

# Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU

Anca DANIELA CHIRIȚĂ\*

*This article explains the Lisbon Treaty's provisions relating to competition policy and offers a dynamic interpretation of Article 102 Treaty on the Functioning of the European Union (TFEU), which could justify the consideration of an effects-based approach to those anti-competitive practices that are most harmful to the final consumers under the economic theory of consumer welfare. The implications of 'consumer-protection requirements' must shed special light on Article 12 TFEU. Therefore, this article examines the possibility of shifting the courts' teleological interpretation of Article 102, which is based on Protocol 27's 'undistorted competition', towards a legal balancing test of the Treaty's objectives. It also highlights the interpretation of undistorted competition within the internal market and the interplay between EU 'free' and fair and unfair competition rules. The balance of EU competition law should, therefore, be performed between Article 119 TFEU's free competition or economic freedom-based competition and Article 12 as ensuring a 'high level of protection', as embedded in the Treaty, for the final consumers. This article explains how consumer-protection requirements must be defined narrowly so that Article 12 may be applied to Article 102. Article 12 can, therefore, mandate a high level of consumer protection for the final consumers in implementing such a specific policy as the abuse of dominance.*

## 1. INTRODUCTION

This article explains the Lisbon Reform's Treaty regarding provisions for competition policy, especially for the abuse of dominance, namely, undistorted and free competition in the light of economic efficiency and a social market economy. It offers a comparative understanding of the term 'undistorted' with fair and unfair competition principles in the light of German competition and unfair competition laws. Following a dynamic interpretation of the Lisbon Treaty's understanding of distortion, this article challenges the view that Protocol 27 on the Internal Market and Competition could also apply to EU law on unfair commercial practices. Therefore, distinction should be made between distortions that harm consumers' economic interests and those that harm the final consumers.

Furthermore, this article presents the division of laws under German competition and unfair competition laws. Despite safeguarding consumers' interests as an intermediate goal, a shifting to the final consumers' welfare raises another pertinent question of whether the Treaty allows it and why the Commission focuses on a more effects-based approach. As the

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\* Konrad Adenauer Research Fellow, Europa-Institut, University of Saarland, Saarbrücken. I would like to thank Prof. Helmuth Schröter, Torsten Stein and Richard Whish.

concept of harm to consumers in general and the paramount consideration of direct harm fall under the EU unfair competition rule, if the Commission were to shift its analysis to the conduct of dominant undertakings that directly harms consumers, such effects may overlap with unfair competition. Thus, if the interests of the intermediate or final consumers are considered, the possibility of overlapping is reduced. Finally, it explains why public policy should be excluded while enforcing Article 102 Treaty on the Functioning of the European Union (TFEU), as it may result in over-deterrence and a criminal abuse-of-dominance policy.

This article offers a comparative understanding of broad distortions, explains how a shifting of the courts' interpretation ensures a more effects-based approach, and allows consideration of consumer harm. It critically assesses the interplay of EU competition law with elements of unfair competition and offers the solution for the balancing of the Treaty's policy objectives. It then examines the high level of consumer protection and welfare and explains the role of consumer-protection requirements under Article 12 TFEU.

Finally, this article examines the possibility of shifting the courts' teleological interpretation of Article 102, which is based on Protocol 27's 'undistorted competition', towards a legal balancing test of the Treaty's objectives. It highlights the interpretation of undistorted competition within the internal market and the interplay between EU free, fair, and unfair competition rules. The balance of EU competition law should, therefore, be performed between Article 119 TFEU's free competition or economic freedom-based competition and Article 12 to ensure a 'high level of consumer protection', as embedded in the Treaty, for the final consumers. Article 12 mandates that 'consumer-protection requirements' be taken into account in defining and implementing other Union policies. It can, therefore, mandate a high level of consumer protection for the final consumers by implementing such a specific policy as the abuse of dominance in the sense of consumer welfare. This article explains how consumer-protection requirements must then be defined narrowly so that Article 12 may be applied to Article 102.

## 2. THE COMPETITION POLICY OBJECTIVES AFTER LISBON

Perhaps, the most important provision of the Reform Treaty (Lisbon Treaty) is Article 3(1)(b) Treaty on European Union (TEU), which clearly confers 'exclusive' competence on the Union for establishing the competition rules necessary for the functioning of the internal market.<sup>1</sup> Insofar as the internal market is established and the approximation of competition rules is fulfilled, Article 3 TEU's market-integration imperative is no longer a goal in itself.

Furthermore, Article 3 I(g) of the EC Treaty has been removed from Protocol 27 on Internal Market and Competition. This mandates that the internal market must include a system ensuring that 'competition is not distorted'. However, its removal does not affect the liberal principle of an 'open market economy with free competition' enshrined in

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<sup>1</sup> Consolidated Version of the 'Treaties': Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), OJ C111/51, 9 May 2008.

Article 119 TFEU for the purposes set out in Article 3 TEU.<sup>2</sup> This provision reflects the authentic principle of an economic constitution, which is the creation of a workable price system under conditions of free competition.<sup>3</sup>

Therefore, Article 119's free competition is paramount for the purpose set out in Article 3(3) TEU, namely, the recommendation of a 'highly competitive social market economy'. The latter combines market freedom with social balance, aimed at 'full employment and social progress' and a 'high level of protection and improvement of the quality of the environment'. The 'social market economy' cannot, however, be an objective itself for competition law, as the Lisbon Treaty confers 'shared' competence on the Union with its Member States for both social and environmental policies.<sup>4</sup>

The 'free competition' is therefore paramount for Article 102 TFEU and competition policy, as it serves as a basis for conferring economic rights. Furthermore, it allows a fair balancing of the economic freedom-based competition against the Treaty's other objectives that can be pursued in the name of competition, such as Article 169(1) TFEU's highest protection for the narrowly defined consumers in the light of Article 12, namely the welfare of the final consumer.

However, Article 119 must be interpreted in conjunction with Article 120 TFEU, which requires Member States and the Union to act in accordance with the principle of an open market economy with free competition, 'favouring an efficient allocation of resources'. The latter is an expression of economic efficiency as a policy objective. Thus, allocative efficiency refers to relatively static efficiencies that do not include dynamic efficiencies. Some commentators have argued that ordoliberals use economic efficiency only as a generic term for growth and allocative efficiency and only as an 'indirect and derivate' policy objective.<sup>5</sup> However, other German economists mention economic

<sup>2</sup> Ex Art. 4 EC has the value of a constitutional principle; see He. Schröter, 'Institutioneller Rahmen', in *Kommentar zum Europäischen Wettbewerbsrecht*, ed. H. Schröter, T. Jakob & W. Mederer (Baden-Baden: Nomos, 2003), para. 27, 66; E.-J. Mestmäcker & H. Schweitzer, *Europäisches Wettbewerbsrecht* (München: C.H. Beck, 2004), para. 24, 44; W. Eucken, *Grundsätze der Wirtschaftspolitik* (Tübingen: Mohr, 1952), 292. See free competition and economic and monetary policy in Arts 120 and 127 TFEU, respectively.

<sup>3</sup> M. Monti, 'European Competition Policy for the 21st Century', in *International Antitrust Law & Policy 2000*, ed. B. Hawk (Huntington, New York: Juris Publishing, 2001), 257. The principle of open markets with free competition reflects 'the fundamental role of the market and of competition in guaranteeing consumer welfare, encouraging the optimal allocation of resources and granting to economic agents the appropriate incentives to pursue productive efficiency, quality and innovation'.

<sup>4</sup> See Art. 4(2)(b) TFEU for social policy, respectively (e) for environment. Even if social policy contributes to social progress, competition policy conflicts with the former; see K. Herdzina, *Wettbewerbspolitik*, 5th edn (Stuttgart: Lucius & Lucius, 1999), 36. Similarly, German social policies that threaten to distort competition in the market are excluded; see C. Joerges & F. Rödl, "'Social Market Economy" as Europe's Social Model?', EUI Working Paper No. 2004/8, 16; F. Rittner & M. Kulka, *Wettbewerbs- und Kartellrecht: Eine Systematische Darstellung des Deutschen und Europäischen Rechts*, 7th edn (Heidelberg: C.F. Müller, 2008), para. 32, 28. Rittner and Kulka argued that environmental, public health, and social goals are excluded from the Act against Restraints of Competition's (ARC's) policy objectives; generally, A Müller-Armack, *Wirtschaftslenkung und Marktwirtschaft* (München: Kastell, 1990).

