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The Objectives of EU Competition Law

- A normative analysis

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1. Summary

The aim of this essay is to contribute to the ongoing debate about the objectives of European competition law. To understand why the debate has flared, we need to be familiar with the core elements of the debate; articles 101 and 102 in the Treaty of the Functioning of the European Union, efficiency and non-efficiency goals. Articles 101 and 102 of the Treaty are concerned with conducts undertaken by private parties. In this essay, the conducts of these parties are of core concern. In order to answer the normative questions of what the objectives of EU competition law should be and what methods should be used to achieve these objectives, we has to evaluate the consequences of allowing or disallowing certain conducts.

In this essay I am using economic and philosophical theories to explain and discuss different approaches to the objectives. In my opinion, monopolies and cartels should be regulated in order to preserve the democratic system. This is the current ordoliberal approach, mostly applied by the Court of Justice. Ordoliberals are concerned about a free market and they are supporting a pluralistic market structure. Nevertheless, they are considering some regulations as necessary in order to prevent too powerful firms from eroding the democratic system.

The ordoliberal approach is supporting a less regulated market than the proponents of consumer welfare. Even so, the former approach is generally referred to as a formalistic approach. This is because ordoliberals argue that no balancing of pro-competitive effects should be allowed in the assessment of if a conduct is anti-competitive or not. The proponents of consumer welfare are supporting a more flexible approach to competition law by which conducts should be evaluated with respect to their positive effects. This effect based approach has been critisised for being too easy to misuse but it is in my opinion a better option to use than a formalistic approach. The ordoliber tools of evaluating conducts could as well be misused and they are sometimes leading to inappropriate results. The conclusion of this essay is therefore that consumer welfare should be the main objective of EU competition law. Non-efficiency goals should not be considered an objective of EU competition law.
2. Introduction
The debate concerning the normative question of what the main objective or objectives of European (EU) competition law should be has increased in the recent years.¹ There is a disagreement between those who argue that only efficiency goals should be considered under EU competition law and those who believe that even non-efficiency goals should have an impact. Related to efficiency goals, there are as well different approaches to what kind of efficiencies that should be the most important.²

In its guidelines, the Commission has had a consistent view of consumer welfare as its main goal of EU competition law in cases relating to article 101 of the Treaty of the Functioning of the European Union (TFEU). The Court of First Instance has supported this approach but their decisions have been reapproved by Court of Justice. The fragmentation between the Commission and the courts is what has caused the debate among scholars and the key articles of the criticism are articles 101 and 102 TFEU. The debate has mainly concerned the question of to what extent competition policy should be used to protect consumer welfare. The Court of Justice has been criticised for being too “ordoliberal” and formalistic in their approach due to their unwillingness of recognising consumer welfare as the main objective of EU competition law. According to the critics, the Court of Justice has focused too much on competition as an end in itself and not as a mean of receiving consumer welfare or efficiency.³

The underlying reason to the debate is that the rules of EU competition law are many and sometimes hard to oversee. Articles applied to individual legal subjects need to be considered in the light of other articles of the TFEU. Apart from the Treaty itself, there is case law from the Court of Justice which it binding and should be applied by the national courts. Guidelines from the European Commission are further deeply influencing the judgments of EU institutions and national courts even though they are not binding. Since there is not much more needed than a transaction between firms or a firm and an individual consumer, for competition law to apply, involved parties have a

¹ Lianos, I., pg. 2.
² Ibid. The proponents of consumer welfare are mainly concerned with allocative efficiency and deontological theories are concerned with dynamic efficiencies.
³ Nazzini, R., pg. 1 – 3.
huge interest in understanding the rules of EU competition law.\(^4\) The ongoing debate indicates that the need of clear guidelines has not been satisfied.

The normative questions of what the main objective or objectives of EU competition law should be and what methods that should be used to reach the objective or objectives are affected by subjective political and economic opinions and the theories supporting different approaches are several.\(^5\) In this essay I am going to use economic and philosophical theories to support my analysis of the objectives. The economic theories mainly reflect the macro perspective of competition law in this essay. They reflect the effects of different behaviors on the market. The philosophical theories are, on the other hand, mainly reflecting the micro perspective of EU competition law. They are concerned with how the individuals are affected by different conducts, in life and in their interaction with others. The line between economic and philosophic theories is nevertheless not easy to draw and economic theories are more or less based on philosophical theories and ethical values.

2.1. Purpose
In this essay I attempt to answer the question of what objective or objectives should be covered by the EU competition rules and what method or methods are best used to receive this objective or these objectives. The question covers the reflection of if there should be one main objective or various objectives. The discussion will be permeated by an economic and philosophical perspective and I am going to analyse the effects on consumers, undertakings and the society as a whole.

2.2. Method
To fulfill the purpose of this essay and answer the questions inquired I have decided to use the legal method of analysing case law, institutional guidelines, literature and other written material.

In assessing the problem question I have to apply and analyse EU law. It is therefore of importance to know the internal hierarchy of the EU legal sources. The EU law is divided into primary and secondary law. Primary law is in particular the treaties. They

\(^4\) Bladini, F., pg. 458.
\(^5\) Maier-Rigaud, F., pg. 138.
contain the basic provisions and shall be guiding in all EU activities. Secondary rules are regulations, directives and decisions. These are all based on the principles and objectives set out in the treaties. The member states have a duty to act in accordance with the EU treaties and legislation. The Commission is controlling the member states and may interfere if a member states has not incorporated an EU directive or in other ways, is not following the Union law.  

In competition law matters, there is as well case law from the Court of Justice that is binding for the member states. National courts shall decide in accordance with the precedents decided by the Court of Justice. The articles of interest in this essay are articles 101 and 102 TFEU, which regulates the relations between private parties. The articles are fully applicable in all member states. 

It has been said that, in order to fully understand the conflict between efficiency and non-efficiency goals, one has to understand the methodology used by the Commission and the EU courts. This is because the application of non-efficiency goals is based on other arguments than efficiency goals. Townley explains:

“… the court usually has recourse to three types of first-order criteria in typical hard case situations: (i) semiotic or linguistic arguments; (ii) systematic and context-establishing arguments; and (iii) teleological, functional or consequentialist arguments – and that preference is usually given to systematic functional criteria”. 

Non-efficiency goals are hard cases for the EU courts and the way of understanding and relating to them is by adapting a systematic and theological approach, focusing on the wording of the Treaty and its general policies. Since the aim of this essay is to answer what the objective or objectives should be from a lex forenda perspective, understanding and applying the teleological method serves the purpose of explaining how non-efficiency goals could be considered.

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6 European Commission, The European Commission at work, Applying EU law, Monitoring the application of Union law.
7 Ibid.
8 Townley, C., Is there anything more Important than Consumer Welfare (in Article 81 EC)? […], pg. 350.
9 Ibid.
2.3. Demarcation and outline
In this essay I am firstly going to present the background to EU competition law, the articles of interest for this essay and the problems that EU competition law faces today. I am going to focus on article 101 and 102 TFEU since those articles are concerned with conducts affecting private parties. Secondly, I am going present the objectives of EU competition law as they are defined in the TEFU, by the Commission and in case law. To fully understand the different approaches concerning the objectives of article 101 and 102 TFEU, a separation between efficiency and non-efficiency goals will be made.

Thirdly, I am going to present different economic and philosophical theories historically used in analysing and determining the objectives of EU competition law. The main differences between the economic theories will be defined and the use of philosophical theories will be presented and discussed in relation to ethical concerns. The reason for considering philosophical and ethical arguments in this essay is because of the clear relationship that has existed between ethics and economics in the past. Philosophical theories are in some cases that integrated with economic theories that they are better presented in relation to the relevant economic theory. Economic and philosophical theories are therefore to some extend integrated with each other in this essay.

In the fourth part of this essay is my intention to bring some clarity to the relationship between the normative questions of what objective or objectives EU competition law should involve and how these should be achieved, economic and philosophical theories. I will discuss the pros and cons of different economic, moral and ethical approaches to competition law. In the end of my analysis, I will summarise my findings and answer the questions of this essay.

2.4. Background

2.4.1. The introduction of EU competition law
The policy of EU competition law was set out in the Treaty of Rome in 1957. The aim was to create a system that could ensure “that competition in the common market [was] not distorted”, i.e. a system of a free market, which would work appropriately and provide benefits to the consumers. An appropriately functioning market is a market
where competitors can compete fairly with each other and the aim is to produce benefits such as lower prices, higher quality and a wider range of opportunity products for consumers.\textsuperscript{10} A free market strongly contributes to the realisation of the overall objective of the European Union, i.e. to create a strong economic, monetary and political unit.\textsuperscript{11}

Unfortunately the introduction of the policies set out in the Treaty of Rome did not satisfactorily clarify the purpose of EU competition law. In the subsequent years, EU competition law lacked clarity about “whether Union competition law [existed] to promote efficiency, to achieve the Union objective of market integration, to promote certain market freedoms desirable in a democracy, or to achieve any Union objective”.\textsuperscript{12} Furthermore similar cases were judged differently and the outcome seemed to depend more on who the judge was, rather than the actual circumstances in the case.\textsuperscript{13}

Until the 1990s there was a never ending discussion about the meaning of the wording “restriction of competition” within article 101 TFEU.\textsuperscript{14} In the mid-1990s the criticism against the lack of coherence within EU competition law, including article 101 and 102 TFEU, had risen to a new level and the critics demanded a change in the application of competition law policies. The critics held that the overall approach within the practice of competition law was too focused on a “pluralistic market structure” and not with economic efficiency or welfare.\textsuperscript{15}

\textbf{2.4.1.1. Article 101 TFEU}

Article 101 TFEU is concerned with agreements between undertakings or associations of undertakings and concerned practices which may affect trade between member states and which have as their object or effect to prevent, restrict or distort competition on the internal market.\textsuperscript{16} An agreement which is restricting competition by object is per se illegal and it is therefore no need to evaluate its effects on competition within article

\begin{thebibliography}{9}
\bibitem{10} European Commission, The European Union Explained, pg. 3.
\bibitem{11} Ottervanger, T., Steenbergen, J., van der Voorde, S., J., pg. 1.
\bibitem{12} Odudo, O., pg. 600.
\bibitem{13} Ibid.
\bibitem{14} Ibid.
\bibitem{15} Nazzini, R., pg. 2.
\bibitem{16} Article 101 TFEU.
\end{thebibliography}
When an agreement is not restricting competition by object it may restrict it by its effects. The effects are evaluated with regard to the actual conditions of the agreement, the legal and economic context, the products and services subject to the agreement and the structure of the relevant market. The agreements may be horizontal or vertical, i.e. between actors on the same level or different levels of the distribution chain. The former relates to agreements between non-competitors and the latter to agreements between competitors.

If an agreement is found to restrict competition within the meaning of article 101(1) TFEU, it may still be legal. Article 101(3) TFEU can be raised as a defense and the burden is on the undertaking to prove that the conduct is in fact not illegal. The undertaking has to prove that there are certain efficiencies sufficiently likely to stem from the conduct and that these efficiencies outweigh the cons of the conduct. The efficiencies are improvements in production or distribution of products or contributions to developments of technical or economic processes. This includes inter alia the developments of new products, reduced prices or increased quality of products.

A fair share of these efficiencies need to be given to the consumers, the restriction on competition need to be indispensable to receive these efficiencies and the conduct cannot eliminate competition on a substantial part of the internal market.

