



KATHOLIEKE UNIVERSITEIT LEUVEN

FACULTEIT RECHTSGELEERDHEID

Academic year 2010-2011

# The Interface between Competition Law, other EU Public Policies and their Objectives.

Promotor: Prof. Dr. J. STUYCK

Master Thesis handed in by:

Marlies DE DEYGERE

Final exam for the degree of:

MASTER OF LAW



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## Summary

This master dissertation makes a two-step analysis.

The first section ('competition law and its goals') is an outline of the goals of competition, how they developed in the course of time and to what the extent Union goals concerning competition stem from American antitrust law. It is by no means an attempt to provide for an exhaustive list of goals, rather I tried to define the competition goals most essential for Union law, in order to grasp two propositions necessary for the second section ('the identification and appraisal of possible clashes'). The first trace is the clear shift towards a full and comprehensive economic appraisal of competition law matters. The second is the confirmation of European competition law's specificity due to three peculiarities: consumer welfare, market integration and fairness considerations.

Building on this substantive delineation of EU competition law goals, the second section identifies three possible clashes of goals and appraises whether the conflict at issue really constitutes a problem. Three intermediary conclusions can be drawn. First, European competition law can indeed insist on a strong economic appraisal of the matter, but it is also *just* a policy within a wider framework. Therefore competition policy should respect the more general policy choices on a Union level and stimulate policy integration. Second, the clash between competition policy goals itself, is of minor importance. The Union has clearly chosen to advance consumer welfare above all. Third, I examined whether other Union interests (aside economic ones) can be taken into consideration under article 101(3) TFEU. It stems from the examined cases that a consistent linear perspective could not be traced. In line with MONTI, I conclude that a positive upshot on other policies, is a side-effect ought to be welcomed. However, in order to establish legal certainty, the Commission should: (a) adjust its guidelines on article 101(3) TFEU insisting on a merely economic appraisal, given their inconsistency with the case law, the Commission's own decisions and the duty to integrate policies and (b) provide for enough delineation on how and to what extent other policies can be taken into account. An important question for the future, is to what extent article 7 TFEU, insisting on policy integration, will play a role in practice.

## **Acknowledgments**

Special thanks goes to my promoter, Prof. Dr. Jules Stuyck, for allowing me to chose a topic of interest and writing in English, providing essential information and a critical evaluation of the text. Also a sincere word of thanks to Prof. Dr. Laura Parret for useful suggestions and general remarks on the text.

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## Introduction

### *The economic approach*

Recently, the Commission and the Court of Justice of the European Union (hereinafter CJEU) have shown an increased determination to handle competition law issues from a more economic perspective. The importance of economics in that field of law becomes obvious, once one has examined the key concepts of the practice area such as ‘competition’, ‘monopoly’, ‘oligopoly’, ‘barriers to entry’, which all seem to be economic in nature<sup>1</sup>. Hence, it is unsurprising that economic principles have increasingly played a decisive role in the submissions to the Commission, the decisions of the Commission and the judgments of the General Court (hereinafter GC) and the CJEU.

In the 1970’s and 1980’s, economic principles were applied imprecisely and in an *ad hoc* manner by the Commission and the CJEU, if economic reasoning was already considered to any extent<sup>2</sup>. However, lately there has been a trend towards an increased and explicit use of economic arguments<sup>3</sup>. One can remark the increased reliance on economic reasoning in the Merger Regulation<sup>4</sup> and a number of guidelines and notices<sup>5</sup>. The paramount importance of economics in EU competition law was further confirmed by the appointment of a Chief Economist in 2003<sup>6</sup>. Parallel, increased prominence is attributed to empirical evidence to support economic reasoning. In applying economic reasoning, competition authorities are able to assess the pro- or anti-competitive effects of the conduct on the market more precisely.

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<sup>1</sup> S. BISHOP and M. WALKER, *The economics of EC Competition law*, London, Sweet & Maxwell, 2010, 1-001.

<sup>2</sup> S. BISHOP and M. WALKER, *The economics of EC Competition law*, London, Sweet & Maxwell, 2010, 1-003.

<sup>3</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 12.

<sup>4</sup> Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ECMR), [2004] OJ L124 /1.

<sup>5</sup> European Commission Notice on the definition of the relevant market for the purposes of Community competition [1997] OJ C 372/1; European Commission Guidelines on vertical restraints [2000] OJ C291/01; European Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5; DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses [2005]

<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> ; European Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6; European Commission Communication: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to the exclusionary conduct by dominant undertakings [2009] OJ C45.

<sup>6</sup> His task is to report directly to the Director General of DG Competition. The Chief Economist is supported by a team of economists.

Overall, there seems to be a consensus that competition law should be applied in pursuit of economic efficiencies and consumer welfare and both should be appraised in an economic manner<sup>7</sup>. The major consequence that has arisen from the more explicit economic reasoning in general is the change of focus from protecting competitors towards protecting *competition* and therefore examining the effects of the conduct rather than the form.

### *Outline of the problem*

In this regard, the question arises to what extent EU competition law can take into account other objectives than the mere pursuit of economic efficiencies.

The initial stage where a possible problem can arise, is in the enumeration of the various goals of competition itself. Can the EU limit its policy solely to the protection of competition without for instance taking into account the (smaller and maybe less efficient) competitors? Does obtaining economic efficiencies automatically result in consumer welfare benefits?

Secondly, from an 'internal market' point of view, it is clear that over the years the Union has outgrown a mere *economic* conception of the European (Economic) Union. Consequently, in Europe competition law is embedded in a larger framework.

The internal market project explains the Commission's hostility towards agreements or practices which prevent or hinder inter-state trade. Broadly speaking, *EU* competition law has two goals: the promotion of integration between member states and the promotion of effective and undistorted competition<sup>8</sup>. The two enumerated goals have the potential to conflict with one another. For instance, some manufacturers may seek to limit the activities of retailers to certain territories. That practice may in certain circumstances prove to be pro-competitive, but at the same time may be considered suspicious by the Commission since it contravenes with the internal market objective (in an inter-national context). Therefore, agreements with the same impact on economic welfare may be scrutinised differently when deemed incompatible with the integration objective<sup>9</sup>. The market integration goal may even come at the expense of

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<sup>7</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 18-19; See also N. KROES, 'European Competition Policy – Delivering Better Markets and Better Choices', London, September 15<sup>th</sup> 2005 available at [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>8</sup> A. JONES and B. SUFRIN, *EU Competition law*, Oxford, Oxford University Press, 2011, 18; G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 52.

<sup>9</sup> S. BISHOP and M. WALKER, *The economics of EC Competition law*, London, Sweet & Maxwell, 2010, 1-008.



efficiencies in the organisation of production and distribution<sup>10</sup>. Indeed, the importance of the objective of integration of the market is an inherent characteristic of EU competition law, which distinguishes it from other competition regimes.

Thirdly, there are possible conflicts of interest where the Union has established other policies (such as consumer protection, industrial policy, social objectives,...).

In other words: how do the European Union and its policies interrelate with the recently adopted 'economic efficiencies' approach in competition law? The extent to which competition law should also pursue other goals than efficiency such as protection of competitors, jobs or the environment is controversial. Many different policy objectives have been pursued in the name of competition law over the years; some of those could not find foundations in notions of consumer welfare at all, whilst some were even "plainly inimical to the pursuit of allocative and productive efficiencies"<sup>11</sup>.

The pursuit of the other goals may be at the expense of consumer welfare or economic efficiencies. Conversely, the realisation of economic efficiencies can conflict with either the pursuit of market integration or other express EU policies. The question is whether, and to what extent social, regional, employment, environmental, integration- or other policies may or should be strived for as a part of competition policy, to what extent these policies influence the decisions of the European Courts or whether we can (and whether it is desirable to) isolate competition policy from other policies.

### *Relevance of the question*

Competition law is a very dynamic field that rapidly evolves. The market has never been this diverse and rapidly shifting. Notable changes have taken place in the world and the Union's economy<sup>12</sup>. For instance, great improvements have been made in technology in sectors like communications, computers, software, energy and the internet. These improvements enable a previous unthinkable scale of information exchange between businesses and consumers. Further, some growing new markets, like sports and media, have commanded the attention for

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<sup>10</sup> J. PELKMANS, *European Integration. Methods and Economic Analysis*, Essex, Longman, 1997, 183-205; R.J. VAN DEN BERGH, Modern industrial organisation and old-fashioned European competition law, 17 *E.C.L.R.*, 1996, 75.

<sup>11</sup> R. WHISH, *Competition law*, Oxford, Oxford University Press, 2009, 19.

<sup>12</sup> D.G. GOYDER, *EC Competition Law*, Oxford, Oxford University Press, 2003, 15.

the inspection of their complex activities and networks. Third, through globalisation the number of concentrations with a Union-dimension has increased. Fourthly, it should be noticed that the impact of human rights as a legislative tool is increasingly gaining importance<sup>13</sup>. Not only can this evolution be observed in the interaction with the European Convention of Human Rights, but also in the Lisbon Treaty (that encloses a Human Rights Charter in the Constitutional text of the EU). The latter provides the CJEU with additional legislative grounds to work with, both on a substantive and a procedural level<sup>14</sup>. Further, the Commission is more closely cooperating with both the US and other competition authorities outside the Union. In addition, the European Union is an evolving concept in itself. Lastly, competition law cases very often have an intertwined playing field with a number of fields of law come together. Against the outlined background it becomes important, both internally and externally, to have a clear framework of what considerations are taken into account on a legislative and judicial level.

For a European scholar it might be evident that other factors than economic considerations are taken into account. However both US scholars and European academics have raised questions about this interaction and criticised the version of competition policy ‘contaminated’ by other policies. I believe we should not flinch to answer these questions. It is to the detriment of the EU’s legal unity that a coherent discussion on the purposes of competition law is not really taking place<sup>15</sup>. It will prove to be useful to tackle criticism, correct flaws and manifestly set out what we are doing and why.

In short, it is useful to go back to the source, in order to redefine one’s own position, to keep up with the stance of reality and establish legal certainty in a complicated and dynamic area of law. In order to understand *European Union’s* competition policy, one should keep in mind the European specificity. GERBER finds law to make markets operate more effectively and tilt their value, but law might also hinder market effectiveness. The grip of markets on societies can be mitigated and moderated by law, but their interrelation can also be intensified. “The shape and effectiveness of these relationships are key factors in determining the extent to

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<sup>13</sup> J.C. PIRIS, *The Lisbon Treaty; A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 71.

<sup>14</sup> K. LENAERTS, ‘The Contribution of the European Court of Justice to the area of Freedom, Security and Justice’, *International and Comparative Law Quarterly*, 2010, 301; Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2009].

<sup>15</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 5.

which competition can deliver on its promises, and they hold the potential for both enhancing the benefits of markets and generating support for them,”<sup>16</sup>.

### *Research method*

This dissertation does not make a detailed analysis on how the Courts and Commission differ in opinion, since that could be a field of study on its own. It is also no chronological outline of goals and their interrelation, rather I try to define what the stance of law today is, where it comes from, what direction it may lead to in the future and usually I add a personal opinion on the matter. I also do not approach the problem in a traditional legal manner. In essence, I try to appraise policy choices on a more general level. That way, I wanted to challenge myself to form an opinion on how (competition) law can (or should) give an incentive to practical, real-life cases.

## Section 1 Competition law and its goals

### Chapter 1 Goals pursued in competition law

#### §1 The evolution of the competition law approach

##### 1. The economic nature of competition law

In order to prove and understand the economic nature of competition law, we must ‘go back to basics’ and ask ourselves the following questions “Why does the legislator feel the need to intervene? Why is there a need for competition law?”. One will immediately see the link between what ‘competition’ is and the question of which goal(s) it serves.

Already in defining the concept of competition, problems arise. Policy makers, economists, lawyers and ultimately judges have employed the word in different ways, serving various ends. In EC competition law (now EU competition law) we find the concept of ‘effective competition’<sup>17</sup>. In several cases, the CJEU has explained the dominant position of article 102 Treaty on the Functioning of the European Union (hereinafter the “TFEU”) as ‘the undertaking’s power to prevent effective competition being maintained on the relevant

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<sup>16</sup> D. GERBER, *Global Competition*, Oxford, Oxford University Press, 2010, 2.

<sup>17</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 33.

market'<sup>18</sup>. In the Merger regulation the basis for prohibiting a merger to take place is the possible effect of 'significantly impeding effective competition'<sup>19</sup>.

BORK lists at least four different senses of the words, worth examining<sup>20</sup>. First, competition can be seen as a synonym of 'rivalry', which is a dynamic conception defining the process. Second, competition might equal 'the absence of restraints' or in a third and more specific wording 'the state of the market where the individual seller or buyer does not influence the price by his sales or purchases'. Fourth, and building upon the former formulation, competition may be read as 'the existence of fragmented industries and markets preserved through the protection of small, viable, locally owned businesses'. BORK criticizes the four named above for they are vague, for their loose usage and because they do not take into account the complexity of reality. Ultimately he finds 'consumer welfare' to be *the* goal. Competition is then the circumstance where consumer welfare cannot be enhanced by consulting an alternative state of affairs in obtaining a ruling of a Court.

For the purpose of this thesis, the following concepts are useful : competition is a struggle for superiority, and in the commercial world this means striving for the custom and business of people in the marketplace<sup>21</sup>. On the website of the Commission competition policy is described as follows: "Competition puts businesses under constant pressure to offer the best possible range of goods at the best possible prices because if they don't, consumers can buy elsewhere. In a free market, business should be a competitive game with consumers as the beneficiaries"<sup>22</sup>.

The reason why governments intervene is based on economy itself: the scientific knowledge or conviction that when we do not operate in the market in certain specific situations, markets do not produce the most efficient outcome (whether that be in favour of the consumer, small businesses or society as a whole). Even classical economists who put great faith in

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<sup>18</sup> Case 2/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429, para. 65; Case 85/76 *Hoffmann-La Roche & Co AG v. Commission* [1979] 3 CMLR 211, para. 38.

<sup>19</sup> Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ECMR), [2004] OJ L124 /1 , Art. 2(3).

<sup>20</sup> P. CLARKE and S. CORONES, *Competition Law and Policy; cases and materials*, Oxford, Oxford University Press, 1999, 89; the same enumeration can be found in S. BISHOP and M. WALKER, *the Economics of EC Competition law*, London, Sweet & Maxwell, 2010, 17 and following.

<sup>21</sup> R. WHISH, *Competition law*, Oxford, Oxford University Press, 2009, 3.

<sup>22</sup> [http://ec.europa.eu/competition/consumers/what\\_en.html](http://ec.europa.eu/competition/consumers/what_en.html)

competition as a process (and do claim state interference is often superfluous), were aware of some need for government interference in order to assure the free operation of markets<sup>23</sup>.

How that is transposed in law, is a matter of policy choice. The twentieth century was characterised by the ideological struggle between capitalism and communism. Many states considered state planning and explicit management of economy more favourable than competitive markets. As the millennium approached, the atmosphere changed and in numerous countries demonopolisation, liberalisation and privatisation took place<sup>24</sup>. The matter was further complicated by the rapid technological developments, globalisation and the increase of international trade. Nowadays, there is consensus that competitive markets produce a better outcome than central state planning<sup>25</sup>. By and large, it is felt that the market and the economic mechanisms described below are often producing the most efficient outcome, given their self-corrective nature. Nevertheless that is not always so. It is in those exceptional instances that the legislator intervenes. The question is how those 'exceptional instances' are defined.

Economists in the nineteenth century usually employed economic models to illustrate the mechanism of competitive processes. In contrast with the dynamic perception of competition (as analysed by classical economists), the focus now shifted to a static notion on the properties of the market equilibrium: the abstraction of perfect competition<sup>26</sup>.

Four models are notable: perfect monopoly, oligopoly, workable competition and perfect competition. Perfect monopoly and perfect competition are rare. In a perfect monopoly, the monopolist has the total control over the market, prices and output. There is no possibility for buyers to switch to another seller (often installed by state intervention, e.g. formerly De Post.). Monopoly is casted off for both efficiency and distributional reasons. Monopoly induces resource misallocation (deadweight loss) and it increases producer's profits to the detriment of consumers<sup>27</sup>. Note that from a distributional point of view, this is perceived as less desirable. The other extreme is a market characterised by pure competition. In this model, there are a substantial number of competitors. The market share of all of them is not

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<sup>23</sup> A. SMITH, *An Enquiry into the Nature and Causes of the Wealth of Nations*, 127-128 (1776); H. COX and H. HÜBENER, *Einführung in die Wettbewerbstheorie und – politik*, in: *Handbuch des Wettbewerbs*, H. Cox, U. Jens & K. Markert eds., 1981, 10-11.

<sup>24</sup> WHISH, R., *Competition Law*, Oxford, Oxford University Press, 2009, 3.

<sup>25</sup> WHISH, R., *Competition Law*, Oxford, Oxford University Press, 2009, 3.

<sup>26</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 5.

<sup>27</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 6.

significant enough for one of them to have a decisive role in the competitive process. This means that none of them can either influence the price levels, nor alter the supply-demand balance<sup>28</sup>. Moreover, products are homogenous, all buyers and sellers have perfect information and there are no entry or exit barriers<sup>29</sup>.

The other two models, oligopoly and workable competition, are of greater importance because of their relevance in practice. In an oligopoly-situation there are only a small number of leading firms in a relevant market. Therefore competitors know each other's identity and are able to alter their economic behaviour given that knowledge. Consequently, oligopolies have the inherent danger to lead to collusion between its players<sup>30</sup>. Workable competition is found where there is a higher level of competitiveness and less information about competitors than in an oligopoly. At the same time, the number of competitors does not amount to the level where one could talk about perfect competition. The aim of competition law is to prevent individual undertakings from unfairly gaining market power, raising prices (by lowering input), foreclosing competitors, ... Not only those basics models, but also the key concepts that characterise them are of an economic nature: 'barriers to entry', 'allocative efficiency', 'productive efficiency', 'elasticity of demand', ...

The criticism often expressed is that the assumptions made in these models, especially the models of perfect competition and monopoly, are unlikely to be observed in practice. The model is -just- a model. Products are diverse, manufacturers differentiate their products, there is not always a sufficient amount of competitors, ... Reality is more complex and moreover, company directors do not always make rational choices trying to maximise profits, nor do they always keep costs at the lowest level possible. WHISH explains the latter as follows: "It is true that the private costs of the producer will be kept low, but that says nothing about the social costs or 'externalities' which arise for society at large from, for example, the air pollution that a factory causes, or the severed limbs that must be paid for because cheap machinery is used which does not include satisfactory safeguards against injury,". WHISH is thus already touching upon one of the leading issues in this thesis: should a policy as competition concern itself with those social costs or it that up to specific legislation<sup>31</sup>? The

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<sup>28</sup> D.G. GOYER, *EC Competition law*, Oxford, Oxford University Press, 1998, 11.

<sup>29</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 7.

<sup>30</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 11.

<sup>31</sup> R. H. BORK, *The Antitrust Paradox*, Oxford, Free press, 1978, 114-115.

third problem with those models is their static nature, neglecting the dynamic nature of markets<sup>32</sup>.

It has been widely debated to what extent and what basic aim should be kept in mind when a national or supra-national authority intervenes. From what we have seen in the past, European policy makers (in line with the Harvard School, cfr. infra) believe there is a need for intervention. The structure of the market, self-interest, and the strive for profit maximisation by individual undertakings, has proven to be a fertile ground for conduct opposed to consumer, producer and total welfare. In the real world, perfectly competitive markets are rare.

## 2. The main objective of competition law: economic efficiency and consumer welfare

As said above, perfect competition (and purely monopolistic) markets are rare. However we can use the model of perfect competition as a standard of reference, in order to determine how to obtain economically efficient markets. Welfare is a concept that allows us to measure how good a market performs. As VAN DEN BERGH and CAMESASCA note: “The structural concept of perfect competition is very useful to analyse the welfare properties of a market system”<sup>33</sup>. Social welfare can be found where efficiency is maximised<sup>34</sup>. Consumer welfare and economic efficiency thus complement each other, since a policy designed to promote greater efficiency is defined by, depending on its distributive nature, measuring the consumer surplus, the producers surplus and total welfare<sup>35</sup>. It is important to already mention at this stage that the two mentioned objectives do not always match.