<sup>5</sup> W. Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy', *Journal of Institutional and Theoretical Economics* 157 (2001): 4; W. Kerber, 'Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundation of Competition Law', in *Economic Theory and Competition Law*, ed. J. Drexler, L. Idot & J. Monéger (Cheltenham: Edward Elgar, 2009). For an analysis of the existing tensions between constitutional and welfare economics, see A.D. Chiriță, 'The EC Commission's Guidance Paper on the Application of Article 82: An Efficient Means of Compliance for Germany?', *European Competition Journal* 5, no. 3 (2009): 680–682.

efficiency as a primary objective of competition policy, followed by the establishing of a competition system that must safeguard free competition and individual freedom of action as a goal in itself.<sup>6</sup> Thus, the German doctrine is not supportive of welfare optimization to the extent to which consumer welfare is reduced to a purely maximization calculus.<sup>7</sup> In order to achieve consumer welfare, a proper competition objective must guarantee economic rights as individual freedom of action.<sup>8</sup> However, the Treaty itself contains a lacuna, since its broad language in Article 120 refers to favouring an 'efficient allocation of resources' but lacks any explicit reference to either productive or dynamic efficiencies that could support welfare optimization.

## 2.1. A COMPARATIVE UNDERSTANDING OF UNDISTORTED, FAIR, AND UNFAIR COMPETITIONS

Despite the legally binding value of Protocol 27 as the basis for the teleological interpretation of Article 102, it is questionable whether the principle of undistorted competition affects only EU competition law.<sup>9</sup> A dynamic interpretation of the Treaty's objective encourages a shift of perspective, as market integration has already been achieved and must be maintained.

In its fourth recital, the Lisbon Treaty's Preamble sets out the principle of fair competition by 'recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition'. Under section 24(2) of the German Act against Restraints of Competition (ARC),<sup>10</sup> competition rules ensure that undertakings' conduct does not violate the same principle. However, for an understanding of German fair competition, one must examine closely the provisions of its

<sup>6</sup> M. Neumann, 'Wettbewerbspolitik: Geschichte, Theorie und Praxis', in *Die Wirtschaftswissenschaften*, ed. H. Albach (Wiesbaden: Gabler, 2000), 1. Neumann identified four major policy objectives: (1) the establishing and safeguarding of a competitive 'order' in order to promote economic efficiency, technical, and economic progress; (2) safeguarding this order, as a goal in itself, in order to guarantee the freedom of economic activity; (3) the creation and maintenance of a level playing field for a 'fair and performance-based competition' and the prohibition of unfair competition through fraud, deceit, extortion, and state aid; (4) preserving a right balance between large and small- and medium-sized undertakings. I. Schmidt, *Wettbewerbspolitik und Kartellrecht: Eine Interdisziplinäre Einführung*, 8th edn (Stuttgart: Lucius & Lucius, 2005), para. 48, 178; generally, Herdzina, n. 4 above, 125; G. Knieps, *Wettbewerbsökonomie: Regulierungstheorie, Nationalökonomie, Wettbewerbspolitik*, 2nd edn (Heidelberg: Springer, 2005).

<sup>7</sup> A. Schmidt, 'Ordnungsökonomische Wettbewerbskonzepte: Die Wettbewerbspolitik im Spannungsfeld Zwischen Freiheit und Effizienz', *ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, vol. 59 (Stuttgart: Lucius & Lucius, 2008), 216.

<sup>8</sup> Schmidt, n. 6 above, 83. For individual freedom of action, see Säcker, Biedenkopf, Böhm, Fikentscher, Hoppmann and Mestmäcker; for welfare maximization, see H. Würdiger. German competition law, however, cannot be seen as totally excluding welfare optimization but rather as a compromise between contradictory approaches; see Herdzina, n. 4 above, 125.

<sup>9</sup> Article 352 TFEU states that if 'action by the Union should prove necessary, within the framework of policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided for the necessary powers', the Council shall adopt the appropriate measures. For the contrary view that Art. 3 I(g) EC's removal to the protocol will negatively impact competition law, see Alan Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law', *European Competition Law Review* 12 (2007): 703–707.

<sup>10</sup> *Gesetz gegen Wettbewerbsbeschränkungen (GWB)*, Communication, 15 Jul. 2005, Federal Law Gazette I-2005, last amended by Art. 8 of the Law, 17 Mar. 2009, Federal Law Gazette I-2009.

Act against Unfair Competition (AUC),<sup>11</sup> which does not overlap the ARC's free and fair competition. The distinction is important because the German concept of 'fairness' has been considered to be reflecting a policy objective of the abuse of dominance.<sup>12</sup>

The second sentence of section 1 AUC states that its object is the protection of 'undistorted' competition in the interest of the public in general.<sup>13</sup> Its understanding of 'undistorted' competition is, however, linked to the former policy objective of Article 3 I(g) EC.<sup>14</sup> From this perspective, the Protocol's system of undistorted competition is close to unfair competition.<sup>15</sup> Furthermore, some commentators argue that this Protocol's policy objective does not apply to only EU competition law but also applies to the EU's unfair competition rules, such as to trademarks or any other aspects of unfair commercial practices.<sup>16</sup> However, the conclusion that German undistorted competition is nothing other than EU unfair competition cannot be drawn without a proper reconsideration of the policy objectives and the interplay between competition and unfair competition rules.

In the law governing German unfair competition, it is not entirely clear the extent to which the aim is to protect the other market participants, especially consumers, against unfair competition.<sup>17</sup> Section 3 AUC prohibits, therefore, unfair commercial practices insofar as they are capable of restricting competition to the 'disadvantage of competitors, consumers, or of any other market participants'.<sup>18</sup> The separate mentioning of a 'public interest' in maintaining or ensuring undistorted competition suggests that its underlying purpose lies not solely in affording immediate, direct protection to any market participants or in safeguarding their individual or collective interests, such as the interests of associations of consumers or undertakings, but in safeguarding competition as an institution.<sup>19</sup> Similarly, Advocate General Kokott argued that Article 102 (ex Article 82 EC) is not primarily

<sup>11</sup> *Gesetz gegen den unlauteren Wettbewerb* (UWG), 3 Jul. 2004, last amended on 22 Dec. 2008, Federal Law Gazette I-2949, 2008. This law was enacted in 1896 as penal law and in 1909 as a Law against Unfair Competition. Its s. 1 remained unchanged until 2004; see Rittner & Kulka, n. 4 above, 18–19; Sebastian Heim, 'Protection of Competitors, Consumers and the General Public: The New German Act against Unfair Competition', *Journal of Intellectual Property Law & Practice* 1, no. 8 (2006): 524–538.

<sup>12</sup> R. O'Donoghue & A.J. Padilla, *The Law and Economics of Article 82 EC* (Oxford: Hart Publishing, 2006), 9, who traced fairness back to the ordoliberal doctrine. Thus, s. 20 ARC borrowed this concept from the unfair competition law of 1909; see E.J. Mestmäcker, *Der Verwaltete Wettbewerb: Eine Vergleichende Untersuchung über den Schutz von Freiheit und Lauterkeit im Wettbewerbsrecht* (Tübingen: Mohr, 1984), 75, 88–91.

<sup>13</sup> Rittner & Kulka, n. 4 above, para. 25, 26.

<sup>14</sup> H. Köhler & J. Bornkamm, *Wettbewerbsrecht: Gesetz Gegen den Unlauteren Wettbewerb*, 25th edn (München: C.H. Beck, 2007), paras 38–39, 116. Recital 3 of the Unfair Commercial Practices Directive 2005/29/EC refers to unfair commercial practices that show market differences, which can generate 'appreciable distortions' of competition and obstacles to the smooth functioning of the internal market, while Recital 4 recognizes that such unfair practices 'harm consumers' economic interests'.