### 2.4.1.2. Article 102 TFEU

Article 102 TFEU is a fundamental part of EU competition law and EU economic law. The article regulates the situations of abuse by a dominant undertaking or undertakings, with the general aim of achieving an integrated internal market. The dominant position could be hold by an undertaking alone or as a collective position. The abuse should, to be illegal, have an exclusionary affect and the Commission is mainly focused on the

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17 The agreement could satisfy the criteria of article 101(3) and thereby be legal even though there is a presumption that restrictions by object are illegal, Commissions Guidelines on art 101, para. 49.
19 Commissions Guidelines on Art 101, para. 1.
20 Commissions Guidelines on art 101, para. 49.
21 Commissions Guidelines on art 101, e.g., para. 185. Compare para. 53 which refer to the specific paragraphs explaining the application of article 101(3) in relation to specific conducts.
22 Commissions Guidelines on art 101, para. 49.
23 Nazzini, R., pg. 1.
24 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 1.
negative effects for consumers when applying article 102 TFEU. These effects are inter 
alia lower prices, better quality and more and better products to choose from on the 
market.\textsuperscript{25}

\textbf{2.4.2. The modernisation process}

The criticism relating to the uncertainty surrounding articles 101 and 102 TFEU was 
met by the Commission and it began to fundamentally evaluate the former approach to 
the main objectives of EU competition law.\textsuperscript{26} The reconstruction of the EU competition 
law policies was finally done on the 30\textsuperscript{th} of March 2004 when the Commission 
completed their guidelines and notices on article 101 TFEU.\textsuperscript{27} In May the same year 
Regulation 1/2003\textsuperscript{28} came into force, abolishing the unilateral right of the Commission 
to grand exceptions under article 101(3) TFEU.\textsuperscript{29} A year later, in 2005, the Commission 
started to reflect over the policies underlying article 102 TFEU.\textsuperscript{30} Nearly five years 
later, on 9\textsuperscript{th} of February 2009, the Guidance on the enforcement priorities of article 102 
TFEU was formally adopted.\textsuperscript{31}

\textbf{3. Legal certainty}

The aim of the modernisation process was to clarify the meaning of article 101 and 102 
TFEU for all subjects concerned by EU competition law. The normative foundations of 
EU competition law are of crucial importance for the daily work of the Commission and 
the courts. Clearly stated precedents are needed to uphold legal certainty for subjects 
affected by the EU competition rules. The precedents need to state the criteria for 
unlawful actions and provide fundamental reasons for a decision.\textsuperscript{32} This is important for 
individuals as well as the national courts, which since the introduction of Regulation 
1/2003, have to directly apply article 101 and 102 TFEU.\textsuperscript{33}

\textsuperscript{25}Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to 
abusive exclusionary conduct by dominant undertakings, para 4, 5.
\textsuperscript{26}Nazzini, R., pg. 2
\textsuperscript{27}Odudo, O., pg. 601.
\textsuperscript{28}Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on 
competition laid down in Articles 81 and 82 of the Treaty.
\textsuperscript{29}Whish, R., Bailey, D., 7\textsuperscript{th} edition, pg. 52.
\textsuperscript{30}Kroes, N., Speech at the Fordham Corporate Law Institute in New York. In the second part of his 
introduction Kroes holds: “The subject of my speech today is to how to improve enforcement of Europe’s 
ban on abuse of monopoly power.”
\textsuperscript{31}Odudo, O., pg. 601.
\textsuperscript{32}Maier-Rigaud, F., pg. 138.
\textsuperscript{33}Korah, V., pg. 467.
Nevertheless, decisions by the courts in competition law matters cannot easily be explained by a formal accuracy and depth economic analysis. The Commission has argued that:

“[E]conomic theory is just one of the sources of policy. In practice, the application of economic theory must take place in the context of the existing legal texts and jurisprudence. Secondly, economic theories are necessary based on simplifying assumptions often obtained in the context of stylized theoretical models that cannot take into account all the complexities of real life cases.”

The statement indicates that even when establishing what the law is, the Commission and the courts have to consider economic theories, legal texts, jurisprudence and a decision’s practical operability and consequences. By focusing on one main objective of EU competition law, the desire is that this uncertainty problem should disappear, or at least be reduced.

4. The lege lata

4.1. The Commission’s view on the objectives

The modernisation process appears to have increased the importance of consumer welfare in the Commissions decisions, in particularly with regard to article 101 TFEU. The guidelines are, on the other hand, not precisely clear about exactly what weight should be given to consumer welfare. In its guidelines on article 101 TFEU, the Commission states that they are concerned both with the actual and the potential effects of anti-competitive behavior. The conducts undertaken by the firms need to be at least likely to have an impact on one of the parameters price, output, product quality, product variation or innovations. The impact is measured based on several factors such as the nature and content of the agreement, the extent to which the parties have obtained market power, the extent to which the agreement contributes to the creation, maintenance or strengthening of such market power and the extent to which the agreement allows for the exploitation of such power. Furthermore the extent to which the concerned undertakings combine their activities, the legal and economic context,

34 Furse, M., pg. 18.  
35 Green Paper on Vertical Restraints, Chapter 9, para. 86.  
36 Nazzini, R., pg. 2  
37 Kieran, F., pg. 192.
barriers to enter\textsuperscript{38} and consumer buyer power\textsuperscript{39}, are affecting the Commission’s decision of if a conduct is illegal or not.\textsuperscript{40}

\subsection*{4.1.1. Consumer Welfare}

The concept of consumer welfare is in itself complex. When the European Commissioner for competition policy, Kroes, in October 2005 stated that “Consumer welfare is now well established as the standard that the Commission applies when assessing […] infringements on the Treaty rules of cartels and monopolies”\textsuperscript{41}, he expressed the view of consumer welfare as the main goal of EU competition law. By the statement, the Commission has decided on what it believes is the best way of reconciling the interests of increasing the overall wealth in society and maintaining competition on the market place. The ultimate goal is to maximize economic efficiency and at the same time provide the consumers with a fair share of the benefits produced on the market. These interests, of the society and the consumers, are the underlying interests in all competition policies. The reason to why there are different approaches to what the objectives of EU competition law are is, according to Cseres, due to the different ways there are to reconcile these interest. Cseres argues that there are three ways of defining the objectives of competition law; (a) consumer welfare as a short-term goal, (b) consumer welfare as a long-term goal or (c) economic efficiency and total welfare.\textsuperscript{42}

When the Commission argues that consumer welfare is the standard it applies in its assessments, they consider consumer welfare to be the most important goal. Economic efficiency as such and the total welfare of the society have thereby subordinated roles. There are however two different ways of considering consumer welfare, either as a long-term or a short-term goal. In a short-term perspective, the interests’ of consumers, e.g. low prices, are more important than the incentives of producers’ e.g. to invest and innovate.\textsuperscript{43} A short-term consumer welfare objective does therefore not value dynamic

\textsuperscript{38} Barriers to enter could be inter alia high market shares, exclusive patent and know-how, cost and network efficiencies and superior technique, Whish, R., 5\textsuperscript{th} edition, pg. 43 – 44.
\textsuperscript{39} Consumer buyer power occurs when the consumers have a range of outside options and a possibility to choose between the products of different companies, Jones, A., Sufrin, B., 5\textsuperscript{th} edition, pg. 1209.
\textsuperscript{40} Commissions Guidelines on Art 101, para. 26 – 30.
\textsuperscript{41} Whish, R., Bailey, D., 7\textsuperscript{th} edition, pg. 19
\textsuperscript{42} Csere, J. K., pg. 125.
\textsuperscript{43} Ibid.
efficiency. Dynamic efficiencies are welfare gains from innovations, i.e. a higher quality of products or services or a higher range of options to choose between. In the long run, however, innovations may create more welfare for the consumers than lower prices would in a short term. This is because innovations generate a wider range of options on the market which the consumers can choose from, new and better products.

The long term perspective allows for some harm to be made to the consumers as long as it increases the overall wealth in the society, the measures undertaken are proportionate, necessary and reasonable to achieve the wealth and the competitive structure on the market is not demolished for an extensive time. Furthermore a fair share of the benefits should later on be passed on to the consumers.

Lower prices, better quality and a wider range of products to choose from are referred to as allocative efficiencies. Allocative efficiencies occur when the market price of a product is equal to the marginal cost of the product. At this time, the market is producing as much as the consumers demand and none of the market players, i.e. sellers or buyers, could be in a better position without lowering the position of someone else. The price is equal to the price that the consumer is prepared to pay for the product and the supplier is producing the exact amount of products to be cost efficient. These allocative efficiencies are attained under perfect competition.

4.1.2. An efficient allocation of resources

The third way of reconciling the interests of the society and the consumers is, according to Cseres, to only consider economic efficiency and social welfare as the objectives of competition law. An approach which focuses only on economic efficiency and the total welfare of the society is not commonly used. It has even been argued that no democratic society would, or could, focus only on those objectives. The reason for this is because such approach ignores any redistribution of wealth from the producer to the consumer and the interests’ of consumers are thereby directly ignored.
In antitrust law, the opinion that there is a necessity to redistribute wealth is not as sharp as in Europe. Some scholars, related to the Chicago School, argue that questions relating to redistribution and equality are not appropriate for the competition law authorities to get involved in. Instead the Chicago School argues in favor of efficiency gains and that wealth should be allocated where it is the “most appreciated”. The proponents of this approach are generally referred to as welfare economics.\textsuperscript{51}

An effective allocation of wealth is achieved when the individuals who benefit from an allocation are gaining more than what the individuals, who are not given anything, loose. As an example to the Chicago School’s approach, a policy which creates more benefits for businesses than harm for consumers would be efficient and the Chicago School would argue that such a decision is logical based on rationality.\textsuperscript{52} This efficient allocation of resources allows for the consideration of both allocative and productive efficiency and the approach is therefore considered to be a more neutral alternative to consumer welfare. Production efficiencies are cost savings occurring from a higher level of output, or a more qualitative output, from the same amount of input. The savings are the results of obtained economics of scope or scale, reductions in transport costs, transitions made to the supply assortment by which less valuable products are removed, the use of more efficient techniques and other savings done to distribution and research.\textsuperscript{53}

An efficient allocation of resources is considered to be a more neutral alternative to consumer welfare since the efficiency of both the consumer and the producer are considered within the objective and not only the consumer. Nevertheless, even though the total welfare approach and the consumer welfare approach are favoring different standards of welfare in competition law issues, it has been argued that they in reality are producing similar results. The statement is not clearly defined but it seems to me that it is based on the fact that society’s problems are usually linked to the problems’ of the consumers and by solving the former we automatically solve the latter. There is however clearly a disagreement between scholars, with others arguing that the standards, total or consumer welfare, demand different rules of enforcement and are

\textsuperscript{51} Cseres, K., J., pg. 125.
\textsuperscript{52} Ibid.
\textsuperscript{53} OECD; Policy Roundtables, Competition Policy and Efficiency Claims in Horizontal Agreements 1995, pg. 6.
thereby not producing similar results.\textsuperscript{54} However, both social and consumer welfare are considered to be maximized during perfect competition.\textsuperscript{55}

\subsection*{4.2. The Court of Justice’s view on the objectives}

Although the Court of Justice has been critisised for being too ordoliberal and formalistic, it has obtained both a formalistic and an effect based approach in their rulings relating to article 101 and 102 TFEU.\textsuperscript{56} Their formalistic approach could be seen inter alia in the cases of \textit{Consten and Grundig} and \textit{T-mobile}. In the former, the Court of Justice held that some conducts by their very nature could infringe article 101 TFEU.\textsuperscript{57} The court has referred inter alia to agreements which has as their objective to fix prices, limiting output or sharing markets or consumers.\textsuperscript{58} In \textit{T-mobile} this formalistic approach was repeated by the court. It held that in order to find a restriction of competition by object, there is no need to establish a direct effect on prices for end users. Rather the aim of competition law was held to be the protection of the competitive structure on the market and competition as such.\textsuperscript{59} This formalistic approach was critisised by the Court of Justice itself in \textit{Cartes Bancaires}. In the case, the court held that one has to be cautious in assessing a conduct as “restricting by object” in relation to article 101 TFEU.\textsuperscript{60}

