Rewriting competition law from an economic perspective

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Discussion paper No. 65

Barbara E. Baarsma

seo economic research

Roetersstraat 29 - 1018 WB Amsterdam - T (+31) 20 525 1630 - F (+31) 020 525 1686 - www.seo.nl - secretariaat@seo.nl
ABN-AMRO 41.17.44.356 - Postbank 4641100 . KvK Amsterdam 41197444 - BTW 800943223 B02

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Summary

What is the goal of competition law? This varies depending on the perspective taken. From an economic perspective the goal is the protection of consumer welfare, while from a legal perspective the goal is the protection of competition. These perspectives differ, perhaps not so much in theory, but they do in practice. Two main causes are discussed. Firstly, from the legal point of view it is presently not possible to simultaneously consider the advantages and disadvantages of a merger or agreement and therefore the case in its entirety, and secondly, in recent years case law has led to the use of checklists, much to the detriment of common sense. Thus, we come to the question of how this juridization of the application of competition law can be stopped. Taking the economic perspective, this paper argues that competition law should be rewritten to better ensure welfare protection. It is shown how competition law could be rewritten to include the welfare criterion in the law. Of course rewriting European competition law is unrealistic given the trouble it would take to change the Treaty. The goal of this rewriting exercise is, therefore, to rethink the formal goal and the wording of competition law.

1 Introduction

This paper discusses the goal of EU competition law, which consists of three main pillars.[1] Of these, two prohibition rules set out in the Treaty on the Functioning of the European Union (TFEU) cover the antitrust area. First, agreements between two or more firms which restrict competition are prohibited by Article 101 of the Treaty. Second, firms in a dominant position may not abuse that position (Article 102 TFEU). In addition to these two antitrust laws, there is also the merger regulation (EC 139/2004).[2]

The goal of competition law varies depending on the perspective taken. From an economic perspective the goal is the protection of consumer welfare, while from a legal perspective the goal is the protection of competition. This difference between the economic and legal perspectives with respect to the goal of competition law has been analysed in the literature. Parret (2009) takes a legal perspective and concludes that most lawyers tend to focus on the law as it stands or as it has evolved over time in legislation and jurisprudence, rather than stepping back and questioning what the law is actually attempting to achieve. However, this view is currently changing and according to Parret this is for the better. However, she not only refers to a broadening of the goal to welfare protection, but also to a wide set of goals: 'The system of European competition law has always had and still has different objectives: economic and non-economic objectives, political and social objectives, legal objectives. A unitary goal is not desirable and not realistic.' (Parret, 2000, p. 46). Edlin and Farrell (2011) take an economic perspective in their analysis of the goal of competition law and state that welfare protection 'clearly' should be the goal of competition law, 'but equally clearly it is not so simple'. Posner (2001), Farrell and Katz (2006) and Salop (2010) also take the welfare standard as a starting point when assessing competition cases. These authors do not agree, however, on the best welfare standard: total welfare or consumer welfare. This will be discussed in more detail in section 3 below.

The difference in the application of competition law is also extensively reviewed in the literature. Nicolaides (2001) analyses the substantive differences, where economics regards as anti-competitive any action that reduces economic welfare, and law defines anti-competitive action in a priori terms by taking constitutional objectives as its point of reference. In short, economics looks at outcomes, whereas law looks at deviations from various *ex ante* goals, such as the protection of consumers, the freedom to trade and the promotion of public interest. Geradin and Petit (2011) speak of the outcome-based versus the rights-based approaches, while Breyer (2009) describes how antitrust law reveals the tension between the economic preference for flexible standards and the legal preference for bright-line rules. Moreover, he explains why appellate courts sometimes seem inhospitable to economic reasoning. Firstly, the law needs and prefers administrable rules. Secondly, both economists and lawyers have 'a certain tunnel vision [...] that inhibits each from taking full account of the other's discipline'. Thirdly, the economic perspective

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1 A fourth pillar is not discussed here, namely the control of direct and indirect aid given by Member States of the European Union to companies. State aid is covered under Article 107 TFEU.

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

often requires new approaches and because the law distrusts novelty, these novelties must slowly win acceptance in other institutions before a court will introduce them into the law.

Taking the economic perspective, this paper argues that competition law should be rewritten to better ensure welfare protection. The paper is structured as follows. Section 2 describes how the application of competition law is becoming increasingly juridified, and the goal of competition law is discussed in section 3. Taking the protection of welfare to be the goal of competition law, the question that arises is whether total welfare or consumer welfare should be the competition law standard. Section 4 addresses this matter in detail. Section 5 then analyses why there is a difference between the legal goal of 'protecting competition' and the economic goal of 'protecting consumer welfare'. Two main causes are discussed. Firstly, from the legal point of view it is presently not possible to simultaneously consider the advantages and disadvantages of a merger or agreement and therefore the case in its entirety, and secondly, in recent years case law has led to the use of checklists, much to the detriment of common sense. Thus, we come to the question of how this juridization of the application of competition law can be stopped. The only solution is to include the welfare criterion in the law. Section 6 shows how competition law could be rewritten to include the economic criterion of welfare protection, while section 7 offers some final remarks.

2 The goal of competition law

'What do you think is the goal of competition law?', is a question I ask students in my classes. They are given four options:

- To protect competition
- To protect total welfare
- To protect competitors
- To protect consumer welfare

As most of them are economists in their third year, they know that the protection of competitors is obviously the wrong answer. In a report by the US Department of Justice (2008) this is nicely explained: 'Competition produces injuries; an enterprising firm may negatively affect rivals' profits or drive them out of business. But competition also benefits consumers by spurring price reductions, better quality, and innovation. Accordingly, mere harm to competitors is not a basis for antitrust liability'. The purpose of competition law is 'not to protect businesses from the working of the market; it is to protect the public from the failure of the market'.[3]

Thus, only three options remain: the goal of competition law is to protect competition or to protect consumer or total welfare. Most economics students choose welfare protection, be it consumer or total welfare (cf. section 3). Technically speaking, they are wrong.