There are three economic efficiency components: productive, allocative and dynamic efficiency. A more efficient firm will maximise output by using the most effective combination of input which can be called productively efficient. Allocative efficiency is reached when people can buy the product in the amount they want and they are willing to pay

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<sup>32</sup> R WHISH, *Competition Law*, Oxford, Oxford University Press, 2009, 9.

<sup>33</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 20.

<sup>34</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 13.

<sup>35</sup> Compare S.S. CRAMPTON, *Alternative approaches to competition law*, 17 *W. COMP.* 55, 1994, nr.4.

the price that has been set. Dynamic efficiency is not a static notion and therefore supplements the two others. It offers social welfare in the long run, by the invention, development and diffusion of new products and production processes<sup>36</sup>. In reality, markets evolve due to technological discoveries and the introduction of new and improved products. Welfare analysis should thus consider both aspects and any trade-off between them<sup>37</sup>.

Total welfare is the sum of producer and consumer surplus. Both consumer and producer surplus are maximised in a perfectly competitive market<sup>38</sup>. Now, what is the basic concern towards monopoly? The (efficiency) problem is that the surplus lost by consumers does not equal the gain of the monopolist. That is what we call ‘deadweight loss’: some surplus is lost to the market. The same can be said for oligopoly situations: the consumer has to be protected as there is a likelihood of collusion between competitors. Prices can be raised, output restricted, information disposal blurred ...

Given the fact that most markets are not characterised by perfect competition, the European legislator strongly believes that he should take up action and strive for the most *efficient* form of competition in the relating market. GOYDER advocates that negative aims alone are not enough<sup>39</sup>. Negative legislation provides for penalties rendering agreements that fall within the prohibition void and unenforceable. “Once, however, a competition authority has achieved a reasonable degree of success in implementing such forms of negative control, it is usually realised that such control alone may not in the long run satisfy public or political demand for the achievement of tangible results in for instance liberalising markets previously dominated by State-owned or State-controlled organisations,”<sup>40</sup>. Subsequently, there is a need to go further than these negative responsibilities and to combine them with a positive distress for a framework encouraging competition in all its various forms. Very often, that is done by issuing block exemptions that stimulate well-defined categories to ‘mould’ their agreements in a way consistent with the new legislation. Furthermore, even those undertakings that are required to obtain an individual approval (because they exceed a threshold) will normally try to convince the Commission that their agreement follows the pattern laid down by the block exemption in every other respect.

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<sup>36</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 5.

<sup>37</sup> D. HILDEBRAND, *The role of Economic Analysis in the EC Competition rules*, The Hague, Kluwer law International, 2002, 167.

<sup>38</sup> Consumer surplus: the discrepancy between the price consumers paid, and what they would have been willing to pay; Producer surplus: the profit margin, the discrepancy between the cost of producing and the selling price.

<sup>39</sup> D.G. GOYDER, *EC Competition Law*, Oxford, Oxford University Press, 2003, 527.

<sup>40</sup> D.G. GOYDER, *EC Competition Law*, Oxford, Oxford University Press, 2003, 528.



Overall, the majority view is that competition law should pursue as a main goal economic efficiency and consumer welfare<sup>41</sup>. In the next section, a historical outline and discussion of the legal thinking concerning the goals and foundations of competition law is provided for.

### 3. The US

The US had a decisive influence on the thinking and development of competition law. Therefore, it is important to examine the American analysis concerning competition law goals. That way, we can establish what the main objectives in *European* competition law are, to what extent they have been derived from or have a different focus than US antitrust law.

#### 3.1. The Harvard School

In the 1930's the 'structure-conduct-performance paradigm' arose at Harvard University<sup>42</sup>. The paradigm explains that the structure of a market has a decisive influence on the conduct of an economic actor, which leads to certain kinds of economic performance. It signifies that since in the end structure dictates performance, structural remedies are favoured over behavioural remedies.<sup>43</sup> In the original Harvard view market power was scrutinised as being *per se* harmful and thus illegal. BAIN examined industries and found that most industries were highly concentrated; entry barriers were a common phenomenon and a market setting resulting in monopoly prices did not require a high level of concentration<sup>44</sup>. Consequently, American Antitrust law sought to protect small businesses and had a critical attitude towards business enlargement. The result was a very intrusive antitrust enforcement policy in the 1960's<sup>45</sup>.

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<sup>41</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 51.

<sup>42</sup> See J.S. BAIN, *Barriers to New Competition: their character and consequences in manufacturing industries*, Harvard University Press, 1956.

<sup>43</sup> C. KAYSEN and D.F. TURNER, *Antitrust Policy, An Economic and Legal Analysis*, Harvard University Press, 1959.

<sup>44</sup> A. JONES and B. SUFRIN, *EU Competition law*, Oxford, Oxford University Press, 2011, 22.

<sup>45</sup> E.g., *Brown Shoe Co v. United States*, 370 US 294, 82 S.Ct 1502 (1962); *FTC v. Consolidated Foods Corp* 380 US 592, 85 S.Ct 1220 (1965); *FTC v. Proctor & Gamble Co*, 386 US 568, 87 S.Ct 1224 (1967); *United States v. Arnold, Schwinn & Co*, 388 US 365, 87 S.Ct 1856 (1967).

### 3.2. The Chicago School

The Chicago School reacted to the Harvard School's empirical results. They claimed that economies of scale were not rare and barriers to entry were not widespread. Their basis of competition policy was theoretical rather than empirical. The Chicago School had a strong belief in the market and its corrective mechanism. No sentimental ground for small competitors should be taken into account, rather the pursuit of efficiency should be the unique goal of competition law<sup>46</sup>. Price theory assumes that firms will seek to maximise profits. Trying to maximise profits is in essence competitive conduct. There is a strong reliance on the conviction that markets are able to correct eventual imperfections themselves. POSNER derives two guidelines for antitrust law: the conduct of maximising profits is in essence lawful and the benchmark to scrutinise (anti)competitive conduct should not be an economic model, but the 'economically efficient' touchstone<sup>47</sup>. It is worth mentioning here already that POSNER, although he does not personally favour this option, recognises the possibility for the legislator to embrace a broader set of goals<sup>48</sup>.

BORK is one of the authors convinced of the sole pursuit of efficiency in competition law. In his book *The Antitrust Paradox: A Policy at War with itself*<sup>49</sup>, he claims that antitrust law should by no means enclose an ethical component. Consumer welfare is obtained when the consumer demand is satisfied as fully as the technological process allows. There is no distributive normative purpose underpinning competition law. Allocative efficiency entails consumer welfare, but consumer welfare without any implied normative saying about how that prosperity should be divided amongst society. Those are matters for other laws and public policy fields<sup>50</sup>. Chicagoans thus strive for a more minimal, scientifically and economically justified approach in competition law.

However, one of the main critiques we find in literature is the non-existence of the apolitical contention Chicagoans claim to have. ADHAR submits that a non-distributional notion of efficiency can in fact not claim to be neutral in itself. That attitude of indifference in fact results into an encouragement of inequality in the distribution of income throughout society.

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<sup>46</sup> The Chicago school in this respect means allocative efficiency, which is reached when the supplier produces to the point where marginal cost and market price are congruent.

<sup>47</sup> R.A. POSNER, *The Chicago School of Antitrust analysis*, 127 *U. PA. L. Rev.* 925, 1979; R.A. POSNER, *Antitrust law: an economic perspective*, Chicago, University of Chicago Press, 1976, 20.

<sup>48</sup> R.A. POSNER, *Antitrust law: an economic perspective*, Chicago, University of Chicago Press, 1976, 4.

<sup>49</sup> R. H. BORK, *The Antitrust Paradox: A Policy at War with Itself*, New York, Free press, 1993, 426-429.

<sup>50</sup> V. KORAH, *An introductory guide to EC competition law. Seventh ed.*, Oxford, Hart Publishing, 2000, 9.

Stated in an explicit way: “it is only neutral if you believe helping the wealthy to get wealthier is neutral,”<sup>51</sup>. Or when we would apply RAWLS’S theory of justice (thus from a political and philosophical angle): Chicagoans, already taking a stance without admitting to do so, would not support the alleged non-distributional goal if the ‘original position’ would be overshadowed by ‘a veil of ignorance’ when determining the morality of a certain issue<sup>52</sup>. RAWLS establishes a theory concerning justice originating from a specific ‘original position’. In the hypothetical situation people would be in a pre-social state where the decision of how a future society should look like is yet to be made, all people would opt for two principles. The first would be each person having an equal right to the most extensive scheme of equal basic liberties, compatible with those of others. The second focuses on the arrangement of social and economic inequalities so that they are to (a) everyone’s advantage and (b) attached to positions and offices open to all<sup>53</sup>. Thus, when an individual’s judgment is covered by ‘a veil of ignorance’, he or she will chose the maximum for all, without privileging any class or kind of people. In the policy field of competition those ‘all’ will ultimately be the consumers profiting of a competitive market. That finding already shows an apolitical contention is a dubious concept to claim.

FOX and SULLIVAN advocate that although economics are a helpful tool for competition law, antitrust law does not equal economics. “Antitrust law was not adopted to squeeze the greatest possible efficiency out of business”<sup>54</sup>. According to “most people agree that economics is a tool helping competition law on course to help consumers and to facilitate dynamic competition. We do not want an antitrust system that hurts consumers rather than helps them,”. Even within the US there have been calls in case-law and policy statements of enforcement agencies confirming the importance of consumer benefit. The Department of Justice published policy statement in 2005 titled: “Antitrust Enforcement and the Consumer”. The guideline states: “Antitrust laws protect competition. Free and open competition benefits consumers by ensuring lower prices and new and better products. [...] When competitors agree to fix prices, rig bids or allocate (divide up) customers, consumers lose the benefits of competition. The prices that result when competitors agree in these ways are artificially high; such prices do not accurately reflect cost and therefore distort the allocation of society's

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<sup>51</sup> R. ADHAR, Consumers, redistribution of income and the purpose of competition law, *ECLR*, 2002, 23.

<sup>52</sup> P.B. LEHNING, *Rawls. Kopstukken filosofie*, Rotterdam, Lemniscaat, 2006, 45.

<sup>53</sup> J. RAWLS, *A Theory of Justice*, Oxford, Oxford University Press, 1999, 53.

<sup>54</sup> E.M. FOX and L.A. SULLIVAN, ‘Antitrust – Retrospective and Prospective: Where are we coming from? Where are we going?’ (1987) 62 *New York Univ LR* 936, 956-9.

resources. The result is a loss not only to U.S. consumers and taxpayers, but also the U.S. economy,”<sup>55</sup>.

If we would compose an antitrust law of a minimal sort, that would only proscribe clear cartel agreements and mergers creating monopoly positions excluding all possible competition. As noted above these clear cases are not to be found often. So antitrust law in itself would not be effective, nor efficient. The strong belief of Chicagoans in the self-corrective ability of the market is often criticized as well<sup>56</sup>.

### 3.3. Post-Chicago

JONES and SUFRIN establish an accurate conclusion on the Post-Chicago view on the aim of competition law in general: “Post-Chicago competition scholarship admits of more complexities than either the pure Harvard or Chicago approaches,”<sup>57</sup>. In fact, in the view of many scholars it has been recognised that economic theory is a useful tool to obtain efficiency. However these economic answers need not to be definite or the only motive in competition law, nor have economic assessments always been of a value-free nature.

## 4. Europe

4.1. The alignment of competition law with modern economic thinking: indicators of a more economic approach of which the consumer ultimately benefits

The European Union has initially based its competition policy on the Harvard School’s analysis. As noted above, this conception of competition policy leaves space for a wide range of factors to be taken into account when scrutinising whether conduct is anti-competitive or not. However, the Union has acknowledged the criticism expressed by Chicagoans to analyse competition not merely structurally, but as a process as well. Up until today Europe is trying to find the ‘consensus position’ in between the pure and extreme views of either Harvard or Chicago.

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<sup>55</sup> [http://www.justice.gov/atr/public/div\\_stats/211491.htm](http://www.justice.gov/atr/public/div_stats/211491.htm)

<sup>56</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 30.

<sup>57</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 31.

Contrary to how American scholars often perceive EU competition policy, for the continental lawyer, law-maker and doctrine; ‘Antitrust law’ should not be a highly interventionist and protectionist framework to ensure economic and consumer welfare in every industrial sector. Rather, it is there to ensure anticompetitive behaviour does not take place<sup>58</sup>. According to MONTI, a competition policy is not set up to guarantee the welfare of every section of the economy. It has a more humble intent, namely to condemn anti-competitive behaviour<sup>59</sup>. In other words, it aims to provide for a framework within which the market can operate freely, whilst setting out the out-and-outer borders. This means that scarce resources should be exploited in an efficient way, both in the short and the long run. Consequently, the focus on economics as guiding principles is paramount, but in no way exhaustive.

European competition law and policy should always be seen against the background of the European Union framework and its objectives. Indeed articles 2 and 3 Treaty on the establishment of the European Union (hereinafter TEU) which spell out the values and objectives of the EU are an important source of the interpretation of the provisions on competition<sup>60</sup>. The Treaty of Lisbon replaced the list of Union and Community objectives, instruments and tasks by an introductory title in the TEU (Title I: Common provisions) that sets out the values of the Union (2 TEU) and provides the Union with a list of objectives (3 TEU). Worth noticing is that the list focuses on non-economic goals to a far greater extent than the EC Treaty.

It is clear that the concept of workable competition and the theory of the Harvard School are more favourable to far-reaching governmental intervention. Both have a manifest impact on European competition policy<sup>61</sup>. That is logical, since competition policy in the EU should always be seen against the internal market framework. As PARRET expresses it: “For competition, this has meant an instrumental view of competition provisions as being primarily intended to help create the single market,”<sup>62</sup>. Indeed, there are political goals underpinning

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<sup>58</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 2.

<sup>59</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 2.

<sup>60</sup> Case C-9/99 *Echirrolles Distribution* [2000] ECR I-8207, 24.

<sup>61</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 34.

<sup>62</sup> L.Y.J.M. PARRET, Do we (still) know what we are protecting? The discussion on the objectives of competition law from different perspectives, *TILEC Discussion paper Series*, 2009-2010.

competition policy and that is exactly because the EU has an institutional framework and vision to install and protect the internal market.

European law provides for three basic rules to strive for undistorted competition. Article 102 TFEU prohibits dominant firms to harm the competitive process. Article 101 TFEU prohibits firms to conclude anti-competitive agreements and finally Regulation 139/2004 prohibits firms to merge when the effect would harm competition<sup>63</sup>. In addition, the Treaty provides for several obligations for member states to reduce barriers to trade in order to create an internal market. Further, Article 3(1)(g) EC used to state that the EC shall have ‘a system ensuring that competition in the internal market is not distorted’. Below, the reason of the removal and consequences thereof will be outlined.

As previously indicated, in the 1970’s and 1980’s, economic principles were applied imprecisely and in an *ad hoc* manner by the Commission and the CJEU<sup>64</sup>. In 1969, the CJEU expressed its concern with regards to competition policy being used without a precise economic analysis, which might undermine the foundations of competition law<sup>65</sup>. From the 1990’s onwards we can perceive a general determination in Europe to keep competition law in line with the modern economic theories and its understandings as ‘efficiency trade-offs’, ‘dynamic efficiency’ and ‘consumer welfare’<sup>66</sup>. It is obvious that since competition law is economic in nature, and economic techniques of analysis evolve and improve, those renewed conceptualisations and findings need to be applied in modern competition assessments<sup>67</sup>. Below, indicators of this increased encroachment on modern economic evaluation techniques will be set out. Summarily, European Competition law has evolved from a legalistic tradition to a framework of economic assessment of business practices affecting competition<sup>68</sup>. In the same course in time, the ‘consumer welfare’ concept was increasingly taken into account<sup>69</sup>.

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<sup>63</sup> Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ECMR), [2004] OJ L124 /1.

<sup>64</sup> R. WHISH, *Competition Law*, Oxford, Oxford University Press, 2009, 2 .

<sup>65</sup> Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1, 13, at 14.

<sup>66</sup> D. HILDEBRAND, *The role of Economic Analysis in the EC Competition rules*, The Hague, Kluwer law International, 2002, 3; R. WHISH, *Competition Law*, Oxford, Oxford University Press, 2009, 2.

<sup>67</sup> D. HILDEBRAND, *The role of Economic Analysis in the EC Competition rules*, The Hague, Kluwer law International, 2002, 3.

<sup>68</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 5.

<sup>69</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 5.

If we read what has been said above through the eyes of a US scholar, we must acknowledge that there is a need for a more precise and accurate analysis of the subject matter. For it is also the Union's aim to ensure that the implementation of the relevant provisions of the Treaty are carried out, by the Union's institutions and member states, in a legally consistent and complete fashion<sup>70</sup>. We must use economic tools to enhance legal consistency, gain legitimacy and even in broader terms there is a benefit for democratic transparency. It is however important that the US scholar understands and acknowledges the prior basic structure of the former EEC and its inherent economic program. There is an inevitable interrelation between any competition policy rule and other aims and objectives of what is now called the European Union. The European Policy maker's conviction is that if one engages in a system with on its agenda, amongst other policies, competition policy, the framework objectives and aims cannot and should not be sacrificed because of the (more specific) economic considerations in that policy area. The dissident opinion would diminish the internal logic of the EU program itself. Reconciling both means that indeed, there is a need for consistency in the application of economic concepts in competition law. But on a more general level, there is a need for a consistent relation with the institutional framework of the Union which features as a 'spider web' distributing overarching aims and objectives.

#### 4.1.1. In law

Article 101(3) TFEU provides for the possibility of allowing a restrictive agreement if it has been shown that the *production or distribution of goods is improved or the technical or economical process has been promoted*, while consumers are allowed to obtain a fair share of the benefit. The abuse of a dominant position by undertakings is prohibited by article 102 TFEU. The article itself refers to a number of non-exhaustive examples of that conduct like *unfair purchase or selling prices, unfair trading conditions, limiting production, markets or technical development,...* Also in the Merger Regulation economic concepts are a focal point of attention. The Merger Regulation states in article 2(3) a concentration that would significantly *impede effective competition*, in the common market or in a substantial part of it, in particular as a result of the *creation or*

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<sup>70</sup> D.G. GOYDER, *EC Competition Law*, Oxford, Oxford University Press, 2003, 521.

*strengthening of a dominant position*, shall be declared incompatible with the common market<sup>71</sup>. It is clear that the concepts in italics favour an economic appraisal.

#### 4.1.2. Institutions and public authorities, their speeches and guidelines

In many speeches and publications of the Commission, the shift towards the promotion of economic efficiency (and consumer welfare) can be noticed.

In 2000, the Commission adopted Guidelines on vertical restraints. In paragraph 7 one reads: ‘The protection of competition is the primary objective of EC competition policy, as it enhances consumer welfare and creates an efficient allocation of resources’<sup>72</sup>.

In 1999, the economist MONTI was appointed Commissioner responsible for competition, which in itself is an acknowledgement of the importance of an economic approach in the competition law field. He furthered the shift in describing the EC approach as follows:

“Enshrined in the Treaty... [is] ‘an open market economy with free competition’. Since its adoption more than 40 years ago, the Treaty acknowledges the fundamental role of the market and of competition in [...], *encouraging the optimal allocation of resources and granting the economic agents the appropriate incentives to pursue productive efficiency, quality and innovation*. Personally I believe that this principle of an open market economy does not imply an attitude of unconditional faith with respect to the operation of market mechanisms. On the contrary, it requires a serious commitment-as well as a self-restraint-by public powers, aimed at preserving those mechanisms,<sup>73</sup>.”

Neelie KROES also pointed out the economic character competition law took up, in her speech ‘Assessment of and perspectives for competition policy in Europe Celebration of the 50<sup>th</sup> anniversary of the Treaty of Rome’<sup>74</sup>: “In the mid to late 1990s, the Commission began a re-evaluation of many areas of its antitrust policy: the assessment of vertical restraints, horizontal cooperation agreements and car distribution agreements were all

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<sup>71</sup> Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ECMR), [2004] OJ L124 /1.

<sup>72</sup> European Commission Guidelines on vertical restraints [2000] OJ C291/01, para 7.

<sup>73</sup> M. MONTI, ‘European Competition policy for the 21st Century’ in B. Hawk (ed.) [2000] *Fordham Corp L Inst*, chap. 15, (and available on the Commission’s website <http://www.europa.eu.int/comm/competition/speeches/>).

