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The Great Competition Debate
a systematic inquiry

Master's thesis European Economic Law
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Introduction

In competition law lectures, students often quip about what they regard as an unduly wide discretion of the European Commission in the field of the European competition system. *Why* does the Commission have the power to accept commitments, excluding the EU Courts from exercising review? Can the Commission *really* create all that soft law, regulating such profound issues as the creating the European Competition Network? And, most importantly: is it not a flagrant violation of *all things* democratic that the Commission, as the executive branch, has made a decision belonging to the legislative branch, by deciding that the ultimate objective of the competition system is consumer welfare?

This thesis attempts to go beyond the initial confusion that law students, including the present author, face when entering the wonderful –but very odd— world of European competition law. While the thesis accepts that, indeed, the Commission pushes for the objective of consumer welfare, it wonders *why* the Commission would take such a step. Leaving normative verdicts about the alleged anti-democratic or power-hungry intentions of the Commission (also present in the literature)[1] at the door, a systematic approach is taken. The systematic approach consists of a variant of Structure, Conduct, Performance (SCP) thinking, and suggests that the Structure of the competition system influences the Position of the institutions, which conditions their Conduct, resulting in a certain degree of Legitimacy. Despite the acronym becoming slightly less attractive than the original ('SPCL'), the framework helps to overcome the confusion by not merely taking a normative position regarding the conduct of the Commission, but by trying to understand how its institutional position (itself a result of the structure of the system) incentivizes it to choose for the objective of the European competition system.

Looking at the structure of the thesis, chapter one will describe the structure of the European competition system. It will be seen that the design is such to promote disagreement, which is indeed so profound that it is called, tongue-in-cheek, the Great Competition Debate. Chapter 2 will look at how the system, as described in the previous chapter, has influenced the institutional position and conduct of the Commission when it chose for the objective of consumer welfare. This chapter will also analyze the result that the Commission's conduct has on the degree of legitimacy of the overall system. Because it will be seen that the overall degree of legitimacy has been negatively impacted by the Commission's conduct – for which it was incentivized by its institutional position,

[1] S Weber Waller, 'Antitrust and Democracy' (2019) 45 Florida State University L Rev; A Reyna, 'Why Competition Law Must Protect Democracy – A European Welfare Perspective (2017) 16th OECD Global Forum on Competition 7 to 8 December 2017; H Buch-Hansen and A Wigger, *The Politics of European Competition Regulation* (2011 Routledge), 109; with some counterarguments why the European system scores better on democratic standards than the American one, H First and S Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81 Fordham Law Review, 33-7.

which itself was a result of the overall system design – chapter 3 will search for alternatives with a higher degree of legitimacy.

A short word on terminology is in place in order to facilitate the reader to understand the various terms. First, while ‘competition law’ is the most commonly used term, it appears to exclude, when taken literally, competition policy and enforcement. Because this thesis is so clearly focused on providing a holistic view of the legal framework, institutions and acts of those institutions, the term ‘the competition system’ is used, meant to encapsulate all aspects. Only at times, when specific mention is made of eg competition enforcement or law, those respective words are used. Second, while the thesis does not take a normative stance on which objective, or objectives are legitimate, using either the singular or the plural would indicate a preference towards one side of the debate. Notwithstanding this thesis’ neutral position to those camps, the plural form is used in order to avoid using the difficult to read ‘objective(s)’.

Chapter 1 – The system: a Great Competition Debate

The competition system does not have an unimportant place in the European Union. It has been named a 'vital part' of EU law,[2] and a 'key element' of the European Union.[3] More dramatically, it has 'long held a kind of rock star status'.[4] In practice it has wide ranging effects, too: it regulates a core aspect of our society—the economic markets. These are a core aspect of our current welfare, expressed by either ethereal concepts such as 'free markets' as well as worldly benefits such as cheap poultry.[5] But does the competition system have other objectives, such as protecting data privacy, a free media or perhaps the environment? Disagreement about this question –what are the legitimate objectives of the competition system?—is rife.[6] Often, commentators take to defending or attacking one specific point of view, arguing for their vision to be accepted.[7] With this, they contribute to the debate, and, depending on the degree to which their arguments are convincing, (dis)agreement. In order to not 'loose sight of the wood for the trees', however, a more systematic understanding of the debate is desirable: in what ways do we disagree, and whether it is reasonable that we disagree, are questions that might lead to answers that offer an insight in the nature of the debate. To the end of understanding in what ways we disagree, an interesting taxonomy on disagreement is put together by Caney, writing on moral disagreement.[8] While it is debatable whether disagreement on objectives for the competition system is the same as the *moral*

[2] E Fox and D Gerard, *Eu Competition Law* (2017 Edward Elgar), 1.

[3] C Heide-Jorgensen and others, 'Introduction' in C Heide-Jorgensen and others (eds), *Aims and Values in Competition Law* (2013 DJØF Publishing), 15.

[4] R Kelemen, *Eurolegalism – The Transformation of Law and Regulation in the European Union* (2011 Harvard University Press), 143; cited by G Monti, 'EU Competition Law from Rome to Lisbon – Social Market Economy' in C Heide-Jorgensen and others (eds), *Aims and Values in Competition Law* (2013 DJØF Publishing), 27.

[5] The Dutch NCA has found that consumers are not willing to pay for increased living standards of chickens and therefore deemed an agreed rise in price by poultry farmers as violating competition law, ACM, 'Afspraken Kip van Morgen beperken concurrentie' (2015) Persbericht <https://www.acm.nl/nl/publicaties/publicatie/13760/Afspraken-Kip-van-Morgen-beperken-concurrentie> accessed 10 July 2019.

[6] For example, a small selection consists in the following commentaries: Arguing for inclusion of broader policy goals into competition rules, C Townley, *Article 81 and Public Policy* (2009 Hart Publishing); Disagreeing with Townley's argument, O Odudu, 'The Wider Concerns of Competition Law' (2010) 30 3 Oxford Journal of Legal Studies 599; Townley back again, disagreeing with the conclusion of the roundtable organized by the UKs Office of Fair Trading that only direct economic effects should be included in competition rules, C Townley, 'Which Goals Count in Article 101 TFEU? Public Policy and its Discontents' (2011) 9 European Competition Law Review 441; In the same vein, arguing for inclusion of the objective of social values such as job creation, A Chirita, 'Competition policy's social paradox: are we losing sight of the wood for the trees?' (2018) 14 2-3 European Competition Journal 367; Arguing that, post-Lisbon, non-competition interests must be included but only under certain circumstances, S Lavrijssen, 'The Protection of Non-Competition Interests; What Role for Competition Authorities after Lisbon? (2010) 5 European Law Review 635; C Townley, 'Is There (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?' in C Heide-Jorgensen (ed), *Aims and Values in Competition Law* (2013 Djøf Publishing); On the disagreement whether the objectives of economic freedom and consumer welfare are in conflict, L Lovdahl Gormesen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82' (2007) 3 European Competition Journal 329, 330; Arguing that the competition regime should include several objectives, I Lianos, 'Polycentric Competition Law' (2018) 71 1 Current Legal Problems 161.

[7] Mockingly, Lianos writes about this 'most discussions on the goals of competition law take a normative perspective, based on some philosophical pre-commitment or prior beliefs on certain values and personal taste, occasionally taking support in the legislative history or the interpretation of the competition law provisions by the courts and competition authorities in past decisional practice', I Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) 3 CLES Working Paper Series, 3.

[8] S Caney, 'Liberal Legitimacy, Reasonable Disagreement and Justice' (1998) 1 3 Critical Review of International Social and Political Philosophy 19, 24-5.

disagreement Caney was writing about,[9] the taxonomy offers surprisingly accurate insight in the problems encountered in the Great Competition Debate today and will therefore be used for its practical benefit.

The taxonomy lists five different ways in which moral disagreement can exist. First, there might be disagreement on *fundamental values*:[10] a clear example is found in the abortion debate, where a pro-choice activist arguing that the (premature) life of the baby is not a *valid* concern in deciding on abortion (only the bodily autonomy of the mother is valid in this person's perception). Second, even when debaters agree about which fundamental values are legitimate, they might differ about *the ranking of those values*.[11] In the abortion debate, that would be the case if the previously mentioned pro-choicer now accepts that the (premature) life of the baby must be taken into account, but, weighing that against the bodily autonomy of the mother, still concludes that the latter is more important, and in that respect disagrees with a pro-lifer. Third, *the degree of generality* might play a role in disagreement.[12] This can be explained by pointing to the difference between the 'concept' and the 'conception': while many people might agree that a sex offender must be punished, they might disagree on what punishment must entail (prison? Taking away voting rights? Sterilization?). The fourth type of disagreement arises due to *different modes of reasoning*.[13] Where one person might believe that the Koran is an acceptable source for making a claim, Caney writes, an atheist is likely to disagree with that mode of reasoning. Finally, the *tradition of thought* is somewhat related to modes of reasoning, but spans wider; Caney refers to someone's world view.[14]

Section 1. Setting the scene of the Great Competition Debate

Before applying Caney's taxonomy to the Great Competition Debate, a brief historical outline will be drawn to understand the context in which the debate takes place. Debate on the objectives of the European Competition system is not new, although the current debate finds it roots in the Modernisation package. Towards the end of the 1990s, the competition system as it stood seemed in need of an update. Part of the criticism was levelled against the formalistic approach to finding a restriction of competition: certain behavior might be restrictive of competition according to the legal rules, even though *de facto* it promotes competition.[15] Another problem was found in the central role of the Commission under the old Regulation 17/1962: a company had to have each and every agreement vetted by the Commission to exclude it from [now] article 101 TFEU. That increased the workload of the Commission, which was expected to further rise due to the upcoming accession round of 2004.[16]

The Commission, faced with this criticism, rolled up its proverbial sleeves and created the aforementioned Modernisation package. Essentially, it responded to the criticism against its

[9] One might argue that objectives are simply factual goals arising from moral norms, and thus are not morals in themselves. However, since objectives, even in that reading, sprout from morals, this thesis will treat them as having a moral character and thus possibly subject to moral disagreement.
[10] Caney (n 8) 24.
[11] Caney (n 8) 25.
[12] Caney (n 8) 25.
[13] Caney (n 8) 25.
[14] Caney (n 8) 25.
[15] W Davies, *The Limits of Neoliberalism* (2014 Sage), 95.
[16] S Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy' (2005) 18 3 Governance 431, 436.