<sup>15</sup> Rittner & Kulka, n. 4 above, para. 35, 29. See Unfair Commercial Practices Directive 2005/29/EC, amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC, OJ L149 (2005), which concern unfair business-to-consumer commercial practices in the internal market; Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ L95 (1993).

<sup>16</sup> Köhler & Bornkamm, n. 14 above, paras 38–39, 116. See Directive 84/450/EEC (1984) OJ L150, where Art. 1 states clearly that its purpose is to protect consumers and 'the interests of the public in general against misleading advertising and the unfair consequences thereof'. Art. 2(2) explains 'misleading advertising means any advertising which deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which... is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor' (emphasis added).

<sup>17</sup> Köhler & Bornkamm, paras 35 and 115.

<sup>18</sup> See n. 17 above, paras 36–37, 116.

<sup>19</sup> *Ibid.*

designed to protect the immediate interests of individual competitors or consumers but to protect ‘competition as an institution’.<sup>20</sup> Thus, under EU competition policy, the welfare of the ‘final’ consumers may require protection from certain ‘most harmful’ anti-competitive practices, whose effects on the final consumers affect the safeguarding or maintaining of a lively competitive process, and, therefore, require direct action. Not least, as an intermediate policy goal, consumer welfare receives an indirect protection function.<sup>21</sup> Consumers are also included in the broad concept of third parties that require institutional protection.<sup>22</sup>

Similarly, Article 169 TFEU and its secondary legislation on EU unfair commercial practices aims to ensure a high level of consumer protection<sup>23</sup> but lacks a common law against EU unfair competition. The protection afforded by the German unfair competition law is seen as an ‘integration model’ that protects competitors in a horizontal relationship and consumers and any other market participants in a vertical relationship.<sup>24</sup>

The interplay of EU competition and unfair competition rules allows a distinction to be made between anti-competitive practices that harm the final consumers and unfair commercial practices that harm consumers’ economic interests. It is, therefore, inconsistent with the Treaty itself if the EU competition policy is focused only upon undertakings’ commercial interests or upon their competitors, when certain anti-competitive practices, such as exploitative abuses or excessive pricing, require consideration of the final consumers. Despite safeguarding consumers’ interests being an intermediate goal, a shift to the final consumers’ welfare raises another pertinent question regarding whether the Treaty allows it and why the Commission focuses on a more effects-based approach.

## 2.2. SHIFTING TO THE MORE EFFECTS-BASED APPROACH AND CONSUMER HARM

Under EU competition law, the effects on consumers are, however, included only in the particular situation of Article 102(b) TFEU of ‘limiting the production, marketing or technical development to the prejudice of consumers’, which cannot be applied to the abuse-of-dominance policy as a whole.<sup>25</sup> Overall, the Commission’s guidance enforces a

<sup>20</sup> Opinion of Advocate General Kokott, 19 February, Case C-8/08, *T-Mobile Netherlands BV and Others* [2009] ECR I-0000, para. 58 (unreported); Case C-95/04, *British Airways v. Commission* [2007] ECR I-2332, para. 68.

<sup>21</sup> See the Bundeskartellamt (Federal Cartel Office) Report and Federal Government Opinion in Deutscher Bundestag, 16. Wahlperiode Drucks. 16/13,500, ‘Bericht des Bundeskartellamtes über Seine Tätigkeit in den Jahren 2007/2008 Sowie über die Lage und Entwicklung auf Seinem Aufgabengebiet und Stellungnahme der Bundesregierung’, <<http://dip21.bundestag.de/dip21/btd/16/135/1613500.pdf>>, 22 Jun. 2009.

<sup>22</sup> U. Immenga & E.J. Mestmäcker, *Wettbewerbsrecht GWB: Kommentar zum Deutschen Kartellrecht*, vol. 2, 4th edn (München: C.H. Beck, 2007), paras 16–17; Schröter, n. 2 above, para. 24.

<sup>23</sup> Generally, R. Bieber, A. Epiney & M. Haag, *Die Europäische Union: Europarecht und Politik*, 7th edn (Baden-Baden: Nomos, 2006), 502–515. Some commentators argued that upon completion of the internal market one of the major shortcomings concerns whether consumer interests are sufficiently articulated; see P. Craig & G. De Burca, *EU Law: Text, Cases and Materials*, 3rd edn (Oxford: Oxford University Press, 2003), 1195.

<sup>24</sup> Köhler & Bornkamm, n. 14 above, paras 36 and 40, 116–117. However, within the meaning of unfair competition law, the interest of the public in general is not relevant beyond its alleged conduct on the market. Therefore, it may not include social, environmental, or public morals as public-policy objectives, which are the objectives of other laws.

<sup>25</sup> On the contrary, see J.T. Lang, ‘Article 82 EC – The Problems and the Solution’, in *Institutions and Market Series*, ed. F. Panunzi, 4.

more effects-based approach to anti-competitive practices that are most harmful to consumers, and it requires a high degree of evidentiary proof, namely, an anti-competitive foreclosure leading to direct ‘consumer harm’.<sup>26</sup>

The concept of harm to consumers in general and the paramount consideration of direct harm fall under EU unfair competition rules.<sup>27</sup> Therefore, if the Commission were to shift its analysis to the conduct of dominant undertakings that directly, and not ultimately and indirectly, harms consumers, such effects may, indeed, overlap with unfair competition. They may be inconsistent with safeguarding the competitive process if consideration is afforded to the broad economic interests of consumers or consumer associations. EU competition law should refrain from affording them paramount consideration where these interests are the objective of unfair commercial practices that harm consumers’ economic interests. However, this may prove beneficial for the final consumers or those interests that appear under Article 2 of the EC Merger Regulation where *inter alia* the ‘interests of the intermediate and ultimate consumers’ are taken into account.

The Bundeskartellamt considers efficiencies to be an appropriate means for enforcing an effects-based approach that focuses upon actual or likely effects on consumers but considers it unnecessary to prove ‘direct’ harm to consumers.<sup>28</sup> This approach is, however, based on the German division of competence under the ARC and AUC. Advocate General Trstenjak was also reluctant to apply a more effects-based approach and argued that since ‘the restriction of competition at the upstream market level has an appreciable adverse effect on the final consumer’, it would probably be more difficult to achieve without carrying out a market analysis.<sup>29</sup> Thus, the effects-based approach is also based on the same market structure analysis, but it reflects a more severe analysis of the concept of harm to consumers.<sup>30</sup>

The Guidance Paper’s mention of the safeguarding of an ‘effective competitive process’ is a clear indication that this remains the policy objective for applying Article 102, while the protection of consumers is an intermediate goal. This view is similar to Germany’s experience in pursuing other policy goals when enforcing its ARC. One recent example is the Eighth Amendment to the ARC, which introduced two legislative changes as short-term measures, one of them with regard to pricing abuses in the

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<sup>26</sup> The European Commission’s Guidance Paper on the Commission’s Enforcement Priorities in Applying Art. 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Communication from the Commission, OJ C45 (2009).

<sup>27</sup> Recital 4, n. 14 above.

<sup>28</sup> Federal Cartel Office Report and Federal Government Opinion, n. 21 above; B. Heitzer, ‘EC Developments in European Competition Policy’, CRA International Annual Conference (Brussels, 3 Dec. 2008). Heitzer argued that even a ‘highly sophisticated theoretical and quantitative economic analysis’ is unable to indicate an action’s ultimate effect on consumer welfare; see B. Heitzer, ‘International Antitrust: Recent Developments and Trends’, Fordham Competition Law Institute, Thirty-Sixth Annual Conference on International Law and Policy (New York, 24 and 25 Sep. 2009).