<sup>74</sup> N. KROES, *Assessment of and perspectives for competition policy in Europe*, Barcelona, November 19<sup>th</sup> 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/722&format=HTML&aged=1&language=EN&guiLanguage=en>



revisited to introduce a more economic approach. Block exemptions no longer contain lists of positive and negative clauses. Only anticompetitive clauses are listed, and comprehensive guidelines explain how to assess agreements in their economic context. The same approach was followed for technology transfer agreements in 2004.”.

The focus on economics as one of the guiding principles in competition law, has once again been reconfirmed in the speech of ALMUNIA, Vice President of the European Commission responsible for Competition policy, on the Competition Day 2010:

“We need to keep our rules in tune with today’s changing economy and ensure that we have a consistent framework, rooted in solid economic principles, that can give guidance to companies,”<sup>75</sup>. Again in a speech of 2010, ALMUNIA confirms the shift towards a modern economic approach: “What we can see is a modern approach to antitrust enforcement, which focuses on preventing or putting an end to consumer harm, rather than protecting "competitors" as such.[...] What I have already witnessed is the huge amount of detailed work which goes into the legal and economic analysis that underpins the Commission's work,”<sup>76</sup>.

#### 4.1.3. The economic analysis of the Commission and the use of econometric research

The Commission has shown its determination to base its notices and group exemptions on insights derived from industrial economics.

The reliance on economics can be seen in a wider or less wider application of article 101(1) TFEU, the new approach towards vertical restraints<sup>77</sup>, the manner of assessing dominance in article 102 TFEU, the delineation of the relevant market<sup>78</sup> and collective dominance under the

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<sup>75</sup> J. ALMUNIA, ‘*Competition Policy: State of Play and Future Outlook European Competition Day*’, Brussels, October 21<sup>st</sup> 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/576&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>76</sup> J. ALMUNIA, ‘*EU Antitrust policy: the road ahead International Forum on EU Competition Law*’, Brussels, March 9<sup>th</sup> 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/81&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>77</sup> Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] OJ L 336/21.

<sup>78</sup> European Commission Notice on the definition of the relevant market for the purposes of Community competition [1997] OJ C 372/1.

Merger Regulation<sup>79</sup>. The evolution towards a more economic appraisal arose in for instance the Merger Regulation and the EC Horizontal Merger Guidelines. The second revision of the Merger Regulation was to a large extent prompted by the chiding decisions of the GC in *Airtours*<sup>80</sup>, *Schneider/Legrand*<sup>81</sup> and *Tetra Laval/Sidel*<sup>82</sup>. The Court annulled the decisions made by the Commission because of the unsound substantive appraisal. The Commission was shaken up by this criticism. Subsequently, the Merger Task Force of the DG Competition was institutionally altered and more importantly, a highly-welcomed focus on the competitive effects of concentrations in economics and the issuance of EC Horizontal Merger Guidelines took place. The more transparent and detailed description of the Commission's assessment criteria was appreciated for obvious reasons, a long side the use of principles of economic analysis. The Commission has also requested a number of expert reports concerning economic theory and measurement of unilateral effects<sup>83</sup>, tacit collusion<sup>84</sup>, differentiated product mergers<sup>85</sup>, and the impact of vertical and conglomerate mergers<sup>86</sup>.

#### 4.2. Economic focus, with a twist

As already indicated above, it should be brought to one's attention that in Europe, non-economic goals do play a role in the current competition policy<sup>87</sup>. There are a number of political goals underpinning EU competition law that will not always be in harmony with the aim of allocative efficiency<sup>88</sup>. Thus, the focus is not solely set on economic efficiency reasoning. As noted above, consumer welfare and others goals are added to the latter. This means that in essence in Europe 'economic efficiency' as a concept is more than global

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<sup>79</sup> D. HILDEBRAND, *The role of Economic Analysis in the EC Competition rules*, The Hague, Kluwer law International, 2002, 3.

<sup>80</sup> Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

<sup>81</sup> Case T-310/01 *Schneider v Commission* [2002] ECR II-4071.

<sup>82</sup> Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

<sup>83</sup> M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT and J. TIROLE, *Economics of Unilateral Effects* [2003] (Final Report Prepared for DG Comp.).

<sup>84</sup> M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT and J. TIROLE, *Economics of Unilateral Effects* [2003] (Final Report Prepared for DG Comp.).

<sup>85</sup> R.J. EPSTEIN, and D.L. RUBINFELD, *Effects of Mergers Involving Differentiated products* [2004] (Final Report Prepared for DG Comp.)

[http://ec.europa.eu/competition/mergers/studies\\_reports/effects\\_mergers\\_involving\\_differentiated\\_products.pdf](http://ec.europa.eu/competition/mergers/studies_reports/effects_mergers_involving_differentiated_products.pdf)

<sup>86</sup> J. CHURCH, *The impact of Vertical and Conglomerate Mergers* [2004] (Final Report Prepared for DG Comp.)

[http://ec.europa.eu/competition/mergers/studies\\_reports/merger\\_impact.pdf](http://ec.europa.eu/competition/mergers/studies_reports/merger_impact.pdf)

<sup>87</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 1.

<sup>88</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 2.

economic welfare, the sum of producer and consumer welfare<sup>89</sup>. In addition competition policy in Europe is just one of the EU's policies. The broader context of EU competition policy, the Treaty as a whole and the outline and 'sphere' of its objectives, are relevant for understanding EU competition law<sup>90</sup>.

Enumerating the various aims of EU Competition law is not an easy task. Scholars differ in opinion, enumeration, number of goals mentioned, ... On top of that, there is an economic and a legal perspective for classifying goals. Very often the objectives enumerated by scholars are so intertwined that I found it particularly difficult to divide them up in categories. Therefore, what follows is by no means exhaustive, nor fixed. Let that be an important caveat when reading the following.

#### 4.2.1. Consumer welfare

Under the consumer welfare standard, producer gains cannot justify losses in consumer surplus. If however, total welfare instead of consumer welfare is linked to allocative efficiency, the outcome will be totally different. Since total welfare consists of the sum of consumer and producer welfare, it is of no importance which one of the two gains. What 'welfare concept' policy makers link to economic efficiency will thus result in different outcomes. The Commission has gradually advanced the protection of consumer welfare (by ensuring low prices) as a paramount goal, whilst at the same time stressing the weight of efficiency savings (by pointing out the cost reducing potential of mergers)<sup>91</sup>.

Consumer welfare is often characterised as a more political objective, thus it must be an explicit policy of the legislator<sup>92</sup>. Article 101(3) TFEU clarifies that European competition policy does not serve the narrow goal of simply maximising consumer and producer surplus, since cartel agreements are deemed to 'allow consumers a fair share of the benefit'. However, in literature it is said that it follows from other language versions of the Treaty that the

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<sup>89</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 1.

<sup>90</sup> L.Y.J.M. PARRET, Do we (still) know what we are protecting? The discussion on the objectives of competition law from different perspectives, *TILEC Discussion paper Series*, 2009-2010.

<sup>91</sup> R.J. VAN DEN BERGH AND P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 5.

<sup>92</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 15.

consumer in this provision need not necessarily be the ultimate consumer, rather the client of the undertaking concerned<sup>93</sup>. In article 102(b) TFEU the abuse of one's dominant position (by limiting production, markets or technical development) which harms consumers shall be prohibited as it is incompatible with the internal market. Article 2(1)(b) of the Merger Regulation also contains a reference to consumers, in which it is outlined that the Commission shall take into account the interests of intermediate and ultimate consumers in appraising mergers<sup>94</sup>.

The GC in 2006 ruled on two cases, marking the 'well-being' or 'welfare' of consumers as an objective. In *Österreichische Postsparkasse*, the GC said:

“It should be pointed out in this respect that the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers. That purpose in particular can be seen from the wording of Article 81 EC. Whilst the prohibition laid down in article 81(1) EC may be declared inapplicable in the case of cartels which contribute to improving the production or distribution of the goods in question or to promoting technical or economic progress, that possibility, for which provision is made in Article 81(3) EC, is inter alia subject to the condition that a fair share of the resulting benefit is allowed for users of those products. Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods and services,”<sup>95</sup>. In *GlaxoSmithKline*, the GC said:

“However, as the objective of the Community competition rules 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,”<sup>96</sup>.

Further, the span of article 169 TFEU on consumer protection should be taken into account. The article explains that the Union and its institutions should favour policy integration, in particular outlining that ‘the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests,’.

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<sup>93</sup> I. VAN BAEL and J.F. BELLIS, *EC Competition Law Reporte* an examination of EC competition law and policy, supported by relevant texts, London, Sweet & Maxwell, 1994, para. 11-40; European Commission Communication: Guidelines on the application of Article 81(3) [2004] OJ C101/97, para 84.

<sup>94</sup> Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ECMR), [2004] OJ L124 /1.

<sup>95</sup> Cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG v. Commission and Bank für Arbeit und Wirtschaft AG v. Commission* [2006] ECR II-160, para. 115.

<sup>96</sup> Case T-168/01, *GlaxoSmithKlineServices Unlimited v. Commission* [2006] ECR II-2969, para. 118.

Consumer welfare is a broader concept than consumer protection. Before the modernisation process<sup>97</sup>, which established a clear shift towards economic efficiency reasoning and the consumer welfare standard, VEDDER accentuated the disparities between consumer protection laws and competition law<sup>98</sup>. He claimed that article 101(3) TFEU requires social welfare to increase, not necessarily consumer welfare. He focused on the insurance that benefits arising from an agreement are passed on and thus do not only serve the parties' interests. In his view, the 'consumers' referred to in the aforementioned articles need not necessarily be final consumers, nor would the term 'consumer' per se be used in the same way as for the purpose of consumer law. Rather and more general, consumers would be any party in a downstream relation. Due to the specific reference to the ultimate consumer in the Merger Regulation article, VEDDER recognises the possibility of competition policy, used as a consumer protection instrument. He underscores that consumer protection is only one of the various factors the Commission pays attention to. Further, he cites articles 2(2) and (3) of the Merger Regulation which clarify that the ultimate tool of appraisal of concentrations is 'the significant impediment of effective competition'. In his view, there is thus a clear hierarchy between consumer welfare and economic efficiency.

STUYCK believes, and even more so after modernisation, that consumer protection is at the core of competition policy<sup>99</sup>. That conception of competition is confirmed in numerous reports and speeches over the last years. For instance in ALMUNIA's speech of February 11<sup>th</sup> 2011 where he said: "I have seen first-hand that the fair and robust enforcement of EU competition law helps business and consumers make the most of the internal market, which is a key asset for Europe,"<sup>100</sup>. Worth noticing again is the nexus between the interests of both consumers, producers and the internal market realisation. On the Commission's website, competition policy is explained as striving for a free market where "business should be a competitive game with consumers as the beneficiaries"<sup>101</sup>. In a recent speech of Director

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<sup>97</sup> What is meant by 'modernisation': the vertical restraints reform, the reform of horizontal agreements and finally Regulation 1/2003.

<sup>98</sup> H.H.B. VEDDER, Competition law and consumer protection: how competition law can be used to protect consumers even better – or not?, *EBLR*, 2006, 83.

<sup>99</sup> J. STUYCK, EC Competition policy after modernisation: more than ever the interests of consumers., *Journal of Consumer Policy*, 2005, nr. 28, 1.

<sup>100</sup> J. ALMUNIA, *Taking stock and looking forward: a year at the helm of EU competition* *Revue Conurrences conference: "New Frontiers of Antitrust 2011"*, Paris, February 11<sup>th</sup> 2011,

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/96&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>101</sup> [http://ec.europa.eu/competition/consumers/what\\_en.html](http://ec.europa.eu/competition/consumers/what_en.html)

General ITALIANER numerous references to consumer benefits are made<sup>102</sup>. Consumer policy and competition policy complement each other (like the free movement articles and competition policy are complementary for creating an internal market, cfr. infra): competition makes sure there are enough products at the lowest possible price on the market for the consumers to choose from (supply side). Consumer laws, on the other hand, ensure that the individual is able to make an deliberate and adequately-informed choice. The consumer then draws subjective rights on the demand side. NEVEN, PAPANDROPOULOS and SEABRIGHT conducted a survey of the Reports on Competition Policy in 1998 and came to the conclusion that “the choice has clearly been made to favour income redistribution from producers with market power to consumers,”<sup>103</sup>. In a recent contribution of STEENBERGEN consumer welfare is mentioned as *the* principal goal of competition policy<sup>104</sup>.

That is not to say consumer policy was not taken into account before modernisation, although it was in a somewhat disguised way or in interaction with another goal. In the *Consten & Grundig* judgment the reasoning was that, by unifying the market and eliminating obstacles refraining interstate trade, consumers would automatically benefit from the increased number of competitors on the market<sup>105</sup>. One directly observes the interrelation between market integration (described below) and consumer benefit. Moreover, this sheds a light on the relation between economic efficiency and consumer welfare and underscores the difference with US antitrust law.

In essence, market integration strives for economic efficiency since cutting down barriers to trade and simplifying existing rules through the provisions on free movement aims at diminishing transaction costs and ‘enabling everyone in the EU - individuals, consumers and businesses - to make the most of the opportunities offered to them by having direct access to 27 countries and 480 million people’<sup>106</sup>. The internal market intends to increase competition and specialisation, to be conducive for larger economies of scale, allows goods and factors of production to move to the area where they are most valued, thus improving the efficiency of the allocation of resources. In other words, the internal market attempts to make ‘the demand

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<sup>102</sup> A. ITALIANER, Institute for European and International Affairs, *EU priorities and competition enforcement*, Dublin, 25 March 2011, [http://ec.europa.eu/competition/speeches/text/sp2011\\_03\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_03_en.pdf)

<sup>103</sup> D. NEVEN, P. PAPANDROPOULOS and P. SEABRIGHT, , *Trawling for Minnows: European Competition Policy and Agreements Between Firms*, London, Centre for Economic Policy research, 1998, 12.

<sup>104</sup> WYTINCK, P. (ed.), *Gericht op Mededinging: In honorem Bernard van de Walle de Ghelcke*, Antwerpen, Maklu, 2011, 80.

<sup>105</sup> Joined cases 54/64 58/64 *Consten & Grundig v. Commission* [1966] ECR 229.

<sup>106</sup> [http://ec.europa.eu/internal\\_market/top\\_layer/index\\_1\\_en.htm](http://ec.europa.eu/internal_market/top_layer/index_1_en.htm)

and supply mechanism' play beyond national borders, consequently economic efficiency, of which the consumer benefits, is induced.

At the end of the 90's, the Commission 'modernised' its approach by being more explicitly consumer-oriented and at the same time moving to a more economic appraisal of the matter<sup>107</sup>. When consumer surplus is diminished there can be an unlawful restriction of competition, even if total welfare increases. In a European context one euro consumer surplus does not equal one euro producer surplus. Economists do not perceive the concept of allocative efficiency in the same manner. BISHOP and WALKER find economists to have focused on social welfare (consumer plus producer welfare) in the past, whereas now it would be manifest that "consumer welfare is valued above producer welfare in EC Competition law,"<sup>108</sup>. Indeed, as STUYCK puts it, in the analysis of the reference to consumers in the Treaty and Merger Regulation articles, the consumer is not deemed to be the beneficiary of EU competition rules in a specific or technical fashion<sup>109</sup>. However, and that is of importance in this thesis because of the insistence on bringing competition law goals to the surface, the enforcement of competition law ultimately improves consumer welfare, whether that be directly or indirectly<sup>110</sup>. Directly, by for instance prohibiting price-fixing or the limitation of production and indirectly, by ensuring effective competition is possible. Consumer law is more than competition law, because of the broader and more diffuse requisites of consumers like health protection and safety concerns. However, it is worth noticing that the problems mentioned are more likely to occur in a setting where no effective competition is established and thus indirectly affect the consumer situation.

That does not mean that the role of economic analysis is of minor importance, on the contrary, it merely makes the European policy 'layered' and more complex, as it takes into account a wide(r) sphere of objectives which do not always seem to be identifiable or separable<sup>111</sup>.

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<sup>107</sup> D. SCHMIDTCHEN, M. ALBERT, and S. VOIGT (eds.), *The More Economic Approach to European Competition Law*, Tübingen, Mohr Siebeck, 2007, 1.

<sup>108</sup> S. BISHOP and M. WALKER, *The economics of EC Competition law*, London, Sweet & Maxwell, 2002, 2.22-2.27.

<sup>109</sup> J. STUYCK, EC Competition policy after modernisation: more than ever the interests of consumers., *Journal of Consumer Policy*, 2005, nr. 28, 10.

<sup>110</sup> G. MONTI, *EC competition law*, Cambridge, Cambridge University Press, 2007, 89.

<sup>111</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 3.; D. HILDEBRAND, *The role of Economic Analysis in the EC Competition rules*, The Hague, Kluwer law International, 2002, 1.

BORK found that even in the legislative intent of the Sherman Act, consumer welfare was the objective<sup>112</sup>.

In conclusion, it is maintained that *in se* competition law does not serve a goal of distributive justice<sup>113</sup>. There is no rule stating that the final consumer is *per se* the one to benefit from the economic efficiencies obtained, rather it can be seen as a side-effect ought to be welcomed. The GC has for example ruled that in deciding whether the requirement of article 101(3) TFEU of a ‘fair share of the benefit for the consumers’ is met, a project must be appraised as objectively as possible, without in any way considering the appropriateness of the project by other technically possible or economically viable choices. That is a matter to be considered in ‘the indispensability’ or otherwise in the restriction involved<sup>114</sup>. However, competition is about making sure that there is setting enabling consumers to make a fair and economically reasonable choice. Whilst some may advance this is not the principal aim of competition, it is clear that consumers must at some momentum share in the wealth created by producers. It can by no means be thought of as reasonable to ultimately put the consumer in a position in which he or she is worse off.

Therefore I would find it quite reasonable, on the Commission’s part, to be firm and clear about the relationship between consumer welfare and economic efficiency and their role to play in the appraisal of each individual case. Are the two goals equally important or is economic efficiency subordinate to consumer welfare?

At a first glance (and as has been said above) consumer welfare and economic efficiency seem to complement each other. As an argument of minor importance, the latter seems true since the Commission advanced both objectives in the same course of time and thus must not have seen any particular or major inconsistencies in their interrelationship. Further, the interrelation can be seen in situations like the *Consten & Grundig* Case, where the elimination of transnational barriers to trade almost naturally resulted in a consumer benefit in the form of the increase of competitors<sup>115</sup>. Other commentators find the two not to be easily achieved

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<sup>112</sup> R.H. BORK, Legislative intent of the Sherman Act, *Competition policy International*, 2006, 1, originally published in *Journal of Law and Economics*, 1966, 7.

<sup>113</sup> J. STUYCK, EC Competition policy after modernisation: more than ever the interests of consumers., *Journal of Consumer Policy*, 2005, nr. 28, 27.

<sup>114</sup> Case T-17/93 *Matra Hachette SA v EC Commission* [1994] ECR II-595, para. 122.

<sup>115</sup> Joined cases 54/64 58/64 *Consten & Grundig v. Commission* [1966] ECR 229.



simultaneously<sup>116</sup>. VAN DEN BERGH AND CAMESASCA note that for policy makers it might be impossible to avoid difficult trade-offs<sup>117</sup>. That is due to the difference in weighing and explicit choices made. In a consumer welfare view, ultimately consumers should benefit from business practices, economic efficiencies should not serve total welfare. In the latter concept, the trade off being made can be to the detriment of the consumer, in the sense that an efficiency saving might outweigh consumer loss.

#### 4.2.2. Market integration

As noted before, EU Competition law is said to have the two-fold aim of on the one hand promoting integration between member states and on the other hand promoting effective and undistorted competition<sup>118</sup>.

The integration goal is to be read in article 3(1)(b) of the TFEU which states that “the Union has the exclusive competence in the area of establishing competition rules necessary for the functioning of the internal market”. From this sentence, one could extract that competition is a means for completing the establishment of the internal market. Protocol No 27 expresses that “The Union shall, if necessary, take action under the provisions of the Treaties, including under article 352 of the Treaty of the functioning of the EU,”. The Protocol refers back to the old article 3 of the EC Treaty which includes a system ensuring that competition “is not distorted”.

#### *The functional nature of competition: The elimination of article 3(1)(g) TEC*

Before the Lisbon Treaty, article 3(1)(g) Treaty establishing the European Community (hereinafter TEC) stated that: “The *activities* of the Community shall include ‘a system ensuring that competition in the internal market is not distorted,’. That wording had been in the EC Treaty since the inception of the EEC. The Constitutional Treaty would have included an article on the Union’s objectives. In the latter, provision was made for the *objective* rather than the *activity or task* of free and undistorted competition (Article I-3(2)). On June 21 of

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<sup>116</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 5.

