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Consumer Welfare and the European Commission

How the role of consumer welfare has evolved throughout the history of the Commission's competition policy, and how digital markets and sustainability affects consumer welfare now

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Table of Contents

Summary

This essay aims to answer several questions: how is consumer welfare defined in economics and by the Commission, how has the role of the concept evolved throughout the history of the Commission's competition policy, and how do the modern problems of digital markets and sustainability affect the role of consumer welfare?

It can first be stated that there exists a clear definition and a way to measure consumer welfare in economic theory. In short, it is the difference between what consumers would have been willing to pay for a good and what they actually had to pay. The Commission has however not defined the concept as precisely, rather, a broad definition is applied, now encompassing price, quality, choice, innovation, fairness, and contestability in the Digital Markets Act. Throughout history, consumer welfare did not have a prevalent role until a shift to 'a more economic approach' in competition policy was seen in the 1990s, where critique from experts and several other factors led to consumer welfare becoming the spoken goal of the Commission's competition policy. However, a disconnect between statements, and decisions and guidelines can be seen, as to the importance of consumer welfare.

For consumers, a broad definition of consumer welfare is beneficial, due to it taking into consideration other factors than just price, but to have sufficient protection in other areas, clear assessment criteria are necessary for the principle of rule of law to be satisfied. As sustainability considerations are becoming more prevalent in competition policy, this is of particular importance. This essay argues that the current consumer welfare standard, rooted in consumer's willingness to pay, is unsatisfactory when applied to sustainability considerations and needs to either be adapted, or replaced with a different standard.

This essay further argues that the new Digital Markets Act, while consumer welfare being an objective of the regulation, potentially does not satisfy consumer protection needs, due to primarily regulating the relationship between gatekeepers and business users. Thus, it is relying on the trickle down of effects to consumers.

It is important, as we move towards a new era of competition law, focused on digital markets and sustainability, sufficient consumer protection is ensured. As of right now, the Digital Markets Act and sustainability considerations creates more uncertainty, rather than ensuring the protection of consumers in the modern world

Abbreviations

DMA – Digital Markets Act

EC – European Community

EU – European Union

iOS – iPhone Operating System

NFC – Near Field Communication

OECD – Organization for Economic Co-operation and Development

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

US – United States of America

1. Introduction

1.1 Background

Throughout the history of competition law, many statements from the Commission indicate that consumer welfare plays a vital role in competition policy- and decisions. For instance, Commissioner Almunia stated in 2010 that the ultimate objective of competition policy was clear, it was a tool at the service for consumers and consumer welfare was at the heart of the Commission's policies and decisions.[1]

However, this has not been the case throughout history, instead, until the 90s the main objective was seen as market integration, and it was not until the Commission's practices came under major scrutiny from economists that consumer welfare got a more prevalent role.

Today, we are seeing a similar shift in priorities of the objectives underlying competition policy, and new obstacles facing the EU. For instance, the digital markets are growing at an incredible pace which leads to the behavior of companies operating on such markets being investigated more frequently due to the conduct's influence on consumers. Although the Digital Markets Act is not in the writer's view competition law per se (due to it not relating to Articles 101, 102 TFEU or merger regulation, and it being adopted under Article 114 TFEU) it aims at addressing the shortcomings and limitations of Articles 101 and 102 TFEU when they are applied to digital markets (which will be shown below). This makes the regulation relevant for the purpose of this essay.

Furthermore, in 2019 the EU presented the green deal which aims to transform the EU into a modern, resource-efficient, and competitive economy, through ensuring no net emissions of greenhouse gasses by 2050 together with several other objectives.[2]

When such major developments are influencing competition law, it is important that sufficient protection of consumers is still achieved. This essay will try to outline the historical evolution of the role of consumer welfare to give a historical context of the concept. Following this, the modern challenges facing competition law through the digital markets and

[1] Joaquín Almunia, Competition and consumers: the future of EU competition policy, speech at European Competition Day, Madrid, 12 May 2010, <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_10_233/SPEECH_10_233_EN.pdf>, accessed 2022-04-25.

[2] A European Green Deal, <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en>, accessed 2022-05-10.

sustainability will be described and analyzed, specifically their relationship to the role of consumer welfare.

1.2 Purpose and research questions

The purpose of this essay is to investigate how the role of consumer welfare has evolved throughout the history of the Commission's competition policy, and how digital markets and sustainability affects consumer welfare now. To achieve this, one must first define consumer welfare as a general concept, secondly define it within the context of the Commission, thirdly, consider how the application has evolved throughout the years, and fourthly analyze whether the protection is sufficient to meet the consumers' need for protection in the modern world. Therefore, the research questions are the following:

1. How is consumer welfare defined in economic theory?
2. How is consumer welfare defined by the Commission?
3. How has the role of the concept of consumer welfare evolved throughout the history of the Commission's competition policy?
4. How do the two main modern problems facing competition law today, the rise of digital markets and sustainability, affect the role of consumer welfare in competition law?

1.3 Delimitations

The first, main delimitation is that the other objectives of competition law will not be considered, and consumer welfare will not be put in the context of the other objectives. Therefore, the question of the essay is not whether consumer welfare is the ultimate goal, the main question is regarding the influence it has on competition law in practice and in theory.

Furthermore, the drafts for the new Vertical Guidelines and the new Vertical Block Exemptions have been published as of this essay and contain a big focus on digital markets. However, the focus of these is not on the role of consumers, or consumer protection in the digital markets, rather, they give clarity to businesses on how they should apply the competition provisions in the digital markets.

Lastly, due to this essay's focus on the Commission, case law from the Courts will not be discussed more than auxiliary to the purpose of the essay.

1.4 Methodology and materials

This essay will focus on a European legal method, where EU legislation and the Commission's guidelines are at the heart of the essay. What a European legal method entails is however difficult to explain, but identifying a coherent legal method in analyzing EU law within the scope of application of EU law is fundamental to establishing a European legal method.[3]

A legal method can be seen as the doctrine of the sources of law and their interpretation.[4] Within this definitions, four characteristics of European legal methodology in the Courts can be seen: they apply a teleological method of interpretation (the objective of the provision is considered), the interpretation strives for a uniform interpretation, particularly regarding words and concepts, Article 4(3) TEU is of major importance to support the interpretations, and fundamental rights and general principles of EU law are often used as guidance.[5]

Applying this to this essay, when analyzing the role of consumer welfare standard, it is important to consider the underlying goals of applying the standard, the interpretation of the standard must be uniform across the EU, the interpretation should not jeopardize the attainment of the Union's objectives, and respect general principles of EU law and fundamental rights. This is the framework and method that will be applied in this essay to answer the research questions.

Following this, the essay will focus on the main sources of EU law, complemented by the Commission's guidelines which gives insight into the specific goals underlying the provisions. Furthermore, legal doctrine will be used to develop concepts and views presented in the essay.

Competition law has constitutional status through articles 101 and 102 TFEU, and is expanded upon through regulations such as the Merger regulation. When it comes to the application and interpretation of the provisions, the Courts and Commission enjoy a wide margin of discretion.[6] Therefore the Commission's guidelines on the interpretation of the provisions are of major importance to answer the research questions. The Commission plays a

[3] Neergaard, Nielsen & Roseberry (2011) p. 7.
[4] Ibid. p. 12.
[5] Ibid. p. 13.
[6] Riesenhuber (2017) p. 519.

vital role in shaping competition law, both for its own and for the Member States sake, and questions of interpretation are mainly dealt with through the Commission's guidelines.[7]

The Commission's White Paper on Modernisation of the Rules Implementing Articles 85 and 86 EC states that the Commission "might not be binding on national authorities, but they [...] make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases, the Commission [...] confirm the approach they set out. Provided those individual decisions were upheld by the Court of Justice, then, notices and guidelines would come to form part of the rules that must be applied by national authorities."[8] This is why much of this essay's focus is on the Commission's guidelines and interpretation of the provisions and the consumer welfare standard; it forms part of the rules applied by the national Courts, where upheld by the Court of Justice.

In the first part of this essay, weight is also given to economic theory. Competition law is dedicated to markets, therefore, in the application of competition law, economics is relevant.[9] This does not however mean that the application of economic theory on competition law is without problems. "Premises and results of competition should not be misunderstood as a mechanistic, tangible connection between cause and effect that is capable of providing a safe foundation for assessment in competition law."[10] Instead, economics become relevant by creating operational criteria when the provisions are indeterminate, by relating them to basic functions of competition law, e.g. it identifies criteria which act as the starting point for assessing whether conduct is restrictive to competition, what constitutes abuse and which mergers are not in line with Article 3(3) TEU.[11] Therefore, economic theory is relevant for the application of competition law, and it is fundamental to this essay's investigation to define the economic concepts which are applied in competition law when applying a consumer welfare standard.

1.5 Disposition

The essay starts off by defining consumer welfare as an economic concept and how it is applied in practice in economics. After that, the Commission's definition (or lack of definition) is

[7] Ibid.
[8] European Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027 (1999), para. 86.
[9] Riesenhuber (2017) p. 523.
[10] Ibid. p. 524.
[11] Ibid.

analyzed, to gain an understanding of how the Commission's view may differ from the economic one. When the Commission's view is clearer, a historical journey from the 1950s to modern times will try to grasp how the Commission's application has evolved and changed throughout the years; mainly, what role consumer welfare has played throughout the years in policy- and decision making. The last part of the main body will focus on the problems facing competition law in the modern world, the evolution of digital markets and creating a greener tomorrow, and how this affects the role of consumer welfare. This will be analyzed through looking at the major developments in competition law relating to these areas, the Digital Markets Act and the new Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements. The last part of the essay focuses on the author's conclusion, describing the findings and conclusions of the essay.

2. Defining consumer welfare

Consumer welfare is an economic concept, however, is mostly used to legitimize political rationale, competition policy and income distribution policy.[12] A thorough understanding of the economic concept is therefore needed before analyzing how it affects the policy and decisions of the Commission.

