Title: The Legitimacy of Consumer Welfare and Efficiency as Goals of EU Competition Law

Abstract

It has been argued that competition law cannot be properly understood until it is determined what its goals are. However, competition law is a “function of its context” and different regimes reflect different concerns. In the US, although it has been contested by a recent legal-historical review of the Sherman Act, consumer welfare is recognized as the major aim of US antitrust law. In EU competition law, uncertainties have long existed as to the role and extent of efficiency and consumer welfare analysis.

This essay examined the economic concepts of efficiencies and consumer welfare from a normative perspective. It demonstrates the three forms of efficiencies (allocative, productive and dynamic) as the necessary means to achieve consumer and thus social welfare. The legal-historical review of the treaties then reveals that although the market integration has been the primary objective, the emerging competition goals have had its roots in welfare economics. However, it is total welfare, not consumer welfare, which was adopted. This essay also evaluates the European Commission’s promotion of the controversial ‘more economic approach’. It suggests that the Commission’s claim for consumer welfare as the sole aim of competition law conflicts with the ECJ’s insistence on protecting the structure of the internal market by its teleological interpretation. However, since the market integration imperative has been achieved and should be maintained after the Lisbon Treaty, a dynamic interpretation of Art 102 TFEU suggests a shift from the ECJ’s teleological interpretation, which is based on the ‘undistorted competition’ in Protocol 27, to a legal balancing exercise of the Union goals. This exercise can be done under Art 119’s fair competition and Art 12’s high level of consumer protection. Nevertheless, the consumer protection requirements must be narrowly construed, avoiding the trespassing of unfair competition rules to competition law.

Keywords: Competition Law Consumer Welfare Efficiency EU Goals Treaty Interpretation
A. INTRODUCTION

Robert Bork argued that competition law cannot be properly understood until it is determined what its goals are.\(^1\) However, competition law is a “function of its context” and different regimes reflect different concerns.\(^2\) In the US, although it has been contested by a recent legal-historical review of the Sherman Act,\(^3\) consumer welfare is recognized as the sole aim of US antitrust law.\(^4\) In the EU, uncertainties have long existed as to the role and extent of efficiency and consumer welfare analysis in EU competition law.\(^5\) This essay will first critically examine the legitimacy of economic efficiency and consumer welfare from a normative perspective. The second and third sections then evaluate the legislative intent of EU treaties and the tension of interpretations of goals between the European Court of Justice (ECJ) and the European Commission. It is contended that while economic efficiency and consumer welfare are legitimate goals, the multiple values in the post-Lisbon structure of EU treaties compel competition provisions to consider broader evolving social goals, and it is for the ECJ to perform a legal balancing exercise.

B. NORMATIVE PERSPECTIVE ON EFFICIENCY & CONSUMER WELFARE

The view that EU competition law should promote economic efficiency and consumer welfare is linked to the more economics-oriented approach introduced recently.\(^6\) The efficiencies that competition facilitates include allocative, productive and dynamic efficiencies. Allocative efficiency is achieved where the buyers can purchase the goods at prices they are willing to pay; whereas productive efficiency exists when the sellers provides goods at the lowest possible cost.\(^7\) Both of them are regarded as ‘static efficiency’. As for dynamic efficiency, it is when manufacturers are more likely to innovate and

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\(^7\) R Whish and D Bailey, *Competition Law* (Oxford University Press, 7\(^{th}\) edn, 2012) 4-5.
create new products as part of the competition for consumers’ business.\textsuperscript{8} In neo-classical economics, efficiencies help achieve wealth maximization by optimizing consumer surplus and producer surplus,\textsuperscript{9} and consequently achieving social welfare.\textsuperscript{10} Consequently, it can be said that improving efficiencies through competition is the means to achieve the intermediate goal of consumer welfare and ultimately the society benefits from it.

In economics, consumer welfare refers to the benefits a buyer enjoys through the consumption of goods, which is equated with consumer surplus.\textsuperscript{11} Consumer welfare is deemed to bring certainty of outcomes as it is based on economic analysis in which businesses can better predict if their activities will be regarded as anticompetitive.\textsuperscript{12} Nevertheless, the term ‘consumer welfare’ is often misunderstood in legal discourse,\textsuperscript{13} most notably in the US by Bork. He argued that consumer welfare is greatest when social resources are allocated in their best way, thus enabling the maximization of consumers’ wants.\textsuperscript{14} However, this interpretation mistakenly equates consumer welfare to total welfare instead, which is the sum of consumer and producer surplus.\textsuperscript{15} Bork’s exclusive emphasis on static efficiency neglects the importance of dynamic efficiency, by which innovation and technological advancements bring new products and cost reduction.\textsuperscript{16}