<sup>29</sup> Opinion of Advocate General Trstenjak, Joined Cases C-501, 513, 515, 519/06P, *GlaxoSmithKline*, 30 Jun. [2009], ECR I-0000, para. 115 (unreported). The Court of Justice held that the General Court committed an error in law by requiring proof that ‘the agreement entails disadvantages for final consumers as a prerequisite for a finding of an anti-competitive object’; see Cases C-501/06 P, C 513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline v. Commission*, judgment of 6 Oct. 2009 (unreported), para. 64.

<sup>30</sup> Chiriță, n. 5 above, 685–689.

energy sector. The Bundeskartellamt has enforced the measure for the benefit of the final consumers by balancing its main policy goals to favour consumers somewhat, particularly since the electricity market consists of a duopoly situation and its end-consumers have insufficient choices for reacting to increasing energy prices.<sup>31</sup> Section 29 of the ARC, therefore, made it possible for the Bundeskartellamt to compare gas and electricity prices between undertakings that have a similar structure and to control the proportionality of costs with the aim of safeguarding the final consumers' interests in having affordable energy prices.

Therefore, with regard to exclusionary abuse leading to consumer harm, the Commission may decide to intervene, especially where the 'protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured'.<sup>32</sup> As in mergers, and as part of a system ensuring undistorted competition, the intermediate and final consumers' interests may require some sort of balancing under Article 102. Thus, the Guidance Paper fails when it mentions broad consumer-protection requirements, such as 'health or safety reasons related to the nature of the product' as a possible objective justification. This contradicts established case law, where tie-in provisions are not necessary to protect health and to avoid product liability.<sup>33</sup> In fact, the efficiency-based defence<sup>34</sup> allows solely the efficiency balancing of a fair share of benefit for consumers but is a part of the overall objective justification that must, necessarily, include the undertakings' commercial interests. Otherwise, these justifications could overlap with EU unfair competition rules where safety consideration and the prevention of false and misleading advertising is balanced in the light of undistorted competition and the public interest in general.<sup>35</sup> This results in over-deterrence of EU competition law, with criminal sanctions or higher fines due to the interest of the public in general. Therefore, the Commission should perform its final balancing giving consideration to economic freedom and undertakings' commercial interests and a further view of harm to the final consumer. An exclusive focus upon efficiencies endangers economic freedom itself. Enforcing section 29 ARC for the final consumers is also an exceptional measure of consumer protection.

In conclusion, 'non-efficiency' or broad consumer-protection considerations restrict and conflict with undertakings' economic freedom. Consequently, this could even decrease economic freedom and ultimately diminish the competition that increases consumer

<sup>31</sup> FCO, B 8 113/03-12, *ErdgasverG Thüringen-Sachsen*, 2 Feb. 2008; FCO, B 8 113/03-9, *EW AG*, 18 Feb. 2008; FCO, B 8 113/03-10, *E.ON Avacon AG Helmstedt*, 10 Oct. 2007; FCO, B 8 113/08-03, *VNG Verbundnetz Gas Leipzig*, 8 Oct. 2007; FCO, B 8 113/03-11, *Ferngas Nordbayern GmbH*, 17 Sep. 2007; FCO, B 8 113/03-8&6, *Saarfemgas AG & Bayern GmbH*, 29 Jan. 2007; FCO, B 8 113/03-5, *Erdgas-Verkaufs*, 7 Aug. 2007; FCO, B 8 113/03-4, *Gasversorgung*, 6 Sep. 2007.

<sup>32</sup> Guidance Paper, n. 26 above, para. 7.

<sup>33</sup> Note 32 above, para. 29. Commission Decision, *Tetra Pak* [1992] II OJ L72/1 (1992), 4 CMLR 551, paras 118–120, upheld in Case T-83/91, *Tetra Pak International* [1994] ECR II-755; [1997] 4 CMLR 726, paras 139–140 and Case 333/94, *Tetra Pak International* [1996] ECR I-5951; [1997] 4 CMLR 662, para. 37.

<sup>34</sup> Note 26 above, para. 29.

<sup>35</sup> Case T-30/89, *Hilti v. Commission* [1991] ECR II-1439, [1992] 14 CMLR 16, paras 102–119. The court concluded that there was not for Hilti to take steps on its own initiative to eliminate products, which it regarded as dangerous or inferior to its own.



choice.<sup>36</sup> Therefore, under EU competition law, consumer interests must be narrowly defined, while competition policy should be restricted only to the final consumers.<sup>37</sup> The EU system of ensuring fundamental freedoms is expected ‘to ensure the optimal utilisation of production factors, especially for the consumer’.<sup>38</sup> If it is expected to promote the public interest of consumers, it overlaps unfair competition rules.

As the EU competition system must optimize an efficient allocation of resources, its policy objective restricts it to only efficiency-based considerations and excludes general public-policy considerations.<sup>39</sup> One strong argument against considering public interest lies, however, in preventing the integration of public-policy objectives that do not affect the internal market, thereby affecting its private autonomy.<sup>40</sup> Their insertion into German competition law is also disputed because the ARC mentions neither the protection of the individuals’ freedom of action nor third parties as being protected in themselves. Its section 1 refers solely to the prevention of ‘distortions’ of competition. Nevertheless, broad public policy beyond the alleged effect on the market is enforced under other laws. The argument against public policy is in line with the ordoliberal tradition of a private law society.<sup>41</sup>

### 2.3. THE UNDERSTANDING OF DISTORTIONS UNDER BROAD COMPETITION RULES

Since *Continental Can*, the interpretation of abuse by reference to a single Community objective has determined the structure and development of the concept of distortion. Article 102, therefore, should not be directed at practices that may harm consumers directly but to those that are detrimental to them because of their impact on an effective competitive structure.<sup>42</sup> Advocate General Colomer’s call for a ‘rule-of-reason’ under Article 102, namely, as a balancing between the undertaking’s legitimate commercial interests and a

<sup>36</sup> K.J. Cseres, *Competition Law and Consumer Protection* (The Hague: Kluwer Law International, 2005), 318, 328. Cseres acknowledged that information asymmetry and information advantages for firms are present in merger cases and favour consumer welfare.

<sup>37</sup> M. Monti, ‘Competition Enforcement and the Interests of Consumers’, Speech, European Competition Day (Athens, 14 Feb. 2004); generally, Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007).

<sup>38</sup> Schröter, n. 2 above, para. 14, 61–62.

<sup>39</sup> Otherwise, it may lead to a conflict of diverging Treaty objectives, as these goals are pursued under other EU laws and, therefore, require another balancing for which only the courts enjoy wide discretion; see Case 203/86, *Spain v. Council*, [1988] ECR 4563, 4599, para. 10; Case 83 and 85/79, *Valsabbia* [1980] ECR 907, 1002, para. 54; Case 245 and 247/80, *Ludwigshafener Walzmühle* [1981] ECR 3211, 3252, para. 41. Ex Art. 3 I(t) EC’s consumer protection objective complemented and was subordinated to undistorted competition in order to establish and ensure the functioning of the internal market; see C. Wichard, ‘Beitrag der Gemeinschaft zum Verbraucherschutz’, in *EUV/EGV: Das Verfassungsrecht der Europäischen Union mit Europäischen Grundrechtecharta: Kommentar*, ed. C. Callies & M. Ruffert, 3rd edn (München: C.H. Beck, 2007), para. 6, 1699.

<sup>40</sup> Rittner & Kulka, n. 4 above; Köhler & Bornkamm, n. 24 above; Roth mentions that the debate on ‘a more-economic’ approach left the public-policy untouched; see W.-H. Roth, ‘The “More Economic Approach” and the Rule of Law’, in *The More Economic Approach to European Competition Law*, ed. D. Schmidtchen, M. Albert & S. Voigt (Tübingen: Mohr Siebeck, 2007), 42.

<sup>41</sup> Roth, n. 40 above, 41 referred to the ordoliberal doctrine as taking a similar stand with regard to the non-justiciability of public-policy objectives. This stance is, however, disputed; see P. Behrens, ‘Comment on Abuse of Market Power: Controlling Dominance or Protecting Competition?’, in *The Evolution of European Competition Law – Whose Regulation, Which Competition?*, ed. H. Ullrich (Cheltenham: Edward Elgar, 2006), 224–225; Immenga & Mestmäcker, n. 22 above, paras 14–15.

