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Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101

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COMPATIBLE OR CONFLICTING:
THE PROMOTION OF A HIGH LEVEL OF EMPLOYMENT
AND THE CONSUMER WELFARE STANDARD UNDER
ARTICLE 101

TOM C. HODGE^{*}

ABSTRACT

The antitrust, or competition, regime of the European Union (EU) differs substantially from that of the United States, because EU competition law forms part of the EU Treaties and is therefore imbued with the multiple values of the European Union itself. Accordingly, it is by no means clear or settled if the anti-cartel law of the European Union, Article 101 TFEU, must focus solely on a consumer welfare standard or must also consider the broad and multiple policy aims enshrined in the EU Treaties. If Article 101 must balance multiple aims, this would be in stark contrast to Section 1 of the Sherman Act, where the sole goal of consumer welfare has long been established.¹

This Article will seek to demonstrate that when an agreement is examined under Article 101, any anti-competitive impact that is detrimental to consumer welfare must be balanced against the positive effect on the policy goals of the EU (with the Article focusing particularly on employment issues). The Article further proposes that a “bifurcated balancing approach” should be adopted, with economic efficiency concerns being examined under Article 101(1) and broader policy goals being considered in Article 101(3). The proposals made in this Article are not wholly without controversy, but are supported by the case law of the European Court of Justice.

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¹ MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 41 (2010) [hereinafter DABBAH, COMPARATIVE COMPETITION].

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INTRODUCTION

The European Union (EU or the Union) has been described by former Commissioner for Competition and current Commissioner for Digital Agenda, Neelie Kroes, as “a radical experiment in the creation of open markets.”² Such a radical union lists among its aims: “[T]he sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress.”³ The question this Article seeks to answer is whether the EU, being a union with such diverse political and economic aims, can or should balance economic efficiency goals against other broader public policy aims within its competition law regime.

In particular, this Article will examine Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101 TFEU is the Union’s anti-cartel provision.⁴ Article 101(1) prohibits: “[A]ll agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”⁵ However, such agreements can be “excepted,” or exempted, under Article 101(3) if the agreement meets four tests: (1) an efficiency test, (2) provides a fair share for consumers,

² Neelie Kroes, *Industrial Policy and Competition Law and Policy*, 30 *FORDHAM INT’L L.J.* 1401, 1402 (2007).

³ Consolidated Version of the Treaty on European Union art. 3, ¶ 3, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU], available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>.

⁴ Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU], available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>.

⁵ *Id.* at art. 101(1) (“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”).

(3) a test of proportionality, and (4) the agreement does not eliminate competition.⁶

The wording of Article 101 sets out the bare legal bones of the EU's anti-cartel regime, but the Article requires the flesh of case law and Commission Guidelines and Decisions in order to make sense of what the aims of Article 101 should be. This Article will seek to demonstrate, relying on judgments and decisions, that the aims of Article 101 should be diverse and not limited to only an economic efficiency aim. As will be shown, this is in keeping with the structure of the TFEU⁷ and the case law of the European Courts—particularly the European Court of Justice (ECJ)⁸ and, to a lesser extent, the Court of First Instance (CFI).⁹ Throughout the course of this Article, the terminology “Court of First Instance” will be used, in spite of the fact that the Lisbon Treaty changed the name of the CFI to the “General Court;”¹⁰ this will be done for the sake of consistency and in order to avoid confusion. It should also be noted that Article 101 was previously numbered as Article 81¹¹ in the Treaty Establishing the European Community which preceded the TFEU (and prior to that as Article 85¹²); as such, much of the literature, judgments and Commission documents refer to Articles 85 or 81, rather than Article 101. However, all such references are equally applicable to Article 101.

⁶ See *id.* at art. 101(3) (“The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”).

⁷ See *infra* Part IV.A.

⁸ See, e.g., Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1653.

⁹ See, e.g., Joined Cases T-528, T-542, T-543 & T-546/93, *Métropole Télévision v. Comm'n*, 1996 E.C.R. II-652.

¹⁰ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 2(2)(n), Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter *Lisbon Treaty*].

¹¹ See, e.g., Treaty Establishing the European Community art. 81, Nov. 10, 1997, 1997 O.J. (C 340) 3.

¹² See, e.g., Treaty Establishing the European Economic Community art. 85, Mar. 25, 1957, 28 U.N.T.S. II.

The significance of the aims of the Union's competition regime cannot be overstated. The ECJ has described Article 101 as "a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [Union]."¹³ More recently, Advocate-General Kokott has stated that the EU's competition rules are, "without any doubt a fundamental aim of the Treaties."¹⁴ Therefore, Article 101, and EU competition law in general, have been given the responsibility of achieving not only economic efficiency goals, but also the broader aims of the EU.¹⁵ Accordingly, any changes to the structure of the EU Treaties that promote or demote Union goals have a tremendous impact on the functioning of Article 101 itself.¹⁶ As such, this Article will seek to demonstrate that the standard economic efficiency test for competition law, consumer welfare, can be balanced against the promotion of a high level of employment. Promoting a high level of employment is required by Article 9 TFEU,¹⁷ and the structure of the EU Treaties requires "consistency between [the EU's] policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."¹⁸ Therefore, this Article will establish that Article 101 must weigh the potential employment benefits of any agreement against the anticompetitive impact that the agreement could have on consumer welfare.

Determining whether there is a place for the promotion of employment within a competition provision is particularly pertinent at this time. This is not simply because the amendments wrought by the Lisbon Treaty downgraded competition as a Union aim and bolstered the position of other public policy goals, such as employment.¹⁹ Additionally, the economic climate of recent years has once again called into question "what kind of society we are and should strive to be."²⁰ Is an economic efficiency goal all we want from a competition regime, or do we want a regulatory system that is more holistic and better able to consider what might benefit society

¹³ Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-3055, ¶ 36.

¹⁴ Case C-110/10 P, *Solvay SA v. Comm'n*, 2011 O.J. (C 161) ¶ 169.

¹⁵ See TFEU, *supra* note 4, at 50–58.

¹⁶ See *infra* Part IV.A.

¹⁷ TFEU, *supra* note 4, at art. 9 ("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.").

¹⁸ *Id.* at art. 7.

¹⁹ See *infra* Part IV.A.

²⁰ Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 957 (1987).

as a whole? As such, the “financial crisis provides an excellent opportunity to reflect about the economic orientation”²¹ of the Union, and to determine whether the EU’s competition system merely protects individuals as consumers (that is, as purchasers of goods and services) or whether this concern should be balanced against the individual’s role as a producer (that is, when the individual manufactures or provides goods and services).

In order to demonstrate that not only should Article 101 consider, but in fact *must* consider, the promotion of a high level of employment, this Article will be divided into two broad parts. Parts I, II, and III of the Article will deal generally with the concept, and aims, of competition law. Parts IV and V will focus specifically on EU competition law and will demonstrate how consumer welfare and employment are to be balanced under Article 101.

I. THE CONCEPT OF COMPETITION LAW

Competition law is not a new concept, nor is it a simple one. Competition laws can trace their origins back to Ancient Greece²² and Egypt.²³ Before considering the development of competition law in the modern world it is worth asking what competition is, and what competition law does.

Competition is defined as a “struggle or contention for superiority.”²⁴ Therefore, in a commercial marketplace, “[c]ompetition is about the struggle by firms to achieve superiority over other firms.”²⁵ The economics of competition law will be discussed below, in Part II,²⁶ however, it can be stated that competition reaps substantial economic benefits.²⁷ Odu-
du identifies the benefits of competition as being “economic growth” and better quality products being more widely available at a lower cost.²⁸ It can therefore be suggested that competitive markets are a “good thing,” as

²¹ Constanze Semmelmann, *The European Union’s Economic Constitution Under the Lisbon Treaty: Soul-Searching Among Lawyers Shifts the Focus to Procedure*, 35 EUR. L. REV. 516, 516 (2010).

²² See THE EC LAW OF COMPETITION 5 (Jonathan Faull & Ali Nikpay eds., 2d ed. 2007) [hereinafter Faull & Nikpay].

²³ See LORENZO F. PACE, EUROPEAN ANTITRUST LAW: PROHIBITIONS, MERGER CONTROL AND PROCEDURES 3 (2007).

²⁴ RICHARD WHISH, COMPETITION LAW 3 (6th ed. 2008).

²⁵ ROBERT LANE, EC COMPETITION LAW 6 (2000).

²⁶ See *infra* Part II.

²⁷ See OKEOGHENE ODUDU, THE BOUNDARIES OF EC COMPETITION LAW: THE SCOPE OF ARTICLE 81, at 10 (2006).

²⁸ *Id.*

Bishop and Walker wrote: “It is a generally accepted principle that competition is desirable.”²⁹

If competition is a “good thing,” what role does competition law play? The role of competition law is to prevent a “[l]essening of competition.”³⁰ That is to say competition law protects the market from “artificial restraints”³¹ that might distort the “efficient allocation of resources.”³² Essentially, competition law involves itself in ensuring that private actors (firms) do not seek to abuse their strength in the marketplace (either individually or collaboratively) by indulging in behavior that results in a profit margin that is greater than that which the firm, or firms, could generate in a freely competitive market.³³ This concept of competition law is shown in the law of the European Union, which prohibits the “prevention, restriction or distortion of competition”³⁴ and the abuse of a “dominant position.”³⁵

This suggests a difficult balancing act for competition law. On the one hand, governments encourage competition in the marketplace; however, if one firm succeeds in dominating their market, the firm risks coming under scrutiny because of its success.³⁶ This has caused competition law, or at least the excessive use of it, to come in for criticism.³⁷ Sautet levels the accusation that competition law undermines the desire to succeed in the marketplace by “chang[ing] the rules in order to protect some groups against others.”³⁸ Bork states that competition law represents “elaborate deployments of governmental force” into the business world,³⁹ which is arguably inappropriate given that success in a free market requires entrepreneurialism and individualism.

²⁹ SIMON BISHOP & MIKE WALKER, *THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT* 15 (3d ed. 2010).

³⁰ Frederic Sautet, *The Shaky Foundations of Competition Law*, N.Z. L.J. 186, 189 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262999.

³¹ Erich Hoppmann, *Workable Competition: The Development of an Idea on the Norm for the Policy of Competition*, 13 ANTITRUST BULL. 61 (1968).

³² JACQUES PELKMANS, *EUROPEAN INTEGRATION: METHODS AND ECONOMIC ANALYSIS* 224 (3d ed. 2006).

³³ See MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 3 (2004).

³⁴ TFEU, *supra* note 4, at art. 101(1).

³⁵ *Id.* at art. 102.

³⁶ See GIORGIO MONTI, *EC COMPETITION LAW* 4 (2007).

³⁷ See *id.* at 2.

³⁸ Sautet, *supra* note 30, at 190.

³⁹ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 3 (1993).

Clearly the concept of competition law, without even discussing its aims, is not free from controversy.⁴⁰ Accordingly, it is necessary to understand the historical background that gave rise to competition law in its present form. The roots of modern competition law can be found in the common law of England.⁴¹ Conduct that fell afoul of the common law of competition was often described as a “restraint of trade.”⁴² Lord Justice Bowen went further and explained when conduct violated England’s somewhat haphazard and primitive competition laws: “[C]ompetition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable.”⁴³ Although prohibiting conduct that is unfair or unreasonable is unlikely to be specific enough to guide future conduct, it does show that, even at this early stage, the courts were seeking to use competition laws to protect free competition in the marketplace.

Borrowing from English common law terminology, the Sherman Act of the United States prohibited restraints of trade.⁴⁴ In the United States, competition law is known as “antitrust,”⁴⁵ the reason for this being that the Sherman Act had been passed specifically to combat business “trusts” (or cartels).⁴⁶ These trusts consisted of firms operating in the same industry—cooperating to make price and output decisions collectively.⁴⁷ The purpose of trusts was to protect firms from the risks of failure inherent in a free market.⁴⁸ Looking elsewhere in the world, we see that the language of competition is not unilingual. Germany has two “competition” laws: Gesetz gegen Wettbewerbsbeschränkungen (GWB)⁴⁹ and Gesetz gegen den unlauteren Wettbewerb (UWG).⁵⁰ The GWB, or *Kartellrecht*, can be seen as the more familiar form of competition law and protects against re-

⁴⁰ See MONTI, *supra* note 36, at 2.

⁴¹ See, e.g., *The Case of the Tailors*, 11 Co. Rep. 53a, 54a (1614); 77 Eng. Rep. 1218, 1220 (Eng.); see also *The Mogul Steamship Co. v. McGregor*, [1889] 23 Q.B.D. 598, 615 (C.A.) (Bowen L.J.) (Eng.).

⁴² *The Case of the Tailors*, 11 Co. Rep. at 54a.

⁴³ *Mogul Steamship*, 23 Q.B.D. at 615.

⁴⁴ The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

⁴⁵ See MOTTA, *supra* note 33, at 30.

⁴⁶ See *id.* at 3.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ Gesetz gegen Wettbewerbsbeschränkungen [GWB, Act Against Restraints of Competition], Aug. 26, 1998 BGBl. I at 2114 (2005) [hereinafter GWB].

⁵⁰ Gesetz gegen den unlauteren Wettbewerb [UGW, Act Against Unfair Competition], Mar. 7, 2004 BGBl. I at 254 (2005) [hereinafter UGW].

straints of trade,⁵¹ whereas the UWG, or *Wettbewerbsrecht*, forbids unfair competitive acts that are detrimental to competitors and consumers, including activities such as misleading advertising.⁵² In the Republic of Korea, the primary competition statute is the Monopoly Regulation and Fair Trade Act of 1980.⁵³ The Slovak Republic's national competition law is the law on Protection of Competition.⁵⁴ In France, competition law is known as the "droit de la concurrence."⁵⁵ All this points to the fact that "competition law regimes do not necessarily have to be consistently called "competition law" for these laws to be capable of addressing the same problematic situations *or* functioning as proper competition laws."⁵⁶

Returning to the nineteenth century origins of modern competition law, it is worth noting that cartels were not unique to the United States. Cartels were prevalent across Europe.⁵⁷ In the German Empire they were positively encouraged, as the government believed cartelisation would protect Germany from foreign competition.⁵⁸ World War I and its aftermath did not diminish the enthusiasm for cartels in Europe.⁵⁹ In 1926, Germany, France, Belgium, Luxembourg, and the Saar (then a territory governed by Britain and France under a League of Nations mandate) agreed to form an international steel cartel (*Rohstahlgemeinschaft*).⁶⁰ Indeed, in 1930 the Briand Plan proposed forming a European Union "based on economic cartels."⁶¹

It was not until after World War II that continental Europe moved away from the promotion of cartels. The U.S. military government in post-World War II Germany introduced Law 56, which intended to eliminate "concentrations of economic power."⁶² Law 56 laid the foundations for the

⁵¹ See *GWB*, *supra* note 49, at 2114.

⁵² See *UGW*, *supra* note 50, at 254.

⁵³ See 독점규제 및 공정거래에 관한 법률 [Monopoly Regulation and Fair Trade Act], 법률 제3320호 [Act No. 3320] (S. Kor.).

⁵⁴ See Zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže [Protection of Competition] (Slovk.).

⁵⁵ See CODE DE COMMERCE [C. COM] art. L420-1 (Fr.).

⁵⁶ DABBAH, *COMPARATIVE COMPETITION*, *supra* note 1, at 17.

⁵⁷ See *PACE*, *supra* note 23, at 5.

⁵⁸ See *id.*

⁵⁹ See *id.* at 7.

⁶⁰ See *id.* at 13; see also CHARLES S. MAIER, *RECASTING BOURGEOIS EUROPE: STABILIZATION IN FRANCE, GERMANY, AND ITALY IN THE DECADE AFTER WORLD WAR I*, at 526 (1975).

⁶¹ *PACE*, *supra* note 23, at 15.

⁶² U.S. MILITARY GOVERNMENT IN GERMANY PROCLAMATION NO. 56 Preamble (Mar. 1, 1947).

growth of modern anti-cartel competition laws in Europe. It was because of this early exposure to U.S.-style antitrust law that “German competition lawyers trained in that postwar era for many years remained the intellectual aristocracy of the European competition bar.”⁶³ The European Coal and Steel Community (ECSC), formed by the Treaty of Paris in 1951, began to spread competition/antitrust concepts across the continent.⁶⁴ In 1957, the Treaty of Rome established the European Economic Community (EEC), and fifty years later the European Union succeeded the European Community.⁶⁵ The original competition laws laid down in the Treaty of Paris—for those six Member States who were members of the ECSC⁶⁶—were to serve as the basis for the current competition laws of the twenty-seven Member State European Union.⁶⁷ European competition laws “can be traced back, at least in their basic elements, to the articles dealing with competition issues in the Treaty of Paris.”⁶⁸ So Articles 101 and 102 of the TFEU can show a pedigree going back to at least 1951, if not further, and back to Law 56 of 1947.⁶⁹

It is clear that the concept underlying competition law is, ironically, the idea that regulation is required to protect free competition in the market. Furthermore, modern competition law came into being in the nineteenth century, and European Union competition law has existed since the 1950s.⁷⁰ However, what is still not clear is what the aim, or aims, of competition law should be. Competition law can be defined as those laws “which ensure that competition in the marketplace is not restricted in a way that is detrimental to society.”⁷¹ Yet this definition is meaningless, as it still does not expand on what aims competition law should have until

⁶³ John H. Shenefield, *Coherence or Confusion: The Future of the Global Antitrust Conversation*, 49 ANTITRUST BULL. 385, 390 (2004).

⁶⁴ See MOTTA, *supra* note 33, at 13.

⁶⁵ See TEU, *supra* note 3, at art. 1.

⁶⁶ See MOTTA, *supra* note 33, at 13 (the ECSC members were: Belgium, France, Italy, Luxembourg, the Netherlands, and the Federal Republic of Germany); see also *The Benelux*, UK TRADE & INVESTMENT, <http://www.invest.uktradeinvest.gov.uk/export/countries/beneluxcountries.html> (last visited Feb. 3, 2012).

⁶⁷ See TEU, *supra* note 3, at art. 52 (the Member States are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom).

⁶⁸ MOTTA, *supra* note 33, at 13.

⁶⁹ See U.S. MILITARY GOVERNMENT IN GERMANY PROCLAMATION NO. 56 Preamble (Mar. 1, 1947); see also MOTTA, *supra* note 33, at 13.

⁷⁰ See MOTTA, *supra* note 33, at 3, 13.

⁷¹ *Id.* at 30.

there is clarification as to what exactly “detrimental to society” means.⁷² However, before considering the aims of competition law, it is important to recognize the impact of economics upon the underlying theories of competition law.⁷³

II. THE ECONOMICS OF COMPETITION

Although this Article does not seek to deal in detail with the economics of competition, it is necessary to consider economics because economic analysis underpins the law of competition. The European Union is a relative newcomer to relying heavily on economic analysis when considering competition law issues.⁷⁴ In-depth economic analysis of competition law issues is historically more often associated with U.S. antitrust law.⁷⁵ White explains that, by the 1970s, economists were actively participating in U.S. antitrust cases, working for both the Department of Justice and defendants.⁷⁶ However, economic analysis has more recently begun to play a significant role in EU competition law (Monti identifies the *Green Paper on Vertical Restraints*⁷⁷ as “the first serious and sustained attempt to deploy economic analysis to [EU] competition law”).⁷⁸ The adoption of economic principles is because these principles provide “a coherent framework of analysis” to “tell the most plausible story” in determining “under what conditions anticompetitive outcomes are very unlikely, very likely, or rather likely.”⁷⁹ Monti attributes the late blooming of economic analysis in European competition law to the fact that the EU is dominated by Member States with civil law systems, and that the common law is more open to accepting economic “consequentialist reasoning” than the civil law, which favors “resolving problems by a literal interpretation of the statutes.”⁸⁰

⁷² *Id.*

⁷³ *See infra* Part II.

⁷⁴ *See Commission Green Paper on Vertical Restraints*, at exec. summary 1, COM (1996) 721 final (Jan. 22, 1997), 4 C.M.L.R. 519 (1997) [hereinafter *Green Paper on Vertical Restraints*].

⁷⁵ *See* Lawrence J. White, *The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion* 12–13 (N.Y.U., Law & Econ. Research Paper Series, Working Paper No. 08-07, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091531.

⁷⁶ *See id.*

⁷⁷ *See Green Paper on Vertical Restraints*, *supra* note 74, at exec. summary 1.

⁷⁸ MONTI, *supra* note 36, at 82.

⁷⁹ Faull & Nikpay, *supra* note 22, at 4.

⁸⁰ MONTI, *supra* note 36, at 80.

At the outset, it is important to note that economists have traditionally considered the cornerstone of competition law and policy to be the promotion of “social welfare.”⁸¹ Social welfare is a state of affairs whereby economic efficiency is maximized, and the most benefits accrue to society as a whole.⁸² However, social welfare is “value neutral (it values consumer[s] and producer[s] ... equally)” which, “in practice ... leads to redistribution from consumers to producers.”⁸³ As such, economists have moved from maximizing total, or social, welfare towards maximizing consumer welfare.⁸⁴ Consumer welfare is a situation where economic efficiency is enhanced “in order to achieve lower prices, increase choice, and improve product quality for the benefit of the consumer.”⁸⁵ Aims of competition law, such as consumer welfare, will be discussed below in Part III.⁸⁶ However, for the present purpose—the economics of competition—it is important to understand what welfare standard economists use when analyzing firm behavior through the lens of competition economics.

To consider the role of economics in competition law, the following areas will be briefly discussed: (1) the economic efficiencies that competition law seeks to promote and protect, (2) the economic models of the market, (3) market definition, and (4) market power. Market power is the key to understanding the role of economics in competition law, and all the other areas merely set the scene so that market power can be determined.

A. The Economic Efficiencies that Competition Law Seeks to Promote and Protect

The efficiencies that competition in the marketplace encourages are: allocative efficiency, productive efficiency, and dynamic efficiency. Allocative efficiency (also known as Pareto efficiency, Kaldor-Hicks efficiency, or wealth maximization) is a state of affairs whereby the consumer is able to purchase the product or service they want at the price they are prepared to pay.⁸⁷ This coinciding of product and price occurs because manufacturers will continue to produce until the marginal cost (the cost of

⁸¹ BISHOP & WALKER, *supra* note 29, at 29.