In relation to article 102 TFEU, the effect based approach was critisised by the General Court in \textit{Intel}.\textsuperscript{61} The Court of Justice applies the theological method in cases relating to article 102 TFEU. The theological approach has in a majority of cases caused obscure rulings and it has been argued that the rulings relating to article 102 TFEU are generally based more or less on other objectives of the Treaty than the creating of a strong internal market, usually seen as the objective of article 102 TFEU. The Court of Justice has by this stayed away from clearly defining the goals of EU competition law. As a consequence, article 102 TFEU is now seen as only ensuring an undistorted competition

\textsuperscript{54} Cseres, K., J., pg. 126.
\textsuperscript{55} Whish, R., \textit{5th} edition, pg. 2 – 3.
\textsuperscript{56} Whish, R., \textit{5th} edition, pg. 100 – 111.
\textsuperscript{57} Whish, R., \textit{5th} edition, pg. 110.
\textsuperscript{58} Kaczorowska, A., pg. 156.
\textsuperscript{59} Press release No 47/09, Judgment of the Court of Justice in Case C-8/08, T-mobile […], pg. 2.
\textsuperscript{60} Italianer, A., pg. 3
\textsuperscript{61} Ibid.
on the market, which in itself means that the general objectives of the Union should be ensured.62

The obscure rulings could be the reason why article 102 TFEU is considered hard to interpret, i.e. why its objectives and content are hard to define.63 This was held by Nazzini in 2011 even though the European Commissioner for competition policy, Kroes, in October 2005 stated that “Consumer welfare is now well established as the standard that the Commission applies when assessing […] infringements on the Treaty rules of cartels and monopolies”64, referring inter alia to article 102 TFEU. The statement does not seem to have had any major impact on the Commission’s approach towards article 102 TFEU since many other objectives have been used in appliance with the article ever since.65

Statements from the Commission indicate that ensuring consumer welfare and an efficient allocation of resources are the only objectives of EU competition law and these are per se efficiency goals. Odudo holds that consumer welfare and efficiency are in fact synonyms to each other.66 Other goals should not be considered in competition law cases and this approach, the Commission argues, is based on case law from the EU courts. Nevertheless, it is well known that other objectives have been considered, and continue to be considered, by the Court of First Instance and the Court of Justice as well as by the Commission in matters relating to article 101(3) TFEU.67 Further, the more formalistic approaches generally hold by the Court of Justice does not support consumer welfare and an efficient allocation of resources as the main objectives of competition law. Rather the ordoliberal view of competition as an end in itself, to ensure a pluralistic market structure, seems to have been the main objective for the Court of Justice, especially in cases under article 102 TFEU.68

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62 Nazzini, R., Pg. 1
63 Ibid.
64 Whish, R., Bailey, D., 7th edition, pg. 19
65 Ibid.
66 Odudo, O., pg. 601.
67 Townley, C., Is anything more important than Consumer Welfare (in Article 81 EC)? […], pg. 346.
68 Nazzini, R., pg. 1 - 2, Korah, V., pg. 104.
4.2.1. A pluralistic market structure

The objective of maintaining a pluralistic market structure or a free market means that small firms should be protected, barriers to enter should not exist and there should be a freedom for everyone to compete on the market. This freedom should though be restricted in order to prevent firms from growing too big, foreclosing others from the market.\(^69\)

4.3. A debate about the objectives or the methods of assessing EU competition law issues

The debate about what the objectives of EU competition law should be is complex. As I see it, the different views of efficiency goals could be summarised into two different fields. On one hand we have the approach supporting consumer welfare and efficiency. This includes both consumer welfare, society welfare and an effective allocation of resources. The other type of efficiency goal is a pluralistic market or a free market, on which everyone can compete. These are the two types of efficiency goals applied today.\(^70\) The third type of objective which has been discussed in relation to EU competition law is non-efficiency objectives. These objectives should according to Townley be considered by the EU competition law courts as part of the consumer welfare test and if so, they are not an objective in itself. However, other scholars are not supporting non-efficiency goals as a part of the consumer welfare test. The debate about non-efficiency goals has been seen as an important contribution to the debate about the objectives of EU competition law and I have therefore decided to consider non-efficiency goals in this essay, regardless of if they may fall within the concept of consumer welfare or not.\(^71\)

Even though some scholars have argued that there is an inconsistency between the Commission and the courts when it comes to deciding on the main goals of EU competition law, others have been argued that there is in fact no inconsistency. As I see it, the common view is that there is partly an inconsistency between the approach of the Commission and the courts in relation to article 102 TFEU, where the courts have adopted a more ordoliberal approach, with the objective of maintaining a pluralistic

\(^{69}\) Korah, V., pg. 104.
\(^{70}\) The Austrian School, defined later in this essay, has another perspective of how a free competition is achieved.
\(^{71}\) Odudo, O., pg. 613.
market rather than pure consumer welfare. The General Director of the Commission, Italianer, has argued that there is no inconsistency about what the objectives of EU competition is but that there is an inconsistency regarding the methods best used for achieving these objectives. According to Italianer, the inconsistency is related to the use of a formalistic or an effect based approach in the Commission’s and the courts’ assessments of conducts.\textsuperscript{72}

In my opinion there seems to be some uncertainties relating to both what the objectives of EU competition law are as well as how to best achieve these objectives. The continuing sections of this essay will therefore focus both on the questions of what the objectives of EU competition law should be and what methods should be used to achieve these objectives.

5. Non-efficiency goals

5.1. The Commission’s view on non-efficiency goals

Part of the ongoing debate relating to what the objectives of EU competition law should be is the question of what weight should be given to non-efficiency goals. It has been argued that the Commission’s view of using non-efficiency goals as a defense for an anti-competitive behavior “have hardened over time”, giving more weight to non-efficiency goals. The statement is focusing on the Commission’s ruling in CECED (2000), in which it held that environmental protection benefiting society at large could be accepted under article 101(3) TFEU.\textsuperscript{73} This approach has however not been consistent. According to the Commission’s guidelines from 2004, non-efficiency goals seem to have had a minor roll, being considered but never required in determining an anti-competitive behavior.\textsuperscript{74} Later guidelines (2010) contain a similar viewpoint of non-efficiency goals as secondary to primary objectives such as efficiency gains, consumer welfare and economic interests.\textsuperscript{75} Overall the guidelines on article 101 TFEU does not give much help in determining what weight, if any, should be given to non-efficiency goals.\textsuperscript{76} The same is true for cases brought under article 102 TEFU. In these

\footnotesize{\textsuperscript{72} Italianer, A., pg. 5.  
\textsuperscript{73} Kieran, F., pg. 192.  
\textsuperscript{74} Ibid.  
\textsuperscript{75} Ibid.  
\textsuperscript{76} Ibid.}
cases, the Commission focuses on the specific circumstances in each case and decides on a case by case basis the most reasonable and appropriate outcome.77

5.2. Non-efficiency goals

The debate today concerns inter alia the question of if non-efficiency goals should be a part of the objectives of EU competition law or not. However, there is no clear definition of what would count as a non-efficiency goal if non-efficiency goals would to be applied in EU competition law matters. A number of articles in the TEFU require an integration of non-efficiency objectives when an EU activity or policy is implemented. Kieran refers to the seven areas stated in article 6 TFEU when he defines non-efficiency goals and he argues that these should be considered by the EU competition law authorities. The seven areas are protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation.78 Kieran argues that since the Treaty is part of the primary law of the EU, these general objectives of the Treaty should be implemented in all areas of EU law, including competition policies.79

Another defining of non-efficiency goals has been brought by the OCED and it defines non-efficiency goals, in relation to competition law, as broader social or industrial policy goals, than could be linked to economic efficiency.80 These broader goals are “public goals and public interests other than competition and economic efficiency”. This definition includes e.g. benefits from creating new employments, protection of the environment, health and safety to individuals and promoting of ethical behavior.81 Such goals have in some cases been considered by the EU courts in competition law cases but there is no consistency in the courts’ precedents. However, the question of if and when public policies should be relevant to EU competition law is a hard one to answer and it has been argued that a consideration of non-efficiency goals requires a more systematic

77 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 8.
78 Art. 6 TFEU
79 Townley, C., Is anything more important than Consumer Welfare (in Article 81 EC)? […], pg. 350. Art 7 TFEU
81 Kieran, F., pg. 191.
and theological approach to the overall objectives of the Treaty than is usually undertaken by the courts.  

It has been argued that it is the pyramidal structure of the Treaty that has caused the debate about non-efficiency goals. The structure causes objectives of different articles to interfere with each other and the methods of reaching a goal may be by referring to and using other provisions. As an example may an improvement of health in the EU require a stronger support of environmental protection, since health may be improved by a reduction of pollution. It is unclear which objective is superior and which is subordinated. Case law is neither sufficiently solving this uncertainty problem.

By the ratification of the Lisbon Treaty (2009), the EU institutions created a single set of objectives relating to all treaties and policies within the EU, including competition law. These are protection of the environment, employment, public health, culture, consumer protection, economic and social cohesion as well as development. These policies, defined as “policy-linking clauses” by Townley, are sometimes clashing with the specific policies of EU competition law. When it happens, one has to decide if, and how, we should respond to the conflict. The ratification has thereby not clarified the status of or defined non-efficiency goals in EU competition law. According to Townley the objectives in the Lisbon Treaty should be considered within EU competition law. Townley does not refer to these policy-linking clauses as non-efficiency goals but the overall context of his article indicates that they are synonyms. To achieve a clear definition of non-efficiency goals through this essay I am going to use the definition of non-efficiency goals as “public goals and public interests other than competition and economic efficiency”.

82 Townley, C., Is anything more important than Consumer Welfare (in Article 81 EC)? […] pg. 350.
83 Townley, C., Is anything more important than Consumer Welfare (in Article 81 EC)? […] pg. 351.
84 Ibid.
85 Ibid.
86 See Townley, C., Is anything more important than Consumer Welfare (in Article 81 EC)? […] pg. 352, "the policy-linking clauses' goals should be considered when competition policy is implemented, even if these goals conflict with other competition law objectives. If public health issues should be considered in the implementation of competition law, can the supermarkets rely on Article 152(1) EC to justify a price-fixing agreement under Article 81 EC?"
If one argues in favor of non-efficiency goals, there are as well the questions of how these goals should be considered and when. Townley describes and analyses a few different ways of balancing between efficiency and non-efficiency goals when there is a conflict between values in the TFEU or between values of the TFEU and those of a member state. One way could be to balance one, a few or all policy goals (efficient as well as non-efficient) with the applicable article, i.e. article 101 or 102 TFEU. Another way of balancing is to pick just one policy goal and balance it with the objectives of article 101 or 102 TFEU and then deal with other conflicts and policy goals external to the actual conduct. What Townley means is that if e.g. the protection of the internal market would be considered the main goal of article 101 TFEU, this would exclude all other objectives from being considered under the article. Other objectives should instead be dealt with by other provisions. This latter approach is not appropriate or possible according to Townley since it is clear that some articles in the TFEU require the consideration of more than one goal. The overall balancing approach is neither supported by inter alia Odudo, who describes any consideration of non-efficiency goals as undemocratic.

