: "Article 6 is not merely programmatic; it imposes legal obligations" and the Opinion of Advocate General Gelhoed in Case C-161/04 *Austria v Parliament and Council* [2006] ECR I-7183, para. 59-60, noting that Article 6 TEC "cannot be regarded as laying down a standard according to which in defining Community policies environmental protection must always be taken to be the prevalent interest", but "(a)t most (this provision) is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in policy areas outside that of environmental protection *stricto sensu*". Compare with the position of AG Cosmas in Case C-321/95 *Greenpeace* [1998] ECR I-1651 suggesting that the integration principle should have some form of direct effect.

<sup>204</sup> Case C-106/89, *Marleasing* [1990] ECR I-4135.

<sup>205</sup> For the proposition that the environmental integration clauses result in the priority of environmental protection when balanced against other Treaty objectives, see Schumacher, T (2001) 'The environmental integration clause in Article 6 of the EU Treaty: prioritising environmental protection', *Environmental Law Review* 3 29-43. On the interaction of competition law with environmental protection in general, see the excellent study of Kingston, S. (2012) *Greening EU Competition Law and Policy*, Cambridge University Press.

for this task, although one could object that they lack the adequate resources to perform this holistic analysis systematically.

The increasing role of public interests in the enforcement of EU competition law is also recognized in the context of Article 106 TFEU. One could refer to Protocol no. 26 on Services of General Interest, which has been annexed to the Treaty with the aim to emphasize the importance of services of general interest. Already Article 14 TFEU (former Article 16 TEC) recognized the role of services of general economic interest (SGEI) in the “shared values of the Union” and provided that Member States “shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions”. Nevertheless, Protocol no. 26 includes some important interpretive provisions, such as the need to take into account the diversity between various services of general economic interest because of the “differences in the needs and preferences of users that may result from different geographical, social or cultural situations, which also implies that national, regional and local authorities have a wide discretion in providing, commissioning and organizing SGEI closer to the needs of their citizens, as well as the need to ensure “a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights”. The Protocol affirms that “the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest”<sup>206</sup>. To a large extent these provisions reaffirm the principles that have been progressively developed by the jurisprudence of the Court and the decisional practice of the European Commission<sup>207</sup>. Furthermore, Article 36 of the Charter of Fundamental rights, having a similar legal value than the Treaties, states that “the Union recognises and respects access to services of general economic interest as provided for in national laws and practices”, “in order to promote the social and territorial cohesion of the Union”. Would the reinforced legal effect of the Charter in conjunction to the interpretive principle of “social market economy” provide more discretion to Member States with regard to the organisation of public service obligations? Would the scope of Article 106(1) be shrunk or that of Article 106(2) be extended as a consequence of these Treaty modifications? One cannot exclude these potential outcomes, should the Court be receptive to this interpretive option.

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<sup>206</sup> It should thus be possible for a Member State to exclude certain services not presenting any economic, commercial and industrial character from the scope of competition law, with the exception of course of cases where the activity is pursued in a competitive environment, which implies that it possesses economic (commercial) characteristics. See, Joined Cases C-223/99 & 260/99, *Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR I-3605.

<sup>207</sup> For example, in order to ensure the adequate operation of services of general economic interest with regard to quality, safety, affordability, equal treatment and the promotion of universal access, the financing of services of general economic interest is permitted, under certain circumstances, under the state aids regime of Article 107 TFEU. The issue is not addressed under Article 106 TFEU. One should, however, remark that even in this case, there is a need for a competitive benchmark, linked to the adoption of a specific procedure for the selection of the operators to receive compensation based on a public tender (public procurement). For a recent commentary on the relation between services of general interest and competition, see Gyselen, L. (2010) ‘Services of general economic interest and competition under European law: a delicate balance’, *Journal of European Competition Law & Practice*, **1(6)** 491-499; Buendia Sierra, J.-L. (2007) ‘Article 86-Exclusive Rights and other Anti-Competitive State Measures’, in *Faull & Nikpay, The EC Law of Competition*, Oxford: Oxford University Press, pp. 593-657; Bovis, C (2005) ‘Financing services of general interest in the EU: How do Public Procurement and State aids interact to demarcate between market forces and protection’, *European Law Journal* **11(1)** 79-109.



#### 4. Collective labour agreements and the social dimension of EU competition law

In order to illustrate how the interpretation of the competition law provisions of the Treaty might be affected by a greater recognition of the social dimension of the EU, I will focus on the example of collective labour agreements.

The Court of Justice discussed the interaction between competition law and collective labour agreements ensuring social protection in *Albany*, where it excluded an agreement between employers and employees to make affiliation to a sectoral pension fund compulsory from the scope of article 101(1)<sup>208</sup>. The case concerned organisations representing employers and employees that had collectively agreed to set up a single pension fund responsible for managing a supplementary pension scheme and had made requests to the public authorities to make affiliation to the fund compulsory. The Court of Justice referred to article 2 TEC as well as to the social policy provisions of the Treaty in order to proclaim that the Commission has to promote a close cooperation between Member States in the social field and to enhance the dialogue between management and labour at the European level<sup>209</sup>. Although the Court recognized that “it is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers”, it also held that “the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101(1)] of the Treaty when seeking jointly to adopt measures to improve the conditions of work and employment”<sup>210</sup>. It followed “from an interpretation of the provisions of the Treaty as a whole” that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 101(1)<sup>211</sup>. The value of competition had in this case to be sacrificed for the attainment of another value, social protection.

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<sup>208</sup> Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751. See also, Joined Cases C-115-117/97 *Brentjens* [1999] ECR I-6025. Interestingly, the case law does not exclude from the application of competition law collective agreements concluded between the members of liberal professions with regard to the fixation of minimum rates or other anticompetitive agreements, for example. See, Joined Cases C-180-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451; Commission Decision 2005/8/CE, *Belgian Architects Association* [2005] OJ L 4/10.

<sup>209</sup> Case C-67/96, *op. cit.*, paras. 54-58.

<sup>210</sup> *Ibid.*, para 59.

<sup>211</sup> *Ibid.*, para 60. Without necessarily referring to the aims of the Treaty, the Court of Justice has also excluded from the application of Article 101 TFEU, individual agreements between an employer and an employee, presumably for the lack of “independence” and “autonomy” of the employee. See, Case C-22/98, *Criminal proceedings against Jean Claude Becu* [1999] ECR I-5665, notwithstanding the fact that employees offer their services in a particular market and could potentially be considered as undertakings. One of the possible reasons justifying this approach is the specificity of the labor market, which requires some form of protection for the employees, considered as the weakest party in the transaction. Compare with the approach of the Court in Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889, where Article 101 TFEU was found applicable, for the simple reason that the dock workers did not conclude individual contracts for the provision of their services but acted through the intermediary of dock work companies, thus mitigating the weakness of dock workers in individual transactions.