<sup>117</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, London, Sweet & Maxwell, 2006, 5 and 38.

<sup>118</sup> S. BISHOP and M. WALKER, *The economics of EC competition law*, London, Sweet & Maxwell, 1999, 3.

2007, during the negotiations for amending the TEU, Nicholas SARKOZY proposed to remove the reference to free and undistorted competition. Later on, Protocol No 27 reaffirmed the commitment of the member states to competition policy<sup>119</sup>.

Competition policy had been a part of the ‘Community activities’ list (set out in article 3) since the inception of the Community in 1958. The European economic integration aim was promoted through ‘a set of wider policies’<sup>120</sup>. In essence economic integration is supported and made possible by both the provisions on free movement and competition. Free movement ensures that states do not apply measures preventing free movement of persons, goods, services or capital, whereas competition makes sure private actors do not distort effective competition in the market<sup>121</sup>. The Union’s Courts have emphasised the functional nature of the competition rules. In *Eco Suisse*, the CJEU said: “However, according to article [3(1)(g)] EC..., Article [101] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market,”<sup>122</sup>. Market integration is an essential concept in the EU, which differentiates EU competition law from other competition laws<sup>123</sup>.

What legal consequences does the elimination of the article entail? One could say it is only a symbolic intervention, since the practical effect will be determined by the CJEU, other references in the Treaties remain standing and the substantive articles regulating competition law have not been altered<sup>124</sup>. Furthermore, the Protocol itself refers to article 3(1)(g) TEC. The majority in literature seems to agree with this view<sup>125</sup>. In addition, the Protocol names the possibility for the Union to take action under article 352 TFEU. This article allows the Union to take action to achieve one of the *objectives* of the Union<sup>126</sup>.

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<sup>119</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 1401.

<sup>120</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 41.

<sup>121</sup> J. STUYCK, ‘Libre circulation et concurrence: les deux piliers du Marché commun’ in *Mélanges en Hommage à Michel Waelbroeck*, Brussel, Emile Bruylant, 1999, 1478.

<sup>122</sup> Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, [2000] 5 CMLR 816, para 36.

<sup>123</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 42; P. R. WILLIS, *Introduction to EU Competition Law*, London, T&F Informa UK, 2005, 2.

<sup>124</sup> J.C. PIRIS, *The Lisbon Treaty; A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 309.

<sup>125</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer, 2009, 130.; R. BARENTS, *Het verdrag van Lissabon; Achtergronden en commentaar*, Deventer, Kluwer 2008, 186; A. KACZOROWSKA, *European Union Law*, Oxon, Routledge-Cavendish, 2009, 50.

<sup>126</sup> A. KACZOROWSKA, *European Union Law*, Oxon, Routledge-Cavendish, 2009, 50.

However, PARRET notes that the removal of competition as an objective might have an influence on competition law in the long run, since policies listed as an objective are used by the CJEU in a teleological way. Being listed as an objective renders a policy of paramount importance, one could say ‘quasi-constitutional’<sup>127</sup>. That makes it a favourable interpretation tool for the CJEU. It enables the Court to link the ‘substantive’ articles to the ‘objective’ article and apply general principles and legal theories (used in other areas of EU law as well) such as the ‘doctrine of effet utile’<sup>128</sup>. A good example of the latter can be found in *Courage*, in which the Court, through its reliance on article 3(1)(g) TEC was able to stress the importance of the competition provisions<sup>129</sup>. In *GB-INNO-BM*<sup>130</sup> the CJEU said for the first time that member states must renounce rules which could deprive articles 81 and 82 TEC of their effect<sup>131</sup>. In saying so, the Court used the former article 10 TEC, containing the principle of sincere cooperation, and linked that article to 82 EC and article 3(1)(g). Article 10 EC required member states to ensure the fulfillment of the obligations arising out of the Treaty, facilitate the achievement of the (then) Community’s tasks, and abstain from measures which have the ability to jeopardize the attainment of the Treaty’s objectives.

The legal technique used by the Court can be explained as follows: in article 3(1)(g) TEC competition was outlined as an activity of the Community. Therefore, member states have the responsibility under article 10 TEC to make sure the attainment of that Community’s task is not jeopardized. Article 82 TEC is seen as a specification of the general article 3(1)(g) TEC which lists competition as an objective. In other words, article 3(1)(g) TEC made the link between more specific competition articles and the principle of sincere cooperation possible. It is not hard to see how that technique is made more difficult due to the removal of competition as a Union activity. The alternative might be the link with the new article 7 TFEU, fostering policy consistency.

The question is whether the Court will go as far as to make the link between Protocol No 27 and what is now article 4(3) TEU. In theory, it is still possible for the Court to go down that route, since a protocol is primary law. However, at first glance one could think that the use of Protocol No 27 *juncto* article 4(3) TEU would be a politically sensitive issue and more easily

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<sup>127</sup> L.Y.J.M. PARRET, Do we (still) know what we are protecting? The discussion on the objectives of competition law from different perspectives, *TILEC Discussion paper Series*, 2009-2010.

<sup>128</sup> Case C-198/01 *Conorzio Industrie Fiammiferi(CIF) v Autorità garante della Concorrenza e del Mercato* [2003] ECR I-8055.

<sup>129</sup> Case C-453/99 *Courage* [2001] ECR I-6297.

<sup>130</sup> Case 13/77 *NV GB-INNO-BM v. ATAB* [1977] ECR 2115.

<sup>131</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 623.

classified as 'judicial activism', a label which the Court is very active in trying to prevent from being pinned up. LENAERTS and VAN NUFFEL mention that in *Leclerc*<sup>132</sup> the CJEU made clear that the reliance on article 4(3) TEU cannot be used as a gateway for *any* Union policy, there needs to be 'a clear Union policy'<sup>133</sup>. In casu the Court said that: "It is thus apparent that the purely national systems and practices in the book trade have not been made subject to a community competition policy with which the member states would be required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty,".

By contrast, this formulation does not preclude the Court from using the Protocol in conjunction with article 4(3) TEU since a wholly internal aspect needs to be differentiated from a situation where the Union has an exclusive competence, like competition policy.

The consequence of the removal of competition as an activity might be that the CJEU is constrained in using the loyalty clause as a flexibility tool and is not able to point up the importance of (in practice, not anymore in writing) competition. BARENTS states the Protocol makes clear that the spirit of the former article 3(1)(g) TEC is maintained, since the article in the protocol indicates that there is no substantive alteration in articles 101-106 TFEU. Hence he concludes that the Courts in their jurisdiction can use the aforementioned technique without restraints<sup>134</sup>.

The fact that competition is marked as a competence in article 3 TFEU rather than an objective in the TEU, does not comply with the paramount importance that has been given to the policy in the EU machinery and by consequence the legal and paralegal texts adopted by the Commission and other institutions. The future will reveal the impact of the disposal. In any event, it does express the difficult relationship between competition law and member states and their protectionist interventions and shows that there are at least some (political) challenges to face. It all just adds to the need for an explicit choice and statement of what competition policy's role in Europe consists of<sup>135</sup>. In conclusion, the evolution affirms the suspicious attitude of member states towards these rules, again generating an additional reason to shed a light on the objectives of the policy matter and substantially clarify its scope.

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<sup>132</sup> Case 229/83 *Leclercq* [1985] ECR 1, para20.

<sup>133</sup> K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union*, second edition, London, Sweet & Maxwell, 2005, 122, footnote 208.

<sup>134</sup> R. BARENTS, *Het verdrag van Lissabon; Achtergronden en commentaar*, Deventer, Kluwer 2008, 561.

<sup>135</sup> S. BISHOP and M. WALKER, *the Economics of EC Competition law*, London, Sweet & Maxwell, 2010, 3.

*From a functional approach to competition to a complementary conception of the internal market and competition*

As has been said above, in the past, competition law was seen as pursuing a double sided goal: serving competition on the one hand and market integration on the other. In 2000, the Commission, in its 29<sup>th</sup> report on Competition policy reiterated the two objectives of competition law namely: the maintenance of competitive markets and the single market objective. However, in the white paper on Modernisation of 1999, the Commission said that the focus of competition law had changed. The Commission would rather be concerned with ‘ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive markets structures’<sup>136</sup>. Indeed, the Commission does no longer handle competition as a means to obtain the internal market objective, rather it sees competition and market integration as complementary concepts.

WILLIS is unsure about to what extent EU competition law prohibits conduct under the ‘market integration’ objective where no ‘market power’ (in my enumeration: competition) issues arises. Consequently, he does not take the objective into account for any further analysis, as he would find it economically dubious if the objective could prevail where there is no actual market power issue<sup>137</sup>. In his analysis, the better view would be that ‘market integration’ cannot prohibit behaviour where no ‘market power’ problem takes place. This might be seen as a shift from the integration goal in the EU, previously serving as the framework principle, towards the ‘economically efficient’ approach as the comprehensive base for both competition and market integration. If that would be the sole factor to take into account, I personally would find that a misconception of the EU as a concept. Competition as a policy then crosses borders and persists on economic efficiency reasoning to be encompassing and regulating not only its own field of competence, hence claiming a spill-over effect. Further in this thesis I will elaborate on this. Moreover, in the enumeration of hardcore restrictions (which are presumed to infringe article 101(1) and unlikely to satisfy 101(3)TFEU) in the block exemption on vertical agreements, absolute territorial restraints are banned<sup>138</sup>. The latter prohibition is very much inspired by market integrational concerns.

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<sup>136</sup> Commission White Paper on modernisation of the rules of implementing Articles 81 and 82 of the EC Treaty [1999] OJ C132/1, [1999] 5 CMLR 208, Executive Summary, pt. 8.

<sup>137</sup> P. R. WILLIS, *Introduction to EU Competition Law*, London, T&F Informa UK, 2005, 4.

<sup>138</sup> A. JONES and B. SUFRIN, *EU Competition law*, Oxford, Oxford University Press, 2011, 255; art. 4(b) Verticals Regulation 339/2010

The more the integration of the European market is reaching its stage of completion, the more 'space' there is to present 'economic efficiency' as the paramount objective<sup>139</sup>. Whilst that might be true (and in fact only partially, since other concerns such as consumer welfare and other objectives are taken into account) on the competition policy level, on that is not so a more general level. The Union is outstepping its initial economic ambitions. Combine that with the insistence of the Lisbon treaty on policy integration and one gets a whole different perspective for the future of competition policy in Europe than the mere alignment and smoothing with US law. Market integration still proves to have a decisive impact on today's EU competition law.

#### 4.2.4. Freedom of action, economic freedom, SME protection and fairness considerations

For some, a healthy competitive environment is one where small and medium-sized firms are protected. More generally, we talk about 'economic freedom'. The latter goal is often linked with considerations of fairness: the insurance of 'equal opportunities'<sup>140</sup>. There is no direct link with allocative efficiency, the named goal is rather of a philosophical nature. On the basis of liberal democracy and the exercise of fundamental rights, any private party can establish a firm or a company or perform transactions on the market. Whenever a company gains power, the fear is that such power can be devoid of any true legitimation and would be used to infringe the economic freedom of other private actors. On top of that, public policy decisions might be distorted<sup>141</sup>. The angle from which we examine competition law's goals now is one in the sphere of fundamental rights: every individual has, in principle, the liberty to exercise his or her economic freedom without crossing the limited allotted prerogatives and with an attitude of fundamental respect for these (same) fundamental rights conferred to other private actors.

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<sup>139</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 7.

<sup>140</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 7.

<sup>141</sup> G. AMATO *Antitrust and the Bounds of Power, : the Dilemma of Liberal Democracy in the History of the Market*, Oxford, Hart Publishing, 1997, 2-3.

Current competition policy embodies rules that aim to protect small businesses and preserve their rights to make independent decisions and maintain equal opportunities<sup>142</sup>. For instance, the ban of cartels is not applicable to ‘agreements of minor importance’. It is ought impossible for small and medium-sized enterprises to compete in an economically viable way, without them being allowed to cooperate with one another<sup>143</sup>. In cartel cases, except for those of minor importance mentioned above, there is a presumption that there is a reduction of efficiency and thus a restriction of competition. This presumption can possibly be rebutted by analysing the effect of the agreement<sup>144</sup>. The objective serves as a dual goal: on the one hand, willingness towards and exemptions for smaller rivals and on the other hand bringing out the microscope in examining the conduct of larger companies.

The Courts have regularly put this interest in the scale, balancing economic freedom as a fundamental right implicitly with 102 TFEU, the alleged abuse of a dominant position<sup>145</sup>. The renewed focus on fundamental rights through the insertion of a Charter of fundamental rights in the Lisbon Treaty, might be an impetus to the aforementioned objective.

One of the properties upon which US and EU antitrust regimes disagree most is just this element: the protection of competitors. Whereas in the current US Policy the for mentioned objective is perceived as a questionable and discredited goal, European competition policy has taken into account these fairness considerations. This has recently been confirmed in the speech of Director General ITALIANER in which he said: “By unlocking the potential of the internal market, competition policy can allow businesses – whether established ones such as agribusiness, or start-ups or SMEs (small and medium enterprises) – to turn innovative ideas into products and services that meet the demand of the globalised markets. By increasing competitiveness in the internal market, these businesses will also be strengthened and able to take on international competition,”<sup>146</sup>.

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<sup>142</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 4.

<sup>143</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis* Notice) [2001] OJ C368/07.

<sup>144</sup> G. MONTI, *EC competition law*, Cambridge, Cambridge University Press, 2007, 52.

<sup>145</sup> Case T-41/96 *Bayer AG v. Commission* [2000] ECR II-3383.

<sup>146</sup> ITALIANER, A., Institute for European and International Affairs, *EU priorities and competition enforcement*, Dublin, 25 March 2011, [http://ec.europa.eu/competition/speeches/text/sp2011\\_03\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_03_en.pdf)  
In this statement, one can see a combination of objectives that in US Antitrust law are ought not to be taken into account: freedom of action, consumers, fairness.

On a national level, the Belgian law on business practices is also not completely consistent with the mere efficiencies approach<sup>147</sup>. For example: The prohibition for all traders, irrespective of market shares, to sell a product at a loss price in article 101. That national rule is allowed by article 3, limb 3 of regulation 1/2003 which states: “Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the Courts of the member states apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty,”<sup>148</sup>.

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<sup>147</sup> Wet 6 april 2010 betreffende marktpraktijken en consumentenbescherming.

<sup>148</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L/1.



## Chapter 2 The relevance of the quest for goals

§1 Problem – a web of playing fields, a layered policy structure with different opinions and a rapidly shifting stance of reality

MONTI claims that it is impossible to identify the ‘soul’ of competition law. At most, we could shed a light on the different but equally legitimate opinions on what goals competition law should achieve. He states that in every country, the purposes of competition law change in the course of time, even without the amendment of legislative texts<sup>149</sup>. Further, it is doubtful whether competition law can pin its goals down to just one set of goals. In fact, no competition authority has narrowed the aim of competition down to one unchangeable package<sup>150</sup>. Goals have changed over time and even at the same time competition laws can pursue different goals, even conflicting with one another.

Indeed, the open structure of competition law and its layered policy structure (politics, economics and institutions), leaves space for various interpretations. Moreover, and like many other fields of law, the playing-field is often intertwined with numerous other concerns. This is not surprising. However, in case the rigid Chicagoan view on competition law is upheld, this would result in an economic dictation that is either black or white. Competition law is precisely not that easy to define, given the interplay with various extracurricular fields. Hence a degree of flexibility is required.

MONTI describes a useful distinction in considerations that influence the shape of competition law and consequently, the decisions that stem from those basic rules. There is a *political question* as to the merits and goals of competition law; the choice for an *economic view* on market behaviour and; the *institutional structure* that ultimately enforces competition law<sup>151</sup>. As to the political question, competition law can (in extreme terms) either strive for a range of public interest goals or can solely strive for promoting economic welfare. A more moderate view would be the pursuit of a limited set of public policy goals other than economic welfare. The problem with the distinction mentioned above is that it might be useful in theory, but in practice the distinction often proves to be difficult. Economic reasoning is often used to fill in the vague (political) terms of competition law. The most striking example is the notion of competition itself, which is described in many ways. Moreover, some tools of legal analysis do not have the same substance as the economic concept; market definition is the obvious

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<sup>149</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 3.

<sup>150</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 3.

<sup>151</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 4.

example. Last, it is not easy to find ‘economic evidence’ in real life cases and that is so in every stage of a case assessment.

## §2 Conclusion drawn of what has been said above – a necessary evil

That politically inspired policies (alongside economics) are decisive in shaping competition law, is thus in itself not a problem. However, we should be concerned about the explicit statement of these objective(s), how they interrelate. Overall we should make sure there are objective benchmarks at hand<sup>152</sup>. Economic principles may provide a useful and more objective tool in the appraisal of competition cases, going side by side these policies. But also in this second stage, economic choices should be made explicit. It is clear from the evolution in competition law in time and the different opinions in American and European economic theory today, that there is not one vast and secure economic framework either. The quest for goals is thus relevant on these three levels: politics, economics and institutional make-up.

It would be better for Europe to state a clear goal in its competition law policy given the EU’s framework and conceptual role (level: institutions and politics), it’s legislative exemplary nature for national institutions and the aim of diminishing barriers to trade (level: economy). As BORK stated in his book *The antitrust paradox*: “Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give... Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules,”<sup>153</sup>.

In line with MONTI, it is my conviction that the presence of policy in competition law should not be put to the test when applied in a consistent and transparent way<sup>154</sup>. Policies (cfr. supra and infra) have proven to be an inherent characteristic of the EU program today. The questions we should ask ourselves concern the use of such objectives in an arbitrary way. Arbitrariness cannot reasonably be part of a legal system.

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<sup>152</sup> R.J. VAN DEN BERGH and P.D. CAMESASCA, *European Competition law and Economics*, Schoten, Intersentia, 2001, 15.

<sup>153</sup> R. H. BORK, *The Antitrust Paradox*, New York, Free press, 1993, 50.

<sup>154</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 16.

The call for that clear statement has become even more urgent since the institutional change that came with Regulation 1/2003, granting National Competition Authorities and Courts the power to apply EU competition law in a more comprehensive manner<sup>155</sup>.

### §3 The result of the research conducted above – an outline

First and foremost, EU competition law certainly does not rely upon the Chicagoan view on competition policy. Second, the importance of economics in competition policy is manifest. The past years, authors have (rightly so) emphasised this evolution because of the shortcoming of a sound economic appraisal before. Third, one must not forget the EU's specificity, highlighted by three peculiarities: the insistence on consumer welfare as the ultimate result, the internal market as an overarching feature and the inclusion of fairness considerations. Overstating the evolution towards a more economic appraisal has the inherent danger of losing track of the EU's framework and specificity.

### §4 Link with the identification and appraisal of clashes

Against the background of the EU competition law goals mentioned above, one should ask himself how these various goals interrelate and how the Commission and Courts can use them in a coherent way. For example: an authority can allow a merger, even if that is not economically rational, when that decision is underpinned by highly supported political reasons (e.g. the conservation of jobs). But where does one draw that line then? In other words: how many jobs have to be put in the scale so that the economical reasoning is set aside, or less important? The answer to that question is important to achieve a valuable, reasonable, equally applied and justified competition law policy in Europe, to pursue legal certainty and tackle the (often justified) criticism of US scholars.

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<sup>155</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L/1.

## Section 2 The identification and appraisal of possible clashes

In line with PARRET, I am convinced it is not merely of theoretical importance to clearly define the chosen policy direction. I will try to provide an outline of the aforementioned objectives and how they relate to the Union framework objectives, how multiple goals of competition itself interrelate and assess the nexus with other Union policies. The intention is to give the reader a schematic overview of ‘the hierarchy’, even where the European policymaker did not yet make a straightforward choice or to bring to the surface any possible conflicting interests. For reasons of legal certainty and policy consistency it is claimed that in any event it is to the benefit for the Commission to abolish uncertainty at the (initial) level of stating goals and their hierarchy.

In essence, a distinction can be made between (a) general concepts, values and (b) objectives which should be taken into consideration in the more specific policy fields. Competition, although one of the European union’s most far-reaching policy areas, is in that sense, *just* a policy.