6. Economic and philosophical theories

In this part of the essay I am going to present some of the most important economic and philosophical theories underlying the policies of EU competition law. The economic theories mainly reflect the macro perspective of competition law in this essay. They reflect the effects of different behaviors on the market. The philosophical theories are, on the other hand, mainly reflecting the micro perspective of EU competition law. They are concerned with how individuals are affected by different conducts, in life and in their interaction with others. The line between economic and philosophic theories is nevertheless not easy to draw and economic theories are more or less based on philosophical theories and ethical values. This is why a theory, e.g. utilitarianism, may occur in relation to both economic and philosophical issues. The philosophical contribution is however still important and it benefits the discussion due to its many

87 Odudo, O., pg. 603. Compare Odudo’s critic of Townley. “The first task Townley faces is to demonstrate ‘why it might be apposite for competition policy to incorporate public policy objectives’. The second and third tasks are then to show how and when non-efficiency considerations ought to operate within Article 101 TFEU, ex Article 81 EC.”
88 Townley, C., Is anything more important than Consumer Welfare (in Article 81 EC)? […], pg. 354.
89 Odudo, O., pg. 609.
intellectual aspects on political and cultural competition.\textsuperscript{90} The philosophical influences are directly affecting competition law inter alia by their views on utility (welfare) and authority (state control/freedom to compete).

6.1. The relationship between ethics and economics
The study of economics was for a long time seen as something integrated with the field of ethics. By the time this approach has changed and in 1987, \textit{Sen} held that the most common view was that there was no logical relationship between economics and ethics.\textsuperscript{91} Even so, the field of ethical studying is one of two origins of economics. On one hand it’s the ethical concerns laid forward by \textit{Aristoteles} and on the other hand there is the more business approach, defined by \textit{Sen} as the “engineering approach”.\textsuperscript{92} Philosophical theories concerned with the normative question of what the law should be have further directly affected the way we look upon the competition law objectives. In practice, the utilitarian device of Pareto optimal, or perfect competition, is based entirely on ethical concerns.\textsuperscript{93}

The “engineering-approach” of economics is concerned mainly with the means of reaching an end, i.e. what are the suitable means that we have to use in order find out what a good life is?\textsuperscript{94} Both the ethical and engineering approach to economic behavior has influenced scholars in various amounts. Among influential ethical proponents we have Adam Smith, John Stuart Mills and Karl Marx. On the other arena there are inter alia William Petty, Francois Quesnay and David Ricardo, who have been arguing more in favor for the engineering approach. However, there is not a clear distinction between the two camps since neither of the scholars holds a pure view in any sense, rather the separation relates to how they have chosen to balance the two approaches.\textsuperscript{95}

6.2. The macro and micro economic perspective of competition law
When analysing competition law from an economic point of view, two main approaches are outstanding. The first approach analyses competition by estimating the effects of laws and policies on market failures. From a macro-economic point of view, the main

\textsuperscript{90} Andriychuk, O., pg. 575.  
\textsuperscript{91} Sen, A., pg. 2.  
\textsuperscript{92} Ibid.  
\textsuperscript{93} Sen, A., pg. 31.  
\textsuperscript{94} Sen, A., pg. 6.  
\textsuperscript{95} Ibid.
goal of competition law is to prevent the market from collapsing and save the costs which would otherwise be lost in such failure. The underlying micro-economic view of competition law is concerned with the individual, the right to interfere others in some cases and the right to defend oneself in other cases. The economic aspect of competition law is necessary in order to generate laws which lead to the desired effect and to achieve such laws one cannot have an overall legalistic approach to economic issues. One has to understand the concrete effects of a conduct on the market and on individuals. The micro-economic tools used in so-called industrial economics are the most important for competition law to understand. These tools are described as “an individual’s preferences for apples over pears, or the costs of making a chair instead of a table”. These metaphors relate to how individuals make preferences and reason about costs. They are applied in a wider market context to understand how and why individuals and firms interact as they do.

6.3. The role of an authority

The role of an authority has been discussed for centuries and the different approaches to state control are in my opinion valuable to consider even in this essay. According to Aristoteles the authority of a state should always act with the aim of maximizing the good for each inhabitant. Used in competition law, I would argue that it means that the competition law authorities should act with the aim of maximizing the good of each individual in the member states.

To maximize wealth, the authority uses the economy. The economy is a tool to be used in maximizing wealth, and the underlying objective is that each individual should use his or her wealth to reach one’s underlying individual and basic goals. Economy as such has two fundamental foundations and they are both ethically based. The first foundation is concerned with “how one should live” and the motivations behind certain behaviors. Our individual and ethical views affect our actions and our preferences of how one should live. These preferences are subjective and the extent to which they affect us differs among individuals and types of conduct. The second foundation of

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96 Furse, M., pg. 7.
97 Furse, M., pg. 9.
98 Sen, A., pg. 2.
99 Ibid.
100 Ibid.
economics relates to how we define Aristoteles’ “the good for [a] man”, i.e. how we define what we need in order to live a flourishing life. The concept relates to us as individuals as well as to our roles as members of a society. Modern welfare economics are usually of the view that “the good” to be achieved is for the society as a whole and not only for a majority. This broader view of welfare does not stop at any arbitrary point, when efficiency is considered satisfied. According to Aristoteles all laws should be stated with the aim of constructing a worthwhile way of living for a human being, i.e. a good life.\textsuperscript{101}

The role of an authority has been developed by Grotius and Hobbes. Grotius was concerned with creating a society which would be stable and have a well-functioning government. This could only be achieved if the inhabitants surrendered some of their freedom to the government. In return they received protection against extraneous threats. The relationship between the state and the inhabitants has been explained as a social contract and Hobbes has developed the theory by specifying that without the contract, every society would be like a “state of nature” and there would be chaos. This is because every human is driven by a survival instinct and since there is no common perception of what reason, we cannot use reason to create non-overlapping spheres of rights and duties between people. Everyone would argue that they had a right to everything. In order to create non-overlapping spheres we need the law, Hobbes says. The law has authority and creates an efficient system.\textsuperscript{102}

\textbf{6.4. The rational man}

In a state of nature, all humans are driven by self-interest and this leads to chaos according to Hobbes. This liberalist view of man as driven by self-interest has been seen as the classical model of competition law.\textsuperscript{103} The concept of rationality has been assessed by Smith. According to Smith and his theory of the invisible hand, every man is guided by his or her own view of what is the most efficient way of using his or her resources. The ultimate goal of all actions is satisfaction. To find the action which gives

\begin{footnotes}
\footnotetext[101]{Sen, A., pg. 2.}
\footnotetext[102]{Freeman, M., pg. 95 - 96.}
\footnotetext[103]{Middleton, K., Rodger, B., MacCulloch, A., pg. 1.}
\end{footnotes}
the highest amount of satisfaction, a human being is always doing internal analyses over different outcomes in order to find the one most efficient. ¹⁰⁴

Smith’s theory illustrates that the greatest good in a society may come from the selfish conduct of individuals and not from authority control. According to his theory it is not the love and care to humanity that motivates the baker to bake bread for us to buy but rather his own goal of surviving. The non-rational action of the baker, and the actions of every non-rational individual, contributes to a collective rationality, even though the individuals themselves have no clue of their contribution. ¹⁰⁵ Any action, not undertaken by self-interest, would interfere with the appropriate Darwinist way of explaining supremacy and the natural way of selecting the most efficient participants. Everyone is rational and there is no more regulatory level to search for. ¹⁰⁶

6.5. Utilitarianism and deontological theories

In order to answer the question of what the main objective or objectives of EU competition law should be, one firstly has to decide what the end result should be. A way of describing the line between the approaches undertaken by the Commission and the Court of Justice is to use the theory of utilitarianism and deontological theories. The former theory is promoting consumer welfare and efficiency and the latter theories argue in favor of a pluralistic market structure/ free competition. ¹⁰⁷ Utilitarianism and the deontological theories represent two different ways of dealing with competition law issues. ¹⁰⁸

6.5.1. Utilitarianism

Utilitarianism is concerned with generating the most utility, or happiness, for the most people as possible. ¹⁰⁹ Applied in competition law, the utilitarian approach means that the most benefits should be given to the consumers and as such, the society as a whole. Competition as an object in itself is not important as long as the welfare in a society is maximized. ¹¹⁰ This view of utilitarianism was supported by Bentham and as such, his

¹⁰⁴ Dahlman, C., Glader, M., Reidhav, D., pg. 9.
¹⁰⁵ Sen, A., pg. 23.
¹⁰⁷ Andriychuk, O., pg. 578.
¹⁰⁸ Ibid.
¹⁰⁹ Simmons, N., E., pg. 25.
¹¹⁰ Andriychuk, O., pg. 578.
theory holds that a majority can do whatever they like to a minority as long as the pleasure for the majority is greater than pain for the minority.\textsuperscript{111} Critics of the utilitarian approach hold that even though the overall utilitarian objective is good, there lack of an overall aim of equal distribution makes the theory morally blind and thereby wrong.\textsuperscript{112}

6.5.1.1. Mill and the harm principle
The utilitarian view as expressed by Bentham was later modernised by Mill.\textsuperscript{113} Mill argued that there are limits to what the majority can do. The limits are defined by Mill’s “harm principle”, which states that a state should and should only interfere with the life of an individual if it is to prevent harm to another person’s interests. These interests are secured by state governance and no majority can interfere with them. The interests are individual rights and the harm is made through interference with these rights. Which these rights are is not clearly defined.\textsuperscript{114} In relation to free speech, Mill seems to distinguish between the risk of harm to property and life and the physiological harm to a person. An illegitimate harm seems to be caused only in the cases in which the expression itself is seen as “a positive instigation to some mischievous act”.\textsuperscript{115} The harm, as I understand it, is in fact the risk of harm to a person in form of having his or her property destroyed or being injured.\textsuperscript{116} The philosophical theories of Mill changes during his lifetime and even though he started as a utilitarian proponent, he is now days well-known as one of the most important liberalist philosophers of the 19\textsuperscript{th} century.\textsuperscript{117}

6.5.1.2. Perfect competition
The utilitarian view of competition law is related to the phenomena of perfect competition. In a perfect competition, no one can be better off without at the same time, making someone else worse off.\textsuperscript{118} When a market has perfect competition there are a large number of sellers and buyers on the market, the product is homogenous, the buyers and sellers are informed about fluctuations in supply and demand, there are no

\textsuperscript{111} Simmons, N., E., pg. 30.
\textsuperscript{112} Simmons, N., E., pg. 26.
\textsuperscript{113} Brink, D., section 1.
\textsuperscript{114} Mill, J., S., On liberty, in Lloyd’s introduction to jurisprudence, Freeman, M., pg. 1368, ”… the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”
\textsuperscript{115} Van Mill, D., section: 2.1.
\textsuperscript{116} Ibid.
\textsuperscript{117} Brink, D., section: introduction.
\textsuperscript{118} Burton, J., pg. 5.
barriers to enter or exit on the market, no transaction costs and no external circumstances affecting the costs of the producer.  