2.1 Legal perspective in competition law

The objective of competition law is to protect competition. According to the text of competition law, the criterion is not consumer or total welfare, but the distortion of competition. For instance, Article 101 TFEU (ex Article 81 TEC) prohibits agreements 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' (emphasis added). Similarly, the Merger Regulation prohibits a concentration which would 'significantly *impede effective competition*' (emphasis added).

This seems strange from the economic perspective: competition is not an objective in itself, merely a means for increasing consumer welfare. This is where economists differ from lawyers, the latter applying the law, which states that it is illegal to restrict competition. In other words, the legal criterion is competition restriction. The effects on welfare are irrelevant from the *legal* perspective.

This situation persists, despite stirring speeches from the chairman of the board of the Dutch competition authority (NMa), Pieter Kalbfleisch, and the former Competition Commissioner of the European Commission, Neelie Kroes. In a speech delivered in February 2009 in Innsbruck, Kalbfleisch stated: 'While we all agree that consumer welfare should be at the heart of

3 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

competition policy, we often disagree about how that should be done. [...] To conclude, the enhancement of consumer welfare, both short and long term should be to [sic] the forefront when we are applying competition law'.[4] Earlier, in 2005, Kroes discussed 'European Competition Policy – Delivering Better Markets and Better Choices'. In her speech she mentioned: 'Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies'.[5]

2.2 Economic perspective in NCA's mission statements, soft law and case law

Consumer welfare is not included in competition law, but it is included in the mission statements of some National Competition Authorities (NCA).[6] For instance, the Swedish Competition Authority speaks of 'Economic welfare through effective markets', and their Norwegian colleagues speak of 'Sound competition for increased welfare'. The Office of Fair Trading (UK) has as their mission, 'Make markets work well for consumers'. The aim of the Irish Competition Authority is 'to ensure that competition works well for consumers and the Irish economy'.

In addition to mentioning consumer welfare standards in speeches and mission statements, consumer welfare is also set as a goal of competition law in the soft law (guidelines and notices, as well as case law). The enlightened explanation in the guidelines emphasizes that the objective of competition law should be to increase consumer welfare. According to the Guidelines 2004/C 101/08 on the application of Article 81(3) (now 101(3)), the goal of the cartel prohibition is the protection of consumer welfare: 'The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers'. Similarly, according to the guidelines on the Commission's enforcement priorities in applying Article 82 (now 102) of the EC Treaty to abusive exclusionary conduct by dominant undertakings, the goal is to protect consumer welfare: 'The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice'.

When it comes to case law, the US court rulings take a more economic or less judicially conservative perspective than the European court rulings. For instance, the US Supreme court noted that '[p]romoting consumer welfare is the primary goal of US competition law enforcement. [...] Congress designed the Sherman Act as a "consumer welfare prescription"'.[7]

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[4] <http://www.nmanet.nl/Images/Consumer%20welfare,%20innovation%20and%20competition%20Innsbruck%20februari%202009_tcm16-124493.pdf>.

[5] <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/512&format=HTML&aged=1&language=EN&guiLanguage=en>.

[6] All examples are taken from Van Sinderen & Kemp (2007).

[7] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 106–07 (1984), quoting Reiter v. Sonotone Corp., 442 U.S. 330, 342–43 (1979).

The recent ruling by the European Court of Justice in the GlaxoSmithKline case[8] confirms that, legally speaking, competition law does not include the protection of consumer welfare as an objective.

This case concerned the general terms and conditions that GlaxoSmithKline – a manufacturer of pharmaceutical products – imposed on Spanish wholesalers. In 2000, when the notification procedure still existed, Glaxo had notified the Commission of its 'General sales conditions of pharmaceutical specialities to authorized wholesalers' with a view to obtaining a negative clearance or an exemption. In May 2001, the Commission found that the notified agreement infringed the cartel prohibition. The Commission refused to grant an exemption pursuant to the then valid Article 81(3) EC (now Article 101(3) TFEU). Glaxo challenged this decision before the Court of First Instance. Although this Court annulled the second part of the Commission's decision that refused to grant an exemption, Glaxo lodged a further appeal before the European Court of Justice, as it also wanted to obtain an annulment of the first part of the Commission's decision that had deemed the agreement unlawful pursuant to Article 81(1) EC (Article 101(1) TFEU).
In October 2009, the European Court of Justice declared that:

> With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position.
> First of all, there is nothing in this provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, *competition as such*. (emphasis added by author)

This is just one example from European case law that demonstrates that in everyday practice the judges also adhere to the formal goal of competition law: namely to prevent the restriction of competition.

2.3 Difference between the legal and economic perspectives

The question is whether there really is much difference between the legal assessment criterion of 'protecting competition' and the economic criterion of 'protecting consumer welfare'. In theory there is probably not much difference. There are few situations in which competition is detrimental to consumer welfare. However, while the difference may not be great in theory, it is larger in practice. Take the example of a case concerning fines imposed by the Netherlands

[8] GlaxoSmithKline, 6 October 2009, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P.

Competition Authority (NMa) for price agreements between psychologists. Between 1998 and 2002, the four professional psychologists associations advised their members on rates. In 2004, the NMa imposed a total fine of EUR 445,000. The case ended up at the Trade and Industry Appeals Tribunal (CBb) and a formal-legal discussion ensued on whether or not the *objective* of this advice on rates could have been to restrict competition. The NMa thought that it could, while the trade organizations argued to the contrary. The CBb found that the NMa had not proven that competition is limited by recommendations regarding rates.

Of course, the judge was right in saying that a study of the impact of these price agreements, which the NMa had not undertaken, was necessary: unfortunately, however, there was no place for consumer welfare in the court's final decision. The CBb concluded that because price is *not* a factor in patient choice in this instance, any price increases as a result of price agreements do *not* restrict competition. However, while the price paid by patients may not influence the choice of a particular psychologist – because that choice is often made by general practitioners who base their decision on reputation, not price – price increases *could still* negatively affect consumer welfare. After all, patients would have to pay a higher personal contribution for their treatment and policyholders would be faced with higher insurance premiums. If the judge had been required to include consumer welfare in his considerations, he would also have had to consider the higher personal contributions and insurance premiums. After the CBb's ruling, the NMa remitted the fines in March 2009. This is a regrettable state of affairs from the consumer's perspective.