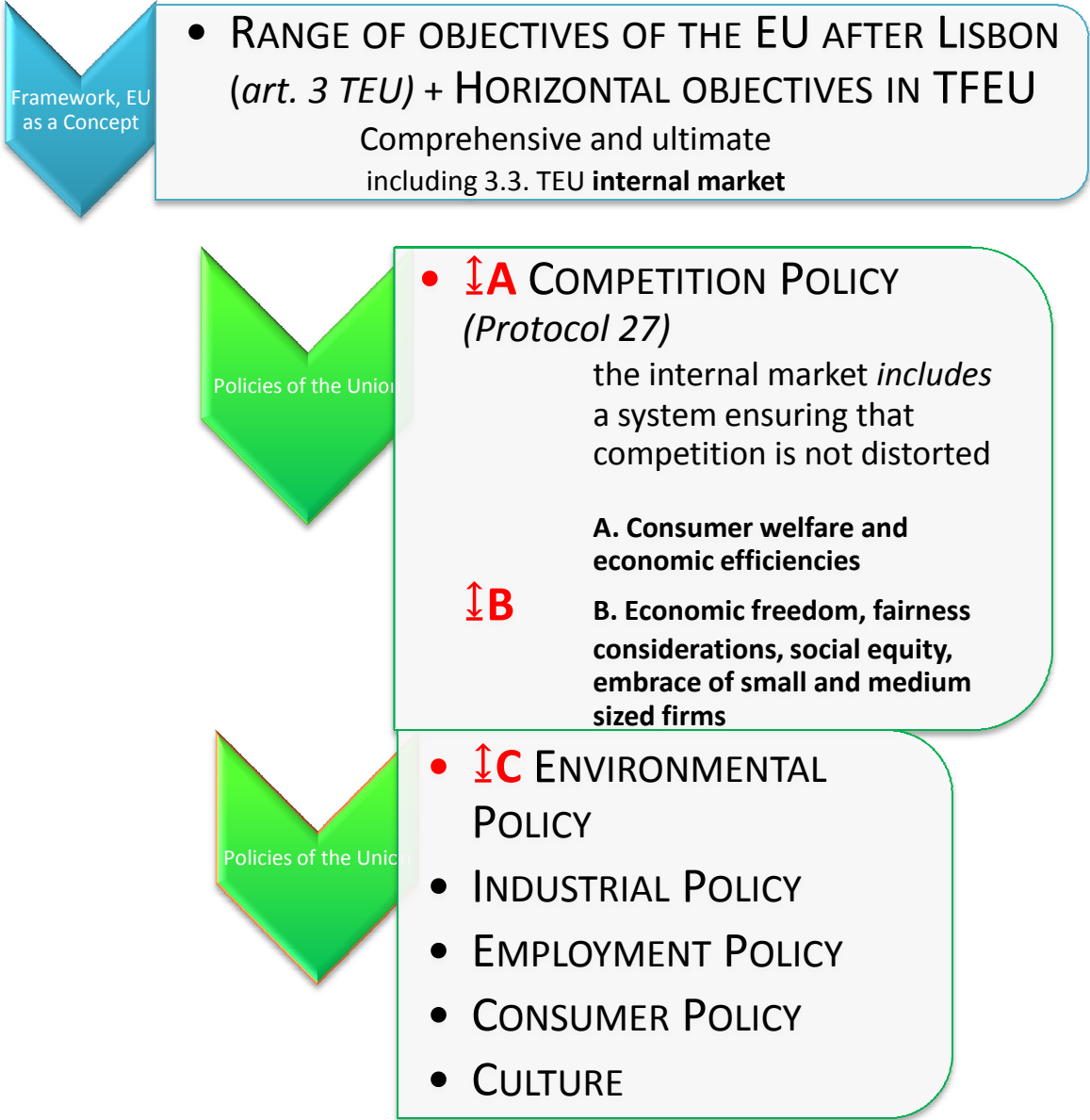
Competition and market integration are often put on the same level. However, one should make a clear distinction in the EU’s hierarchy and conceptual framework for the purposes of fully and comprehensively understanding the role of competition law in the European framework. I find the distinction in literature as if competition would be serving two goals: on the one hand the competition goal, on the other hand the integration goal to be at least of an imprecise nature<sup>156</sup>. This is not the only stance where borders between levels are blurred (cfr. *infra*). However, during the course of time (and certainly through the Lisbon changes), the EU has strengthened its conceptual framework. I will explain how I believe the increased reliance on non-economic considerations might have implicitly changed and clarified the EU’s ‘constitutional’ hierarchy, formulate where the changes have not been implemented yet (policy integration) and reveal the inconsistent reasoning in article 101(3) TFEU.

The technique I will be using to go through this clew of intertwined policy statements and objectives contains two steps. The first one entails the identification of possible conflicts.

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<sup>156</sup> C. KIRCHNER, ‘Goals of Antitrust and Competition Law Revisited’ in *The more Economic Approach to European Competition Law*, D. Schmidtchen, M. Albert & S. Voigt (eds.), Tübingen, Mohr Siebeck, 2007, 7.

Second, I will try to assess whether on a substantive level, the possible clash constitutes a problem. Pursuing multiple goals is in fact not the problem. The real question is the interrelation of goals and to what extent a ‘weighing’ occurs in the judicial appraisal of the European and national Courts.



### Conceptual framework objectives vs specific objectives of competition law

- *Does the identified clash really constitute a problem?*  
Possibly yes, competition cannot allege to be a quasi -autonomous policy. Hence, it should take into account 'the EU as a concept'. However, as long as it does not manifestly go against the economic and political choices on the highest level, a real conflict is improbable.

### Conflicts between the multiple competition policy goals

- *Does the identified clash really constitute a problem?*  
In a majority of cases, no.

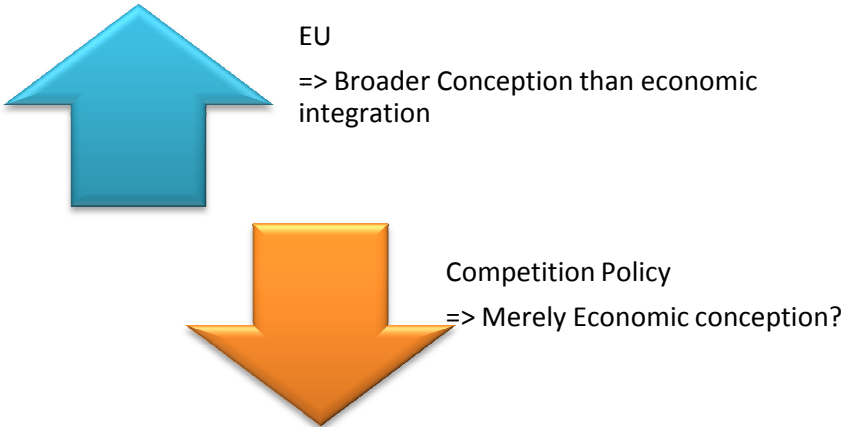
### Conflicts with other policies within the EU

- *Does the identified clash really constitute a a problem?*  
Yes and no, all in all a real conflict is not common. In the case of 101(3) TFEU, the question is more whether the non-economic factors are allowed to complement the others. Note that the obligation to integrate policies also amounts to this level.

Chapter 1 First Clash: The conceptual framework objectives and the more specific objectives of competition policy

It goes too far and is not always relevant, to go over all general Union objectives enumerated in article 3 TEU and their relation to competition policy objectives. KACZOROWSKA distinguishes overreaching objectives (like the promotion of peace, of the EU’s values and of the well-being of its people) and ‘more specific’ general objectives<sup>157</sup>. The latter are: the creation of an area of freedom, security and justice, the establishment of the internal market and the establishment of the EMU. It makes sense to focus on the interrelation between competition policy and the core objective of the EU: the establishment of the internal market, since there is an (economic) link between both.

At first sight, competition and free movement objectives seem to be complementary. Therefore, I will focus on the complementary nature of competition and free movement provisions first. Second, I will describe the evolution towards a more ambitious Union. In this section, the clash between competition law (featuring its evolution towards a more economic approach) with the Union as a concept (more and more relying on a wider range of non-economic features and policies), pops up. I will argue that in essence this is not a problem, as long as competition does not take up an autonomous role and keeps in mind its European policy integration duties.



<sup>157</sup> A. KACZOROWSKA, *European Union Law*, Oxon, Routledge-Cavendish, 2009, 49-50.

## §1 The EU and the internal market

In order to enable a discussion on the convergence of the fundamental freedoms and the Treaty's competition rules, it is necessary to briefly describe and highlight some of the more fundamental functions of the two respective categories of legal rules.

On the one hand, the fundamental freedoms deal with restrictions imposed by member states<sup>158</sup>. Such restrictions can be either directly discriminatory, and thus discriminate on the basis of nationality, or be indirectly discriminatory. The latter category consists of obstacles which seem non-discriminatory at first sight, but in reality have a greater discriminatory impact on nationals of other member states<sup>159</sup>. The rules on free movement are addressed to the member states and are all directly applicable<sup>160</sup>. From a territorial point of view, they apply only within the European Union and there is no *de minimis* rule<sup>161</sup>.

The competition rules<sup>162</sup>, on the other hand, deal with behaviour by private undertakings<sup>163</sup>. Until quite recently, parts of the competition law provisions – Article 101(3) TFEU – were not directly applicable. Thus, the exemptions under article 101(3) TFEU could only be granted by the Commission<sup>164</sup>. This has changed by abolishing the Commission's previous exclusive power to grant exemptions. Article 101 TFEU is now, as are the rules on free movement, directly applicable in its entirety<sup>165</sup>.

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<sup>158</sup> Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837 para 5.

<sup>159</sup> C. BARNARD, *The Substantive Law of the EU – The Four Freedoms*, Oxford, Oxford University Press, 2007, 256.

<sup>160</sup> See i.e. Case 2/74 *Reyners v. Belgium* [1974] ECR 631; Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; C-163/94 & C-165/94 & C-250/94 *Sanz de Lera* [1995] ECR I-04821; Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

<sup>161</sup> J. BAQUERO CRUZ, *Between Competition and Free Movement – The Economic Constitutional Law of the European Community*, Oxford, Hart Publishing, 2002, 86–87; However, one could see the Keck ruling as a *de minimis* rule.

<sup>162</sup> Primarily Articles 101 and 102 of the TFEU and Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

<sup>163</sup> See Articles 101 and 102 TFEU.

<sup>164</sup> See Council Regulation (EEC) No. 17/62 of 6 February 1962 on the implementation of Articles 85 and 86 of the Treaty, [1962] OJ 13.

<sup>165</sup> See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L/1, article 5.



1. The fertile ground for convergence amongst market integration and competition law : the aim of an efficient internal market

In containing the basic provisions on the free movement of services<sup>166</sup>, goods<sup>167</sup>, workers<sup>168</sup>, and capital<sup>169</sup> as well as the provisions on competition<sup>170</sup>, the TFEU lays down the legal framework for the establishment of the internal market. The internal market comprises an area without internal frontiers in which the four basic freedoms may be exercised freely in accordance with the Treaty's provisions<sup>171</sup>. In order to achieve this, it was clear already at the dawn of the European cooperation that the rules on competition and free movement were supposed to supplement each other. Without such interaction, it was assumed that private undertakings would impose new barriers to trade which to some extent would replace the national ones. The latter were abolished by the Treaty of Rome and its subsequent amendments<sup>172</sup>. A competition policy has been embedded in the Treaty right from the start, *as a means* of achieving the objective of European economic integration. It is obvious that it makes no sense to prohibit states to take measures that fragment the market, if private undertakings could create and maintain barriers by engaging in anti-competitive practices<sup>173</sup>.

In *Consten & Grundig* the Court ruled that an agreement will be prohibited insofar as it is a threat, either direct or indirect, actual or potential to intra-Community trade<sup>174</sup>. *Dassonville* defines the measures having equivalent effect as "all trading rules enacted by member states which are capable of hindering directly or indirectly, actually or potentially intra-Community trade"<sup>175</sup>. The resemblance between the two formulas is striking.

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<sup>166</sup> See article 56 of the TFEU.

<sup>167</sup> See Article 34 of the TFEU.

<sup>168</sup> See Article 45 of the TFEU.

<sup>169</sup> See Article 63 of the TFEU.

<sup>170</sup> See Articles 101 and 102 of the TFEU.

<sup>171</sup> See Article 26 of the TFEU.

<sup>172</sup> SPAAK Report, Comité intergouvernemental créé par la conférence de Messine, '*Rapport des Chefs de délégation aux ministres des affaires étrangères*', presented in Brussels on 21 April 1956, para.16. These opinions have also been repeated at later points of time, see i.e. Pescatore, Pierre, 'Public and Private Aspects of Community Competition Law', in *US and Common Market Antitrust Policies: 1986 Corporate Law Institute* (1987), ed. B Hawk, at 392.

<sup>173</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2007, 41; SPAAK Report, Comité intergouvernemental créé par la conférence de Messine, '*Rapport des Chefs de Délégation aux Ministres des Affaires Étrangères*', presented in Brussels on 21 April 1956, para 16.

<sup>174</sup> Joined cases 54/64 58/64 *Consten & Grundig v. Commission* [1966] ECR 229.

<sup>175</sup> Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

It has been argued that the primary goal of European Union competition law is to eliminate private practices that interfere with market integration. Competition law would be about furthering European economic integration, rather than to achieve economic efficiencies and to increase consumer welfare<sup>176</sup>. The European Commission more or less explicitly acknowledged this by stating that *the maintenance of competitive markets* (serving competition) and the *furtherance of the internal market* (serving integration) were the primary objectives of European Union's competition policy<sup>177</sup>. Indeed, the ethos of the Union's economic constitutional law has continuously been based on 'the principle of an open market economy with free competition'<sup>178</sup> which is achieved through both the four freedoms and competition rules. In that conception, competition thus encompassed two separate objectives: competition and integration. One could see competition policy as serving the broader end of establishing the internal market. This could be one reading of (but, below it will be argued why this not the case) art. 3 TFEU: "The Union shall have exclusive competence in the following areas: [...] (b) the establishing of the Competition rules *necessary for the functioning of the internal market*,".

The purposes of the Union's competition law seem to have changed from time to time. This has been mirrored in the case-law of the CJEU<sup>179</sup>. In the late 1990's the Commission launched its modernisation efforts regarding the application of the competition rules. In its 1999 *White Paper on Modernisation*<sup>180</sup> the Commission restated its competition policy objectives, and explicitly expressed that, although its focus had previously been the establishment of rules on restrictive practices interfering directly with the *goal of market integration*, the Commission was now concentrating more on *ensuring effective competition* by detecting and stopping cross-border cartels, and maintaining competitive market

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<sup>176</sup> HAWK, BARRY E., "The American (anti-trust) revolution: lessons for the EEC?", *European Competition Law Review*, issue 1, 1988, 54 and A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press 2008, 42.

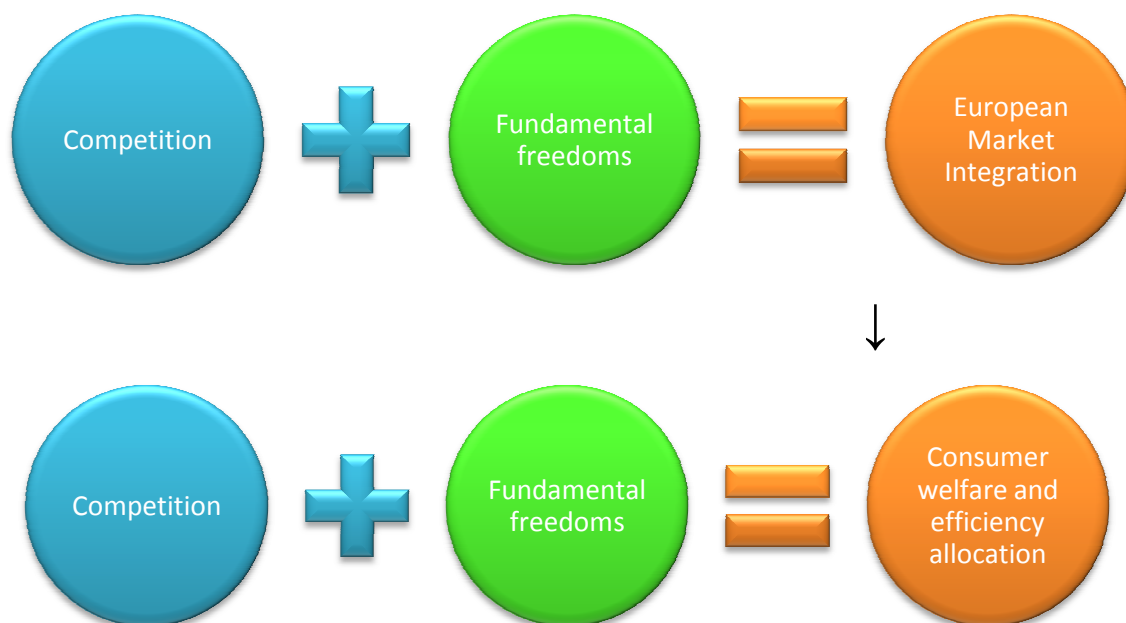
<sup>177</sup> Commission's XXIXth Report on Competition Policy [1999] [http://ec.europa.eu/competition/publications/annual\\_report/1999/en.pdf](http://ec.europa.eu/competition/publications/annual_report/1999/en.pdf) paras 2-3.

<sup>178</sup> J. BAQUERO CRUZ, *Between Competition and Free Movement: the Economic Constitutional law of the European Community*, Hart publishing, 2002, 65.

<sup>179</sup> See, i.e. Cases 177 & 178/82 *Van den Haar* [1984] ECR 1797, paras 11 – 12, in which the Court held that the rules on the free movement of goods were intended to ensure precisely this; i.e. to eliminate measures imposed by Member states while the aim of the competition rules was to ensure the effective competition on the internal market. See also Case 229/83 *Leclercq* [1985] ECR 1, para. 9, where the Court held that – in light of the Treaty's objectives to establish an internal market characterised by the free movement of goods where the terms of competition are not distorted – both the rules on competition and the rules on the free movement of goods lead to the attainment of the same goal.

<sup>180</sup> Commission White Paper on modernization of the rules of implementing Articles 81 and 82 of the EC Treaty [1999] OJ C132/1, [1999] 5 CMLR 208.

structures<sup>181</sup>. This stance has been further modified by the Commission. The Commission now considers the integration of the internal market by means of abolishing trade barriers imposed by the member states and the European Union's competition law *to serve the same ends by increasing consumer welfare and by furthering the efficient allocation of resources*<sup>182</sup>.



That competition policy is necessary to the attain the objective of establishing an internal market is undoubtedly true, but that is just one of its features (cfr. supra, the enumeration of objectives). The more the internal market gets shaped up, the more it is there to protect the integrity, rather than ensuring the establishment thereof. Competition and market integration seem to meet each other in the objective of consumer welfare and efficiency enhancement. In essence, I don't think we should see competition merely as a tool to ensure the establishment of the internal market. On the other hand the internal market is the core of the Union and therefore a feature to be taken into account in *every* Union policy.

<sup>181</sup> Commission White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the EC Treaty [1999] OJ C132/1, [1999] 5 CMLR 208, para 8.

<sup>182</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press, 2008, 51.

## 2. The EU in motion: from an economic to a broader Union?

I think it is correct to say that nowadays, the creation of the internal market is a feature of a Union, aspiring to realise a wide range of goals. The creation of an internal market was initially the core business in the early conception of the Union. However, during the course of time the Union has elaborated its ambitions in many ways<sup>183</sup>. A number of indicators are worth mentioning in this respect.

-Geographically, the Union has expanded. The EU has over the course of time welcomed successive waves of new members<sup>184</sup>.

- Whereas the initial outset of the Union was one of economic nature, the Union substantially elaborated its powers. It proved to be necessary to regulate a certain number of (unexpected) areas in the light of the establishment of the internal market. Further, the Union used its harmonization instruments extensively. The *Tobacco advertising* case demonstrates this has not always been without controversy<sup>185</sup>.

- The teleological use and interpretation of legislative texts by the Courts further backed up the evolution towards a more encompassing Union. The doctrine of 'effet utile' is worth mentioning in this respect. The recent expansion of the notion citizenship is another illustration thereof.

-The reliance on non-economic objectives in the Treaties to a far greater extent than before Lisbon and the inclusion of a Human Rights Charter of a 'constitutional nature' further demonstrate this.