unduly formalistic analysis by focusing on a 'more economic approach'.[17] This approach involves economic, instead of mere legal, analysis to determine whether behavior falls afoul of competition law, which should have the effect of bringing the results more in line with reality. Moreover, the Commission proposed Regulation 1/2003, replacing the old Regulation 17/1962, offering profound procedural changes. In essence, the new Regulation decentralized the enforcement of competition law by allocating the smaller cases to the National Competition Authorities (NCAs) and have undertakings go through a system of self-assessment in order to determine whether certain behavior fell afoul of competition provisions.[18] Stepping away from its central 'throne' it occupied under the old Regulation 17, the Commission motivated this cession of power by pointing to its high work load, arguing this was a necessary step in order to keep the system functioning after the 2004 accession.[19] It wrote that competition enforcement would 'be shared more equitably',[20] and that this was now possible because the NCAs had progressed substantially in effectiveness.[21] From an institutional perspective, it might seem odd that the Commission, by proposing Regulation 1/2003, voluntarily gave up its central role in the competition system. The National Competition Authorities (NCAs), at the time, welcomed their increased powers, as their position had been marginalized under the old Regulation 17.[22] Possibly due to the optics of the Commission 'doing the right thing', Regulation 1/2003 was accepted without any major amendments.[23]

However, the narrative of the Commission ceding its power has subsequently been nuanced by commentators. Stephen Wilks has argued that the Commission has not decentralized by *Europeanized* the national competition regimes by means of Regulation 1/2003.[24] What he means is that Regulation 1/2003 imposes several obligations on national regimes to enforce European competition law (as opposed to only their national competition law). In that way, the Regulation 'welds together 26 non-majoritarian institutions into a form of "supra-nonmajoritarian institution"'.[25] Wilks outlines four ways in which the Regulation achieves this effect.[26] First, article 3 of the Regulation requires EU law to be applied to all agreements that fall within their scope, effectively 'exporting' EU competition law to the national systems. Second, the Commission gained supervisory powers as it has the right to vet all NCA decisions. Third, the Regulation requires NCAs to cooperate in the European Competition Network (ECN) in which the Commission is dominant, and, fourth, the Commission's direct powers of investigation, fining and commitments are strengthened. While the validity of Wilks' normative assessment ('the Commission has pulled off an extraordinary coup')[27] is left to the reader's interpretation, his theory

[17] F Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54 4 JCMS 826, 833.
[18] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (1999) COM/99/101, 5.
[19] Commission (n 18) 3-5.
[20] Commission (n 18).
[21] 'National competition authorities (…) are generally well equipped to deal with Community competition law cases', Commission, 'Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty' [2000] COM/2000/0582 final OJ C365E, C1(a).
[22] F Cengiz, 'Multi-level Governance in Competition Policy' (2010) 35 5 European Law Review 660, 663.
[23] Wilks (n 16) 433.
[24] Idem.
[25] Wilks (n 24) 449.
[26] Wilks (n 24) 439.
[27] Wilks (n 24) 437.

of Regulation 1/2003 *Europeanizing* the national competition systems seems to stand firm. What is also worth noting is that the Commission has not presented it in this light (see the original framing as equitable enforcement and decentralization described above), so at the very least it was unaware of this effect at the time of the proposal, while it is likely that it was understood to some extent that decentralization did not equate to a decrease in the Commission's dominance in the Europe wide (both on European and national level) competition system. Firat Cengiz, in some ways, follows Wilks' ideas by adding that the Commission, by means of the ECN network, has become the 'manager' of the NCAs.[28] She supports this view by pointing to the dominant position of the Commission in the network, which, as was mentioned before, all the NCAs plus the Commission sit in. The dominance of the latter is established through the final say it has on case allocation between NCAs, and the strong guidance it offers on informal policy creation within the network.[29]

Thus, while the response of various institutions to the Commission's Modernisation package will be discussed below to dive into the actual debate, it is important to realize where the debate originated. The Commission has been the driving force behind the Modernisation, responding to the criticism of the 1990s. While it presented its reforms as equitable and having a decentralizing effect, flattering the NCAs, Wilks and Cengiz have shown that the Commission has *de facto* become the manager of the NCAs and Europeanized the national competition systems. Thus, at the very least, the Commission's stated expectation of the reforms have not been entirely in line with the result; or, as Cengiz and Wilks suggest, there was an intention on the part of the Commission to keep a firm grip on the European competition system. Either way, it shows that an institution's stated aims cannot always be accepted at face value (no matter how truthful its intentions), and that institutional dimensions may possibly play a role in proposing legislation or creating policy. These existing insights are interesting and explain to some extent the bewilderment of some students of the competition system: the Commission has 'played smart' and likes and protects its power in the field of the competition system. On the other hand, attractive it may be to label the Commission as an escaped agent,[30] it does not offer much insight beyond describing the moral integrity of that institution. It does completely explain why the Commission, in the face of a developing crisis about the European Union's democratic deficit, would pursue this course of action, knowing it would face criticism for it. Hence, a further search is warranted, which shall focus on describing the incentives created by the European competition system.

Section 2. Taxonomy of disagreement in the Great Competition Debate

Having considered the historical context of the debate, and some of the responses, the next part will, in order to get an understanding of the system, start by analyzing the debate using Caney's taxonomy on disagreement. The aim is to outline a general picture of the debate, which will show that disagreement exists on many different levels, making it resistant to a solution. Those characteristics will be described as showing a degree of *wickedness*, which will be explained in more detail later but essentially points to its resistance to a solution. Since that is the goal of this part, the below taxonomy does not purport to be an exhaustive description of the Great Competition Debate; while the examples mentioned must be able to face scrutiny in and by themselves, there are multiple other examples which are not mentioned for reasons of time and space. However,

[28] Cengiz (n 22) 661.
[29] Cengiz (n 22) 668-9.
[30] Wilks (n 16) 431.

since the goal is to show the wicked nature of the debate, all that is necessary is to show sufficient examples to prove this character. The, undoubtedly, multitude of examples that are not mentioned only serve to substantiate this claim further.

Disagreement on fundamental values, and their hierarchy

The Modernisation did not only bring procedural changes in the enforcement of competition law: the Commission also pushed for acceptance of the ultimate objective of consumer welfare of the competition system.[31] The objective of consumer welfare is predicated on punishing behavior that leads to inefficiencies in the markets, while allowing efficient, or harmless, behavior. Within the neo-classical economic thought of the Modernisation,[32] inefficiencies lead to harm in consumer welfare. Importantly, enforcement is based to a large extent on market-based principles, as opposed to legal principles. The aim of this is to bring the outcome of competition enforcement more in line with business reality. Since its introduction, the objective of consumer welfare has been supported in a range of documents and by subsequent Competition Commissioners, starting with Mario Monti: '*the* goal of competition policy, in all its aspects, is to protect consumer welfare (…) (emphasis mine)'.[33] Hence, the Commission focuses its enforcement on benefitting consumers by 'delivering lower prices, greater output, greater choice, higher quality, and more innovation in products and services'.[34] Important to note, however, is that the Commission must be delicate about its push for consumer welfare: indeed, it has no legislative power to decide so. Rather, it is argued here, it employs two main methods: it influences the narrative, eg by means of statements from Competition Commissioners, and it subtly brings its enforcement practice in line with its publicized statements, eg by means of the Guidance Paper. In the Guidance Paper, despite it officially being mere enforcement priorities for article 102 TFEU, the Commission first summarizes the existing case-law of the Court – seemingly staying within the requirements of legality – only to subsequently state that it will enforce the case-law of the Court only when it considers that consumer welfare is harmed. While that has the effect of shutting the door to the

[31] In 2004 'the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources', Commission, 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 13; in 2005: 'with regard to exclusionary abuses the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources', DG Competition, Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses [2005], para 4; in 2009 'the Commission will focus on those types of conduct that are most harmful to consumers', Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/2, para 5.

[32] H Buch-Hansen and A Wigger, *The Politics of European Competition Regulation* (2011 Routledge), 109; although that is now being 're-examined', M Stucke, 'What is Competition?' in D Zimmer (ed), *The Goals of Competition Law* (2012 Edward Elgar), 27.

[33] While it is acknowledged that the Commission sits in college, weight is given to the statements of the Commissioners for two reasons. First, because they operate as agenda-setters; in 2001, M Monti, 'The Future for Competition Policy in the European Union' [2001] Merchant Taylor's Hall, London SPEECH/01/340; 'Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare (…)', in 2005 N Kroes, 'Delivering Better Markets and Better Choices' [2005] European Consumer and Competition Day, London SPEECH/05/512; in 2011 '[Consumer welfare (…) is the cornerstone the guiding principle of EU competition policy', J Almunia, 'Competition – what's in it for consumers?' [2011] Poznan SPEECH/1/2003803; second, because their statements are cited in the literature, L Parret, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives' in D Zimmer (ed), *The Goals of EU Competition Law* (2012 Edward Elgar), 76-7.

[34] A Jones & B Sufrin, *EU Competition Law* (6th edn, 2016 OUP), 39.

objective of market structure,[35] it is not by means of a 'normal' legislative instrument, a dichotomy which has been criticized.[36] Thus, while it is argued here that the Commission does push for consumer welfare as the ultimate objective of the competition system, its means for doing so are legally limited and thus the methods it employs are slightly more subtle and nuanced.