In other cases, the NMa did apply a consumer welfare standard.[9] This, however, is not the point. Because the law does not aim to protect consumer welfare, the court or NCAs have discretionary powers. They can decide for themselves whether or not to use the criterion of consumer welfare.

Section 4 will discuss in further detail why in practice there is indeed a difference between 'protecting competition' and 'protecting consumer welfare'.

2.4 The importance of competition

In the remainder of this section, we take one step back and dwell on the declining role of competition in the context of the European treaties. Competition law is part of the law within the European Union. The ultimate objectives of the European treaties recently changed in a subtle but important way when the Treaty of Lisbon led to the Treaty on European Union evolving into the Treaty on the Functioning of the European Union. Alongside changes to the numbering of the antitrust articles, it also downscaled the importance of the concept of competition. Moreover,

[9] For instance, in 2010 the NMa approved the acquisition of veal producer Alpuro by rival Van Drie on the grounds that it is unlikely that Van Drie's acquisition of Alpuro would have adverse effects on retail veal prices. Both parties have a modest market share on the European sales market, and foreign abattoirs rely on Dutch fattened calves only to a small degree. Another example is the approval of the acquisition of Yellow Pages Netherlands by De Telefoongids in 2008. In this case, the NMa weighed anti-competitive effects for a small group of advertisers against the positive effects for a large group of users of the guide. Part of the equation was that the acquisition would result in consumers receiving the Yellow Pages Netherlands and De Telefoongids as one business directory by 2009 at the latest. Their websites would also be integrated into one online directory. According to the NMa, the integrated directory would be consulted by more users, which would be beneficial to advertisers. In addition, users would receive a single directory with all the information they required.

market integration was considered less important as a driving force behind the development of EC competition law.

First of all, the reference to the open-market economy based on the principle of free economy in Article 4 has disappeared from the beginning of the Treaty and has been relegated to the new Article 119 at the beginning of the chapter on economic and monetary policy. Secondly, the goal was to establish a common market, which is now referred to as a highly competitive social market economy.[10] Whereas a common market is a clear concept – it refers to a competitive internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital – the latter concept is not clear at all. What is a *social* market economy? Does it mean that competition has become less important as a means to create welfare? This would be an adverse development from a welfare perspective.

From a simple analysis using data from the World Economic Forum, it is obvious that in order to have high GDP (which is a narrow definition of welfare), it is important to have a competitive economy. The annual competitiveness report by the WEF examines the factors that enable national economies to achieve sustained economic growth and long-term prosperity. Competitiveness – defined as the set of institutions, policies and factors that determine the level of productivity in a country – would appear to be key. Which obstacles stand in the way of improved competitiveness?

The Global Competiveness Index (GCI) is a composite index and consists of 12 pillars,[11] each of which is made up of several variables. For instance, 'Goods Market Efficiency' includes 15 variables, including the effectiveness of anti-monopoly policy. A total of 109 variables are included in the GCI, and GDP is not one of them. Below, we present a simple linear regression of GDP per capita on the GCI. The dataset includes 129 countries. The results reveal a significant and positive correlation between the two variables (cf. Table 1 and Figure 1).

We performed the regression again using only those pillars that describe market efficiency. This composite index is called the Efficiency Enhancer Score (EES) and is made up of data on Higher Education and Training, Goods Market Efficiency, Labour Market Efficiency, Financial Market Development, Technological Readiness and Market Size. The results are quite similar to our earlier results using the GCI. When we repeated the same two regressions using data from 2008, we again obtained similar results. Although we did not use any sophisticated econometric

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10 Article 2 (Treaty on European Union, Official Journal C 191, 29 July 1992) cf. <http://eur-lex.europa.eu/en/treaties/index.htm#other>. Article 2 was worded as follows: 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'. Article 2 is to be replaced by the following: 'The Union shall establish an internal market. It shall work for the 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, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

11 These 12 pillars are: Institutions, Infrastructure, Macroeconomic Environment, Health and Primary Education, Higher Education and Training, Goods Market Efficiency, Labour Market Efficiency, Financial Market Development, Technological Readiness, Market Size, Business Sophistication and Innovation.