⁸² Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1025 (1987).

⁸³ CHRISTOPHER TOWNLEY, ARTICLE 81 EC AND PUBLIC POLICY 19 (2009).

⁸⁴ *See id.*

⁸⁵ MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 52 (2003) [hereinafter DABBAH, ANTITRUST POLICY].

⁸⁶ *See infra* Part III.

⁸⁷ WHISH, *supra* note 24, at 4–5; RICHARD A. POSNER, ANTITRUST LAW 23 (2d ed. 2001).

producing an additional unit of output) and the marginal revenue (the price that the manufacturer would obtain for a unit of production) meet.⁸⁸ This means that, in a competitive market, the manufacturer will continue to produce until the production of additional units ceases to be profitable. In other words, resources are allocated precisely according to society's needs, "as consumers can obtain the amounts of goods or services they require at the price they are prepared to pay."⁸⁹

Productive efficiency has been described as "symmetrical" to allocative efficiency.⁹⁰ Productive efficiency occurs when the manufacturer provides goods and services at the lowest possible cost.⁹¹ This results in society's wealth being expended at the lowest possible level.⁹² In such a situation, the manufacturer will not seek to raise prices above costs, as this will result in customers abandoning the manufacturer and may encourage other competitors to enter the marketplace.⁹³ Additionally, a manufacturer will not drop his prices below cost,⁹⁴ as this will result in a failure to make a profit.⁹⁵

A final form of efficiency, "which cannot be proved scientifically,"⁹⁶ is dynamic efficiency. This potential benefit of a competitive market results in innovation and technological development, as manufacturers will compete with each other for a fixed number of consumer purchases.⁹⁷

Of these three forms of efficiency, the one that competition most actively seeks to promote is arguably allocative efficiency. For Posner, this is because competition laws are only capable of promoting allocative efficiency.⁹⁸ Of course, a competitive marketplace is also likely to promote productive efficiency, because manufacturers will seek to operate as efficiently as possible—in other words, to keep their costs as low as possible—or they will be driven from the market by their more efficient rivals. However, while productive efficiency works as an economic theory of firm behavior, it would be difficult, if not impossible, for the law to pro-

⁸⁸ WHISH, *supra* note 24, at 5.

⁸⁹ *Id.*

⁹⁰ BORK, *supra* note 39, at 104.

⁹¹ WHISH, *supra* note 24, at 5.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ It should be explained that, in economic theory, the term 'cost' includes a 'rate of return' or profit. *Id.* at 707–08. Therefore, when references are made to selling a product at 'cost,' such 'cost' includes a profit that would be sustainable in a competitive market.

⁹⁵ *Id.*

⁹⁶ *Id.* at 5.

⁹⁷ WHISH, *supra* note 24, at 5–6.

⁹⁸ POSNER, *supra* note 87, at 23.

mote. It is possibly easier to promote allocative efficiency through encouraging competitive economic models of the marketplace. These economic models will now be considered.

B. The Economic Models of the Market

In economic theory there are two extreme models of the marketplace: perfect competition and monopoly. Perfect competition “bears little relation to reality”⁹⁹ and “does not seem to be attainable;”¹⁰⁰ as such, perfect competition remains theoretical. A monopoly situation is possible but also rare. In developed countries a monopoly is usually the result of government action; for example, the state legally creates a sole government-owned company that monopolizes the defense industry.¹⁰¹ In developing countries, monopolies are more likely to occur naturally because of the national economy being dominated by a handful of “firms, individuals and families” due to the “concentration of wealth within society.”¹⁰²

It is under perfect competition that allocative and productive efficiency will be achieved. This is because, in a perfectly competitive market, no firm has the power to raise prices by restricting output; otherwise, a rival firm will fill this void.¹⁰³ Therefore, every manufacturer in the marketplace will continue to produce until marginal cost meets marginal revenue.¹⁰⁴ However, perfect competition can only be theoretical because achieving a perfectly competitive marketplace would require: (1) all manufacturers to be producing homogenous goods, (2) that the consumers possessed all relevant information about the marketplace, and (3) that there were no “barriers to entry” to prevent other manufacturers entering the marketplace.¹⁰⁵ In reality, goods are not homogeneous, especially because manufacturers must promote their brand as unique or different to secure and promote their market share. Equally, consumers are not completely informed about the market and, in almost all situations, barriers to entry exist.¹⁰⁶

Given that no market will be perfectly competitive, it could be questioned what purpose the theory of perfect competition serves to inform

⁹⁹ BISHOP & WALKER, *supra* note 29, at 22.

¹⁰⁰ DABBAH, ANTITRUST POLICY, *supra* note 85, at 24.

¹⁰¹ See, e.g., WHISH, *supra* note 24, at 843.

¹⁰² DABBAH, COMPARATIVE COMPETITION, *supra* note 1, at 297.

¹⁰³ See WHISH, *supra* note 24, at 5.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 7.

¹⁰⁶ See *id.*

competition law. Although perfect competition can never be achieved, competition law should seek to push markets in that direction to encourage “the most effective use of scarce resources,”¹⁰⁷ and because regulation of the market can achieve workable competition.¹⁰⁸ Workable competition can be equated with effective competition; although, unfortunately, effective competition is a concept that Bishop and Walker are unable to formally define.¹⁰⁹ To determine if a market is subject to effective, or workable, competition requires “an analysis of the current structure of the market and behavior of the firms within the market.”¹¹⁰ This is in keeping with the Extended SCP framework of analysis, discussed *infra*.¹¹¹

Workable competition cannot be achieved in a monopoly situation. A monopoly is defined as: “[A] seller (or group of sellers acting like a single seller) who can change the price at which his product will sell in the market by changing the quantity that he sells.”¹¹² Essentially, a monopolist, free from the restraints of competition, will not manufacture enough goods to meet consumer demand; therefore, the scarcity of goods drives the price above competitive levels. This results in supra-competitive profits for the monopolist and reduced efficiency because “consumer demands are satisfied at a higher cost than necessary.”¹¹³ Lack of competition creates inefficiency in the marketplace, which harms society as a whole.

Workable competition falls into the final of the three models of competition: oligopoly.¹¹⁴ The oligopoly model most accurately reflects the reality of the market, as it concerns the “interaction between a limited number of firms.”¹¹⁵ The oligopoly model is of most use to determining what economic functions competition law regimes should seek to achieve, because the model recognizes restraints that perfect competition ignores and, unlike the monopoly model, oligopoly recognizes that most markets involve multiple firms engaged in the competitive process. Therefore, “[t]he discussion of oligopoly models ... helps address what outcomes one can reasonably expect effective competition to achieve.”¹¹⁶

Accepting the uses of the three economic models, and how they can indicate what is achievable by regulation in order to foster workable com-

¹⁰⁷ MONTI, *supra* note 36, at 55.

¹⁰⁸ *See id.*

¹⁰⁹ BISHOP & WALKER, *supra* note 29, at 50.

¹¹⁰ *Id.*

¹¹¹ *See infra* notes 117–21 and accompanying text.

¹¹² POSNER, *supra* note 87, at 9.

¹¹³ *Id.* at 12.

¹¹⁴ BISHOP & WALKER, *supra* note 29, at 15–16.

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.*

petition, has resulted in economists taking a structural view of the marketplace.¹¹⁷ That is to say that economists came to believe that the structure of the marketplace will determine how firms behave; for example, competition laws should concern themselves with ensuring that markets do not become concentrated or that high barriers to entry are not established.¹¹⁸ This structural framework was developed by the Harvard School and is known as the “Market Structure-Conduct-Performance” Framework (or SCP).¹¹⁹ The Chicago School criticized the SCP framework, finding the SCP too interventionist, and arguing that more reliance should be placed on the self-correcting forces of competition, rather than regulatory intervention based on the structure of the marketplace.¹²⁰ In spite of its disparagement, the Chicago School was unsuccessful in ridding economic thinking of the SCP framework. Current post-Chicago analysis, however, recognizes that market structure is potentially anticompetitive, but also recognizes that this is just the starting point of any investigation into the market, not the be-all and end-all.¹²¹ In order to determine anticompetitive effects, market structure must be considered in conjunction with firm behavior and firm performance (such as product innovation or the development of more efficient production methods).

C. Market Definition

Given that it has now been established that discovering anticompetitive behavior requires examining the relevant marketplace, it is worth briefly considering how competition law defines the relevant market. The market can be defined in three ways: (1) the relevant product; (2) geographic extent; and, possibly, (3) the temporal extent.

The product market is defined in terms of “interchangeability,” as confirmed by the European Court of Justice in *Continental Can*.¹²² Interchangeability is the extent to which goods are transposable with alternative products.¹²³ What interchangeability seeks to discover is whether bananas

¹¹⁷ See RICHARD E. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE* 17 (7th ed. 1992).

¹¹⁸ See, e.g., Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940*, 65 Q.J. ECON. 293, 309, 323 (1951).

¹¹⁹ CAVES, *supra* note 117, at 15.

¹²⁰ Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 291–95 (2010).

¹²¹ Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 270 (2001).

¹²² Case 6/72, *Continental Can Co. v. Comm’n*, 1973 E.C.R. 215, ¶ 32.

¹²³ Case 27/76, *United Brands Co. v. Comm’n*, 1978 E.C.R. 207, 226.

(for example) form a unique market of themselves or if bananas are just part of a broader fresh fruit market.¹²⁴ To identify the relevant product market, the SSNIP test (Small but Significant Non-transitory Increase in Price) is used.¹²⁵ What the SSNIP test tries to answer is whether the customers of a manufacturer would switch to alternative products as a result of a hypothetical, small (roughly five to ten percent), permanent increase in price.¹²⁶ If consumers would switch to the alternative products as a result of the price increase, then the alternatives are included in the product market definition.¹²⁷ Essentially, what the SSNIP test is seeking to determine is whether alternative products or services “generate a competitive restraint” on the product in question; if the alternatives do exercise such a restraint, then they form part of the relevant market.¹²⁸

Defining the relevant geographic market can also be discovered by using the SSNIP test; for example, would the hypothetical increase in price result in consumers looking further afield in order to buy alternative products? In many situations, however, the geographic market can be defined more simply because some products are capable of being supplied throughout the EU or even the world, whereas there are “technical, legal or practical reasons”¹²⁹ why some products have a more limited market. There are also other reasons why a geographic market is limited to national boundaries or less, such as: “[P]references for national brands, language, culture and life style, and the need for a local presence.”¹³⁰

Taken together, the relevant product and geographic markets attempt to demonstrate how many products make up the relevant market and how far the market for those products spreads. There is a third possible type of market definition, which is the temporal market.¹³¹ Whish suggests that markets can grow or contract depending on the time of year.¹³² The question of temporal markets was not dealt with by the ECJ in *United Brands*,¹³³ although the Commission did accept that a temporal market for oil exists, following OPEC’s decision to raise prices in the 1970s.¹³⁴

¹²⁴ *Id.* at 270–73.

¹²⁵ MOTTA, *supra* note 33, at 102–03.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ LANE, *supra* note 25, at 8.

¹²⁹ WHISH, *supra* note 24, at 37.

¹³⁰ DABBAH, *COMPARATIVE COMPETITION*, *supra* note 1, at 39.

¹³¹ WHISH, *supra* note 24, at 39.

¹³² *Id.*

¹³³ Case 27/76, *United Brands v. Comm’n*, 1978 E.C.R. 207.

¹³⁴ *ABG* (Case IV/28.841) Commission Decision 77/327/EEC, 1977 O.J. (L 117) 1, 9–

D. Market Power

The purpose of the above discussion is all a preamble to the real concern of competition law: the “problems which may result from a firm or firms possessing market power.”¹³⁵ Market power is the situation whereby the “constraints of competitive forces”¹³⁶ have broken down; as such, the firm(s) possessing market power can raise prices above the competitive level “in a profitable way.”¹³⁷ A firm, or firms, exercising market power can cause a similarly negative impact as a monopolist, because they are capable of reducing output and limiting consumer choice.¹³⁸

The basis for market power is that a firm, or firms, can reduce their output, and as such make profits at a supra-competitive level. There are various factors that create the necessary conditions to exercise market power, including possessing a high market share of over fifty percent.¹³⁹ Under Article 102 TFEU, a high degree of market share is described as holding a “dominant position,” and the ECJ has held that a market share of fifty percent or more may well indicate dominance, or market power, in relation to Article 102.¹⁴⁰ The presumption of market power where the firm has a large market share “has affinities with the SCP paradigm.”¹⁴¹ Bishop and Walker lists other factors that might be relevant to an assessment of market power, such as: “[B]arriers to entry and potential competition; barriers to expansion; countervailing buyer power; ... and the nature of the oligopolistic interaction between firms.”¹⁴²

The economic principle that determines if firms are capable of exercising market power is price elasticity of demand.¹⁴³ Price elasticity of demand is the ratio of the percentage decrease in sales resulting from a given percentage increase in price.

$$\text{Price Elasticity of Demand} = \frac{\text{Percentage change in sales}^{144}}{\text{Percentage change in price}}$$

¹³⁵ DABBAH, ANTITRUST POLICY, *supra* note 85, at 35.

¹³⁶ LANE, *supra* note 25, at 7.

¹³⁷ MOTTA, *supra* note 33, at 40.

¹³⁸ *See id.* at 115–16.

¹³⁹ *See id.* at 117–18.

¹⁴⁰ Case 62/86, AKZO Chemie BV v. Comm’n, 1991 E.C.R. I-3359, ¶ 60.

¹⁴¹ MONTI, *supra* note 36, at 86.

¹⁴² BISHOP & WALKER, *supra* note 29, at 62.

¹⁴³ *Id.* at 54.

¹⁴⁴ *Id.*

In a market where there is a high elasticity, an increase in price will lead to a decrease in overall profits. This is because the profit accruing from a smaller amount of goods being sold at a higher price will not exceed the profit that was generated by selling a larger quantity of goods at the original price. Market power is more likely to occur where demand is inelastic, because an increase in price will not result in a large drop in sales.

The elasticity of demand for the firm's products will be influenced by the competitive constraints upon the firm.¹⁴⁵ For instance, a firm with a large market share in a market where there is limited buyer power and high barriers to entry is likely to have inelastic demand because there is no viable alternative; accordingly, the firm can raise prices at will. Whereas a firm in the opposite situation—in other words, with a lower market share, strong buyers and low barriers to entry—will have a high elasticity of demand and therefore cannot exercise market power.

Market power is an evil that competition law seeks to prevent by promoting workable competition. The foregoing consideration of economics and competition law might suggest that preventing the abuse of market power is the final, or ultimate, aim of competition. This is not the case, however, as will be discussed in Part III below.¹⁴⁶

III. THE AIMS OF COMPETITION LAW

*“[A]ll competition decisions are subject to political debate.”*¹⁴⁷

As Bork famously stated, competition law cannot be understood until it is determined, “[w]hat is the point of the law—what are its goals?”¹⁴⁸ In trying to answer that question, a ceaseless argument, “an evergreen ‘old’ debate,”¹⁴⁹ continues to this day. Some scholars suggest that there is now “a rough consensus on certain—but not all—core antitrust principles.”¹⁵⁰

¹⁴⁵ Mark Fursey, *The Role of Competition Policy: A Survey*, 17 EUR. COMPETITION L. REV. 250, 251 (1996).

¹⁴⁶ See *infra* Part III.

¹⁴⁷ Editorial, *War by Competition Policy: The de Havilland Row Is Just a Skirmish in the Battle Between Economic Ideologies*, ECONOMIST, Oct. 12, 1991, at 18.

¹⁴⁸ BORK, *supra* note 39, at 50.

¹⁴⁹ DABBAH, ANTITRUST POLICY, *supra* note 85, at 49.

¹⁵⁰ Shenefield, *supra* note 63, at 402.

However, others argue that there is “no consensus.”¹⁵¹ Accordingly, the “battle for the soul of antitrust”¹⁵² still rages.

In order to understand the competition law of the European Union, a variety of aims of competition law will be considered. First, the aims of competition law across the globe will be briefly dealt with, in order to demonstrate that no consensus has been reached as to the aims of competition law. Second, the consumer welfare aim will be discussed, as this is recognized as the sole aim of U.S. antitrust law,¹⁵³ and scholars on both sides of the Atlantic have gone to great lengths to argue that consumer welfare (or economic efficiency) is the only acceptable goal of competition law.¹⁵⁴ Third, this Article will seek to argue that non-efficiency goals can be incorporated into the aims of competition law. Finally, some of the non-efficiency aims of competition law will be discussed in turn, namely: fairness, freedom, and democracy; the protection of competitors; environmental considerations; employment; and single market integration within the European Union.

A. Global Perspectives on the Aims of Competition Law

From a global perspective, it is arguable that there is no convergence in international competition law. This is because “different systems of competition law protect idiosyncratic aims.”¹⁵⁵ As such, competition law has been used to promote a variety of objectives, including: “regional development, to maintain high employment levels, to protect home industry from foreign ownership or domination so allowing the growth of national champions and to protect industries vital to national military defence.”¹⁵⁶

¹⁵¹ DABBAH, ANTITRUST POLICY, *supra* note 85, at 49.

¹⁵² Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 917 (1987).

¹⁵³ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) (“A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”).

¹⁵⁴ See generally BORK, *supra* note 39; ODUDU, *supra* note 27; POSNER, *supra* note 87; WHISH, *supra* note 24.

¹⁵⁵ Albertina Albors-Llorens, *Competition Policy and the Shaping of the Single Market*, in THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 311, 311 (Catherine Barnard & Joanne Scott eds., 2002).

¹⁵⁶ MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 32–33 (2005).

This can be explained because “competition law is a function of its context.”¹⁵⁷ To put it another way, the aims of competition law are determined by the path dependency of the relevant jurisdiction. Path dependency is defined as meaning “that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it.”¹⁵⁸ As such, history and ideology matter,¹⁵⁹ because when it comes to competition law, “a jurisdiction’s prevailing political mood—informed by history, culture, and its view of others’ success— ... gives specificity to ... policy decisions.”¹⁶⁰ As Furse writes: “Different regimes have emerged at different times and in response to different pressures.”¹⁶¹ For instance, Korean competition law was introduced partly in order to correct distortions that had occurred in the economy “due to the government-led rapid economic growth.”¹⁶²

Owing to the weight of path dependency, it is hardly surprising that there is not a unified global goal for competition law. However, the OECD has noted that “there appears to be a shift away from use of competition laws to promote what might be characterized as broad public interest objectives.”¹⁶³ Arguably, the OECD may be overstating this shift away from public interest objectives and towards consumer welfare. As will be discussed below, European Union competition law recognizes multiple

¹⁵⁷ ELEANOR M. FOX, *THE COMPETITION LAW OF THE EUROPEAN UNION IN COMPARATIVE PERSPECTIVE: CASES AND MATERIALS* 5 (2009).

¹⁵⁸ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001).

¹⁵⁹ See David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT’L L. 161, 171–72 (2009).

¹⁶⁰ Alan Devlin & Michael Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 NW. U. L. REV. 253, 287 (2010).

¹⁶¹ Furse, *supra* note 145, at 254.

¹⁶² Dong Won Suh, *Enforcement Direction of Competition Law*, 4 J. KOREAN L. 29, 34 (2005).

¹⁶³ Organization for Economic Co-operation and Development [OECD], *The Objectives of Competition Law and Policy*, at 3, OECD Doc. CCNM/GF/COMP(2003) (Jan. 29, 2003), available at <http://www.oecd.org/dataoecd/57/39/2486329.pdf> [hereinafter OECD, *Competition Law*]. Amongst “public interest objectives,” the OECD includes:

[T]he promotion of employment, regional development, national champions (sometimes couched in terms such as promoting an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare, poverty alleviation, the spread of ownership stakes of historically disadvantaged persons, security interests and the ‘national’ interest. In addition, a number of domestic competition laws in Europe include the Treaty of Rome objective of market integration within the European Union.

Id. at n.2.

aims,¹⁶⁴ as does the Canadian Competition Act, including the protection of small businesses.¹⁶⁵ Furthermore, even in developed nations, unbridled free-market competition is not necessarily accepted with enthusiasm. As Président Sarkozy of France asked in 2007: “Parce qu’en tant qu’idéologie, que dogme, qu’a donné la concurrence à l’Europe?”¹⁶⁶

It therefore seems that the aims of the world’s various competition laws are diverse and will probably remain so for the foreseeable future. Despite this, there are calls, even demands, for convergence.¹⁶⁷ Competition has been described as the “one area of the law in which we would expect to see pressure toward the creation of a single standard.”¹⁶⁸ This convergence is inevitably considered to be towards the sole consumer welfare standard adopted in the United States, as “advocates of convergence [believe] that jurisdictions should have similar rules and ones that should follow those of the U.S.”¹⁶⁹

From one perspective, it is easy to see why the cheerleaders of convergence aspire to push the rest of the world into following the United States’ consumer welfare example. The sole aim of the consumer welfare standard breeds certainty of outcome. In theory, businesspeople are better able to predict outcomes when dealing with U.S. antitrust than with EU competition law. The uncertainty inherent in EU law “primarily result[s] from uncertainty as to the purpose ascribed to Union competition law.”¹⁷⁰ The U.S. antitrust regime, therefore, is considered superior because outcomes are more predictable and based on economic analysis; as such, firms are better able to plan their future strategies.¹⁷¹ It has been suggested that the United States has the most advanced competition law regime in the world;¹⁷² accordingly, it can therefore be argued that it would be “best practice” to adopt the U.S. consumer welfare approach. Finally, it could be

¹⁶⁴ See *infra* Part IV.A.

¹⁶⁵ Competition Act § 1.1, R.S.C., 1985, c. C-34 (Can.).

¹⁶⁶ CONFÉRENCE DE PRESSE FINALE DE M. NICOLAS SARKOZY, PRÉSIDENT DE LA RÉPUBLIQUE, À L’OCCASION DU CONSEIL EUROPÉEN À BRUXELLES, available at http://www.ambafrance-au.org/IMG/pdf/Conference_de_presse_finale_de_Sarkozy.pdf. (English translation: “Competition as an ideology, as a dogma, what has it done for Europe?”).

¹⁶⁷ See, e.g., ODUDU, *supra* note 27, at 165.