In a perfect competitive market, firms have to be efficient in order to survive on the market place. Inefficient firms will be bowled over by other more efficient firms. The reason is that when there is perfect competition, the marginal cost equals the price of the product. Firms have to compete on other parts, e.g. quality or service. When this occurs in perfect competition, the resources in a society are located in a way that benefits both the seller and the buyer. At the times there is also an efficient allocation of resources which is one of the main objectives of article 101 TFEU according to the Commissions guidelines. \[120\] When there is an efficient allocation of resources, the market reflects an ideal state of market structure and competition platform, according to the proponents of utilitarianism. \[121\] The state is ideal because it is structured in a way which makes the economy the most effective. The structural condition is explained by the neo-classical theories as a “general equilibrium” and “partial equilibrium”. \[122\] The neo-classical way of analysing economic consequences begun in the end of the 19\textsuperscript{th} century and the use of neo-classical utensils such as the “general equilibrium” and “partial equilibrium” are today the basis for the very well known, standard price theory. \[123\] The theory is based on the assumption that the market is consistently under technical competition, firms are autonomous and there are no standard contracts restricting them. This rivalry is maximizing welfare by generating low prices, quality products and a wide range of optional products. \[124\]

6.5.1.2.1. Pareto optimal

The theory of perfect competition is also referred to as the theory of Pareto optimal and it is based entirely on ethical concerns relating to the hypothesis of human beings as always guided by self-interest. \[125\] A state is “Pareto optimal” when there is no way to increase the utility of one person without lowering the utility for another person. It does

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119 Jones, A., Sufrin, B., 5\textsuperscript{th} edition, pg. 7.
121 Burton, J., pg. 5
122 Ibid.
123 Burton, J., pg. 4
124 Meese, A., J., pg. 80.
125 Sen, A., pg. 31, 34.
not say anything about equality. When a state is Pareto optimal it means that the utility in the state is distributed in the most economical efficient way.\textsuperscript{126}

For welfare economics the Pareto optimality is the only tool of judging economic choices and the choices are based on the “self-seeking behavior” of an individual. The use of Pareto optimality is related to the results on the market during perfect competition. When there are no external influencing factors to the market, a competitive market is always Pareto optimal. The balance is the opposite, i.e. a Pareto optimal market is equal to perfect competition, when there are especially “no economics of large scale” and “for some initial distribution of endowments”.\textsuperscript{127} By using the theory of Pareto optimality, ethical statements of what is a good life, is directly connected with efficiency. The aim of perfect competition is to create efficient results and the meaning of such results is that it creates efficient positions, i.e. positions in which everyone is the best of as they can be without lowering the benefits of anyone else.\textsuperscript{128}

### 6.5.2. Deontological theories

On the opposite side of utilitarianism, we have the deontological theories. These theories are concerned with competition as an end in itself and not as something used to justify other objectives. Consequently, deontological proponents do not care about the end result of a conduct, only that the market is regulated in such a way that it generates the most freedom for individuals. This is preserved in a liberal democracy, where state interference is minimized.\textsuperscript{129}

The deontological theories are two different schools, the Ordoliberal School and the Austrian School. They are both considering the main objective of competition law to be the establishment of a pluralistic market structure with a free competition as an end in itself. The differences between them relate to their perspective on the authority and the measures best used to “establish, maintain, protect and promote competition” as well as the concepts of individual and collective rights.\textsuperscript{130}

\textsuperscript{126} Sen, A., pg. 32.
\textsuperscript{127} Sen, A., pg. 34.
\textsuperscript{128} Furse, M., pg. 9 - 10.
\textsuperscript{129} Andriychuk, O., pg. 578, 581.
\textsuperscript{130} Andriychuk, O., pg. 581.
6.5.2.1. Ordoliberal School

Ordoliberals have a skeptical view of the market as self-contained and believe that there is no way to establish a sustainable market without regulations and government control. This is because competition in itself is fragile and weak. It cannot protect itself from powerful actors such as monopolists.\textsuperscript{131}

Ordoliberals are concerned with each and everyone’s individual right to compete on the market place and they argue that monopolies and cartels should be regulated in order to create the most fair environment for each subject to compete.\textsuperscript{132} The concern is for the competitors, small and medium enterprises.\textsuperscript{133} According to some scholar of this ordoliberal view, a sole economic efficiency goal would completely interfere with the objectives of the TFEU, leading to a fundamental change of the Treaty.\textsuperscript{134}

For the collective good, a free competition provides benefits for society as a whole. Ordoliberals believe these benefits are provided by considering social concerns through legislation and institutional control. The philosophical ground is that there is some need to redistribute the wealth in society.\textsuperscript{135}

6.5.2.2. Austrian School

Austrians have a more cynical view of state control and they believe that the market is self-sufficient. Competition as such is best preserved when the state is as little involved in the process as possible, the market should guide itself and by so, entrepreneurial spirits should create the most beneficial result.\textsuperscript{136}

The Austrian School argues in favor for monopolies and cartels since they are natural results of great economic decisions. An individual firm has the opportunity to compete on the market place, but this is only if it is as efficient as, or more efficient, than other firms on the market. If not, there is no reason why the firm should stay on the market.

\textsuperscript{131} Ibid.
\textsuperscript{132} Andriychuk, O., pg. 582.
\textsuperscript{133} Jones, A., Sufrin, B., 3\textsuperscript{rd} edition, pg. 35.
\textsuperscript{134} Maier-Rigaud, F., pg. 135.
\textsuperscript{135} Andriychuk, O., pg. 583.
\textsuperscript{136} Andriychuk, O., pg. 581.
More benefits for society are provided from efficient companies, even if they are monopolists or members of cartels, according to the Austrian School of thought.\textsuperscript{137}

The Austrian School is, as ordoliberals, concerned with the collective good and social welfare. Nevertheless, their view of how to create benefits for the society is different to the ordoliberal view. Austrians believe that unregulated markets create incentives to individuals to engage in economic activities, which in the end benefits society as a whole. The Austrians would argue that benefits are given voluntarily by the wealthier companies to those who have less.\textsuperscript{138}

6.5.2.3. Neoliberals

It has been argued that to fully understand the views of ordoliberals one has to first make a difference between ordoliberals and neoliberals.\textsuperscript{139} Neoliberals are by some scholars considered an own theory and by others, a theory integrated within the Austrian School.\textsuperscript{140} Neoliberalism is related to the classical economic liberalism but the approach is modernised. The neoliberal thought is that market imperatives should be supported as well as an unequal distribution of economic benefits. By this, neoliberalism preserves the liberalist idea of an efficient and autonomous market but at the same time asks for democratic legitimacy. Legality is reached inter alia by ensuring “a reasonable level of economic opportunity, distributive fairness, workplace security, community and solidarity and civil equality”.\textsuperscript{141} The weight to be given to either the market imperative or democratic strains depends on the context and circumstances in the given situation.\textsuperscript{142} Overall, the neoliberal approach seems to be considered an integrated part of the Austrian School and any attempt to separate them in this essay would probably be unsuccessful.\textsuperscript{143}

\textsuperscript{137} Andriychuk, O., pg. 582.
\textsuperscript{138} Ibid.
\textsuperscript{139} Maier-Rigaud, F., 138 - 139.
\textsuperscript{140} Maier-Rigaud does not mention the Austrian School in relation to neoliberalism, only that neoliberalism was born/ supported by the works of Hayek, Maier-Rigaud, F., pg. 144 – 145. Hayek himself should have defined neoliberalism as a theory that “sprung out” of the Austrian School, Peters, M., section: Introduction. Jones and Sufrin include Hayek’s work as within the Austrian School, Jones, A., Sufrin, B., 3rd edition, pg. 33.
\textsuperscript{141} Grewal Singh D., Purdy J., pg. 1.
\textsuperscript{142} Ibid.
\textsuperscript{143} Maier-Rigaud does not mention the Austrian School in relation to neoliberalism, only that neoliberalism was born/ supported by the works of Hayek, Maier-Rigaud, F., pg. 144 – 145. Hayek himself should have defined neoliberalism as a theory that “sprung out” of the Austrian School, Peters,
6.5.2.4. A free market; Oligopolistic and Monopolistic markets

Since welfare or an efficient allocation of resources is not supported as the main objective by the deontological theories, perfect competition is not the ideal state for all scholars. To some scholars, a market with perfect competition would be stagnant since it would only consider the available resources at the time and not dynamic resources such as the value of incentives to innovate new products. Proponents of the deontological theories therefore allows for other kinds of market structures, i.e. oligopolistic and monopolistic markets.

An oligopolistic market is a market with only a few players who interacts together in a symbiotic way. This means that the actions of one player directly affect the actions of another player. To understand and predict the behavior of players on oligopolistic markets, the “game theory” was introduced in the 1940s. The theory focuses on the possible effects of corporative and non-corporative behaviors among firms on the market. The conclusion of the theory is that all players are better off if they cooperate with each other, collude their behavior and create cartels.

The definition of a monopolistic market is a market where there is only one firm that produces a specific product. As a single producer, the monopolist can increase prices or restrain production arbitrarily, preventing consumers from buying the products that they want. This type of “true” monopolies is not common. The types of monopolies more commonly existing on the markets are so-called “natural monopolies”, created due to important economics of scale. The economics of scale are too important, or too high, for any competitor to compete with. Natural monopolies could inter alia arise as a matter of state delegations to certain companies. Nevertheless, despite its origin, natural monopolies should comply with article 102 TFEU.
7. Analysis

It has been argued that the utilitarian way of reasoning about the objectives of EU competition law are the ones that are most applied in reality. This means that the overall goal is to ensure the most welfare to each and every one affected by competition on the market. In Europe, the most commonly applied utilitarian approach of welfare is the one of consumer welfare. Nevertheless, there is still a tendency to the debate about the most appropriate objectives of competition law, with inter alia Andriychuk arguing in favor of a more ordoliberal approach. Even if the utilitarian approach of consumer welfare is the one which has mostly affected the laws and policies of EU competition law, there is nothing saying that it is the right approach to use. The present distinction between ordoliberals and Austrians further stretches the discussion by asking us to consider different available methods of achieving a goal.

7.1. Divisions

This analysis is divided into three different parts. The first part concerns the pros and cons of only considering efficiency goals as the objective of EU competition law. The first part includes the questions of (a) should consumer welfare, social welfare and an effective allocation of resources or a pluralistic market structure/free competition be the main objective of EU competition law? And (b) if a pluralistic market structure/free competition should be the main objective, should we allow monopolies and cartels to be unregulated since they create more dynamic efficiency than other firms according to the Austrian School?

The second part of this analysis concerns the positive and negative effects of considering non-efficiency goals under EU competition law. If non-efficiency goals should not be considered under the current wording of the Treaty, I am going to continue the discussing by asking if the Treaty should be amended. This part involves the question of which objectives are best regulated under EU competition law and which objectives are best regulated in the member states. The separation of power approach is an important part of this essay since there could be objectives that are important to support but where the effects of legislation on an EU-level could be more negative than if the issue was regulated on a state level.

Andriychuk, O., pg. 579.
The last part of this analysis is the conclusion. In this part I am going to summarise the other parts of the analysis and answer the last and most important question of this essay; what should the main objective or objectives be? All questions in this analysis will be discussed through a comparative perspective and economic and philosophical theories will be used to support or criticise alternative approaches to the questions.

7.2. Efficiency goals

7.2.1. Consumer welfare; in a short and a long term perspective

Consumer welfare as a short term goal has been criticised due to its lack of valuing dynamic efficiency.\(^{151}\) The incentives to invest for the producers are zero since the only focus is on maximizing consumer surplus. In my opinion, there are clearly some areas in the market where innovations are essential for the society to develop. An example is within the field of medicines and cures for deadly illnesses. Everyone in the society benefits from these medicines but the initial costs of developing them are high for the companies. The incentives to innovate can therefore not be totally unprotected.