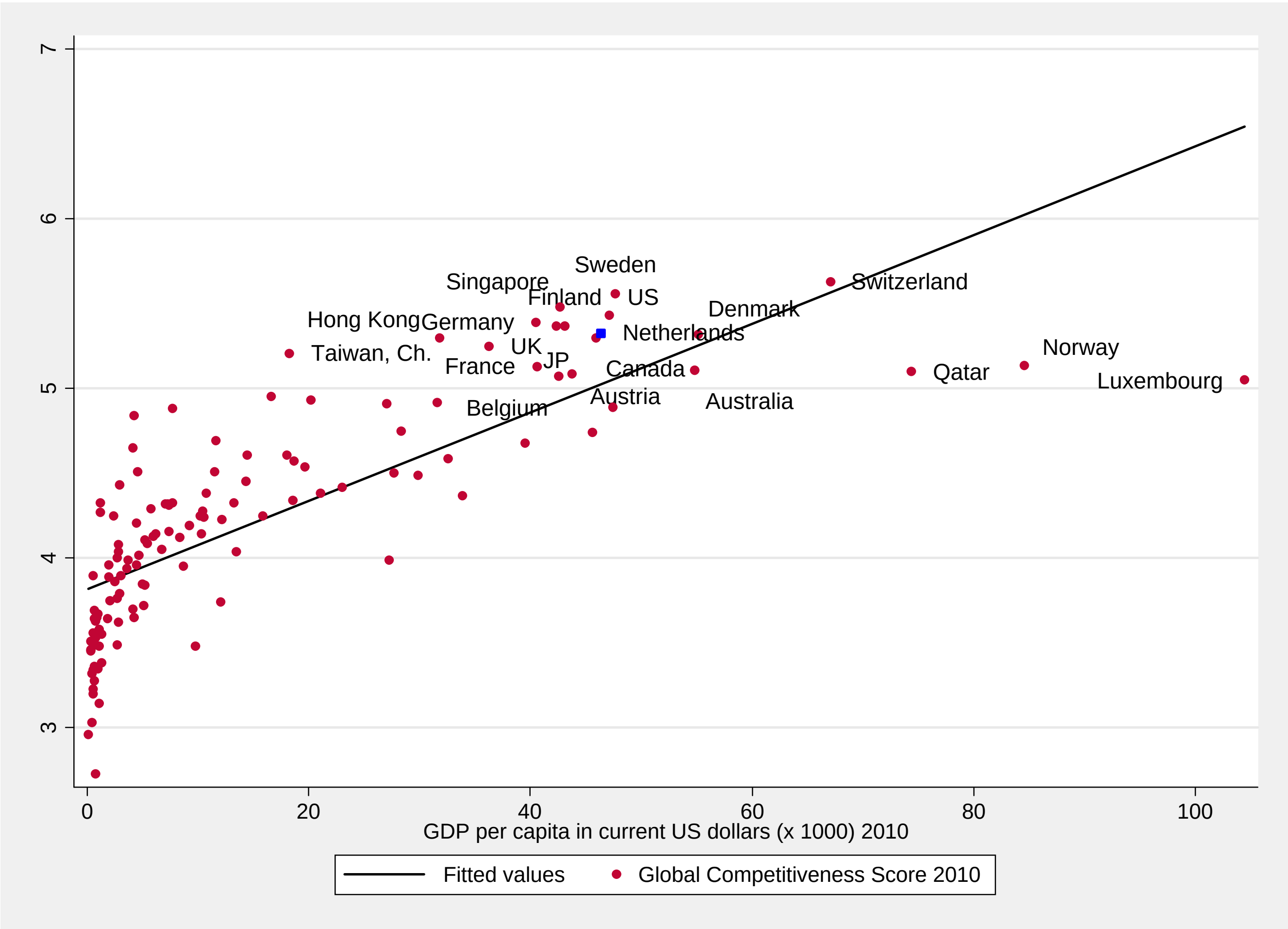
techniques,[12] we conclude that the relationship between competiveness and GDP per capita is strong and robust.

If the recent changes to the role of competition in the Treaty on the Functioning of the European Union do indeed imply that competition is considered less important as a means to create welfare, then this simple analysis indicates that the effect is adverse. From a political perspective, it is interesting that the vigorous enforcement of antitrust rules still plays a vital role in ensuring welfare in the US. On 10 March 2011, Senator Kohl, who chairs the US Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, announced that: 'Millions of consumers rely every day on competitive markets to keep prices low, and quality of goods and services high. On the Antitrust Subcommittee we have found, in industry after industry, that the best way to ensure full and fair competition is through the vigorous enforcement of antitrust law'.[13]

Table 1: A simple regression shows that the GCI score correlates strongly with GDP per capita

GDP per capita in 2010	Coefficient	Standard error	t-value	95% confidence interval	
Global Competition Index 2010	23.26	1.66	14.04	19.98	26.54
Constant	- 82.82	7.06	- 11.74	- 96.79	- 68.86
N = 129; R^2 = 0.6080; $R^2_{Adjusted}$ = 0.6049					

Figure 1: A high GCI score corresponds with a high GDP per capita



3 Consumer welfare or total welfare standard?

Let us now return to the multiple-choice question on the goal of competition law and to the economists' answer that this law is aimed to protect welfare, be it consumer or total welfare. However, which of these two options should be chosen from an economic point of view?

3.1 So many economists, so many views

Economists do not agree on the answer, although most would choose 'protection of consumer welfare'. According to Adam Smith, producers are merely there to serve consumers: 'Consumption is the sole end and purpose of production; and the intent of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer'.[14] Therefore, consumers should be at the heart of an economic analysis of markets and competition, and the right answer to the multiple-choice question is 'to protect consumer welfare'.

In contrast, Motta (2004, pp. 19–22) chooses total welfare: 'it would not be wise for competition authorities to adopt a consumer welfare objective'. Taking the consumer welfare standard literally would lead to pricing at marginal costs, with firms exiting the market in the long run because they could not cover their fixed costs. If the consumer welfare standard had the effect of lowering prices and profits, firms would have less incentive to innovate, invest and introduce new products. Yet another reason to choose the total welfare standard is that the consumer welfare standard may have become a little artificial. Today consumers often own firms (partly or fully), directly or through pension and investment funds. Accordingly, dividends are distributed to vast numbers of citizens, who would be hurt if profits were reduced.

Farrell and Katz (2006) argue that antitrust enforcement has both process and consequence components: it not only examines consequences (the change in consumer or total welfare) but also the process (the nature of the acts) that generates the consequences. Specifically, they conclude, competition law prohibits firms from harming consumers and/or efficiency through anti-competitive actions. They believe that there is a strong case for using a total welfare rather than a consumer welfare standard, because this latter criterion would imply that competition law was a policy tool for the redistribution of income, whereas they are convinced that competition law is not a good tool for that policy purpose. Ilzkovitz and Meiklejohn (2003) have the opposite opinion: 'The choice between the consumer welfare and total welfare standards is essentially a political one. The consumer welfare criterion would be favoured by those who consider that competition authorities should avoid trading off the welfare of one group against that of another. The consumer welfare standard avoids such a trade-off by accepting the efficiency defence only where the nature and size of efficiency gains are such that, even with reduced competition in the

14 Smith, Adam (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations*. London: Penguin Books Ltd.; Book IV, Chapter VIII.

market, the consumer will be no worse off than before the merger'. However, as Cseres (2007) rightly points out, competition law aims to enhance the efficiency of markets, it does not make value judgements on how efficiency gains should be distributed among various social groups.[15]

Posner (2001) and Salop (2010) have argued that antitrust laws should seek to protect consumer welfare. In the words of Salop: 'The aggregate economic welfare standard would condemn conduct if it decreases the aggregate welfare of consumers (i.e., buyers) plus producers (i.e., sellers plus competitors), without regard to any wealth transfers. In contrast, the true consumer welfare standard would condemn conduct if it actually reduces the welfare of buyers, irrespective of its impact on sellers. […] Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits would pass through to consumers so that consumers (i.e., the buyers) would benefit from the conduct'.