It is nonetheless possible to advance a more competition-friendly reading of this case. As Advocate General Jacobs noted in his Opinion in *Albany* “this conclusion in favour of a limited antitrust immunity for collective agreements between management and labour is not incompatible with the idea that there is no exception for the social field as a whole”<sup>212</sup>. The main difference is that in the case of collective bargaining, the exception is not based on the subject-matter of the agreement but mainly on the framework in which it is concluded. These agreements contribute to a measure of equilibrium between the bargaining power on both sides, which helps to ensure a balanced outcome for both sides and for society as a whole. The countervailing bargaining power function of these agreements comes from the fact that the interests of employers and employees do not coincide: the obvious conflicting interests of the different parties further the public interest<sup>213</sup>. The Court did not exclude the application of competition law because the value of social protection was considered superior but it simply adopted a decision procedure based on a serial or lexical order<sup>214</sup>. Social protection was considered by the Court as a first principle in the order of preferences that should not lead to the elimination of competition (perceived as efficiency). Because of the conflicting interests of the employers and employees and their self-restraining effect, the agreements were socially valuable (and thus efficient) in this case<sup>215</sup>.

In *Viking*<sup>216</sup> and *Laval*<sup>217</sup> the Court followed a different approach for the reconciliation of the fundamental freedoms of the Internal Market with “social” fundamental rights, relying on the balancing metaphor. The Court explicitly embraced the “balancing” terminology (although one could have some doubts on its effective application in this case) by noting that

“(s)ince the Community has thus not only an economic but also social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy”<sup>218</sup>.

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<sup>212</sup> Opinion of AG Jacobs, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, op. cit., para. 183.

<sup>213</sup> Ibid., para. 185.

<sup>214</sup> Rawls, J. (1999, first published 1979) *A Theory of Justice*, Harvard University Press, p. 38 defines lexicographical or serial/lexical order as following: “(t)his is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception. We can regard such a ranking as analogous to a sequence of constrained maximum principles. For we can suppose that any principle in the order is to be maximized subject to the condition that the preceding principles are fully satisfied”.

<sup>215</sup> See, for an equivalent reading, the recent opinion of AG Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany* [2010] ECR I-7091, para. 58-60. The AG noted that the “Albany exception” to the application of EU competition law should be interpreted restrictively.

<sup>216</sup> Case C-438/05, *International Transport Workers’ Federation & Finish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

<sup>217</sup> Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767. See also Case C-346/06 *Rüffert* [2008] ECR I-1989.

<sup>218</sup> Case C-438/05, *International Transport Workers’ Federation & Finish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 79 (hereinafter *Viking*).

The Court subjected collective action to the scope of the free establishment provisions by rejecting the view that the Community has no (positive integration) competence to regulate social rights and that, therefore, the negative integration provisions of the Treaty would not apply. It also rejected the view that collective action, perceived as a fundamental right, should exclude the application of a freedom of movement. The Court rightly insisted on the social function and the non-absolute character of this right, consistent with its previous case law on individual rights (not just collective), such as the right to property<sup>219</sup>. But the Court also considered that freedom of establishment is a “fundamental freedom” that needs to be reconciled with the fundamental right of collective action<sup>220</sup>, through the application of the proportionality principle. The Court subjected only the fundamental right to the principle of proportionality (not the freedom of movement/establishment), thus implying that the freedom of movement would be of a higher order than fundamental rights in the hierarchy of norms<sup>221</sup>. The rhetoric of the Court put aside, the test applied had nothing to do with a proper balancing exercise that would evaluate both costs and benefits for each value in conflict. The most recent case law of the Court on the reconciliation of fundamental rights with the economic freedoms of the Treaty maintains this one-way reconciliation: fundamental rights are only subject to the proportionality principle, not fundamental freedoms<sup>222</sup>.

The reasons are not entirely clear, but it seems that in *Albany* the Court attached importance to the fact that the restriction of competition was inherent in the collective agreements, and thus the enforcement of competition law would have jeopardised their enactment, while this was not a risk to be incurred in *Viking* for the exercise of trade union rights. It was possible to exercise trade union rights without “prejudicing to a certain degree” the “fundamental” freedoms of movement<sup>223</sup>. However, it is impossible to conclude collective agreements without producing effects on wages, output, prices etc. and thus affect competition and consumers. The balancing metaphor could also be employed for the reconciliation of competition law with individual, as opposed to collective, fundamental rights. The integration of the Charter on Fundamental Rights into the framework of the Treaties may have important implications on the interpretation and enforcement of substantive competition law provisions. Undertakings may profit from substantive law rights, such as the freedom to conduct a business (Art. 16), the right to property (Art. 17) or to the protection of their intellectual property (Art. 17.2).

It remains to be seen what option the EU Courts will follow in the reconciliation of fundamental rights and public policies with the substance of competition law provisions of the Treaty.

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<sup>219</sup> Property is not an absolute right. European Union law emphasises the ‘social function’ of property, according to which, property rights can be restricted for reasons of public interest. See Case 265/87, *Herman Schröder HS Kraftfutter GmbH v Hauptzollamt Gronau* [1989] ECR 2237, para 15.

<sup>220</sup> For a similar approach see also opinion of AG Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany* [2010] ECR I-7091, para. 187 (noting that the content of the fundamental freedoms of movement might be conceived as tantamount to fundamental rights protecting economic activity).

<sup>221</sup> See also, opinion of Advocate General (AG) Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany*, op. cit., para. 183.

<sup>222</sup> Case C-271/08, op. cit. para. 43-49.

<sup>223</sup> Case C-438/05, *Viking*, op. cit., para 52.

#### IV. Moving beyond the goals debate: the need for a comparative institutional analysis

The important, at least in terms of numbers, literature on the goals of EU competition law may indicate that this issue is a paramount concern for the enforcement of EU competition law. Yet, this approach might commit what I will call the *jurisprudential fallacy*, that is the divorce between the question of the goal(s) presumably pursued by the legal sub-system created by the EU Treaties for the protection of competition and that of the institutional organization and capacity of the adjudicative process, that is the set of rules, practices, competences, powers of the institutions put in place to implement this area of law and their interaction with those of other institutions with which they might overlap, the concept of competition policy being much broader than competition law. In other words, the approach followed by the literature on the goals of competition law disconnects the jurisprudential stage, if we employ the Dworkinian terminology, here the “demand side” for always more overreaching and sophisticated protection of the principle of competition or of the normative values it aims to satisfy, from the consideration of the “supply side”, “the little engine of law and rights”<sup>224</sup>, that is, the adjudicative process and the available technologies and tools for the implementation of the law. One might not be able to rely on “Herculean” judges or adjudicators to perform this task, even if, following Dworkin’s admonition, the latter focus on principles and rights, rather than on issues of policy<sup>225</sup>: what would be total or consumer welfare considerations in competition law. The view that the EU political process is defective might lead in this case to argue for an expansive definition of principles and rights, so as to enable the Herculean judge to step in. Yet, as it is rightly pointed out by Neil Komesar, such an approach might commit the *sin of single institutional analysis*, as it will emphasize the defects of one institutional alternative (e.g. the political process) on some aspects to argue for an expansive role of another, probably equally defective in some other aspects, institutional choice: the adjudicative process<sup>226</sup>.