Moreover, an economic approach does not make consumer welfare a value-free standard and there are limitations on this approach undermining its legitimacy. The approach presupposes the self-correcting capacity of the market under perfect competition, which is unrealistic in practice.\textsuperscript{17} Consumer welfare artificially categorizes people into either consumers or sellers, while in

\textsuperscript{8} Ibid.
\textsuperscript{14} Bork, supra n 1.
reality, individuals can be both.\textsuperscript{18} As Motta criticized, consumer welfare standard fails to recognize that it itself could be detrimental to individuals, since it benefits individuals only when they are acting as consumers.\textsuperscript{19} The confusion between 'surplus' and 'welfare' also obscures the tension between antitrust and consumer protection, since competition law only protects certain consumer interests.\textsuperscript{20} Moreover, the existing allocation of resources is probably based on an initially unjust distribution of income; meanwhile the producers may not shift the advantages of efficiencies to intermediate consumers, such as retailers, and consequently the final consumers. An economic efficiency-based approach thus fails to address the redistribution issue.\textsuperscript{21} While one may counter that redistribution could be done through taxation, it is nevertheless not a viable option due to the EU's inability to do so within the member states.\textsuperscript{22} As McDonnell and Farber observed, dominant firms are not randomly distributed across the EU, producer surplus is more likely to accumulate in powerful member states.\textsuperscript{23}

Therefore, despite the objection of some commentators,\textsuperscript{24} it is suggested that the social welfare standard, which is similar to the social market economy in the Lisbon Treaty, is the more legitimate final goal of EU competition law.\textsuperscript{25}

C. EVOLUTIONARY LEGITIMACY OF GOALS

The history and ideology of the Treaty framework have shaped the peculiar EU competition regime.\textsuperscript{26} Contrary to its US counterpart, EU competition law is not a 'stand-alone' legislation aimed at isolated objectives, but part of a framework of interlinked Treaty provisions.\textsuperscript{27} To evaluate the legitimacy of efficiency and consumer welfare, it is therefore necessary to consider the different Treaty

\textsuperscript{20} B Orbach, ‘Was the Crisis in Antitrust a Trojan Horse?’ (2014) \textit{The Antitrust Law Journal} (Forthcoming).
\textsuperscript{21} Lianos, supra n 6, 8.
\textsuperscript{22} Ibid.
\textsuperscript{27} C Townley, \textit{Article 81 EC and Public Policy} (Oxford, Hart, 2009) 48.
interpretation approaches adopted by the ECJ.  

1. Historical Interpretation

In the US, Bork reviewed the legislative history of the Sherman Act, and argued accordingly that its legislative intent is to achieve consumer welfare. This changed the direction of US antitrust law, and remains influential today. Although more recent historical findings suggest that Bork’s proposition is inconsistent with well-documented historical records, historical interpretation as supplementary tool is demonstrated to be useful to clarify present Treaty goals by considering drafters’ original legislative intent. 

Since the Schuman Plan, the market integration imperative has been at the heart of competition policy. Competition, and thus the efficiencies stimulated, was simply the means to an end. However, previous historical findings, which were on the extremes, have shown some misunderstandings. Based on the Spaak Report of Foreign Ministers, Akman argued that the original goal of EU competition law is productive efficiency; conversely, based on the same document, Forrester countered that there are other goals such as consumer welfare and market integration. The contradiction suggests that they do not reflect a complete historical picture. The current controversy is therefore said to be the result of putting new economic agenda into previous legal objectives.

Meanwhile, a review of the historical evolution of the Treaty of Paris and the Treaty of Rome has created a more nuanced picture. Although market integration was the primary imperative, consumer surplus and productive

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29 Bork, supra n 1.
30 Reiter, supra n 4.
32 Orbach, supra n 3.
33 R David and J Brierley, Major Legal Systems in the World Today (Stevens, 1985).
efficiency were included into the category of competition goals.\textsuperscript{38} However, protection was also afforded to producer.\textsuperscript{39} Thus, while the emerging goals of competition law reflected their foundation in welfare economics, a standard of total welfare, not pure consumer welfare, was adopted.\textsuperscript{40} Effectively this is in line with the US standard, though Bork miscategorised it as ‘consumer welfare’.\textsuperscript{41} Despite this revelation, there are limits of the historical interpretation, as it does not shed light on how efficiencies and the welfare standard in EU competition rules interact with other provisions.