One of the reasons why that is so, lies in the approach already embraced in the Treaty establishing the European Atomic Energy Community. The competence of the Union is not delineated to particular subject matters, but functionally limited to the objectives and tasks the Union requires (see article 1.1. TEU)<sup>186</sup>. In essence, that is not a bad thing. The framework of the Union should be 'flexible' enough to keep up with the rapidly evolving nature of reality.

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<sup>183</sup> C. BARNARD and O. ODUDU, *The Outer Limits of European Union Law*, Portland, Hart Publishing, 2009, 8.

<sup>184</sup> [http://europa.eu/pol/enlarg/index\\_en.htm](http://europa.eu/pol/enlarg/index_en.htm)

<sup>185</sup> Case C-376/98 *Tobacco Advertising* [2000] ECR I-8419.

<sup>186</sup> K. LENAERTS and P. VAN NUFFEL, *Europees Recht*, Antwerpen-Cambridge, Intersentia, 2011, 75.

### 3. The Lisbon Treaty and its reliance on policy integration

The Treaty of Lisbon substituted the list of Union- and Community objectives by an introductory title in the TEU (Title I: Common provisions), setting out the values of the Union (article 2 TEU) and a renewed list of objectives (article 3 TEU). The former category has been expanded with values that were implicit under the previous Treaties. KACZOROWSKA claims they are not declarations without commitment<sup>187</sup>. In respect to the objectives category, it is of importance that in comparison with the EC Treaty, this list of objectives focuses to a far greater extent on non-economic objectives (which only intensifies the plea I hold in respect to the third clash). Further, the Lisbon Treaty inserted article 7 TFEU that fosters policy consistency between policies and activities, taking all objectives into account.

On the 3<sup>rd</sup> of March 2010, the Commission issued a Communication titled ‘Europe 2020; A strategy for smart, sustainable and inclusive growth’, intended to establish a coherent response to the financial crisis. At the heart of Europe 2020 there should be:

-Smart growth – developing an economy based on knowledge and innovation.

-Sustainable growth – promoting a more resource efficient, greener and more competitive economy.

-Inclusive growth – fostering a high-employment economy delivering economic, social and territorial cohesion.

The reason I quote this passage is two-fold: first, it is essential to see that economy is linked to other policy fields. Second, the passage unfolds a reliance on cohesion and an insistence on how policies complement each other. Policy integration in the EU has been encouraged since the early 1980’s, particularly since the United Nations Conference on Environment and Development (UNCED) in 1992. The idea has gained importance through a series of environmental action programs and through the inclusion and strengthening of the integration requirement in successive amendments to the EC Treaty<sup>188</sup>. The White Paper on Governance (2001), states that there are big challenges ahead in the field of subsidiarity, decentralisation, the public-private interface, consultation standards and procedures and *coherence of policies*<sup>189</sup>. It is clear that policy integration is a feature ought to be taken into account by the Commission.

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<sup>187</sup> A. KACZOROWSKA, *European Union Law*, Abingdon, Routledge-Cavendish, 2009, 48.

<sup>188</sup> Article 6 of the Amsterdam Treaty, signed in 1997, placed integration among the main principles, and linked it with the promotion of sustainable development. The emphasis placed on integration by the Treaty came at a time when there was a growing realisation of the inadequacy of for instance environmental policy *per se* in tackling the underlying causes of environmental degradation caused by other sectoral policies and activities.

<sup>189</sup> The White Paper on Governance ([http://ec.europa.eu/governance/white\\_paper/en.pdf](http://ec.europa.eu/governance/white_paper/en.pdf)) makes recommendations in three areas: (i) with regard to participation and openness of policy-making and decision

Of importance for the clash between general Union objectives and competition policy objectives, is that the objectives enumerated in article 3 TEU should not be impaired by other policies' objectives. (Clashes between different Union policies will be described below.)

#### 4. Conclusion

It is important to put the present discussion into perspective. In fact the identified clash should not constitute that much of an obstacle. There are several reasons for that: one of them is that when needed, the Courts find their ways to take into account broader goals (like market integration) than a mere efficiency reasoning. Second, the influence of those broader objectives might have been of minor importance, since market integration and competition policy are not inherently in conflict with one another<sup>190</sup>. In the majority of cases, one can we may assume policies incorporate the objectives of the Union (article 3 TEU). As long as competition policy does not manifestly go against the economic and political choices on the highest level, a real conflict is improbable

Further, we should bear in mind where we came from. We came from a legal situation where economic reasoning was used imprecisely. The inclusion of scientific economic reasoning is thus a step forward, also for internal market purposes. At length, when reliable quantitative measuring techniques underpin economic theory, this favours legal certainty through reducing the inconsistencies European competition law still entails and secondly, by providing more predictability in decision-making<sup>191</sup>.

However, due to the importance given to the Union in the field of competition and the fact that the DG concerned has been granted notable powers and used them too, it should be assured that competition cannot allege to be a quasi-autonomous policy and impose its economic efficiency reasoning on the broader perspective. The EU does not have a Chicagoan view on competition: the idea that the Union imposes a purely mercantilist market concept is

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making; (ii) with respect to coherence and effectiveness of policies; and (iii) with respect to the division of powers between European institutions.

<sup>190</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer 2009, 133.

<sup>191</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, Schoten, Intersentia, 2001, 7.

no longer in compliance with literature. Competition, like other policy fields, should take into account the broader policy features of the EU, certainly after Lisbon<sup>192</sup>.

Chapter 2 Second clash: Impingements within the multiple goals of Competition Policy, focus on economic efficiencies and consumer welfare

I will be brief on this second identified clash for reasons of relevance and because I have touched upon this topic in explaining both goals above (cfr. the end of 4.2.1 consumer welfare).

Social welfare is found where efficiency is maximised<sup>193</sup>. Consumer welfare and economic efficiency complement each other in the bulk of cases, since a policy designed to promote greater efficiency is defined by, depending on its distributive nature, measuring the consumer surplus, the producers surplus and total welfare<sup>194</sup>. As I have argued before, Europe has clearly chosen the route of welfare effects to the benefit of consumers<sup>195</sup>.

However, the two mentioned objectives do not always match. It is not hard to see how the economically the 'efficient' choice is not necessarily in parallel with consumer welfare considerations. In connection therewith, it is important to realise that there are three components of economic efficiency, namely: productive, allocative and dynamic efficiency. Those three are not always entirely consistent with one another. An simple case-setting can illustrate this. Important economies of scale may be attained through a merger, thus causing productive efficiency. At the same time the two formerly independent undertakings might now be enabled to collide and raise prices, hampering allocative efficiency<sup>196</sup>. The same reasoning can be made when new technologies are developed. Whilst dynamic efficiency increases and this may lead to productive efficiency (lower costs), at the same time market

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<sup>192</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in De Europese Unie na het Verdrag van Lissabon, Deventer, Kluwer 2009, 137.

<sup>193</sup> A. JONES and B. SUFRIN, *EC Competition law*, New York, Oxford University Press, 2008, 13.

<sup>194</sup> S.S. CRAMPTON, Alternative approaches to competition law, *17 W. COMP.* 55, 1994, nr.4, at 60.

<sup>195</sup> A. JONES and B. SUFRIN, *EC Competition law*, New York, Oxford University Press, 2011, 47.

<sup>196</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, Schoten, Intersentia, 2001, 5.

concentration can be accrued or prices can be raised above marginal costs since firms want an appropriate compensation for their research investments<sup>197</sup>.

A weighing of the efficiency features of might thus seem desirable. BISHOP and WALKER find both allocative and productive efficiency to be promoted in EU competition law. In the case of productive efficiency that can only be to the extent that consumer welfare does not stop to increase or would even suffer from reduction<sup>198</sup>. However, one important caveat has to be made. Whereas it is obvious that consumers benefit from allocative efficiency, in an indirect way they also do so from dynamic and productive efficiency. Competition authorities should consider that in their assessment.

The statement of objectives in the article 101(3) TFEU guidelines mention both consumer welfare and the efficient allocation of resources<sup>199</sup>. To the contrary, the Guidance paper on article 102 TFEU focuses on enforcement actions against behaviour having ‘an adverse effect on consumer welfare’, whereas efficiency is not mentioned anymore<sup>200</sup>. Consumer welfare is thus seen as encompassing efficient allocation<sup>201</sup>.

Concluding, it seems that in the majority of cases the distinction between both objectives of EU competition law can be neglected, since overall they seem to strengthen each other. By contrast, should the distinction prove to be relevant, the focus should rather be on consumer welfare for the reasons mentioned above.

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<sup>197</sup> R.J. VAN DEN BERGH and P. D. CAMESASCA, *European Competition Law and Economics: A Comparative Perspective*, Schoten, Intersentia, 2001, 6.

<sup>198</sup> S. BISHOP and M. WALKER, *The economics of EC Competition law*, London, Sweet & Maxwell, 2010, 2-019.

<sup>199</sup> European Commission Communication: Guidelines on the application of Article 81(3) [2004] OJ C101/97.

<sup>200</sup> European Commission Communication: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to the exclusionary conduct by dominant undertakings [2009] OJ C45, para. 5.

<sup>201</sup> LOWE, P., ‘*Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?*’ 13Th International Competition and 14th European Competition Policy Day, Munich, March 27<sup>th</sup> 2007, [http://ec.europa.eu/competition/speeches/index\\_2007.html](http://ec.europa.eu/competition/speeches/index_2007.html)

p.2 ‘...[You] would probably also follow me if I said that consumer welfare and efficiency are closely related. An economy is operating at maximum efficiency when society is squeezing the greatest value - the highest level of welfare- out of its scarce resources’.



## Chapter 3 Third clash: Competition and other treaty policies

### §1 Examining the possibility to take into account broader interests than merely economic justifications in article 101 (3) TFEU?

#### 1. Economic vs. non-economic considerations

In this section I will provide for the rationale of why economic considerations are seen as the appropriate (primary) justifications in competition law under article 101(3) TFEU. I will contrast this with the use of non-economic justification criteria in free movement cases and show how the distinction does not always be drawn in particular cases.

A notable difference between ‘fundamental freedom’ justifications and ‘competition’ justifications is the grounds one can rely upon to prove that there has been no breach<sup>202</sup>. As to the free movement of goods, the national interests that might be taken into account must be general interests of a non-economic character<sup>203</sup>. Article 101(3) TFEU provides for the possibility of weighing the restrictive effects of the agreement against the economic benefits and efficiencies created by the agreement. The common ground to justify restrictions in both competition and free movement cases, is the proportionality review.

MORTELMANS claims there are multiple indicators towards convergence between free movement and competition<sup>204</sup>. Convergence might for instance be found in the judgment *Campus Oil*<sup>205</sup>, where the Court seemed to open up the possibility for taking into consideration economic interests when deciding whether an infringement of art. 34 TFEU could be justified on art. 36 TFEU grounds. But for the purpose of this dissertation, only the reverse reasoning is of importance: to what extent are broader interests than merely economic ones taken into account in jurisdiction?

It seems that the difference in use of justifications under article 101(3) TFEU and the non-economic motives possible of justifying restrictions to free movements, are inherently linked to the level they apply to. We should ask ourselves, *why* can restrictions of free movement only be justified by invoking non-economic grounds? That is because the free movement rules

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<sup>202</sup> This will be my main focus of attention when examining convergence.

<sup>203</sup> Case 7/61 *Commission v. Italy* [1961] ECR 317.

<sup>204</sup> K. MORTELMANS, *Towards convergence in the application of the rules on free movement and competition?*, CML Rev. 2001, 636.

<sup>205</sup> Case 72/83 *Campus Oil* [1984] ECR 2727.

apply to state measures. The rules on free movement would be of no use if member states would be allowed to put up barriers again and protect national economic interests. The purpose of the internal market is exactly to abolish national protectionist measures, therefore justifications should not be economic in nature. The opposite reasoning would render the rules in free movement useless.

Conversely, competition law applies to the level of private parties and therefore other kinds of justifications are appropriate. It is not likely that a private party will affect the market in the same way as state authorities adopting general policies covering all players in the market. Who is affected by restrictive agreements and abuse of dominance? The consumer. Therefore restrictions on competition can only be justified if they enhance efficiencies and consumer welfare. A narrow construction of the matters taken into account in article 101(3) TFEU sits most comfortable with the Commission's view on article 101 TFEU<sup>206</sup>. By having both competition law and free movement to secure effective inter-nation trade, we serve all objectives: serving the broad objectives of the Union while making economically reasonable choices. Indeed, the division between the public and private sphere has deep roots in the functioning and legitimacy of both spheres<sup>207</sup>. The parties covered by each scheme of rules, influence the market differently. In general, the distinction makes sense.

By installing a set of competition and a set of free movement rules, the Union aimed at covering the whole range of cases. However, the distinction of personal scope has been obfuscated by the 'privatisation' of free movement and the 'publicisation' of competition<sup>208</sup>. The case law has presented some gaps and overlaps, that may diminish the effectiveness of the provisions of their goal to maintain and integrate a competitive market. The problem occurs when we are confronted with behaviour that does not clearly stem from a private or public entity, or a mixed situation where various actors step in, presenting either a free movement issue, a competition problem, or both<sup>209</sup>. A 'private' organisation, entrusted with a task in a particular sector might adopt a role of a quasigovernmental nature, consequently

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<sup>206</sup> A. JONES and B. SUFRIN, *EC Competition law*, Oxford, Oxford University Press 2007, 274.

<sup>207</sup> J. BAQUERO CRUZ, *Between Competition and Free Movement; The Economic Constitutional Law of the European Community*, Oxford, Hart publishing, 2002, 88.

<sup>208</sup> P. LINDH, *The influence of Competition Law on Free Movement Rules* in EU Competition Law in Context; Essays in Honour of Virpi Tiili, H. Kanninen, N. Korjus and A. Rosas (eds.), Oxford, Hart publishing, 2009, 18; K. MORTELMANS, *Towards convergence in the application of the rules on free movement and competition?*, CML Rev. 2001, 624; J. STUYCK, 'Libre circulation et concurrence: les deux piliers du Marché commun' in *Mélanges en Hommage à Michel Waelbroeck*, Brussel, Emile Bruylant, 1999, 1487.

<sup>209</sup> J. BAQUERO CRUZ, *Between Competition and Free Movement; The Economic Constitutional Law of the European Community*, Oxford, Hart publishing, 2002, 87.

taking into account public policy concerns. The CJEU has applied the rules on free movement of workers, services and establishment to conduct of private organisations (although it has to be said, in very specific situations)<sup>210</sup>. The use of free movement provisions to these mixed situations makes the legislative framework hazy. It is recommended that the legislature intervenes by clarifying how these intermediary situations should be handled. That way, the Courts would not be forced to adopt a reasoning in which excessive formalism towards the personal scope of both sets of rules is dismissed. An alternative reasoning on a judicial level, would be to condemn the failure of the public party to take up responsibility<sup>211</sup>. That way, the primary distinction is respected. However, it might not always be possible to transpose the act of a private party (and its public policy objectives) into a responsibility (the omission) carried by a public authority.

The identification of a party as being either ‘private’ or ‘public’, has further implications. When the Court identifies the organisation as ‘private’ in nature, the justifications that could possibly exempt the contested conduct do not (entirely) match reality, since then the main focus should then be on economic reasoning, and not on public policy concerns. The obvious examples often relate to the cultural (and sports) sector. For instance in *VBVB & VBBB*, where national book publishers agreed to fix prices and individual publishers imposed a price restriction on booksellers at a retail level. In essence, ‘resale price maintenance agreements’ repress price competition at a retail level, and are thus anticompetitive in nature<sup>212</sup>. However the rationale of the measure is to subsidise sales of less popular books. The applicants even argued that such a system was necessary to ensure freedom of expression<sup>213</sup>. The Court eventually dismissed this line of reasoning of the booksellers and came to the conclusion there was a restriction on competition.

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<sup>210</sup> J. STUYCK, ‘Libre circulation et concurrence: les deux piliers du Marché commun’ in *Mélanges en Hommage à Michel Waelbroeck*, Brussel, Emile Bruylant, 1999, 1489; Case 36/74 *Walrave & Koch vs. Union cycliste Internationale* [1974] ECR 1405; Case 13/76 *Donà* [1976] ECR 1333; Case C-415/93 *Bosman* [1995] ECR I-4921, 82-87.

<sup>211</sup> Case C-265/95 *Commission vs. France* [1997] ECR I-6959.

<sup>212</sup> D.G GOYDER, *EC Competition Law*, Oxford, Oxford University Press, 2003, 177-179.

<sup>213</sup> Joined Cases 43 and 63/82 *VBVB and VBBB v. Commission* [1984] ECR 19 para. 33.

## 2. Cases in which non-economic considerations were taken into account

The inclusion of non-economic considerations in competition law can be examined through the appraisal of a number of legislative articles and doctrines. Article 21 of the Merger Regulation for instance, which attributes the Commission the exclusive competence to assess the competitive impact of concentrations with a Union dimension. According to Vice President ALMUNIA article 21 of the Merger Regulation allows member states to take into account legitimate public interests such as media plurality, public security, and prudential rules<sup>214</sup>. Even though article 102 TFEU does not incorporate a provision corresponding with article 101(3) TFEU, the Court has developed the conception of ‘objective justification’ which renders a possibility to escape infringement of the article<sup>215</sup>. Nevertheless, it seems like the Commission and Courts are only taking into account the legitimate commercial interests of the undertaking itself and the ‘meeting the competition defense’. A weighing analogous to article 101(3) TFEU, including the appraisal of other policy considerations, could be advocated through allowing an efficiency defense<sup>216</sup>. The aforementioned articles are all examples of how non-economic considerations can play a (secondary) role. For reasons of space limitation and depth of study, I will only focus on how flanking policy factors are appraised under 101(3) TFEU.

### 2.1. Environmental policy

Under article 101(3) TFEU, agreements that reduced plastic waste, environmental risks or led to lower energy consumption have been exempted. These agreements supplement the EU’s environmental regulations.

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<sup>214</sup>J. ALMUNIA, ‘Recent developments and future priorities in EU competition policy’, International Competition Law Forum, St. Gallen, April 8<sup>th</sup> 2011,

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/243&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>215</sup> A. JONES and B. SUFRIN, *EU Competition law*, New York, Oxford University Press, 2011, 376.

<sup>216</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer 2009, 135; DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses [2005] <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>

- Exxon-Shell<sup>217</sup>

(65) The agreements between Exxon and Shell meet the conditions for exemption laid down in Article 85(3). They contribute to improving the production of goods and to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefit. [...] (67) The agreements between the parties allow for the building of the first LLDPE/HDPE plant in the European Community utilizing the Unipol technology. This technology provides a high degree of flexibility [...] and efficiency (enabling the plant at NDG to produce polyethylene at competitive costs). [...] This would result in a *reduction of customers' use of raw materials, their costs and the volume of plastic wastes*. (68) Account also has to be taken of the fact that an LLDPE/HDPE production joint venture between two ethylene producers which, because of the exchange swap agreements, do not need to transport ethylene, *avoids health and environmental risks connected with such transport*.

- Philips-Osram<sup>218</sup>

(25) The joint venture achieves rationalization of production by allowing Osram to eliminate its obsolete facilities in Berlin and allowing Philips to relocate certain non-lead glass production from Lommel to other glass factories in the Philips' group. The joint venture will offer greater flexibility in quantities and types of product (1) and a lower risk of breakdown, and will have a production capacity substantially higher than that resulting from the combination of the production capacity of the facilities of the parent companies in the EEA for the production of lead glass prior to the creation of the present joint venture. The joint venture will result in *lower total energy usage and a better prospect of realizing energy reduction and waste emission programmes*.

In addition, the parties will concentrate their R& D activities in Philips' laboratories, achieving savings and economies of scale and a concentration of effort to tackle properly the common challenge of developing lead-free materials.

(26) [...] Such savings are due, in particular, to extended production range, rationalization, decreased overhead costs, flexible furnace utilization, *reduced energy and environmental costs*, and shared R& D on substitutes for lead glass.[...] (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*. This positive effect will be substantially reinforced when R& D in the field produces lead-free materials. In addition, the cost advantages resulting from the improvements mentioned above will be passed on to consumers in the form of downward pressure on lamp prices, which have been falling steadily due, in particular, to the development of new types of more modern lamps and to competition from the central and eastern European countries.

- DSD<sup>219</sup>

(143) DSD is currently the only extensive take-back and exemption system for used sales packaging; according to its objects, it seeks to give effect to national and *Community environmental policy with*

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<sup>217</sup> *Exxon-Shell* [1994] OJ L144/21.