Consumer welfare as a long-term goal considers producer surplus insofar as it ultimately creates benefits for the consumers.\(^ {152}\) Consumer welfare as a long-term goal has been criticised for mainly three reasons. The first reason is due to the term’s abstract character. In defining what consumer welfare is we use abstract utilitarian values by which the view of the majority is guiding. The problem is that no one actually knows what the real majority wants. To come up with subjective views of what the majority desires may be easier than trying to define what the most beneficial outcome for the society is. Thus, just because consumer welfare may be an easier test to apply than society welfare “does not make it a good test and even less does it make it the objective of the law”.\(^ {153}\)

It has further been argued that the meaning of consumer welfare is per se rhetoric and the term can be used to hide ulterior motives which favor the politicians at a certain

\(^{151}\) Nazzini, R., pg. 40.
\(^{152}\) Nazzini, R., pg. 41.
\(^{153}\) Nazzini, R., pg. 45.
time. The fact that the term is rhetorical is thus as well an argument used by those who argue in favor of consumer welfare. The fact that competition policies does not exist in a vacuum but rather as existing values of the current society, allows politicians to form their decisions in accordance with the current values of the majority.

In my opinion, the rhetorical content of consumer welfare allows for a flexibility which means that the core objectives of the society can always be maintained without having to change the laws and policies of EU competition law. This is positive since costs and time otherwise involved in the legislation process are saved. These positive effects would probably occur even if the objective of competition was social welfare since, in my opinion, the term social welfare allows for the same flexibility as consumer welfare. However, cost savings cannot be prioritised over clarified and consistent laws and policies. Private parties, directly affected by the competition laws must be able to understand the laws that apply to them to know what conducts are in fact legal and which ones are not. If consumer welfare cannot be defined in any way which is consistent and understandable for the parties involved, maybe it should not be the main objective of EU competition law.

Consumer welfare relates to the effects on the well-being of individuals. A definition of well-being is given by Odudo and it is expressed as an “intuitive understanding of a person’s welfare as, roughly, what makes life go well for him”. What makes life well is efficiency, i.e. a wider range of options, cheaper, new and better products. Altogether these efficiencies raises our standards in life and thereby our well-being. By giving this definition to the term of consumer welfare we receive estimates which makes the term more concrete and measurable. Even so, it could be argued that these efficiencies are not the only things humans need for living a flourishing life. That is neither the purpose of the term. There are subjective values related to what a good life is and no definition can capture them all. The purpose of the authority, as Aristoteles held, is just to act in accordance with that it believes is a good life for the people. In my opinion, the

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154 Ibid.
156 Andriychuk, O., pg. 356.
157 Odudo, O., pg. 603, referring to an earlier definition by Black.
158 Ibid.
159 Odudo, O., pg. 608.
definition of consumer welfare relates to values that could be adopted as objective and important for our well-being by the majority in the member states.

7.2.2. Consumer welfare, social welfare and an effective allocation of resources

The main difference between consumer welfare and social welfare is related to the view on redistribution of wealth. Consumer welfare is considered to be a regressive form of redistribution with the aim of transferring “the wealth from individuals with a lower marginal utility of income to individuals with a higher marginal utility of income.”\textsuperscript{160} Social welfare is, on the other hand, a more natural way of redistributing the wealth in a society.\textsuperscript{161}

Redistribution as such requires knowledge about the income of a consumer and a firm’s owner. It has been argued that consumer welfare is only concerned with the redistribution of wealth from a company to a consumer and not the other way around. The proponents of social welfare argue that this is a wrong way of considering redistribution and that producer surplus is sometimes more important than consumer surplus. This is inter alia due to the fact that investors may have a low income and thus need the security of a producer surplus to invest. Furthermore, higher prices lead to higher profits and this could raise the income of the employees, i.e. indirectly consumers.\textsuperscript{162} The latter argument is in my opinion weak. There is nothing securing that a higher profit raises the salary of the employees. The extra profit may be used to improve other areas within the company or to raise the salaries of the owners. The former argument is directly connected with the value of investments and I have discussed the importance of incentives to invest above in relation to short term consumer welfare. It will further be discussed in the approaching sections.

7.2.3. A free competition

The objective of maintaining a pluralistic market structure or a free market means that small firms should be protected, barriers to enter should not exist and there should be a

\textsuperscript{160} Nazzini, R., pg. 41.
\textsuperscript{161} Ibid.
\textsuperscript{162} Nazzini R., pg. 41 – 42.
freedom for everyone to compete on the market.\textsuperscript{163} These are confidently important objectives since they are the essence of competition itself. The objective of maintaining a strong and free market could be achieved through two different methods, with or without regulations on monopolies and cartels. In section 7.2.3.1 – 7.2.3.5 I am going to discuss the pros and cons of regulating monopolies in order to evaluate the different \textit{methods} of reaching a strong and free market.

\textbf{7.2.3.1. The effects of monopolies}

A free competition/pluralistic market structure may be obtained with or without regulations on inter alia monopolies. As a single producer, the monopolist may increase prices or restrain production arbitrarily, preventing consumers from buying the products that they want. It has been arguing that a market with a monopolist is an ethically unsound market and this is even if the monopolist is not abusing its position.\textsuperscript{164} The sole fact that the monopolist has the opportunity to raise prices or in any other way abuse its position seems to be the reason to the market’s unsoundness. With such an approach, there is no need to establish clear evidence of that a monopolist’s actions are in fact negative for the consumers.

It has been argued that a monopolist’s price raise is not only negative for the community as a whole. Due to price raises, under the conditions that the consumers are still buying the products, the yield may increase for the stakeholders of the monopolistic undertaking. And according to \textit{Korah} these owners are often institutions and pension funds, i.e. indirectly consumers.\textsuperscript{165} A problem occurs when the consumers cannot buy the monopolist’s products due to high prices. The welfare is then for no one. This phenomenon is called “the deadweight loss” since no one benefit from the situation.\textsuperscript{166}

Some scholars argue that the deadweight loss isn’t the most important issue to deal with concerning the negative effects of high prices. \textit{Posner} argues that the resources spent on obtaining and maintaining market power are a real waste for society. The resources are spent on creating barriers to enter for competitors, influencing authorities to regulate in

\textsuperscript{163} Korah, V., pg. 104.
\textsuperscript{164} Whish, R., Bailey, D., 7\textsuperscript{th} edition, pg. 13: “The very notion of a process of rivalry whereby firms strive for superiority may be considered ethically unsound”, i.e. a market with not perfect competition.
\textsuperscript{165} Korah, V., pg. 11.
\textsuperscript{166} Korah, V., pg. 12.
favor of the superior firms etc. The repercussion is that the maintaining competing firms have to get into illegal agreements by which they regulate their prices with the aim of surviving on the market. The most important task of competition policies is therefore to prevent the possibility of such behavior emerging from high market power. The resources spent by a company to eliminate competition should instead be used to decrease prices and increase service and quality.\footnote{Ibid.} As a further argument against market power, it reduces the incentive to increase efficiency, e.g. lower prices and higher quality, since there is no need to be more efficient if the consumers are buying the goods anyway.\footnote{Korah, V., pg. 12.}

7.2.3.1.1. The European and American view on monopolies

The European view of monopolies as legal as long as they do not abuse their position is a more generous view than the American approach, by which all monopolies are illegal per se.\footnote{Furse, M., pg. 6 – 8, “In the United States ´monopolization´ is condemned”, pg. 8.} It has been argued that a market that is not under perfect competition is ethically unsound.\footnote{Whish, R., Bailey, D., 7\textsuperscript{th} edition, pg. 13.} This could indicate that monopolies should never be accepted, as in the United States. On the other hand it is not clear what is actually meant by an “ethically unsound” market. Whish seems to mean that a market which is not in perfect competition wastes the time and other resources of consumers and companies, and this waste is what makes the market ethically unsound. It is unsound that a consumer should spend time trying to find the cheapest bread on the market and it is unsound that a company should spend a lot of money on advertising or selling below costs in order to win the price-war.\footnote{Whish, R., Bailey, D., 7\textsuperscript{th} edition, pg. 13, 14.}

In the same time empirical studies show that monopolies would never survive on the market without legal protection.\footnote{Furse, M., pg. 10.} If they are only on the market for a limited time, maybe they should never be illegal since they are no long-term threats. However, the study does not give an answer to for how long a monopolist would stay on the market without legal protection and it is a possibility that they would force a majority of the other competitors out of the market before the society would start to interfere. The argument does not lead anywhere in my opinion since monopolies would only stay on
the markets as long as they followed the rules of the state and this is exactly the current position of the EU competition law today. They would stay on the market until the society started to interfere.

7.2.3.1.2. Monopolies and efficiency

Another argument, in favor of a less state-governed approach to monopolies, is to argue that a monopolist should be allowed to stay on the market and expand since it has proved itself to be efficient. The question involves moral considerations relating to ownership and a right to what has arisen of one’s hard work. This argument is based on the importance of supporting innovations. For the society to develop inter alia within the fields of health and security, innovations are essential. As I have argued above, an example is within the field of medicines and cures for deadly illnesses. Everyone in the society benefits from these medicines but the costs of developing them are high for the companies. Without the safe net of legal patents and a monopolist position, these medicines might not be innovated. Patents are solving some of this issue, allowing some security for innovative companies against free riders for a certain time. In relation to this issue, an interesting question is if monopolies should be obligated to contribute to the society since a democratic society is providing them with tools for existing. By this statement, I mean that since a democratic society allows for business to make a profit and thereby expand their market share, maybe there should be a forced reciprocity from the monopolist to the society. The Austrian School believes that a reciprocity approach is undertaken by monopolies without any regulations forcing them to contribute to the society. This approach is similar to the view of Smith and his invisible hand theory, by which a collective good is created without the individuals knowing about it. The difference is that according to the Austrian School, the wealthier companies contribute voluntary with knowledge of their contribution, and according to Smith’s theory, they are unaware of their contribution.

7.2.3.1.3. Monopolies and power

The Austrian School’s approach to unregulated markets and monopolies has been feared because it could easily go too far and the monopolist could be too powerful. An example used by the ordoliberalists to illustrate the problem is the free election in Germany 1933, which eventually lead to the Second World War. Since there were no
boundaries to the election, the most popular candidate could win even though he was not suitable for the position.\textsuperscript{173} The same kind of non-regulated economic system could allow for powerful and dangerous parties to get to the top positions in the society, where they could carry out the same kind of terrible actions.

The freedom to compete is clearly limited by the fact that monopolies are illegal in certain cases. Nevertheless, most freedoms need to be limited in some way because the democratic society would not otherwise prevail. This necessary restriction on freedoms and liberties has been the core concern of legal philosophy since \textit{Aristoteles}, who tried to define the role of the authorities. The issue also relates to \textit{Mill’s} theory of the harm principle and even if monopolies are not actually harming others, the principle is based on harm to someone’s interests. Harm is defined as “an action … [that] directly and in the first instance invade[s] the rights of a person”.\textsuperscript{174} The harm, as I understand it, is the risk of harm to a person in form of having his or her property destroyed or being injured.\textsuperscript{175} Since monopolies as such are not destroying individual property or injure people, they cause no harm in such a way that they should be restricted according to \textit{Mill’s} view. Nevertheless, the extremist ideas of Hitler should neither have been restricted according to \textit{Mill’s} view. The line seems to be drawn between verbal and physical harm, and the latter is considered by \textit{Mill} to be harmless. In my opinion, the line should not be so easily drawn. It might seem radical to compare powerful and popular parties with monopolies but in both cases there is a risk that an influential part gets too much power and start affecting the democratic system.

\textbf{7.2.3.1.4. Monopolies and democracy}

A monopolist could try to influence politicians in a society in order to receive its goals. The monopolist could use its economic importance to a society as an argument for persuading the politicians. In my opinion, the mere fact that a company is important to a state could affect the democratic views of the inhabitants in that state. There could be uncertainties about the company’s real influence on the state employees and politicians.