¹⁶⁸ James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 373 (2007).

¹⁶⁹ See Evans, *supra* note 159, at 182.

¹⁷⁰ Okeoghene Odudu, *The Wider Concerns of Competition Law*, 30 OXFORD J. LEGAL STUD. 599, 600 (2010) [hereinafter Odudu, *Wider Concerns*].

¹⁷¹ See Evans, *supra* note 159, at 170–71.

¹⁷² Siddharth Fernandes, *F. Hoffman-LaRoche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 CONN. J. INT’L L. 267, 268 (2005).

argued that the wisdom of adopting a sole consumer welfare goal needs no more evidence than the fact that, in 2007, China—the world’s fastest growing economy¹⁷³—“adopted consumer welfare as [the] goal” of its competition regime.¹⁷⁴

These arguments for convergence towards a consumer welfare standard are perhaps not as strong as they first appear. Although not a result of adopting a consumer welfare standard, the U.S. system of antitrust litigation is arguably fraught with risk and uncertainty. In the end, antitrust cases “are decided by lay jurors” and “the common use of class action lawsuits in the U.S.[] makes antitrust cases highly risky for businesses sued there.”¹⁷⁵ Furthermore, U.S. antitrust law allows for treble damages to be awarded against defendants;¹⁷⁶ this could potentially be an incentive to encourage baseless litigation. While the uncertainties created by issues such as jury trials and class action lawsuits are not because of the adoption of a consumer welfare standard, these issues do serve to illustrate that U.S. antitrust is perhaps not a fount of perfect clarity.

The sole aim of the consumer welfare goal may well be “best practice” in the United States, but that does not necessarily make it so for every jurisdiction. This returns us to the issue of path dependency. A consumer welfare standard is arguably better suited to “America because of its relatively stronger embrace of capitalism, than in Europe, where socialist and ordoliberal thought is much more attractive.”¹⁷⁷ What champions of convergence need to understand is that laws need to suit the societal and cultural norms of their jurisdictions. Transplanting law, or the aims of a law, from one jurisdiction to another and failing to have regard for these societal and cultural norms is likely to be a recipe for failure.

¹⁷³ Press Release, U.N. Secretary General, Hailing China as World’s Fastest Growing Economy, Secretary-General Urges Chinese to Put Greater Emphasis on Social Equity, Environmental Sustainability, U.N. Doc. SG/SM/13219 (Oct. 31, 2010), *available at* <http://www.un.org/News/Press/docs/2010/sgsm13219.doc.htm>.

¹⁷⁴ Evans, *supra* note 159, at 168.

¹⁷⁵ *Id.* at 171.

¹⁷⁶ Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15 (2006)).

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

Id.

¹⁷⁷ Devlin & Jacobs, *supra* note 160, at 266.

This continued failure to adopt consumer welfare as the sole aim baffles convergence advocates.¹⁷⁸ In their article *Antitrust Divergence and the Limits of Economics*, Devlin and Jacobs suggest that: firstly, the EU has adopted the sole consumer welfare standard;¹⁷⁹ secondly, “European competition law does not fully understand” business practices;¹⁸⁰ and finally, “a transatlantic chasm ... frustrates efforts to attain international harmonization”¹⁸¹ (that is, convergence towards the sole aim of consumer welfare).

Devlin and Jacobs’ first claim that the EU has adopted the sole aim of consumer welfare can best be described as wishful thinking by those looking to find evidence of convergence. Although the European Commission has made statements to that effect,¹⁸² the European Court of Justice explicitly rejected that idea in *GlaxoSmithKline v. Commission*.¹⁸³ The second and third statements are perhaps informed by the belief that, if competition law does not serve the same masters as U.S. law, it is fundamentally defective.

This Article seeks to demonstrate that, from a global perspective, competition law pursues a myriad of aims and there is no sign of convergence. Shenefield has stated that convergence “can never happen; it will never happen; and even if it could happen, it would in all probability be a bad thing.”¹⁸⁴ This is because competition law must “reflect[] the current inherent socio-economic and cultural values” of their jurisdiction.¹⁸⁵ As hard as that might be for convergence advocates to appreciate, jurisdictions “should not be subject to criticism in comparison with the competition laws of countries with different values.”¹⁸⁶ What this means is that competition regimes can adopt multiple aims, which do not have to be related to economic efficiency. However, as consumer welfare is perhaps the most prominent goal in competition law, it will be discussed next.

¹⁷⁸ *Id.* at 266–67.

¹⁷⁹ *Id.* at 266.

¹⁸⁰ *Id.* at 288.

¹⁸¹ *Id.* at 254.

¹⁸² See, e.g., Commission Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, ¶ 13 [hereinafter Article 81(3) Guidelines].

¹⁸³ Joined Cases C-501, C-513, C-515 & C-519/06 P, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2009 E.C.R. I-9291, ¶ 63 [hereinafter *GlaxoSmithKline* (ECJ)] will be used in order to distinguish this judgment from the CFI judgment: Case T-168/01, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2006 E.C.R. II-2981].

¹⁸⁴ Shenefield, *supra* note 63, at 388.

¹⁸⁵ Katri Paas-Mohando, *Fairness Principle in the Competition Laws of Some Asian Countries*, 31 EUR. COMPETITION L. REV. 466, 469 (2010).

¹⁸⁶ *Id.*

B. The Consumer Welfare Standard

Despite it being clear that consumer welfare has not been universally accepted as the sole goal of antitrust, consumer welfare is an important goal (or the sole goal) of many competition regimes, including the United States and the European Union.¹⁸⁷ The significance of consumer welfare can therefore not be overstated, particularly when it is recognized as the sole goal of U.S. law and a goal of EU law, and these jurisdictions have “the most comprehensive and aggressively enforced antitrust laws in the world.”¹⁸⁸

In a sense, consumer welfare is just a short hand for economic efficiency, although it is a form seeking to maximize economic efficiency that prefers the consumer to the producer.¹⁸⁹ However, in the end, “maximising consumer welfare and maximising social welfare give the same result.”¹⁹⁰ Bork defines consumer welfare as being “another term for the wealth of the nation.”¹⁹¹ For those who subscribe wholeheartedly to the consumer welfare goal, the promotion of economic efficiency is “the only goal of antitrust law.”¹⁹²

The general benefit that is accrued from having consumer welfare as the aim of competition law is that the consumer welfare standard “is the best guarantee for consumers to be able to buy good quality products at the lowest possible prices.”¹⁹³ As consumer welfare reduces prices and improves product quality, this has led to suggestions that the consumer welfare aim benefits the poorest members of society: “[I]t is notable that antitrust enforcement generally serves to help those at the low end of the income distribution range without decreasing efficiency.... [P]rices will be made lower in this market so that for any given income, however low, a larger basket of goods and services can be purchased.”¹⁹⁴ As mentioned previously,¹⁹⁵ consumer welfare is also believed to contribute to certainty of outcomes. This is because the consumer welfare standard is based on

¹⁸⁷ Kenneth J. Hamner, *The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China*, 11 *J. TRANSNAT'L L. & POL'Y* 385, 389–90 (2002).

¹⁸⁸ *Id.* at 386.

¹⁸⁹ *See supra* Part II.A.

¹⁹⁰ BISHOP & WALKER, *supra* note 29, at 30.

¹⁹¹ BORK, *supra* note 39, at 90.

¹⁹² POSNER, *supra* note 87, at 2.

¹⁹³ *Green Paper on Vertical Restraints*, *supra* note 74, at ¶ 54.

¹⁹⁴ Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 *U. PA. L. REV.* 1191, 1194–95 (1977).

¹⁹⁵ *See supra* notes 169–74 and accompanying text.

economic analysis, unlike “nebulous social goals,”¹⁹⁶ meaning that businesspeople can better determine if their firms are involved in activities that competition authorities are likely to consider anticompetitive.¹⁹⁷

Therefore, there are benefits to adopting the consumer welfare standard. As such, it is worthwhile considering why consumer welfare was initially adopted in the United States; after all, consumer welfare was not the original goal of U.S. antitrust law.¹⁹⁸ Consumer welfare advocates argue that consumer welfare is a better aim for competition law than other goals because the consumer welfare standard produces results based on economic analysis,¹⁹⁹ whereas the other potential aims of competition law are liable to be influenced by changing political considerations.²⁰⁰

However, the consumer welfare standard was the product of political ideology.²⁰¹ The Sherman Act never specified what the aims of America’s antitrust regime should be.²⁰² Accordingly, it fell to the courts to decide those aims, and the courts settled on adopting an economic approach to antitrust.²⁰³ An economic approach does not instinctively make consumer welfare a value-free approach to enforcing competition law. The adoption of consumer welfare, it is argued by Hughes, was the specific intent of the Reagan Administration, which

pluck[ed] from academia many of the most articulate spokesmen for the Chicago School approach and install[ed] them on the courts of appeals. The new judges, including Bork on the Court of Appeals for the District of Columbia and Richard Posner and Frank Easterbrook on the Seventh Circuit, began to write opinions reflecting the Chicago approach, including the view that consumer welfare should be the exclusive focus of the law.²⁰⁴

Therefore, the consumer welfare standard is not a value-free approach; while its reliance on economic analysis potentially might produce greater certainty, the consumer welfare approach is an approach driven by those who believe in the self-correcting abilities of the free-market. As

¹⁹⁶ Furse, *supra* note 145, at 258.

¹⁹⁷ *Id.*

¹⁹⁸ *See, e.g.,* United States v. Aluminum Co. of Am., 148 F.2d 416, 428–29 (2d Cir. 1945).

¹⁹⁹ BORK, *supra* note 39, at 91.

²⁰⁰ *See, e.g.,* Furse, *supra* note 145, at 256.

²⁰¹ BORK, *supra* note 39, at 84.

²⁰² *See* POSNER, *supra* note 87, at 34–35.

²⁰³ *Id.* at 35.

²⁰⁴ Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265, 272 (1994).

such, the consumer welfare standard is more likely to reward or exempt behavior of which its creators approve. For instance, the Chicago School applauds potentially “morally repugnant” behavior, such as “an efficient firm using any means at its disposal to drive a less efficient firm out of business.”²⁰⁵ It can therefore be argued that the consumer welfare standard is not an instinctively “better” aim for competition law than any other standard, it simply happens to be the winner of the argument in the United States, and to the victor go the spoils.

Consumer welfare became of increasing significance to the competition law of the European Union/Community from the beginning of the twenty-first century onwards,²⁰⁶ although consumer choice and “consumers’ advantage” were considered decisive by the Commission as far back as 1991.²⁰⁷ The European Commission has made repeated statements to the effect that consumer welfare is now the sole goal of EU competition law.²⁰⁸ However, the European Court of Justice has singularly failed to recognize it as such, most recently in *GlaxoSmithKline v. Commission*:

[I]t must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.²⁰⁹

Further, the Commission may now be backing away from their position of holding up consumer welfare as the sole goal of competition law. The latest Guidelines released by the Commission do not mention either consumer welfare or economic efficiency, and instead the Commission merely states a purpose of “ensur[ing] that effective competition is maintained.”²¹⁰

Consumer welfare is therefore established as a sole goal of competition in the United States, and a goal of competition in the EU, China,²¹¹

²⁰⁵ *Id.* at 287.

²⁰⁶ MONTI, *supra* note 36, at 82–83.

²⁰⁷ *Aerospatiale-Alenia/de Havilland* (Case IV/M.053) Commission Decision 91/619/EEC, 1991 O.J. (L 334) 42, ¶ 69.

²⁰⁸ *Green Paper on Vertical Restraints*, *supra* note 74, at ¶ 54; Article 81(3) Guidelines, *supra* note 182, at ¶ 13.

²⁰⁹ *Joined Cases C-501, C-513, C-515 & C-519/06 P, GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2009 E.C.R. I-9291 at ¶ 63.

²¹⁰ *Commission Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, SEC(2010) 528/2, at ¶ 4.

²¹¹ Evans, *supra* note 159, at 168.

Canada²¹² and Australia²¹³ (to name but a few). Consumer welfare is now so well-established that Whitman has written: “The primacy of consumer economic interest has come to seem so self-evident that it hardly requires any effort at justification.”²¹⁴ Somewhat mockingly, Hughes describes such statements as “a Möbius strip of rationalization” for justifying and defending the consumer welfare standard.²¹⁵

This blinkered assumption of the perfection of the consumer welfare standard does not conceal the fact that criticism can be leveled against it. Consumer welfare artificially divides individuals into two distinct categories: consumers and producers,²¹⁶ but in reality, individuals are both: “When a worker works, he is a producer; when he shops, he is a consumer.”²¹⁷ As such, the consumer and producer distinction is not a clear one, particularly because large public firms “are owned by shareholders,”²¹⁸ therefore the consumer welfare standard may give to the individual when he or she is a consumer, but take away from him or her when the individual is a producer or shareholder. It is because consumer welfare makes this artificial distinction that it fails to appreciate that a sole consumer welfare standard could actually be damaging to individuals. As Motta explains, the consumer welfare standard may benefit the individual when that individual is acting as a consumer but will not produce an overall benefit for the individual:

²¹² Competition Act 1985, § 1.1, R.S.C. 1985, c. C-34 (Can.).

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and *in order to provide consumers with competitive prices and product choices.*

Id. (emphasis added).

²¹³ Shirley Quo, *The Role of Competition Law in Promoting Corporate Social Responsibility: An Australian Perspective*, 31 CO. L. 17, 17 (2010).

²¹⁴ Whitman, *supra* note 168, at 372.

²¹⁵ Hughes, *supra* note 204, at 278.

²¹⁶ See Whitman, *supra* note 168, at 347–48.

²¹⁷ *Id.* at 348.

²¹⁸ BISHOP & WALKER, *supra* note 29, at 29.

[I]n today's advanced economies consumers often own firms (partly or fully), directly or through pension and investment funds. Accordingly, dividends are distributed to a vast number of citizens who would be hurt if profits were reduced. If the adoption of a consumer welfare standard were intended to favour "citizens" as opposed to "firms," it would not be clear that such a goal would be achieved. Second, if one took literally the objective of maximising consumer surplus, this would lead to pricing at marginal costs, with firms exiting the industry in the long-run or having to be subsidised to cover fixed costs Third, and of great importance, lower prices and profits would have the effect of depriving firms from the necessary incentives to innovate, invest, and introduce new products.²¹⁹

As such, there does seem to be a persuasive argument that consumer welfare should not be the be-all and end-all when it comes to competition policy, as it only accounts for benefits to individuals when they are consumers. This issue goes to the heart of the matter that this Article seeks to answer. Consumer welfare needs to be balanced with matters that are also of collective concern to individuals and society as a whole, such as employment or environmental protection.

The consumer welfare standard and economic efficiency have been beneficial in defining the goals of competition law, but, like perfect competition, they remain just theories. Like all theories, consumer welfare does not survive contact with reality. Clearly consumer welfare has an important role to play, but it is neither the "correct" position nor the "last word" in the aims of competition law.²²⁰ If consumer welfare is not balanced against non-efficiency goals in the application of competition law, then the results could well be harmful to society as a whole.

C. Incorporating Non-Efficiency Goals into Competition Law as a General Proposition

The sole consumer welfare standard represents one end of the spectrum regarding the aims of competition law. At the other end of the spectrum is the view "that competition policy is based on multiple values that cannot be reduced to a single economic goal," and that these values must "reflect society's wishes, culture, history, institutions and perception of itself."²²¹ This "multiple values" view of the aims of competition law is a reflection of jurisdictional path dependency; as Townley states: "[L]aw (and more importantly legal interpretation) is founded in country and cul-

²¹⁹ MOTTA, *supra* note 33, at 21.

²²⁰ Shenefield, *supra* note 63, at 403.

²²¹ TOWNLEY, *supra* note 83, at 1.

ture.”²²² Dabbah lists various “social goals or values” including: (1) protecting small businesses, (2) protection of democracy, and (3) market fairness.²²³ This section seeks to demonstrate that a more holistic approach to the aims of competition law, which incorporates non-efficiency goals, is necessary in order for competition law to benefit society.

If it is accepted that competition law should have multiple aims, the question then becomes what aims should be included? Bork writes that competition regimes that include multiple aims are “likely to leave the impression that antitrust is a cornucopia of social values, all of them rather vague and undefined but infinitely attractive.”²²⁴ Dabbah divides the aims of competition law into three general categories: economic goals, social goals, and broader political goals.²²⁵ Although consumer welfare advocates would like to do so, social goals and broader political goals cannot be rendered as automatically inapplicable as concerns of competition law. The aims that should be included in a competition regime arguably need to be determined by each jurisdiction in order to be in keeping with the goals and values of that society. For instance, the European Union has, since its inception, used competition law as a way to prevent distortions in the internal market, in other words, as a means for promoting market integration.²²⁶ As such, there can be no “one size fits all” guide to what aims competition regimes should incorporate. What this Article seeks to argue is that it seems clear that competition law should not merely aim at hitting a consumer welfare target—with the possible exception of the United States, where it appears that consumer welfare has laid down deep jurisprudential and intellectual roots and, accordingly, has become part of that jurisdiction’s path dependency.

There are two arguments against incorporating non-efficiency values into competition. First, values other than efficiency can create uncertain outcomes or “fundamentally alter the final outcome”²²⁷ of an investigation into allegedly anticompetitive conduct. This has previously been discussed.²²⁸ The second issue is whether non-efficiency aims are appropriate to be considered as part of a competition law analysis.²²⁹ Odudu questions

²²² *Id.* at 3.

²²³ DABBAH, *COMPARATIVE COMPETITION*, *supra* note 1, at 41–42.

²²⁴ BORK, *supra* note 39, at 50.

²²⁵ DABBAH, *ANTITRUST POLICY*, *supra* note 85, at 52–53.

²²⁶ Treaty Establishing the European Economic Community, *supra* note 12, at art. 3(f).

²²⁷ TOWNLEY, *supra* note 83, at 3.

²²⁸ *See supra* notes 171–75 and accompanying text.

²²⁹ TOWNLEY, *supra* note 83, at 5.

the legitimacy of incorporating non-efficiency goals into competition law.²³⁰ In Odudu's opinion, using competition law to "coerce virtues"²³¹ is undemocratic because such non-efficiency objectives should "be pursued through democratic, political, legislative routes."²³² In support of his position, Odudu points to the U.S. Supreme Court decision of *National Society of Professional Engineers v. United States*.²³³ In *National Society of Professional Engineers*, Justice Stevens ruled that:

[T]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." ... Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.²³⁴

However, Justice Stevens is misstating the law. The Sherman Act does not list the aims of U.S. antitrust law. The consumer welfare aim was a creation of the courts, who were building on the intellectual foundations provided by Robert Bork.²³⁵ Therefore, Odudu's argument falls short. If Odudu can accept that judges interpret competition statutes (which are silent on the aims of competition law) to make consumer welfare the sole aim of competition law, then there is no reason he cannot accept judges interpreting statutes to give competition laws different aims. This is particularly true of the European Union, as Article 7 TFEU insists that there is "consistency between [the Union's] policies and activities."²³⁶ As such, as is argued in greater detail below,²³⁷ the EU's competition law must consider aims other than consumer welfare. Including aims other than consumer welfare is not a "usurpation of democracy,"²³⁸ but rather, it is an acknowledgement that competition law is part of a broader regulatory framework; as such, competition law needs to work towards the same aims as other laws that govern industrial policy.

Furthermore, Odudu's argument is flawed for two reasons. Firstly, consumer welfare advocates believe that focusing exclusively on consum-

²³⁰ Odudu, *Wider Concerns*, *supra* note 170, at 608.

²³¹ *Id.* at 609.

²³² *Id.* at 608–09.

²³³ *Id.* at 609.

²³⁴ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

²³⁵ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

²³⁶ TFEU, *supra* note 4, at art. 7.

²³⁷ *See infra* Part III.C–H.

²³⁸ Odudu, *Wider Concerns*, *supra* note 170, at 612.

er welfare competition regimes “increase[s] welfare for the society as a whole”²³⁹—in other words, that an efficient market will promote overall welfare. Therefore, consumer welfare advocates assume that by aiming for the goal of maximizing consumer welfare, this will generate non-efficiency benefits, such as consumer protection, promotion of employment, and others. The issue is that consumer welfare alone cannot benefit society as a whole. Despite Kroes’ arguments to the contrary,²⁴⁰ it is irrational to suggest that non-efficiency goals can be incidentally promoted through exclusion. In order to promote the multiple outcomes that benefit society as a whole, all these aims must be considered together in a holistic analysis.

This leads to the second flaw in Odudu’s argument, that such benefits are arguably not “Townley’s values”²⁴¹ but universal values. Although some of Townley’s more extreme examples include using competition law to discourage binge drinking,²⁴² for the most part non-efficiency goals are not extremist viewpoints. For instance, Article 9 TFEU requires that, “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.”²⁴³ Is Odudu suggesting that the majority of citizens in a democracy are opposed to promoting employment or education? This author would submit that the answer is almost certainly not. These are non-efficiency concerns that are arguably valid and widely accepted by members of a democratic society.

In order for competition law to function effectively, it needs to balance broader aims against consumer welfare, otherwise competition law will continue to be “out of whack.”²⁴⁴ To work towards improving society as a whole and raising living standards, competition cannot be “only about the survival of the fittest but also about the protection of the weak and the

²³⁹ Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1509 (1998).

²⁴⁰ Kroes, *supra* note 2, at 1407 (“By stimulating efficiency in production and innovation and allocation of resources, competition in the provision of products and services ensures sustainable economic growth, employment, and economic welfare generally.”).

²⁴¹ Odudu, *Wider Concerns*, *supra* note 170, at 608.

²⁴² See Christopher Townley, *Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer*, 10 CAMBRIDGE Y.B. EUR. LEGAL STUD. 345, 348–49 (2007–2008) [hereinafter Townley, *Reflections of a Community Lawyer*].

²⁴³ TFEU, *supra* note 4, at art. 9.