2. Contested Legitimacy of the More Economic Approach

Advocating a more economic approach,\textsuperscript{42} the European Commission has repeatedly argued in its non-binding guidelines that economic efficiency and consumer welfare are the only goals of EU competition law,\textsuperscript{43} which is free of political consideration.\textsuperscript{44} The Commission decision of Intel\textsuperscript{45}, which is still under appeal, has demonstrated how efficiency-based analysis was introduced through administrative reform, and its tension with the ECJ’s view.

Indeed, the Treaty has recognized economic efficiency as a legitimate objective, albeit an intermediate one. Under the Economic Policy in Art 120 TFEU, member states and the Union are required to observe the principle of an open market economy with free competition, ‘favouring an efficient allocation of resources’. Thus, free competition is linked to economic and monetary policies,\textsuperscript{46} and Art 120 legitimizes allocative efficiency as a form of static efficiencies, and can be applied by analogy to competition rules through contextual interpretation.\textsuperscript{47} Meanwhile, the Union’s shift toward

\textsuperscript{38} Art 3 ECSC.
\textsuperscript{39} Ibid.
\textsuperscript{41} Zimmer, supra n 15.
\textsuperscript{42} EAGCP, Report on an Economic Approach to Article 82 EC (July 2005).
\textsuperscript{45} Case T-286/09 Intel v Commission, not yet decided.
\textsuperscript{46} A Chiriţă, ‘Legal Interpretation and Practice versus Legal Theory: A Reconciliation of Competition Goals and a Reply to Andriychuk’, in Zimmer, supra n 15, 122.
knowledge-based economies gives dynamic efficiency greater recognition. Under Art 3(3) TEU, it is the Union’s goal to promote scientific and technological advance. Art 173(1) TFEU also requires the better exploitation of the industrial potential of policies of innovation, research and technological development. Thus, it is legally legitimate to pursue dynamic efficiency. Yet, despite the recognized legitimacy, this does not make efficiencies the overriding competition goal. Under Art 102, productive efficiency is merely involved for the balancing of a fair share of benefit for consumers. It forms only part of the overall ‘objective justification’ that must include the undertakings’ interests.

Conversely, the claim that consumer welfare is the primary goal of EU competition law is more doubtful. As Kalbfleisch noted, the TEU contains no explicit reference to consumer welfare as such. Instead, it refers to the idea of citizen’s well-being and sustainable development in the Union based on balanced economic growth, price stability and a highly competitive social market economy.

Akman further observed that there was a discrepancy between the Commission’s practice and rhetoric. It is criticized that the Commission always associates consumer welfare with efficiency, thereby obscuring the distinct role of efficiency. It uses “consumer welfare”, “consumer surplus” and “consumer choice” interchangeably in its Guidelines. This suggests that even the Commission itself fails to define the concepts. The Commission’s approach is thus questionable. As in the US, ‘consumer welfare’ is consequently criticized as a convenient tool for political persuasion in the EU.

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53 See Art 3(1) and (3) TEU.
56 Lianos, supra n 6, 16.
3. The ECJ’s Jurisprudence

For the ECJ, the claim that consumer welfare is the sole objective of competition law is never accepted. Instead, the case law of the ECJ implies its endorsement of the multiple goals of competition law. It is argued that EU competition law complements other provisions of the TEU and TFEU to accomplish the tasks entrusted to the EU. The ECJ has therefore consistently adopted a teleological interpretation and incorporated non-efficiency goals. In *British Airways*, the ECJ explicitly rejected the exclusive consumer welfare approach. In *MOTOE*, it was ruled that ‘equality of opportunity’ is a goal pursued by EU competition law. In *GlaxoSmithKline*, the ECJ held that Art 101 TFEU not only protect competitors or consumers, ‘but also the structure of the market and, in doing so, competition as such’. Similar dicta were also found in Art 102 cases. More recently, the Court stated that the function of competition law is to prevent distorted competition causing harm to public interests, producers and consumers, ‘thereby ensuring the well-being’ of the Union.

The jurisprudence of the Court is not without ambiguity. Some decisions of the General Court have explicitly endorsed the importance of protecting the final consumers as a goal, whereas the ECJ has also paid particular attention to ultimate consumers. It also recently accepted that one of the main functions of EU competition law is to prevent “consumer harm”, and created new legal categories such as price and non-price restraints. This may be deemed a necessary adjustment of the judicial process to the multiple dimensions of the ‘more economic approach’. However, this adjustment still does not suggest that the ECJ gives much deference to the Commission.