Edlin and Farrell (2011) state that welfare protection 'clearly' should be the goal of competition law, 'but equally clearly it is not so simple'. According to these authors, antitrust law does not ban everything that reduces consumer welfare in equilibrium, rather, it protects the potential beneficial transactions between competitors and consumers: 'Consumers are not protected from all high prices, but only from those that a competitor would be happy to beat but for some thwarting action; this explains why a pure monopoly does not violate the law simply by charging high prices. Competitors are not protected from actual everyday low prices, but only from tactics such as moving the goalposts that block them from giving customers a better deal than a monopoly does. […] Antitrust (mainly) seeks to protect against monopoly abuse not by barring deviations from competitive outcomes, but by safeguarding the competitive process, which we suggest involves freedom to trade. Simply charging monopoly prices harms welfare, but does not limit rivals' freedom to trade'. Freedom to trade means various strategic behaviours (such as raising rivals' costs) that impede movement toward the optimal deal.

Adopting the consumer welfare standard could also have several advantages, one being that it becomes possible to apply competition law more unambiguously. This avoids alternating between viewing matters from a consumer perspective on some occasions and from the producer's perspective on others (risking the possibility that competitors are protected rather than competition). Very often consumers are not willing or able to exert their aggregate power since the effect of a given market situation is likely to be dispersed across many of them, while it is much less dispersed for producers. For instance we have very few telecom operators.[16] If they were to raise their prices, they would earn large additional profits, whereas it would only cost a little more for an individual consumer to make a phone call. This individual consumer therefore only has limited incentive to protest against these extra costs. Attaching heavier weight to consumer surplus than to producer surplus might help redress the balance towards consumers. It is also argued that merging firms have better and more information about the effects of the merger than do competition authorities. The adoption of a consumer welfare standard (that is, accepting the merger only if it increases consumer welfare, no matter what the effects on profits and therefore on total welfare) might counterbalance this information asymmetry.

[15] Economic analyses use the idea of 'one dollar, one vote', which implies that the current income distribution is taken as given and only efficiency is dealt with.

[16] This telecom example is taken from Motta (2004).

Another argument that is sometimes raised in favour of the consumer welfare standard is that it might simplify decisions by competition authorities in merger cases. Take for example a merger that entails savings on fixed costs but at the same time entails higher consumer prices. How should these two effects be weighed against each other? By using a consumer welfare standard alone, the competition authority could limit itself to the relatively simpler assessment of the effects on consumer prices.

3.2 Political view on consumer welfare as the goal of competition law

From a political perspective, it could also be argued that an additional reason to adopt a consumer welfare standard is to increase the political support for competition policy now that a market-based economic policy is less popular, particularly in Europe (cf. section 2). Parret (2009) states: 'Selling competition policy more as a way of protecting consumers than as a way to ensure free competition and/or protecting competitors, might seem safer in times where the principles of a free market economy underlying the EC treaty rules are under some pressure'.

Indeed, consumer policy and competition policy are intertwined. First, a well-functioning market provides the best guarantee that the interests of consumers will be best served. Second, the market only functions well if consumers are adequately informed and make good choices, so the supply side is effectively disciplined. At the same time it is important to distinguish between competition policy aimed at the protection of consumer welfare on the one hand and consumer protection policy on the other (Kovacic, 2007). The latter works to ensure that consumers are empowered to participate in the marketplace by enabling them to make well-informed choices and with the confidence that sellers fulfil their promises about the goods and services they offer. National Competition Authorities are established to prevent or curb market failures caused by market power. Although the policy impact is on the supply side, the objective is always the protection of consumer welfare. The idea is that competition serves consumers. Consumer policy is primarily motivated by another kind of market failure, namely, that due to information asymmetry. Often the consumer is less well informed than the supplier and the legislation aims to prevent consumers from being exploited.

3.3 Synthesis

Total welfare consists of consumer welfare and producer welfare. Consumer surplus arises when consumers are willing to pay more for goods than they actually pay, while producer surplus arises when the market price is higher than the price manufacturers would want for their goods and services. The consumer welfare standard implies that the goal of competition law should be to prevent increases in consumer prices above competitive pricing levels, as well as restricting output or the deterioration of quality, service or variety through the exercise of market power by firms. The total welfare standard implies that as long as welfare improves, the agreement, concerted practice or merger should not be prohibited by competition law. This means that welfare may also improve in terms of increased profits of undertakings resulting from increasing prices without increasing production, service or quality, or without investing this profit in R&D.

However, this is only one part of the reasoning. According to the standard model, in which a monopolist sets a single price for all consumers, the monopolist will sell a lower quantity of goods at a higher price than would firms under perfect competition. Because the monopolist ultimately forgoes transactions with consumers who value the product or service more than its cost, monopoly pricing creates a deadweight loss, referring to potential gains that go neither to the monopolist nor the consumer. Given the presence of this deadweight loss, the combined surplus for the monopolist and consumers is necessarily less than the total surplus obtained by consumers under perfect competition. The focus of competition can either be on the prevention of a deadweight loss (that is, to protect total welfare) or the protection of consumer surplus.

In order to cover the effects on potential competition through R&D innovation and entrance, the optimal standard in competition law is: consumer surplus now and over time, and static as well as dynamic efficiency. Note that the consumer welfare and total welfare standards are almost equivalent in the long run because short-term profits spur firms to serve consumers' long-term interests (Farrell & Katz, 2006; Salop, 2010). In most competition cases, the time horizon chosen is no more than two years. This difference in time horizon is the cause of any differences between applying a total or consumer welfare standard. Consumer welfare as a long-term goal of competition law should, therefore, be taken to mean total welfare, insofar as at least part of this extra total welfare is passed on to consumers. According to this criterion, one or more firms may increase their profits, as long as at least part of the potential increase is passed on to consumers in terms of lower prices, higher quality, better service or more variety. Also, the term 'consumer' should be defined broadly to include intermediate purchasers as well as end-use retail customers.