²⁴⁴ Hughes, *supra* note 204, at 265.

pursuit of important social goals.”²⁴⁵ To balance consumer welfare with other objectives within competition law, this Article proposes a stakeholder theory of competition law. A stakeholder in a business is defined as: “A person who has an interest in a business or enterprise, though not necessarily as an owner.”²⁴⁶ In terms of a stakeholder theory of competition law, this would involve encompassing multiple aims that take into consideration the needs of businesses, employees, and the concerns of society as a whole (for example, environmental protection, et cetera). Accordingly, the aims of competition law should represent a coalition of interests and the involvement of all relevant participants. As Stucke puts it: “[R]ejoice when different stakeholders actively participate in shaping the objectives of competition policy. One does not develop a competition culture by cutting off the debate and entrusting policy to the experts. Such fiat is a recipe for disaster.”²⁴⁷ As such, it seems clear that competition law needs not only a soul, but also a heart. A competition law regime should not function just on the basis of economic analysis, but should also consider virtues that help protect and promote the living standards and quality of life of a jurisdiction’s citizens. Consumer welfare does not go the whole way towards achieving that end; non-efficiency aims must be incorporated.

D. Fairness, Freedom, and Democracy

Fairness, freedom, and the promotion and defense of democracy through competition law can largely be traced back to the German Freiburg School.²⁴⁸ The Freiburg School developed a philosophy “based on the values of personal liberty and equality.”²⁴⁹ From an ordoliberal perspective, “freedom is the ultimate goal” of competition law.²⁵⁰

Freedom is the most fundamental goal of competition law for ordoliberals.²⁵¹ Economic freedom is closely linked with the protection of fairness and democracy because “the protection of individual freedom of action ... restrain[s] undue economic power.”²⁵² By restraining over-

²⁴⁵ Albors-Llorens, *supra* note 155, at 311.

²⁴⁶ BLACK’S LAW DICTIONARY 1534 (9th ed. 2009).

²⁴⁷ Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951, 1008 (2008).

²⁴⁸ See, e.g., ODUDU, *supra* note 27, at 14–17; Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29 OXFORD J. LEGAL STUD. 267, 273 (2009).

²⁴⁹ MONTI, *supra* note 36, at 24.

²⁵⁰ ODUDU, *supra* note 27, at 16.

²⁵¹ *Id.*

²⁵² Akman, *supra* note 248, at 273.

whelming economic power, “individuals are free to participate”²⁵³ in markets and are given ample opportunity to seek their own role in society. Economic freedom was held to be an aim of U.S. antitrust law; in *Northern Pacific Railway Co. v. United States* the Supreme Court stated: “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition.”²⁵⁴

The aim of economic freedom has come in for criticism because, in order to ensure the economic freedom demanded by ordoliberalism, it would require the destruction of all contractual relationships.²⁵⁵ This problem with the economic freedom aim, if taken to its logical extreme, has been highlighted by the U.S. Supreme Court.²⁵⁶ As Justice Brandeis pointed out, “[e]very agreement concerning trade ... restrains. To bind, to restrain, is of their very essence.”²⁵⁷ Accordingly, U.S. antitrust law only prohibits “unreasonable restraint[s] of trade.”²⁵⁸

As such, economic freedom is not without its flaws. If total economic freedom was achieved, it would lead to anarchy in the marketplace; however, freedom does inform the thinking behind the non-efficiency goals of fairness and democracy. Fairness will be considered first. Fairness is linked to freedom since it stems “from our beliefs in free will, responsibility, autonomy, [and] equality.”²⁵⁹ Hughes believes that “fairness is a ratifying process” in that “[t]he competitors who achieve success thereby prove that they deserve it.”²⁶⁰ Fairness requires “firms to behave in a certain way both with respect to customers and to rivals,”²⁶¹ meaning that firms cannot resort to unprincipled tactics in order to compete in the marketplace. The main examples of unfair conduct are predatory pricing and refusal to supply (in some circumstances).

Predatory pricing is when a dominant firm, or group of firms, “reduces prices to a loss-making level” in order to discipline or drive a competitor out of the marketplace.²⁶² Once the competitor has ceased to be a threat,

²⁵³ ODUDU, *supra* note 27, at 14.

²⁵⁴ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

²⁵⁵ BORK, *supra* note 39, at 59; Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 COMMON MKT. L. REV. 973, 978 (1995).

²⁵⁶ *See* *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

²⁵⁷ *Id.*

²⁵⁸ *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 87 (1911).

²⁵⁹ Hughes, *supra* note 204, at 296.

²⁶⁰ *Id.* at 283.

²⁶¹ MOTTA, *supra* note 33, at 24.

²⁶² WHISH, *supra* note 24, at 730; *see, e.g., Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 117 (1986) (“Predatory pricing may be defined as pricing below an appropriate

the dominant firm will then raise prices above competitive levels.²⁶³ Predatory pricing may be unfair to competitors, but arguably promotes consumer welfare by lowering prices: “[C]utting prices in order to increase business often is the very essence of competition.”²⁶⁴ Given the potential benefits of predatory pricing to consumers, both the U.S. Supreme Court²⁶⁵ and the Privy Council (for New Zealand)²⁶⁶ have held that, in order to prove predatory pricing is harmful, evidence must be presented that the dominant firm is capable of recouping the losses incurred through predatory pricing in the long run. However, the ECJ has taken a comparatively harsh view towards identifying conduct as predatory pricing: in *AKZO v. Commission* the Court made clear that firms engaged in predatory pricing would be punished.²⁶⁷ Furthermore, the ECJ does not require proof that the dominant firm is able to recoup its losses in order to prove predatory pricing.²⁶⁸ Predatory pricing can be seen as falling within the consumer welfare paradigm; if predatory pricing successfully forces competitors out of the market, then the remaining firm(s) can raise prices to supra-competitive. However, prohibitions against predatory pricing are more about fairness than consumer welfare. It is unfair to force competitors out of the marketplace by driving them out of business with artificially low prices, therefore denying them their economic freedom to participate in the marketplace.

Refusal to supply is restricted to limited sets of circumstances and, for the most part, contract law does not insist upon “compulsory dealing.”²⁶⁹ One situation where refusal to supply offends principles of fairness, and is therefore prohibited, is refusing to supply an existing customer with a necessary raw material when that customer is also a competitor in a downstream market, and the raw material is necessary to manufacture the downstream product.²⁷⁰ Similarly, an unfair refusal to supply occurs when “a powerful firm permit[s] rivals to compete and prosper ... and then pull[s] the rug out.”²⁷¹ Such a situation occurred in *Aspen Skiing*,²⁷² where

measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.”).

²⁶³ See WHISH, *supra* note 24, at 730.

²⁶⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

²⁶⁵ See, e.g., *Pac. Bell Tel. Co. v. Linkline Commc’n, Inc.*, 555 U.S. 438 (2009).

²⁶⁶ See, e.g., *Carter Holt Harvey Bldg. Prod. Grp. Ltd. v. The Commerce Comm’n* [2004] UKPC 37, ¶ 67.

²⁶⁷ Case C-62/86, *AKZO Chemie BV v. Comm’n*, 1991 E.C.R. I-3359, ¶¶ 70–72.

²⁶⁸ Case C-202/07 P, *Fr. Telecom SA v. Comm’n*, 2009 E.C.R. I-2369, ¶ 110.

²⁶⁹ WHISH, *supra* note 24, at 688.

²⁷⁰ See *Joined Cases 6 & 7/73, Commercial Solvents v. Comm’n*, 1974 E.C.R. 225.

²⁷¹ *Hughes*, *supra* note 204, at 300.

the dominant firm originally allowed its competitor (both firms operated ski facilities in the same region) to engage in a joint marketing scheme and a ticketing system where customers could buy passes that could be used at either facility. However, when the competitor started prospering, the dominant firm cancelled the agreement.²⁷³ Like predatory pricing, these instances of refusal to supply demonstrate when competition law takes fairness into account—when conduct crosses a line and ceases to be rigorous competition and instead becomes abusive. This unfair behavior impinges upon the economic freedom of individuals by not giving that individual a reasonable opportunity to function in the marketplace. The individual's economic freedom is crushed by more powerful, or dominant, actors. This crushing of individual economic freedom damages not only the individual concerned, but also the relevant market, and society as a whole.

The abuse of dominance is most clearly seen (from an economic freedom perspective) by the use of competition laws to protect democracy itself. Judge Learned Hand called “great industrial consolidations ... inherently undesirable.”²⁷⁴ This is because great economic power, when linked with “anti-competitive conduct ... is incompatible with democracy.”²⁷⁵ For instance, following World War II, the United States introduced competition laws into Germany and Japan in order to “diffuse centers of power” that might otherwise “be marshalled behind [resurgent] authoritarian regimes.”²⁷⁶ This comes from a general fear that freedom and democracy are “put at risk when a few citizens and groups dominate a large share of resources.”²⁷⁷ An example of such economic power influencing political decisions is found in modern-day Hong Kong, where business interests have used their influence to ensure that the Hong Kong government opposes “domestic or international legislation on competition.”²⁷⁸ Wilkinson and Pickett note that:

²⁷² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

²⁷³ *Id.*

²⁷⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

²⁷⁵ ODUDU, *supra* note 27, at 16.

²⁷⁶ David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 812 (1989).

²⁷⁷ MOTTA, *supra* note 33, at 27.

²⁷⁸ WILLIAMS, *supra* note 156, at 32.

[H]alf of the world's largest economies are multinationals, and that General Motors is bigger than Denmark, that DaimlerChrysler is bigger than Poland; Royal Dutch/Shell bigger than Venezuela, and Sony bigger than Pakistan. Like the aristocratic ownership of huge tracts of land, which in 1791 Tom Paine attacked in his *The Rights of Man*, these productive assets remain effectively in the hands of a very few, very rich people, and make our claims to real democracy look pretty thin.²⁷⁹

It is clear that competition law can play a much wider role than mere economic efficiency, particularly given the immense economic clout wielded by multinational corporations. Competition law can be used to safeguard our rights to engage in economic activity and our system of government.

E. The Protection of Competitors

Using competition law to protect competitors fits in well with ordoliberal thought, as protecting competitors is arguably a method to prevent dominant firms from wielding too much power and potentially limiting the economic freedom of other actors. Motta states that the defense of small firms is “one of the main reasons behind the adoption of competition laws.”²⁸⁰ In line with an ordoliberal justification for the protection of competitors, the U.S. Supreme Court ruled:

[I]t is not for the real prosperity of any country that ... changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.²⁸¹

The protection of competitors is also in keeping with the SCP framework.²⁸² By protecting competitors, the structure of the market is protected, thus preventing a firm from achieving a dominant position. For instance, in *Brown Shoe Co. v. United States*, the U.S. Supreme Court stated that the role of U.S. antitrust law was the “protection of competition, not competitors.”²⁸³ However, in the Supreme Court's opinion, the

²⁷⁹ RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 244 (Bloomsbury Press 2010) (footnote omitted).

²⁸⁰ MOTTA, *supra* note 33, at 22.

²⁸¹ *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 324 (1897).

²⁸² *See supra* notes 117–21 and accompanying text.

²⁸³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

best way “to promote competition [is] through the protection of viable, small, locally owned businesses.”²⁸⁴ *Brown Shoe* was one of many cases during the 1960s in which the Warren Court protected small firms in order to protect the competitive process.²⁸⁵ It is because of this that the argument has been advanced that protecting competitors is the same as protecting competition itself, as “an effort to protect competitors includes protecting competition”²⁸⁶—after all, “competition requires competitors.”²⁸⁷ The ECJ has also noted that it is sometimes difficult to separate the protection of competitors “from the maintenance of an effective competitive structure.”²⁸⁸

In addition to protecting the structure of the market, other benefits that potentially accrue from the protection of competitors are innovation and promotion of local businesses.²⁸⁹ According to Motta: “The European Commission seems to have taken the view that small and medium sized enterprises (SMEs) are more dynamic, more likely to innovate and more likely to create employment than large firms. This would be an additional argument to promote SMEs. However, the empirical evidence is quite ambiguous.”²⁹⁰ The possibility of smaller competitors being more innovative is an economic efficiency goal, whereas the promotion of competitors to protect local firms is a non-efficiency goal. There is a current of thought that local businesses, being part of the local community, will be more likely to serve broader goals, such as promoting a high level of employment.²⁹¹ As Justice Douglas memorably stated in defense of localism: “Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship.”²⁹² An example of the protection of local firms from the encroachment of larger national or multinational competitors is the French “zone de chalandise,” the purpose of

²⁸⁴ *Id.* at 344.

²⁸⁵ See Stefan Schmitz, *The European Commission’s Decision in GE/Honeywell and the Question of the Goals of Antitrust Law*, 23 U. PA. J. INT’L ECON. L. 539, 546–47 (2002).

²⁸⁶ DABBAH, *COMPARATIVE COMPETITION*, *supra* note 1, at 60.

²⁸⁷ Shirley Quo & Rodney Con Foo, *Competition Law, CSR and Small Business*, 31 CO. L. 402, 405 (2010).

²⁸⁸ Case C-481/01 P(R), *NDC Health Corp. v. Comm’n*, 2002 E.C.R. I-3401, ¶ 84.

²⁸⁹ MOTTA, *supra* note 33, at 22.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 541–42 (1973).

which is “to guarantee that small butchers and bakers will not face ruinous competition from large-square-footage stores.”²⁹³

Despite these potential benefits flowing from the protection of competitors, this aim faces considerable criticisms.²⁹⁴ Williams describes the protection of competitors as a “political slogan” in defense of the “little guy,” “but bad economics.”²⁹⁵ The main criticism of the protection of competitors is that, as an aim, it is not economically efficient.²⁹⁶ Protecting smaller firms leads to inefficient allocation of resources and undermines the competitive process; by shielding smaller firms from their larger and more successful rivals, large firms are denied their “economies of scale in a market” which allow these large firms the ability to compete in the most effective manner.²⁹⁷ A non-efficiency criticism of the protection of competitors is somewhat darker in its nature; essentially, that the protection of small firms finds its roots in anti-Semitic opposition to Jewish owned chain-stores in pre-World War II Europe.²⁹⁸ Despite the inevitable criticism that the protection of competitors is not economically efficient, arguments could be advanced that small, locally-owned businesses are as important to a society’s well-being as vast multi-national conglomerates. Given that smaller firms are likely to be more fragile than large competitors, there is an argument to be made that SMEs deserve a special measure of protection.

F. Protecting the Environment through Competition Law

Despite not being economically efficient, the aims of economic freedom and the protection of competitors are established goals of competition law regimes.²⁹⁹ Using competition law for environmental concerns is a relatively new concept. Environmental concerns have been used by the European Commission to permit conduct that would otherwise have been considered anticompetitive.³⁰⁰ The Commission has not directly stated that environmental concerns are enough to trump competition; the closest the Commission has come to this is allowing an agreement on the basis that it

²⁹³ Whitman, *supra* note 168, at 388–89.

²⁹⁴ WILLIAMS, *supra* note 156, at 32.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ MOTTA, *supra* note 33, at 25–26.

²⁹⁸ See Whitman, *supra* note 168, at 358–59.

²⁹⁹ See WILLIAMS, *supra* note 156, at 32.

³⁰⁰ *DSD* (Case COMP/34.493) Commission Decision 2001/837/EC, 2001 O.J. (L 319) 1, ¶¶ 142–44.

“gives direct practical effect to environmental objectives.”³⁰¹ However, the Commission has primarily sought to justify the inclusion of environmental concerns on the basis of “economic progress”³⁰² or economic efficiency.³⁰³ Thus, the Commission is attempting to subsume environmental issues into the consumer welfare standard. For instance, in the *Philips-Osram* decision, the Commission noted that a reduction in air pollution created “direct and indirect benefits for consumers.”³⁰⁴

Integrating environmental concerns into the consumer welfare standard can be justified because “consumers do not properly take into account all the externalities involved in their purchase and consumption decisions.”³⁰⁵ This stance was specifically taken by the Commission in *CECED*.³⁰⁶ Essentially, the Commission has directly equated environmental concerns with economic efficiency.³⁰⁷ Monti describes this method of analysis as “remarkable.”³⁰⁸ From a consumer welfare perspective, it is hard to understand why consumer choice should be limited because of environmental concerns; a purist of the Chicago School would not approve. Of course, from a total or social welfare perspective, the *Philips-Osram*, *CECED*, and *DSD* decisions could be justified because, in the long run, society as a whole reduces costs by preventing environmental damage (rather than paying to repair it). However, this author would submit that environmental protection is just another public policy, or non-efficiency, aim for competition law. The Commission should seek to clarify its position, and state that it does consider non-efficiency aims, such as the environment, rather than dishonestly attempting to shoehorn these aims into the consumer welfare standard.

G. Promoting Employment

Promoting a high level of employment is, like environmental protection, a public policy goal that contributes to the total welfare of society. Given that “[c]ompetition ... is not an ultimate goal in itself, but rather an instrument to enhance the welfare of people,”³⁰⁹ then arguably one of the

³⁰¹ *Id.* ¶ 144.

³⁰² *Id.* ¶ 146.

³⁰³ Case IV.F.1/36.718, *CECED*, 2000/475/EC, 2000 O.J. (L 187) 47, ¶ 48.

³⁰⁴ Case IV/34.252, *Phillips Osram*, 94/986/EC, 1994 O.J. (L 378) 37, ¶ 27.

³⁰⁵ MOTTA, *supra* note 33, at 28.

³⁰⁶ Case IV.F.1/36.718, *CECED*, ¶ 62.

³⁰⁷ Giorgio Monti, *Article 81 EC and Public Policy*, 39 COMMON MKT. L. REV. 1057, 1074 (2002) [hereinafter Monti, *Public Policy*].

³⁰⁸ *Id.* at 1074.

³⁰⁹ DABBAH, *ANTITRUST POLICY*, *supra* note 85, at 28.

most important roles for competition law should be promoting and sustaining a high level of employment. Without discussing the importance given to employment (or the environment for that matter) under the TFEU, which will be discussed below,³¹⁰ there are compelling reasons for accepting the consideration of employment in competition law analysis. If competition law benefits the individual as a consumer, should it not also seek to benefit the individual when he or she is functioning as a producer?

The Commission and the European courts have considered employment issues to be a valid part of competition law analysis, even if this is not always clear.³¹¹ In *Ford/Volkswagen* the Commission noted that a joint venture would create “about 5,000 jobs and indirectly create up to another 10,000 jobs.”³¹² However, the Commission then went on to state that this was not “enough to make an exemption possible.”³¹³ The Court of First Instance confirmed that the Commission had only considered the employment benefits of the Ford and Volkswagen joint venture “supererogatorily,” and that “the operative part of the decision adopted would have been exactly the same” regardless of the jobs created.³¹⁴ Both European institutions insist that job creation was purely incidental to the Commission’s decision.³¹⁵ However, Monti states that “many are persuaded that the agreement’s impact on employment was a relevant factor.”³¹⁶ Arguably, it is strange to state in a Commission decision that an agreement will lead to job creation, and then go on to state that such a benefit is irrelevant to the analysis.

Although *Ford/Volkswagen* might arguably be the most opaque decision in terms of the incorporation of employment considerations into competition law, other European decisions have barely been clearer. For instance, in the *Synthetic Fibres*³¹⁷ and *Stichting Baksteen*³¹⁸ decisions, the Commission noted that the parties to the agreement would “endeavour, as far as possible, to secure the retraining and redeployment of any labour

³¹⁰ See *infra* Part IV.A.

³¹¹ See, e.g., *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC, 1993 (L 20) 14, ¶¶ 18, 36.

³¹² *Id.* ¶ 36.

³¹³ *Id.*

³¹⁴ Case T-17/93, *Matra Hachette SA v. Comm’n*, 1994 E.C.R. II-00595, ¶ 139.

³¹⁵ See *Ford/Volkswagen*, 1993 (L 20) 14, ¶ 36.

³¹⁶ MONTI, *supra* note 36, at 97.

³¹⁷ See Commission Decision *Synthetic Fibres* (Case IV/30.810) 1984 O.J. (L 207) 17.

³¹⁸ Commission Decision 94/296/EC of 29 April 1994 Relating to a Proceeding Under Article 85 of the EC Treaty (IV/34.456-*Stichting Baksteen*), 1994 O.J. (L 131) 15, ¶¶ 27, 28 [hereinafter *Stichting Baksteen*].

displaced in the process of restructuring.”³¹⁹ These decisions suggest that, “the agreements might not have been approved” without “measures designed to soften the blow on employment;” however, this is not forthrightly stated.³²⁰ In *Metro-SB-Grossmärkte v. Commission*, the ECJ held that “the provision of employment” was one of the factors that “may” be considered under Article 101(3),³²¹ meaning that an agreement which is considered anticompetitive under Article 101(1) may be exempted under 101(3) if it has a beneficial impact upon employment. The problem with this holding is the use of the word “may.” “May” does not provide clear guidance; it suggests only that it is a factor that *might* be used, meaning that employment resides in a grey area being neither excluded nor required for consideration. This sort of jurisprudence provides neither clarity nor guidance. Of course, as this Article argues below, employment must now be considered under the TFEU.³²²

The impact of firm conduct upon employment has only produced a limited impression in the United States; perhaps because “labor rights plays a far more central role in Europe than in the United States.”³²³ The one area where employment and labor laws meet with competition laws, and “trump the competition law ones,” are collective agreements.³²⁴ The U.S. Supreme Court,³²⁵ the ECJ,³²⁶ and the Chancery Division of the High Court of England and Wales³²⁷ have all held that collective bargaining arrangements are excluded from competition law. In all the cases cited, much the same reasoning was given for excluding collective bargaining from the remit of competition law, namely, that allowing competition law to intrude into collective bargaining would significantly undermine labor rights.³²⁸ On the basis of decisions like *Ford/Volkswagen* and the *Metro-SB-Grossmärkte* judgment, it seems that employment considerations have

³¹⁹ *Synthetic Fibres*, *supra* note 317, ¶ 18; *see also Stichting Baksteen*, *supra* note 318, ¶ 12.

³²⁰ MONTI, *supra* note 36, at 97.

³²¹ Case 26/76, *Metro-SB-Grossmärkte GmbH & Co KG v. Comm'n*, 1977 E.C.R. 1875, ¶ 43.

³²² *See infra* notes 323–29 and accompanying text.

³²³ Whitman, *supra* note 168, at 395.

³²⁴ TOWNLEY, *supra* note 83, at 60.

³²⁵ *See Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

³²⁶ *See Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 1999 E.C.R. I-5863, ¶¶ 55–56.

³²⁷ *See Reynolds v. Shipping Fed'n* [1924] 1 Ch. 28, 39 (Eng.).