Similar criticisms can be made to competition law scholarship on the goals of competition law. Some authors advance the view that these goals should be limited to economic efficiency or consumer welfare, arguing that the adjudicative process would be unable to deal with a variety of conflicting objectives<sup>227</sup>. Others argue that the efficiency or welfare view is itself complex and demanding and that a rights and rules-based rather than policy and standards-based competition law is more hospitable to the weaknesses of the

<sup>224</sup> Komesar K. N. (2001) *Law’s Limits*, Cambridge: Cambridge University Press.

<sup>225</sup> For the classic statement of this view see, Dworkin, R. (1975) ‘Hard Cases’ *Harvard Law Review* 88 1057-1109 ; Dworkin, R. (1985), *A Matter of Principle*, Oxford University Press.

<sup>226</sup> Komesar K. N. (2001) *Law’s Limits*, p. 169, noting that “(n)owhere does Dworkin consider the systemic characteristics of the adjudicative process to which he assigns so much responsibility [...] Judges are embedded in an adjudicative process that relies on the dynamics of litigation to bring judges societal issues and on the adversarial process to inform them. This adjudicative process is constricted by its severely limited physical capacity as well as by the competence of its judges and juries [...] Dworkin’s version of the Rule of Law will remain empty until he addresses these institutional choices and the profound systemic issues that underlie them”.

<sup>227</sup> The classic argument was made in the context of US antitrust law by Easterbrook, F. (1985), ‘The Limits of Antitrust’ *Texas Law Review* 63(1) 1-40. In Europe, the argument has been made by many, but insistently by Odudu, O. (2006), *The Boundaries of EC Competition Law: The Scope of Article 81*, Oxford University Press; Odudu, O. (2010) ‘The Wider Concerns of Competition Law’ *Oxford Journal of Legal Studies* 30(3) 599-613.

adjudicative process<sup>228</sup>. Others advance a broad welfare approach that would integrate public policy concerns in EU competition law through a “common denominator” or cost benefit analysis, arguing that this is required by the intended relationship between Treaty provisions<sup>229</sup>. None of these approaches, however, examines systematically the advantages and disadvantages of the underlying comparative institutional choice that each decision involves.

I will first examine the problem of the interpretive method faced by the EU courts in the presence of goal pluralism and will then argue for a comparative institutional analysis.

### A. The goals of competition law and the problem of the interpretive method

The studies examining the goals of competition law usually adopt the following theoretical standpoints: Some would start from a default end-state position, determined by the goal(s) of competition law, and under the assumption that the legal system should or is effectively pursuing this aim, they would advance a specific interpretive technique or tool that would enable the adjudicator to attain this pre-determined desirable end-state. In other words, this approach requires the competition law adjudicator to discover the most effective form of legal reasoning, with regard to the completion of the desirable end state, before implementing the competition law provisions. The choice of the interpretive strategy is thus of little value other than the realization of the end-state sought, once the goal(s) have been determined. From this perspective, providing the adjudicator the widest margin of discretion is the prevailing strategy, as in any case, the adjudicator should guide the legal process to the “optimal” solution. It is not a surprise that authors advancing the goal of consumer welfare or that of the protection of the consumer and those arguing for a total welfare approach and economic efficiency agree on the rule of reason and different forms of balancing as their preferred strategy for implementing competition law. Their conception of legal presumptions remains also influenced by this balancing metaphor, as *per se* rules in US antitrust law or object restrictions in EU Competition law are perceived as embodying the balancing experience of the adjudicator in past decisions, or past economic analysis, culminating to the formation of legal presumptions that codify past practice or economic consensus<sup>230</sup>.

The question of the ultimate goals of competition law, or put differently, the end-state it aims to achieve, becomes in this case the most important question that needs to be resolved *prior* to the choice of the form of balancing, as it will determine its result. The debates over total or consumer welfare standard can be explained through this angle. It is unclear how these different standards achieve different solutions in practice<sup>231</sup>, but discussions are often

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<sup>228</sup> See, for instance, the criticisms to the rule of reason by Stucke, M. (2009) ‘Does the Rule of reason Violate the Rule of Law?’ *UC Davis Law Review* 42(5) 1375-1490. For an interesting effort to reconcile the “economic approach” (welfare driven approach) with a more rules-based competition law, see Christiansen, A. & Kerber, W. (2006) ‘Competition Policy with Optimally Differentiated Rules Instead of ‘Per Se Rules’ versus ‘Rule of Reason’ *Journal of Competition Law & Economics* 2(2) 215-244.

<sup>229</sup> See, for instance, Townley, C. (2009) *Article 81 EC and Public Policy*, Oxford: Hart Pub.

<sup>230</sup> See, for instance, Opinion of Advocate General Trstenjak, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission*, op. cit., para. 92.

<sup>231</sup> See, for instance, the conflicting positions on the practical implications of the choice of consumer versus total welfare of Blair, R. and D. Sokol (2012), ‘The Rule of Reason and the Goals of Antitrust: An Economic

characterized by theological fervour as debates over stepping stones (or is it in reality a stumbling block?) usually do. Some of these debates are driven by ideological commitments to government or inversely market failures<sup>232</sup>, in other instances, by “pragmatic” considerations over the need for global convergence, although no effort is made to explain on which normative grounds convergence is a desirable objective and who will ultimately benefit from it<sup>233</sup>.

The teleological and contextual methods often employed by the European Courts have enabled this goal-oriented approach of legal interpretation to thrive. This specific blending of the teleological and contextual approaches links the effort of interpretation to the purpose and object of the text and its systemic context (with the other provisions of the Treaty). It is particularly appropriate in the absence of clear definitions of the terms used by the Treaties, such as the concept of “competition”, and the largely imprecise language often used, the Treaty setting out a grand design rather than a detailed blueprint. Although the Court of Justice has employed a variety of interpretive methods, the teleological and contextual methods of interpretation have played an important role in the development of EU law in general and competition law in particular. The Court has famously made use of this “European pattern<sup>234</sup>” of interpretive method in the *Continental Can* case, where it explicitly rejected the literal interpretation of the Treaties and the reference to the experience of national laws (some would see in this the premises of a comparative law method), and made reference to the “spirit, general scheme and wording of Article [102], as well as to the system and objectives of the Treaty” to hold that Article 102 could apply to a merger between undertakings<sup>235</sup>. As we have discussed earlier the use of this interpretive method has led to a number of important judgments of the Court expanding the reach of EU competition law.

