



## The Impact of Economic Efficiency on Employment

### *A Case Study of Mergers & Acquisitions*

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#### I. Introduction

This paper seeks to challenge the present rhetoric used by competition policy makers and enforcers when advancing economic efficiency as a goal of competition policy. The fixation on the promotion of economic efficiency and intense or fierce competition comes at the expense of other sensible social values, such as job creation. This trend of modern competition policy is based on a reductionist assumption about how markets work in practice. In particular, it is firmly believed that promoting efficiency will lead to inefficient market players leaving the market. This policy, however, reveals its own fallacy. The exit of larger, or the merger of smaller businesses, is often associated with their downsizing or restructuring and, as a result, with job losses.

A dogmatic application of competition policy serving economic calculus, rather than the social order, has silently ignored the negative impact of competition on wages and employment. Over the past many years of successful enforcement of competition laws, no attempts have been made to reverse the negative social impact that has been inflicted by fierce and aggressive forms of competition. One way of curbing the negative impact of

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aggressive forms of competition could be through job creation, for example, instead of a fine imposed on corporations that breach competition rules, by offering a reduction based on the number of jobs that are newly created.

By revisiting the classical price and wage efficiency theoretic assumptions, this paper challenges the use of the 'efficiency' benchmark at both micro- (industrial organization) and macroeconomic levels. The case study of mergers and acquisitions (M&A) across several sectors of the economy will be used to demonstrate how internal growth and merger-specific efficiencies – some of which include the elimination of labour costs - affect wage efficiency and employment prospects. While 6.5% out of 3.7 million jobs losses as a result of M&A activity during a four-year period does not seem to have created a major macroeconomic imbalance, a closer look at recent M&A trends during 2013-2016 demonstrates that, indeed, job losses far outweigh the balance of job creation.

Ultimately, if efficiency always translates into the destruction of jobs, why should it, then, be afforded such a prominent role in any competition policy rhetoric? This paper will challenge the well-established assumption that 'new jobs replace old jobs' following a successful merger. This false assumption is basically at odds with the fact that the majority of European Union mergers are approved, even if subject to conditions, leaving an insignificant percentage of mergers blocked since 1990 (24 or 0.3%).

## II. From Classical to Modern Price *versus* Wage Efficiency Intricacies

Reflecting on the complex relationship between market price and wages, Adam Smith offers the example of monopolists who 'by keeping the market constantly under-stocked' do not meet actual demand so that they can sell well above the 'natural' price of free competition, and later raise wages or profits 'greatly above their natural rate'.<sup>1</sup> These days, it is not surprising to see popular brands disappearing from supermarket shelves only to have their prices pushed up. However, while higher prices will be channelled towards higher corporate profits, they do not necessarily lead to higher wages for workers.

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<sup>1</sup> A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Modern Library, New York, 1937).

Moving on from this classical example offered by Adam Smith, a contemporary example of a contrasting real-life scenario is offered by the European Commissioner for Competition, Ms Vestager, when talking about the over-capacity of the steel industry. This industry went through a painful process of restructuring to make its business more competitive.<sup>2</sup> In the context of state aid, granting national subsidies to maintain over-capacity in the Italian steel sector was seen as effectively putting ‘other steelworkers’ jobs at risk across Europe’. The above example offers conclusive evidence of the close, but inverse, relationship that exists between (lower) price efficiency and job security.

In contrast to harmful monopolies, which maintain artificially high prices above those that could arise from competition under free markets, fierce competition delivers the lowest possible price. Naturally arising lower prices are an efficient market outcome. As mentioned earlier, higher corporate profits might negatively affect wages if corporations become too greedy to invest in human resources and choose not to contribute towards better wages. Alternatively, lower prices could lead to overproduction and possibly lower corporate profits, which could make the social impact on wages much worse.

The ideal of price efficiency can be reached only through vigorous competition. The same game of competition drives labour markets and, implicitly, the ideal of wage efficiency.<sup>3</sup> In this context, Smith recalls the ‘exclusive privileges of corporations,’ as well as of employment laws, which could restrain labour market competition ‘to a smaller number than might otherwise go into them’. Depicted as ‘enlarged monopolies’, by making employment opportunities available to only a select category of individuals, the relevant market price was kept above the natural price of free market competition, as were the wages of the employed labour and monopolistic corporate profits.

The overarching concept of efficiency works differently for market prices and wages. If one were to employ the same natural level for labourers’ wages as for the natural market price, the lowest market price would be on a par with the lowest possible living wage for individuals. For example, Ricardo’s concept of the ‘original state of efficiency’ considers

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<sup>2</sup> European Commission, M Vestager, Speech of 14 July 2016, ‘EESC Plenary, Thursday 14 July’, 4.

<sup>3</sup> On the phenomenon of ‘efficiency wages’ used by employers as a retention incentive, see e.g. P Krugman and R Wells, *Microeconomics* (Worth Publishers, 2013), 548; P Krugman and R Wells, *Macroeconomics* (Worth Publishers, 2013), 224.

primarily the costs associated with ‘paying the wages for the labour’ necessary for the production of goods, which makes the trade surplus, i.e., profit, dependent on ‘efficiency wages’ minus additional expenses.<sup>4</sup> Were such labour costs lower than they should be, then the monopolists could add another monopoly margin to those extracted from the overpriced sale of goods.