³²⁸ *Connell Const. Co., Inc.*, 421 U.S. at 622; *Albany Int'l*, 1999 E.C.R. I-5863, ¶ 59; *see also Reynolds* [1924] 1 Ch at 39.

only entered into competition law analysis at the European Union level, making employment an almost unique consideration to the EU, although Furse states that increasing employment was the original reason behind the UK's competition law.³²⁹ It is now time to move on from an almost unique consideration of the EU, to the unique consideration of the EU, an aim that has truly been the guiding light for EU competition law.

H. The Role of Competition Law in the Single Market Integration of the European Union

Competition law has been described as “central to the integration project,”³³⁰ as the European Union has “a fixation on the creation of a single EU-wide market.”³³¹ Given the structure of the various treaties, it was arguably inevitable that competition law would be imbued with this unique mandate.³³² As such, in market integration, EU competition law has a goal that takes “priority over economic efficiency.”³³³

However, Odudu argues that single market integration is an efficiency goal:

A driver for market integration is the realization that firms in isolated markets, which concentrate solely on satisfying the demand of their home market, cannot exploit efficiency advantages because the minimum efficient scale may greatly exceed national demand. In a larger, integrated market, firms have the ability and incentive to specialize, improve their technical efficiency, and exploit economies of scale and other cost advantages.³³⁴

This is perhaps true, but if so it is an unintended consequence of the single market integration goal, rather than the underlying reason for market integration. Albers-Llorens better explains why the EU has relied on competition law to integrate the single market:

³²⁹ Furse, *supra* note 145, at 254.

³³⁰ DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 385 (1st ed. 1998).

³³¹ WILLIAMS, *supra* note 156, at 31.

³³² See Albers-Llorens, *supra* note 155, at 329.

³³³ MONTI, *supra* note 36, at 51.

³³⁴ ODUDU, *supra* note 27, at 13.

The EC Treaty provisions on free movement of goods, persons and services are primarily concerned with the removal of barriers that Member States might put in place to compartmentalise the territory of the Common Market along national lines. The removal of these barriers, however, does not suffice to achieve a unified market. In particular, private parties could carry out anti-competitive practices and Member States could give artificial competitive advantages to ailing national industries or prevent the liberalisation of markets traditionally subject to state monopolies. All these activities could effectively divide the Common Market. A system ensuring undistorted competition is, therefore, an essential piece in the single market jigsaw.³³⁵

Albors-Llorens's explanation that competition law was used to promote and protect market integration is amply demonstrated by case law and Commission decisions.³³⁶ *Consten and Grundig v. Commission*³³⁷ and *Italy v. Council* launched the relevant line of case law.³³⁸ These cases were decided on the same day in 1966, and in almost identical language ruled that private firms could not "recreate"³³⁹ or "restore"³⁴⁰ the barriers between Member States that the European Union (in its previous incarnations) had sought to abolish. A long line of case law confirms the importance of market integration in competition law,³⁴¹ as do Commission Decisions³⁴² and Commission Guidelines.³⁴³ As such, the primary significance of market integration in EU competition law cannot be disputed, let alone ignored. There could be an argument for stating that the relatively recent case of *Bayer AG*³⁴⁴ demonstrates that the ECJ is no longer inter-

³³⁵ Albors-Llorens, *supra* note 155, at 311–12.

³³⁶ See, e.g., Case 32/65, *Italy v. Council*, 1966 E.C.R. 389, 408.

³³⁷ See Joined Cases 56 & 58/64, *Consten and Grundig v. Comm'n*, 1966 E.C.R. 299, 340.

³³⁸ *Italy*, 1966 E.C.R. at 405.

³³⁹ *Id.* at 408.

³⁴⁰ *Consten and Grundig*, 1966 E.C.R. at 340.

³⁴¹ Case 48/69, *Imperial Chem. Indus., Ltd. v. Comm'n*, 1972 E.C.R. 619, ¶¶ 115–16; Case 22/78, *Hugin Kassaregister AB v. Comm'n*, 1979 E.C.R. 1869, ¶ 17; Joined Cases 100–103/80, *Musique Diffusion Francaise SA v. Comm'n*, 1983 E.C.R. 1825, ¶ 86; Joined Cases 25 & 26/84, *Ford Werke AG v. Comm'n*, 1985 E.C.R. 2725, ¶ 16; Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff*, 1993 E.C.R. I-5801, ¶ 22; Case T-62/98, *Volkswagen AG v. Comm'n*, 2000 E.C.R. II-2707, ¶ 174.

³⁴² Commission Decision 91/297/EEC, 1991 O.J. (L 152) 1, ¶ 64; Commission Decision 1999/60/EC, 1999 O.J. (L 24) 1, ¶ 128; Commission Decision 2003/382/EC, 2003 O.J. (L 140) 1, ¶ 145.

³⁴³ Commission Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1, ¶ 7 [hereinafter Guidelines on Vertical Restraints].

³⁴⁴ Joined Cases C-2 & C-3/01 P, *Comm'n v. Bayer AG*, 2004 E.C.R. I-64, ¶¶ 100–102.

ested in using competition law to pursue the market integration goal. After all, the ECJ affirmed the CFI's judgment in *Bayer AG v. Commission*.³⁴⁵ In its judgment, the CFI stated: "[I]t is not open to the Commission to attempt to achieve a result, such as the harmonisation of prices in the medicinal products market."³⁴⁶ This statement by the CFI has been taken as evidence of:

[The CFI's] hostility to the Commission's attempt of forcing price harmonisation by using competition law. ... [T]he CFI's pronouncements under Art[icle 101] ... serve as a warning to the Commission against its policy of using competition law as a vehicle for bringing about forced market integration. Whilst the goal of market integration has always been an underlying imperative of [EU] competition law, it seems that this goal is no longer to be blindly pursued at the expense of all other interests.³⁴⁷

Although Dawes' interpretation of the CFI's judgment in *Bayer AG v. Commission* might be correct, to apply the same interpretation to the ECJ's judgment in *Bayer* would be to misread the judgment. The ECJ did not hold that market integration was no longer an objective of competition law, but rather that there had been no violation of competition law because an agreement could not be proved (therefore Article 101 did not apply),³⁴⁸ and, as Bayer was not in a dominant position, Article 102 did not apply.³⁴⁹ As such, there is no logical reading of *Bayer* that would suggest that the ECJ no longer considers market integration a goal of competition law. The aim of single market integration highlights the fact that EU competition law operates in a unique environment, distinct from any other in the world. That being the case, it is now necessary to consider the framework of EU law, of which Article 101 is just a part.

IV. COMPETITION LAW WITHIN AN EU FRAMEWORK

The European Union has been described as "a radical experiment in the creation of open markets"³⁵⁰ and "represents the most advanced form

³⁴⁵ See Case T-41/96, *Bayer AG v. Comm'n*, 2000 E.C.R. II-3383, ¶ 178.

³⁴⁶ *Id.* ¶ 179.

³⁴⁷ Anthony Dawes, *Neither Head Nor Tail: The Confused Application of EC Competition Law to the Pharmaceutical Sector*, 27 EUR. COMPETITION L. REV. 269, 275 (2006) (footnotes omitted).

³⁴⁸ *Bayer AG*, 2000 E.C.R. at ¶¶ 62–63.

³⁴⁹ *Id.* ¶ 70.

³⁵⁰ Kroes, *supra* note 2, at 1402.

of regional social and economic integration”³⁵¹ on the planet. Therefore, the EU can justifiably be described as unique. Such a unique organization perhaps requires a unique competition regime; after all, the European Union’s “structural features are markedly different from the unified single market of the United States.”³⁵² As such, in order to understand what function and role competition law in general, and Article 101 in particular, should play means “putting Article [101] in its [Union] context.”³⁵³ In order to explain the purpose of competition law within an EU framework, the following will be discussed: (1) the Treaty on the Functioning of the European Union, with particular regard to policy-linking clauses; (2) the dispute between the courts and the European Commission over the role of Article 101; and (3) the political dimension of European Commission decision-making.

A. The Treaty on the Functioning of the European Union

The Treaty on the Functioning of the European Union (TFEU) superseded the Treaty establishing the European Community.³⁵⁴ The TFEU came into effect on the 1st December 2009, which was the date the Lisbon Treaty entered into force, following the ratification of the treaty by Ireland and the Czech Republic, the last two Member States to do so.³⁵⁵ This was in accordance with Article 6(2) of the Lisbon Treaty.³⁵⁶ The TFEU is to be read in conjunction with the Treaty on European Union (TEU); both treaties “have the same legal value.”³⁵⁷ The TEU lays out “the mission and values of the European Union,”³⁵⁸ whereas the TFEU is more of a functional document (as the name suggests). From a competition perspective this is significant because the TEU makes no mention of “competition.”³⁵⁹ Among the aims of the EU listed in the TEU is that the Union “shall work

³⁵¹ DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES, INDUSTRIAL RELATIONS IN EUROPE, 38 (2008), available at <http://ec.europa.eu/social/BlobServlet?docId=2535&langId=en>.

³⁵² WILLIAMS, *supra* note 156, at 33.

³⁵³ TOWNLEY, *supra* note 83, at 48.

³⁵⁴ Lisbon Treaty, *supra* note 10, at art. 2(1).

³⁵⁵ *Id.*; see also DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 49 (2d ed. 2010).

³⁵⁶ Lisbon Treaty, *supra* note 10, at art. 6(2) (“This Treaty shall enter into force on 1 January 2009, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.”).

³⁵⁷ TEU, *supra* note 3, at art. 1; TFEU, *supra* note 4, at art. 1(2).

³⁵⁸ CHALMERS, *supra* note 355, at 40.

³⁵⁹ See generally TEU, *supra* note 3.

for the sustainable development of Europe ... aiming at full employment,”³⁶⁰ meaning that promoting a high level of employment is an aim of the EU whereas competition is not. Competition is of course mentioned in the TFEU, but, as is argued below, it does appear that competition has been downgraded following Lisbon.³⁶¹

Before moving on to the impact of Lisbon, it is necessary to consider the structure of the TFEU and the impact this has upon the aims of competition law. Unlike the United States’ Sherman Act, EU competition law is not “stand-alone competition legislation aimed at isolated goals, but ... part of a web of inter-related Treaty articles.”³⁶² This creates the problem of whether the articles of the TFEU relating to competition, Article 101 and Article 102, should be read “in isolation” or in conjunction with the TFEU as a whole.³⁶³ Those who believe in the sole consumer welfare goal for EU competition law must argue that Article 101 should be read in isolation from the rest of the Treaty because the TFEU insists on the inclusion of multiple goals.

The TFEU creates multiple goals, and the potential for conflict between these goals comes “through the hierarchy of its articles and due to the presence of policy-linking clauses.”³⁶⁴ What Townley means by a hierarchy of articles in the Treaties is that not all articles are created equal. The top-level aims of the European Union (including the promotion of a high level of employment) can be found in Article 3 TEU.³⁶⁵ The requirement to promote a high level of employment can also be found in Article 9 TFEU.³⁶⁶ Another Article that would appear to encourage employment to be considered under competition is Article 173(1) TFEU.³⁶⁷ Article 173(1) deals with industrial policy and states that “cooperation between undertakings” is to be encouraged, as is “speeding up the adjustment of industry to structural changes.”³⁶⁸ Although Article 173(3) goes on to state that the Title should not distort competition, it is arguable that 173(1) can be relied upon as a basis for exempting an agreement which might otherwise breach Article 101(3).

³⁶⁰ TEU, *supra* note 3, at art. 3(3).

³⁶¹ See *infra* notes 402–14 and accompanying text.

³⁶² TOWNLEY, *supra* note 83, at 48.

³⁶³ *Id.* at 3.

³⁶⁴ *Id.* at 48.

³⁶⁵ TEU, *supra* note 3, at art. 3.

³⁶⁶ TFEU, *supra* note 4, at art. 9.

³⁶⁷ See *id.* at art. 173(1).

³⁶⁸ *Id.*

Article 173 is a good example of the inherent contradiction within areas of EU policy. Townley points out that, “[t]reaty provisions incorporate conflicting values.”³⁶⁹ Within Article 173 there is a contradiction between 173(1) and 173(3). Article 173(1) calls for a system of “competitiveness” that “encourag[es] an environment favourable to cooperation between undertakings.”³⁷⁰ But 173(3) states that the Article cannot be relied upon to create a “distortion of competition.”³⁷¹ Article 173(3), it should be noted, is also an integration clause: “The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties.”³⁷² Article 173 is arguably a good example of the bizarre way that the EU Treaties deal with conflicting policy goals: giving with one hand and taking away with the other. However, perhaps Article 173 is more useful than it might at first appear. The Article states that the EU’s system of competition should take into account industrial policy and allow a system of competition which permits undertakings to cooperate.³⁷³ However, such cooperation is only to the extent necessary to allow Union industrial policies to be achieved, but cartel-like collusion that damages “competition” will be prohibited.³⁷⁴ Whether this Article’s interpretation of Article 173 is in fact correct will be determined by the European Courts; however, such an interpretation would seem to appropriately balance industrial policy against the potential negative impact on other EU goals.

These potentially diverse and conflicting EU aims must be considered when applying any other article in either the TEU or the TFEU because of policy-linking clauses. These policy-linking clauses, or integration clauses, require that the overriding objectives of the EU are taken into account by the relevant EU institution whenever a decision is made. The overriding objectives of the EU are found in Article 3 of the TEU and are listed in more detail in Title II of Part One of the TFEU.³⁷⁵ The first article in Title II, Article 7, has been described as the “super-integration clause”³⁷⁶ and states: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the

³⁶⁹ TOWNLEY, *supra* note 83, at 52.

³⁷⁰ TFEU, *supra* note 4, at art. 173(1).

³⁷¹ *Id.* at art. 173(3).

³⁷² *Id.*

³⁷³ *Id.* at art. 173(1).

³⁷⁴ *Id.* at art. 173(3).

³⁷⁵ *Id.* at arts. 7–17.

³⁷⁶ Hans Vedder, *The Treaty of Lisbon and European Environmental Law and Policy*, 22 J. ENVTL. L. 285, 289 (2010).

principle of conferral of powers.”³⁷⁷ Article 7 and the remainder of Title II can be seen as the “tool[s] for the achievement of ... Treaty objective[s].”³⁷⁸ What this means is that the integration clauses, as tools to accomplish EU objectives, bind together disparate and seemingly unconnected areas of law and policy and ensure that, as a body, they are pointing towards a common goal. Therefore, when considering the application of Article 101 it is necessary for the Union’s institutions to “take into account requirements linked to the promotion of a high level of employment.”³⁷⁹ Relying on Article 9 to integrate employment concerns into Article 101 is perhaps particularly pertinent at the present moment. As the Commission stated: “[T]he top challenge for the EU today must be to prevent high levels of unemployment, to boost job creation and to pave the way for economic renewal, sustainable recovery and growth. This will only be achieved with stronger cooperation between all stakeholders [and] better policy coordination.”³⁸⁰ By making statements concerning the promotion of employment and policy coordination, this Article suggests that the Commission implicitly recognizes that a concerted effort is called for, and such a concerted effort is precisely why the Treaties include integration clauses.

It should be noted that Article 7 was introduced by the Lisbon amendments, but it is not revolutionary. Article 7 can be seen as a codification and development of ECJ case law.³⁸¹ However, what is not clear is the legal status of integration clauses. As Schumacher asks, are “integration clause[s] merely a political principle or do [they] have legal force?”³⁸² This author would argue that, given the ECJ’s teleological approach to interpreting the Treaties, the integration clauses are not merely policy statements but have legal effect.³⁸³

³⁷⁷ TFEU, *supra* note 4, at art. 7.

³⁷⁸ Toby Schumacher, *The Environmental Protection Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection*, 3 ENVTL. L. REV. 29, 32 (2001).

³⁷⁹ TFEU, *supra* note 4, at art. 9.

³⁸⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - A Shared Commitment for Employment*, at ¶ 1, COM (2009) 257 final (June 3, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0257:EN:NOT>.

³⁸¹ See, e.g., Case C-233/94, *Fed. Republic of Ger. v. Eur. Parl.*, 1997 E.C.R. I-2441, ¶ 48; Case C-379/98, *PreussenElektra AG on the Interpretation of Article 30 of the EC Treaty*, 2001 E.C.R. I-2159, ¶¶ 76–81.

³⁸² Schumacher, *supra* note 378, at 31.

³⁸³ See *infra* notes 421–38 and accompanying text.

As such, it seems clear that owing to the policy-linking clauses, Article 101 “should generally be read so as to incorporate other objectives.”³⁸⁴ However, this is not a universally accepted view: Odudu seeks to argue that policy-linking clauses should not be applied to the competition provisions of the TFEU.³⁸⁵ Odudu’s argument is based on the fact that, as the policy-linking clauses create “a positive legal obligation,” it should be expected that the clauses would “be expressly invoked in the jurisprudence of the Court as justifying consideration of non-efficiency objectives.”³⁸⁶ Odudu goes on to note that, in relation to competition law, the ECJ has singularly failed to do so.³⁸⁷ However, Monti disagrees with Odudu’s assessment, and writes: “[T]he European Court of Justice has regularly held that the competition rules must be read in the context of the wider ambitions of the [Union].”³⁸⁸ The following passages from ECJ judgments support Monti’s statement: “[R]estrictions on competition, that are permitted by the Treaty in certain circumstances because the various aims of the Treaty must be reconciled with one another,”³⁸⁹ and “the aims of the common agricultural policy, whose precedence over the application of the Treaty provisions relating to competition is enshrined in the Treaty itself.”³⁹⁰

Of course, there is an argument to be made that both Odudu and Monti are correct, in that “non-efficiency objectives” and “the wider ambitions of the Union” are not necessarily one and the same.³⁹¹ This author would seek to dispute that statement because the aims of the EU listed in Article 3 TEU would not be considered efficiency goals by those who advocate a consumer welfare/economic efficiency approach to competition law. Therefore, although the wording is different, it is submitted that “non-efficiency objectives” and “the wider ambitions of the Union” can be considered analogous.

As such, it seems clear that the EU competition policy must consider more than just consumer welfare, and that the ECJ has recognized that the structure of the EU’s treaties demands the consideration of goals other than economic efficiency; in short, “competition policy cannot be imple-

³⁸⁴ TOWNLEY, *supra* note 83, at 54.

³⁸⁵ Odudu, *Wider Concerns*, *supra* note 170, at 607.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ Monti, *Public Policy*, *supra* note 307, at 1057.

³⁸⁹ Case 6/72, *Continental Can Co. v. Comm’n*, 1973 E.C.R. 215, 247 ¶ 32.

³⁹⁰ Case C-321/99 P, *Associação dos Refinadores de Açúcar Portugueses (ARAP) v. Comm’n*, 2002 E.C.R. I-4350, ¶ 41.

³⁹¹ See Odudu, *Wider Concerns*, *supra* note 170, at 607.

mented in a vacuum, but must be consistent with the development of the European project.”³⁹² Essentially, within the EU, “competition policy is subservient to other policy objectives.”³⁹³ Part of the beauty of the EU treaties is that, although they list the aims of the European Union, these aims are not ranked at the highest level (despite the hierarchy of articles); this is important as it allows the European Union to achieve the “optimal balance”³⁹⁴ as priorities shift over time. Gerber is arguably wrong to express concern over the reduced rule for single market integration; Gerber states that, with the EU having almost achieved the goal of a single market, competition law “faces fundamental questions about what it is doing and why.”³⁹⁵

So although Gerber is correct in writing: “The creation of the European Economic Community in 1957 began a process of integration in which competition law has played a pivotal role, and that process has, in turn, imbued competition law with roles and influence far beyond those it is likely to have achieved otherwise,”³⁹⁶ that does not mean that single integration is, or has to be, the sole goal of European competition law. The structure of the TFEU allows aims to change over time to achieve what is necessary.³⁹⁷ Now that single market integration is near to completion, that does not mean that EU competition law is adrift without its “lodestar,”³⁹⁸ rather, it means that the EU can now give priority to other objectives. What this Article seeks to argue is that the EU, particularly given the current global economic climate, should now focus on employment issues. This is in order to protect European workers who are potentially under threat of losing their jobs as employers seek to lower costs by “relocat[ing] production to lower-cost regions.”³⁹⁹

However, prior to Lisbon, the suggestion was made that, “[o]nce the internal market aims are fully achieved, EC competition law might become more independent from the other Treaty provisions and therefore less based on principles and more focused on economic analysis.”⁴⁰⁰ Monti suggested that the Commission should either “clarify” or “eliminate” the

³⁹² Monti, *Public Policy*, *supra* note 307, at 1057.

³⁹³ Furse, *supra* note 145, at 255.

³⁹⁴ TOWNLEY, *supra* note 83, at 54.

³⁹⁵ GERBER, *supra* note 330, at 388.

³⁹⁶ *Id.* at 334.

³⁹⁷ See *supra* notes 357–64 and accompanying text.

³⁹⁸ GERBER, *supra* note 330, at 388.

³⁹⁹ Sanford M. Jacoby, *Economic Ideas and the Labor Market: Origins of the Anglo-American Model and Prospects for Global Diffusion*, 25 COMP. LAB. L. & POL’Y J. 43, 72 (2003).

⁴⁰⁰ Albors-Llorens, *supra* note 155, at 331.

role of non-efficiency goals under Article 101.⁴⁰¹ With the ratification of Lisbon, as this Article seeks to demonstrate, non-efficiency goals will continue to be considered in the EU's competition laws and the Commission will have no choice but to continue to consider such goals.

The most dramatic impact that Lisbon has had on competition law is that Article 3(1)(g) EC has no equivalent in the TFEU. Article 3(1)(g) EC stated: "[T]he activities of the Community shall include ... a system ensuring that competition in the internal market is not distorted."⁴⁰² However, Lavrijssen has dismissed the impact of the removal of Article 3(1)(g) EC on the importance of competition law as a Union aim.⁴⁰³ Lavrijssen writes that: "[C]ompetition policy is explicitly mentioned as a Union competence in art. 3(1)(b) TFEU. The latter provision has taken over the function of art. 3(1)(g) EC."⁴⁰⁴ Therefore, Lavrijssen's argument is that competition has not been downgraded as an EU policy. This argument is less than convincing. Article 3(1)(b) TFEU states: "The Union shall have exclusive competence in the following areas: ... the establishing of the competition rules necessary for the functioning of the internal market."⁴⁰⁵ The language used in Article 3(1)(b) suggests a downgrading of competition, in that competition is now only necessary as far as it is "necessary for the functioning of the internal market."⁴⁰⁶ It could be suggested that this is a very different, and far more limited, goal than the Article 3(1)(g) EC goal of ensuring that competition is not distorted.