<sup>42</sup> Case 6/72, *Continental Can v. Commission* [1973] ECR 215, para. 26; C-202/07 P, *France Télécom v. Commission*, [2 Apr. 2009] ECR I-02369, para. 103.

more effects-based approach that requires proof of net economic effects on consumers, did not fully convince the Court of Justice.<sup>43</sup> The court recognized that a dominant undertaking can protect its own legitimate commercial interests in a reasonable and proportionate manner but ignored the latter's economic effects, since parallel trade 'ultimately' benefits consumers with regard to both price and product variety.<sup>44</sup> This judgment clearly shows that shifting the courts' interpretation requires support in the Treaty, as the Commission's Guidance is without prejudice to the existent case law. Therefore, the Guidance may prove insufficient before the courts, as it is settled case law to apply Article 102 by means of a teleologically objective interpretation that has its purpose embedded in the Treaty, while consumer welfare would still require the same support.

A shift to a more effects-based approach to consumer harm should, therefore, question whether the broad meaning of a 'high level of consumer protection' includes consumer welfare so that the latter can be subsumed by the Treaty's broader language. As former Article 3 I(t) EC is no longer a policy objective,<sup>45</sup> consumer protection disappeared as one of the Union's first pillars but remains under the Member States' competence. Thus, Article 12 TFEU gains an independent, autonomous standing by requiring that broad 'consumer-protection requirements' shall be taken into account in defining and implementing other Union policies. The challenge then is to define consumer-protection requirements narrowly for the abuse-of-dominance policy. Having a market-integration imperative for both the common competition and consumer rules allows this shift to occur.<sup>46</sup>

Although 'undistorted competition' has never been teleologically interpreted with regard to provisions regarding consumer protection or unfair commercial practices, some recitals of unfair competition directives refer to distortions that affect the 'smooth functioning' of the internal market.<sup>47</sup> The meaning of 'distortion' is, however, explicitly explained under the common competition rules with regard to the approximation of laws.<sup>48</sup> Since the primary purpose for achieving market integration was the approximation of competition regimes among the Member States, along with eradicating barriers to interstate trade, the answer to this question must also throw light on the provision of Article 116 TFEU that states that:

where the Commission finds a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

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<sup>43</sup> Opinion of Advocate General Ruiz-Jarabo Colomer, Joined Cases C-468/06 to C-478/06, *Sot. Lelos v. GlaxoSmithKline* [2008] ECR I-07139, paras 79 and 123(2).

<sup>44</sup> Joined Cases C-468/06 to C-478/06, *Sot. Lelos v. GlaxoSmithKline* [2008] ECR I-07139, paras 67–69.

<sup>45</sup> For consumer protection as one intermediate goal or competition function, see Schröter, n. 2 above, para. 41, 74; R. Whish, *Competition Law*, 6th edn (Oxford: Oxford University Press, 2009), 19.

<sup>46</sup> V. Korah, *EEC Competition Law and Practice* (Oxford: ESC Publications, 1986), 6; B.E. Hawk, 'Antitrust in the EEC – The First Decade', *Fordham L. Rev.* 41 (1972): 229, 231.

<sup>47</sup> See n. 14 above.

<sup>48</sup> Title VII for the common rules on competition, taxation, and the approximations of laws.

The latter condition of Article 116 has been narrowly applied and has led to a further requirement that, *a fortiori*, ‘undistorted competition’ presupposes that competition should not be eliminated. Thus, the Treaty does not refer to competitive distortions, but to broad distortions created as a result of any administrative competition rules enacted by Member States. Therefore, the focus in *Continental Can* is upon protecting residual competition in order to establish a ‘common’ market with real or potential competition, or competition that remains in spite of existing dominance. The focus since then has been largely upon exclusionary abuse, assuming an individual right of each competitor not to be excluded by illegal acts, irrespective of whether this results in a verifiable overall decrease of competition or efficiency in the market place or of the nature of the distortion.<sup>49</sup>

This assumption combines the market-integration imperative of undistorted competition with the German exercise of individual economic freedom, but it may also overlap public interest in general of unfair competition with EU competition law. This is obvious in *Microsoft* where the General Court (former Court of First Instance (CFI)) held that a dominant undertaking had a ‘special responsibility, irrespective of the causes of that position, not to allow its conduct to impair undistorted competition’ in the internal market<sup>50</sup> and that Microsoft ‘had not taken sufficiently into account not to hinder effective and undistorted competition’.<sup>51</sup> Furthermore, the court held that the ‘public interest in maintaining effective competition in the market permitted interference with the exclusive right of the owner of the intellectual property right and was not objective justification’.<sup>52</sup>

This is even more obvious when the court concluded that Microsoft had a lead over its competitors not based on the merits of its products, but by its ‘unfair’ interoperability advantage.<sup>53</sup> Do unfair competitive advantage, as part of the protection of any competitors’ disadvantage, and undistorted competition with ‘public interest’, as an exceptional circumstance for the duty to disclose, not line up with the German unfair competition approach? However, solely an overall interest in ‘opening up’ the media player market may, indeed, line up with the ARC and its decisions. Thus, the Federal Supreme Court, but not the Bundeskartellamt, deemed a refusal to supply as abusive where on balance the interest in opening up the pharmaceutical market to more competition was superior to the

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<sup>49</sup> He. Schweitzer, ‘Parallels and Differences in the Attitude towards Single-Firm Conduct: What Are the Reasons? The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82’, EUI Working Papers 2007/32, 26, 28; L.L. Gormsen, ‘The Parallels between the Harvard Structural School and Article 82 EC and the Divergences between the Chicago- and Post-Chicago Schools and Article 82’, *European Competition Journal* 4, no. 1 (2008): 233, 235. For the freedom to compete as a necessary ingredient for the freedom of action, see F. Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung der Frage des Wirtschaftlichen Kampfrechts und zur Frage der Struktur der geltenden Wirtschaftsordnung* (Berlin: Carl Heymann, 1964).

<sup>50</sup> Case T-201/04, *Microsoft v. Commission* [2007] 5 CMLR 11, ECR II-3601, para. 229; E.M. Fox, ‘The Efficiency Paradox’, Law & Economics Research Paper Series No. 09-26 (2009), searching for the exceptional circumstances and the emphasis on ‘public interest’.

<sup>51</sup> *Microsoft*, n. 50 above, para. 775.

<sup>52</sup> Note 50 above, para. 1333.

<sup>53</sup> *Ibid.*, paras 460 and 407; Commission Decision, Case COMP/C-3/37.990, *Intel*, OJ C227 (2009), para. 288, where the Commission held that the ‘transformation of a rebate awarded only to Dell into a lower price applicable identically to all its competitors was a net lost competitive disadvantage’.

undertaking's commercial interests.<sup>54</sup> The Federal Court of Justice (FCJ), therefore, balanced Scandlines' interest in having unlimited use of its own terminal against the applicant's interest in starting up competing ferry operations.<sup>55</sup> However, in *Microsoft*, Sun did not require access to interoperability information in the sense of a classical refusal to supply. This is also recognized in the US *Intel* case where the elements of unfair competition are present with regard to 'deception by failure to disclose information'.<sup>56</sup> Finally, comparing the pharmaceutical with the media player market may not have the same relevance under German competition law. Thus, Article 3 TEU's industrial policy objective of promoting 'scientific and technological advance' within the internal market makes courts' balancing even easier under unfair competition. This is despite the lack of the Union's exclusive competence for consumer or unfair competition rules.

As already mentioned, under EU competition law, the only provision that could justify opening up the markets is Article 119 TFEU. Therefore, such an abuse-of-dominance policy interferes with undertakings' economic freedom. However, in *Microsoft* this represents largely an expression of interventionism into the undertaking's business and commercial interests, as a public interest of the competitors and consumers is at stake. From a German perspective, therefore, the court exceeded the boundaries of free and fair competition policy goals and gave preference to those of unfair competition.