4 Why is there a difference between ‘protecting competition’ and ‘protecting consumer welfare’?

Why is there a difference between ‘protecting competition’ and ‘protecting consumer welfare’ in practice? Here two main causes are discussed. Firstly, from the legal point of view it is not possible to simultaneously consider the advantages and disadvantages of a merger or agreement and therefore a case in its entirety (section 4.1), and secondly, case law in recent years has led to the use of checklists, much to the detriment of common sense (section 4.2).

4.1 Lack of integral assessment of pro- and anti-competitive effects

The example of the European prohibition on cartels is taken here to clarify the point on considering the matter in its entirety. This is currently Article 101 of the Working Treaty. It has been possible to present efficiency as a defence since Regulation 1/2003 was introduced in May 2004. The modernization reform eliminated the notification system of cartels and established the premises for a more decentralized and harmonized application of Community competition rules by National Competition Authorities and national courts. In the new system the application of both Articles 101 and 102 is based on self-assessment by undertakings. Before 2004, only the Commission could grant an exemption pursuant to Article 81(3) EC when judging an agreement in the notification procedure (the Commission possessed a monopoly on applying Article 101[3]). After May 2004, undertakings were required to make a self-assessment on whether their agreement restricted competition under Article 101(1) and, if so, whether the agreement might benefit from an exemption under Article 101(3).

Since the introduction of Regulation 1/2003, a cartel may be legal if, on balance, it brings more *benefits* than *disadvantages*. Unfortunately, the benefits and disadvantages cannot be assessed simultaneously. Instead, the disadvantages must be assessed first (in paragraph 1). Possible benefits cannot be included in the equation until a restriction on competition has been established (in paragraph 3). This two-stage process is an obstacle to an integral consideration of economic welfare. Lugard and Hancher (2004) conclude that once the applicability of Article 81(1) is established there is too little scope to convincingly adduce the extensive evidence required under Article 101(3).

In other words, one must first be found guilty before one can cite efficiency as a defence. Given the understandable reluctance on the part of most competition lawyers to plead guilty and the uncertainty that the regulator will accept a defence on the grounds of efficiency, there have been very few successful defences on the grounds of efficiency. The lack of encouraging examples further discourages the use of an efficiency defence because it is uncertain how the competition authority will treat the defence. This may turn out to become a self-fulfilling prophecy.

Paragraph 3 provides the scope for efficiency defences. This is the only part of the competition law which includes consumer benefits. The cartel prohibition is declared inapplicable in the case of agreements or concerted practices which contribute 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*. From an economic perspective it is a shame that consumer welfare only enters into the assessment after it has been determined that an agreement has the effect of objectively restricting competition.

It was Williamson (1968) who introduced this line of thinking into competition law. His paper was written at a time when efficiencies played little role in merger control. Triggered by this deficiency, Williamson published his famous trade-off between the deadweight-loss triangle caused by a market-power enhancing merger on the one hand, and a cost-savings rectangle due to the merger on the other. His main point was that it does not take much cost improvement to make up for the deadweight loss caused by a merger. Of course some healthy scepticism is appropriate when parties apparently pull efficiency claims from thin air with the obvious aim of having their deal accepted. However, one would expect that in at least some cases, after careful assessment by the competition authorities, efficiencies are found to be persuasive and decisive in the final approval.

Mergers that significantly impede competition can also be admitted on the basis of an efficiency defence. Article 2(4) of the merger regulation states that: 'To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 101(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market'. An efficiency defence may also apply to dominant undertakings that abuse their dominance. Think of a dominance in which efficiency effects may offset the negative effects of anti-competitive behaviour by the dominant firm. Waelbroeck (2009) states that an Article 101(3)-style efficiency defence is somewhat contradictory in the context of Article 102. Contrary to some anti-competitive agreements, abuses are almost always a 'bad' thing. Thus, if an undertaking abuses its dominant position, it cannot do any good, and an efficiency defence is inappropriate in the context of Article 102. Perhaps instances of countervailing buyer power is the only category that possibly fulfils the requirement of an efficiency defence.

This paper concludes that the two-stage process prescribed by Article 101, paragraphs 1 and 3, does not work in practice. The odds are simply too high. This is due to both the strict legal conditions and more practical problems. There is not enough scope to save on costs in the longer term or to consider efficiencies that are difficult to quantify, such as quality improvements. Furthermore, the burden of proof regarding compliance with the conditions for a defence based on efficiency lies with the market parties. The parties must prove that the agreement is essential to obtaining efficiency-driven profits. The parties must then go on to prove that a fair share of these efficiency-driven profits will be used to benefit the users and end users. Considering that the European Commission prioritizes the protection of competition above competition-fostering efficiency gains, this is far from a simple task.

Note that the rule-of-reason approach in the US is different from the European efficiency defence. In the US an integral assessment is possible. The cartel prohibition in the US Sherman Act prohibits 'agreements, conspiracies or trusts in restraint of trade'. The case law has changed this so that the test of whether the agreement is 'unreasonably restraining trade' is included. The rule of reason – in the sense of balancing the benefits and disadvantages of the agreement – is already part of this (due to the word 'unreasonable').

4.2 Juridization of the application of competition law

The second reason for the difference between the legal criterion of 'protecting competition' and the economic criterion of 'protecting consumer welfare' is that the long-term, often legal application of competition law, has obfuscated the view of its effects on welfare. This juridization has occurred despite the attempts to 'economize' competition law.

What does the 'economization' of competition law mean? Legal literature usually takes the term 'economic approach' to mean the inclusion of the economic circumstances under which parties operate in the judgement. Economization, however, means more than that. Others take economization to refer to the increasingly important role of economic analysis in the application of European competition. This role has grown since the additions in 2004, when several guidelines were set up on how to apply European competition law and conduct economic analysis. Economization, however, also means more than this.