<sup>218</sup> *Philips-Osram* [1994] OJ L378/37.

<sup>219</sup> *DSD* [2001] OJ L319/1.

*regard to the prevention, recycling and recovery of waste packaging.* The Service Agreement is therefore intended to implement the objectives of the German Packaging Ordinance and of Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (13). This legislation is aimed at preventing or reducing the impact of waste packaging on the environment, thus providing a high level of environmental protection.

- CECED<sup>220</sup>

- (a) *Individual economic benefits*

- b) *Collective environmental benefits*

- (56) The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called ‘external costs’) at EUR 41 to 61 per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4 000 to 7 000 per ton and EUR 3 000 to 5 000 per ton of nitrous oxide (11). On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. *Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.*

It is obvious from the extracts above that the positive effects on the environment were only taken into account as an accessory (efficiency) gain<sup>221</sup>. However, the *CECED* case seems to go further. The Court reasoned that the higher washing machine prices for consumers were in the end outweighed by the environmental gain for society<sup>222</sup>. The fact that the Commission took up the interest of ‘society’ was however combined with the long term electricity bills decrease for consumers, which could be seen as a ‘dynamic efficiency’. This reading of the case seems in line with the comfort letter the Commission issued and where it clarified that when an environmental agreement is reviewed, the Commission will be concerned with the cost savings for consumers of the goods in question, and then estimate ‘the benefits which the society at large derives from improved environmental conditions’<sup>223</sup>. In any event, benefits to society as a whole and not only to the specific buyers of goods in question, are a relevant factor<sup>224</sup>.

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<sup>220</sup> *CECED* [2000] OJ L187/47.

<sup>221</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 91.

<sup>222</sup> The increased price for one washing machine, was outweighed by the environmental benefits and the lower electricity bills for consumers.

<sup>223</sup> MARTINEZ LOPEZ, M., ‘Commission Confirms its Policy Line in respect to Horizontal Agreements on Energy Efficiency of Domestic Appliances’ [2002] 1 *Competition Policy Newsletter* 50, 52.

<sup>224</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 92.

The question is whether this environmental impetus to exempt the agreement was of a decisive character and hence taking over the pivotal role of economic considerations. The Commission has been criticized in *CECED* for this reasoning, as by doing so the Commission infringed the Guidelines on the application of article 101(3) TFEU that point out ‘efficiencies’ to be the sole ground for exemption<sup>225</sup>. I believe this is not the case, since the interest of society as a whole can be restated as a ‘dynamic efficiency’ given the fact that the new machines lower costs on the long-term. Furthermore the Commission has a duty to integrate policies under articles 7 TFEU and more specifically 11 TFEU.

## 2.2. Industrial policy

An industrial policy is a strategic plan to stimulate specific sectors or activities and promote structural change. The interaction between competitiveness and competition can be of a conflicting nature. The Commission however, has advocated from the outset that the two are compatible<sup>226</sup>. Article 173 TFEU is in fact a way in between: the conditions necessary for the competitiveness of the Union’s industry should be ensured, whilst at the same time those measures should not lead to a distortion of competition. Promoting competitiveness is thus legitimate as long as it does not impair competition<sup>227</sup>. Hence, competition is there to create an environment where competitiveness and thus economic development is fostered. The Commission has sometimes taken up the fact that an agreement might give a positive impetus to the overall competitiveness by for instance allowing a number of crisis cartels or taking into account that the exempted agreement will enforce the Union’s industry on a global scale.

- BPCL/ICI<sup>228</sup>

(37) The restrictions in the agreements for the reciprocal sale of LDPE and PVC plants, and the restrictions implied both by the sale of the most-modern plant and by the sale of the goodwill for all the plants (which brought about a specialization of production and the closure of the remaining plants) were necessary to achieve the beneficial objectives.

Such arrangements allowed the purchaser to have the best chance of improving loading capacities in the most-modern plant. In effect, the specialization by each party in the UK market is a better means of

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<sup>225</sup> G. VAN GERVEN, ‘The Application of Article 81 in new Europe’ *Fordham Corporate Law Institute*, 2003, 429-30.

<sup>226</sup> Commission of the EEC, *20th General Report on the Activities of the European Community: 1990*, Brussels, 1991.

<sup>227</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 94.

<sup>228</sup> BPCL/ICI [1984] OJ L212/1 para. 37

reducing capacity and improving loading than competition itself, since its beneficial effects are felt immediately.

- Optical Fibres<sup>229</sup>

Moreover, the joint ventures facilitate a more constant and rapid transfer of Corning's technology than would otherwise be possible. This concurrent introduction of Corning's most up-to-date technology in the common market is essential to enable the European companies to withstand competition from non-Community producers, especially in the USA and Japan, in an area of fast-moving technology.

- Stichting Baksteen<sup>230</sup>

(26) By reducing capacity, firms throw off the financial burden of maintaining unused surplus capacities and, by increasing utilization of the capacity utilization of the capacity retained, do not have to reduce output. As the capacity closures concern production units that are the least suitable at least efficient because of obsolescence, limited size or outdated technology, production will in future be concentrated in the more modern plants which will then be able to operate at higher capacity and productivity levels; this will lead to a corresponding reduction in the incidence of fixed costs, which form a large proportion of net costs. As a result, it is possible to predict a future increase in the profitability of the Dutch brick industry and, therefore, a return to normal competitiveness.

The aforementioned cases illustrate how features of industrial competitiveness are considered when explaining why a particular agreement is exempted. However, individually, these effects on industrial policy do not seem to be sufficient for exempting the agreement. MONTI even considers them less important than environmental contemplations<sup>231</sup>.

SAUTER makes the full reflection on how competition and industrial policy are complementary to each other. In addition, he stresses that competition policy within Europe is construed in a broad manner, conceived towards the general goals of European integration rather than a narrow form of efficiency-enhancing antitrust<sup>232</sup>. Over the course of time competition policy has thus been adapted to the shifting priorities of the Union. In the 'EU 2020' strategy we read that the Commission will work to "develop a horizontal approach to *industrial policy* combining different policy instruments (e.g. "smart" regulation, modernized public procurement, *competition rules* and standard setting)",<sup>233</sup>

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<sup>229</sup> *Optical Fibres* [1986] OJ L236/30 para. 59.

<sup>230</sup> *Stichting Baksteen* [1994] OJ L131/15, [1995] 4 CMLR 646, para. 26.

<sup>231</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 96.

<sup>232</sup> W. SAUTER, *Competition law and Industrial Policy in the EU*, New York, Oxford University Press, 1997, 112.

<sup>233</sup> Communication from the Commission, Europe 2020; A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010, COM(2010) 2020 final, 17 [http://europa.eu/press\\_room/pdf/complet\\_en\\_barroso\\_007\\_-\\_europe\\_2020\\_-\\_en\\_version.pdf](http://europa.eu/press_room/pdf/complet_en_barroso_007_-_europe_2020_-_en_version.pdf)



### 2.3. Employment policy

Employment is another non-efficiency variable considered relevant in a number of cases. The Lisbon Treaty broadened article 127 (2) TEC in article 9 TFEU that adopts the more elaborate text from the Treaty establishing a Constitution for Europe. Article 147 TFEU states that when formulating and implementing Union policies and activities, a high level of employment shall be taken into consideration. STEENBERGEN submits it is logical to take account this objective into account in cartel cases and the article 101(3) TFEU argumentation<sup>234</sup>. He argues it is desirable that the Commission indicates how it took into consideration the objectives mentioned in article 9 TFEU in policy options. The following cases are some of the examples where the Court took into account factors like the stability of the labour market and the creation of a high number of jobs.

- Ford/Volkswagen<sup>235</sup>

The JV will have extremely positive effects on the infrastructure and employment in one of the poorest regions in the Community (recital 36). In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, inter alia, to the creation of about 5 000 jobs and indirectly create up to another 10 000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also furthers European market integration by linking Portugal more closely to the Community through one of its important industries. This would not be enough to make an exemption possible unless the conditions of Article 85 (3) were fulfilled, but it is an element which the Commission has taken into account.

- Metro<sup>236</sup>

Furthermore, the establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are favourable, comes within the framework of the objectives to which reference may be had pursuant to article 85(3).

- FEDETAB<sup>237</sup>

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<sup>234</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer 2009, 135.

<sup>235</sup> *Ford/Volkswagen* [1993] OJ L20/14, [1993] 5 CLMR 617; I. KOKKORIS, *Competition Cases from the European Union*, London, Sweet & Maxwell, 2008, 51.

<sup>236</sup> Case 26/76 *Metro-SB-Grossmärkte GmbH v. Commission* [1977] ECR 1857, [1978] 2 CMLR, 43.

<sup>237</sup> Case *Fedetab* [1980] C-209/78 ECR 3125.

The elimination of many specialist intermediaries would, in the applicant's opinion, involve not only a reduction in the number of brands available to the consumer but also serious social consequences. In that respect it is pertinent to observe that the Court stressed in its judgment in the Metro case that considerations of social nature, and in particular concern to safeguard employment in an unfavourable economic climate, may be taken into account under article 85(3).

- Stichting baksteen<sup>238</sup>

In addition, because the closures are coordinated, restructuring can be carried out in acceptable social conditions, including the redeployment of employees.

It can, therefore, be concluded that the agreement helps to improve production and to promote technical and economic progress.

It is worth noticing again that the Court said it could only take the employment element into account given the fact that the other conditions of article 101(3) TFEU were fulfilled<sup>239</sup>. Therefore one could say that non-economic considerations can only be considered as a secondary means.

In the case of employment, the Court reasoned in the *Brentjens* case that in certain circumstances employment concerns do not fall within the ambit of article 101 TFEU at all<sup>240</sup>. This case concerned the compatibility of a compulsory affiliation to a sectoral pension fund with the competition rules<sup>241</sup>. It stems from this line of case-law that 'agreements concluded in the context of collective negotiations between management and labour in pursuit of such [social policy] objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of article [81 (1)] of the Treaty'<sup>242</sup>. The CJEU enumerates a number of articles which point towards obligations that promote and take into account social policy objectives (3(1)(g) and (i), 118 TEC and article 1 of the Agreement on social policy). The Court goes on by stating that certain restrictions of competition are *inherent* in collective agreements. Therefore social policy objectives would be seriously undermined if management and labour would be subject to article 101(1) TFEU when adopting measures that seek to

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<sup>238</sup> *Stichting Baksteen* [1994] OJ L131/15, [1995] 4 CMLR 646, 27 & 28.

<sup>239</sup> *Ford/Volkswagen* [1993] OJ L20/14, [1993] 5 CLMR 617, para. 36.

<sup>240</sup> Joined cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025, para 47; similar: Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 and Case C-219/97 *Drijvende Blokken v. Stichting Pensioenfonds voor de vervoeren havenbedrijven* [1999] ECR I-6121.

<sup>241</sup> B. RODGER, *Article 234 and Competition Law; An Analysis*, Alphen aan den Rijn, Kuwer Law International, 2008, 493.

<sup>242</sup> Joined cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025, para 57.

improve both conditions of work and employment<sup>243</sup>. It should be noted that this line of reasoning is broad and does not really explain why these restrictions are inherent in collective agreements or how social policy would be undermined.

MONTI finds this judgment hard to explain, as he does not see any reason why it would not have been possible to take into account policy considerations at the article 101(3) TFEU stage<sup>244</sup>. This judgment could be explained in a broad way, by excluding *any* agreement contributing to social policy from the application of article 101 TFEU. However, Advocate General (AG) Jacobs dismisses this extensive reading and remarks that in national law, it is common to attribute a special status restricting the scope of competition law to collective agreements<sup>245</sup>. Moreover, when competition rules are excluded from specific sectors, that is explicitly mentioned in the Treaty, that is not the case for ‘social policy’ as such. In subsequent case-law, this was confirmed. The CJEU stated that whenever an agreement was not concluded in a collective bargaining setting between employers and employees, those agreements would not, by reason of their nature and purpose, fall outside the scope of article 101 TFEU<sup>246</sup>. Also in *Pavlov* the Court made clear that a scheme introduced unilaterally by the employers' organization, does not fall within the ambit of the *Brentjens*' exception<sup>247</sup>.

More important than the stance that a narrow reading seems appropriate, is the fact that this judgment creates another legal technique for reconciling the core values of competition with other Union policies. This judgment accepts the non-application of competition whenever the pursuit of Union objectives seem of a more weighty nature<sup>248</sup>. The *Brentjens* approach does take into account any weighing under article 101(1) and (3) TFEU. Rather, it questions whether competition law is applicable in the first place<sup>249</sup>. However, it seems that the reasoning of the Court was of a specific nature, given the outset of collective bargaining agreements. In any event, it does not seem favourable to continue this line of reasoning, as

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<sup>243</sup> Joined cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025, para 56.

<sup>244</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 98.

<sup>245</sup> Joined cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025, AG Jacobs, paras. 109-11.

<sup>246</sup> Joined Cases C-180/98 to C-184/98 *Pavel Pavlov et al. V. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para. 68-70.

<sup>247</sup> Joined Cases C-180/98 to C-184/98 *Pavel Pavlov et al. V. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para. 74.

<sup>248</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 98.

<sup>249</sup> J.C.A. HOUDIJK, *Publieke belangen in het mededingingsrecht: een onderzoek in vijf domeinen*, Brussel, Kluwer, 2009, 86.

this approach is far reaching. Moreover, there are no indicators as to which policies tilt the scale towards the non-applicability of competition rules.

In line with the technique mentioned above, is the ‘doctrine of ancillary restraints’. A restraint ancillary to the main agreement which is compatible with article 101(1) TFEU, will also be seen as compatible with 101(1) TFEU<sup>250</sup>. An ancillary restraint (for instance a non compete clause, or restrictions in franchising agreements) is a limitation which is necessary for the implementation and proportionate to the main non-restrictive distribution or joint venture agreement.

The *Wouters* case concerned rules adopted by the Dutch bar that prohibited members of the bar to engage in a full partnership with an accountant<sup>251</sup>. The Court did not say that the rules on professional services should not be considered under article 101(1) TFEU altogether. Rather, the Court acknowledged that the agreement had an adverse effect on competition, affecting trade between member states<sup>252</sup>. One would expect that in line with former case law, the Court would appraise a possible exemption under article 101(3) TFEU. However the Court refrained from doing so and said that despite the restrictive effects on competition, the agreement was necessary for the proper practice of the legal profession and therefore concluded article 101(1) TFEU was not violated.

Neither did the Court state that, like in *Brentjens*, the agreement fell outside the scope of article 101 altogether. The Court rather seemed to weigh the anti-competitive effects of the agreement against non-economic efficiency benefits (and under 101 TFEU). The Court might have felt the need to do so in order to not go against the Commission’s view and its own case law, that only allowed the ‘supporting role’ of non-economic concerns under article 101(3) TFEU to tilt the scale towards an exemption. However by avoiding this mystification, it brought up another: what analysis should be followed under 101 TFEU? The whole problem also stems from the fact that a clear distinction between public and private parties and their respective roles cannot be drawn up easily. Private parties may to some extent be occupied with tasks of public interest or with activities that relate to such tasks. Consequently, the sound framework is not so sound anymore: the Court has to decide whether the competition rules apply or not. In case it answers affirmatively, the ‘justifications’ it can use in that scheme do not match the task the party at hand is entrusted with. WHISH suggests that a

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<sup>250</sup> European Commission Communication: Guidelines on the application of Article 81(3) [2004] OJ C101/97, 28-29.

<sup>251</sup> Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 27.

<sup>252</sup> Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 27, 86.

suppression of broader considerations under article 101(3) TFEU might give an impetus to their re-emergence under article 101(1) TFEU following the *Wouters* case-law<sup>253</sup>.

## 2.4. Consumer policy

The relation with consumer policy can be dealt with briefly. There seems to be little conflict since the primary goal of competition policy is consumer welfare, all the more reason to let consumer policy strengthen competition. Moreover, the second criterion for an agreement to be exempted under article 101(3) TFEU is indeed ‘allowing consumers a fair share of the resulting benefit’. However, as has been said before, consumer welfare is not the same as consumer protection, as the latter also includes unfair practices, health and product safety. In *Asahi*, the Court had to decide upon an agreement that led to safer consumer goods apart from the development of new products, therefore enhancing dynamic efficiency<sup>254</sup>. The Commission exempted this agreement setting up a selective distribution network. The manufacturer made several commitments, *inter alia* the offering a Union-wide warranty<sup>255</sup>. Hence, another mechanism of implementing other policies in competition cases pops up: solely when parties modify their agreements to the benefit of consumers, the agreements will be considered to comply with article 101 TFEU.

## 2.5. Conclusion

AMATO criticizes the Court and the Union’s willingness to consider non-economic factors. He finds them not to be enumerated in the article 101(3) TFEU requirements. In his view, antitrust is weakened through permeability. Social cohesion and industrial policy are not to be taken into account since they corrode the sense and logic of antitrust from within<sup>256</sup>. In *Matra Hachette* the GC seemed to suggest that considerations of employment policy, public infrastructure and European integration are extraneous to the appraisal of article 101(3)

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<sup>253</sup> R. WHISH, *Competition Law*, Oxford, Oxford University Press, 2009, 155.

<sup>254</sup> *Ashani* [1994] OJ L354/87 paras. 24-26.

<sup>255</sup> *Grundig’s EC Distribution System* [1994] OJ L20/15 para.19.

<sup>256</sup> G. AMATO, *Antitrust and the Bounds of Power, : the Dilemma of Liberal Democracy in the History of the Market*, Oxford, Hart Publishing, 1997, 61.

TFEU<sup>257</sup>. Further, the guidelines on the application of article 101(3) TFEU seem to entail a restrictive approach focusing on cost and qualitative efficiencies. The Commission narrows down the scope of article 101(3) TFEU by interpreting ‘technical and economic progress’ as solely comprising economic efficiency and by minimising the role of non-economic concerns<sup>258</sup>.

In *Métropole television SA v Commission*, the GC said: “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 [81(3)],”<sup>259</sup>. In essence it stems from the aforementioned examples that whenever an agreement could possibly have a positive effect on another policy pursued by the Union, the Commission, national Courts or authorities should take that other policy into account as well when appraising the agreement. The rather broad appraisal of article 101(3) TFEU stems from the low jurisdictional threshold the Commission handles in order to satisfy 101(1) TFEU. Therefore, a number of authors propose to apply a ‘rule of reason’ in which the economic appraisal is made under article 101(1) TFEU. Subsequently, on the basis of 101(3) TFEU industrial, regional, social or environmental policy features might possibly outweigh the detrimental impact of the agreement<sup>260</sup>.

The restrictive approach of the Commission in the Guidelines is a reflection of the fear of divergence between national Courts and competition authorities and the possibility to hold up national interests when considering individual exemptions after the modernisation process<sup>261</sup>. It seems that the pursuit of legal certainty prevails over the need to see competition as one of the policies promoting the Treaty’s objectives. The benefit thereof is the possible emergence of a systematic approach towards granting exemptions. Ironically, legal certainty is nevertheless not achieved by sticking merely economic considerations.

The reasons to support policy integration are numerous and of a sound nature. First, the Guidelines are not binding, so the Courts and competition authorities are able to apply the more liberal case law whenever they deem to find this appropriate. Second, the Treaties are

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<sup>257</sup>Case T-17/93 *Matra Hachette SA v EC Commission* [1994] ECR II-595, para. 139.

<sup>258</sup> European Commission Communication: Guidelines on the application of Article 81(3) [2004] OJ C101/97, para. 42 and 50.

<sup>259</sup> Cases T-528/93 *Métropole Télévision SA v. Commission* [1996] ECR II-649, [1996] 5 CMLR 386.

<sup>260</sup> M. SIRAGUSA, in *European Competition Law Annual 1997: the Objectives of Competition Policy*, (eds. Ehlermann and Laudati, Hart Publishing, 1998), 549.