Unfortunately for the Commission, however, the European Courts have 'not (…) wholeheartedly' embraced the consumer welfare standard.[37] Indeed, the Modernisation, with its focus on consumer welfare as the ultimate objective of competition law, deviated from case-law of the Court going back to the 1972 *Continental Can* case, where the (as it was then) ECJ mentioned both consumers as well as an effective competitive market structure as objectives worthy of protection.[38] It appears that the (as they are now) European Courts (the General Court and the Court of Justice) disagree in their approach to the Modernisation. While the General Court seemed to go along in 2006 with the Commission's Modernisation,[39] the Court of Justice disagreed by emphasizing 'Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such'.[40] However, that does not mean that the EU Courts have subsequently shown a clear and consistent commitment to these objectives. For example, they have been not been altogether clear regarding a possible ranking between consumer welfare and market structure; in eg *T-Mobile*, the wording of the CJ seems to indicate that both objectives stand independently,[41] while the jurisprudential line of *Europemballage* would suggest that the protection of an effective market structure is dependent on whether or not consumers are harmed indirectly.[42] Furthermore, Jones and Sufrin have shown that it would be possible to interpret the case-law of the Courts as holding even more objectives, including, for example, the well-being of the European Union.[43] They note that 'looking at the jurisprudence of the EU Courts in the last ten years (…) we see a confused picture with no straightforward trajectory'.[44] For the purpose of the taxonomy of

[35] Other soft law instruments pushing for consumer welfare are, Commission, 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 8; Commission, 'Guidelines on Vertical Restraints' [2000] OJ C291/1, para 7; Commission, 'Guidelines on the assessment of horizontal mergers' [2004] OJ C31/5, para 8.

[36] G Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 1 J of Eur Competition Law and Practice, 2.

[37] Jones & Sufrin (n 34) 40.

[38] '[Article 86] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in article 3(f) of the treaty', Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (*Continental Can)* ECLI:EU:C:1973:22, para 26; this has been confirmed in, Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB (TeliaSonera)* ECLI:EU:C:2011:83, para 24; Case C-209/10, *Post Danmark A/S v Konkurrencerådet (Post Danmark I)* ECLI:EU:C:2012:172, para 20.

[39] Case T-213 and 214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities (Postsparkasse GC)* ECLI:EU:T:2006:151, para 115; Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities (Glaxo Smith Kline GC)* ECLI:EU:T:2006:265, para 118.

[40] Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (T-Mobile)* ECLI:EU:C:2009:343, para 38.

[41] 'Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such' *T-Mobile* (n 40).

[42] (n 38).

[43] Jones & Sufrin (n 34) 42.

[44] Idem; supported by Faull & Nikpay who write about the disobedience of the General Court, which continues to lean toward an effect-based (ie consumer welfare) approach even in the aftermath of *T-Mobile*, J Faull & A Nikpay, *The*

disagreement, however, the most certain perspective is taken: the EU Courts regard both consumer welfare and market structure as independent objectives, without establishing a hierarchy.

The European Parliament, meanwhile, is standing on the sidelines of the Great Competition Debate. This is mainly due to its consultative position in the legislative procedure applicable to creating competition law.[45] Hence, the Council only needs to obtain Parliament's opinion, before it can issue legislation such as Regulation 1/2003, which kickstarted the Modernisation. Despite the legal framework not giving a lot of weight to the opinion of Parliament, the institution has a relatively clear opinion regarding the objectives of the European competition system, as Cengiz has demonstrated with her empirical research. Not just consumer welfare, but multiple other objectives should be pursued by the competition system, including economic growth, the internal market and industrial policy.[46] Moreover, most objectives are carried by a clear, cross-party majority that exists since 1999.[47] Or, as Cengiz notes, there is 'a lack of outright partisanship' in Parliament concerning competition objectives.[48] It is noted, however, that Cengiz' empirical research is based on parliamentary debates, and not final positions, which assumedly reduces the seriousness of the statements of the Europarliamentarians (MEPs) somewhat; simply talking about what should happen is notably different from deciding what will happen. Nevertheless, it is clear that Parliament disagrees with both the Commission and the EU Courts on the objectives of the competition system, something that is made clear by MEPs who repeatedly voice their displeasure with the Commission's course of action in the competition regime.[49]

Recalling Caney's taxonomy of disagreement, two observations can be made (O1 and O2). First, it can be argued that there is disagreement on what the fundamental values (taken here as: fundamental objectives) are, while the second observation might be that there is some degree to which there is agreement on the objectives, there is none regarding their ranking. Those two views will be discussed in turn.

When taking the position that disagreement on the fundamental objectives exist, one could point to Parliament's preference for a multitude of objectives; the EU Courts' preference, after resolving their intra-court quibble, for both consumer welfare and market structure; and the Commission's push for consumer welfare as the sole objective of the competition system. Based on the findings of this thesis, that position seems defendable concerning Parliament; it is clear that it regards more than two objectives as legitimate. However, there is an important nuance for O1 in the supposed disagreement on the fundamental objectives between the Commission and the Courts. It was seen that a Competition Commissioner said that '*the* goal of competition policy, in all its aspects, is to protect consumer welfare'. This could be interpreted as consumer welfare being the *only* goal. Another interpretation, however, is that *the most important goal* of the competition system is consumer welfare, and that other legitimate goals exist but only in a supportive role. Moreover,

EU Law of Competition (3rd edn, 2014 OUP), 3.172; however, since then, the GC appears to slightly adjust this by holding '[art 102 TFEU aims] not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on effective competitive structure', Case T-286/09, *Intel Corporation v Commissie (Intel)* ECLI:EU:T:2014:547, para 105.

[45] Interestingly, competition law is the only exclusive competence of the Union where Parliament 'enjoys' a consultative role, Article 103(1) TFEU.

[46] Cengiz (n 17) 836.

[47] Cengiz (n 17) 837.

[48] Cengiz (n 17) 838.

[49] Perhaps strangely, Parliament's general consensus on competition is broken by the Socialists and Democrats on the issue of transparency, to which they barely refer, Cengiz (n 17) 837-8.

this is a statement by one Commissioner, not the Commission as a body, and corresponding importance has to be given to it. Altogether, while some of the rhetoric might be interpreted as forming a narrative that consumer welfare is the only objective according to the Commission, closer inspection reveals otherwise: also market structure is part of the Commission's objectives, albeit in a lower hierarchical position. That reading is confirmed by, for example, the Guidance Paper, as that document allows for enforcement of behavior that damages the market structure, as long as that damage leads to harm to consumer welfare. O1, therefore, seems only partially correct: both the Commission and the Court are found to accept that consumer welfare and market structure are legitimate objectives, while the Parliament is the institution that disagrees based on its discussions: it wants to include other objectives, as well.

That brings the discussion to O2. Is there disagreement on the ranking of the objectives? That, indeed, seems to be the core of the disagreement between the EU Courts and the Commission. While the Courts emphasize an independent existence of both the objective of consumer welfare and market structure, not stating clearly whether one independent objective trumps the other, the Commission is unmistakably clear: consumer welfare is the top dog. Based on the findings of this thesis, it is not clear whether Parliament regards its several objectives to be in a hierarchical order. While that point might be taken as an argument to not take Parliament's position too seriously, as 'simply' listing a handful of possibly conflicting objectives without a clear hierarchy might detract from how well defined the position is, it is here recalled that it is often the task of adjudicatory institutions, such as the Court, to solve conflicts between different values or objectives.

Another preliminary observation can be added (O3): the disagreement in the literature seems to be mostly focused on what the legitimate objective(s) is, or are, and to a lesser extent on what the hierarchy between those objectives is.[50] To scrutinize this, further research in the form of a more complete literature research is necessary, something outside of the scope of this thesis. It would, nevertheless, be interesting, because it would show an important lacuna in the arguments of commentators arguing for multiple objectives: how are conflicts between those objectives solved, if they arise? Based on the fact that there is a multitude of suggestions around, which increases the likelihood that, ultimately, it will not be a sole objective, it would help the debate forward if there is a structured way to discuss what the hierarchy between conflicting objectives will be.

In sum, O1 partially withstands scrutiny, while O2 offers interesting insight in the nature of disagreement. O3 is a suggestion for further research. That means that between the two most important institutions, the Commission and the EU Courts (if they can be regarded as one), it can be argued that agreement exists about which objectives deserve protection—it is the hierarchy between the two objectives that causes the disagreement.

Disagreement on degree of generality

The word 'nitty-gritty' is often used in competition law and enforcement to signal an argument going from 'concept' to 'conception'. That is, the concept may be that the competition system protects consumer welfare, but does the conception of consumer welfare consist in a low price, a wide choice or data privacy? The concept of a low price might seem clear, but does the conception of a low price point result in a comparison between the actual price and actual cost, between the price of the product and the price of a competing product, or is the excessiveness of the price

[50] See (n 6) for a small selection of the debate. Although some examples exist of commentators explicitly recognizing a hierarchy (Lianos (n 6)), the majority implicitly seems to deny this.

simply determined by what is to be expected in that market? Many times, it seems that the extent of the nitty-grittiness, in other words the different conceptions, is considerable.

Turning towards a present and ongoing conflict between concept and conception, the definition of consumer welfare seems to be subject to disagreement. Originally, the Court used the notion of *consumer well-being*, as it was, and still is, found in the Treaty.[51] The Commission subsequently introduced *consumer welfare*,[52] the difference being that the former term embodies a wider notion (Ezrachi calls it 'more normative'), while the latter denotes a more economic idea.[53] That economic idea is by some seen as the consumer surplus,[54] resulting in a seemingly clearly defined concept that stands apart from its normative uncle. However, while consumer surplus seems to be favored by competition authorities, it does not 'embody universally agreed properties', as explained below.[55]

It is worth briefly looking at the historical context of the concept of consumer welfare. For that, we have to turn to the American competition system up until the 1960s, which mainly protected small competitors.[56] Robert Bork was critical of this, writing 'the life of the antitrust law (…) is (…) neither logic nor experience but bad economics and worse jurisprudence'.[57] He proposed that consumer welfare was the sole objective of the U.S. competition system, a suggestion that was successful according to Barak Orbach 'because it combined popular appeal with a patina of economic erudition'.[58] While Bork's work was fiercely debated amongst commentators, his approach was adopted by the Supreme Court, establishing the consumer welfare standard as the law up until today.[59] Orbach, however, is critical of Bork's legal arguments that purport to show that consumer welfare should be adopted—he accuses Bork of 'mislabeling' the notion, as both Bork's legislative historical arguments and economic analysis are, to Orbach's mind, flawed.[60] Nevertheless, Bork's consumer welfare standard has been influential in the U.S. system. The European Union 'Americanized' its system gradually towards consumer welfare,[61] starting in the 1990s with the EU Merger Regulation and culminating in the Modernisation, which has been discussed.[62] However, despite consumer welfare being a concept of predominant importance, neither American nor the European commentators have agreed on its conception—or, put simply, what it means. Debate is rife whether 'total welfare' or 'consumer welfare' must be taken as standard, or simply 'economic efficiency', with proponents of that latter term falling apart on the