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58 Lianos, supra n 6, 32.
60 Hodge, supra n 16, 114.
61 Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para. 106.
67 See, e.g., Case C-468/06 – 478/01 *Sot Lesos Kai Sia EE v GlaxoSmithKline AEVE* [2008] ECR I-7139, paras. 56-57.
69 Cf Evans, supra n 24.
Further, the assumption that the tests applying to different types of conducts must correspond to the goal of competition law is mistaken. Despite being a useful analytical tool to pursue social welfare, a consumer harm test does not make consumer welfare an absolute goal, or the ultimate objective of the law. Indeed, the Commission may start backing away from its previous claim. Neither consumer welfare nor efficiency is mentioned in the Commission’s latest Guidelines. It is warned that a pure efficiency-consumer welfare approach would break the normative link between EU competition law and free movement rules, thereby instrumentalizing competition policy.

D. POST-LISBON LEGAL BALANCING OF GOALS

1. Towards A Dynamic Interpretation
After Lisbon, Art 3(1)(b) TFEU confers exclusive competence on the Union for establishing the competition rules necessary for the functioning of the internal market. The principle of ‘open market economy with free competition’ remains in Art 119 TFEU for the provision of a ‘highly competitive social market economy’ in Art 3(3) TEU. Yet the previous Art 3(1)(g) EC, which requires that the internal market must include a system ensuring undistorted competition, has been removed from the TFEU. Instead, it is placed in Protocol No. 27 on the internal market and competition annexed to the Lisbon Treaty. While some suggested that the change has little influence on the paramount status of competition as a Union goal, this argument is unconvincing. Although post-Lisbon decisions have given weight to the Protocol for the teleological interpretation of Treaty rules in relation to undistorted competition, the wordings of Art 3(1)(b) TFEU implies a subservient role of competition. This is because competition is necessary only if it is ‘necessary for the functioning of the internal market’. However, since the internal market is established, it is no longer a proper goal per se. Thus, Art 12 TFEU becomes an independent provision now by requiring ‘consumer protection requirements’ to be

71 R Nazzini, supra n 25, 44-45.
73 Schweitzer, supra n 27, 181.
74 G Monti, ‘EU Competition Law from Rome to Lisbon’ in Heide-Jorgensen (ed) Aims and Values in Competition Law (Forthcoming) 29.
75 See, e.g., TeliaSonera, supra n 40.
76 Hodge, supra n 16, 110.
77 Chiriţă, supra n 43, 418.
incorporated into other Union policies’ definitions and implementations.\textsuperscript{78}

Consequently, a dynamic interpretation of post-Lisbon Treaty objectives suggests a change of approach.\textsuperscript{79} Although the objectives of the Union are listed in the Treaty, they are not ranked at the highest level.\textsuperscript{80} This enables the ECJ to shift its teleological interpretation towards a legal balancing exercise of the Treaty’s multiple goals, thereby matching the evolution of the European project.\textsuperscript{81}

Nevertheless, consumer interests should be narrowly defined, since a broad consumer-protection requirement limits undertakings’ economic freedom. There is the danger of overlapping EU competition law with unfair competition rules where policy interests, such as health and safety, have to be balanced in the legal exercise.\textsuperscript{82} This can lead to an over-deterrence of competition law,\textsuperscript{83} and consequently stifles competition that boosts consumer choice.\textsuperscript{84}

2. Interpretation of Art 102 TFEU
Under the abuse-of-dominance policy, the effects on consumers are considered only under Art 102 (b), which cannot be applied to other parts of the provision as a whole.\textsuperscript{85} Thus, the current teleological interpretation of the provision cannot shift the focus to efficiency-based approach or consumer welfare analysis for abuse-of-dominance cases.\textsuperscript{86}