<sup>261</sup> A. EZARCHI, *EC Competition law; An Analytical Guide to the Leading Cases*, Portland, Hart Publishing, 2008, 81.

not neutral on a policy level, on the contrary, the Union furthers sustainable development based on a social market economy ( article 3 TEU). “Challenges to EC competition policy on the basis that it is politicised miss the mark – it is *designed* to be politicised, albeit within the limits of Community competence,”<sup>262</sup>. MONTI states that: “Competition policy cannot be implemented in a vacuum, but must be consistent with the development of the European project,”<sup>263</sup>. Besides, since the entry into force of the Lisbon Treaty, member states *have a duty* to apply economic policies in manner they contribute to the Union objectives and keep in mind the cross-sectional policy integration clauses<sup>264</sup>. It is not always easy to separate policies pursued by the Union from economic considerations. The Union is no longer merely an *economic* Union and is strongly concerned with the insertion of certain public policy considerations through the enhanced emphasis of ‘cross-sectional clauses’<sup>265</sup>. Third, the exclusive economic reasoning neglects the possibility to take up certain interests we wish to foster, even at the expense of consumer welfare<sup>266</sup>. Fourth, given the rather broad conception of the Commission as to the economic effects of the agreement, the distinction becomes rather vague. It requires little effort to reformulate most benefits into an economic value (e.g. the reduced energy bill as an dynamic efficiency in *CECED*)<sup>267</sup>. To conclude, the Commission is not always straight forward itself in its advocated ‘non appliance of other policy considerations’ approach, with *CECED* as a prime example. Provided that the agreement at hand also improves efficiency, a reduction of competition should be tolerated when it contributes to the Union’s objectives<sup>268</sup>.

It does not make sense trying to prevent national authorities from taking into account national interests by prohibiting to take up non-economic factors from the outset. Further, the suspicious attitude towards the national Courts is in my view unnecessary, certainly not since the Commission has the possibility to avoid a reasoning contaminated by ‘national interests’ by providing clear guidelines. This proactive modus of providing national authorities with sufficient directives and delineation of appraisal, would be all the more effective, when construed in a sophisticated and well balanced manner.

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<sup>262</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 118.

<sup>263</sup> G. MONTI, ‘Article 81 EC and Public Policy’, 2002, *CMLRev*, 1057.

<sup>264</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer 2009, 137.

<sup>265</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 91.

<sup>266</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 120: e.g. pluralism in publishing and a healthy sports sector are enumerated.

<sup>267</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 120-121.

<sup>268</sup> G. MONTI, ‘Article 81 EC and Public Policy’, 2002, *CMLRev*, 1078.

Let us overthrow the reasoning made, since the outcome thereof allows us to put into perspective the relatively limited ‘tilting weight’ non-economic considerations have in the end. What happens when an agreement *negatively* affects another Union Policy? For instance, one could reverse the *CECED* case. Suppose washing manufacturers would make cheaper machines resulting in high electricity consumption. This is clearly against the environmental policies the Union is implementing, but it is not the task of competition to condemn these practices *if* they are not contrary to the purposes of competition law. The abolition of such practices should in the first instance stem from environmental policy regulations.

However, for the purposes of competition such an agreement might be perceived as inefficient for consumers in the long run. More importantly, it is difficult to see how such an agreement would yield economic progress.

MONTI finds that the Commission should take into consideration the fact that an agreement complements another Union policy *solely* when the core values of article 101(3) TFEU are respected<sup>269</sup>. Thus, when an agreement contributes to a Union policy but is inefficient, it ought not to be exempted. In the majority of cases, I find this stance to be correct since it essentially demands both efficiency enhancement and contribution to other policies in order to be exempted, in line with policy integration duties.

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<sup>269</sup> G. MONTI, ‘Article 81 EC and Public Policy’, 2002, *CMLRev*, 1071.



## §2 Examining the duty to take into account other policy interests than merely economic justifications?

The more troublesome clashes (and more important in practice) have proved to be the ones on the same ‘level’, namely clashes between policies themselves. The question of the interpretation of article 101(3) TFEU is even more relevant since the increased reliance on policy integration. What makes it even more difficult, is that policies within the Union do not seem to be without hierarchy. An extensive reading of the case law proves otherwise. For instance employment and competition cannot be put on the same level. Competition policy is a field of law in which the Union is exclusively competent, the latter policy is much more elaborated in detail. This might create an additional difficulty when a weighing between interests would deem to be necessary. MONTI considers industrial policy considerations have less weight than environmental contemplations<sup>270</sup>. Environmental incentives seem to be more easily considered.

In this paragraph, want to return to policy integration and examine whether there might be not only a possibility (§1), but also a duty consider other policies when applying competition law. Indeed policy integration does not only amount to objectives in the relation general Union objectives – specific policy objectives; it is even more important within different Union policies. The additional goals set out in ‘provisions having general application’ under title II of the TFEU are seen as ‘horizontal objectives’ the Union must comply with in the implementation of its policies. Worth mentioning for the purposes of this thesis are:

- article 8 TFEU: *In all its activities*, the Union shall aim to eliminate inequalities, and to promote of equality between men and women.
- article 9 TFEU: *In 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.
- article 11 TFEU: Environmental protection requirements *must be integrated into the definition and implementation of the Union’s policies and activities*, in particular with a view to promoting sustainable development.
- article 12 TFEU: Consumer protection requirements *shall be taken into account* in defining and implementing *other Union policies and activities*.
- article 147.2. TFEU: The objective of the high level of employment *shall be taken into consideration in the formulation and implementation of Union policies and activities*.

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<sup>270</sup> G. MONTI, *EC Competition law*, Cambridge, Cambridge University Press, 2007, 96.

- article 167.4 TFEU: The Union *shall take cultural aspects into account in its action* under provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

- article 208.1 TFEU: Union policy in the field of development cooperation *shall be conducted within the framework of the principles and objectives* of the Union's external action.

All these policies ought to be treated on an equal footing with other objectives the Union imposes in other Treaty articles<sup>271</sup>. Hence, the legislative ground explaining why competition law cannot make its own policy objectives dissociate from the European framework. Most authors do acknowledge that, like JONES and SUFRIN: "EU Competition policy can never stand alone in splendid isolation,"<sup>272</sup>. Nonetheless, it is often argued that the pursuit of those other policies should not affect the interpretation and application of competition rules<sup>273</sup>. MONTI detects a commitment of the Commission to avoid using non-economic considerations in making competition law decisions<sup>274</sup>.

Yet, the EC Treaty already mentioned a number of 'flanking' provisions imposing an obligation to take into account certain policy objectives when pursuing others. In that respect, The Lisbon Treaty stepped up the game by inserting article 7 TFEU. The intention was to not only construe the Union in institutional terms in a more uniform way, but also in substantive terms, to seek for consistency<sup>275</sup>. Article 7 TFEU closes the circle by imposing a general obligation on the Union to 'ensure consistency between its policies and activities taking all of its objectives into account and in accordance with the principle of conferral of powers'. Apart from this increased importance accorded to policy integration in the legislative text, the Courts might parallel this evolution in the future, by insisting on article 7 TFEU as a general obligation. However, the validity thereof might be questioned if policy makers do not make more precise to what extent policies should be integrated. The CJEU has indeed held that the legal status of horizontal objectives depends on their implementation in policy by the Union and the member states, with the result that their legal impact is limited to guiding the interpretation of Union law as long as the latter has not been done<sup>276</sup>.

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<sup>271</sup> K. LENAERTS and P. VAN NUFFEL, *Europees Recht*, Antwerpen-Cambridge, Intersentia, 2011, 78.

<sup>272</sup> A. JONES and B. SUFRIN, *EU Competition law*, New York, Oxford University Press, 2011, 52.

<sup>273</sup> A. JONES and B. SUFRIN, *EU Competition law*, New York, Oxford University Press, 2011, 51.

<sup>274</sup> G. MONTI, *EC competition law*, Cambridge, Cambridge University Press, 2007, 89.

<sup>275</sup> R. BARENTS, *Het verdrag van Lissabon; Achtergronden en commentaar*, Deventer, Kluwer, 2008, 559.

<sup>276</sup> Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paras, 86-87.

STEENBERGEN explores the matter in detail in his recent article on how Lisbon affects competition policy<sup>277</sup>. In essence, he concludes that a modest, but not unimportant reinforcement of the Commission's position has taken place. The question, as he reiterates, is essentially how autonomous competition policy is from for instance employment policy. He completes the analysis for article 147(2) TFEU ("the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities") which has been 'generalised' by the insertion of a new article, article 9 TFEU ("in 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"). In fact the argumentation goes for the other areas of 'flanking' policies too. Of utmost importance is that the reasoning he builds up, can be used in relation to article 7 TFEU (the general article on policy consistency). Given the broad scope and wording of article 7 furthering policy integration, the reasoning made below might provide a sound option (even an obligation) for the Courts and the Commission to take into account elements of other policy spheres.

The argumentation goes as follows: STEENBERGEN says the words 'taken into consideration' in article 147(2) TFEU need not to be interpreted as if competition policy would be subordinate to other policy spheres<sup>278</sup>. It *does* mean that competition authorities need to consider how the objectives, both the general and the horizontal ones, are affected by their policy. His first conclusion, is a confirmation of what I stated above, namely that it is recommended that competition authorities explicitly mention how they take into account for instance the policy orientation of article 9 TFEU ('a high level of employment'). His second conclusion is of even greater importance, namely: studying the effects of competition policy on the general and horizontal objectives does not make much sense when no conclusions are drawn. He criticises policies that seem to rely on the hope that only some rules will be invoked. This cannot be good governance. The objectives in the Treaty are of a very general nature and are characterised by an ambitious scope. The Commission and Courts should avoid rendering them superfluous by not applying or enforcing them.

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<sup>277</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer, 2009, 123.

<sup>278</sup> J. STEENBERGEN, *Het mededingingsbeleid en het verdrag van Lissabon* in *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer, 2009, 133.

All of this leaves the ‘to what extent’ question unanswered. Unfortunately, there is no satisfactory answer given yet to that question, since the Commission holds a dubious attitude towards policy integration. On the one hand the Commission did take into account these other policies in some decisions (cfr. *infra*). Conversely, the Commission seems to stick to a mere economic appraisal (cfr. the Guidelines on the application of article 101(3) TFEU)<sup>279</sup>. In the future, the CJEU might point out the Commission’s responsibility to integrate policies by relying on for instance article 7 TFEU. Although this article is of ‘constitutional’ importance, it needs specification. STEENBERGEN lists a few bottlenecks:

- Do Union institutions need to assess the effects of a competition policy option on other objectives? And to what extent? Is a formal motivation enough or should more difficult hurdles be overcome?
- Does a rationale of competition policy options in very broad terms suffice in a sense that (for example) article 9 TFEU objectives have sufficiently been taken into account?
- Should, in case of multiple technically acceptable competition orientations, preference be given to what can best be reconciled with other relevant policy objectives? It should be noted that this would give rise to another effects assessment and therefore would further complicate competition policy.
- Or should, aside the assessment of economic effects doctrine, a second test be carried out where the competition policy solution is being tested in the light of the general and horizontal objectives? The additional problem (apart from the one outlined above) with this solution would be that it would render competition policy subordinate to other policy objectives.
- Of paramount importance: who decides whether or not another policy objective has been sufficiently taken into account? So far, the Courts occasionally took into account other policy considerations. The Commission has not really addressed the matter in specific wording, but did take into account other policies in some decisions. From a legal point of view, the Courts make the ultimate decision. However, it might be expected that the Courts will be reluctant to burn themselves on the matter and the review will remain of a marginal kind. This is due to the wording and content of the general and horizontal objectives, the fact that little has been said about their interrelation, nor has there been given guidance initiating from the Commission.
- Should there be a hierarchy in ‘other policies’?

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<sup>279</sup> European Commission Communication: Guidelines on the application of Article 81(3) [2004] OJ C101/97

## Conclusion & view for EU competition law in the future

### *Relevance of the debate and indications of its topicality*

The debate concerning goals and objectives of policies in competition law and on a more general scheme, European law, might seem academic. However, I strongly believe that it is only to the benefit of scholars and policymakers to firmly know what the outset of a policy is, why it is necessary and to what extent it should be used. The more explicit policy makers state why a policy is chosen, or on a judicial level, why a case is decided in a certain manner, the easier it is for scholars, citizens and policymakers to understand and correctly apply the mechanisms installed and react when they are misapplied<sup>280</sup>. The confusion, *inter alia*, stems from the very fact that a ‘goal’ and which level it applies to, is often not made explicit.

To a large extent, clarifying the European institutional structure is exactly what Lisbon did. The insertion of a clear list of objectives is a step forward. Transparency will only enhance the democratic validity of the European Union. “Perhaps it is through the adoption of legislation that judicial creativity is to be curtailed,” BARNARD and ODUDU note<sup>281</sup>. “Having clear competition rules is a necessity, not a luxury,” is how Director General ITALIANER recently formulated it<sup>282</sup>. On April 8<sup>th</sup> 2011, Vice President ALMUNIA put it in a comprehensive manner: “I realise that the typical features of a good enforcement authority are continuity and predictability. However, I believe that it is also our duty to keep our doctrine and operations constantly up to date with changes in the markets and in business practice,”<sup>283</sup>. Hence, whenever a major policy change occurs (the focus on economic appraisal), we cannot rest on our laurels. It is all the more important to make the policy alteration explicit and pronounce oneself on the relationship between goals, on every possible level.

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<sup>280</sup> F. JENNY, *European Competition Law Annual 1997: Objectives of Competition Policy* (eds. Ehlermann and Laudati, Hart Publishing, 1998), 39.

<sup>281</sup> C. BARNARD and O. ODUDU, *The Outer Limits of European Union Law*, Portland, Hart Publishing, 2009, 14.

<sup>282</sup> ITALIANER, A., Institute for European and International Affairs, *EU priorities and competition enforcement*, Dublin, 25 March 2011, [http://ec.europa.eu/competition/speeches/text/sp2011\\_03\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_03_en.pdf)

<sup>283</sup> ALMUNIA, J., ‘Recent developments and future priorities in EU competition policy’, International Competition Law Forum, St. Gallen, April 8<sup>th</sup> 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/243&format=HTML&aged=0&language=EN&guiLanguage=en>

It is worth stating an extremely well formulated passage of PELIKÁNOVÁ. The author's aim is to show how competition law absorbs elements from case-law relating to other Union policies and how conversely, competition influences those other areas<sup>284</sup>.

“[...] Community law is an interlinked normative system, the functional cohesion and efficient operation of which is dependent on the relevant actors considering not only the unique circumstances of a specific case, but also the general context. Neglecting the latter leads to the risk of constituting differing notions, often under the same designation, with the resulting adverse impact on the coherence of interpretation of EC law. Hence, when trying to answer a legal question relating to a particular area, it is also necessary to assess case-law from other fields, all the while taking into account their specific details. The balancing act between maintaining conceptual coherence and respecting relevant divergences is one of particularly difficult aspects of the decision-making process of the Community judiciary,”<sup>285</sup>.

*The political component in the (economic) choices made: economic efficiency within a setting of consumer welfare affiliations, market integration and fairness considerations.*

It is clear that the EU does not uphold a Chicagoan view on competition. Indeed efficiency is an (increasingly) important goal that should be pursued by scientifically justified means, but whether it should therefore become the only possible goal of competition is debated<sup>286</sup>. I believe this is certainly not what we should strive for. In this respect it is worth citing PITOFKY: “Suppose a political component were to be included in an antitrust enforcement equation. Would that introduce chaos into what otherwise would be an orderly, reliable, and predictable regulatory process? Such a result is unlikely. Those opposed to the inclusion of political factors exaggerate the precision of an enforcement approach that incorporates solely economic concerns, and overstate the administrative difficulties and enforcement costs of taking non-economic concerns into account,”<sup>287</sup>. He argues that those claiming an apolitical competition policy are merely holding up an illusion, since certainty is not a feature contained

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<sup>284</sup> I. PELIKÁNOVÁ, *The Role of Competition law in the Evolution of Community Law in in EU Competition Law in Context*; Essays in Honour of Virpi Tiili, H. Kanninen, N. Korjus and A. Rosas (eds.), Oxford, Hart publishing, 2009, 29.

<sup>285</sup> I. PELIKÁNOVÁ, *The Role of Competition law in the Evolution of Community Law in in EU Competition Law in Context*; Essays in Honour of Virpi Tiili, H. Kanninen, N. Korjus and A. Rosas (eds.), Oxford, Hart publishing, 2009, 36-37.

<sup>286</sup> H. HOVENKAMP, ‘Antitrust Policy After Chicago’ [1985] *Univ. Mich. LR* 213.

<sup>287</sup> P. CLARKE and S. CORONES, *Competition Law and Policy; cases and materials*, Oxford, Oxford University Press, 1999, 107; PITOFKY, ‘The political Content of Antitrust’ *127 University of Pennsylvania Law Review*, 1979, 1051, para 1065.

in economics. He reasons that economists do not always agree on theories covering crucial aspects of antitrust policies. Furthermore, even if certainty were an inherent characteristic of economics, it cannot precisely predict what the pro- or anti-competitive effects of for instance a merger will be. The author concludes that antitrust enforcement, even along economic lines, will always contain a certain degree of hunch, faith and intuition. PITOFSKY ultimately puts his finger on the spot: “[...]unavoidable inconsistencies occasionally do arise, and the question at that point is whether inclusion of political values, reasonable defined and weighted, leads to unacceptable administrative or anti-efficiency costs. That depends on how political values are introduced into the antitrust equation.”

Howsoever attractive this reasoning might be in the line of my argument, it cannot be met without suspicion. The article is to a certain degree outdated, since economic research and econometrics have to a considerable extent improved their methods. However I do feel that the line of reasoning is not completely irrelevant, in the sense that it claims that a policymaker makes political choices too by defining what practices are not economically efficient.

“While the ultimate *economic* goals of competition policy is the wholesome development of the economy of a country or a group of countries, ultimate *political* goals are the underpinning and furthering of the democratic process and its essential elements, like pluralism, free enterprise, individual freedom, etc.”<sup>288</sup>. This thesis puts forward the three peculiar choices of the Union: consumer welfare, market integration and fairness considerations. In fact all three of those can be restated in either an economic or political terms or objectives.

#### *An appraisal on how inconsistencies of goals are treated in the Union today*

First, in respect with the shift towards economic reasoning and techniques of appraisal, the EU framework should be emphasised. Competition policy cannot allege to be autonomous and should respect the more general policy choices of the Union.

Second, the possible inconsistency between economic efficiency and consumer welfare (internal competition goals) has been met with a straightforward answer: usually both complement each other, but ultimately, consumer welfare prevails.

Third, the question was asked to what extent other, supplementary goals are to be fostered.

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<sup>288</sup> C.D. EHLERMANN and L.L. LAUDATI, *European Competition Law Annual 1997: Objectives of Competition Policy*, Oxford, Hart Publishing, 1998, ix. (emphasis added)

In my opinion, EU law fails in respect with article 101(3) TFEU, by not clearly stating which goals need to be taken into account alongside economic efficiency and consumer welfare. Or better: the insistence on economic reasoning in article 101(3) TFEU is not in line with either the Commission's own practice, not with the case law of the Courts. It should come as no surprise that the decisions of the European Courts may appear to be very diverse, not straightforward and very much decided on a case by case basis. I believe that, as a result, for the internal logic of the Union, this should be clarified in the legislative texts, or at least in the Commission's guidelines. Setting up a hierarchy is maybe not what we should aim for, but the fact that the case-law occasionally stumbles over this non-existing hierarchy, calls for the policy maker to at least make the position of the judiciary less thorny by providing it with appropriate tools.

In this respect, I cannot support the view that other laws should 'pick up' what has not been done in competition law. It is true that each branch of law has its own 'field of occupation' and some tools are more suitable to achieve for instance environmental protection, such as taxes and subsidies. However, occasionally there are overlaps. Factual situations are not always made to be put in only 'one particular box under a specific label' and interrelations between various policy fields are unavoidable. Competition law as such is not aimed at serving distributional justice. It is there to create honest market conditions for both sides of market players (demand and supply). If however, the economic appraisal of a practice is not entirely straightforward or is deemed to have a notable effect on other policy fields, it would be irrational not to look ahead towards the possible effects of the different decisions on other policy areas. For sure, if the economic appraisal of the matter gives rise to substantially different situations for the environment, employed worker, the consumer, industrial policy... it would even be irrational and economically defective to not do so. That would neither benefit the consistency of laws, nor be efficient in itself.

In a Union context this applies even more, certainly since the reliance on national competition authorities has increased. The Lisbon Treaty underscored the need for policy integration. Further, it might not always be possible to distillate the mere economic efficiency reasoning from other concerns at hand. Policies do interrelate and in that case a due weighing of interests should be strived for. The perception of economics as the sole rule of thumb, would in fact be a negation of the complexity of reality. Competition has a strong economic nature, but should therefore not be dictated by economics solely.



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