[51] Currently, Consolidated Version of the Treaty on the European Union (TEU) [2012] OJ C326/13, art 3(1).
[52] A Weitbrecht, 'From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law' (2008) ECLR 81, 85.
[53] A Ezrachi, 'The Goals Of EU Competition Law And The Digital Economy' (2018) Discussion Paper Commissioned by The European Consumer Organization, 5.
[54] J Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) NYU L Rev 1020.
[55] Ezrachi (n 53) 6.
[56] B Orbach, 'The Antitrust Consumer Welfare Paradox' (2011) 10 073 Arizona Legal Studies Discussion Paper, 3.
[57] R Bork, 'The Goals of Antitrust Policy' (1967) 57 American Economic Review, 242.
[58] Orbach (n 56) 135.
[59] Recently, proposals have been put forward to change this, L Kahn, 'Amazon's Antitrust Paradox' (2016) 126 Yale L J; Weber Waller (n 1).
[60] Orbach (n 56) 142.
[61] Parret (n 33) 77; the 2005 Economic Advisory Group for Competition Policy (EAGCP) report spoke positively about the American Rule of Reason, EAGCP, 'An Economic Approach to Article 82' (2005) Report commissioned by the European Commission, 3.
[62] Lianos (n 62) 4.

point of whether to use the Kaldor-Hicks or the Pareto efficiency.[63] Thus, while the standard of consumer welfare has been actively used and discussed in two major competition systems in the world, disagreement on its conception has been widespread.

Hence, while consumer welfare plays a prominent role in the EU competition system, there is no widespread consensus on its definition. That complicates the Great Competition Debate, as it adds another layer of disagreement. Even when one would argue that consumer welfare should be the sole focus, but, after having reached consensus there, having to turn around and hammer out the conception of the concept.

Method of reasoning

In a debate, it is important to agree which types of arguments are valid if a consensus is desirable. In the competition system, two distinct methods of reasoning are predominant: legal and economic. Whereas the lawyer would argue that certain conduct should be forbidden because a rule of law says so, if interpreted in a teleological, structural, textual, etcetera, the economist would argue that that conduct must be allowed because economic theory XYZ proves that it leads to an increase in consumer surplus. While, naturally, the legal rule may be designed or interpreted to increase the consumer surplus according to legal theory XYZ, that is not always the case in practice.

Up until the reforms of the 1990s, legal reasoning was paramount in the competition system.[64] That changed gradually, when it became clear that this, at times, produced undesirable results in the sense that it restricted competition instead of promoting it. The Commission clearly indicated it wanted to change this with its phrase of a 'more economic approach'. To this end, it was stimulated by the General Court, which annulled three merger decisions in a single year on the basis of economic reasoning; shortly after, a Chief Competition Economist was hired at the Commission,[65] whose key task is to 'provide guidance on methodological issues of economics and econometrics in the application of EU competition rules'.[66] The methodology of economics seems to be by and large welcomed in the competition community to the extent that it ensures a more realistic outcome of enforcement analysis.[67] For example, in some major textbooks, one of the first chapters is devoted to explaining the economics of competition.[68] However, people seem to disagree whether economic reasoning should be the only method (or the predominant one) when it comes to enforcement,[69] because the method, by its very nature, does not allow for the inclusion of non-economical objectives. Thus, in the eyes of someone that thinks that consumer welfare should be the only objective for the competition system, the methodology of economical reasoning is welcome;[70] for someone that thinks that consumer welfare in and of itself is a legitimate objective, but for whom other objectives are important as well, economic reasoning should be

[63] Lianos (n 62) 5.
[64] R Whish & D Bailey, *Competition Law* (9th edn, 2018 OUP), 3.
[65] Cengiz links the hiring of the Chief Competition Economist in part to the GCs annulment of the decision, Cengiz (n 17) 838.
[66] A Witt, *The More Economic Approach to EU Antitrust Law* (2016 Bloomsbury Publishing), 48.
[67] Eg even Lianos, with a clear preference for including more objectives besides consumer welfare, recognizes that the economical methodology is desirable in itself, albeit not to the extent where the methodology has the effect of excluding other objectives, Lianos (n 6) 17-8.
[68] Jones & Sufrin (n 34) ch 1.3; Faull & Nikpay (n 44) ch 1; and to an extent, Whish & Bailey ch 1.
[69] Lianos (n 6) 16.
[70] Faull & Nikpay (n 44) 4.102.

desirable as far as the objective of consumer welfare goes, while other methods of reasoning are desirable.[71]

Those other methods of reasoning might be described as political and ideological. Political arguments are often made with regard to the inclusion of other policy objectives, such as the protection of the environment or national security. An ideological method of reasoning is found in proposals for the competition system to serve an ideological goal such as democracy.[72]

In sum, while some level of agreement exist regarding the desirability of the increased economical method of reasoning,[73] disagreement enters the picture along the lines of the debate on fundamental objectives.

School of thought

Fifth and final, Caney describes how disagreement can exist on the level of diverging schools of thought. Some examples of schools of thought in the European competition system are Ordoliberalism and the (new) Chicago School. Whereas the pre-Modernisation system was predicated to a degree on the German Ordoliberalism, which understands the process of competition as consisting in the relationship between the government and individuals,[74] the Chicago school regards competition as a means to generate total welfare, and focuses on consumer welfare.[75] It therefore seems that it is these schools of thought that have the biggest influence on setting the goals of the competition system, as the objectives follow logically from these schools. For example, the Ordoliberal school, with its economic constitution, considers it important to protect competition as a system, while the Chicago school, with its neoclassical ideas, cannot see any rationale beyond prohibiting practice that affects consumer welfare.

Conclusion: a wicked *problem*

Hence, the Great Competition Debate is a complex phenomenon, with disagreement present on all five levels of Caney's taxonomy. Indeed, the debate can be described as a *wicked* problem: wicked, not as in evil, but as in resistant to a solution.[76] The term 'Wicked Problem' was coined by Horst Rittel in the 1970s to describe the disappointment city planners felt when the rise of Rationalism of the 1960s had not been able to solve certain problems. Whereas the Rationalists attempted to fit every problem in a pre-conceived system to find a solution, Rittel showed that certain problems exhibit certain properties that make them resistant to a linear, systematic solution. In that regard, the term seems to be suitable for the day and age the competition system finds itself in: a heavy focus on economic reasoning has, apparently, not convinced all, and there seems to be no end to

[71] Lianos (n 6) 16.
[72] Weber Waller (n 1); A Reyna (n 1).
[73] Although not everyone agrees, eg Lianos arguing that under the current neoclassical methodology an 'individual loses his emotional and social (professional) identity and is transformed into an automaton operating according to the sole', Lianos (n 6) 11.
[74] A Al-Ameen, 'Antitrust Pluralism and Justice' in D Zimmer (ed), *The Goals of Competition Law* (2012 Edward Elgar), 262.
[75] O Andriychuk, 'Thinking Inside the Box: Why Competition as a Process is a Sui Generis Right – a Methodological Observation' in D Zimmer (ed), *The Goals of Competition Law* (2012 Edward Elgar), 107.
[76] Rittel and Webber characterized wicked problems as: 1) undefinable until the solution is found; 2) never-ending; 3) resulting in 'good' or 'bad' solutions, not 'true' or 'false'; every solution can only be implemented once under the same conditions, as the implementation alters the structure of the problem. These are the most important of the ten characteristics, H Rittel and M Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 2 Policy Sciences 155, 161-7.

the debate in sight. In that same light, we might glean some insight from the approaches originally described to tackle wicked problems. So far, this section has practiced one approach (approach number 1), as it investigated the kind of wickedness at work: [77] it is multi-leveled wickedness. This has shown that, if one would want to 'win the debate', promoting a certain school of thought seems to be most successful. The other two prescribed methods to approaching wicked problems are 2) understanding the design of the system and 3) admitting that there is no one-off solution but a need for an ongoing process working through the wickedness.[78] There are three general strategies for solving wicked problems.[79] First, the problem may be solved in an authoritative way, which 'tames' the problem by simply declaring certain objectives or values as 'good'. Second, there are competitive strategies, where different stakeholders are pitted against each other in order to find the best solution. Third, stakeholders may work together in collaboration strategies.

With that in mind, the following part will use the second method to approaching a wicked problem: understanding the design of the system.

Section 3. Reasons for existence of disagreement

Whereas it was seen that the Great Competition Debate is held on five different levels, providing an understanding of what the debate looks like, that does not explain *why* the debate exists in the first place. Not every field of law is characterized by a dissensus this profound, hence there must be a reason for it being so prominent in the competition system. In order to find that reason, or reasons, the legal system regulating competition law, policy and enforcement will be mapped out. This will produce two main conclusions: 1) the silence of the constitutional provisions on the competition system contributes to the debate as there is no expressly worded authoritative source to rely on, and; 2) although, with political will, the legislator has an opportunity to step into the void of the first conclusion, it has not done so.