Art 101(3) enables a consumer welfare analysis by referring to passing on to consumers ‘a fair share of the resulting benefit’,\textsuperscript{87} and consequently enabling the balancing of efficiencies.\textsuperscript{88} It is argued that while the exercise should not be extended to Art 101(1), a contextual analogy of consumers under Art 101(3) suggests that the balancing exercise can be applied to Art 102 as a whole.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{78} Ibid 426.
\item \textsuperscript{79} Ibid.
\item \textsuperscript{80} See, e.g., Art 169 TFEU (“High level of consumer protection”).
\item \textsuperscript{81} Hodge, supra n 16, 108.
\item \textsuperscript{82} Hilti, supra n 47, paras. 102-119.
\item \textsuperscript{83} Chiriţă, supra n 43, 424.
\item \textsuperscript{86} Chiriţă, supra n 43,432.
\item \textsuperscript{87} Rose and Bailey, supra n 55, para. 3.001.
\item \textsuperscript{88} P Marsden and P Whelan, “Consumer Detriment and its Application in EC and UK Competition Law’ (2006) ECL Rev 569.
\item \textsuperscript{89} Chiriţă, supra n 43, 433.
\end{itemize}
Through a teleological interpretation of Art 102 in the light of Art 12, a narrow conception of consumer interests defined as final consumers can be applied to introduce a test of legal balancing of Union objectives that spills into the abuse-of-dominance policy.\footnote{A Chiriţă, ‘The EC Commission’s Guidance Paper on the Application of Article 82: An Efficient Means of Compliance for Germany?’ (2009) ECJ 677, 685.} While such an exercise promotes consumer welfare by restricting the economic freedom of undertakings, it also deals with the disparity between the dominant market power of undertakings and that of consumers.\footnote{S Haupt, ‘An Economic Analysis of Consumer Protection in Contract Law’ (2003) German Journal 1138.} As for the broad consumer protection under Art 169(2) which is applicable to competition policy, its application to Art 102 should also be narrowly construed to exclude consideration of public interests generally. This avoids the overlapping of EU competition law and unfair competition rules.\footnote{Chiriţă, supra n 43, 434.}

**E. CONCLUSION**

This essay examined the economic concepts of efficiencies and consumer welfare from a normative perspective, which was often misunderstood in legal discourse. It demonstrated the three forms of efficiencies (allocative, productive and dynamic) as the necessary means to achieve consumer and thus social welfare. The legal-historical review of the EU treaties then revealed that even though the market integration has been the primary objective, the emerging competition goals have had its roots in welfare economics. However, it is total welfare, not consumer welfare, which was adopted. This essay also evaluated the European Commission’s promotion of the controversial ‘more economic approach’. It is found that the Commission’s claim for consumer welfare as the sole aim of competition law conflicts with the ECJ’s insistence on protecting the structure of the internal market by its teleological interpretation of EU treaty goals. However, since the market integration imperative has been achieved and should be maintained after the Lisbon Treaty, a dynamic interpretation of Art 102 TFEU suggests a shift from the ECJ’s teleological interpretation, which is based on the ‘undistorted competition’ in Protocol 27, to a legal balancing exercise of the Union goals. This exercise can be done under Art 119’s fair competition and Art 12’s high level of consumer protection. Nevertheless, the consumer protection requirements must be narrowly construed, avoiding the trespassing of unfair
competition rules to competition law.
Bibliography

Articles


Orbach B, ‘Was the Crisis in Antitrust a Trojan Horse?’ (2014) *The Antitrust Law Journal* (Forthcoming)

Pattet L, ‘Shouldn’t We Know What We Are Protecting?’ (2010) *European Competition Journal* 339


Van der Esch B, ‘The Principles of Interpretation Applied by the Court of


**Books**


Heide-Jorgensen C (ed) *Aims and Values in Competition Law* (Forthcoming)


Rose V and Bailey D (eds), Bellamy and Child: European Union Law of Competition (OUP, 7th edn, 2013)

Townley C, Article 81 EC and Public Policy (Oxford, Hart, 2009)


Zimmer D (ed), Goals of Competition Law (Cheltenham, Edward Edgar, 2012)

Cases
Case T-321/05 AstraZeneca AB and AstraZeneca plc v European Commission [2010] ECR II-2805
Case C-95/04 P British Airways v Commission [2007] ECR I-2331
Case T-286/09 Intel v Commission, not yet decided
Case C-52/09 Konkurrenverket v TeliaSonera Sverige AB [2011] ECR 527
C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio[2008] ECR I-4863
NCAA v Board of Regents of the University of Oklahoma 468 US 85 (1984)
Reiter v Sonotone Corp 442 US 330 (1979)
Case C-468/06 – 478/01 Sot Lelos Kai Sia EE v GlaxoSmithKline AEVE [2008] ECR I-7139

European Commission Guidelines & Reports

European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJC 101/7

EAGCP, Report on an Economic Approach to Article 82 EC (July 2005)

European Commission, Guidelines on Vertical Restraints [2010] OJC 130/1

European Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements [2010] OJC 528/2