Relying on this specific method of interpretation and the need for coherence among the different provisions of the EU Treaties, some authors have suggested some textual amendments to the Treaties in order to incorporate language that would enable the EU courts to “maximize” or achieve their preferred goal. Most often, these suggestions have touched Article 101(3), precisely because it is the one of the main two provisions of EU competition law that incorporates explicitly a balancing test, the fetish of all goal inspired authors. On one side of the spectrum, Giorgio Monti has argued for the addition of an Article 101(4) TFEU that would enable public policy considerations to be integrated in the balancing pot<sup>236</sup>. Taking a different perspective, Oles Andriuchyk has suggested the addition of an Article 101(4)

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Approach’, op. cit (noting that in most simple cases, the choice of the antitrust welfare standard does not matter) and Kaplow, L. (2012), ‘On the Choice of Welfare Standards in Competition Law’ in Zimmer, D. (eds.), *The Goals of Competition Law*, op. cit., pp. 3-26 (advancing the view that the choice of the standard may have important implications on all competition cases).

<sup>232</sup> Wright, J. (2012), ‘Abandoning Antitrust Chicago Obsession: The Case for Evidence-Based Antitrust’, op. cit.

<sup>233</sup> See, for instance, Blair, R. and D. Sokol (2012), ‘The Rule of Reason and the Goals of Antitrust: An Economic Approach’, op. cit.

<sup>234</sup> See, Lord Denning in *Bulmer v. Bollinger* [1974] Ch 401, p. 425, noting how the methods of interpretation employed by the CJEU differ from those applied by the English courts.

<sup>235</sup> Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, para. 22.

<sup>236</sup> Monti, G. (2002) ‘Article 81 EC and Public Policy’ *Common Market Law Review* 39(5) 1057-1099.

TFEU that would enable the principle of competition to take precedence in certain cases over public policy or welfare concerns<sup>237</sup>. Others have preferred the resolution of these conflicts in the context of both Articles 101(1) and 101(3) believing that Article 101(1) may enable the resolution of eventual conflicts, either by excluding the application of EU competition law, for example by narrowing down the concept of undertaking<sup>238</sup>, or by applying the principle of proportionality<sup>239</sup>. Some would see the proportionality test as a form of balancing analysis, this time intuitive, rather than quantitative, as it is the case for cost benefit analysis<sup>240</sup>, hence denying the distinctiveness of a “European rule of reason” or a “rule of regulatory ancillarity”<sup>241</sup>. Finally, there are authors that conscious of the power of the contextual-teleological method, exclude these public policy or non-competition concerns altogether from any consideration under Article 101(3), bounding Prometheus, aka the Court of Justice, on the basis of administrability or justiciability concerns<sup>242</sup>. *Et j’en passe....*

Furthermore, some authors have challenged the existing case law of the EU Courts on Article 102 TFEU by arguing for an original intent style of interpretive method of the provisions of the Treaty that would require the analysis of the *travaux préparatoires*<sup>243</sup>. I think their suggestion misunderstands the specificities of the interpretive methods usually employed by the EU Courts, the claim for an autonomous hermeneutic framework, distinct from that of international law<sup>244</sup>, and the little attraction the historical method of interpretation has exercised so far in EU law. No serious normative argument is provided to justify this interpretative shift.

A different approach would not focus on goals but will examine institutions before exploring the question of the objectives of EU competition law. Neil Komesar has advanced a theory of comparative institutional analysis emphasizing the primary role of institutional

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<sup>237</sup> Andriychuk, O. (2010), ‘Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process’, op. cit., pp. 596-600.

<sup>238</sup> van Rompuy, B. (2012), op. cit., p. 218, noting: ‘a distinction must be made between two general approaches to resolve potential conflicts between competition considerations and non-efficiency considerations in the context of Article 101 TFEU. The first approach is to resolve the conflict external to Article 101 TFEU, by exclusion. Under this approach, non-efficiency considerations are not integrated in the substance of antitrust analysis. The conflicting interests trump Article 101 TFEU as a whole. In other words, the scope of application of Article 101 TFEU is delimited for the purpose of accommodating non-efficiency considerations. The second approach is to resolve the conflict within Article 101 TFEU, by compromise. Under this approach, non-efficiency considerations are integrated in the substance of antitrust analysis. As part of the assessment under Article 101(1) or 101(3) TFEU, the competition concerns are balanced against conflicting non-efficiency considerations. The mechanism of “balancing” refers here to the balancing of conflicting values to identify an optimal equilibrium. Balancing also has a second meaning in EU antitrust law’.

<sup>239</sup> Komninos, A (2005) ‘Non competition concerns – Resolution of conflicts in the Integrated Article 81 EC’, CCLP Working paper 08-05, Oxford CCLP.

<sup>240</sup> Lianos, I. (2007), *La Transformation du droit de la concurrence par le recours à l’analyse économique*, Brussels /Athens: Bruylant/Sakkoulas.

<sup>241</sup> Whish, R & D. Bailey (2011) *Competition Law*, Oxford: Oxford University Press, p. 130.

<sup>242</sup> See, for instance, Odudu, O (2010) ‘The wider concerns of competition law’, op. cit., pp. 611-612.

<sup>243</sup> Akman, P. (2009), ‘Searching for the Long-Lost Soul of Article 82EC’, op. cit.

<sup>244</sup> See, for instance, Kovar, R. (1995), *La contribution de la Cour de justice à l’édification de l’ordre juridique communautaire. Cours général de droit communautaire*, Collected Courses of the Academy of European Law, 1993, IV/1, The Hague/Boston/London, Kluwer Law International/Martinus Nijhoff, pp. 15-122.

choice and the connections between issues of institutional choice and goals<sup>245</sup>. For Komesar, the question of the goals should follow and not precede that of institutional choice: “identifying a goal [...] tells us virtually nothing about law and rights”<sup>246</sup>. By institutional choice I mean the selection of the social decision-making process that would dispose the residual right of decision-making in a specific context. Komesar distinguishes between legislatures (the political realm), courts (adjudicators) and markets. It is, however, possible to break his categories and apply his analysis to various other intermediary social decision-making processes, such as the State bureaucracy, independent regulators, private standard setting/self-regulation bodies, or, in our case, competition authorities. Goals are achieved by the intermediary of institutional processes, and institutional processes inevitably affect outcomes.