\textsuperscript{173} Andriychuk, O., pg. 582.
\textsuperscript{174} Van Mill, D., section 2.1.
\textsuperscript{175} Ibid.
One could argue that the ongoing search for wealth and power are natural responses of a human from a liberalist perspective, and that no laws should try to regulate these natural instincts. To allow for a more dualistic system, based on the principle of laissez-faire, would lead to a less authorial society in which the government should only regulate a few areas in certain times of peace.\textsuperscript{176} This could as well be used as an argument for democracy. \textit{Andriychuk} argues that a free market from a deontological perspective is a necessary component of democracy together with free elections (political) and free speech (cultural) competition. It is not clear whether \textit{Andriychuk} refers to the ordoliberal view of a free competition or the Austrian School’s approach. One could argue that it is neither of importance since the underlying object of ordoliberals and Austrians is the same, i.e. that competition should be considered as an aim in itself, and this is what \textit{Andriychuk} argues I favor for. In my opinion, these unreliable natural instincts of humans are exactly what make the Austrian School’s approach to competition law impossible to use in reality. The restrictions on monopolies do serve the purpose of creating an efficient system. The main purpose might not be to prevent wars between people, as \textit{Hobbes} saw it, but there is in my opinion a point in regulating monopolies in order to prevent a single actor from receiving too much power.

\section*{7.3. Non-efficiency goals}

\subsection*{7.3.1. Non-efficiency goals and consumer welfare}

According to the ordoliberal view of economic efficiency as the main goal of competition law, no competition policy can legally take into account, or to a significant extent, non-efficiency goals.\textsuperscript{177} Neither the utilitarian approach supports any consideration of such goals as long as it means that the total welfare for consumers or the society is reduced. It has thus been argued that non-efficiency goals should be considered because the current approach to consumer welfare does not lead to a maximum of efficiency and well-being among individuals.\textsuperscript{178} By such an approach, considering non-efficiency goals would fall within the flexible concept of consumer welfare. This is in my opinion a weak argument. It is true that consumer welfare relates to the well-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{176} Hyneman-Knight, F., pg. 292.
\item \textsuperscript{177} Kingston, S., pg. 782.
\item \textsuperscript{178} Odudo, O., pg. 603, referring to a statement made by Townley.
\end{enumerate}
\end{footnotesize}
being of individuals and that well-being cannot be objectively estimated.\textsuperscript{179} On the other hand there seems to be an accepted definition of consumer welfare as efficiency, i.e. a wider range of options, cheaper, new and better products.\textsuperscript{180} It is possible that other values may be more important in the future and that consumer welfare could be redefined by the courts to allow for such new values. However, the current approach of consumer welfare is in line with what is considered to maximize welfare by the majority.

7.3.2. Non-efficiency goals and the Treaty

It has further been argued that non-efficiency goals should be considered because they are part of the founding treaties of the EU and the treaties form a coherent system. These treaties are the tenets of all EU law, including EU competition law and their content should therefore, when possible, be interpreted in all areas. Slightly incorporated in this argument is the third argument for considering non-efficiency goals. The argument is based on the historical development of EU law which has happened and the status that environmental objectives have had during the years serves as an example. In the original Treaty there was nothing mentioned about the environment and today environmental policy is one of EU’s pre- eminent components. The change indicates, according to Kingston, that EU competition authorities must consider the current values in a society and be aware of that the importance of non-efficiency goals may increase over time.\textsuperscript{181}

Environmental protection could serve as an example for the further discussion about non-efficiency goals. Concerns of the environment shall, in accordance with article 11 in the TEFU, be deliberated in every policy or action undertaken by an EU institution. Exactly what weight e.g. environmental concerns should have is on the other hand not clear. Kingston argues that environmental protection should have priority at all stages when EU policies are defined and implemented. This is necessary in order to comply with the integration principle in the TFEU, as well as with economic interests since environmental resources are limited and essential for the functions of the economy.\textsuperscript{182}

The latter part of this argument is clearly based on economic concerns and can therefore

\textsuperscript{179} Andriychuk, O., pg. 356.
\textsuperscript{180} Odudo, O., pg. 603.
\textsuperscript{181} Kingston, S., pg. 784.
\textsuperscript{182} Kingston, S., pg. 798.
not serve as an argument favoring non-efficiency goals. The former part of the argument, referring to the symbiotic relationship between all provisions in the treaty, is neither, in my opinion, clearly substantiated. It has been argued that the Court of Justice in many occasions has had the opportunity to clearly define the value of non-efficiency goals and that the reason why they have not done it is because non-efficiency goals are irrelevant and not legitimate.\textsuperscript{183} This is nevertheless just an idea of why non-efficiency goals are not mentioned and their value defined. The reason why the Court of Justice avoids giving a clear answer to the status of non-efficiency goals could be that they want to avoid negative responses which could arise regardless of whatever direction they would decide in. To give an example of what I am meaning, there could be negative responses like (a) “the Court of Justice is completely ignoring human values and are in favor of environmental pollution” if they would decide that non-efficiency goals are not part of the EU competition law and (b) “the Court of Justice is eroding the democratic system by deciding on issues not within their competence” if they would decide that non-efficiency goals were of equal importance as consumer welfare or a pluralistic market structure/ free competition. The latter reaction could lead to an attenuation of the whole EU, which I will discuss more in section 7.3.4.

7.3.3. Non-efficiency goals and social issues
A further argument for allowing considerations of non-efficiency goals is that it creates an opportunity to deal with problematic issues in the society. \textit{Townley} argues that price fixing agreements should be legal in order to prevent binge drinking since it would have a positive effect on peoples’ health.\textsuperscript{184} In my opinion, there are clearly some public policy goals, such as reducing binge drinking, which are important to the society. A reduce of binge drinking would improve the health of people and consequently reduce the costs of health care in a society. The costs saved could be used to improve other state regulated areas which would benefit the society. Nonetheless, I am skeptical to the fact that competition authorities should be involved and decide in such matters. Consumption of alcohol looks different in the member states, with Sweden and its natural monopoly on alcoholic beverages as a good example. In my opinion, there is a risk involved in changing the law and allow the EU to regulate issues which are now

\textsuperscript{183} Odudo, O., pg. 607.
\textsuperscript{184} Townley, C., Is anything more Important than Consumer Welfare (in article 81 EC)? […], pg. 384 – 349.
days very differently regulated in the member states due to cultural and historical differences. To allow a natural monopoly in Sweden on alcoholic beverages is of course not the same as allowing a price-fixing agreement with the purpose of preventing people from drinking too much. But the underlying concept is similar. There is clearly a subjective part involved in both of them. In Sweden, the state government believes public health is best preserved by having a natural monopoly on alcohol and in Townley’s perspective, binge drinking should be made more expensive in order to limit its negative consequences. The difference is that the monopoly in Sweden is something Swedes know and are used to. By this, I do not say that the monopoly is good or bad, only that there is a difference between if a member state has a tradition of a higher level of standard on any non-efficiency goal and if the authorities on an EU-level would start requiring these extra standards. Even if non-efficiency goals are part of the Treaty there is “no guidance, or apparent consistency [relating to them] … no explanation of what objectives might be considered relevant and why … Nor are we told how much weight these values should be given.”

Because of this, there is no certainty for private parties of what, if any, weight is given to the effects of their conduct on non-efficiency goals, neither if the conduct is beneficial or harming the objectives. One could argue that this abstract approach to non-efficiency goals could be compared with the abstract rhetorical content of consumer welfare, and yet we consider consumer welfare. Nevertheless, consumer welfare has a definition even though it is sometimes hard to apply and this gives some legal certainty to the parties. One could of course argue that just because there is no certainty relating to non-efficiency goals, this does not mean that they should not be considered. This approach is a bit similar to the approach held by the deontological proponents, in relation to consumer welfare, when they argue that consumer welfare is too wide and undefined to be the main goal of EU competition law.

7.3.4. Non-efficiency goals and democracy

It has been argued that a change from the current approach of focusing mainly on consumer welfare to a more “balancing approach” between consumer welfare and non-efficiency goals would be undemocratic since the member states have not agreed to be bound by non-efficiency objectives. In order to maintain a society without overlapping

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185 Odudo, O., pg. 605, referring to a statement made by Townley.
186 Nazzini, R., pg. 45.
entitlements, the majority’s view, i.e. democratic decisions, need to be followed. If the majority in a member state have voted for an EU membership, knowing that non-efficiency goals would still be a matter for the own state, then non-efficiency goals should not be considered by the EU institutions. The consequences could otherwise be too big, inter alia with member states threatening to leave the EU.\textsuperscript{187}

The articles in the TFEU referring to non-efficiency goals are either of shared compliance or exclusively for the EU institutions.\textsuperscript{188} It is therefore possible to argue that the member states could have known, and in some cases should have known, that the EU could decide in these areas even in competition law matters. On the other hand, it has been argued that the policy-linking clauses referring to non-efficiency goals are only to be considered when the EU is legislating.\textsuperscript{189} It would therefore be directly undemocratic to allow for an enforcement of non-efficiency goals without any other legislation that the current one. Since the precedents from the Court of Justice relating to non-efficiency goals are not clear, they can neither justify a consideration of non-efficiency goals. This means that a current consideration of non-efficiency goals would be undemocratic, not because the member states have not agreed to be bound by non-efficiency objectives, they have agreed by giving the EU shared and exclusive rights to legislate in some areas relating to non-efficiency objectives, but because there are no clear precedents or laws explaining what the consequences are for not complying with non-efficiency objectives. It would be a retroactive punishment to fine an undertaking for not acting in accordance with a non-efficiency goal. For that reason, it is in my opinion wrong to consider non-efficiency goals within EU competition law. The problem could be further examined. The fact that non-efficiency goal should not be considered according to the current wording of the Treaty other than when the EU is legislating, does not mean that the Treaty, from a normative point of view, is correctly formed.

\textsuperscript{187} Compare the situation in UK and the Hirsh case. Due to the case, which though relates to human rights, the UK have threaten to leave the UK. Slack, J., Cohen, T., for the Daily Mail, UK’s threat to quit’led Euro court back down on votes for prisoners’: Strasbourg runs scared as it puts issue off until September, 25 September, 2014.

\textsuperscript{188} Kieran, F., pg. 198.