2.1 The economic approach to consumer welfare

Initially, it is relevant to acknowledge that the economic approach and the legal approach differs.[13] In economics, a formal model is often used to demonstrate welfare effects of different goals of competition law, while the legal approach puts welfare within a constitutional context and defines the concepts in a way which fits into that context.[14] However, while the approaches are different, they are still connected.[15] Changes in economic theory may affect how we as legal scholars define the goals of competition law, therefore, a purely economic or legal approach to the goals of competition law would not be appropriate; the goals must be approached in a way studying the interrelationship between the approaches.[16]

According to the OECD glossary, consumer welfare "refers to the individual benefits derived from the consumption of goods and services"[17] and is defined by "an individual's own assessment of his/her satisfaction, given prices and income"[18]. In short, "consumer welfare is the difference between what consumers would have been willing to pay for a good and what they actually had to pay." [19]

In practice, consumer welfare is measured through consumer surplus, which is defined as "the excess of social valuation of product over the price actually paid", or the area indicated

[12] Cseres (2007) p. 122.
[13] Kirchner in Schmidtchen, Albert and Voigt (2007) p. 8.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Khemani & Shapiro, Glossary of Industrial Organisation Economics and Competition law (1999), <https://www.oecd.org/regreform/sectors/2376087.pdf>, accessed 2022-04-20, p. 29.
[18] Ibid.
[19] Albæk, Consumer Welfare in EU Competition Policy (2013), <https://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf>, accessed 2022-04-20, p. 70.

below a demand curve and above the observed price.[20] This illustrates the aggregate benefits derived from the consumption of goods and services, however does not take into account the individual preferences of the consumers, and their individual satisfaction, given the price and their income.[21] Consumer surplus is therefore aggregate consumer welfare on a given market and used in practice to measure consumer welfare.[22]

Producer surplus is in contrast the sum of all profits made by producers in the industry.[23]

A discrepancy between consumer welfare and consumer surplus exists, the concept of welfare is broader than the notion of surplus, and it is unclear how the broader elements should be implemented into the legal analysis, e.g. when the counterclaim of improvement in quality and innovation is made to justify a price increase.[24] The notion of consumer surplus does not encompass this argument and therefore the situation from a legal standpoint becomes unclear when applying the economic concepts.[25] One therefore has to be careful when applying the notion of consumer surplus, so as to not sacrifice dynamic efficiency – stifling innovation and future efficiencies.[26]

Furthermore, the relationship between consumer welfare and allocative efficiency must be ascertained. Often, in policy statements made by the European Commission, allocative efficiency is stated in conjunction with the goal of consumer welfare.[27] It is therefore important to define their relationship to understand the concept of consumer welfare. Allocative efficiency can also be referred to as Pareto efficiency and relates to when resources are allocated in a way in which it is not possible to make anyone better off without making someone else worse off.[28] In this case, it is assumed that products are produced in the most efficient way.[29] Two interpretations of consumer welfare can following this be made, that "the consumer welfare goal requires that changes improving the individual welfare of producers also improve

[20] Khemani & Shapiro, Glossary of Industrial Organisation Economics and Competition law (1999), <https://www.oecd.org/regreform/sectors/2376087.pdf>, accessed 2022-04-20, p. 28.
[21] Ibid. p. 29.
[22] Ibid.
[23] Motta (2004) p. 18.
[24] Daskalova (2015) p. 135.
[25] Ibid.
[26] Ibid.
[27] Van den Bergh in Schmidtchen et al. (2007) p. 29.
[28] Khemani & Shapiro, Glossary of Industrial Organisation Economics and Competition law (1999), <https://www.oecd.org/regreform/sectors/2376087.pdf>, accessed 2022-04-20, p. 65.
[29] Ibid.

the welfare of individual consumers or at least do not make any individual consumer worse off"[30] or that consumer welfare is "defined as maximization of consumer surplus."[31]

The first interpretation satisfies the Pareto criterion, and consumer welfare and allocative efficiency are not in conflict, however, it imposes restrictions on policy decisions, due to the difficulty of making producers better off without making consumers worse off, e.g. mergers which reduce costs without negatively impacting prices.[32]

The second interpretation has no basis in welfare economics, it does not satisfy the Pareto criterion nor the Kaldor-Hicks criterion – consumer welfare loss is accepted if they lead to sufficiently large gains for producers, which compensate for the consumer welfare loss.[33] Interventions leading to a decrease of consumer prices will inevitably lead to a decrease in profits for producers, therefore not satisfying the Pareto criterion, while applying a consumer welfare standard would not allow for the Kaldor-Hicks criterion to be satisfied, due to it presupposing that gains only gained by the producers are accepted.[34]

We will see below how the Commission has adopted a pragmatic consumer welfare standard to solve this.

Additionally, it must be investigated to whom consumers in the consumer welfare standard refers to. It is important to know whose harm or benefit would count in court, therefore, a precise meaning of the word consumer is essential.[35] While economic theory does not offer clarity, it simply states that consumer is the purchaser of a good or service[36] guidance can be found in literature, where the consumers are sometimes assumed to be the final consumers.[37] To understand whose welfare is to be considered, we need to build an understanding of the specific factual situation and economic model at hand.[38] In this understanding, the model relates to the clarification of the relationship between the parties in the specific case.[39]

Two understandings of consumer can initially be seen, which justify different policy decisions. One where consumer welfare relates to purchaser welfare, and the other, where it

[30] Van den Bergh in Schmidtchen et al. (2007) p. 29.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Daskalova (2015) p. 136.
[36] Ibid. p. 138.
[37] Ibid. p. 137.
[38] Ibid.
[39] Ibid.

relates to final consumer welfare.[40] This can be exemplified, if, for instance, when a powerful intermediary buyer pushes their business partners to lower their prices in the supply chain for the benefit of the powerful purchaser, while it is obvious that this increases the buyers surplus, however, there is no guarantee that this surplus reaches the final consumers.[41] To know if final consumer surplus is increased, a separate investigation into the competitive conditions on the market between seller and final consumer is needed.[42]

If we require that the surplus is enjoyed by the final consumers, and that the requirement of harm in antitrust law only relates to end user harm, most abuses occurring along the supply chain would be outside the scope of antitrust regulation, if we do not prove an impact on final consumers.[43]

As stated above, the economic definition does not distinguish between individuals and companies, nor intermediary and final consumers.[44] Therefore, the economic definition of consumer welfare does not clarify what kind of injury and to whom it would seek to protect, thus, while it may be relevant for the purpose of economic science, it is unsatisfactory in a legal context.[45]

[40] Ibid.
[41] Ibid.
[42] Ibid. p. 138.
[43] Ibid.
[44] Ibid. p. 139.
[45] Ibid.

3. The role of consumer welfare according to the Commission

3.1 General considerations on the Commission's approach to consumer welfare

The Commission can be said to have adopted a pragmatic approach to consumer welfare.[46] This approach means that the rules of primary EU law reject the Kaldor-Hicks criterion of total welfare.[47] Pragmatism can be seen in the Commission requiring that the net effect of agreements (or a merger) is at least neutral from the point of view of the consumers.[48] Therefore, while more weight is given to competitive prices for consumers than cost savings or profits for producers, producer surplus is still taken into account.[49]

Pragmatism when applying a consumer welfare standard can also be seen in the Commission's willingness to accept arguments of dynamic efficiencies, at least in its guidelines on the application of Article 81(3).[50] In the guidelines, the Commission acknowledges that agreements may yield efficiencies relating to technical advances and qualitative advances.[51] However, the Commission also acknowledges that it is difficult to assign precise values to such efficiencies.[52]

In the 2004 Guidelines on the application of Article 81(3) EC the Commission presented both consumer welfare and allocative efficiency as the goals of the article.[53] While it was discussed above that the relationship between these two are complicated, and satisfying both is difficult, the Commission's pragmatic approach described above nonetheless aims to do so. It can therefore be claimed that the EU has adopted a consumer welfare standard, while still recognizing certain efficiency gains.[54]

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[46] Van den Bergh in Schmidtchen et al. (2007) p. 30.
[47] Ibid. p. 29 & 30.
[48] Ibid. p. 30.
[49] Ibid.
[50] Ibid. p. 30 & 31 and Guidelines on the application of Article 81(3) of the Treaty (2004) paras. 69–72.
[51] Guidelines on the application of Article 81(3) of the Treaty (2004) paras. 69–72.
[52] Van den Bergh in Schmidtchen et al. (2007) p. 31.
[53] Guidelines on the application of Article 81(3) of the Treaty (2004) para. 13.
[54] Cseres (2005) p. 252.

As for what Consumer welfare includes, it does not, in the EU, just encompass price, but also quality, choice and innovation, although the Commission has used price as a way of measuring all parameters.[55] More and more price, quality and choice has become synonymous with consumer welfare by the Commission,[56] as we will see later. An unwillingness to define consumer welfare more specifically within the EU can be seen. Within the EU framework a definition as specific as the economic one does not exist, but Commissioners, such as Commissioner Almunia, have specifically referred to consumer welfare as the goal of competition law.[57] Still, it is unclear if this follows the economic definition, due to lack of statements regarding the definition of consumer welfare in the EU.

Lastly, it is important to acknowledge, in EU law, that consumers not only mean end users, but also intermediary consumers.[58] In the Guidelines on the application of Article 81(3) the Commission stated the following: "The concept of 'consumers' encompasses all direct or indirect users of the products [...]. [C]onsumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers [which] [...] can be undertakings [...] or final customers."[59] The same viewpoint is held in the 2011 Guidelines on horizontal cooperation agreements[60] and the 2004 Merger Control Regulation and Guidelines[61].