The first implication of this standpoint is that the choice of the adequate institutional process, for example courts or the market, cannot be done in *abstracto* and from a static perspective, but should take an empirical and dynamic approach that would focus on the number and the complexity of the matters to be decided by these processes. His analysis suggests a shift in the choice of the adequate institutional process as numbers and complexity increase<sup>247</sup>. Hence, institutional choices “define the terms of legal analysis not the other way around”<sup>248</sup>. As it is explained by Komesar,

“[...] (V)irtually nothing follows from the choice of a goal. You cannot hardwire goals and institutions and, therefore, no program of law and public policy follows from goal choice. The simple correlations between goals and institutions that characterize so many ideological positions simply do not hold”<sup>249</sup>.

Such an approach would abandon the “simplistic associations of goals and institutions”<sup>250</sup> and would argue that institutional choice should become the focus of the analysis. These institutional choices can be viewed in “welfare terms (regarding the efficiency and distributive consequences of a particular institution) and in participatory terms (regarding the quality and extent of participation in the decision-making processes at issue)”<sup>251</sup>, the assumption being that “institutional processes mediate the articulation of individual preferences”<sup>252</sup>.

The second implication is that the choice of the institution that will balance the costs and benefits should be comparative, rather than single. Institutions are alternative mechanisms by which societies carry out their goals. Each of them presents specific limits and imperfections and the decision over the most optimal one should result from a

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<sup>245</sup> Komesar, N. (1997) *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, University of Chicago Press; Komesar, N. (2001), *Law's Limits*, Cambridge: Cambridge University Press.

<sup>246</sup> Komesar, N. (2001), *Law's Limits*, op. cit., p. 23.

<sup>247</sup> Ibid., p. 19.

<sup>248</sup> Ibid., p. 34.

<sup>249</sup> Ibid., p. 175.

<sup>250</sup> Ibid.

<sup>251</sup> Schaffer, G. & Trachtman, J. (2011), ‘Interpretation and Institutional Choice at the WTO’ *Virginia Journal of International Law* **52(1)** 103-153, p. 106.

<sup>252</sup> Ibid., p. 152.



comparative cost benefit analysis of all the alternative institutional choices in order to select the least imperfect one. Contrary to single institutional analysis that would immediately conclude that, for example, in presence of market failures the courts or the legislative process should intervene, or that in the presence of a government failure, the market is the adequate institutional choice, comparative institutional analysis will assess both options before any decision is made. According to Komesar, “we must confront the reality that the best choices will be highly imperfect and that the relative merits of institutions will vary across different settings”<sup>253</sup>.

None of these institutional choices is perfect from the perspectives of social welfare maximization, distributive fairness or the direct and indirect participation in decision-making of the affected stakeholders. Under each alternative, stakeholder positions will be reflected and affected in different ways. Different interpretive choices can thus be analyzed using a comparative institutional analytic method that focuses on the relative implications of interpretive choices for welfare and participation. The allocation of institutional responsibilities always turns upon a judgment about which of the candidate institutions is, when compared to the other candidates, best suited to the job. Komesar is rightly criticizing the fallacy of single-institutionalism (that is the allocation of a social task to one institution based solely on the judgment that other institutions will carry out the task imperfectly, without the necessary comparative judgments). It is not sufficient to raise the imperfections of one institution, e.g. the market, advancing the view that these should be corrected by the political or the adjudicative process, and inversely, without comparing the relative trade-offs of these alternative institutional processes as well in the same context. This is of course a skeleton of an approach rather than a detailed and solid framework, but this route is promising and needs to be explored further.

A further point that Komesar makes is that the quality and extent of participation can serve as a proxy for both efficiency and distributive consequences. All institutional processes, the market, the political or the adjudicative process, are marked by biases in participation, hence the need to conduct a comparative institutional analysis to find the least biased one. Komesar advances a “participation-centered” approach<sup>254</sup>, which will not commit the fallacy of one-sided interest group analysis to only focus on the risk of over representation of minority interests seeking rents, but it will search for all affected groups in various dimensions and will examine how the distribution of benefits and costs of action would affect the ability of different groups to get what they want via the different institutions. From this perspective, the over-representation of some majority interests (e.g. consumers) might also lead to unsatisfactory results from the point of view of welfare. According to this theory, it is important to focus on the factors determining a group’s marginal cost of participation. In Komesar’s “participation-centered” model, “information costs” and “organization costs” determine a group’s participation costs<sup>255</sup>. The first refer to the costs of learning the law and procedures applicable as well as the costs for the

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<sup>253</sup> Ibid., p. 189.

<sup>254</sup> Komesar, N. (1994), *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, op. cit.

<sup>255</sup> Ibid., p. 8

specific institution to gather information. The organization costs facing a group are the costs to be incurred by the members who want to take action, and want other members to contribute. Organization costs increase with group size. The size of each member's individual stake - how much she stands to gain from winning - also affects her inclination to organize her fellow members. It follows that organization costs rise as individual stakes decrease.

The dispute resolution can thus be biased in two ways: a “minority bias” when a small group with high individual stakes convinces an institution to enact its preferred policy and by doing so inflicts a greater cost on a large group with lower individual stakes than the benefit it obtains<sup>256</sup>, or a “majoritarian bias” when a large group with low individual stakes prevails and thereby inflicts a greater cost on a small, high-stakes group than the benefit it obtains<sup>257</sup>. Once a dispute has been identified, the goal of comparative institutional analysis would thus be to find the institution least likely to develop a minority or majoritarian bias, that is, the institution where the group with the highest total stake is most likely to win.

How may this framework affect the interpretive strategies followed by the competition authorities and the courts?

## **B. Foundations for a comparative institutional analysis in EU Competition Law**

Komesar focuses on a specific *topos* of the adjudicative process: the courts. The adjudicative process constitutes a distinct form of social ordering; its distinguishing characteristic "lies in the “fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor”<sup>258</sup>. It is usually distinguished from the political realm (in which the affected parties participate through voting) and the market (in which participation takes the form of transactions, negotiation and contract)<sup>259</sup>.

Judges are situated decision-makers responding to disputes in light of particular social, political, and historical contexts that shape their views of the facts of a particular case. Courts may find it difficult to collect the great amount of data needed to conduct an extensive comparative institutional analysis. Hence, it is important to emphasize the issue of interpretive choice, as the judge applies standard decision-making strategies of choice under a situation of “irreducible empirical uncertainty”<sup>260</sup>. Taking a different perspective than Komesar, Adrian Vermeule observes that “interpretive choice is a choice among possible means to attain stipulated ends”<sup>261</sup>. According to Vermeule, “courts’ foremost concern should

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<sup>256</sup> Ibid., p. 55.

<sup>257</sup> Ibid., p. 77.

<sup>258</sup> Fuller, L.L & Winston I.K. (1978), ‘The Forms and Limits of Adjudication’ *Harvard Law Review* 92(2) 353-409, p. 364

<sup>259</sup> Ibid.