Moreover, the economization of competition law does not simply refer to the creation by the Commission in September 2003 of the position of a Chief Economist, who is assisted by some two dozen of PhD economists. Although this has improved the quality of the economic reasoning contained in Commission decisions (Röller & Buiges, 2005), it is not economization. It also does not refer to educating judges in economics, even though this will increase the quality of the administration of justice in the sense that the decisions of judges who have basic economic training are much less likely to be appealed than those by generalist judges (Baye & Wright, 2009).[17]

Real economization means that the effects of competition are judged on the basis of an economic criterion. The ultimate economic criterion is welfare, in this case, consumer welfare. Despite the efforts to economize the application of competition law, the application of competition regulation is becoming increasingly juridified. Due to current thinking in terms of checklists, the criterion on 'restricting competition' has taken on a life of its own, divorced from the effects on welfare. The concept of competition restriction in the prohibition on cartels has been dissected into all sorts of varieties: noticeable versus non-noticeable restrictions; agreements that have as their object to restrict competition versus agreements that merely have the restriction of competition as an effect; necessary versus non-necessary restrictions; plus all sorts of combinations that make the matter even more complicated, at least for an economist. From the

17 Baye & Wright (2009) examined data from antitrust litigation in federal district and administrative courts from 1996 to 2006 to test what impact economic training may have on the ability of generalist judges to successfully adjudicate antitrust cases. Their analysis took a variety of controls into account, including the type of cases, the appellate circuit in which the case was litigated, the level of judicial experience with antitrust claims, judicial quality and political ideology.

economic point of view, the only concern is whether conduct or an agreement that restricts competition does or does not reduce consumer welfare. Economic assessment is not affected by whether competition restriction is the objective or the effect or whether the restriction is deemed necessary or not.

In the case of the psychologists mentioned earlier, the NMa used a checklist and asked: was the objective of the price agreements to restrict competition, or was the restriction an effect of these agreements? NMa found that it was an agreement whose objective was to limit competition. This is a hardcore cartel, which is prohibited *by definition*. Even if a deliberate limitation does not lead to competition being restricted, it is still forbidden.

Of course, there are also types of conduct and agreements that have been repeatedly shown to restrict competition. From the perspective of process efficiency, there is something to say for having a category that is 'illegal per se'. However, this should not be undertaken lightly. This is made clear by the example of the T-Mobile ruling.

This ruling concerned an exchange of information between Dutch mobile telecom operators regarding lowering the standard remunerations for dealers. The NMa established that this was a price agreement and did not conduct any further research into the consequences of the agreement for the consumer. Legally speaking, Article 101(1) applies to agreements that either have as their object or the effect the restriction of competition (the concepts of a 'restriction by object' and a 'restriction by effect'). If it is determined that the object of an agreement is to restrict competition, no further analysis is required. Agreements that are found to restrict competition by object are so-called hardcore cartels – consider the resale price maintenance and agreements on market partitioning. When the object of an agreement is not restrictive, the effects of the agreement on competition have to be assessed.

In 2002, the NMa imposed a fine of EUR 88 million in total on the telecom operators. After the market parties lodged an objection, the NMa lowered the fines to just over EUR 52 million in 2004. The telecom operators took their appeal to court, which doubted whether the quick route via a hardcore cartel (with no further investigation) was possible and asked the European Court of Justice for advice. What followed was a legal-formal consideration of whether, from the legal point of view, it is permissible to talk of an agreement whose objective it is to restrict competition if there is no direct link between the operators' consultation and consumer prices, but only between the consultation and dealer remuneration. The possible benefits or disadvantages for end users were not included in this consideration, despite the fact that prices for consumers could fall if dealers receive lower commissions. This case shows how thinking in terms of checklists can hinder taking consumer welfare into consideration.

5 Rewriting competition law

How can this juridization of the application of competition law be stopped? This paper concludes that the only solution is to include the consumer welfare criterion in the law. Admittedly, this is quite ambitious for a simple economist. And rewriting European competition law is probably even unrealistic given the trouble it would take to change the Treaty. The goal of this rewriting exercise is, therefore, to rethink the formal goal and the wording of competition law.

Below, the three basic articles in competition law, the cartel prohibition, the prohibition of abuse of a dominant position and the merger regulation, are rewritten. We start with cartel prohibition. Box 1 cites Article 101 TFEU as it is currently worded with (1) the description in paragraph 1 of what a competition restriction – a cartel – actually is, (2) the annulment of cartels, addressed in paragraph 2, and (3) the conditions for an efficiency defence found in paragraph 3 (see Box 1).

In Box 2 the cartel prohibition has been changed in three ways (see Box 2 below). Firstly, in paragraph 1 an additional condition has been included, meaning that three rather than two conditions must be met before a case can fall under the cartel prohibition. This third condition is the economic welfare criterion. Only competition restrictions that are detrimental to consumer welfare may fall under the cartel prohibition. Secondly, in paragraph 3, the second stage, which can provide the basis for an efficiency defence, has been totally removed. This is possible because the consideration of welfare effects has been moved to paragraph 1 and the economic welfare criterion have also been included there. This dismantles the two-stage process, creating the possibility of an integral consideration. The conditions that were first stipulated in paragraph 3 have been removed from the section and included in the guidelines as clarification. Another benefit of this is that paragraph 2, on the invalidity of cartels, would then be in a more logical place, namely as the final paragraph, no longer wedged between the two steps of the two-stage process. Finally, the five examples of cartels have been moved from the legislative text to the guidelines. These examples currently attract a great deal of attention, while the real issue is the actual prohibition. Furthermore, some of the examples are rather dated.

The concept of the efficiency defence is potentially the most economic part of competition law. In practice, however, this is not the case. According to Nicolaides (2005), there appears to be no true economic balancing of pro- and anti-competitive effects under Article 101(3). He speaks of the application of successive 'filters' to weed out certain anti-competitive agreements. What is needed is neither filters nor rules of thumb but real economic thinking. That is why the conditions have been removed from Article 101(3) and placed in the guidelines. After all, they are merely sub-questions and do not pose the key question: Will the agreement of concerted practice reduce consumer welfare?