3.2 The early approach

In the Commission's first report on competition policy in 1971 it put forth the objectives of competition law. Competition policy was described as the best stimulant for economic activity, since it guarantees the widest possible freedom of action to all.[62] The Commission claimed that

[55] Daskalova (2015) p. 145-146 and Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) and Guidelines on the application of Article 81(3) of the Treaty (2004).
[56] Daskalova (2015) p. 146.
[57] Joaquín Almunia, Competition and consumers: the future of EU competition policy, speech at European Competition Day, Madrid, 12 May 2010, <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_10_233/SPEECH_10_233_EN.pdf>, accessed 2022-04-25.
[58] Daskalova (2015) p. 144.
[59] Guidelines on the application of Article 81(3) of the Treaty (2004) para. 84.
[60] Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011) para. 49.
[61] Article 2(1)b of the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
[62] European Commission, 1st report on Competition policy (1972) p. 11.

competition policy ensures that the individual and collective needs of society are satisfied[63] and that it "endeavours to maintain or to create effective conditions of competition by means of rules applying to enterprises"[64]. It continued that it encourages the best use of resources for the greatest benefit of the economy and in particular for the consumers and as such, the Commission is responsible for adopting legislation which increases the quantity of goods, promoting better information for consumers, harmonize laws and remove technical barriers to trade, to promote the establishment of the common market.[65] The competition policy of the EU was said to, broadly speaking, be focused on the creation and operation of the common market.[66]

As for taking consumer interests into consideration in Commission proceedings it was stated that in "order [for] [...] the consumer [to] [...] fully benefit from the effects of the Common Market, [...] the Commission endeavours actively to promote the protection of, and provide information to the consumer"[67] and that this action is taken to promote intelligent choice in the market, and protect consumer's rights and health.[68]

In the Commission's sixth report on Competition policy from 1976 the Commission stated that the aim of competition policy was to "ensure that business operates along competitive lines, while protecting the consumer by making goods and services available on the most favourable terms possible."[69] The Commission had also given priority to cases where firms had conducted in industries which by their very structure ran the risk of harming consumer interests if competitive pressures were to be lessened.[70]

While this can be interpreted to mean that consumer welfare was one of the aims of competition policy, ambiguity existed as to the precise goals of competition policy, and to what extent economic efficiency played a role in the Commission's approach to its decisions.[71]

[63] Ibid.
[64] Ibid. p. 12.
[65] Ibid.
[66] Ibid.
[67] Ibid. p. 189.
[68] Ibid.
[69] European Commission, 6th report on Competition policy (1977) p. 9.
[70] Ibid. p. 11.
[71] Cseres (2007) p. 151.

3.3 The shift to a more economic approach

In the late 1980s and early 1990s, several academics came to criticize the Commission's approach to antitrust law.[72] An example of this is the analysis published by Barry Hawk in 1995 in which he deemed the approach too legalistic and lacking in economic analysis.[73] He was not the only one to call for modernization, several academics, practitioners and even Commission officials were calling for it.[74] One can say that many of these claims were based on comparisons to US antitrust law, which had adopted economic theory since the late 1970s.[75] However, many other factors were behind the modernization of EU competition law.

Before discussing the Commission's modern approach to consumer welfare, it is therefore necessary to look at the key triggers and catalyst for the development of the approach. As stated above, the EU and the US differed in their approach to antitrust law in the 1980s and 1990s, they did not follow the same substantive principles.[76] While this had been a subject of academics before, in the late 1990s the discrepancies lead to real implications when several cases with international dimensions reached the authorities.[77]

While US and EU competition law prohibited anticompetitive agreements, anticompetitive conduct by dominant undertakings and anticompetitive mergers, it became clear that the authorities did not interpret the rules similarly.[78] For example, in *GE/Honeywell*, the authorities assessed different types of effects, and relied on different theories of harm.[79]

The background to the case was that the US and EU competition authorities were investigating a merger between two companies, General Electric Company (GE) and Honeywell International Inc. (Honeywell).[80] Both companies were established in the US, but the turnovers of the companies were such that the proposed merger had a Community dimension within the meaning of Regulation 4064/89, therefore the merger was within the scope of EU law.[81] What was significant was that the US authorities concluded that the merger

[72] Witt (2016) p. 10.
[73] Ibid.
[74] Ibid. p. 11.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid. p. 25.
[79] Ibid.
[80] Ibid. p. 14.
[81] Ibid. p. 14 & 15.

did not raise significant competitive concerns, while the European Commission, only a few weeks after the US decision, prohibited the acquisition due to finding it did.[82]

The US department of Justice in its investigation initially feared that the proposed merger would result in higher prices, lower quality and reduced innovation in the production of helicopter engines for the US military, and that it would likely result in a substantial lessening of competition in the market for the maintenance, repair and overhaul of Honeywell aircraft engines and auxiliary power units.[83] GE therefore pledged to dismantle Honeywell's helicopter division after the merger, and to license a competitor to service certain engines.[84] This was considered sufficient to mitigate the concerns according to the Department.[85]

The Commission however reached a different conclusion as to the assessment of the merger. It held that it would strengthen an already dominant position in markets which the companies shared, as well as reduce the number of competitors and eliminate the undertaking which had posed the only significant constraints on GE.[86] It also held that the merger would result in anticompetitive effects on vertically related and adjacent markets.[87]

An analysis of the two authorities' different assessments indicates that they analyzed very different types of effects, where the Commission focused on whether the merger would lead to the creation or strengthening of a dominant position, and the US Department of Justice instead examined whether it would result in the creation of market power, which was probable to result in higher prices, lower quality, and reduced innovation for consumers.[88]

The criticism that followed from US antitrust experts claimed that the Commission had not properly acknowledged and made its decision dependent on the merger's effect on consumers, instead basing it on the possibility of competitors being forced to leave the market.[89] The consensus was therefore that EU competition law protected competitors, while the US protected consumers.[90]

The experts claimed that the Commission's assessment was out of sync with contemporary economic theory, and began to wonder whether the two agencies even pursued

[82] Ibid. p. 15.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid. p. 16.
[87] Ibid.
[88] Ibid. p. 17.
[89] Ibid.
[90] Ibid.

the same aim.[91] Discussion continued on whether the EU aimed to protect businesses from the anticompetitive conduct of their competitors, while the consensus around the objective of US antitrust law was that it aimed to protect consumers from anticompetitive conduct.[92] This debate, both at academic and political level, must be seen as influential to the modernization process of EU competition law that occurred in the beginning of the twenty-first century.[93]

Another important factor to consider when discussing the Commission's shift to a more economic approach is that in 2002 the General Court found in three merger cases that the Commission had committed assessment errors of such gravity that the Court considered them to exceed the permissible margin of discretion normally afforded the Commission under article 2 of the Merger Regulation.[94] The three cases were *Airtours*[95], *Schneider Electric*[96] and *Tetra Laval*[97].

These three decisions occurred one year after the *GE/Honeywell* debate started, and while the US experts were claiming that the Commission was not guided by the objective of contemporary economic theory – the maximization of welfare, either total or consumer – one should not presume this was why the General Court decided in the way it did.[98] While the experts considered that the assessment in competition cases had to be based on whether the conduct reduced economic welfare, which the Commission failed to do in *GE/Honeywell*; the General Court didn't consider the relevance of consumer harm the point of contention.[99] Instead, the main issue in the three cases was that the Commission had not supported its assumptions sufficiently, and had ignored fundamental economic reasoning.[100] However, the decisions still have to be considered impactful in the evolution of the Commission's approach.[101]

Furthermore, the influence Mario Monti had on the development and shaping of modern EU competition law cannot be understated. Monti, when he became Commissioner for Competition Policy in 1999, was the first economist appointed to this position, which had

[91] Ibid. p. 26.
[92] Ibid.
[93] Ibid. p. 27.
[94] Ibid. p. 27 & 28.
[95] Case T-342/99.
[96] Case T-310/01.
[97] Case T-5/02.
[98] Ibid. p. 33.
[99] Ibid.
[100] Ibid.
[101] Ibid.

previously been held mostly by politicians with a law or political science background.[102] In a guest editorial for the Journal of World Competition in 2000 he called for the Commission to ensure that its competition policy meets the challenges of the future, adopt its approach to be in line with the economic and political realities, and bring legislation more in line with current economic thinking.[103] This ambition to change the approach from legalistic, to one based on sound economic principles is something that defined his term as Commissioner.[104]

Some doubt as to the adoption of a more economic approach existed before, for example in the Green Paper on Vertical Restraints[105]. While the Paper proposed policy changes which would take economic theory regarding the economic effects of vertical agreements into account, it was still cautious as to the role and significance of economic theory in competition policy.[106] The Paper stressed that economic theory had to be one of many relevant sources, and that evaluation in accordance with economic principles would be too costly, and lead to legal uncertainty.[107]

These doubts were under Monti's tenure put to rest, as the Commission published the guidelines on Article 101[108], reform of EU merger law[109] and the guidelines on the assessment of horizontal mergers[110], which were all influential in the introduction of the more economic approach to EU competition law.[111]

Concluding this, several different events acted as catalysts for the change in the Commission's approach to competition policy in the early 2000s. The Commission came under major scrutiny from US experts following their decision in *GE/Honeywell*, and from the Court in *Airtours, Schneider Electric* and *Tetra Laval*. In the 1990s, the internal market had also been realized to a major extent, which meant that the objective of market integration was no longer

[102] Ibid. p. 34.
[103] Monti (2000) p. 1-3.
[104] Witt (2016) p. 34.
[105] European Commission, Green Paper on Vertical Restraints in EC Competition Policy (1997)
[106] Witt (2016) p. 35.
[107] European Commission, Green Paper on Vertical Restraints in EC Competition Policy paras. 13 & 86.
[108] Guidelines on Vertical Restraints of 13 October 2000, [2000] OJ C291/1; Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements of 6 January 2001, [2001] OJ C3/2; Guidelines on the Application of Article 81 of the Treaty to Technology Transfer Agreements [2004] OJ C101/2; and Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97.
[109] European Commission, 'Green Paper on the Review of Council Regulation (EEC) No 4064/89', COM(2001) 745/6 of 11 December 2001; European Commission, Proposal for a Council Regulation on the control of concentrations between undertakings [2003] OJ C20/4.
[110] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C31/5 (2004).
[111] Witt (2016) p. 35.

in the necessary forefront of policy developments.[112] The Commission could therefore, following these factors, shift its focus and approach, and begin implementing a more economic approach to EU competition law.

3.4 The implementation of the more economic approach

From Monti's appointment as Commissioner the annual reports started to explicitly refer to the significance of the role of competition policy in protecting consumers' lives, and that it can have a positive impact on them.[113] In the Commission's 29th Report on Competition Policy Monti stated that "the protection of the interests of the consumer, and therefore of European citizens, is at the heart of Community competition policy"[114]. In the 32nd Report it was stated that "one of the main purposes of European competition policy is to promote the interests of consumers, that is, to ensure that consumers benefit from the wealth generated by the European economy. This objective, [...], is horizontal in nature: the Commission thus [...] [takes] the interest of consumers into account in all aspects of its competition policy"[115].