Vague constitutional provisions

The constitutional set up of the Union, consisting of the Treaties, is silent on clear objectives. Admittedly, there are some hints. Examples include fairness,[80] consumer well-being,[81] competitiveness[82] and a social market.[83] However, these hints are so disparate, that they have the ability to support a range of objectives, while not offering a clear hierarchy. Thus, the Treaties do not provide clear objectives for the competition regime, while facilitating disagreement due to the variety of 'hints'. To place this in context, competition seems to be the only exclusive competence

[77] R Knapp, 'Wholesome Design For Wicked Problems' (2010) 82 Public Sphere Project <http://publicsphereproject.org/content/wholesome-design-wicked-problems> accessed 8 June 2019.
[78] R Knapp (n 77).
[79] The author identifies six, of which, due to reasons of space, the three most promising are used here, N Roberts, 'Wicked Problem Territory and the Design Strategy' (2018) International Public Policy Workshop on Wicked Problems and Agenda Setting, 21-5.
[80] Eg Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, art 101(3).
[81] TFEU (n 80) art 101(3); the GC has held that the requirement of (then) article 81(3) to give consumers a fair share of benefits results in the objective of the 'well-being of consumers', *Postsparkasse GC* (n 39) para 115; the term well-being was subsequently turned into 'welfare' by the Commission to use a more economic benchmark, Ezrachi (n 53) 5; while, at the face of it, it seems rather weak to find the 'ultimate purpose', as the GC wrote, in one out of four complementary elements required to justify an infringement, consumer welfare is mentioned here because the GC mentions it.
[82] Eg TEU (n 51) art 3(3).
[83] Idem.

of the Union that lacks clearly stated goals. The customs union, for example, has as objective the establishment of the internal market, and allows for legislation to 'strengthen customs cooperation between Member States and between the latter and the Commission'.[84] The primary aim of monetary policy is to maintain price stability, while secondary objectives are to support general economic policies and article 3 TEU objectives.[85] The objectives of the common agricultural policy are: a) increase productivity, b) ensure a fair standard of living; c) stabilise markets, etc.[86] Furthermore, the objectives of the common commercial policy are the harmonious development of world trade, the progressive abolition of restrictions on international trade, etc.[87] . Is it not strange, that in a system that is subject to the principle of conferral of powers, which entails that the actor on whom power is conferred may only act within the objectives of the conferred competences, the field of competition law is conferred exclusively on the Union, without a clear delineation by means of objectives? Since that is the case, it is necessary to look further and see how well this system facilitates the formulation of these objectives.

Not specified in secondary legislation

As described above, when the Treaties are silent on objectives, they might have provided for legislative procedures in order to establish these objectives. Such a choice might be made due to a variety of reasons. Due to the constitutional and fundamental nature of a Treaty change, it might be more expedient to create a legislative procedure that provides for objectives for a field that changes constantly. Alternatively, perhaps it was not possible to decide on objectives during the Treaty negotiations, which prompted the drafters to leave it up to the legislator to hammer out. Since it is clear that the Treaties themselves do not pronounce on objectives, the legislative options will be considered. The competition provisions in the Treaty provide for a legislative basis by means of Article 103 TFEU. However, as is inherent to an EU legal basis, it stipulates the purpose(s) for which it can be used. Article 103 TFEUs purposes are drafted rather narrow:

> 1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
>
> 2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
>
> (a) to *ensure compliance* with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;
> (b) to lay down *detailed rules for the application of Article 101(3)*, taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
> (c) to define, if need be, in the *various branches of the economy*, the scope of the provisions of Articles 101 and 102;
> (d) to define the respective *functions of the Commission and of the Court of Justice* of the European Union in applying the provisions laid down in this paragraph;
> (e) to determine *the relationship between national laws and the provisions* contained in this Section or adopted pursuant to this Article.

[84] Eg TFEU (n 80) art 33.
[85] Eg TFEU (n 80) art 127.
[86] Eg TFEU (n 80) art 39.
[87] Eg TFEU (n 80) art 206.

With in mind that this legal basis should offer the possibility to define objectives for the competition regime, the five purposes of art 103 TFEU within which legislation must remain are rather narrow. Accepting that objectives have an overarching nature that guide actions on a more detailed level, the purposes under a) and b) are not suitable on first reading. They both point to provisions in article 101 TFEU only, complicating the possibility to enact objectives for the entire competition regime. Furthermore, a) is concerned with ensuring compliance, while b) is concerned with detailed rules; both these formulations point to purposes that operate on a lower, more detailed level than actual objectives. Paragraphs d) and e) are equally unsuitable for the creation of objectives. The former is concerned with the institutional functions of the Commission and the Court, not with anything substantive. The latter regards the relationship between national and European law. The most promising purpose is arguably found in paragraphs c), which forms a legal basis in order to regulate the scope of articles 101 and 102 TFEU. The scope of an article generally includes elements such as the subjective, material and temporal scope. It delineates the applicability of the article *vis-á-vis* other articles. In principle, that does not include setting an objective. Perhaps, with a combination of systematic and teleological reasoning, it could be argued that determining a scope is possible only when the objective of the provision is known, thus interpreting the article 103(2)(c) as a legal basis to set an objective. That argument seems not very convincing, however, and it would not solve the problem of how merger control could be unified under this objective. It can therefore be concluded that article 103 TFEU, despite being the only legal basis in Chapter 1 of title VII of the Treaty, does not facilitate the formulation of objectives in European competition law.

Despite the limitations of article 103 TFEU, the Council has, however, been creative in its use of its legislative powers in the field of competition law. For example, it has adopted the EU Merger Regulation on the basis of both articles 103 and 352 TFEU,[88] while, together with Parliament, it has used the combination of articles 114 and 103 to enact the EU Damages Directive.[89] Could it enact legislation on the objectives of competition law using a combination of articles 103 and 352 TFEU? The first problem with this is the formulation of article 352(1) TFEU, which specifically limits the availability of the residual legislative basis to 'attain one of the objectives set out in the Treaties'. While this can certainly be seen as a problem, as using article 352 TFEU to formulate objectives for the competition regime while staying within the objectives of the Treaties seems a circular reasoning, it might be solved with some semantics. As was seen above, the Treaties do provide for, what were called, 'hints' concerning the objectives of the competition regime. If those 'hints' are taken as the objectives article 352 TFEU refers to, that article might be used to formulate not objectives but eg 'goals' for the competition regime. Those goals might then consist of consumer welfare, market structure, or any other objective. After all, the Council felt confident enough to create a wholly new element to the competition regime, consisting in the Merger Regulation, on the basis of articles 103 and 352 TFEU—why not clarify the goals of the existing

[88] 'Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty', Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L024/1, Preamble 7.

[89] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, Preamble.

regime? Notwithstanding arguments in support and against this position, the main factor determining the feasibility of this plan is the political will of the Council, which is not the object of this thesis and of which the likelihood is left to the reader's judgment. That, of course, is equally valid for a Treaty change that could enlighten the regime with clear objectives.

Summary

Thus, the Great Competition Debate is fought out over several different levels. While, between the Commission and the EU Courts, there might be a consensus regarding which objectives are legitimate, disagreement exists whether consumer welfare stands higher in the hierarchy than market structure. Even when, for example, consumer welfare is accepted as objective, debate exists on its conception: total welfare or consumer surplus? This confusion is compounded by different modes of reasoning, where legal, economical, political and ideological arguments are not regarded as equally important by different commentators. While there is disagreement regarding the schools of thought as well, these schools seem important in terms of which camp an actor finds him or herself in regarding the four other types of disagreement. Due to the disagreement on all these levels, the Great Competition Debate is difficult to solve and therefore labelled as *wicked*.

Further, it was seen that there are logical reasons for the existence of the Great Competition Debate. First, the constitutional provisions give several 'hints' regarding objectives, but offer no hierarchy. That confusion is not remedied by secondary legislation, which might be explained by the seemingly narrow legal basis available to the legislator; however, it was suggested that, similar to the EU Merger Regulation, the Council could use article 103 and 352 TFEU to express itself on objectives. This notwithstanding the high threshold by means of the unanimity requirement imposed by the legislative procedure of article 352 TFEU. The desirability of such a course of action will be further investigated in chapter 3.

The, possibly unintended, strategy of the Union to solve the wicked problem of the Great Competition Debate seems focused on a competitive strategy: as the Treaties are silent on the objectives, authority is not used, and the different stakeholders are pitted against each other to argue for their version of the right objectives. The arguable advantage of this strategy has been that innovative and new approaches are used. For example, the Commission's push to include the latest economic insights into its analysis can be seen as innovative, while the use of soft law such as the Guidance Paper to introduce the objective of a whole regime might be seen as procedural creativity. However, to gain a more profound understanding of how the system has conditioned the Commission to choose for the objective of consumer welfare, chapter 2 will consider this, including some of its downsides.

Chapter 2 – Institutional Position, Conduct and Legitimacy

The previous chapter has shown the degree to which the Great Competition Debate is wicked; disagreement about its objectives exists on five different levels. It was also seen that, looking at the constitutional design, the inconclusive nature of the constitutive provisions regarding the objectives, coupled with the lack of secondary legislation filling this void, contribute to the wickedness. That is so because these two avenues for solving the Great Competition Debate, consisting in either a Treaty amendment or using the residual legal basis, require a strong political decidedness. In the midst of all this wickedness, what is one to think of the Commission's push for the ultimate objective of consumer welfare, through the perspective of its institutional position? This chapter will investigate how the system design influences the institutional position of the Commission, which then conditions its conduct. Finally, the impact of that conduct on legitimacy will be seen.

This will be done using a paradigm inspired by Structure, Conduct, Performance thinking (SCP thinking). Originally, this Harvard School method was used to understand how markets work and on which levels enforcement or regulation was desired. Essentially, the idea is that the structure of a market (how difficult is it to enter a market? How many competitors are active? Is the market share evenly divided? Etcetera) influences the conduct of undertakings (a monopolist will still innovate when barriers to entry are low, whereas that innovation might stop when it is difficult to enter a market), which results in performance (the degree of innovation, level of the price, etcetera). The theory offers an interesting perspective to understand how the system design of the European competition system influences the Commission. In a slightly adjusted fashion, it will be argued that the System design influences the Position of the institution, which then influences the Conduct of the institution, resulting in a certain level of Legitimacy (resulting in the slightly butchered acronym 'SPCL'). Thus, it was seen in the previous chapter that the Great Competition Debate results in a *wicked* system design, where disagreement about the objectives is not easily solvable. Below the institutional Position of the Commission, arising out of this design, will be seen, together with its Conduct and the resulting Legitimacy.

It is not claimed that this perspective determines everything the Commission does within the competition system; a certain desire on the part of the Commission to strengthen its institutional position, as explained by eg Wilks (recall his 'extraordinary coup' perspective) and Cengiz is also recognized. Rather, this SPCL perspective attempts to look beyond the argument that the Commission is solely interested in self-promotion. The intuition is that a finding that the Commission is of bad faith offers less of a solution than understanding what is the core of the 'problem'. Shortly coming back to the various perspectives of Wilks and Cengiz, who essentially argue that the conduct of the Commission decreases various types of legitimacy: they only assess the conduct and performance. Although that is perfectly valid in and of itself, including the structure and position of the institution at hand might offer insight why the Commission conducts itself in a certain way and, following from that, why a certain level of legitimacy is produced.