<sup>260</sup> Vermeule, A. (2000) ‘Interpretive Choice’ *New York University Law Review* 75(1) 74-149.

<sup>261</sup> Ibid., p. 76.

be to minimize the costs of judicial decision-making and of legal uncertainty<sup>262</sup>. This concern “pushes interpretive doctrine in the direction of formalism towards rules rather than standards, towards a relatively small, traceable and cheap set of interpretive sources rather than a relative large, complex and expansive set”<sup>263</sup>. Now there are various ways to make decisions under uncertainty. Some examples are delegating the decision to (a community of) experts in the hope that the experts can better access the empirical questions, or basing the decision on some group consensus in the hope that aggregating many people’s assessments of the uncertainties will improve accuracy, or adopt avoidance strategies, such as “allocating the burden of overcoming uncertainty to one position or another (commonly by placing a burden of proof upon opponents of status quo), or reducing the scope of uncertainty by basing choices upon the known costs and benefits of the candidate doctrines, while assuming that the unknown costs and benefits of the candidates will prove roughly equal, and picking doctrines swiftly, rather than choosing them after protracted deliberation”<sup>264</sup>. It is important to acknowledge here that “judges have far superior information about the costs of decision-making and legal uncertainty that they do about other empirical components of interpretive choice”<sup>265</sup>. Thus, according to Vermeule, judges should focus “upon the variables they understand best, and should choose interpretive doctrines with a view of minimizing legal uncertainty, judicial vacillation and the costs of litigation and judicial decision-making”<sup>266</sup>.

One of the dimensions of interpretive choice is also “the choice among a whole menagerie of forms (rules, standard, presumptions, rules with exceptions, etc)”<sup>267</sup>. According to Vermeule, “(r)ules economize on information and thus often reduce legal uncertainty and judicial decision costs, at least in the short term”<sup>268</sup>. Yet rules may prove over or under-inclusive, and “may raise error costs relative to the performance of a fully informed and fully competent decision-maker using a standard”<sup>269</sup>. The choice of the specific legal form will require “empirical assessments of the competence of the judges or decision-makers who will apply the chosen legal doctrine, the relative decision costs of rules, standards, and their variants, and the effects of the choice of form on the legislative and administrative institutions who create law and on the private firms and individuals who live under it”<sup>270</sup>. The choice of legal form has thus an effect on the allocation of decision-making authority. Standards delegate authority to the decision-maker at the point of application. Rules “vest authority in the rule formulators rather than in those who apply the rule in particular cases at a later time”<sup>271</sup>. Hence, for Vermeule, rules “require more information and decisional competence *ex ante*, at the time the rule formulators decide what the content of the rule should be”, while “standards require more information and decisional competence *ex post*, at the time of application”. An important consideration in the choice between rules and

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<sup>262</sup> *Ibid.*, p. 79.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*, p. 81.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*, p. 92.

<sup>268</sup> *Ibid.*, p. 91.

<sup>269</sup> *Ibid.*, p. 92.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*, p. 93.

standards is thus “whether the rule creators, or instead the rule appliers have better information and superior competence to translate information into sound legal policy”<sup>272</sup>.

If one follows this approach in conceptualizing interpretive choice, the prospects for a pluralist programme with regard to the goals of EU competition law may run to important institutional difficulties, if this is to be implemented by courts. Yet, the main actors of the adjudicative process in EU Competition law are competition authorities rather than courts, in view of the predominant role played by administrative enforcement in EU competition law and the limited role of courts with regard to the judicial review of competition authorities’ decisions. Competition authorities may take the form of independent administrative agencies, or the form of a ministerial department, as it is the case with the DG Competition at the European Commission. Their attractiveness in terms of institutional choice and the resulting interpretive choices they adhere to differs from those of courts and may even vary among them, depending on their mandate and institutional capacities. Competition law principles may also be applied by sector specific regulators in disputes rising in regulated sectors of the economy (e.g. telecoms, energy, more generally utilities); in some jurisdictions, regulators dispose of a concurrent authority to that of competition authorities to implement EU competition law.

Modelled closely to the paradigm of court adjudication, the adjudicative process in regulatory agencies and competition authorities involves the participation of the affected parties in the decision-making process through the presentation of proofs and reasoned arguments. However, despite the effort recently made in EU Competition law to reinforce the judicial characteristics of the administrative enforcement process by protecting the rights of defence and introducing a limited adversarial dimension in the process (e.g. oral hearing, the reinforced role of the hearing officer)<sup>273</sup>, decision-making in the European Commission is markedly different from that followed in courts. This is not only function of the inquisitorial character of the procedure, but also of the “polycentric” nature of the disputes competition authorities are generally asked to address. By “polycentric”, it is not only meant a situation in which the decision may affect many actors, thus leading to a fluid state of affairs if all affected interests are taken into account, but also encloses situations when a decision over the position of one of the actors would have a different set of repercussions and might require in each instance a redefinition of the parties affected<sup>274</sup>. Concealed polycentric elements are present in all problems resolved by adjudication: the rule of precedent or *stare decisis* being an illustration. The more polycentric a dispute is, the more flexible the decision-maker should be and the more “liberally” judicial precedents would be interpreted and subject to reformulation, as problems not originally foreseen arise<sup>275</sup>.

Competition law disputes have seen their polycentric dimension accentuated with the move towards a more economic approach. The original setting put in place by the constitutive

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<sup>272</sup> Ibid.

<sup>273</sup> Decision 2011/695 of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in certain competition proceedings [2011] OJ L 275/29.

<sup>274</sup> Fuller, L.L & Winston I.K. (1978), ‘The Forms and Limits of Adjudication’, op. cit., p.

<sup>275</sup> Ibid., p. 398.

Treaties was the result of a compromise between the German ordo-liberal model of neoliberalism and the model of strong administrative or regulatory involvement in the economy that had emerged in liberal democracies of the West following the Great Depression in the 1930s and Keynesian economics. An important element of the German neo-liberal programme was that the “juridical”, the Rule of Law, should be implemented in the economic order: as Foucault has presciently explained in his lectures on *The Birth of Biopolitics*, applying the principle of the Rule of Law in the economic order “means that the state can make legal interventions in the economic order only if these legal interventions take the form solely of the introduction of formal principles”<sup>276</sup>. This is the complete opposite of a plan, that is, “the adoption of precise and definite economic ends”<sup>277</sup>. According to Foucault,

“(t)he Rule of law will have the possibility of formulating certain measures of a general kind, but these must remain completely formal and must never pursue a particular end [...] [First,] (a) law in the economic order must remain strictly formal. It must tell people what they must and must not do; it must not be inscribed within an overall economic choice. [...] [Second,] it must be conceived a priori in the form of fixed rules and must never be rectifiable by reference to the effects produced. Third, it must define a framework within which economic agents can freely make their decisions, inasmuch as, precisely, every agent knows that the legal framework is fixed in its action and will not change [...]”<sup>278</sup>.