In reality, this meant that the Commission's competition policy was realigned to be in accordance with the protection of consumers being the objective.[116] Transparency in this process was important, therefore, in the Commission's annual reports, the Commission started to mention specific cases to illustrate how competition policy acted for the benefit of consumers.[117] One example of this is *Nintendo,*[118] in which anti-competitive agreements between Nintendo and its distributors were terminated.[119] In this case it was found that Nintendo had colluded with its distributors to maintain artificially high price differences within the EU, and also prevented low-price to high-price exports.[120]

Work was also made to bring the decision-making process closer to the consumers by decentralizing competition law, which made it possible for consumers to be heard by both the

[112] Witt (2016) p. 39.
[113] Cseres (2005) p. 241
[114] European Commission, 29th Report on Competition Policy (2000) p. 10.
[115] European Commission, 32nd Report on Competition Policy (2003) p. 20.
[116] Cseres (2005) p. 242.
[117] Ibid.
[118] Cases COMP/C-3/35.587, COMP/C-3/35.706, COMP/C-3/36.321.
[119] Cseres (2005) p. 243.
[120] Ibid.

national competition authorities and the Commission.[121] They could also bring action directly to their national courts against companies who had not acted in accordance with EU law.[122]

This viewpoint continued after Monti's term as Commissioner ended. For example, in 2005, Commission Kroes said that consumer welfare was the standard the Commission applied when assessing mergers and infringements of the Treaty rules on cartels and monopolies.[123] Furthermore, Commissioner Almunia stated when he took office that the ultimate objective of competition policy was clear, it was a tool at the service for consumers and consumer welfare was at the heart of the Commission's policies and decisions.[124] In 2011 he further stated that consumer welfare was the cornerstone and guiding principle of EU competition policy.[125]

3.4.1 Article 101 TFEU (previously Article 81 EC)

Article 101(3) TFEU states that an agreement which is prohibited under Article 101(1) TFEU may be exempted if it 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.

Referring to allowing consumers a fair share of the resulting benefits clearly shows that it is based on a consumer welfare standard and supports the conclusion that the EU does not adopt a total welfare standard, rather a consumer welfare standard which still allows for certain efficiency gains to be taken into consideration.[126]

In the now *General guidelines* it is stated that 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."[127] Therefore, the guidelines relate competition policy and market integration under the same goal, consumer welfare, and argue that it promotes an efficient allocation of resources for consumer benefit.[128] When discussing the assessment of hard-core restrictions, the Guidelines state that "[r]estrictions by object such as price fixing

[121] Ibid.
[122] Ibid.
[123] Jones, Sufrin & Dunne (2019) p. 46.
[124] Joaquín Almunia, Competition and consumers: the future of EU competition policy, speech at European Competition Day, Madrid, 12 May 2010, <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_10_233/SPEECH_10_233_EN.pdf>, accessed 2022-04-25.
[125] Jones, Sufrin & Dunne (2019) p. 47.
[126] Cseres (2005) p. 242.
[127] Guidelines on the application of Article 81(3) of the Treaty (2004) para. 13.
[128] Cseres (2005) p. 253.

and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by consumers are not produced. They also lead to a reduction in consumer welfare because consumers have to pay higher prices for the goods and services in question."[129] The Guidelines therefore reference the consumer welfare standard in the assessment of hard-core restrictions.

Similar statements can for example also be found in the Guidelines on Vertical Restraints paragraph 7 which states that "[t]he objective of Article 101 is to ensure that undertakings do not use agreements [...] to restrict competition on the market to the detriment of consumers."[130]

3.4.2 Merger control

As for the Commission's stance on the role of consumer welfare under the Merger Control Regulation it states in paragraph 8 of the Horizontal Merger Guidelines that "[e]ffective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms."[131]

When discussing merger control it is important to discuss whether, specifically for merger control, the Commission applies a consumer- or total welfare standard. Policy may differ significantly depending on the standard applied, due to many mergers leading to productive efficiency, which may also lead to higher consumer prices.[132] If we base merger control policy on a total welfare standard, cost savings may balance out the price increases, however, Article 2(1) (b) of Regulation 139/2004 requires that efficiencies are for the benefit of consumers to be considered.[133]

From the Guidelines on the assessment of horizontal mergers it should be clear that a consumer welfare standard is applied. Paragraph 79 states that "the relevant benchmark in assessing efficiency claims is that consumer will not be worse of as a result of the merger"[134],

[129] Guidelines on the application of Article 81(3) of the Treaty (2004) para. 21.
[130] Guidelines on Vertical Restraints (2010) para. 7.
[131] Guidelines on the Assessment of Horizontal Mergers (2004) para. 8.
[132] Cseres (2005) p. 254.
[133] Ibid.
[134] Guidelines on the Assessment of Horizontal Mergers (2004) para. 79.

and in other paragraphs it is asserted that only efficiencies that benefit consumers are considered, cost savings can therefore not justify price increases by themselves.[135]

3.4.3 Article 102 TFEU (previously Article 82 EC)

Article 102 TFEU warrants more discussion than Article 101 and the Merger Control Regulation. While the Commission has stated that "[i]n applying Article [102] on exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers"[136], it is important to look at the evolution of the notion of consumer welfare in relation to Article 102 TFEU.

Article 102 prohibits abuse of dominant position by one or more undertakings within the EU and provides examples of abuses. Only Article 102(b) mentions consumers by prohibiting limiting production, markets, or technical development to the prejudice of consumers, however, it does not make clear what prejudice to consumers means. An explanation for this can be that the Courts have interpreted consumers as meaning both final- and intermediary consumers.[137] Furthermore, Article 102 TFEU does not specify a particular objective or standard of harm for its application, while Article 101 TFEU prohibits conduct which has as its objective or effect the prevention, restriction, or distortion of competition.[138]

Whereas the Merger Control Regulation and Article 101 TFEU adopted a consumer welfare standard,[139] Article 102 remained unchanged, potentially because of the heavy influence of the Ordoliberal School.[140]

The Ordoliberal School originated from Germany in the 1930s and advocates an economic system which promotes competition and economic freedom through law, to prevent unconstrained private power and discretionary government intervention in the economy.[141] A competitive market under this school of thought is therefore a "system of decentralized economic planning based on individual economic freedom legally protected by the system of private law of property and contract"[142] and competition law protects competition "as a system

[135] Ibid. paras. 76, 77 and 78.
[136] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) para. 5.
[137] See e.g. Case C-53/72P Hilti v. Commission
[138] Dayagi-Epstein in Ezrachi (2009) p. 69.
[139] See Guidelines on the application of article 81(3) of the Treaty (2004) and the Guidelines on the Assessment of Horizontal Mergers (2004).
[140] Dayagi-Epstein in Ezrachi (2009) p. 69.
[141] Jones, Sufrin & Dunne (2019) p. 27.
[142] Ibid.

within which individuals are free to make their choices on the market"[143]. Article 102 TFEU, due to the influence of the Ordoliberal School, has therefore been interpreted as "a means of protecting the structure of the competitive process as an institution which enhances individuals [...] economic freedom and improves economic outcomes"[144]. What is considered abusive is therefore conduct which can be considered detrimental to the competitive structure due to either the form of conduct or the effect of the conduct, regardless of their direct effect on consumers.[145] The Ordoliberal School of thought is not only seen in the protection of the competitive structure, but also in the emphasis on protecting individual's economic freedom to have equal opportunity to participate in the market.[146]

In practice, this influence meant that certain conduct was prohibited due to the form or detrimental effects on competitors and intermediary customers, or on the structure of the competitive process, with disregard as to their actual or likely effects on final consumers.[147]

After the critique that was discussed above in 3.3 the Commission initiated the process of modernizing its approach to Article 102 TFEU and implementing an effects-based approach focused on the conduct's impact on consumer welfare.[148]

An effects-based approach to Article 102 TFEU centers around if the conduct produces anticompetitive effects on consumer welfare, e.g. when adverse effects on price are not counterbalanced by certain approved efficiencies.[149]

Through the Discussion Paper on the Application of Article 82 the Commission initiated the modernization and stated in paragraph 4 that "the objective of Article 82 is the protection of competition in the market as means of enhancing consumer welfare and ensuring an efficient allocation of resources."[150]

From the Discussion Paper it may be reasonable to conclude that consumer welfare and allocative efficiency are two separate notions in the Commission's view, interestingly, in paragraph 19 of the Guidance on the Commission's enforcement priorities, such a distinction is not made, instead it only mentions the impact on consumer welfare.[151]

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[143] Ibid. p. 27 & 28.
[144] Dayagi-Epstein in Ezrachi (2009) p. 69.
[145] Ibid.
[146] Ibid. p. 72.
[147] Ibid. p. 73.
[148] Ibid. p. 74.
[149] Ibid. p. 75.
[150] EC Discussion Paper on the Application of Article 82 (2005) para. 4.
[151] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) para. 19.

Furthermore, the Discussion Paper sets up a requirement (which is also present in the Commission Guidance) that the exclusionary conduct requires actual or likely anticompetitive effects and possible or indirect consumer harm, which implies that adverse effects to the competitive process and to consumer welfare are cumulative.[152] The interpretation this supports is that unless there is consumer harm, the harm to the competitive process is irrelevant, which seems to also be supported by the Commission Guidance through paragraph 19 which states that the aim is to "ensure that dominant undertakings do not impair effective competition by foreclosing their rivals in an anticompetitive way and thus having an adverse impact on consumer welfare."[153]

While the Commission's aim of applying a consumer welfare standard is clear, it is of little use without clear enforcement criteria as for the standard of harm that should be applied.[154] Questions regarding how consumer harm should be assessed, how conduct leads to foreclosure and how to separate consumer harm, competitor harm and harm to competition is absent from the Discussion Paper.[155] It can therefore be argued that, while much emphasis is put on consumer welfare, the Discussion Paper does not adequately address how the assessment of the consumer effects is to be made or require proof of actual or potential effects on consumers.[156]

The Commission Guidance sought to remedy some of these critiques by mentioning specific theories of harm, how they are to be assessed, what factors are relevant and what considerations are taken into account.[157] These considerations are the position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure and direct evidence of any exclusionary strategy.[158] Therefore, the lack of a clear standard of harm in the Discussion Paper is remedied in the Commission Guidance.

[152] Dayagi-Epstein in Ezrachi (2009) p. 76.
[153] Ibid. p. 77 and Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) para. 19.
[154] Dayagi-Epstein in Ezrachi (2009) p. 77.
[155] Ibid.
[156] Ibid. p. 78.
[157] Ibid. p. 79.
[158] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) para 20.