Article 102 TFEU and Article 2 of the Merger Regulation have been rewritten in a similar way (see Boxes 3 to 6).

Box 1: Cartel prohibition, Article 101 TFEU as it is currently worded

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.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
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.

Box 2: Cartel prohibition, Article 101 TFEU rewritten

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;
   - have as their object or effect the prevention, restriction or distortion of competition within the internal market; and
   - <u>decrease consumer welfare</u>.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

Addition to the guidelines:

Addition of the welfare criterion in paragraph 1 means that the prohibition does not apply to:

— 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.

Addition to the guidelines:

Examples of behaviour or conduct under paragraph 1 may include:

(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.

Box 3: Abuse of dominance, Article 102 TFEU as it is currently worded

Current text of the Article:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making 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.

Box 4: Abuse of dominance, Article 102 TFEU rewritten

Article 102 TFEU rewritten:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may:

- affect trade between Member States;
- negatively affect consumer welfare.

Addition to the guidelines:

Examples of abuse may include:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making 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.

Box 5: Merger Regulation, Article 2, Appraisal of concentrations, as it is currently worded

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account:
   (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
   (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.
4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 101(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.
5. In making this appraisal, the Commission shall take into account in particular:
   — whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,
   — whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Box 6: Merger Regulation, Article 2, rewritten

Only changes in paragraph 1 sub a, paragraphs 3 and 4

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account:
   (a) the need to maintain and develop effective competition within the common market and to promote consumer welfare in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

   [….]
3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, and that would decrease consumer welfare shall be declared incompatible with the common market.
4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 101~~(1) and (3)~~ of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

6 Final remarks

The inclusion of the welfare criterion would make it possible to measure the effects of restricting competition on consumer welfare. It is true that this will make the outcome of a case more unpredictable. In other words, legal uncertainty will increase. It is also true that consumer welfare is difficult to measure, but this applies equally to measuring whether or not competition has been restricted.

A welfare analysis of competition policy sounds like a sacred principle that is not practicable. However, this is not true. There is an excellent instrument for assessing effects on welfare: a social cost-benefit analysis. Although it seems these analyses only deals with hard economic issues such as sales and employment, this is also categorically not true. After all, the economic concept of welfare is broad and includes for example environmental impacts, the importance of safety, as well as all other aspects that influence welfare. Lawyers debate whether or not there is room in competition law to consider non-competition interests, such as care, environment and culture.[18] To avoid confusion in competition cases, it would be better to refer to social cost-benefit analysis than competition cost-benefit analysis.

Lawyers and political scientists tend to approach the concept of public interests differently to economists. The former define public interests on the basis of the primacy of politics: any democratically elected politician is free to appoint public interests. In other words, something is a public interest because politicians determine that it is the responsibility of the government to guarantee that interest. This line of thinking results in a circular argument. Economists define public interests as an interest that cannot be generated by the market because of market failure. Economic theory describes four types of market failure: lack of effective competition, information asymmetry, external effects and public goods.[19] Economically speaking, government action is only called for in order to correct a market failure[20] and competition law is solely aimed at correcting market failure due to lack of effective competition.

This makes it clear that the first requirement for considering effects on welfare is the restriction of competition. Also, an efficiency defence does not mean that anti-competitive effects can be offset by 'non-competition interests' or 'public interest' such as environmental concerns, media

18 Sometimes these public interests are referred to as non-economic interests. From an economic perspective, the distinction between economic and non-economic interests is not relevant since a broad welfare concept is applied.

19 A first ground for government action is when competition is seriously threatened, for example in the case of a natural monopoly, or in the case of a dominant supplier or the threat of one arising as a result of a merger. A second type of market failure is information asymmetry between the producer and the consumer. In most cases, the problem occurs when consumers cannot properly assess quality and therefore give suppliers the opportunity to overcharge consumers. A third type of market failure occurs through external effects, that is, effects of production and consumption that influence production opportunities and welfare but do not have a price (for example, 'excessive' noise pollution in aviation). Finally, public goods may give rise to government action in the public interest. Consumers will often be unwilling to pay for these goods on an individual basis because it is impossible to exclude people from the use of the good and the marginal costs of an extra user are zero.

20 This is valid as long as the remedial costs of any government action are no more expensive (in terms of welfare) than the costs of the market cure.

pluralism or social cohesion. According to Petit (2009), this is perhaps the most apparent area of inconsistency between the guidelines on Article 81(3) and the case law. The guidelines are clear when referring to 'improv[ements] in production or distribution of goods or to promoting technical or economic progress' and 'objective economic efficiencies' (e.g., synergies or economies of scope or scale). According to Petit, case law is not clear: '[It] is a more open-ended interpretation of Article 81(3), and covers not only pure "economic efficiencies", but also encompasses non-competition concerns'.

There is, therefore, no question of extending the consideration to include public interests if no restriction of competition occurs. This would only lead to contamination of the cartel prohibition. Of course consumer welfare may be influenced if public interests are at stake, but not all actions that influence welfare are relevant when applying competition law. Competition law is only intended to solve problems concerning market power. In the words of Farrell and Katz (2006), '"anticompetitive" actions that harm consumers are illegal but other actions that harm consumers are not'. The government must resolve different market failures using different policies. The Dutch competition authority is the NMa, where this abbreviation stands for the Netherlands Competition Authority, not the Netherlands Market Failure Authority.

I have explained why it is important to base competition law on economic welfare. Competition is an essential part of the market mechanism. As with the market mechanism, the objective of competition is to make society, or rather consumers, more prosperous. This welfare criterion, however, is absent from competition law. Formal-legal criteria therefore dominate the application of competition law. This paper has argued that a change of legislation is necessary in order to give the welfare criterion its rightful place in competition law and bring a halt to further juridization. Knowing that rewriting European competition law would be quite unrealistic, at least in the short term, the goal of this rewriting exercise is to rethink the formal goal and the wording of competition law.

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Roetersstraat 29 . 1018 WB Amsterdam . T (+31) 20 525 16 30 . F (+31) 20 525 16 86 . www.seo.nl