Ordoliberals emphasized the role of the judiciary or adjudication in general, as opposed to the model of managerial direction in central planned economies: “(i)t is now advisable, to make courts, more than in the past, organs of the economy and to entrust to their decision tasks that were previously entrusted to administrative authorities”<sup>279</sup>. The competition law provisions of the Treaty and their implementation by the European Courts and the European Commission, at least until the advent of the “more economic” “effects-based” approach in the 1990s, exemplified these institutional and interpretive choices. Competition law rules were subject to adjudication by national courts as well as by the European Commission, which would not however act as a central planner or as a regulator in this context, but as an adjudicator, with streamlined rules of procedure, limited remedial tools and subject to judicial scrutiny by a generalist court. The predominant goal of EU competition law at the time, economic freedom or freedom to compete of economic actors (suppliers, distributors), was equally adjudication friendly, as it is the function of the courts to declare and adjudicate conflicting rights. The competition law provisions with the strongest polycentric dimension, such as Article 101(3), were of the exclusive competence of the European Commission, as a result of the legal authorisation system adopted by Regulation 17/62 and the obligation imposed to the parties to notify their agreements to the European Commission.

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<sup>276</sup> Foucault, M. (2010), *The Birth of Biopolitics- Lectures at the Collège de France*, Palgrave Macmillan, p. 171.

<sup>277</sup> Ibid. p. 172.

<sup>278</sup> Ibid., p. 173

<sup>279</sup> Ibid., p. 176, citing Röpke, W. (1950) *The Social Crisis of our Time*, University of Chicago Press, Part II, chapter 2, p. 193.

The move towards a more economic approach and a system of legal exception in the context of Article 101 TFEU has accentuated the polycentric dimension of competition law disputes. Consumers active in the specific relevant market were added to the list of the participants affected by the adjudicated transaction, their interest(s) being given the most important weight in the decision-making process (because of the emphasis on consumer harm). The polycentric character of competition law disputes will no doubt increase in intensity, should EU competition law move to a holistic approach and incorporate more systematically public policy concerns, thus multiplying the categories of affected participants and the conflicting interests to take into account. The number of affected participants and the complexity of repercussions, because of the variety of interests to take into account, might justify a shift in institutional and interpretive choice.

What becomes important is thus the “question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached”<sup>280</sup>. Problems that are sufficiently polycentric may be unsuited for adjudication and may be resolved either through managerial direction, through negotiation and contract<sup>281</sup>, or left to the forces of the market. Some problems, such as the allocation of economic resources, may indeed “present too strong a polycentric aspect to be suitable for adjudication”<sup>282</sup>. Fuller explains what happens when an attempt is made to deal by adjudicative forms with a problem that is essentially polycentric:

“[...] three things can happen, sometimes all at once. First, the adjudicative solution may fail. Unexpected repercussions make the decision unworkable; it is ignored, withdrawn, or modified, sometimes repeatedly. Second, the purported arbiter ignores judicial proprieties - he "tries out" various solutions in post-hearing conferences, consults parties not represented at the hearings, guesses at facts not proved and not properly matters for anything like judicial notice. Third, instead of accommodating his procedures to the nature of the problem he confronts, he may reformulate the problem so as to make it amenable to solution through adjudicative procedures”<sup>283</sup>.

A holistic competition law might run to similar difficulties, although it may be normatively more appealing than the other options on offer. The experience on the implementation of Section 21 of the Restrictive Trade Practices Act (RTPA) of 1956 in the UK, a contemporary regime to the German Act Against Restraints of Competition of 1957 and the Treaty of Rome, might provide some interesting historical insights to the difficulties of a holistic competition law regime. Section 21 of the RTPA provided that any restrictions of competition provided by the Act were *prima facie* contrary to the public interest unless the parties to the agreement brought evidence that the agreement satisfied the conditions of a number of gateways instituted by the RTPA, such as the protection of the public against injury in connection with the consumption, installation or use of the goods, the protection of the benefits that purchasers, consumers or users of the goods would get from the restriction to

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<sup>280</sup> Fuller, L.L & Winston I.K. (1978), op. cit., p. 398.

<sup>281</sup> Ibid.

<sup>282</sup> Ibid., p. 400.

<sup>283</sup> Ibid., p. 401.

competition, the possibility for the parties to deal with a preponderant customer or supplier, the prevention of serious unemployment, among others. These considerations were subject to a balancing test. The balancing was to be implemented by a specialised court, the Restrictive Trade Practices Court (RTPC), a mixed court of professional judges and laymen. Although the gateways were narrowly defined and did not include all public policy concerns, there was some discussion over their justiciability, in other words their amenity to adjudication, once the relevant facts have been ascertained<sup>284</sup>. Justiciability also involves that the “answer which would be given by persons of common training and habits of thought would be predictable”<sup>285</sup>. One of the main difficulties was for the Court to form predictable and valid value judgments upon matters of economics, the different commentators questioning the ability of the judicial process based upon the adversary system to provide a suitable machinery for ascertaining the relevant facts and evaluating conflicting expert opinions on matters of economics. In particular, the difficulties of selecting the appropriate economic hypothesis or of predicting future business behaviour and economic conditions were dully noted. Yet, despite the inherent weakness of using the judicial process for making regulatory decisions, the operation of the RTPC exemplifies the strategy of adjusting the adjudicative process to polycentric questions. First, the Court discouraged any tendency to treat its decisions in particular cases as binding precedents<sup>286</sup>, thus offering an increased degree of flexibility in assessing new problems and factual issues. Second, the Court took care to reformulate the problems submitted to it in a way more amenable to adjudication, by emphasizing the primordial role of the promotion of competition as the basic policy of the Act and by refusing to take into account the implications or effects of its decisions, for example on unemployment, as this would be an important departure from the legalistic reasoning required by the judicial function. The Court also adopted a more flexible approach to balancing while realigning the burden of proof in order to reduce the cost of collecting and assessing information on the different gateways<sup>287</sup>.

The evolution of EU Competition law towards the adoption of a more narrowly defined standard of consumer harm<sup>288</sup>, the elaboration of new legal categories, such as price and non-price restraints<sup>289</sup>, and presumptions with regard to anticompetitive effects, such as prices below average variable costs for predatory pricing<sup>290</sup> or the exclusion of an as efficient as competitor in margin squeeze cases<sup>291</sup> may be considered as a necessary adjustment for accommodating the adjudicative process to the polycentric dimension of the more economic

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<sup>284</sup> See, for instance, Diplock, W.J. K. (1967), *The Role of the Judicial process in the Regulation of Competition*, London: Oxford University Press; Yamey B.S. & Stevens R.B. (1965), *The Restrictive Practices Court*, London: Weidenfeld and Nicolson.