Consumer harm is of utmost importance in the Commission Guidance, for example, anticompetitive foreclosure relates to foreclosure leading to consumer harm[159] and consumer harm is a key component of specific abuses[160]. The Commission Guidance also deliberates on how consumer harm can be identified, through qualitative and, where appropriate, quantitative evidence,[161] where the latter can be interpreted as meaning that economic evidence can be used to substantiate arguments of consumer harm.[162]

In relation to the specific example of price predation, the Commission Guidance sets a clear standard of harm: "consumers are likely to be harmed where the dominant undertaking incurs a sacrifice (making an avoidable loss or forgoing profits). Pricing below average avoidable costs (AAC), or pricing above AAC which leads to a loss that could be avoided (pricing below average total costs), will be presumed to constitute such a sacrifice."[163] This is different from the Discussion Paper which is more inconsistent as to the standard of harm in predation cases.[164]

A further difference between the Discussion Paper and the Commission Guidance is the fact that the Guidance distinguishes between anticompetitive foreclosure at intermediary- and final consumer level.[165] It also differs when it comes to whether the intermediary user is an actual or potential competitor, where assessment is done on the effects of the conduct on users further downstream, and when the intermediary customer is not an actual or potential competitor, where the effects on customers further downstream is not necessary.[166]

The differing approaches depending on whether the intermediary customer is an actual or potential competitor or not can be seen as the Commission's again indicating the importance of the consumer welfare standard.[167]

[159]Ibid. para. 19.
[160] Ibid. paras. 85–87.
[161] Ibid. para. 19.
[162] Dayagi-Epstein in Ezrachi (2009) p. 79.
[163] Ibid. p. 80, see also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) paras 64 & 69.
[164] Dayagi-Epstein in Ezrachi (2009) p. 80.
[165] Ibid. p. 81.
[166] Ibid. and Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) para. 19.
[167] Dayagi-Epstein in Ezrachi (2009) p. 81.

3.5 The Commission's view after the Guidance papers

Consumer welfare continued to be an essential part of the Commission's approach to competition policy. However, it seemed to have become one of several goals of competition policy during the early 2010s. In the Staff Working Paper which accompanied the 2011 Report on Competition Policy, the three main objectives of competition policy were "i) protecting competition on the market as a means of enhancing consumer welfare, ii) supporting growth, jobs and the competitiveness of the EU economy and iii) fostering a competition culture."[168] This means that consumer welfare is one of the goals of competition policy, sharing the title with industrial policy goals.[169] For example, in a speech in January 2014, Joaquín Almunia barely discussed impact on consumers and consumer welfare as goals of competition policy.[170]

Whether industrial goals such as growth and jobs could be considered prevailing over price-considerations is difficult to say, however, some Commission decisions may give weight to the view that innovation and choice might.[171] For example, in its 2004 decision in *Microsoft*, the Commission expressed concern over limitations to choice and innovation, without expressing concerns for monetary harm to consumers.[172] In the Commission's decision against Microsoft in 2009, it once more put emphasis on innovation and choice, and not monetary harm.[173]

In the 2004 case, the Commission found that Microsoft had committed two abuses: refusal to supply and tying.[174] Where the refusal to supply concerned Microsoft not supplying interoperability information, and the tying concerned Microsoft tying their media player to Windows.[175] By limiting interoperability, Microsoft's conduct was liable to limit the potential of competitors marketing their innovations, which in turn discourages innovation in the first place.[176] The Commission further considered that the tying of the media player was liable to result in deterrence of innovation, and over time, reduction of choice of competing media

[168] Commission Staff Working Paper Accompanying the Report on Competition Policy 2011 (2012), p. 3.
[169] Daskalova (2015) p. 147.
[170] Ibid. and Joaquín Almunia, "Competition policy for the post-crisis world: A perspective" (Speech/14/34, 17 January 2014, Bruges, Belgium), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_34> accessed 2022-04-25.
[171] Daskalova (2015) p. 147.
[172] Ibid. p. 148.
[173] Ibid.
[174] Case COMP/C-3/37.792 Microsoft, paras. 1063, 1064 & 1066.
[175] Ibid. para. 545.
[176] Ibid. para. 694.

players.[177] Furthermore, they regarded consumer choice and innovation as being of major importance regarding applications such as media players.[178] The Commission also stated that a major objective of competition policy was to maintain competitive markets so that innovation failed or succeeded based on its merits, not any other factors.[179]

The reference to innovation and choice, together with consumer prices, can be seen in more recent annual competition reports. In its 2016 Report on Competition Policy the aim of competition policy was stated as being "to ensure that consumers are treated fairly and that powerful businesses are prevented from striking deals that raise prices, or suppress innovation, or deny people the freedom to choose the products they want."[180] Additionally, the 2017 Report on Competition Policy stated that "[c]ompetition drives businesses to compete on the merits – on prices, quality, and innovation – and to meet consumers' needs. By pushing companies to do better, competition puts power in the hands of consumers."[181]

From this it can be concluded that that the Commission, during the most part of the 2000s, has put consumer welfare at the forefront of the application of competition law, however, in the latter years of this analysis, it has also been put in the context of other industrial goals and been broadly defined as relating to price, quality, innovation and choice.

3.6 The Commission's view today; entering a new stage of competition law?

On the 18th of November 2021 the Commission published a Communication on a competition policy for new challenges,[182] which warrants a starting point of this analysis. In this communication the Commission detailed several initiatives for competition policy to ensure that the future applicability of competition law would be effective. These were two proposals, one for a Digital Markets Act and one for a Regulation of Foreign Subsidies, as well as initiatives regarding mergers, antitrust in general and state aid.[183] The Communication is

[177] Ibid. para. 832.
[178] Ibid. para. 958.
[179] Ibid. para. 978.
[180] European Commission, Report on Competition Policy 2016 (2017) p. 10.
[181] European Commission, Report on Competition Policy 2017 (2018) p. 1.
[182] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A competition policy fit for new challenges, COM(2021)713, 18th of November 2021, <https://eur-lex.europa.eu/resource.html?uri=cellar:77b87fe6-4856-11ec-91ac-01aa75ed71a1.0001.02/DOC_1&format=PDF>, accessed 2022-05-03.
[183] See the Annex to the Communication.

relevant to this essay for two purposes, the implementation of the Digital Markets Act and how it relates to the consumer welfare standard, and the Commission's new focus on sustainability as a guiding principle of competition law. The Communication states that the ongoing review of all competition instruments will contribute to the twin green and digital transitions, by enabling industries to lead the transitions, while simultaneously guaranteeing consumers a fair share of the benefits.[184] This focus on the climate and the digital market is of major importance to the development of competition policy in recent years, in my opinion, and they are of utmost importance to the discussion of the role of consumer welfare within the scope of this essay.

During her tenure, Commissioner Vestager has been consistent in identifying these two focus points of the future of competition law. In a speech to the Danish Competition and Consumer Authority in 2021 she stated that the green- and digital renewal is our generation's peace project, and that competition must play an influential role in this process.[185] She identified several roles of competition policy: creating fairer markets, lower consumer prices, better products, more innovation; it makes the economy more efficient and the European industry more competitive,[186] but the question must be how this relates to the green- and digital renewal, and what it means for the role of consumer welfare in European competition law.

To understand the connection, competition law must be seen as a way to reform, as Vestager put it in a speech to the 2021 Competition Law conference: "competition drives reform, and reform enables competition. It would be a mistake to think of competition policy as something 'apart', something separate. The truth is that competition rules and other policy measures are mutually reinforcing. Competition policy, if well-designed, can help drive and accelerate the achievement of other policy objectives."[187] The message is clear from Vestager, "goals of climate neutrality by 2050 and the digital transition will only work if competition

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[184] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A competition policy fit for new challenges, COM(2021)713, 18th of November 2021, <https://eur-lex.europa.eu/resource.html?uri=cellar:77b87fe6-4856-11ec-91ac-01aa75ed71a1.0001.02/DOC_1&format=PDF>, accessed 2022-05-03, p. 6.

[185] Speech by EVP Margrethe Vestager to the Danish Competition and Consumer Authority for the 2021 Competition Day – "What is competition for?" (2021), <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-danish-competition-and-consumer-authority-2021-competition-day-what_en>, accessed 2022-05-03.

[186] Ibid.

[187] Speech by EVP Margrethe Vestager in the 2021 Competition Law conference organized by the Association of Finnish Lawyers - "A Competition Policy Fit for New Challenges" (2021), <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-2021-competition-law-conference-organised-association-finnish-lawyers_en>, accessed 2022-05-03.

works."[188] Competition is the main factor in innovation, and is essential in incentivizing ideas or creating efficient solutions.[189]

However, statements are one thing, actions are another. The analysis of modern competition policy, how it helps achieve the Union's climate goals and the digital transition, and how it relates to consumer welfare has to be examined, and for the purpose of this essay it will start with analyzing digital markets cases and the Digital Markets Act, then move on to the sustainability discussion as well as a discussion around the new Guidelines on Horizontal Agreements.

3.6.1 Digital Markets cases

As seen above, Commissioner Vestager has during her tenure stressed the importance of keeping major digital actors at bay, to protect consumers in the digital market and ensure that competition policy is fit for the future; "you can't have a competition policy that is ready for the future, unless it can tackle the threats to competition that comes from digitization."[190]

For the purpose of this essay, it is important to look at the Commission's decisions aimed at achieving this, and which laid the groundwork for the Digital Markets Act.