Section 1. The Commission's institutional position: adjudicative and political

The first position the Commission finds itself in is an adjudicatory position. It adjudicates when it issues fines, accepts commitments of undertakings or decides whether or not to act on a complaint. That means that its tasks are often practical, albeit with consequence: accepting commitments of undertaking XYZ will lead to lower consumer prices, for example. Hence, the adjudicatory

position places the Commission's feet firmly in the mud.[90] That adjudicatory work is made more difficult when unclear standards and rules exist, let alone dissensus about the objectives to be pursued. To recycle the example about commitments on the level of retail prices: it is very difficult indeed to decide whether lower consumer prices are 'right' when it is unclear whether the objective is consumer welfare. As follows, it is natural for an institution in an adjudicative position to push for clarity on the objective to be pursued. That position, frustrated by the lack of decisiveness on the objectives of the other institutions,[91] might have incentivized the Commission to step into this void and decide for itself. This step, deciding on the objective of the competition system, had a side-effect, however: it placed the Commission in a political position.

The political position of the Commission in the European competition system is not to be disregarded. Arguably, some of the most important political choices in the competition system over the past two decades have been made by it. It set in motion the Modernisation, adopting the neoclassical school of thought, and, as a result, chose to protect consumers over competitors. The Commission's influence in the network of European competition enforcers (the European Competition Network) is described as important in terms of unofficial policy making.[92] That *de facto* political position in the competition system, however, sits uncomfortably with its *legal* institutional position: it is the Guardian of the Treaties, that does its work in a technocratic fashion. It is expected to not represent the interests of the Member State, but rather the European interests, making every balancing of interests like tiptoeing on a tightrope, as each political choice is bound to upset some Member States. Nevertheless, the Commission is, incentivized by its adjudicative position, pushed into a political one. Its apolitical nature, however, shines some light not on *why* it chose to act politically (that is done by the adjudicative position), but rather *what* incentivized it to choose for specifically the objective of consumer welfare.

The Commission strongly links consumer welfare to its 'more economic approach', and legitimizes its choice by pointing to economic theories. Such an argument may seem to lead to an unavoidable conclusion— hard, factual numbers prove that it is consumers that must be protected. In other words, the choice for consumers must be viewed in the light of the wider framework of the Modernisation: recall that it started in the 1990s in response to criticism of the system's overly formalistic (read: legalistic) approach to finding a restriction of competition, and that it therefore seemed perfectly sensible to include more economics in the analysis, which results in what seems as a technocratic conclusion: economic theories dictate that the consumer must be protected, therefore that will be the ultimate objective to the competition system. Thus, while good reasons are to be found to include an economic element in a competition enforcement analysis, the very fact that that *technocratic method* gained in popularity seems to have partially legitimized the choice for the *political objective*. Possibly, the political objective *was in fact* viewed as a technocratic choice.[93] Hence, the strong support for implementing a new method of reasoning

[90] Translated from the Dutch proverb *met de poten in de klei*, similar to 'hands on' or 'down to earth'.
[91] Although an easy counter argument would be that the EU Courts had already decided on the objectives, their lack of steadfastness, explained in the previous chapter, might have resulted in too much confusion for the Commission.
[92] Cengiz (n 22) 666.
[93] That the staff working at the Commission increasingly value technical information is highlighted by Cengiz on the basis of interviews with Commission officials, an effect which makes them value information from industry lobby over consumer organizations (as the former have more resources and are able to produce the costly technical information), Cengiz (n 17) 834-5.

(recalling Caney's taxonomy) served as a legitimizing factor for a political choice on the fundamental objective to be pursued. Important to add, in this respect, is that it was the Commission who was in the position to do so due to the vagueness of the constitutive competition provisions regarding the objective, which, together with the lack of secondary legislation on that matter, left a void as no authoritative source could be relied upon. Why, then, did the Commission not add any other objective, besides the seemingly technocratic economic one? Doing so would widen its possibilities for enforcement, which results in a larger institutional discretion, something that the Commission would see as attractive, based on Wilks' and Cengiz' perspectives of institutional self-promotion. The view taken here, that the Commission is an apolitical institution by nature but acted politically throughout the Modernisation, might offer the following insight: while acting politically, the institution felt it was necessary to restrain the political extent of its choices as much as possible, and therefore attempted to conceal it with technocratic reasoning. That works with consumer welfare, as one can point to economical theories that produce an absolute outcome. However, problems occur when trying to find technocratic arguments for including objectives such as the environment, data privacy or free media. The discrepancy between appearing apolitical but in reality being political may be reminiscent of Giandomenico Majone's theory of a regulatory state. Int his theory, Majone proposed that *efficient policies* that 'attempt to increase aggregate welfare, that is, to improve conditions of all, or almost all'[94] are in less need of legitimization than *redistributive policies*, which, as their name implies, redistribute wealth from one group to another.[95] While the latter are, according to Majone, in need of legitimacy, subjecting *efficient policies* to the bureaucratic strains inherent to legitimacy leads to unacceptable delays in their development.[96] Majone has named such a lagging effect 'time inconsistencies', suggesting that legitimacy requirements block effective policy-making.[97] Can the conduct of the Commission of choosing the objectives be understood from the point of view of *efficient policies*, that would be riddled with time inconsistencies when the Commission would not have pushed through the objective? It is argued here that it cannot—at least not in the sense that it justifies the downsides the Commission's conduct has on legitimacy (discussed in more detail below). It cannot, because the Commission's choice for consumer welfare fails in two ways to be an *efficient policy*, although it is not clear whether Majone would have the same view. The first way in which the objective is not an efficient policy is its inherent characteristics: as it was seen, the conception of consumer welfare is not subject to consensus, thus depending on whether one takes, for example, total or consumer welfare, very different rights are protected. Even when one would argue that consumer welfare in itself is an *efficient policy*, the decision to position consumer welfare as the ultimate objective, choosing to forego other options, excludes those other objectives, including the groups they would offer protection to. It thus redistributes welfare from, for example, competitors, to consumers.

In sum, the adjudicative position of the Commission, together with the void of objectives that was left by the lack of Treaty provisions and secondary legislation, incentivized the Commission to clarify its day-to-day tasks and decide on an objective for the European competition system. However, finding itself in a political position due to that decision, its apolitical nature incentivized it to select an objective that seemed as apolitical as possible: on the basis of economic theories,

[94] G Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (1996) 96 57 European University Institute Working Paper RSC, 10.
[95] Not to be confused with distributive policies, that initially distribute wealth between people, Majone (n 94).
[96] Majone (n 94) 11.
[97] Idem.

that was consumer welfare. In that regard, Majone's theory of the regulatory state would not offer logical relief.

Section 2. The Commission's Conduct: a restraint response

While the literal conduct of the Commission has been described in the previous section, it is useful to characterize that conduct in order to easily refer to it.

Whereas the Commission, on the one hand, engaged with the challenge at hand by selecting an objective, it avoids making choices that it regards as too political, by focusing on technocratic methods of reasoning. In that way, it seeks to steer clear of political controversies, while achieving its aim of clarity in its adjudicatory work. The Commission's action of pushing for consumer welfare as the ultimate objective of the competition system may therefore be characterized as a *restraint response*. Response, in the sense that its action is incentivized by the design of the system at large, and restraint, in the sense that its political choice remained as technocratic as possible. This model does not put blame on the Commission's response in selecting an objective; since the political institutions had not done so, there was a clear need from the point of view of clarity.

Section 3. The downsides for Legitimacy

Not allocating 'blame' to the Commission does not, however, mean that there is no downside to its conduct. While the main part of this section studies the impact on the theoretical concept of legitimacy, first a pragmatic view is taken to understand why legitimacy is important in the first place.

Pragmatic view

The practical result of the Commission's restraint response lies in the aforementioned *form* it pushes for consumer welfare: its shaping of the narrative, by means of public statements, and issuance of soft law, in the form of eg the Guidance Paper and its dominant position in ECN policy discussions. This approach in shaping a paramount norm, usually laid down in the Treaties, does not conform to the usual approach to policy making, where the higher the norm, the 'heavier' the legislative instrument. As described, all the other exclusive competences have stipulated objective in their respective Treaty provisions; why must the objective for the competition system then be shaped in non-legislative soft law? While there are some expected arguments in favor of this (the competition system changes quickly; therefore the objectives must be flexible), that does not detract from the downside of a system where a higher norm such as an objective is determined by a low-ranking instrument: the instrument does not carry enough 'weight' to convince the other institutions, such as the EU Courts. Even when the EU Courts would agree with the substance of the decision to place consumer welfare as the ultimate objective of the competition system, it would, from the point of view of legality, very difficult for the Courts to rely on eg the Guidance Paper due to its low ranking. While it was seen that the Courts seem to be gradually shifting towards adjudicating more importance to consumer welfare, that process is slow and merely based on the enforcement practice of the Commission. Because it is a gradual process, compliance for undertakings, which the Modernisation heavily predicated on a system of self-assessment, is characterized by uncertainty: will a certain case present a shift towards, or away, from the practical implications of consumer welfare?[98] In sum, the practical implication of the Commission using

[98] For example, in *Intel*, the CJ supported an effects-based assessment of rebates and set aside the GCs judgment, something not readily foreseeable, C-413/14 P, *Intel Corporation v Commission* ECLI:EU:C:2017:632; more in

low-ranking instruments to push for change in the objective to be pursued results in slow change; that slow change is not beneficial to the subjects of the system, as it decreases legal certainty in the sense that it is not altogether clear at what time a new balance between interests will be struck.[99]

Theoretical view

This part will see which forms of legitimacy—there are many—are affected by the conduct of the Commission. While there is an open list of types, forms and definition of legitimacy (is it a Great Legitimacy Debate?), several are chosen here for either their design on the basis of the European system (for example, Scharpf's) or their interesting perspective on the situation (eg Weber's and Beetham's).