A dynamic interpretation of the Lisbon Treaty, therefore, completes the understanding of 'distortion' in the light of its development from inter-Member States' trade distortions to broad distortions that affect the internal market. Should 'distortions' then be interpreted as serving solely the approximation of national competition laws, as under Article 116 or 117 TFEU, or should it be, indeed, necessary to emphasize further the broader distortions of competition that may also affect unfair competition law within the internal market? The latter aspect requires consideration of the common consumer rules and of their standing as subordinated to the imperative of market integration.

EU unfair competition directives are intended to contribute to the proper functioning of the internal market by the approximation of national laws.<sup>57</sup> If the answer to the last question is affirmative, both EU competition law and the secondary legislation on unfair commercial practices and on consumers have the same purpose, namely, not to distort genuine competition in the internal market. Therefore, while enforcing such common rules in order to maintain effective competition in the internal market, a distinction should be made between free and fair competitions and a more severe punishing mechanism be

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<sup>54</sup> Federal Court of Justice, KVR 10/94, *Importarzneimittel*, 21 Feb. 1995, WuW/E, 2990; FCO, B 9 199/97 and B 9-16/98, *Puttgarden (Scandlines)*, 21 Dec. 1999; FCJ, 24 Sep. 2002, WuW/E DE-R, 977; *Deutsche Bahn*, WuW/E DE-R 253; FCJ, *Arealnetz*, 28 Jun. 2005, WuW/E DE-R 1520.

<sup>55</sup> FCJ, KVR 15/01, *Puttgarden*, 24 Sep. 2002, WuW/E DE-R, 977.

<sup>56</sup> D. A. Crane, 'Reflections on Section 5 of the FTC Act and the FTC's case against Intel', Michigan Law School Public Law and Legal Theory Working Paper Series no. 181 (2010); Antitrust Chronical, vol. 2 (2010).

<sup>57</sup> The Unfair Commercial Practices Directive 2005/29/EC stated in Art. 1 that its purpose is 'to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States in unfair commercial practices harming consumers' economic interests'.

devised against unfair competition, where unfair commercial practices may affect a general public interest.

In conclusion, this dynamic interpretation of competition and unfair competition rules has proven that both competition and unfair competition are teleologically interpreted in the light of the same underlying principle of undistorted competition as is subordinated to the internal market. Thus, the EU's free and fair competition does not have the same primary objective as unfair competition, and therefore, a further enforcement of the EU unfair competition's public-interest goals would run counter to the EU competition rules if the courts fail to perform a balancing of the overall policy objectives under both areas.

Therefore, regarding anti-competitive practices, while balancing, fair competition should be subordinated to free competition and undertakings' freedom of action. Other unfair 'methods of competition',<sup>58</sup> such as EU unfair competition, should aim to achieve fair and undistorted competition. For unfair competition, the Commission's competence as Directorate General for Competition (DG COMP) would exceed the power confined to a national competition authority and, therefore, a proper balancing of public interest in maintaining effective competition would result in over-deterrence.

It is, however, controversial to endorse the view that the Commission misuses the power given to it by the Treaty itself when such a surplus of competence is now achieved by the Union's 'exclusive' competence for competition, without further mention of to which competition it refers. Article 3(b) TFEU states that the Union shall have exclusive competence 'in the establishing of the competition rules necessary for the functioning of the internal market'. Which rules function then for market integration? Unfair competition practices as such are not embedded in the same Title VII with competition rules. While at least consumer protection falls under the Union's share of competence with Member States, the Commission would, indeed, exceed its overall competence as a competition authority or public body responsible for penal fines for unfair competition.

The major shortcoming of performing an inadequate balancing of policy objectives would result in over-deterrence and a criminal EU competition law, which could lead to an overall excess of consumer benefit or even competitors' protection instead of safeguarding a lively, neutral, and effective competition process for all market participants.

However, the meaning of distortion with regard to unfair commercial practices is based on the same requirement for the approximation of laws, which makes it clear that undistorted competition must be an overall policy objective for both competition and unfair competition rules. Article 119, however, makes, the same distinction between the Protocol's broad requirement of 'undistorted competition' and 'free' competition as the German economic freedom does by conferring economic rights.

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<sup>58</sup> Abuse may consist, *inter alia*, in having 'recourse to *methods different* from those which condition *normal competition*'; see Case C-85/76, *Hoffmann-La Roche* [1979] ECR 461, paras 6 and 91; Case 322/81, *Michelin I* [1983] ECR 3461, para. 70; Case C-62/86, *AKZO* [1991] ECR I-3359, para. 69; Case C-95/04, *British Airways* [2007] ECR I-2332, para. 66; Case C-202/07 P, judgment of 2 Apr. 2009, *France Télécom (formerly Wanadoo) v. Commission*, para. 105. (Emphasis added.)

Therefore, when a distortion arises within the meaning of Article 116 or 117 TFEU, the courts' balancing should be based on Protocol 27 but should take into account Article 119. Under EU unfair competition law, solely unfair commercial practices as 'other methods than normal competition' should then be the courts' balancing of the public interest in order to maintain undistorted, fair, and effective competition within the internal market. Otherwise, EU competition law will enforce EU unfair competition law with a detrimental effect upon undertakings' economic freedom and, ultimately, upon consumers who are not gaining the desired fair share of benefits if the safeguarding of the competitive process with free competition and economic rights fails.

### 3. A HIGH LEVEL OF PROTECTION VERSUS CONSUMER WELFARE AND PUBLIC POLICY

In recent years, the purpose of competition has been to promote consumer welfare through the process of competition itself. Following this line, competition law 'should be regarded as having a "consumer protection" function',<sup>59</sup> despite fears of consumer welfare being used as a populist 'slogan'.<sup>60</sup> The Treaty, however, justifies 'making markets work better for consumers'<sup>61</sup> by strengthening consumers' rights within the process of competition itself, giving consumer protection an independent standing embedded in its own separate title. Introducing this title did not immediately result in protection for consumers, as the primary goal was the correct functioning of the internal market with effective competition.<sup>62</sup> As for common competition rules, the primary purpose of the consumer-protection rules is to achieve harmonized rules among the Member States for the establishment of the internal market.

Furthermore, according to Article 169(1) TFEU, 'in order to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers'. Thus, the provision leaves it unclear if it is to be applied narrowly to consumer law or more broadly to unfair competition directives. The broad consumer-protection 'requirements' of Article 169(2) encompass both efficiency-based considerations that are the object of competition law and the non-competition concerns as EU public-policy goals.<sup>63</sup> Thus, the latter are enforced separately.

Narrow, efficiency-based considerations of consumer protection, however, should be seen as a normal function of EU competition law to the extent that consumer protection as an independent provision is necessary for the functioning of the internal market under effective competition rules. The lack of an insufficient distinction between the two has been called the 'Chicago trap'.<sup>64</sup> The rationale behind the separation of consumer and

<sup>59</sup> Whish, n. 45 above.

<sup>60</sup> P. Akman, '“Consumer Welfare” and Article 82 EC: Practice and Rhetoric', *World Competition* 32, no. 1 (2009): 72.

<sup>61</sup> N. Kroes, 'EU competition Rules – Part of the Solution for Europe's Economy', Speech, European Competition Day (Paris, 18 Nov. 2008).

<sup>62</sup> Cseres, n. 36 above, 199.

<sup>63</sup> Wichard, n. 39 above, para. 8, 1700.

<sup>64</sup> Cseres, n. 36 above, 331.

competition law also addresses the inability of a purely consumer-welfare-based competition policy to provide the final consumers with the greatest protection and welfare.

As a result, competition law that is primarily concerned with the ‘welfare of final consumers’ would eventually improve the serving of consumer interests but would not be intended to address the issue of consumer protection. Competition law concerned primarily with economic freedom of action, however, assumes that the competitive process indirectly protects consumers’ interests as an intermediate goal, because stimulating businesses is beneficial for consumers in the long run.<sup>65</sup>

While the general public policy is excluded from competition law as public policy,<sup>66</sup> it is, however, appropriate not to exclude the concept of the intermediate or final consumer by narrowly limiting it to efficiency-enhancing considerations. Rejecting them altogether as being either public interest based on non-competition considerations<sup>67</sup> or as consumer or unfair competition law is an inconsistent approach to consumer, competition, and unfair competition law.<sup>68</sup> This manoeuvre, therefore, fails to explain the extent to which efficiency-based considerations would affect competition law if they were to be applied as part of it.