For many years, the Commission was relatively passive when it came to enforcing competition law on big tech companies.[191] A turning point can however be seen in 2018, when the Commission fined Google the highest fine ever imposed of €4,34 billion due to finding that Google had abused its dominant position by its conduct relating to Google Android.[192] In particular, the Commission considered that the tying of the Google Search app and the Chrome browser was illegal.[193] By tying through pre-installation the company had created a status quo bias, where consumers who buy the phone, and find the apps pre-installed, are likely to keep

[188] Ibid.
[189] Ibid.
[190] Margrethe Vestager, Speech, 3 June 2019, Competition and the digital economy, <https://wayback.archive-it.org/12090/20191129200956/https:/ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en>, accessed 2022-05-09.
[191] Braeken, Versteeg & Hieselaar, 30 June 2021, An overview of Big Tech cases leading up to the Digital Markets Act (DMA), <https://www.bureaubrandeis.com/an-overview-of-big-tech-cases-leading-up-to-the-digital-markets-act-dma/?lang=en>, accessed 2022-05-09.
[192] Ibid. and Press release, 18 July 2018, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine, <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581>, accessed 2022-05-09.
[193]Press release, 18 July 2018, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine, <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581>, accessed 2022-05-09

using these apps, and less likely to download competing apps.[194] This could be seen in the fact that on Android devices, where the apps were pre-installed, 95% of search queries were made through Google Search, while on Windows devices, where they weren't pre-installed, only 25% were made using Google Search.[195] These practices reduced the incentive of users to download competing apps and for manufacturers to pre-install other apps on their devices, which was considered harmful to competition.[196]

Furthermore, Google had granted some device manufacturers financial incentives to exclusively pre-install Google Search on their Android devices, which harmed competition by reducing the incentives to pre-install competing applications.[197]

Lastly, the Commission found Google to have illegally obstructed development and distribution of competing Android operating systems by requiring that manufacturers did not produce mobile devices running an alternative version of Android, not approved by Google.[198] This harmed competition and further innovation in the mobile space, both in the internet search space, and the digital space in general, due to them obstructing other developers from producing alternatives to Android, which could have let other app developers thrive.[199]

In relation to the decision, Commissioner Vestager stated that: "These practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere. This is illegal under EU antitrust rules.[200]

In the *Google Android* case, focus of the abusive conduct was on its effect on two factors in my view, contestability (accessibility to the market for new undertakings which, in my view, presupposes competition on merits) and innovation. The consequences of Google's conduct led to the incentives and potential of undertakings entering the search engine and Android operating system markets were reduced, which reduced contestability. Furthermore, innovation was stifled through Google requiring manufacturers to not produce devices running an alternative to a Google approved version of Android.

The year before the *Google Android* case, the Commission had fined Google €2,42 billion for abusing its dominance as a search engine through conduct regarding its shopping

[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.

service.[201] Google had systematically placed its own comparison shopping service at the top, or near the top, of its search results, as well as demoted rivaling comparison shopping services in its search results.[202] This resulted in Google's own service being more visible to consumers in the search results, and evidence showed that consumers are much more likely to click on the result that is more visible, e.g. the one at the top of the search results. Because of this, Google's service was given a significant advantage over other competing services.[203] This is illegal under EU competition law due to the conduct denying, as Commissioner Vestager put it, "other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation."[204]

From the two cases, we can see a focus from the Commission on the conduct's effects on competition on merits, consumer choice and innovation. This is still echoed today. On the 2nd of May 2022 the Commission published a press release stating its preliminary view that Apple had abused its dominant position in the market for mobile wallets on iOS devices.[205] Apple's specific conduct was that they were the only mobile wallet which may access the necessary NFC input on iOS, it was not available to any third-party developers.[206] Through not making the NFC input in iOS available to third parties and reserving it for its own solution, Apple Pay, Apple was considered to have abused its dominant position. The conduct had an exclusionary effect on competitors, lead to less innovation and less choice for consumers,[207] which are the same factors as those behind the decisions in the two Google cases above.

After the Google decisions, and Vestager's comments and focus on enforcement in the digital markets as necessary for competition policy to adapt to the rise of the digital economy, several investigations followed. For example, investigations were made into the conduct of Amazon, Apple and Facebook, together with several cases at national level.[208] This, together with the long processes associated with the cases and the complexity of the investigations, lead

[201] Press release, 27 June 2017, Antitrust: Commission fines Google €2,42 billion for abusing dominance as search engine by giving illegal advantage to own comparison service, <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784>, accessed 2022-05-09.
[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] Press release, 2 May 2022, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay, <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2764>, accessed 2022-05-09.
[206] Ibid.
[207] Ibid.
[208] Remarks by Executive Vice-President Vestager for the political agreement on the Digital Markets Act (2022), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2042>, accessed 2022-05-03.

to the need for ex-ante enforcement of digital actors conduct, due to the damage already being done when the sanction was imposed.[209] The Digital Markets Act embodies this shift from ex-post to ex-ante enforcement on digital markets and will be discussed below. In the DMA, a focus in line with the Commission's decisions in Google Android and Google Search (Shopping) can be seen, by the focus on choice, innovation, and contestability.

3.6.2 The Digital Markets Act and consumer welfare

To begin with, a discussion on the European Parliament resolution on supporting consumer rights in the digital single market from 2014 is warranted. In this resolution, the Parliament called for the Member States and the Commission to address barriers that are hindering the development of the digital single market.[210] Furthermore, the Resolution stressed "the need to ensure a level playing field for companies operating in the digital single market in order for them to be able to compete; [and called] on the Commission to properly enforce EU competition rules in order to prevent excessive market concentration and abuse of dominant position"[211]. Where the competition rules enforced in the digital market will determine the growth of the market, consumer access and choice, and competitiveness in the long term – consumers should have the same protection on digital markets as in traditional markets.[212]

To understand the purpose of the Digital Markets Act we must first look at the history preceding it (and the Digital Services Act). Commissioner Margrethe Vestager, in her remarks on the act, stated that while the Commission is able to correct illegal behavior in specific cases, when it becomes systematic, regulation is a must.[213] Before this remark there had been three Google cases, two Amazon cases, three Apple cases and one Facebook case, complaints about digital companies were at an all-time high and affected not only the Commission, but also the National enforcement agencies.[214] Vestager goes on to liken the DMA to what has been done in other important sectors previously such as banking, telecoms, energy and transport, markets

[209] Braeken, Versteeg & Hieselaar, 30 June 2021, An overview of Big Tech cases leading up to the Digital Markets Act (DMA), <https://www.bureaubrandeis.com/an-overview-of-big-tech-cases-leading-up-to-the-digital-markets-act-dma/?lang=en>, accessed 2022-05-09.
[210] European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2014/2973(RSP)), para. 1.
[211] Ibid. para. 9.
[212] Ibid. para. 10.
[213] Remarks by Executive Vice-President Vestager for the political agreement on the Digital Markets Act (2022), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2042>, accessed 2022-05-03.
[214] Ibid.

which require greater regulatory oversight, and the digital market is one such.[215] In short, the regulation centralized enforcement at EU level, created a process to identify gatekeepers and set out the do's and don'ts which specifically were imposed on them.[216]

Recital 79 of the DMA states the aims of the regulation as price, innovation, quality, consumer choice, contestability and fairness.[217] This is in line with the Commission's position on the role and meaning of consumer welfare seen above in 3.5, where consumer welfare was synonymous with benefits related to price, quality, innovation, and choice. The DMA therefore seems to have as its objective to promote consumer welfare in the digital market. Interestingly though, both contestability and fairness are included with the goals of the DMA, which is a new development which will be discussed below.

In the explanatory memorandum to the regulation it is stated that gatekeepers have a major impact and substantial influence on the digital economy, which leads to a dependency on them from the users, which may incentivize unfair practices and create a lack of contestability of the services.[218] Such behavior and effects lead to inefficient outcomes in the way of higher prices, lower quality as well as less choice and innovation – it leads to a loss in consumer welfare.[219] This is why the DMA is of major relevance when discussing consumer welfare and modern competition policy.

One can also look at the DMA as a way of compensating for previous shortcomings of the Commission in its consumer protection on the digital market. The power of digital gatekeepers had not been properly restrained by Articles 101 and 102 TFEU or through merger control, for example when Facebook and WhatsApp merged which enabled Facebook to control the digital communication market.[220] Another example is the *Google Search (Shopping)* case, where the process started in 2010 with investigating whether Google was abusing its power of being the dominant search engine by self-preferencing its own services in the search engine.[221] While abuse was found, the process took six and a half years before the

[215] Ibid.
[216] Ibid.
[217] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842, recital 79.
[218] Ibid. Explanatory Memorandum p. 1.
[219] Ibid.
[220] Podszun (2022) p. 2.
[221] Ibid.

decision came, which the General Court upheld in 2021, but has been appealed.[222] Such a long process must be seen as a failure to protect consumers.

As seen above in 3.4.3, actual or likely consumer harm is a requirement to find exclusionary abuse under Article 102, and is assessed using qualitative and, where possible and appropriate, quantitative evidence. This led to interventions by the Commission being based on the possibility of demonstrating the harm to consumers through concrete economic loss to consumers.[223]

A shift is therefore seen since Vestager took office, where the aims are broadly defined in the DMA.[224] As seen above, the DMA states objectives such as contestability (accessibility to the market for new undertakings) and fairness, and not only price, quality and innovation.[225] Such aims require normative decisions, value-judgements which are not defined by economic models, rather through opinions from officials, judges and society as a whole on what standard gatekeepers should be held to.[226] By shifting the focus from economic- to normative reasoning, the scope of consumer protection has been broadened, which is beneficial to consumers, due to their interests being considered in a broader sense through a normative understanding which includes long-term consequences and non-monetary aspects.[227]

This more normative understanding of consumer protection is seen in the focus on innovation and choice, not only price considerations. Dynamic efficiencies, such as technological advances and increase in quality, are by their nature long-term when it comes to having effects on consumers.[228] As for choice, while it has been discussed as an aim of competition policy previously, it has become a more prominent feature during Vestager's tenure, e.g. as an argument by the General Court in *Google Search (Shopping)*[229]. Due to the nature of the digital markets and their potential to limit choice, protecting consumer choice becomes a prerequisite to have adequate consumer protection in the digital world.[230]

Furthermore, another interesting feature of the DMA is the lack of an efficiency defense. Efficiencies generated through a merger or market behavior can in some cases justify the anticompetitive effects of the conduct, however, in the DMA, no such justification is

[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid. p. 3.
[228] Ibid.
[229] Case T-612/17 paras. 566 & 588.
[230] Podszun (2022), p. 3.

present. This can be seen as a consequence of the more normative approach taken in the DMA which replaced the economic, model-driven approach previously held, and in such a normative approach, it would not be possible to justify unfair behavior through arguments of efficiency gains.[231]

3.6.2.1 The provisions of the DMA and consumer protection

Interestingly after understanding the increased focus on consumer protection in the DMA, the gatekeeper's relationship with end users is not the focus of the regulation, rather gatekeepers' relationship with business users.