Essentially, under the TFEU, competition has been downgraded because it is not an aim in itself, but is instead subservient to the "functioning" of the European Union.⁴⁰⁷ According to Graupner, the Commission has dismissed this revision of language, which has downgraded competition as "a storm in a teacup."⁴⁰⁸ However, given that the European Courts "have periodically found it necessary to refer to the [EU]'s objectives specifically,"⁴⁰⁹ it is clearly possible that a change in language could well have an impact upon the role of competition in the EU. For instance, in

⁴⁰¹ Monti, *Public Policy*, *supra* note 307, at 1092.

⁴⁰² Treaty Establishing the European Community art. 3, Nov. 10, 1997, 1997 O.J. (C 340) 3.

⁴⁰³ See Saskia Lavrijssen, *What Role for National Competition Authorities in Protecting Non-Competition Interests After Lisbon?*, 35 EUR. L. REV. 636, 637 (2010).

⁴⁰⁴ *Id.*

⁴⁰⁵ TFEU, *supra* note 4, at art. 3(1)(b).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Francis Graupner, *The Battle Over the Role of European Competition Policy: Now You See It, Now You Don't*, 6 COMPETITION L.J. 89, 99 (2007).

⁴⁰⁹ *Id.* at 96–97.

Eco Swiss China Time, the ECJ felt it necessary to refer to Article 3(1)(g) EC as underpinning what is now Article 101.⁴¹⁰ *Continental Can* went further and described Article 3(1)(g) as “so essential that without it numerous provisions on the treaty would be pointless.”⁴¹¹

It is important to note that another reference to competition as a Union aim is found in Protocol (No. 27), which states: “[T]he internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.”⁴¹² This wording is similar to that of Article 3(1)(g) EC; however, the fact that this wording has been removed from the Treaty itself and placed in a Protocol is indicative of the downgrading of competition as a Union aim, and once again reinforces the fact that the Union Courts are likely to give less weight to competition in the future when competition is balanced against Union aims that feature in Title I, TEU and Title II, TFEU.

In a recent judgment, the ECJ referred to Protocol (No. 27) as an “integral part of the Treaties,”⁴¹³ which indicates that the Union Courts will continue to have regard for the principle that competition should not be distorted. This has been taken as evidence that competition has not been downgraded as a Union aim.⁴¹⁴ Arguably, this reads too much into the judgment. In the case before the ECJ, there was no opposing policy aim which competition needed to be balanced against. Accordingly, competition could be given free rein; the real test to determine the importance of competition in the post-Lisbon Union will come when competition must be weighed against the aims laid out in Title I, TEU and Title II, TFEU.

The other impact of the Lisbon amendments was the expanded role for policy-linking clauses.⁴¹⁵ Most notable was the inclusion of Article 7 TFEU,⁴¹⁶ “which demands consistency between the Community policies

⁴¹⁰ Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int’l NV*, 1999 E.C.R. I-3079, ¶ 36.

⁴¹¹ Case 6/72, *Cont’l Can Co. v. Comm’n*, 1973 E.C.R. 215, ¶ 24.

⁴¹² Protocol (No. 27) to the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 201 [hereinafter Protocol 27].

⁴¹³ Case C-496/09, *Italy v. Comm’n*, (17 November 2011) ¶ 60, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=114584&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=162556>.

⁴¹⁴ Ben Van Rompuy, “*Thanks Nicolas Sarkozy, But No Thanks.*” *CJEU Rules on Status of Protocol on Internal Market and Competition*, KLUWER COMPETITION L. BLOG (Nov. 25, 2011), <http://kluwercompetitionlawblog.com/2011/11/25/%E2%80%9Cthank-s-nicolas-sarkozy-but-no-thanks-%E2%80%9D-cjeu-rules-on-status-of-protocol-on-internal-market-and-competition/>.

⁴¹⁵ See *supra* notes 375–83 and accompanying text.

⁴¹⁶ See *supra* notes 376–79 and accompanying text.

and activities, taking all of the objectives into account.”⁴¹⁷ As such, Lisbon insists upon the recognition of non-efficiency goals in EU competition policy.⁴¹⁸

B. The Dispute between the Courts and the European Commission over the Role of Article 101

Within the European Union, enforcement of competition law is the responsibility of the European Commission, specifically the Directorate General for Competition, whereas the responsibility for determining the ambit of European law falls to the Court of Justice of the European Union.⁴¹⁹ As such, there is the possibility that the Commission and court will clash over the role and function of competition law. This situation is hardly unique. For example, in the United States, the Department of Justice’s Antitrust Division enforces federal antitrust law, and the federal courts rule on challenges to the legality of the Department of Justice’s actions.⁴²⁰ Essentially, it is not uncommon to divide responsibilities for competition law between an administrative agency charged with enforcement and judicial oversight being provided by the relevant courts.

The Commission and courts have come into conflict because the Commission has tried to establish a sole consumer goal for competition law, which is free of political (that is, non-efficiency) considerations.⁴²¹ However, the courts have adopted a teleological approach to interpreting treaty articles.⁴²² Teleological interpretation, or construction, is “[a]n interpretation that looks to the ‘evil’ that the statute is trying to correct (i.e., the statute’s purpose).”⁴²³ Due to this teleological approach, “[t]he ECJ gives the interpretation most likely to further what it considers that provision in its context was aimed to achieve. Often this is very far from a literal interpretation of the Treaty and may even fly in the face of the express language.”⁴²⁴ Examples of the courts using a teleological approach can be

⁴¹⁷ TOWNLEY, *supra* note 83, at 51.

⁴¹⁸ *See id.*

⁴¹⁹ *See* FOX, *supra* note 157, at 11–12; MONTI, *supra* note 36, at 2.

⁴²⁰ *See* Administrative Procedure Act, 5 U.S.C. § 702 (1994); C. PAUL ROGERS, III ET AL., ANTITRUST LAW: POLICY AND PRACTICE 36 (4th ed. 2008).

⁴²¹ *See Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* 1999 O.J. (C 132) 1, ¶ 57 [hereinafter *White Paper on Modernisation*]; Article 81(3) Guidelines, *supra* note 182, at ¶ 13.

⁴²² TOWNLEY, *supra* note 83, at 62.

⁴²³ BLACK’S LAW DICTIONARY 356 (9th ed. 2009).

⁴²⁴ TOWNLEY, *supra* note 83, at 62.

found in *Commission v. Belgium*,⁴²⁵ and *R. (on the application of University of Cambridge) v. HM Treasury*.⁴²⁶ In the specific context of mergers, the ECJ held that an EU Regulation must be interpreted “by reference to its purpose and general structure.”⁴²⁷ As a general proposition, part of the reason behind the adoption of the teleological approach can be found in the different legal cultures of the Member States. Because of differences in language and legal culture between the Member States, “the scope of the provision at issue cannot be appraised solely on the basis of a textual interpretation. Its meaning must therefore be clarified in the light of ... its place in the system of Community law ... and its purpose.”⁴²⁸

This teleological approach clearly has the potential to clash with the Commission’s consumer welfare approach, particularly because under Article 267(a) TFEU the Court of Justice of the European Union has ultimate authority to determine “the interpretation of the Treaties.”⁴²⁹ Using their authority and the teleological approach, the courts have incorporated non-efficiency goals into Article 101 and balanced competition against other Union objectives.⁴³⁰ However, before Lisbon, the Commission’s consumer welfare view seemed to be in the ascendant. Monti commented that, “the future relevance of non-economic public policy considerations is bleak.”⁴³¹ Prior to Lisbon, the Commission published documents stating that the sole goal of competition law is consumer welfare.⁴³² Academics supported the Commission and argued that Article 101 “should be liberated” from non-efficiency goals.⁴³³ Furthermore, in *GlaxoSmithKline Services v. Commission* the Court of First Instance held that “the objective assigned to Art. [101(1) TFEU] ... is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products.”⁴³⁴ The CFI’s *GlaxoSmithKline* judgment finally gave the Commission’s consumer welfare goal

⁴²⁵ Case C-503/99, *Comm’n v. Kingdom of Belg.*, 2002 E.C.R. I-4812, ¶ 53.

⁴²⁶ Case C-380/98, *The Queen v. H.M. Treasury*, 2000 E.C.R. I-8061, ¶ 39.

⁴²⁷ *Joined Cases C-68/94 & C-30/95, French Republic v. Comm’n*, 1998 E.C.R. I-1453, ¶ 168.

⁴²⁸ Case 135/83, *Abels v. Admin. Bd.*, 1985 E.C.R. 479, ¶ 13.

⁴²⁹ TFEU, *supra* note 4, at art. 267(a).

⁴³⁰ TOWNLEY, *supra* note 83, at 68.

⁴³¹ MONTI, *supra* note 36, at 123.

⁴³² *See* Article 81(3) Guidelines, *supra* note 182, ¶ 13; Guidelines on Vertical Restraints, *supra* note 343, at ¶ 7.

⁴³³ ODUDU, *supra* note 27, at 164.

⁴³⁴ Case T-168/01, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2006 E.C.R. II-2981, ¶ 118 [hereinafter *GlaxoSmithKline Services (CFI)*].

an air of legitimacy.⁴³⁵ As Townley noted, there had previously been no basis for the Commission's position:

The Commission has not sought to justify its adoption of a unitary objective on theoretical grounds. Its guidelines claim that they outline the current state of the case law. However, there is general consensus that public policy goals have been considered within Article [101] EC; and the Community Courts' (European Court of Justice (ECJ) and Court of First Instance (CFI)) judgments continue to do so today (as do many of the Commission's own Article [101](3) decisions).⁴³⁶

However, this sole consumer welfare goal of Article 101 was not accepted by the ECJ,⁴³⁷ which leaves the Commission without any legitimacy for its consumer welfare claims. The strengthening of policy-linking clauses and the removal of Article 3(1)(g) EC from the TFEU also further undermine the Commission's ambitions for a sole consumer welfare goal. It is therefore arguably clear that Lisbon tilted the direction of competition law back towards the multiple goals of competition law favored by teleological interpretation. It is equally clear that, in spite of what Evans believes, the courts do not give "the Commission a great deal of deference."⁴³⁸

C. The Political Dimension of European Commission Decision-Making

It therefore seems that the European Commission's efforts to get consumer welfare recognized as the sole goal of Article 101 are faltering, if not entirely failed. However, there is another issue that complicates Commission decision-making; although the Directorate General for Competition investigates firm conduct to determine whether it violates Article 101, the ultimate decision as to whether to permit or prohibit conduct under Article 101 falls to the twenty-seven European Commissioners.⁴³⁹ The College of Commissioners vote collectively on whether to adopt a decision,⁴⁴⁰ and any discussions relating to a Commission decision "shall be confidential."⁴⁴¹ This means the actual reasoning of the Commissioners

⁴³⁵ *Id.*

⁴³⁶ Townley, *Reflections of a Community Lawyer*, *supra* note 242, at 346.

⁴³⁷ See *GlaxoSmithKline* (ECJ), *supra* note 183, at ¶ 63.

⁴³⁸ Evans, *supra* note 159, at 171.

⁴³⁹ TEU, *supra* note 3, at art. 17(4) ("The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State").

⁴⁴⁰ Decision (EU), Rules of Procedure, 2010 O.J. (L 55) 60, art. 8.

⁴⁴¹ *Id.* at art. 9.

remains hidden, as the Commissioners may well adopt “compromise solutions which the text of the decision may fail to reflect.”⁴⁴²

Monti points to the *de Havilland*⁴⁴³ decision to highlight how political considerations come into play when decisions are put before the College of Commissioners, and the impact of personalities upon decision-making.⁴⁴⁴ Monti explains that the *de Havilland* merger was prohibited because the then Commissioner for Competition, Leon Brittan, was a consumer welfare advocate, whereas other Commissioners wanted to approve the merger because of the beneficial non-efficiency effects.⁴⁴⁵

From Monti’s discussion of the decision to prohibit the *de Havilland* merger, it seems obvious that personalities play a part in the enforcement of EU competition law. As such, it is relevant to consider the personality and politics of the Commissioner for Competition. In February 2010, Joaquín Almunia replaced Neelie Kroes as the Commissioner for Competition.⁴⁴⁶ Neelie Kroes, who frequently made statements in support of the sole consumer welfare aim during her tenure as Competition Commissioner,⁴⁴⁷ is a member of the Dutch People’s Party for Freedom and Democracy⁴⁴⁸ which has a conservative-liberal ideology.⁴⁴⁹ This places Kroes on the center-right of the political spectrum, in contrast to her successor, Almunia, who is a member of, and former prime ministerial candidate for, the Partido Socialista Obrero Español (Spanish Socialist Workers Party).⁴⁵⁰ As the name suggests, the Spanish Socialist Workers Party has a

⁴⁴² Monti, *Public Policy*, *supra* note 307, at 1070.

⁴⁴³ *Aerospatale-Alenia/de Havilland* (Case IV/M.053) Commission Decision 91/619/EEC, 1991 O.J. (L 334) 42.

⁴⁴⁴ See MONTI, *supra* note 36, at 8–9.

⁴⁴⁵ *Id.*

⁴⁴⁶ See *European Commission, Vice-President of the European Commission, Joaquin Almunia CV*, EUROPA, http://ec.europa.eu/commission_2010-2014/almunia/about/cv/index_en.htm (last visited Feb. 3, 2012) [hereinafter *Joaquin Almunia CV*].

⁴⁴⁷ See, e.g., Neelie Kroes, Member of the European Commission, Lecture at the European Consumer and Competition Day: European Competition Policy – Delivering Better Markets and Better Choices 2 (Sept. 15, 2005) (Stating: “Consumer welfare is now well established as the standard the Commission applies”), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/512&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁴⁸ *Biography for Neelie Kroes*, SILOBREAKER, http://www.silobreaker.com/biography-for-neelie-kroes-5_2258144848529850368_4 (last visited Feb. 3, 2012).

⁴⁴⁹ *Netherlands*, PARTIES AND ELECTIONS IN EUROPE, <http://www.parties-and-elections.de/netherlands.html> (last visited Feb. 5, 2012).

⁴⁵⁰ See, *Joaquin Almunia CV*, *supra* note 446.

center-left or social-democratic ideology.⁴⁵¹ Given the change in personnel at the Commissioner level, it could be submitted that Almunia may prove to be more receptive to non-efficiency concerns, such as employment, than Kroes. Nevertheless, Kroes remains a Commissioner (now for Digital Agenda and as a Vice President of the Commission⁴⁵²) and a formal Commission decision is reached collectively by the College of Commissioners.⁴⁵³ As such, there is an argument to be made that Almunia becoming Competition Commissioner will not impact the Commission's decisions, as Kroes will still be in a position to influence other Commissioners. Accordingly, the argument would run that Almunia's appointment will not result in a change in the enforcement priorities or aims of EU competition law. However, it is possible that Almunia's influence could result in the Directorate-General for Competition accounting for a broader range of competition goals during their investigations, which would, in turn, present the College with different choices than they would have had when the Competition Commissioner was a consumer welfare purist.

V. BALANCING EMPLOYMENT AND CONSUMER WELFARE UNDER ARTICLE 101—RULE OF REASON OR LEGAL EXCEPTION ANALYSIS?

Now that it has been clarified that consumer welfare should be balanced against other aims as a general principle, and that this is particularly true in the European Union—because of the policy-linking clauses—it needs to be determined where exactly this balancing should take place. Article 101 has a bifurcated structure, meaning that such a balancing test could take place under either Article 101(1), (3), or both.⁴⁵⁴ A conservative interpretation of Article 101 is that Article 101(1) covers the prohibited activity, and the possibility that such activity can be excepted is dealt with in (3). In order to consider whether this conservative interpretation is correct, this Article will examine: the “rule of reason”⁴⁵⁵ approach, whereby a balancing test is conducted within Article 101(1)—the traditional approach of prohibiting under (1) and exempting under (3)—and a balancing approach, which incorporates consideration of pro- and anticompeti-

⁴⁵¹ Spain, PARTIES AND ELECTIONS IN EUROPE, <http://www.parties-and-elections.de/spain.html> (last visited Feb. 5, 2012).

⁴⁵² *European Commission, Vice-President of the European Commission, Neelie Kroes CV*, EUROPA, http://ec.europa.eu/commission_2010-2014/kroes/about/cv/index_en.htm (last visited Feb. 5, 2012).

⁴⁵³ See *supra* notes 440–42.

⁴⁵⁴ TFEU, *supra* note 4, at art. 101.

⁴⁵⁵ Vincent Verouden, *Vertical Agreements and Article 81(1) EC: The Evolving Role of Economic Analysis*, 71 ANTITRUST L.J. 525, 553 (2003).

tive effects under both Article 101(1) and (3). First, rule of reason analysis will be considered, then legal exception analysis, and finally, a bifurcated balancing approach will be examined.

A. Rule of Reason Analysis under Article 101(1)

Adopting a rule of reason approach for balancing is not without controversy. As Callery states: “The existence of a ‘rule of reason’ in EU law has been perhaps *the* most disputed issue in European legal circles.”⁴⁵⁶ In this section, the following will be discussed: the origins of the rule of reason in U.S. antitrust law; the debate over the existence of a European rule of reason; and the ancillary restraints doctrine.

Before considering the origins of the rule of reason, it is necessary to understand what “rule of reason” means. Rule of reason analysis, at least as the term is understood in U.S. antitrust law, is a “freewheeling inquiry”⁴⁵⁷ which allows the courts to consider all the circumstances of an agreement in order to determine if the overall effect of the agreement is procompetitive or anticompetitive. The U.S. Supreme Court has explained the rule of reason as being where “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁴⁵⁸ The rule of reason, therefore, allows a case-by-case analysis of the conduct in question without having to adhere to a strict set of pre-determined rules, which by their nature automatically declare conduct permissible or prohibited without further inquiry (such rules are referred to as “per se” rules⁴⁵⁹).

The rule of reason is generally considered to have arisen in the United States.⁴⁶⁰ This is because if Section 1 of the Sherman Act is read literally, then any and all agreements in restraint of trade would have been declared illegal.⁴⁶¹ The U.S. Supreme Court initially took this approach in *United States v. Trans-Missouri Freight Association*.⁴⁶² Such an approach clearly has the potential to be wildly over-inclusive. An embryonic rule of reason was first espoused in *Standard Oil Co. of New Jersey v. United States* where it was held that the purpose of the Sherman Act “was to prevent

⁴⁵⁶ Craig Callery, *Should the European Union Embrace or Exorcise Leegin’s “Rule of Reason”?*, 32 EUR. COMPETITION L. REV. 42, 42 (2011).

⁴⁵⁷ POSNER, *supra* note 87, at 39.

⁴⁵⁸ *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

⁴⁵⁹ *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 217 (1940).

⁴⁶⁰ MONTI, *supra* note 36, at 29.

⁴⁶¹ Sherman Act of 1890 § 1, 15 U.S.C § 1 (2006).

⁴⁶² *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 340 (1897).

undue restraints” of trade.⁴⁶³ The classic explanation of the rule of reason was given by Justice Brandeis:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.⁴⁶⁴

The rule of reason has since advanced and solidified as the cornerstone of analysis in U.S. antitrust law. The Supreme Court has again and again held that the rule of reason analysis should be employed to determine whether an agreement is anticompetitive,⁴⁶⁵ whereas the importance of inflexible per se rules has declined.⁴⁶⁶

However, Minda suggests that the perceived wisdom that the rule of reason is an American concept is wrong. Minda points to a nineteenth century House of Lords decision as the original rule of reason analysis in competition law.⁴⁶⁷ In *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, Lord Macnaghten held that:

[R]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.⁴⁶⁸

⁴⁶³ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911).

⁴⁶⁴ *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918).

⁴⁶⁵ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 877 (2007); *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 757 (1999); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 447 (1986); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 86 (1984); *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

⁴⁶⁶ See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979).

⁴⁶⁷ See Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461, 492 (1989).

⁴⁶⁸ *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, 565 (appeal taken from C.A.) (Eng.).

This is clearly an articulation of the rule of reason. Given that *Nordenfelt* was decided seventeen years before *Standard Oil*, it can be submitted that it is entirely possible that *Nordenfelt* influenced the Supreme Court's thinking on the application of Section 1 of the Sherman Act, as Minda suggests.⁴⁶⁹ In *United States v. Addyston Pipe & Steel Co.*, the Sixth Circuit Court of Appeals did acknowledge the importance of *Nordenfelt* when determining whether a restraint of trade should be declared illegal.⁴⁷⁰ Regardless of the fact that the rule of reason may have originated on a different side of the Atlantic than is ordinarily supposed, it is clear that the rule of reason constitutes a balancing test: a determination of whether the benefits of the agreement outweigh the anticompetitive parts of the agreement. What is still not entirely clear though is whether a rule of reason exists in European competition law. It should also be noted that the U.S.-style rule of reason goes hand in hand with economic efficiency and consumer welfare, because it only examines "the economic consequences of a challenged agreement."⁴⁷¹ This raises the question of whether such a purely economic efficiency test has a place in European competition law.

There are two aspects to the debate over a rule of reason in EU competition law. First, determining if such a rule of reason actually exists; second, the benefits—or otherwise—of incorporating a rule of reason into Article 101(1). These two aspects will be examined in turn.

When it comes to determining the existence of a rule of reason, the case law is hardly a model of clarity; it is arguable that the case law points in two contradictory directions. In spite of this, this Article will seek to demonstrate that the jurisprudence has incorporated something like a rule of reason into Article 101(1). Accordingly, it is accurate to state that "the rule of reason has not yet crystallized as a valid standard by which to analyze agreements in the European Union."⁴⁷² However, it is not accurate for Reindl to state that the European courts have wholeheartedly rejected the American rule of reason approach and "are settled on this issue."⁴⁷³ This is because, while there is a rule of reason, or something resembling it, existing in European competition law, its scope is vaguely defined. As such, it

⁴⁶⁹ See Minda, *supra* note 467, at 519–20.