\textsuperscript{189} Odudo, O., pg. 607.
7.3.5. Regulation of non-efficiency goals

I believe policy-linking clauses, promotion of ethics and distribution of wealth, equality etc. are important goals. However the consequences of trying to regulate them on an EU level could be largely negative. Different countries could have different legal and ethical standards relating to non-efficiency objectives depending e.g. on their economic or political views or religion, which would make it too hard to create a coherent system that would be appropriately applied in all member states. Case law from the Court of Justice indicates a similar approach. The case law is consistent in cases relating to already state regulated issues. If a state has its own device to deal with a non-efficiency “problem”, justifications from undertakings by which they explain their behavior as pro-competitive due to its positive effects on the state “problem”, will not be successful.\textsuperscript{190} The reason behind this cautious approach seems to be that the EU institutions consider themselves to be in a position of less knowledge than the member states, when it comes to decide on the best solution for the problem. Non-efficiency goals are further easier to protect on a member state level since states are not bound by articles 101 and 102 TFEU. The scope of restricting competition due to non-efficiency goals is therefore greater for member states than it would be for the EU institutions, which would have to balance non-efficiency goals with articles 101 and 102 TFEU.\textsuperscript{191}

There is a problem is if a member state has not regulated a non-efficiency goal. From an economic efficiency perspective, there are pros of having such areas regulated by governments. It has been argued that regulations save a lot of trouble for all parties involved in the organisation process.\textsuperscript{192} By the use of e.g. standard regulations in their contracts, the parties can save time and thereby costs. There is no doubt that a government can fix some things more cheaply, reducing the transaction costs for the firms concerned. It has further been argued that it is easier for a government to supervise that the regulations are followed, than it would be for the individual parties. This is because a government has the police and other law enforcement agencies which control the parties’ compliance with the law.\textsuperscript{193}

\textsuperscript{190} Kieran, F., pg. 194.
\textsuperscript{191} Kieran, F., pg. 191.
\textsuperscript{192} Coase, R., H., The Problem of Social Cost, pg. 9
\textsuperscript{193} Ibid.
However, it is not always the case that government regulations decrease the costs of an individual firm. The administrative process of complying with these regulations may be costly. Secondly, there is nothing saying that a government always knows the best solution for a problem. There could be a weak investigation underlying a regulation, e.g. due to a political pressure, which overlooks the repercussions on competition on the market. The regulations may therefore not always lead to the most efficient economical result. Lastly, there is a wide risk for uncertainty problems if a government comes up with regulations that are applicable in a wide variety of cases. There is also a risk that the regulations are applied in situations in which they lead to an inappropriate result. These arguments are directly related to the effects on economic efficiency and with a balancing approach to the pros and cons one could argue that, if there are a lot of people involved in the decision making process, and the costs of dealing with the problem for the individual firm is high, it is logical that the problem should be solved by government regulations since it would increase legal certainty and reduce costs. Regulations of non-efficiency goals should thus be carried out by the member states.

7.3.5.1. Regulations on a member state’s level

By a decentralised legislation process, cultural and historical difference between states can be preserved at its best. It would further led to a more democratic process since the legislatures are closer to the inhabitants and this increases the possibility for the inhabitants to overlook the whole legislation process. If non-efficiency goals would be allowed to trump other objectives of EU law it could led to a higher protection of non-efficiency goals than a member state considers ideal. It could create a tendency between the states and the EU similar to the one between the United Kingdom and EU, which has occurred due to the EU’s interference with the question of prisoners’ right to vote. In the Hirst case the European Court of Human Rights held that prisoners should have a right to vote, regardless of the nature of their crime. The answering state, the United Kingdom, have not applied with this decision and have threatened to leave the EU since they believe the decision by the court is not within its competence. The same could

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194 Ibid.
195 Ibid.
196 Hirst (No. 2) v. United Kingdom, European Court of Human Rights, Press Unit, Prisoners’ right to vote, pg. 2
197 Compare the pilot judgment in Greens & M.T. In July 2010, the Court decided to apply a pilot judgment in the cases – nothing had (and have) happened since the Hirst judgment. [Pilot judgment = the Court is clearly identifying in a judgment the existence of a structural problem underlying a violation and
happen if the EU authorities started to integrate non-efficiency concerns too much into EU competition policies. By this, I do not say that I am not supporting the European Court of Human Rights in their decision in *Hirst*. I believe that their decision was right. But there is a difference between human rights law and competition law. Non-efficiency goals are important but they are not fundamental basic rights when they are considered under competition law. Non-efficiency goals such as health and safety could raise an issue under article 8 of the European Convention of Human Rights and in my opinion these goals should and could be better preserved under other areas of EU law than competition law.\(^{198}\) The objectives of EU competition law would be too many and the picture would be to obscure for anyone to grip if we allowed all general objectives of EU law to affect competition policies. Non-efficiency goals should therefore not be considered as objectives of EU competition law. If they were considered it would increase the protection of these goals but it would include a cost which would be paid for by the consumers and others harmed by a restricted competition and increased legal uncertainty.\(^{199}\)

### 7.4. Conclusion

In the analysis I have rejected the use of free competition as the main objective of EU competition law if the means used would be in accordance with the view of the Austrian School. I have also rejected the view of supporting non-efficiency goals as a part of EU competition law. The last question to answer is if consumer welfare or/ and a pluralistic market structure/ free competition should be the main objective or objectives of EU competition law. The latter should than be maintained in accordance with the ordoliberal view, i.e. with regulations restricting the growth of powerful firms.

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\(^{198}\) In Greenpeace v. Germany the Court held that noise or other pollution which seriously affecting an individual’s health could raise an issue under art 8, *Greenpeace E.V. and Others v. Germany (18125/06)*, pg. 4.

\(^{199}\) Kieran, F., s. 198.
7.4.1. The overall problem; lack of clarity

Consumer welfare is maintained through a perfect competition but a perfect competition does in reality almost never exist. Perfect competition is therefore a utopia. To support and believe in a market with perfect competition is nevertheless not an act of stupidity. The options are oligopolistic markets or monopolies, both with possible negative effects on consumers, competitors and the market. The former could easily lead to the creation of cartels and monopolies could grow too big, affecting the whole society negatively.

The ordoliberal approach is used in practice by the use of thresholds for dominance, the special responsibility for dominant undertakings, the prohibition of exploitative abuses and the overall formalistic approach used in evaluating the conduct of firms.\(^{200}\) By the use of ordoliberal tools, individuals may receive more legal certainty than if they were only guided by the rhetoric concept of consumer welfare. On the other hand, the thresholds are not clearly seated. In AKZO, the Court of Justice held that there is a presumption of dominance when an undertaking has more than 50 % of the market shares on the relevant market.\(^{201}\) In United Brands the undertaking concerned had a market share between 40 – 45 % but it was still seen as having a dominant position.\(^{202}\) It has been stated, in the DG Competition Discussion Paper, that an even lower percent of market shares could constitute a dominant position.\(^{203}\) The consequence of the statements is that the use of thresholds is not clarifying the legal situation any more than that a high percent of market shares could indicate dominance. A very high market share is however not per se sufficient to create a dominant position on a relevant market.\(^{204}\)

The special responsibility of dominant undertakings and the prohibition of exploitative abuses does not seem to bring any more clarity to the undertakings concerned by article 102 TFEU. The responsibility has from a wider perspective been interpreted as

\(^{200}\) Ahlborn, C., Grave, C., pg. 206.

\(^{201}\) AKZO Nobel Chemicals and Akcros Chemicals v Commission (C-550/07 P), para. 60.


\(^{203}\) DG Competition discussion paper […], para. 31. Undertakings with a market share of less than 25 % are thus not likely to have a dominant position but it is possible.

\(^{204}\) United Brands, para. 109, 110. Irish Sugar Plc v Commission of the European Communities (C-497/99 P), para. 104, Irish Sugar had a market share of more than 90 % on the market, this was thus not alone the reason for their dominance. It was also because they, every year, got the entire “annually allocated quota” of sugar for Ireland, Albors-Llorens, A., pg. 87.
including a duty on the dominant firm not to increase its market power and thereby harm competitors even if such behavior would increase efficiency.\textsuperscript{205} There seems to be no limits to when an increase of market power is harming competitors, leaving it open to the undertakings themselves to estimate what an inappropriate market share would be. This leads to uncertainty problems and some undertakings may not try to be more efficient because of the fear of being too efficient, violating their responsibility and fined. It would decrease innovations and allow for even less efficient firms to stay on the market.

The use of a list of exploitative abuses in article 102 TFEU could serve the purpose of clarifying the situation if it had contained less subjective words. The use of phrases like “Such an abuse may, in particular […]” and words like “unfair” calls for a balance to be made with other circumstances and this makes it hard for the parties to know the difference between legal and illegal conducts. The formalistic approach undertaken by the courts clarifies the situation a bit by establishing some conducts which presumably restrict competition by object. However, even conducts which are presumed to restrict competition by object may satisfy the criteria in article 101(3) TFEU and be legal. The objective box of unlawful conducts is therefore not an instrument which clearly explains the legal effects of a conduct.\textsuperscript{206} The Block exemptions applied to certain agreements, does as well state some circumstances during which a normally illegal conduct is legal due to its counter-balanced efficiency benefits.\textsuperscript{207}

\textbf{7.4.1.1. Homogenous values in a democracy}

Even if the ordoliberal use of thresholds and formalistic guidelines may cause some certainty which the general principles of consumer welfare do not, what is primarily needed may not be legal certainty. In a democratic society there are a number of different values which we consider to be homogenous. Because of this, it is never possible to foresee what value will ultimately prevail.\textsuperscript{208} The legal certainty contained from e.g. an objective box with conducts presumed to restrict competition by object may not lead to the most desirable outcome. In \textit{United Brands}, the price charged for bananas in Ireland was lower than the price in Germany, Belgium-Luxemburg and

\textsuperscript{205} Ahlborn, C., Grave, C., pg. 208.
\textsuperscript{206} International Antitrust Law and Policy, pg. 501.
\textsuperscript{208} Andriychuk, O., pg. 587.
Denmark and the conduct was therefore illegal per se. Any firm who is engaged in price discrimination risks an attack from the Commission, irrespective of its market share. Such an approach does not count for cultural differences in the member states. It could be argued that if the average income of the inhabitants in a member state is sufficiently lower than the average income of the inhabitants in another member state, the price of a product should also be lower in the member state with the lower incomes. The price could however not be lower than the costs of the producer. The example could be used e.g. if a firm was based in a state in where the disposable income per person was generally lower than in the rest of the EU. The firm would than transport its products more cheaply within the own state than it would to the importing states. The extra costs due to the exports could be added to the price in the importing states. The level of welfare would still be the same in these states since the consumers in these countries would have the same possibility to buy the products, due to a higher disposable income. The case of Matra Hachette, in which the General Court held that even conducts which by their object restrict competition, may satisfy the criteria in article 101(3) indicates that a formalistic approach is not always the most appropriate to use.

7.4.2. Dynamic efficiency

Consumer welfare is thus not only about prices. An important part of the objective is to obtain a wide range of options for the consumers to choose from. This objective is directly connected with the ordoliberal goal of maintaining dynamic efficiencies. If dynamic efficiencies would be the key part of consumer welfare, its tendency with ordoliberalism would be reduced. The ordoliberal view of dynamic efficiency is thus, that such efficiency is best received through a less regulated market than when allocative efficiency is the goal. The consequence of focusing only on a free competitive market, with a political and legal framework but no direct involvement of the authority in the competitive process, could be difficult. To establish overall rules of price regulation and other security measures for a free competition is hard on one relevant market. The fact that the internal market is divided into various relevant markets with different market structures, multiply the difficulties and asks for different

209 FitzPatrick, M., H., pg. 340.
forcing rules.\textsuperscript{211} The ordoliberal way of receiving a free competition through a less regulated market would ask for a formalistic approach and would not allow for any balancing of pros and cons of an actual conduct.\textsuperscript{212} In my opinion, this form based approach does not serve the actual situation in the EU. The ordoliberal view is based on the circumstances in the society as they were in the late 1940s. At that time only the United States had competition law policies and in 2006 the number of countries with competition law regulations had exceed to over eighty.\textsuperscript{213} As mentioned above, the member states of the EU do have their own competition law provisions as well as own provisions regulating non-efficiency goals. The member states have different cultures and traditions and EU law cannot regulate all potential situations which can arise in the states. However, the general supervision done by the Commission and the courts is needed to ensure the basic foundations of the EU and they should therefore have the possibility to interfere with the decisions of a member state. This could only be possible if the regulations, articles 101 and 102 TFEU, allowed for some flexibility. The concept of consumer welfare allows the courts to consider dynamic efficiency but also other important efficiencies if they turn out to be valuable. In my opinion, the potential rhetorical problem and arbitrary use of consumer welfare are of less concern. Even ordoliberal tools such as thresholds and special responsibilities for dominant undertakings could, as I have argued above, be used in an arbitrary way. Consumer welfare should therefore be the main objective of EU competition law.

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