In Article 2(16) of the Commission's proposal, end users are defined as "any natural or legal person using core platform services other than as a business user"[232] and in Article 2(17) business users are defined as "any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users."[233] Articles 5 and 6 specify the obligations of gatekeepers, where in the Commission's draft six out of 18 obligations related to the gatekeeper/end user interaction, while some amendments were made in the Parliament[234] which created more end user rights, questions about the level of protection of consumers still exist. An objective of maintaining open markets is present, where end users are protected as a reaction to provisions which aim to ensure contestability and the rights of business users.[235] For example, Article 6(1)(k) of the DMA states that gatekeepers shall "apply fair and non-discriminatory general conditions of access for business users to its software application store"[236]. There is no reference to an obligation of fairness towards end users and the provision only applies to app stores.

Furthermore, end users are not seen as actors in the market sufficiently in the institutional and procedural setting.[237] When it comes to the investigative procedure, and powers to sanction, no reference to end users is made; there is also no way to hear consumers

[231] Ibid.
[232] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), Article 2(16)
[233] Ibid. Article 2(17).
[234] See Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD).
[235] Podszun (2022), p. 4.
[236] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), Article 6(1)(k).
[237] Podszun (2022), p. 5.

in the case procedure, or an institutional way for consumers to complain.[238] A further shortcoming of the DMA and consumer protection is the limited rights granted to national agencies, which makes it more difficult for consumers to bring light to a case.[239]

The DMA can be said to mainly concern the relationship between gatekeepers and business users, while not being specific when it comes to consumer protection, instead leaving that to other regulations.[240] Consumers must be considered as active, independent market actors and be protected as such, not only considered passive and at the mercy of actions taken by other market actors. For example, Podszun likens consumers to umpires in sports, making decisions in the rivaling games of others.[241] Consumers should be free to make their own, informed decisions and be active players in any market, being influential in steering the market towards consumer interests. In the digital market, such a role is difficult to obtain, due to the ease that gatekeepers can steer end users in their desired direction through selective information and limiting choice.[242] It is therefore of utmost importance that, when the DMA is implemented, consumer protection is ensured in a sufficient way, something which as of right now is largely dependent on the effects of obligations imposed on gatekeepers towards business users trickling down to consumers through improved competition in the digital market.

3.6.3 Competition law and sustainability

In a speech in 2021 to the Danish Competition and Consumer Authority, Commissioner Vestager stated in relation to the role and goals of competition law that:

> "In the dictionary, solidarity and competition may be opposites. But in the real world we live in, competition helps us to reach our shared goals. It helps us to use our scarce resources more efficiently, to the benefit of consumers, businesses and society as a whole. It helps us develop innovative products and services. And it helps to make sure that companies operate in a way that's good for us all – not just for themselves. [...]
>
> The pressures of competition can be an excellent way to drive companies to do less harm to the environment, by cutting back on the resources they use. [...]

[238] Ibid.
[239] Ibid.
[240] Ibid. p. 4.
[241] Ibid.
[242] Ibid.

[O]ur antitrust rules can [...] do their bit, to support the green transition."[243]

I find this statement fitting to start off the discussion surrounding competition law, sustainability, and consumer welfare. Vestager considers the active role that competition law can have in shaping the EU in the modern world, rather than passively reacting to developments around it. Competition law can be a driving force in achieving shared goals, and today, no goal is as pressing as sustainability.

As discussed above, the Commission communication on *A competition policy fit for new challenges*[244] provides a starting point for modern competition policy. In this, Vestager's consideration of competition policy as an instigator for change is echoed, it is stated that by "keeping markets open and competitive and ensuring a level playing field, competition policy helps [achieve] the Union's wider priorities as set in its regulatory policies."[245] To achieve the transition into a green EU, a process of reviewing all competition instruments was started, while still ensuring that consumers gain a fair share of the benefits.[246]

The main difficulty in achieving a green EU with the help of competition policy is to do it while still staying true to the goal of keeping markets open and competitive. The way forward may therefore be to see competition policy's role in the transition to push undertaking towards a more sustainable market through more vigorous enforcement, specifically targeting unsustainable practices.

This can for instance be seen when the Commission in 2021 fined car manufacturers €875 million for restricting competition through emission cleaning when producing new diesel cars.[247]

Daimler, BMW and Volkswagen group had held meetings to discuss development of a selective catalytic reduction technology.[248] More specifically, the manufacturers had entered into an agreement and exchanged information which eliminated the uncertainty about future

[243] Speech by EVP Margrethe Vestager to the Danish Competition and Consumer Authority for the 2021 Competition Day – "What is competition for?" (2021), <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-danish-competition-and-consumer-authority-2021-competition-day-what_en>, accessed 2022-05-03.
[244] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A competition policy fit for new challenges, COM(2021)713, 18th of November 2021.
[245] Ibid. p. 6.
[246] Ibid.
[247] Press release, 8 July 2021, Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars, <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581>, accessed 2022-05-09.
[248] Ibid.

market conduct regarding certain emissions, which meant that they had restricted competition and it was considered a by-object restriction.[249] Commissioner Vestager stated that "[c]ompetition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal."[250] This is a specific example of the active role competition policy and enforcement can have in creating a green EU.

However, this raises questions regarding if competition law even should be influenced by sustainability, and how does the goal of promoting sustainability affect the goal of consumer welfare.

Answering the normative question on whether competition law should be influenced by sustainability is a difficult one and is dependent on how we define the goals of competition law and how sustainability relates to the old goal of consumer welfare.[251] There is also a question of whether the relationship between competition law and sustainability should be answered by unelected bureaucrats.[252] What is important when considering normative questions is that they have to be considered in their specific context and the framework which gives rise to the question in the first place.[253] As such, the question regarding the relationship between the two has to be answered within the specific legal and constitutional setting posing the question.[254] Legal requirements and constraints differ between jurisdictions, and are present at different levels and arise from different processes in different jurisdictions, which alter the context in which the discussion is put.[255] It is also important to consider that competition law is only a part of a jurisdiction's laws and regulations, all of which are influenced by differing goals and objectives, where the goals and objectives of the constitution are the overarching ones; as such, the goals of competition law are not necessarily the goals of the jurisdiction.

In the EU, Article 11 TFEU and Article 37 of the Charter require the EU to integrate environmental protection and sustainable development into the definitions and implementation

[249] Ibid.
[250] Ibid.
[251] OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf, p. 15, accessed 2022-05-09.
[252] Ibid.
[253] Ibid.
[254] Ibid.
[255] Ibid.

of the Union's policies and activities (including competition law), while consumer protection should only be taken into account according to Article 12 TFEU.

Considering all of this, it is impossible to answer the normative question of whether sustainability should influence competition law within the context of the EU, what is clear however, is that within its constitutional context, it must be an integrated part of the Union's competition policy.

Where does this put the consumer welfare standard in the modern day then? First, two differing interpretations on the application of competition provisions to promote sustainability can be seen: either competition provisions are interpreted so that conduct harmful to sustainability are prevented/prohibited, or the provisions are interpreted in a way as to allow measures that support sustainability.[256] In both interpretations, consumers play a vital role.

Furthermore, it is important to acknowledge that there is an overlap between sustainability and consumer welfare, due to sustainability being a feature valued by consumers when making their purchasing decisions, a fair assumption is that consumers are willing to choose the more sustainable product when two otherwise identical products are offered at the same price.[257]

The theory of allowing measures that promote sustainability, e.g. when joint agreements to improve sustainability are signed between competitors, would mean that such an agreement would be allowed, even if it would constrain competition and increase consumer prices.[258]

The new draft Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements contains a section on sustainability agreements which focuses on the assessment of agreements between competitors that pursue sustainability objectives.[259] In the draft, it is stated that competition law plays a role in sustainability development through ensuring effective competition, in effect, this creates innovation, increases quality and choice, ensures an efficient allocation of resources, reduces production costs and as a consequence increases consumer welfare.[260] When it comes to Article 101 TFEU, not all sustainability agreements are prohibited, instead, only agreements which restrict competition by object or

[256] Ibid.
[257] Ibid.
[258] Watson, Measuring environmental benefits in competition cases (2021), DAF/COMP(2021)14, p. 4, <https://one.oecd.org/document/DAF/COMP(2021)14/en/pdf>, accessed 2022-05-09.
[259] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, Draft (2022).
[260] Ibid. p. 132.

effect are.[261] Furthermore, such agreements can also be justified if the criteria in Article 101(3) TFEU are met, however, they cannot escape prohibition solely on sustainability grounds.[262]

The Guidance therefore sets out to provide guidance on how to assess the conditions in Article 101 TFEU when it relates to sustainability agreements, with focus on what role sustainability benefits can be taken into account as qualitative or quantitative efficiency gains under Article 101(3) TFEU.[263]

First off, it states three scenarios where sustainability agreements would fall outside the scope of Article 101 TFEU: 1) "agreements that do not concern the economic activity of competitors, but their internal corporate conduct"[264], 2) agreements on the creation of a database containing certain sustainability information about suppliers and 3) "agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental footprint of their consumption, without such campaigns amounting to joint advertising of particular products."[265]

Furthermore, sustainability standardization agreements, when competitors agree to adopt and comply with certain sustainability standards, are considered to not have appreciable negative effects on competition if certain conditions set out in the guidelines are met.[266]

For other sustainability agreements to be justified under Article 101(3) TFEU the conditions in the provision have to be met. First, the agreement must contribute to objective efficiencies e.g. improvements in production and distribution, product variety, quality, and innovation.[267] Second, consumers have to receive a fair share of the resulting benefits of the agreement.[268] Third, the agreement must not impose restrictions indispensable to the attainment of the benefits.[269]

When assessing consumer benefits, consumers are considered to have received a fair share of the benefits when the benefits outweigh the negative effects of the agreement, so that the net effect on the relevant market is neutral or in the consumers favor.[270] The following benefits are relevant to this analysis: 1) individual use value benefits (improved product quality

[261] Ibid.
[262] Ibid.
[263] Ibid. p. 133.
[264] Ibid.
[265] Ibid.
[266] Ibid. p. 136.
[267] Ibid. p. 138.
[268] Ibid. p. 140.
[269] Ibid. p. 139.
[270] Ibid. p. 140.

or variety), 2) individual non-use value benefits (indirect benefits "resulting from the consumers' appreciation of the impact of their sustainable consumption on others")[271] and 3) collective benefits ("occur irrespective of the consumers' individual appreciation of the product and objectively can accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries"[272]).