### 3.1. THE EVOLUTION AND ROLE OF CONSUMERS’ INTERESTS AFTER LISBON

The debate in the previous section must throw light on the recent Commission’s Guidance Paper and the Treaty’s successive amendments culminating with the Lisbon Treaty’s growing awareness of consumer protection. Article 153 III(b) of the Maastricht Treaty strengthened consumer policy and recognized the Community’s power in acting for consumer protection to achieve the market-integration imperative but left consumer-protection measures under the competence of the Member States.<sup>69</sup> Because the

<sup>65</sup> A.D. Chiriță, ‘The Analysis of Market Dominance and Restrictive Practices under German Antitrust Law in Light of EC Antitrust Law’, *European Competition Journal* 4, no. 2 (2008): 439–440; F. Engelsing, P. Marsden & D. Müller, ‘A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A “Dialectic” on Competition Approaches’, *European Competition Journal* 2 (2006); on the contrary, L.L. Gormsen, ‘The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC’, *European Competition Journal* 3, no. 2 (2007): 335.

<sup>66</sup> On the contrary, C. Townley, *Article 81 and Public Policy* (Oxford: Hart Publishing, 2009); for redefining economic efficiency to include public-policy considerations, see Monti, n. 37 above, 119; generally, Roth, n. 40 above. Roth explained that EU law obliges national judges to weigh fundamental freedoms’ objective against the Member States’ public-policy objectives.

<sup>67</sup> For the danger of importing such non-competition concerns as environmental, social, cultural, and consumer-protection ones generally into Art. 101 TFEU, see A. Komninos, ‘Non-competition Concerns Resolution of Conflicts in the Integrated Article 81’, in *European Competition Law Annual*, ed. C.-D. Ehlermann & I. Atanasiu (Oxford: Hart Publishing, 2004). Komninos, however, addressed them all together without addressing whether consumers’ economic interests, narrowly defined, could be included in competition law. If all such non-competition concerns were to be read into Art. 101(3) TFEU, the whole argument with regard ‘to the provision’s direct effect and justiciability is weakened’; see R. Whish & B. Sufrin, ‘Article 85 and the Rule of Reason’, YBEL 7 (1987): 150.

<sup>68</sup> On the contrary, A. Jones & B. Sufrin, *EC Competition Law* (Oxford: Oxford University Press, 2007), 51; for a sui generis European rule-of-reason approach that covers non-competition and non-economic objectives under Art. 101(3), see Case C-309/99, *Wouters et al.* [2002] ECR I-1577; cf. Case C-519/04P, *Meca-Medina v. Commission* [2006] ECR I-6991, [2006] 5 CMLR, 1023; G. Monti, ‘Article 81 EC and Public Policy’, CMLR 39 (2002): 1057–1099; R. Whish, *Competition Law* (London: Lexis Nexis, 2003), 120.

<sup>69</sup> Cseres, n. 36 above, 198.

Community's primary interest was the harmonization of national consumer-protection rules, the object of ex Article 3 I(t) was subordinated to Article 3 I(g) EC's undistorted competition law. Even so, any use of consumer protection to supplement undistorted competition law would have been a misuse of power by the Commission.<sup>70</sup> This was attributed to the lack of any priority ranking being given to other objectives of the Treaty and to the fact that Article 3 I(t) referred to the 'strengthening' but not to ensuring a 'high level' of protection.<sup>71</sup> Thus, Article 169 TFEU refers to a 'high level of consumer protection' and, therefore, overcomes this major shortcoming.

Article 153 II EC's 'horizontal clause' aimed to link consumer protection more closely with other Community policies. This 'flanking' provision<sup>72</sup> required the Community to take consumer-protection requirements into account when it defined and implemented 'other Community policies'. The broader language of 'requirements' covers all other policies or activities. *A fortiori*, consumer interests could, therefore, be taken into account in implementing competition policy. Until the Nice Treaty,<sup>73</sup> it remained unclear how the Community would incorporate consumer protection into other policies. Consumer protection has since evolved into a Community policy for achieving the objective of establishing and completing the internal market. However, Article 12 TFEU has now gained independent, autonomous standing by requiring that consumer-protection requirements be taken into account in defining and implementing other Union policies and activities.

### 3.2. THE INTERPRETATION OF ARTICLE 102 TFEU AFTER LISBON

The present teleological interpretation of Article 102 is insufficient to cause a shift in the area of abuse of dominance with emphasis upon consumer effects or upon the efficiency-based defence. Any further change in EU case law must challenge the interpretation of Article 102 with another Treaty objective that could justify a high level of protection for the final consumer from those types of abusive conduct that the Commission's Guidance suggested as most harmful to consumers. As already explained, despite moving the content of undistorted competition to Protocol 27, it appears clear that undistorted competition remains the basis for Article 102's teleological interpretation. This should be, however, reconsidered to the extent that it may overlap EU competition law with public interest in maintaining an effective challenge to unfair competition in a way that would be to the detriment of economic freedom of competition.

To justifying consumer welfare under the common rules of competition, Article 101(3) explicitly refers to allowing consumers a 'fair share of the resulting benefit'

<sup>70</sup> Monti, n. 37, 102; Wichard, n. 39 above, para. 2, 1697.

<sup>71</sup> Wichard, n. 39 above, para. 21, 1703.

<sup>72</sup> The Treaty has several integration clauses that require that their pursuit must not prejudice the principle of an open market with free competition set out in Art. 119 TFEU, Arts 120 and 127 TFEU, Art. 348 TFEU, etc.

<sup>73</sup> See the Nice Treaty, signed on 21 Jan. 2001, which entered into force on 1 Feb. 2003.



and, therefore, allowing the balancing of efficiencies, as does the EC Merger Regulation.<sup>74</sup> Such a balancing should be applied to Article 101(1) cautiously. Otherwise, it would conflict with the rule of law by adding to the law, since both are provisions of the same article, which should not apply Article 101(3), as a particular situation under Article 101, generally to Article 101(1) itself.<sup>75</sup> However, a contextual analogy of consumers under Article 101(3) implies that, *a minore ad maius*, Article 102 could consider consumers as such for its purpose as a whole. The rule-of-law argument falls if all four conditions for the balancing of efficiencies are applied consistently, even if initially it had been strictly formulated.<sup>76</sup>

If the courts were reluctant to apply an effects-based approach, then Article 12 will solve the issue twice. It will apply a narrow understanding of consumer interests as final consumers for the abuse-of-dominance policy and a similar standard for Article 101 without such public-policy objectives as environmental, social, or public morals goals, which could weaken the provision in its entirety.

The teleological interpretation of Article 102 in the light of Article 12 would, therefore, introduce a test involving the balancing of policy objectives that could spill into the area of abuse of dominance,<sup>77</sup> as the Commission suggested. Such a balancing, therefore, supports consumer welfare by interfering with undertakings' economic freedom but has the benefit of addressing the disproportion between a producer or supplier's strong market power<sup>78</sup> and that of consumers, especially the unfair commercial practices of allegedly market-dominating undertakings or, with regard to EU competition law, merely exploitative abuse such as excessive high prices.<sup>79</sup> For the latter, interference is justified by preventing such abuse. However, it should be cautiously applied to take into account the extent to which EU competition law would overlap EU unfair competition rules. Similarly, the German concept of prevention abuse included in section 20 ARC originates in the unfair commercial practices of its unfair competition law.

The Bundeskartellamt is not empowered to enforce unfair competition law, and therefore, opening up the markets for more competition is subordinated to free

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<sup>74</sup> For an exhaustion of 'consumer detriment' under EC competition law, see P. Marsden & P.M. Whelan, "'Consumer Detriment" and its Application in EC and UK Competition Law', *European Competition Law Review* 27, no. 10 (2006): 569.