Defining legitimacy

In the words of Joseph Weiler, 'legitimacy is a notoriously elusive term, over-used and under-specified'.[100] Indeed, Weiler specifies some forms of legitimacy but without giving a reason for its existence—the legitimacy of legitimacy remains unspecified in his article. That is done more convincingly by Fritz Scharpf, who suggests the need for legitimacy as intrinsic to democracy.[101] As democracy aims for collective self-determination, legitimacy is a tool to measure to what degree that self-determination has a place in reality.[102] Hence, if a certain regime is illegitimate, it does not express the will of the citizens; if a regime is legitimate, it does. Legitimacy stands, as Weiler explains, separate from the popularity of a certain government. Paraphrasing Weiler, the more legitimacy a government enjoys, the greater its ability to adopt unpopular measures.[103] Thus, in the face of a crisis requiring unpopular decisions, the legitimacy of a government is of increasing importance.[104] There is an open list of forms in which legitimacy can present itself.[105] However, most authors define at least input and output legitimacy, about which debate exists as to their exact name and meaning.[106] Input legitimacy, also described as normative or procedural legitimacy,[107] is concerned with *how* a decision is made. Scharpf elegantly explains this. He writes that political choices must derive from the 'authentic preferences' of the citizens, requiring the latter to exercise control over the process of decision-making.[108] Elections are important in this respect, as voters are able to express their will by punishing or rewarding representatives based on their past behavior

general, the Commission is criticized for infringing the principle of legal certainty, M Eben, 'Fining Google: a Missed Opportunity for Legal Certainty? (2018) 14 1 Eur Competition J 129.

[99] On the increasing need for legal certainty in a world with transnationally operating companies, A Wigger, 'Competition for Competitiveness: The Politics of Transformation of the EU Competition Regime' (2008) PhD Dissertation, 331-2.

[100] J Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 7 Journal of European Integration 825, 826.

[101] F Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 1 Journal of European Public Policy 18, 19.

[102] Scharpf (n 101).

[103] Weiler (n 100) 827.

[104] Idem.

[105] Weiler (n 100) 826.

[106] Scharpf (n 101); Weiler (n 100) 826; Cengiz (n 17) 827.

[107] Weiler calls input legitimacy normative legitimacy, Weiler (n 100); Cengiz calls it procedural legitimacy, Cengiz (n 17) 827.

[108] Scharpf (n 101); Scharpf's definition seems to be most closely attached to the liberal perception of input legitimacy that measures decision-maker's legitimacy with their democratic credentials, J Habermas, 'Three Normative Models of Democracy' in S Benhabib (ed), *Democracy and Difference* (1996 Princeton University Press), 21; that differs from the republican view, viewing the process of decision-making as a way for the people to achieve a common good, K Nicolaidis, 'Epilogue: The Challenge of European Demoi-cratization' (2014) 22 1 J of European Public Policy 145.

or future promises.[109] Moreover, authentic preferences for equality, dignity, or liberty can be expressed in the form of principles that have to be adhered to in the decision-making process. Thus, in a system with high input legitimacy, decisions that affect society are taken according to procedures that reflect principles expressing the authentic preferences of citizens in order to give self-determination to those citizens. The second way in which self-determination of the citizens can actualize is called output legitimacy and ensures that the policies of the government have the effect of achieving the desired goal. Scharpf calls this 'effective fate control' by the citizens.[110] Hence, if the citizens perceive immigration as a useful way to combat an ageing population, the rules and policies in place must have the effect of achieving that goal. Alternatively, if citizens wish the competition regime to protect solely consumer welfare, the degree to which it does constitutes output legitimacy. There are some alternatives to Scharpf's definition of output legitimacy. Max Weber argues that output legitimacy is correlated to the degree to which citizens believe that the decision-makers hold their office legitimately,[111] which is contested by David Beetham, who submits that the Weberian approach empties output legitimacy of its morality.[112] Beetham mainly predicates output legitimacy on the expressed consent of the citizens to the system contributing to the general public interest, whereas their withdrawal of consent results in delegitimation.[113] Combining these elements, the definition of output legitimacy used here is the public's expressed opinion regarding the extent to which they have effective control over whether a certain policy contributes to the general public interest.

In sum, the need for a legitimate regime is connected to the idea that a democracy leads to the self-determination of the citizens. Generally, input legitimacy is seen as the degree to which citizens exercise control over the decision-making processes in society, while output legitimacy is seen as giving citizens control over how policies influence their fate. Alternatively, Weiler writes that Europe suffers from lacking both input and output legitimacy, and proposes that European integration is legitimized by political messianism.

The impact of the Commission's conduct on the legitimacy of the European competition system
If we accept that the structure of the system conditions the institutional position, which in turn dictates what types of actions an institution must take, it is important that the system allocates the right choices to the right institutional positions. Thus, market choices should be taken by the market institution, adjudicatory choices by adjudicatory institutions and political choices by political institutions. In this case, a political choice, that of deciding the objectives of the competition system, is allocated by the system to an apolitical institution, the Commission. That institution, due to its pragmatic need for adjudicatory clarity, decides to make that political choice. However, it does so in a technocratic manner, resulting in the exclusion of social objectives for the simple reason that the institution at hand does not have the legitimacy to include those objectives.

The result is that a substantive choice is made for a procedural reason, reducing the legitimacy of that choice. In order to provide a more structured understanding of this harm to legitimacy, below

[109] Elections are key in the liberal view of input legitimacy, Habermas (n 108**Fout! Bladwijzer niet gedefinieerd.**); on the Union's democratic deficit in this respect, S Hix, *What's Wrong with the European Union and How to Fix It* (2008 Polity).
[110] Scharpf (n 101).
[111] M Weber, 'Bureaucracy' in H Gerth and C Mills Wrights (eds), *Max Weber: Essays in Sociology* (1948 Routledge).
[112] D Beetham, *The Legitimation of Power* (1991 Palgrave), 9, 59.
[113] Beetham (n 112) 20.

follows a brief description of its meaning, where after this section concludes by applying it to the Great Competition Debate.

While input legitimacy seems to be negatively impacted by means of the misallocation of a political decision to an apolitical institution, output legitimacy is potentially limited as the apolitical institution limits the possible outcomes to seemingly apolitical ones. The limitation of outcome legitimacy is regarded here as potential, because this thesis has not determined what actual output legitimacy would be; that requires research outside of the scope of this investigation. It does potentially limit legitimacy, however, because the Commission is incentivized to disregard highly political objectives, biasing its choice to objective that appear more technocratic.

It is not the first time that the concept of misallocation has been noticed in the European competition system. Ioannis Lianos writes in that regard 'the allocation of institutional responsibilities always turns upon a judgment about which of the candidate institutions is, when compared to the other candidates, best suited to the job'.[114] Lianos then, joining Neil Komesar, criticizes the method in which this choice is made, which he calls 'single-institutionalism': allocation a task to an institution solely based on the idea that the other institutions would carry out the task imperfectly.[115] Since all institutions, including the institution of 'the market', have a bias in their decision-making process, Komesar proposes a participation-centered approach, where all institutions participate in the decision-making in order to have all biases represented.[116] Thus, where this thesis compares with the proposals of Komesar and Lianos is that they both find problems in the misallocation of tasks, a phenomenon present in the European competition system. Whereas this thesis, however, simply observes that misallocation is present, Lianos and Komesar propose a possible reason for the existence of that misallocation: single-institutionalism. In more practical terms, this thesis notes that the Commission has taken a political decision because no other institution did, something which was problematic from the point of view of the adjudicative position of the Commission. Lianos and Komesar's approach could then suggest that the reason the choice is left up to the Commission is because the other institutions felt they could not reach a perfect decision.

Section 4. Summary

This section utilized the spirit of the SCP thinking, albeit adjusted to the political situation at hand, turning it into SPCL. The framework suggests that the legal Structure of the competition system influences the Position of the institutions, which conditions their Conduct, resulting in a certain level of Legitimacy. This framework is used to assess the legitimacy of the Commission's choice for consumer welfare as the ultimate objective for the European competition system.

The structure of the legal system was already described in the first chapter: with neither Treaty provisions nor secondary legislation instructive enough to authoritatively state which objectives are legitimate, the Great Competition Debate is wide open. That wicked structure positions the Commission in a twofold institutional manner: adjudicative and political. While the adjudicative position incentivizes the Commission to create clarity, pushing it to respond to the

[114] Lianos (n 62) 56.
[115] Lianos (n 62).
[116] N Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1994 University of Chicago Press).

inconclusiveness about the objectives, the apolitical nature of the Commission restrains it when operating in this political position. That is characterized as a *restraint response*.

The downside of the Commission's restraint response can be summarized as a political choice made for institutional reasons, which decreases the input legitimacy and potentially the output legitimacy of the overall system. That is a undesirable, as fixing that problem appears not too difficult in theory: it consist of a simple misallocation of choices. In order to test whether that problem may be solved, the subsequent section will analyze some possible responses.

Chapter 3 – Alternative responses to overcome misallocation

In the previous sections a descriptive approach was taken to mapping out the European competition system, where after a normative conclusion has been offered, suggesting that the downside of the current system is the fact that an apolitical institution, being the Commission, is incentivized to make a political choice. That conclusion rests on two observations:

- O1: the adjudicative position of the apolitical Commission incentivizes it to make a political choice, reducing input legitimacy;
- O2: when O1 places the institution in a political position, the apolitical nature of the Commission restrains the extent of its political decisions, leading to a biased choice that results in a potential restriction of output legitimacy.

Logically, if one wants to solve the problem of misallocation, the focus must be on changing either O1 or O2. Options for this will be considered below in turn.