<sup>285</sup> Diplock, W.J. K. (1967), *op. cit.*, 18.

<sup>286</sup> *Ibid.*, p. 25.

<sup>287</sup> Yamey B.S. & Stevens R.B. (1965), *op. cit.*, pp. 114-137.

<sup>288</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities, *op. cit.*, para. 5; Case C-95/04, *British Airways plc v. Comm'n*, [2007] ECR I-2331, para. 106.

<sup>289</sup> See, for instance, Case C-209/10, *Post Danmark A/S v. Konkurrenserådet* [March 27, 2012], not yet published, para. 20-22 & 25.

<sup>290</sup> Case C-62/86 *Akzo Chemie BV v Commission* [1991] ECR I-3359.

<sup>291</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, *op. cit.*, paras 23-27; Case C-52/09, *Konkurrenverket v. TeliaSonera Sverige AB*, [February 17, 2011], not yet published, paras 31-40.

effects-based approach. At the same time, we have witnessed the propensity of competition authorities, the specialised adjudicators which, one would have expected, would embrace the effects-based approach, to bring largely anticompetitive object cases (rather than anticompetitive effects), thus relying on presumptions and analytical shortcuts rather than sophisticated economic analysis, and to have increasingly recourse to commitment decisions rather than infringement decisions, thus introducing some degree of negotiation with the parties to the dispute and consultation with affected parties in the context of the adjudicative process. The criticisms against the implementation of excessive pricing provisions and the pursuance of fairness objectives in EU competition law have also relied on the difficulties of the adjudicative process to handle what is quintessentially a polycentric issue, the level of pricing, which produces effects on the relevant market and beyond. It is this polycentric dimension, rather than the difficulty of the courts to deal with price setting in general<sup>292</sup>, which explains the relatively cautious approach of EU competition law in these areas and the opposition expressed by some Advocates General of the CJEU to any attempt of transforming the Court to some form of price regulator<sup>293</sup>.

Facing the prospect of increasingly polycentric disputes post Lisbon Treaty, competition authorities in Europe, and in particular the European Commission, may be tempted to reformulate the “consumer harm” standard in a way that would encompass the various facets of the “well-being of the Union”, including a high degree of environmental and social protection or privacy concerns. The highly ambiguous and vague jurisprudence of the Court of Justice with regard to the objectives of EU competition law may be explained by an informed choice to defer to the Commission’s judgment and priorities on the objectives of its enforcement action. Probably, the Court’s abstention in defining an objective or a hierarchy of goals in EU competition law may be the result of an implicit comparative institutional analysis, the Court acknowledging that in a multi-level polity, such as the EU, with various interlocking areas of competence, a hybrid political/adjudicative body, such as the European Commission, might be better placed to increase participation in decision-making, while avoiding minority and majoritarian biases. After all, as the Court recognized in *Masterfoods*, “(t)he Commission, entrusted by Article [105(1) TFEU] with the task of ensuring application of the principles laid down in Articles [101 and 102 TFEU], is responsible for defining and implementing the orientation of Community competition policy”<sup>294</sup>. It follows that, because of its peculiar institutional setting, in particular its hybrid nature, a competition law adjudicator with increased competences in other areas of public policy, EU competition law might be able to follow a more pluralistic agenda, with regard to the values and goals inspiring its action, than US antitrust law, which merely relies on the institutional mechanism of the court system and remains constrained by it. This may have justified the recent expansion by the Supreme Court of the realm of the rule of reason standard, instead of that of *per se* illegality. It is well known that the rule of reason standard operates in practice as a form of presumptive legality rule, which hints to the implicit Supreme Court’s comparative institutional analysis that certain commercial practices should not be assessed within the

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<sup>292</sup> After all, civil courts are asked to set the price of the wrong committed in damages disputes.

<sup>293</sup> Opinion of AG Jacobs, in Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* [1998] ECR I-7791, para. 69.

<sup>294</sup> Case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11361, para. 46.



adjudicative process, but be left to the market process. From this perspective, the expansion of the rule of reason standard signals the institutional choice of the market process as opposed to that of the adjudicative process.

It is also important to adopt a more cautious approach on the alleged weaknesses of the adjudicative process to handle polycentric questions. As we have previously explained, institutional choice involves a selection among imperfect institutional alternatives. Certainly, the adjudicative process might present a number of flaws, but other institutional alternatives, such as negotiating transactions in a market or managerial direction in a regulatory context might still offer less satisfactory solutions with regard to the aim of enhancing total participation<sup>295</sup>. The market might be concentrated and controlled by powerful economic interests or consumers might be unable to exercise choice freely because of behavioral biases and economic coercion; regulators might also be captured by vested interests. In contrast to single institutional analysis, comparative institutional analysis implies that the choice of the societal objectives to be achieved through the implementation of competition law should be a matter of circumstances and dependent on the wider institutional context. The literature on the goals of EU Competition law has so far focused on a sterile debate over programmatic objectives and an acute institutional pessimism for what can be achieved within the existing institutional setting, committing the fallacy of single institutional analysis. It is now time to move away from the issue of goals and focus on the question of institutions and comparative institutional choice.

## **V. Conclusion**

The study first took a normative perspective and examined the various goals that have been advanced by competition law literature on the objectives of EU competition law. A critical analysis of this literature has shown the weaknesses of an economic welfare approach and the difficulties, as well as the normative objections, to incorporating non-welfare goals in the implementation of EU competition law. The normative perspective was then followed by an analysis of positive EU competition law arriving to the conclusion that the case law of the EU Courts is ambiguous as to the existence of a hierarchy of objectives in EU competition law and that the drafting of the Lisbon Treaty opens the door to a more holistic competition law, in congruent co-existence with the other Treaty provisions and policies instituted by the EU Treaties. The final part criticizes the literature on the goals of EU competition law for its emphasis on goals. I argue that the choice of a general objective as an enforcement criterion tells us little about whether any particular institution, for example the adjudicative process, should be charged with implementing that criterion. Comparative institutional analysis emphasizes the connections between issues of institutional choice and goals. The question of goals should follow and not precede that of institutional choice. Institutional choice should be comparative and not proceed to choosing an institution without a proper analysis of the alternative institutions on offer. The conceptualization of the role of courts, and other institutions in a holistic competition law, using comparative institutional analysis, is one of

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<sup>295</sup> See, our analysis in the previous section on the aim of enhancing the quality and extent of participation in the decision-making processes at issue.

the major challenges faced by EU competition law, and new competition law regimes, in the future.