⁴⁷⁰ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

⁴⁷¹ POSNER, *supra* note 87, at 38.

⁴⁷² Emmanuel P. Mastromanolis, *Insights From U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law*, 15 U. PA. J. INT'L BUS. L. 559, 625 (1995).

⁴⁷³ Andreas P. Reindl, *Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach*, 33 FORDHAM INT'L L.J. 1300, 1314 (2010).

is ambitious to state that the European rule of reason is categorically not capable of being an economic efficiency test along the lines of the U.S. rule of reason. Although this Article would submit that the EU should not adopt the U.S. rule of reason, it is simply wrong to suggest that this area of law is settled.

The first case in which the ECJ was asked to consider the existence of a rule of reason was *Société Technique Minière v. Maschinenbau Ulm GmbH*, where the Court called for a wide-ranging analysis of the pro- and anticompetitive effects of the agreement in question.⁴⁷⁴ The balancing test called for in *Société Technique Minière* can clearly be seen as a form of rule of reason analysis.⁴⁷⁵ However, only a fortnight later in *Consten & Grundig*, the ECJ held that there would be no rule of reason analysis, “once it appears that [an agreement] has as its object the prevention, restriction or distortion of competition.”⁴⁷⁶ As such, in the course of two weeks in the summer of 1966, the ECJ laid the grounds for the confusion regarding the possibility of rule of reason analysis under Article 101(1), which has now persisted for over fifty years. However, Nazzini argues that the two cases can be reconciled on the basis that *Consten & Grundig* “is confined to agreements having the object of partitioning the common market” (that is, partitioning of the single market is essentially per se prohibited) and *Société Technique Minière* “is of general application.”⁴⁷⁷ This means that the courts should apply a balancing test unless the intention of the agreement undermines the EU’s single-market aim.

In two later decisions of the ECJ, *Metro SB-Grossmärkte*⁴⁷⁸ and *L.C. Nungesser KG v. Commission of the European Communities*,⁴⁷⁹ the Court weighed the negative effects of the agreements in question against their benefits.⁴⁸⁰ The ECJ conducted this analysis under Article 101(1) and

⁴⁷⁴ See Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235, 250.

⁴⁷⁵ See *id.* at 249–50 (noting “the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied” and that “[t]he competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute”).

⁴⁷⁶ Joined Cases 56 & 58/64, *Consten & Grundig v. Comm’n*, 1966 E.C.R. 299, 342.

⁴⁷⁷ Renato Nazzini, *Article 81 EC Between Time Present and Time Past: A Normative Critique of “Restriction of Competition” in EU Law*, 43 COMMON MKT. L. REV. 497, 510 (2006).

⁴⁷⁸ Case 26/76, *Metro SB-Grossmärkte GmbH & Co. KG v. Comm’n*, 1977 E.C.R. 1875.

⁴⁷⁹ Case 258/78, *L.C. Nungesser KG v. Comm’n*, 1982 E.C.R. 2015.

⁴⁸⁰ See *id.* ¶ 33; *Metro SB- Grossmärkte GmbH*, E.C.R. 1875 ¶ 21.

concluded that the agreements were not “prohibit[ed]”⁴⁸¹ or “incompatible”⁴⁸² with 101(1). This developing rule of reason analysis has been described by Verouden as the European courts looking “beyond the negative elements of agreements in their analysis under Article [101(1)] in order to determine the actual economic impact on the market.”⁴⁸³ This rule of reason approach was clarified in *European Night Services v. Commission of the European Communities*, where it was held that, “in assessing an agreement under Article [101(1)] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned.”⁴⁸⁴

Based on the case law examined so far, it would appear that the jurisprudence of the European courts was developing a rule of reason. In 1999, the ECJ took balancing further still by balancing the promotion of a high level of employment against competition, instead of simply weighing pro- and anticompetitive effects within Article 101(1).⁴⁸⁵ In *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie*, the ECJ considered the anticompetitive effects of collective bargaining, and held that such agreements fell “outside the scope of Article [101(1)] of the Treaty.”⁴⁸⁶ Although *Albany International* dealt with an area of law that has historically been excluded from the remit of competition law—collective bargaining—the case does provide a limited foundation for arguing that agreements which have a positive impact on employment levels should not be prohibited under Article 101(1).⁴⁸⁷

However, despite the establishment of a rule of reason analysis by the late twentieth-century, the concept was to come under assault by the Court of First Instance in the twenty-first. In *Métropole Télévision v. Commis-*

⁴⁸¹ See *Metro SB-Grossmärkte GmbH*, 1977 E.C.R. 1875 ¶¶ 20–21.

⁴⁸² See *L.C. Nungesser KG*, 1982 E.C.R. 2015 ¶ 58.

⁴⁸³ Verouden, *supra* note 455, at 553.

⁴⁸⁴ Joined Cases T-374, T-375, T-384 & T-388/94, *Eur. Night Servs. v. Comm’n*, 1998 E.C.R. II-3141, ¶ 136.

⁴⁸⁵ See Case C-67/96, *Albany Int’l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 1999 E.C.R. I-5751, ¶ 54.

⁴⁸⁶ *Id.* ¶ 60.

⁴⁸⁷ See *id.* ¶ 59 (“It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.”).

sion of the European Communities, the CFI stated that, “the existence of a rule of reason in [Union] competition law is doubtful.”⁴⁸⁸ The reasoning of the CFI was largely based on the use of the word “even” by the ECJ in *Montecatini SpA v. Commission of the European Communities*: “[E]ven if the rule of reason did have a place in the context of Article [101(1)] of the Treaty.”⁴⁸⁹ In *Montecatini*, the ECJ essentially stated that a rule of reason analysis was not necessary because the challenged agreement was so clearly anticompetitive.⁴⁹⁰ Given that the proceedings in *Montecatini* did not involve rule of reason analysis, the doubt cast by the use of “even” in this judgment is arguably relatively minimal.⁴⁹¹ This is especially apparent when such doubt is balanced against the clear statements of the requirement of a balancing test in *Metro SB-Grossmärkte* and *European Night Services*.⁴⁹²

Six months later, the ECJ held: “For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects.”⁴⁹³ This is a restatement of the rule of reason, or balancing, test. However, the ECJ went further still. *Wouters* built on *Albany International* by holding that public policy arguments could be used to “trump” competition, thus meaning that any such activities or agreements that promoted public-policy would not infringe Article 101(1).⁴⁹⁴ Monti has described the approach used in *Wouters* as the “European-style rule of reason.”⁴⁹⁵ This European-style rule of reason allows anticompetitive effects to be balanced both against the procompetitive effects of the agreement and “social and political concerns.”⁴⁹⁶ Due to this recognition of a form of rule of reason analysis, “[i]t should now be recognized that *Wouters* has implicitly overruled *Métropole*.”⁴⁹⁷

In spite of *Wouters*, the CFI hardened its stance against the rule of reason. In *Van den Bergh Foods v. Commission of the European Communities*, the CFI stated that, “the Court would point out that the existence of

⁴⁸⁸ Case T-112/99, *Métropole Télévision v. Comm’n*, 2001 E.C.R. II-2459, ¶ 72.

⁴⁸⁹ Case C-235/92 P, *Montecatini SpA v. Comm’n*, 1999 E.C.R. I-4539, ¶ 133.

⁴⁹⁰ *Id.* ¶ 132.

⁴⁹¹ *See id.*

⁴⁹² *See supra* notes 478–84 and accompanying text.

⁴⁹³ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577, ¶ 97.

⁴⁹⁴ *See id.* ¶ 110.

⁴⁹⁵ Monti, *Public Policy*, *supra* note 307, at 1088.

⁴⁹⁶ Callery, *supra* note 456, at 47 (arguing that *Wouters* goes beyond analysis of “pure competition factors” and calls for “consideration of non-competition factors” as well).

⁴⁹⁷ Nazzini, *supra* note 477, at 535.

such a rule in Community competition law is not accepted.”⁴⁹⁸ In *O2 (Germany) GmbH & Co. OHG v. Commission of the European Communities*, the CFI stated that recognition of a rule of reason under Article 101(1) would be “in contradiction to the case-law.”⁴⁹⁹ The CFI’s continued insistence that there is no rule of reason is somewhat bizarre, but is perhaps based on the fact that the cases that lay out a rule of reason do not refer to the form of analysis adopted as a “rule of reason.”⁵⁰⁰ Despite not calling the form of analysis a rule of reason, the approach used is clearly a balancing test, which bears similarities to the freewheeling inquiry of U.S. antitrust. What is particularly interesting is that in *O2 Germany*, the CFI dismissed any suggestions regarding the existence of a rule of reason, before laying out a counterfactual inquiry⁵⁰¹ that seems very similar to the balancing approach required by a rule of reason analysis.⁵⁰² In *Meca-Medina v. Commission of the European Communities*, the ECJ once again reiterated that a balancing test should be conducted under Article 101(1):

⁴⁹⁸ Case T-65/98, *Van den Bergh Foods v. Comm’n*, 2003 E.C.R. II-4653, ¶ 106.

⁴⁹⁹ Case T-328/03, *O2 (Germany) GmbH v. Comm’n*, 2006 E.C.R. II-1231, ¶ 65.

⁵⁰⁰ See *supra* notes 478–99 and accompanying text. The court commonly refers to a need to “examine the economic and legal context in which the agreement was concluded” and “in which the undertakings operate.” *O2 (Germany)*, E.C.R. II-1231 ¶ 66 (citing Case 22/71, *Bèguelin Import v. S.A.G.L. Import Export*, 1971 E.C.R. 949, ¶ 13); Case C-399/93, *H.G. Oude Littikhuis v. Verenigde Coöperatieve Melkindustrie Coberco*, 1995 E.C.R. I-4515, ¶ 10); see also *O2 (Germany)*, E.C.R. II-1231 ¶ 71 (“The examination required in the light of Article [101(1) TFEU] consists essentially in taking account of the impact of the agreement on existing and potential competition and the competition situation in the absence of the agreement, those two factors being intrinsically linked.”) (citing Case C-234/89, *Delimitis v. Henninger Bräu AG*, 1991 E.C.R. I-935, ¶ 21; Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235, 249–50).

⁵⁰¹ *O2 (Germany)*, E.C.R. II-1231, ¶ 71.

⁵⁰² See *Mel Marquis, O2 (Germany) v. Commission and the Exotic Mysteries of Article 81(1) EC*, 32 EUR. L. REV. 29, 45 (2007) (“[T]he CFI seems to be applying the kind of searching inquiry that it applied in *European Night Services*, and it seems to be carrying out an assessment that looks suspiciously like balancing.”).

Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in [Article 101(1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.⁵⁰³

This restatement that a balancing test can be conducted under Article 101(1) might serve to curb the CFI's obsession with denying the existence of such a test. It can therefore be submitted that *Meca-Medina* overrules the denials of a rule of reason in *Van den Bergh Foods* and *O2 Germany*. However, in *Meca-Medina*, the ECJ still did not specifically use the phrase "rule of reason"—indeed the ECJ has used the terminology "rule of reason" only in passing.⁵⁰⁴ This raises the question: what is the appropriate terminology for the balancing test the ECJ is so clearly using?

Whish and Sufrin suggest that the phrase "rule of reason" should not be used in European competition law, because "it invites misleading comparison with antitrust law analysis in the United States."⁵⁰⁵ There is certainly truth in this criticism. The U.S. rule of reason is a balancing test seeking to ensure that consumer welfare will ultimately be benefited by an agreement.⁵⁰⁶ In contrast, the European-style rule of reason is more holistic, as the rule considers not only the pro- and anticompetitive effects of an agreement, but also public policy considerations.⁵⁰⁷ Accordingly, the U.S. rule of reason and the European-style rule of reason are, despite being related, not identical twins. As such, there is certainly an advantage to the

⁵⁰³ Case C-519/04 P, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991, ¶ 42 (citation omitted).

⁵⁰⁴ *See, e.g.*, Joined Cases 56 & 58/64, *Consten & Grundig v. Comm'n*, 1966 E.C.R. 299, 342 (characterizing Grundig's argument as seeking the application of a rule of reason); Case C-235/92 P, *Montecatini SpA v. Comm'n*, 1999 E.C.R. I-4539, ¶ 45 (discussing the CFI's refusal to apply a rule of reason to the case); Case C-552/03 P, *Unilever Bestfoods v. Comm'n*, 2006 E.C.R. I-9091, ¶ 13 (discussing the CFI's rejection of HB's argument for application of a rule of reason).

⁵⁰⁵ Richard Whish & Brenda Sufrin, *Article 85 and the Rule of Reason*, 7 Y.B. EUR. L. 1, 37 (1987).

⁵⁰⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

⁵⁰⁷ *See infra* Part V.B.

ECJ labeling the balancing test they have developed, as this would provide clarity. It can be submitted that the ECJ should take the earliest opportunity to lay down the precise scope of the balancing test that has been developed, and then christen the test. Although this author would prefer terminology other than “rule of reason,” the phrase is not so inaccurate as to be without meaning and will suffice until something more accurate comes along.

Whish also argues against the very existence of a rule of reason, writing that “reasonable judgments” do not make a rule of reason.⁵⁰⁸ This author would have to disagree with Professor Whish on this point. In all its guises, the rule of reason is a balancing test. When a court reasonably takes into account the pro- and anticompetitive effects of an agreement and balances them against one another, then that court is conducting a rule of reason analysis. Therefore, it is arguable that when the courts embark on a counterfactual analysis,⁵⁰⁹ or balance pro- and anticompetitive effects on the basis that the anticompetitive effects are merely “ancillary restraints,”⁵¹⁰ the court is in fact carrying out a form of rule of reason analysis. Despite the ECJ’s reticence to adopt the phrase, the case law goes to show that the rule of reason balancing test smells as sweet by any other name.⁵¹¹

An argument against a rule of reason is that the rule, or any form of balancing test, “imposes a great burden on the judiciary.”⁵¹² It is possible to argue that removing a rule of reason-type balancing test from Article 101(1) would not reduce the burden; any such burden would simply be shifted into Article 101(3). Therefore, removing a rule of reason-type balancing test from Article 101(1) arguably might not streamline cases; instead, parties would try to shoehorn their analysis into the exemptions allowed by Article 101(3), despite the fact the exemptions listed may not be appropriate.⁵¹³ This Article submits that forcing the parties to balance pro- and anticompetitive effects under inappropriate Article 101(3) exemptions may ultimately lead to confusion and increase the burden on the judiciary.

⁵⁰⁸ WHISH, *supra* note 24, at 131.

⁵⁰⁹ *See, e.g.*, Case T-328/03, O2 (Germany) GmbH v. Comm’n, 2006 E.C.R. II-1231, ¶ 71.

⁵¹⁰ *See, e.g.*, Case C-250/92, Gøttrup-Klim Grovwareforening v. Dansk Landbrugs Grovvarereselskab AmbA, 1994 E.C.R. I-5641, ¶ 19.

⁵¹¹ *See infra* notes 522–34 and accompanying text.

⁵¹² Whish & Sufrin, *supra* note 505, at 7.

⁵¹³ *See* TFEU, *supra* note 4, at art. 101(3). Article 101(3) is made up of four requirements that a restrictive agreement must meet in order to receive an exemption from the provisions of Article 101(1). *See infra* notes 536–39 and accompanying text.

The existence of Article 101(3) is the main objection to the existence of a rule of reason-type analysis under Article 101(1). This is particularly pertinent since the “Modernisation Regulation” came into force in 2004.⁵¹⁴ The Modernisation Regulation gave the National Competition Authorities⁵¹⁵ and the national courts⁵¹⁶ power to exempt agreements under Article 101(3). Exempting, or excepting, under Article 101(3) had previously been the exclusive reserve of the Commission.⁵¹⁷ The purpose of the Modernisation Regulation was to “allow the Commission to increase its ability to take on cases of [Union] interest and become more proactive. The result is to multiply the number of agencies able to enforce [EU] competition law, leading to more rigorous enforcement.”⁵¹⁸ However, the risk arises that with multiple agencies and countless courts in twenty-seven Member States with the power to consider Article 101 in its entirety, there is a clear temptation to bundle prohibition and exception into one rule of reason analysis. For this reason, the Commission, wanting to ensure “consistency in ... enforcement” despite this “era of decentralisation,” established the European Competition Network (ECN).⁵¹⁹ The aim of the ECN is to ensure that the Commission and the National Commission Authorities continue to use the same reasoning and form of analysis.⁵²⁰ Whether the promotion of a high level of employment may find a more suitable home under Article 101(3) will be considered below,⁵²¹ but before doing so, the ancillary restraints doctrine will be discussed. The ancillary restraints doctrine is a form of the rule of reason which has found favor, and been named, by the European courts.⁵²² However, it is submitted that it is perhaps not suitable for consideration of employment.

⁵¹⁴ Council Regulation 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 O.J. (L 1) 1, 25 (EC).

⁵¹⁵ *Id.* at art. 5.

⁵¹⁶ *Id.* at art. 6.

⁵¹⁷ Council Regulation 17/62, of 21 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty, 1962 O.J. (L 13) 204, art. 9(1) (EEC).

⁵¹⁸ MONTI, *supra* note 36, at 404.

⁵¹⁹ Firat Cengiz, *Multi-Level Governance in Competition Policy: The European Competition Network*, 35 EUR. L. REV. 660, 661 (2010).

⁵²⁰ See Commission Notice on Cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 43 (outlining how the ECN “provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe”).

⁵²¹ See *infra* Part V.B.

⁵²² See, e.g., Case T-112/99, *Métropole Télévision v. Comm’n*, 2001 E.C.R. II-2459, ¶ 104 (“In Community competition law the concept of an ‘ancillary restriction’ covers

The ancillary restraints doctrine was first laid down, in the United States, in *Addyston Pipe* by then-Judge Taft.⁵²³ An ancillary restraint is where a restriction on competition is “merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract.”⁵²⁴ Essentially, the ancillary restraints doctrine allows that some restrictions on competition are necessary in order to protect the procompetitive objective of the agreement. The ECJ has allowed such agreements, and therefore held that such agreements were not prohibited by Article 101(1), which contained ancillary restraints such as: selective distribution systems,⁵²⁵ exclusive license agreements,⁵²⁶ and joint buying cooperatives.⁵²⁷ On the basis of the case law, it would seem that the ancillary restraints doctrine would not apply to the promotion of a high level of employment, given that the ECJ has used the doctrine to allow anticompetitive contractual terms in order to make the overall agreement function properly.⁵²⁸ However, Faull and Nikpay argue that the Commission decision of *EPI Code of Conduct*,⁵²⁹ and the judgments in *Wouters*⁵³⁰ and *Meca-Medina*⁵³¹ have created a “public interest objective” form of the ancillary restraints doctrine.⁵³² It can be argued that the public interest ancillary restraints doctrine is no more than another phrase for the European rule of reason. As such, the same murky limits apply and, as Faull and Nikpay explain, “[t]he doctrine cannot therefore be applied with certainty.”⁵³³

any restriction which is directly related and necessary to the implementation of a main operation.”) (internal citations omitted). *But see id.* ¶ 107 (“[I]t must be observed that inasmuch as ... the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions ... to weigh the pro and anti-competitive effects of an agreement.”).

⁵²³ See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899).

⁵²⁴ *Id.*

⁵²⁵ See Case 26/76, *Metro SB-Grossmärkte GmbH & Co. KG v. Comm’n*, 1977 E.C.R. 1875, ¶¶ 42–52.

⁵²⁶ See Case 262/81, *Coditel SA v. Ciné-Vog Films SA*, 1982 E.C.R. 3381, ¶ 20.

⁵²⁷ See Case C-250/92, *Gøttrup-Klim Grovwareforening v. Dansk Landbrugs Grovvarereselskab AmbA*, 1994 E.C.R. I-5641, ¶¶ 30–35.

⁵²⁸ See *supra* notes 522–27 and accompanying text.

⁵²⁹ Commission Decision 1999/267, of 7 April 1999 Relating to a Proceeding Pursuant to Article 85 of the EC Treaty (IV/36.147 EPI Code of Conduct), 1999 O.J. (L 106) 14 (EC).

⁵³⁰ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577.

⁵³¹ Case C-519/04 P, *Meca-Medina v. Comm’n*, 2006 E.C.R. I-6991.

⁵³² See Faull & Nikpay, *supra* note 22, at 238–39.

⁵³³ *Id.* at 243–44.

Balancing within Article 101(1), whether we call it a rule of reason analysis or the ancillary restraints doctrine, offers great possibilities but little that is tangible and which can be relied upon. This is particularly true given the CFI's seeming hostility to a rule of reason, because: "[T]he creation of the CFI necessarily reduces the ECJ's control over developments in the system. No longer is there one judicial voice, there are two."⁵³⁴ Accordingly, incorporating the promotion of a high level of employment into the test laid out in Article 101(3) will now be considered. Additionally, in spite of the potential shown by *Wouters*, the limits of such potential have yet to be defined, making it a risky road for parties to travel down if they are seeking exemption of an agreement.

B. Legal Exception Analysis under Article 101(3)

Article 101(3) offers salvation to agreements that would otherwise be prohibited and therefore void under Article 101(1).⁵³⁵ In order for an agreement to be excepted under Article 101(3), the agreement must meet four requirements, two positive and two negative. Positively, it must be shown that the agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress" and allows "consumers a fair share of the resulting benefit."⁵³⁶ In addition to these positive requirements, the agreement must not: (a) "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives"; and (b) "afford such undertakings the possibility of eliminating competition."⁵³⁷ Both the ECJ⁵³⁸ and the Commission⁵³⁹ have stated that all four conditions must be satisfied in order for Article 101(3) to except an agreement.

So what is needed for an agreement to meet these requirements? The first requirement of improvement or progress can be seen in very general terms as a "benefit ... of objective value to the [Union] as a whole."⁵⁴⁰ The second requirement is that such a benefit must be passed on to consum-

⁵³⁴ TOWNLEY, *supra* note 83, at 212.

⁵³⁵ See TFEU, *supra* note 4, at art. 101(3).

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ Case C-238/05, *Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios*, 2006 ECR I-11125, ¶ 65 ("The applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision.").