Section 1. Input legitimacy

First, O1 essentially offers two reasons for the initial step by the Commission into political territory: it is the passiveness of the other institutions by not making a political decision that puts the ball in the court of the Commission due to its adjudicative nature. It comes natural, if one wants to overcome the problem of misallocation, to allocate the political choice of deciding on the objectives for the European competition system to another institution, preferably a political one. This rationale coincides with the idea of the first chapter, where it was considered that the Council, alike to the Merger Regulation, might use article 103 TFEU together with article 352 TFEU as a sufficiently broad legal basis to issue secondary legislation stipulating clear objectives. It is true that a major political hurdle has to be taken by means of the unanimity requirement required by the legislative procedure of article 352 TFEU—meaning that 28 (or, more likely, post-Brexit, 27) Member States have to agree on an issue. However, the aim of this thesis is not to assess political will, but rather inquire what happens on the assumption that such political will exists: an increase in input legitimacy. *Prima facie*, that might appear to be the case, at least from a legal perspective, as the Council is a legislative institution, which means that a political decision is taken by a political institution. In short, the established procedures are followed, upholding *legality*. However, it does not automatically mean there is a higher input *legitimacy* to the decision: if Scharpf's input legitimacy of multi-leveled government is taken (described in the previous chapter), the decision regarding objectives enjoys input legitimacy when it represents the authentic preferences of the citizens, which is predominantly expressed through elections. In the case of the Council, that is hardly the case. While the Council might to some extent be accountable to national parliaments, its disproportionate representation, encroaching on the principle of equality, and lack of direct elections, chipping away at its accountability, it arguably enjoys only a bit more input legitimacy than the Commission. Does that mean there are no benefits to having the Council issue legislation pronouncing on competition objectives? It does seem to overcome the practical downside of the Commission's response, consisting in the decrease in legal certainty due to the slow acceptance of the new norms as the Commission's instruments (soft law) are of such a low hierarchy. A Council Regulation, although still lower in hierarchy than the Treaty, would be easier for the EU Courts to rely upon than, for example, the Guidance Paper, which ranks rather low in the legal hierarchy. This would arguably shorten the adoption process, increasing legal certainty as the transition phase is shorter, too. In sum, having the Council pronounce on the objectives is a trick that has to do with authority: a Council Regulation carries more weight, and is therefore easier

to accept. In terms of effect on input legitimacy, there is not a straightforward answer or convincing perspective that this method will result in an increase.

The second logical conclusion from O1 might be that, since the adjudicative position of the Commission incentivizes it to make a political decision in the first place, the extent of the adjudicative position should be reduced to such a degree that the incentive is taken away. Practically, that seems difficult to imagine, since the current system places so many adjudicative tasks with the Commission: investigations, fine and accepting commitments are rather essential in the day-to-day functioning of the system and, if the Commission would cede those activities, it is not immediately clear who would perform them—it seems unreasonable to argue that they could be discarded with altogether. In a short thought experiment: imagine the Commission retreats from its current adjudicative position, leaving those tasks to the National Competition Authorities (NCAs). It is fair to assume that they would be incentivized in the same manner, requiring greater directional clarity by means of clear objectives to prioritize their enforcement; they might look for that greater clarity either in the ECN network, or lobby their national governments. This is all very speculative, however, and it does not seem to offer a clear solution for the core of the problem, which consists in the misallocation of a political choice to an apolitical institution: the NCAs are similarly apolitical. Hence, reducing the adjudicative function of the Commission in order to take away its incentive to step into the political domain is not effective, as it does not lead to reallocating the decision to an institution which provides more input legitimacy.

Section 2. Output legitimacy

O2 does not explain why the Commission takes a political decision in the first place –that is already done by O1—but why the Commission feels constrained in the discretion it has in selecting the objectives. As the Commission is an apolitical organization by nature, it has a preference for selecting a seemingly apolitical objective, in the present case consumer welfare. That has the downside of being a biased choice: candidate objectives are deselected due to procedural reasons. The logical response to overcome the problem of O2 is to give the Commission a larger political mandate, in order to afford the institution the discretion it needs to consider all possible candidates for objectives in an objective and unbiased manner. Such a proposal, to give more political power to the Commission in the competition system, seems rather radical, looking at the historical and legal apolitical nature of the Commission. Despite those obvious 'it has always been that way' arguments, it does seem the forthright thing to do, however: why must we make an institution struggle with tasks that do not belong to it, refusing to change the situation because of so-called 'principles'? Does such misallocation not violate one of said principles in and by itself, eg the principle of accountability? Moreover, executing this plan seems to be legally possible, as well: the aforementioned legislative power vested in the Council by means of the duo articles (103 and 352 TFEU) can simply give the Commission a mandate to establish the objectives to the European competition system. Input legitimacy may be ensured as far as possible by means of an obligation on the Commission to undertake public consultations in order to gauge the authentic preferences of citizens, undertakings and other stakeholders—an activity the Commission is not unfamiliar with.[117] The main benefit is that the Commission receives the legal discretion to consider all

[117] Although some pressure to do so is desirable. For example, Cengiz writes that, throughout the Modernisation, there was no deliberation by citizens, Cengiz (n 17) 834.

possible options for competition objectives in an open, unbiased manner, no matter how political they may seem. That takes away the potential restriction of output legitimacy.

Why attribute this choice to the Commission instead of the Council, from the point of view of legitimacy? Regarding input legitimacy, no substantial difference exists as compared to having the Council decide on objectives itself. On the one hand, the Council is perhaps a bit more accountable due to some national parliaments exercising active oversight, while the Commission has a more extensive experience in consulting the public by means of its public consultations. A clear benefit of the Commission deciding is to avoid political bickering. For the Council, agreeing that the Commission will formulate the objectives (not much different from the status quo) is easier than to substantively agree on which objectives are valid. If Member States, whose interest are represented in the Council, feel reluctant to officially delegate such an important choice to the Commission, procedures could be designed where the Council has veto power over the objectives established by the Commission—forcing a Member State to 'go nuclear' in order to disagree, a step historically not easily taken in the Council.

Does that mean that Majone's regulatory state is back? Many arguments seem to point that way: to avoid 'unnecessary' political bickering, a regulatory body should be left to do the job. In that respect, the outcome may seem similar to Majone's proposal. The reasons, however, are very different. Whereas Majone argues from a normative point of view that the regulatory state is better, more effective, this thesis simply concludes that it is the optimal solution in the given circumstance. To be clear: yes, it would probably be better to have a legislator decide on the objectives of the European competition system, but with the condition that that legislator increases the input legitimacy. Due to the constitutional design of the Union, that is doubtful in case of the Council. That is why the thesis goes for the second best option, tackling the bias in the choice of the Commission by giving it a mandate to consider all possible options. It will, disappointingly, mean nothing for input legitimacy. It might, however, help the Great Competition Debate a step forward, by relieving the Commission of its technocratic veil so it can engage in the debate with one less burden of judgment.[118]

[118] John Rawls proposed that burdens of judgment, consisting of experiences and preconceptions, are the reason that reasonable people still disagree, J Rawls, *Political Liberalism* (1996 Columbia University Press), 36-7, 55-7.

Conclusion

On a breezy autumn day in 2018, the competition law lecture ends and the class gathers in the cafeteria for cheap espressos. Scattered around a small table with too few seats, the consensus is clear: the field is undemocratic, the Commission must be reigned in. It is difficult, however, to explain what exactly is 'bad', beyond pointing to generalized concepts such as 'the separation of powers' or 'democracy'. A sense exists that there must be a reason for the system to be as it is.

This thesis has made an attempt to explain that system. To that end, it has focused on one of the specific 'transgressions' of the Commission: the apolitical institution has acted politically by deciding that the ultimate objective of the system is consumer welfare. It is political in the sense that it prioritizes the interests of one group (consumers) over those of other groups (eg competitors, the environment, citizens). The main question revolves around what the legitimacy of this choice was, starting from the assumption that the Commission has taken that decision, at least in part, due to the design of the system as a whole. The intuition was that, while the choice of the Commission probably had a negative influence on the legitimacy of the system, the cause for this, and therefore the solution, had to be found not by blaming the Commission, but in a redesign of the system.

The following answers have been found. The European competition system is designed to facilitate disagreement about its objectives, due to the Treaty provisions being unclear on any hierarchy and the absence of secondary legislation to this effect. That has resulted in a debate, called the Great Competition Debate, where disagreement not only exists about what the objectives should be, there is also disagreement about the hierarchy between the competing objectives, their definition, acceptable methods of reasoning when presenting arguments, and, in the core, different schools of thought. It thus occurs that a Chicago School commentator will present economic arguments to support the idea that consumer welfare, consisting in total welfare, should be the only objective of the competition system, while someone that believes that Digital Markets will negatively impact the freedom of the media brings political or ideological arguments to the table. In sum, the Great Competition Debate is *wicked*.

In the midst of all that wickedness sits the Commission, with practical, day-to-day tasks at hand. It was seen that the Commission, in the European competition system, has an adjudicative and political *position*, while the institution is apolitical *by nature* (or, perhaps more accurately: by law). That adjudicative position, meaning a balancing of competing interests on a daily basis, in the midst of the nitty-grittiness of competition enforcement, incentivizes the Commission, faced with the *wicked* disagreement of the Great Competition Debate, to pronounce on an objective itself. Indeed, with a clear objective, balancing competing interests becomes easier and more predictable. While the adjudicative position of the Commission explains why it has set foot in political territory, its apolitical nature explains why it was incentivized to choose for consumer welfare: compared to other objectives, it appears as a more technocratic choice, befitting to the apolitical nature of the Commission.

The downside of the choice for consumer welfare has three components. First, the Commission is not legislatively empowered to make such a choice, and thus has to resort to narratives and soft law instruments. That does not create certainty for the subjects of the system, let alone offer the EU Courts an authoritative document to rely upon and follow the approach. Second, since a political decision is taken by an apolitical institution, input legitimacy is negatively impacted as there is no accountability to – or representation from – the citizens. Third, although it is not known here which objectives constitute a high output legitimacy, there is still a potential negative impact

because the Commission's apolitical nature incentivized it to disregard objectives because they seemed more political—not for any substantial argument.

Finally, some alternative approaches were considered. The most promising one in this respect seems to accept the already political role of the Commission in the competition system, and, through secondary legislation, give it the power to pronounce on the objectives. It was argued that this would take away the incentive for the Commission to exclude the, seemingly, more political objectives, resulting in a choice that is less biased, which in turn increases the output legitimacy of the European competition system.

It is probably right to end by reflecting on the method. As held before, the SPCL framework will not flawlessly explain, and certainly not predict, the legitimacy of a certain system. Other factors play a role, of which several extremely insightful ones have been highlighted throughout the text. Rather, the framework offers an exercise in disciplined thinking, which offered the author the freedom to initially leave certain normative conclusions behind, resulting in a clearer picture of the 'facts', to subsequently apply norms and personal preferences. While some of the initial confusion created over the cheap espressos still lingers, the method was certainly enjoyable and might prove useful in the future.

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