<sup>75</sup> Generally, F.J. Säcker, Working Papers: Vorlesung zum Deutschen und Europäischen Wettbewerbsrecht, 25. Säcker considered balancing efficiencies as a 'rule-of-reason' applicable only for Art. 101(3) and his n. 75 refers to the unanimously German doctrine at <[http://web.fu-berlin.de/iww/downloads/Skript\\_Wettbewerbsrecht\\_WS\\_06\\_07.pdf](http://web.fu-berlin.de/iww/downloads/Skript_Wettbewerbsrecht_WS_06_07.pdf)>.

<sup>76</sup> Roth, n. 40 above. Against an efficiency-based defence, Case T-51/89, *Tetra Pak I* [1990] ECR II-309, para. 25; in favour see Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, para. 86.

<sup>77</sup> Chiriță, n. 5 above, 685, with the reservation of having a 'functional' balancing test, fragmentation of abuse of dominance is likely to be as beneficial for the enforcement of Art. 102 as under German competition law. Thus, the Guidance attempts to tip the balance in favour of consumers but does not address exploitative abuse.

<sup>78</sup> S. Haupt, 'An Economic Analysis of Consumer Protection in Contract Law', *German Journal* 4, no. 11 (2003): 1138. Haupt argued that consumer protection is only necessary in markets characterized by the existence of many small- or medium-sized producers or suppliers rather than in monopolistic markets.

<sup>79</sup> For an enforcement gap with regard to exploitative abuses under Art. 102, see L.-H. Röller, 'Exploitative Abuses', in *European Competition Law Annual 2007*, ed. C.-D. Ehlermann & M. Marquis (Oxford: Hart Publishing, 2008); C. Osti, 'Interpreting Convergence: Where Antitrust Meets Consumer Law', *European Competition Journal* 5, no. 2 (2009): 285, 389. Osti mentioned practices under consumer law that overlap with antitrust rules.

competition and not to the interest of the public in general, especially competitors or consumers. Therefore, only by safeguarding economic freedom, when affording protection to smaller competitors only to 'enter' the market, contributes to consumer welfare in the long run. The Bundeskartellamt's balancing policy ensures the achievement of a compromise between producer and consumer welfare as societal welfare, since not all cases may be balanced in favour of total welfare per se. However, section 20 ARC's selling below costs, not merely occasionally, as a severe prohibition, results in the balance predominantly favouring societal welfare but with a special emphasis upon consumers in the long run.<sup>80</sup>

Another remaining shortcoming is the broad meaning of Article 169(2)'s 'consumer-protection requirements', which are tied to non-competition concerns. However, if consumer-protection requirements broadly aim to implement 'other' Union policies, it is obvious that, *inter alia*, if applied to such specific policies as that addressing abuse of dominance, its meaning must then be narrowly defined in order to avoid altering the solid ground of competition policy itself.

This implies that since consumer-protection requirements can be generally applied to competition policy as a whole, the retention of the former contextual interpretation means that, *a maiore ad minus*, it could take consumers' interests into account and, particularly for the purpose of Article 102, only the final consumer.<sup>81</sup> Similarly, if efficiencies can be balanced, as under Article 101(3), for the purpose of Article 102 by analogy, no rule-of-law argument prevents narrow consideration being given to the final consumer while applying Article 12 to Article 102.

Public-policy consideration, such as health or safety requirements, must therefore not trespass into the area of abuse of dominance. Furthermore, having Article 12 amended as an autonomous provision out of the Union's pillar and of the broader context of consumer protection makes its future teleological interpretation possible for implementing the Commission's effects-based approach. That Article 12 is still a formal requirement should, however, be seen from the perspective of the Union's exclusive competence for competition rules. This functional balancing would also settle the dispute over 'criminal' competition law and avoid any overlapping with EU unfair competition policy. The same is valid for Article 101 applied to public policy when it results in over-deterrence and criminal competition law.

#### 4. CONCLUSION

A closer examination of the Reform Treaty's relevant provisions for competition policy makes it easier to avoid over-deterrence by performing a more flexible, functional balancing that can distinguish between pro-competitive, anti-competitive, and unfair

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<sup>80</sup> For the selling below costs in general, FCJ, *Hiltlisten* (1995) WuW/E 2977; FCO, *Fotoarbeitstasche*, 17 Dec. 2003, WuW/E DE-V 911, FCO, B 9 85/04, *Fotoarbeiten*, 27 Jun. 2005; for the food sector, FCO, B 9 77/07, *Netto Marken Discount GmbH (EDEKA)*, 25 Oct. 2007, (2008) WuW DE-V 1481-86; FCO, *Rossmann*, press release, 8 Feb. 2007.

<sup>81</sup> See the Commission's shift to the effects-based approach where it held that Intel's rebates and payments had a 'direct and immediate negative impact on those customers who would have had a wider price and quality choice' if they had been offered such advantages in *Intel*, n. 53 above, para. 1603.

commercial practices; between Protocol 27's undistorted competition for both EU competition and unfair competition rules; and consequently, can apply a teleological interpretation to the proper objective of EU competition law after the establishment of the internal market.

Article 119 should, therefore, gain paramount importance for the maintaining of a neutral, lively, and effective business environment, as it guarantees economic freedom for undertakings. In the light of the Treaty's Preamble of fair competition, EU unfair competition rules should gain an independent standing. Furthermore, Article 12 may help enforce an effects-based approach before the European courts and, therefore, avoid any interference of competition with unfair competition and broad public policy.

Even if the Treaty itself binds the courts, EU competition law should be properly enforced as a normally deterrent but not as criminal competition law. This follows consideration of broad public-policy considerations of unfair competition law. The example, therefore, is the German distinction of laws and the Bundeskartellamt's enforcement of limits of power under its ARC. Therefore, it should be not for the Commission as a DG to enforce over-deterrence or criminal competition law. This happens as long as the Union itself shares competence with its Member States over unfair competition, the protection of associations of consumers, broad consumer protection, or environmental protection. Otherwise, both the Commission and the courts run the risk of misusing the power conferred by the Treaty on the Union's Member States.

For the first time, the Lisbon Treaty overcomes the previous misunderstanding over the conferral of powers, when it expresses clearly that the Union enjoys 'exclusive' competence over the competition rules necessary for the internal market. As such, solely for the unfair competition rules may the courts be bound to balance public-policy considerations but not the Commission. This applies, however, only to the extent to which unfair commercial practices are recognized before courts as EU unfair competition law.

The contextual analogy of Article 101(3) to Article 102 for balancing efficiencies remains, however, distinct from the legal balancing of policy objectives. The latter legitimately addresses consumers, it implies the flexibility to apply a differentiated standard for abusive conduct, and replaces per se rules with an effects-based approach to the final consumer, but without attaining the value of a sophisticated 'rule of reason'.

The legal balancing would, therefore, not endanger legal certainty for businesses or for the competition process as a whole. This approach is also consistent with the Commission's suggestion in its Guidance by performing its final balancing in paragraph 31 and receives support from the Treaty itself. Since Article 120 contains a lacuna or simply favours an efficient allocation of resources and disregards the economic evolution of dynamic efficiencies, Article 12 may act as legal support for the balancing of effects on consumers in the light of economic thinking.

Applying Article 12 by means of a teleological interpretation to Article 102, therefore, should disregard non-efficiency or broadly defined consumer-protection requirements for the abuse-of-dominance policy. Article 169(2)'s high level of consumer protection can be generally applied to competition policy as a whole. A *maiore ad minus*, narrowly defined

consumers' interests or the final consumer could be given consideration. Thus, for the purpose of Article 102, it must not address the interests of the public in general, especially the broad economic interests of consumers or of associations of consumers as under unfair competition rules. Public-interest policy or such non-efficiency-based concerns as health or safety requirements would, therefore, never trespass on EU competition law. The latter should not become a battlefield for the protection of consumers or competitors, as is the case under EU unfair competition rules.