⁵³⁹ Article 81(3) Guidelines, *supra* note 182, ¶ 42 ("According to settled case law the four conditions of Article 81(3) are cumulative, i.e. they must all be fulfilled for the exception rule to be applicable." (footnote omitted)).

⁵⁴⁰ WHISH, *supra* note 24, at 151.

ers.⁵⁴¹ The Commission defines consumers as “all direct or indirect users of the products covered by the agreement In other words, consumers within the meaning of Article [101(3)] are the customers of the parties to the agreement and subsequent purchasers.”⁵⁴² This is a fairly narrow definition; it may well be too narrow to allow the promotion of a high level of employment to be considered under Article 101(3). The narrowness or breadth of Article 101(3) will be considered below.⁵⁴³ In order for an agreement that sought to promote a high level of employment to meet the third requirement of indispensability, the parties would have to show “that there are no other economically practicable and less restrictive means”⁵⁴⁴ of achieving the benefits to employment levels. This test requires the parties to show that there was not another type of less anticompetitive agreement they could have relied upon to achieve the same objective.⁵⁴⁵ However, “[t]he Commission will not second guess the business judgment of the parties.”⁵⁴⁶ The final test is to demonstrate that competition is not utterly destroyed by the agreement.⁵⁴⁷

It is questionable if these four tests can be interpreted in such a way as to balance employment against consumer welfare. This is not easy to answer. Odudu has written that “[i]t remains ‘controversial what exactly remains to be considered under Article [101(3)].’”⁵⁴⁸ Which identifies two general views of what can be considered under Article 101(3): the “narrow view” and the “broader view.”⁵⁴⁹ Under the narrow view, Article 101(3) can only consider economic efficiency issues, whereas the broader view allows for a wider range of policy issues to be considered within 101(3).⁵⁵⁰ In order to determine what may be considered under Article 101(3), an attempt needs to be made to discover whether the narrow view or the broader view prevails.

Townley states that “Article [101(3)]’s wording seems too narrow to include many objectives.”⁵⁵¹ On the basis of Article 101(3)’s wording alone, this author is inclined to agree, particularly when Article 101(3) is read in conjunction with the Commission’s *Article 81(3) Guidelines* (the

⁵⁴¹ See TFEU, *supra* note 4, at art. 101(3).

⁵⁴² Article 81(3) Guidelines, *supra* note 182, ¶ 84.

⁵⁴³ See *infra* notes 544–83 and accompanying text.

⁵⁴⁴ Article 81(3) Guidelines, *supra* note 182, ¶ 75.

⁵⁴⁵ *Id.* ¶ 76.

⁵⁴⁶ *Id.* ¶ 75.

⁵⁴⁷ *Id.* ¶ 105.

⁵⁴⁸ ODUDU, *supra* note 27, at 137.

⁵⁴⁹ WHISH, *supra* note 24, at 152–53.

⁵⁵⁰ *Id.*

⁵⁵¹ TOWNLEY, *supra* note 83, at 65.

Guidelines). The *Guidelines* relentlessly pursue an economic efficiency/consumer welfare standard for the application of Article 101(3).⁵⁵² The *Guidelines* speak of agreements being excepted because of their “positive economic effects”⁵⁵³ or “pro-competitive effects.”⁵⁵⁴ This is the language of consumer welfare purists; while reducing unemployment is likely to benefit society as a whole, such an objective is unlikely to be considered a procompetitive effect under a consumer welfare analysis.⁵⁵⁵ The *Guidelines* go on to state that “[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101](3).”⁵⁵⁶ This clearly demonstrates that in the Commission’s opinion there is no room for goals such as Article 9’s promotion of a high level of employment. The Commission’s White Paper also stated that Article 101 could not “be set aside because of political considerations.”⁵⁵⁷

Balancing employment against consumer welfare would probably be considered a goal that could not be incorporated into an Article 101(3) assessment in the Commission’s post-*Guidelines* world. However, it has already been argued that in a post-Lisbon world, competition has been downgraded as a Union goal.⁵⁵⁸ It is also important to bear in mind that the *Guidelines* are in no way binding on the Union’s courts.⁵⁵⁹ Once all this is taken into consideration, it can be submitted that the *Guidelines* and their pursuit of a sole consumer welfare standard was a temporary aberration.

In support of this we can look back prior to the *Guidelines*, and see examples of agreements that promoted employment being excepted. In *Metro-SB-Grossmärkte*, the ECJ held:

⁵⁵² Article 81(3) Guidelines, *supra* note 182, ¶ 13.

⁵⁵³ *Id.* ¶ 32.

⁵⁵⁴ *Id.* ¶ 33.

⁵⁵⁵ See TOWNLEY, *supra* note 83, at 18.

⁵⁵⁶ Article 81(3) Guidelines, *supra* note 182, ¶ 42.

⁵⁵⁷ *White Paper on Modernisation*, *supra* note 421, ¶ 57.

⁵⁵⁸ See *supra* notes 400–06 and accompanying text.

⁵⁵⁹ Article 81(3) Guidelines, *supra* note 182, ¶ 4.

[T]he 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 the market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article [101(3)].⁵⁶⁰

Therefore, the ECJ was able to allow an agreement because it promoted employment; however, Faull and Nikpay state that the economic benefit was not the promotion of employment per se, but because employment improved production.⁵⁶¹ Nevertheless, the effect is the same. Similarly, in *Matra Hachette*, the CFI stated that the Commission did not consider the promotion of employment as a legitimate consideration under Article 101(3).⁵⁶² However, the Commission excepted the Joint Venture between Ford and Volkswagen⁵⁶³ under Article 101(3), and the CFI upheld their decision.⁵⁶⁴ Faull and Nikpay see *Matra Hachette* as “confirming the fact that the benefits in question [employment] did not constitute objective benefits within the meaning of Article [101(3)].”⁵⁶⁵

Arguably Faull and Nikpay are naïve to take the reasoning of the Commission or the Union Courts at face value. Townley writes:

[T]he Commission is rarely explicit about what it is trying to do; normally fails to quantify any costs or benefits that it considers; and, seldom places its analysis within a wider framework, which would allow us to intuit what it is seeking to achieve, or to predict its assessment in future cases.⁵⁶⁶

That being the case, it seems possible that the Commission (with the exception of the sole consumer welfare years) was always following a broader approach to Article 101(3) but may have preferred to shoehorn their analysis into a narrower reasoning.

From a narrow perspective, there still remains the issue of benefiting consumers under Article 101(3), though it may be difficult to show that an agreement that promotes employment will be of benefit to consumers. Monti writes that, when the Commission has sought to use Article 101(3)

⁵⁶⁰ Case 26/76, *Metro-SB-Grossmärkte GmbH & Co. KG v Comm'n*, 1977 E.C.R. 1875, ¶ 43.

⁵⁶¹ Faull & Nikpay, *supra* note 22, at 295.

⁵⁶² Case T-17/93, *Matra Hachette SA v. Comm'n*, 1994 E.C.R. II-00595, ¶ 139.

⁵⁶³ *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC, 1993 O.J. (L 20) 14, 21.

⁵⁶⁴ *Matra Hachette*, E.C.R. II-595 ¶¶ 173–174.

⁵⁶⁵ Faull & Nikpay, *supra* note 22, at 295.

⁵⁶⁶ TOWNLEY, *supra* note 83, at 243.

to except agreements that have a public policy benefit, it has done so by “substitut[ing] the consumers’ interest with the interest of the public.”⁵⁶⁷ Monti goes on to write that such benefits of general public interest “can only be considered under the first positive condition of Article [101(3)] and not the second.”⁵⁶⁸ In summary, the argument Monti advances is that “construing [the second positive requirement] in this way is problematic, because it collapses Article [101(3)]’s first and second tests.”⁵⁶⁹ This author would submit that this wider interpretation is potentially helpful, but would mean that if consumer benefit is synonymous with consumer welfare, then it cannot be considered under Article 101(3) but must be considered elsewhere in Article 101. The problem that arises with a blinkered focus on consumer welfare is that it ignores society as a whole and individuals when they act as producers.

This broader recognition of consumers was most famously employed by the Commission in *CECED*, where environmental benefits of an agreement that would accrue to the EU as a whole were considered to outweigh the anticompetitive fact that the price of washing machines was increased for consumers.⁵⁷⁰ The Commission stated: “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.”⁵⁷¹ It could be proposed that the same broad argument can be made for the promotion of a high level of employment; increasing employment has a number of benefits for society as a whole, which may outweigh the anticompetitive effects of such an agreement.

Arguably, a broad reading of Article 101(3) in general, and the promotion of a high level of employment in particular, is not as far-fetched as it first appears. In *Métropole Télévision*, the CFI made the following broad statement: “[I]n the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101(3)].”⁵⁷² Townley argues that this statement is wide enough to “incorporate the objectives pursued by the policy-linking clauses into the Article [101(3)]

⁵⁶⁷ Monti, *Public Policy*, *supra* note 307, at 1076.

⁵⁶⁸ *Id.* at 1077.

⁵⁶⁹ TOWNLEY, *supra* note 83, at 266.

⁵⁷⁰ *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC, 2000 O.J. (L 187) 47, ¶¶ 53, 55–57.

⁵⁷¹ *Id.* ¶ 56.

⁵⁷² Joined Cases T-528, T-542, T-543 & T-546/93, *Métropole Télévision v. Comm’n*, 1996 E.C.R. II-649, ¶ 118.

test.”⁵⁷³ Furthermore, Townley states that industrial policy (which would include the promotion of employment) “is one of the most heavily used objectives in the Article [101(3)] balance.”⁵⁷⁴ Townley goes on to state that industrial policy is so important to the EU that it can trump not only consumer welfare but Article 173(3) TFEU⁵⁷⁵—which prohibits industrial policy from being used as the basis for distorting competition. Examples of the promotion of employment, based on a broad reading of Article 101(3), have allowed employment to be recognized as a legitimate objective of an agreement by the ECJ in *Metro-SB-Grossmärkte*⁵⁷⁶ and the Commission in *Ford/Volkswagen*⁵⁷⁷ and *Stichting Baksteen*.⁵⁷⁸ Additionally, in *Piau*, the CFI held that qualitative⁵⁷⁹ restrictions, limiting the number of agents for soccer players, were entitled to be excepted by the Commission because they contributed “to promoting economic progress.”⁵⁸⁰ This was an employment-related decision because it was concerned with managing the short playing careers of professional soccer players. The *Piau* decision seems to further highlight that employment is a relevant factor—one that the Commission and the European Courts will consider. Finally, in *Comité Central d’Entreprise de la Société Anonyme Vittel*, the CFI stated, quoting from the Merger Regulation (an issue in that case), that: “[T]he Commission must place its appraisal within the general framework of the achievement of the fundamental objectives ... including that of strengthening the Community’s economic and social cohesion.”⁵⁸¹ Furthermore, the fact that employee organizations “have a relevant interest with respect to the social considerations which may in appropriate cases be taken into account by the Commission in the context of its appraisal of whether the concentration is lawful from the point of view of Community law.”⁵⁸² Despite the fact that the CFI dismissed the case on the basis that

⁵⁷³ TOWNLEY, *supra* note 83, at 67.

⁵⁷⁴ *Id.* at 160.

⁵⁷⁵ *Id.* at 164.

⁵⁷⁶ Case 26/76, *Metro-SB-Grossmärkte GmbH & Co. KG v. Comm’n*, 1977 E.C.R. 1875, ¶ 43.

⁵⁷⁷ *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC, 1993 O.J. (L 20) 14, ¶ 36.

⁵⁷⁸ *Stichting Baksteen* (Case IV/34.456) Commission Decision 94/296/EC, 1994 O.J. (L 131) 15, ¶ 27.

⁵⁷⁹ Case T-193/02, *Piau v. Comm’n*, 2005 E.C.R. II-217, ¶ 100.

⁵⁸⁰ *Id.* ¶ 101.

⁵⁸¹ Case T-12/93, *Comité Central d’Entreprise de la Société Anonyme Vittel v. Comm’n*, 1995 E.C.R. II-1247, ¶ 39.

⁵⁸² *Id.* ¶ 40.

the plaintiffs' procedural rights were not violated,⁵⁸³ the *Vittel* case further demonstrates the court's willingness to consider employment as a legitimate ground in competition cases. Therefore, this Article suggests that these precedents, reinforced by the policy-linking clauses of the TFEU, insist that employment is a relevant factor that must be balanced against consumer welfare, and that the appropriate place to consider employment is under Article 101(3).

C. A Bifurcated Balancing Approach

It is now established that the Article 9 goal of the promotion of a high level of employment must be considered when assessing an agreement under Article 101. Furthermore, the correct forum for considering employment and industrial policy is Article 101(3), as part of a broad reading which combines the two positive tests. To adopt such a broad reading is arguably not controversial: the Commission used this approach in *CECED*, and Townley states that the Union Courts have moved away "from the literal wording [of Article 101(3)] altogether and conduct[] a general public policy test there."⁵⁸⁴ In fact, it can be argued that what is controversial is the Commission's insistence in the *Guidelines* that a consumer welfare goal must be the sole goal of Article 101.⁵⁸⁵

However, under the present structure of Article 101(3), the two positive tests must be read broadly and in conjunction; this means that consumer welfare is submerged into a general societal welfare test and therefore, consumer welfare is not considered at all.⁵⁸⁶ Given that consumer welfare is a necessary component of competition law, the question becomes where in Article 101 consumer welfare should be considered.

Townley writes that the appropriate place for considering consumer welfare is under Article 101(1),⁵⁸⁷ with other public policy goals being balanced against consumer welfare under Article 101(3).⁵⁸⁸ Does Article 101(1)'s wording allow a consumer welfare test to take place? The key words in Article 101(1) are: "[Agreements] hav[ing] as their object or effect the prevention, restriction or distortion of competition within the internal market."⁵⁸⁹ Competition is not defined in either of the Union trea-

⁵⁸³ *Id.* ¶ 64.

⁵⁸⁴ TOWNLEY, *supra* note 83, at 65.

⁵⁸⁵ Article 81(3) Guidelines, *supra* note 182, ¶ 13.

⁵⁸⁶ See *supra* notes 548–50 and accompanying text.

⁵⁸⁷ TOWNLEY, *supra* note 83, at 243.

⁵⁸⁸ *Id.* at 113.

⁵⁸⁹ TFEU, *supra* note 4, at art. 101(1).

ties; indeed, at various points competition is referred to as “free,”⁵⁹⁰ “fair,”⁵⁹¹ and “that competition is not distorted.”⁵⁹² It is at least open to question whether such references to competition are even compatible. Therefore, just as the U.S. federal judiciary created the aims of the Sherman Act, the Union Courts can define the meaning of competition.

In the CFI judgment of *GlaxoSmithKline*, it was held that: “[T]he objective assigned to Art. [101(1) TFEU] ... 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.”⁵⁹³ However, on appeal of the CFI’s decision, the ECJ stated that “that neither the wording of art. [101(1) TFEU] nor the case-law lend support to such a position”⁵⁹⁴ (that is, a sole consumer welfare goal). The ECJ then went on to state that Article 101 “aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.”⁵⁹⁵ That being the case, it can be argued that Article 101(1) has two aims, both grounded in economics: first, the consumer welfare test; and second, ensuring a market structure that maintains and promotes workable competition. Such a dual aim for Article 101(1) would be in keeping with the ECJ’s *GlaxoSmithKline* judgment, and would free up Article 101(3) for non-economic concerns. It would then fall to the decision-maker to determine if the non-economic benefits of an agreement trumped whatever the anticompetitive effects of the agreement were under Article 101(1).

One final point: Article 101(3) has been described as a “formalized and specialized rule of reason.”⁵⁹⁶ This is the approach taken by the Commission,⁵⁹⁷ supported by the CFI in *Métropole*,⁵⁹⁸ and approved of by commentators.⁵⁹⁹ However, this is not strictly accurate—Article 101 in its

⁵⁹⁰ *Id.* at art. 119(1).

⁵⁹¹ *Id.* at Preamble.

⁵⁹² Protocol 27, *supra* note 412, at 309.

⁵⁹³ Case T-168/01, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2006 E.C.R. II-2981, ¶ 118.

⁵⁹⁴ Joined Cases C-501, C-513, C-515 & C-519/06 P, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2009 E.C.R. I-9291, ¶ 62.

⁵⁹⁵ *Id.* ¶ 63.

⁵⁹⁶ Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT’L L. 197, 229 (1998).

⁵⁹⁷ *White Paper on Modernisation*, *supra* note 421, ¶ 57.

⁵⁹⁸ Joined Cases T-528, T-542, T-543 & T-546/93, *Métropole Télévision v. Comm’n*, 1996 E.C.R. II-649, ¶ 69.

⁵⁹⁹ *See, e.g.*, WHISH, *supra* note 24, at 133; TOBIAS LETTL, *KARTELLRECHT* § 2.73 (2d ed. 2007).

entirety is the European rule of reason. Unlike the U.S. rule of reason, the European rule is not entirely an economic efficiency test.⁶⁰⁰ This author would submit that, instead, it is a unique test influenced by both economic analysis and the broader public policy goals of the European Union. The first stage of the test is an analysis under Article 101(1), where the agreement's impact in terms of consumer welfare and market structure is assessed. If the decision-maker concludes that the agreement has no anti-competitive impact upon either consumer welfare or the structure of the market, then the agreement is allowed and no further assessment is required. However, if the agreement does fall foul of Article 101(1) because of its anticompetitive effects, the agreement may be saved (excepted) if the parties can prove, under Article 101(3), that the agreement serves a legitimate public policy goal. For the purposes of this Article, that goal is the promotion of a high level of employment. Finally, it falls to the decision-maker to determine if the public benefit under Article 101(3) outweighs the consumer welfare detriment under Article 101(1). Based on case law,⁶⁰¹ previous Commission decisions,⁶⁰² and the strengthening of policy-linking clauses combined with the downgrading of competition as a Union aim,⁶⁰³ it can be submitted that it is likely an agreement that significantly impacts employment will be excepted.

CONCLUSION

This Article has sought to demonstrate that consumer welfare and broader public policy goals, specifically employment, should and must be balanced under Article 101. By interpreting Article 101 in such a way that consumer welfare is balanced against employment not only would be in keeping with the structure of the EU Treaties, but it would also, arguably, achieve social welfare. Social welfare would be achieved because balancing consumer welfare against employment would mean that competition law considered the individual as both a consumer and producer, without all benefits accruing overwhelmingly to either side.

The introduction of Article 9 TFEU and the Article 7 TFEU integration clause means that employment has been established as a goal that must be considered under Article 101.⁶⁰⁴ To try and claim that Article 101

⁶⁰⁰ Article 81(3) Guidelines, *supra* note 182, ¶ 11.

⁶⁰¹ Case 26/76, *Metro-SB-Grossmärkte GmbH & Co. KG v. Comm'n*, 1977 E.C.R. 1875.

⁶⁰² See *supra* notes 311–13, 342 and accompanying text.

⁶⁰³ See *supra* Part III.H.

⁶⁰⁴ See *supra* Part III.G.

should be purely concerned with economic efficiency is to ignore EU goals such as employment, and would be wholly inconsistent with the structure of the EU Treaties. It is because of this treaty structure that the EU is unique and, as such, competition provisions, such as Article 101, are compelled to consider broader aims than mere economic efficiency.

The holistic path that Article 101 is destined to tread because of the integration clauses and the ECJ's teleological approach differs substantially from U.S. antitrust law. As such, the chances of convergence between the two regimes are negligible. However, the EU's multiple values approach might arguably serve as a better example for nations or international organizations looking to develop their own competition regimes than U.S. antitrust. This is because the EU's embrace of multiple values is more flexible than U.S. antitrust and more capable of adapting to different path dependencies, whereas the American insistence on a sole consumer welfare goal does not take into account cultural differences or varying national attitudes towards the benefits of the free-market. In short, the EU has developed a stakeholder theory of competition law which is capable of representing the interests of individuals as consumers and producers, and society as a whole.

In terms of where this balancing of consumer welfare and employment should occur, this Article proposes that consumer welfare, along with the other economic concerns of Article 101, should be considered under 101(1) because this would leave 101(3) free to consider the public policy goals of the EU Treaties. Although such an analytical approach would necessitate a broad reading of Article 101(3), such a broad reading has been supported by the Commission⁶⁰⁵ and the Courts,⁶⁰⁶ and offers a clarity that an Article 101(1) rule of reason-type analysis does not afford. While *Wouters*⁶⁰⁷ and *Meca-Medina*⁶⁰⁸ offer an appealing possibility of a public policy balancing test under Article 101(1), the courts have not defined the limits of this rule of reason or ancillary restraints doctrine. Until the limits of *Wouters* are defined by further case law, *Wouters* offers only the temptation of what might be.

That is not to say that the bifurcated balancing approach this Article proposes is without controversy or difficulty. For instance, those subscrib-

⁶⁰⁵ See, e.g., *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC, 2000 O.J. (L 187) 47, ¶¶ 55–57.

⁶⁰⁶ See, e.g., Joined Cases T-528, T-542, T-543 & T-546/93, *Métropole Télévision v. Comm'n*, 1996 E.C.R. II-649, ¶¶ 114–18.

⁶⁰⁷ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Order van Advocaten*, 2002 E.C.R. I-1577, ¶ 97.

⁶⁰⁸ Case C-519/04 P, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991, ¶¶ 30–31, 42.

ing to a narrow economic-efficiency reading of Article 101(3) will continue to insist that there is no place for public policy considerations with Article 101,⁶⁰⁹ or EU competition law in general. However, as suggested towards the beginning of this Article,⁶¹⁰ the application of competition law is inherently controversial. It is not possible to give a competition regime aims without investing in that regime political values that some will find unpalatable.

Economic efficiency has a vital role to play in the analysis of firm conduct, but a consumer welfare approach is not value-free. Therefore, judging firm conduct by a consumer welfare standard alone does not give us the complete picture. This is particularly true of the EU, given the integration clauses, which insist upon the permeation of all EU decision-making with their myriad of values. This author concludes that the bifurcated balancing approach offers the best mechanism for weighing economic efficiency goals against broader policy considerations, such as employment.

⁶⁰⁹ See, e.g., ODUDU, *supra* note 27, at 141.

⁶¹⁰ See *supra* Part I.