Consumers therefore play a vital role in the assessment of sustainability agreements under Article 101 TFEU, and it is claimed in the draft that sustainability developments lead to increases in consumer welfare.[273] However, applying the consumer welfare standard to cases where the conduct creates sustainability benefits creates two problems. Firstly, it presupposes that consumers value environmental benefits and are willing to pay in a way that indicates this valuation of the environmental impact, if not, an approach which focuses on the impact of the conduct on consumers through specific targets (such as health, climate change etc.), rather than the consumer's willingness to pay would be more suitable.[274] Secondly, sustainability affects and benefits us all, not only the consumers of the products, therefore, one could argue in favor of a societal welfare standard, rather than a consumer welfare standard.[275]

When applying the consumer welfare standard to sustainability the competition authorities have to consider whether the sustainability benefits offset the higher consumer prices and quantify those benefits when considering the willingness of consumers to pay for them.[276] This application is not easy in practice, and as considered above, some would argue that a societal welfare standard or an approach focused on the impact on specific targets would be more suitable when assessing sustainability in competition law.[277]

If we apply the consumer welfare standard in practice to agreements or mergers, it would mean that such conduct would be prohibited, even though they benefit consumers, because the consumers are unwilling to pay for them, or they benefit society and the environment, but consumers are worse off when applying a willing to pay standard.[278] This

[271] Ibid. p. 141.
[272] Ibid. p. 142.
[273] Ibid. p. 132.
[274] Watson, Measuring environmental benefits in competition cases (2021), DAF/COMP(2021)14, p. 4 & 7, <https://one.oecd.org/document/DAF/COMP(2021)14/en/pdf>, accessed 2022-05-09.
[275] Ibid.
[276] Ibid. p. 7.
[277] Ibid.
[278] Ibid. p. 9.

gives further weight to the argument of applying either an objective approach, or broadening the scope to a societal welfare standard.[279]

In traditional consumer welfare analysis, consumers' 'willingness to pay is analyzed, which means that the impact of the conduct on consumers is measured through sales data or survey data from which consumer preferences are inferred.[280] However, the data only shows the consumers' willingness to pay, given the information they have about the environmental impact at the time of analysis; by not capturing consumers which are underinformed, the data understates the value consumers place on sustainability.[281]

While the direct benefits to consumers is generally assumed to be something consumers are informed about, the passive value is not as approachable to the average consumer.[282] It demands knowledge about the extent the product harms the environment, to what extent a more sustainable product helps the environment, how the consumers' habits could impact the environment and what they are willing to pay for the benefits.[283] This information is not as readily available to the consumers as the direct benefits.

Ensuring that sustainability is considered properly within the scope of a consumer welfare standard means that the passive benefits must be quantified in a way which captures the true value. This means adapting the competition authorities assessment tools to reliably assess sustainability benefits.[284] In environmental economics, discrete choice experiments are the preferred method in assessing the willingness to pay for products.[285] This method entails posing surveys which simulate purchasing decisions to consumers, where each decision concerns a finite set of alternatives, defined by certain attributes such as price and quality.[286] The consumers then choose between a number of combinations of attributes, and pick the one they prefer.

Discrete choice experiments, in combination with objective information regarding the short-term costs and long-term benefits of the conduct will help in determining whether the sustainability benefits are real and if the benefits outweigh any potential harm.[287]

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[279] Ibid.
[280] Ibid. p. 11.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Ibid. p. 13.
[285] Ibid. p. 28.
[286] Ibid. p. 15.
[287] Ibid. p. 28.

It is essential when applying any sustainability considerations in competition law to consider how this affects the established consumer welfare standard applied when assessing conduct. There are instances where the consumer welfare standard and sustainability do not reach the same conclusions, and benefits in one lead to losses for the other e.g. when sustainability benefits lead to higher prices. In these instances, competition authorities must have clear guidelines and methods in assessing the value of the sustainability benefits and doing so within the framework of the existing consumer welfare standard is not easy, as seen above. Therefore, arguments for a more target focused approach to consumer welfare can be made, or that the scope of the standard should increase to become more of a societal welfare standard. Assurance is needed that, as we move towards a green EU, and this goal becoming increasingly influential on competition law, consumer welfare and consumer protection is not forgotten. Furthermore, as the Commission updates competition policy to be in line with this green goal, it must also update the current welfare standard to safeguard that proper protection is guaranteed to consumers when weighing the value of sustainability benefits within the framework of the consumer welfare standard. The real consumer value of sustainability must be found, to ensure that when weighing it against consumer prices, it reflects the true value and considerations of consumers.

4. Conclusion

In economic theory, the concept of consumer welfare is clearly defined. Consumer welfare "refers to the individual benefits derived from the consumption of goods and services"[288] and is defined by "an individual's own assessment of his/her satisfaction, given prices and income."[289] To measure it in practice, consumer surplus (the area under the demand curve and above the observed price) is used to give an estimate of the aggregate consumer welfare in the market for the product or service. In short, it is the difference between what consumers would have been willing to pay for a good and what they actually had to pay.

However, the Commission can be said to hold a pragmatic approach to the concept of consumer welfare, where price considerations are not the guiding factor, rather a combination of price, quality, choice, and innovation are factors to assess the effects on consumer welfare in the given market. Furthermore, while it would be difficult to argue that the Commission employs a total welfare standard (due the prevalence of consumer welfare in the Commission's press releases, speeches and decisions), dynamic efficiencies and producer surplus are still relevant in the assessment of abuse. Pragmatism can be seen in the Commission requiring that the net effect of agreements (or a merger) is at least neutral from the point of view of the consumers. It can also be seen in the Commission's willingness to accept dynamic efficiencies e.g. under article 101(3) TFEU.

When it comes to the evolution of consumer welfare in the EU, market integration was seen as the primary goal of competition law in the formative years. This should not come as a surprise, given the prevalence of Article 3(3) TEU arguments found in the beginning of the Union. A shift in policy can however be seen in the 1990s, when the Commission came under major scrutiny for not adapting to contemporary economic theory and the differing approaches of the US competition authorities and the Commission having real effects due to markets becoming more international. A turning point can be seen with the *GE/Honeywell* case where the US authorities and the Commission reached different conclusions due to analyzing different effects and against different standards of harm, leading to much critique from experts.

When Mario Monti took over as Commissioner, a shift can be seen in the Commission's policy approach, where consumer welfare became the standard for competition policy.

[288] Khemani & Shapiro, Glossary of Industrial Organisation Economics and Competition law (1999), <https://www.oecd.org/regreform/sectors/2376087.pdf>, accessed 2022-04-20, p. 29.
[289] Ibid.

However, this evolved into consumer welfare being put in the context of other industrial goals and broadly defined as relating to price, quality, innovation, and choice. In decisions such as the Microsoft decision in 2004, consumer welfare was even barely mentioned, rather choice and innovation were the standard of harm used. A clear disconnect can therefore be seen between the Commission's statements (press releases and speeches) and how competition law was used in practice. In the statements, consumer welfare was often described as the guiding principle of competition law, however, price considerations were not a guiding principle, rather, focus was often put on consumer choice and innovation. A conclusion can therefore be reached that consumer welfare in the EU is a broadly defined concept in practice, encompassing price, choice, quality, and innovation. A broad definition is beneficial for consumers, due to it taking into consideration other factors than just price, but to have sufficient protection in other areas, clear assessment criteria are necessary for the principle of rule of law to be satisfied. Law has to be clear, precise, and predictable as to its effects. This is lacking in the Commission's practices.

A big shift in priorities can be seen in recent years. Since Commissioner Vestager took office, two areas have been stated as the two main concerns for competition policy: digital markets and sustainability.

Specifically in digital markets, this has led to the concept of consumer welfare being more broadly defined, for example in the Digital Markets Act the goals are defined as price, quality, choice, innovation, contestability, and fairness. Contestability and fairness are normative considerations for the authorities and Courts, therefore broadening the scope further. By shifting the focus from economic- to normative reasoning, the scope of consumer protection has been broadened, which is beneficials to consumers, due to their interests being considered in a broader sense through a normative understanding which includes long-term consequences and non-monetary aspects.

However, the DMA mainly concerns the relationship between gatekeeper and business users, not the relationship between gatekeepers and final consumers. Therefore, the protection of final consumers is reliant on the effects of obligations imposed on gatekeepers towards business users trickling down to consumers through improved competition in the digital market. This creates uncertainty regarding whether the DMA sufficiently protects consumers on digital markets.

Furthermore, the prioritization of sustainability raises questions regarding if competition law even should be influenced by sustainability, and how the goal of promoting sustainability affects the goal of consumer welfare. Answering the normative question of

whether sustainability should influence competition law has to be done within the specific legal context in which the question is raised and does not have a clear answer in the EU.

However, implementing sustainability into competition law considerations creates problems within the scope of a consumer welfare standard. Firstly, it presupposes that consumers value environmental benefits and are willing to pay in a way that indicates this valuation of the environmental impact. Secondly, sustainability affects and benefits us all, not only the consumers of the products.

To solve this, the essay puts forth three solutions. The first one continues to apply a consumer welfare standard, where consumers' willingness to pay is analyzed through sales data or survey data from which consumer preferences are inferred. However, the data only shows the consumers' willingness to pay, given the information they have about the environmental impact at the time of analysis. While consumers are presumed to be informed about the direct value, the passive value of sustainability needs to be quantified, due to the lack of consumer information in this regard. This can be done through discrete choice experiments in combination with objective information regarding the short-term costs and long-term benefits of the conduct.

Alternatively, a target focused approach, where the authorities assess the impact the conduct would have on consumers through specific targets, rather than analyze the consumers' views, could be implemented. Lastly, an alternate approach is to shift to a societal welfare standard. Sustainability benefits society as a whole, not just consumers, and the negative effects are felt by everyone, while only benefitting few. Assessing societal welfare in sustainability cases would therefore be more appropriate if the shortcomings of a consumer welfare standard are not remedied.

To summarize, a clear evolution in the Commission's competition policy can be seen throughout history, where the scope of consumer welfare has been broadened since it became the focus point of the Commission in the late 90s/early 2000s. In recent years, due to the difficulties facing modern societies such as the rise of digital markets and sustainability concerns, the focus of the Commission has once again shifted, and the scope of the concept of consumer welfare has become even broader. However, this raises concerns about whether the demand for consumer protection is met, or if it is falling to the wayside due to the Commission's shift in focus. It is important, as we move towards a new era of competition law, focused on digital markets and sustainability, sufficient consumer protection is ensured. As of right now, the Digital Markets Act and sustainability considerations create more uncertainty, rather than ensuring the protection of consumers in the modern world.

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