The ideals of efficiency inherent in each of the two scenarios explained above stand diametrically opposed to each other. It does not follow that monopolies are bad for prices but good for wages. On the contrary, while monopolies might preserve monopoly rents for a select group of shareholders, the wider public trusts that these monopolistic entities create and secure jobs for the economy at large. Out of sentimentality, there is public sympathy towards monopolists should a fine imposed on them be perceived to lead, immediately, to job losses; giants such as *Google* or *Apple* are obvious examples these days. In contrast, there is no outcry when a smaller or medium-sized firm exits the market, because their business is not regarded publicly as a success story; it is not seen as something that could adversely affect employment at large.

As will be examined in the following sections, the merger of powerful corporations might lead to a monopolistic constellation. Therefore, the practical question to be asked is whether the market price will be moving towards the efficiency ideal and, if so, how this will, in turn, affect wages, or whether the underlying rationale for merging is simply reducing labour costs. In principle, it is assumed that mergers bring about external growth and new jobs. Ultimately, efficiency arguments could twist the outcome of a merger towards jobs losses.

### III. Efficiency as a Goal of Competition Policy

There are conflicting views on the many goals that competition policy has embraced over time. There is more than one goal that deserves attention. Policy makers often state which goal takes precedence at a given time. Thus, previous European Union’s commissioners for competition have projected various goals of European competition law. Amongst the many

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<sup>4</sup> D Ricardo, *Principles of Political Economy and Taxation* (1817) in DA Crane and H Hovenkamp, *The Making of Competition Policy: Legal and Economic Sources* (Oxford University Press, 2013), 26.

past goals, market integration, economic efficiency, consumer welfare and, recently, the social market economy have gradually grown in substance over the years.

The fact that goals conflict with each other is nothing new. Kaysen and Turner argued in favour of a hierarchy of goals considering both the 'limitation of market power' and the achievement of 'desirable economic performance'. They suggested that 'in so far as reduction of market power is incompatible with efficiency and progressiveness', the first goal is subordinate to the second.<sup>5</sup> Therefore, efficiency is best seen as an instrument to achieve economic progress.

For Kaysen and Turner, there should be no competition intervention that could make a few efficient firms exercise their own market power where the cost of intervention could see a 'substantial loss in efficiency'. Nonetheless, 'where market power exists and can be reduced without sacrifices in performance, then such action is desirable without reference to the question of how good over-all performance may have been'.

It is difficult to predict in advance how competition intervention against monopolistic giants could worsen the quality or the performance of the products concerned. Retrospectively, one could assess, for example, whether the intervention against Microsoft's Internet Explorer has, indeed, made the browser more efficient. The positive side of that intervention is that, indeed, it did open up the market for browsers.

It has been advanced that, when drafting the Sherman Act, the US Congress intended primarily to encourage redistribution, not efficiency.<sup>6</sup> The former interpretation endorses the consideration of 'equity'<sup>7</sup> as a legitimate concern of antitrust laws that are called upon to improve the distribution of income, thereby addressing the increasing inequality due to the 'large scale accumulation of wealth'.<sup>8</sup>

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<sup>5</sup> C Kaysen and DF Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press, 1959).

<sup>6</sup> R Lande, *Hastings Law Journal* 1982; on the wider goals of the US Sherman Act, see B Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?* (Wouters, Kluwer, 2012) 72.

<sup>7</sup> See, recently, TC Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity', *Journal of Competition Law and Economics* 12 (2012), 233. Previously alluded by R Whish and D Bailey, *Competition Law* (Oxford University Press, 2012), 21.

<sup>8</sup> On the latter and ensuring a level playing field for small businesses, see OE Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoff', *American Economic Review* 58 (1968) 18; KG Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?', *University of Pennsylvania Law Review* 125 (1977), 1191.

However, critics expressed concern over the incentive cost of redistribution,<sup>9</sup> while others suggested taxation as a better avenue for dealing with distribution.<sup>10</sup> For example, Kaplow argued that

*'because we tax more heavily those who earn more income and subsidize individuals through transfer programs to the extent they earn less income, the tax and the transfer system creates incentives to reduce labour effort, which is inefficient.'*<sup>11</sup>

From the above, it follows that redistribution could be socially costly and remains only a second-best choice. Indeed, the Congress aimed to prevent 'unfair transfers of wealth from consumers to firms with market power'. This had been understood in the sense that the objective of antitrust law is 'essentially a political rather than an economic enterprise'.<sup>12</sup> Nonetheless, Hofstadter identified social goals of antitrust measures alongside economic, political, and moral goals. Oberschall and Leifer raised yet another interesting issue on the use by sociologists of the term 'function', instead of 'goal', as something which is sought to be accomplished.<sup>13</sup>

It is rather unfortunate that subsequent government administrations often chose to ignore social goals in the interpretation of the US Sherman Act.<sup>14</sup> Following a similar critical line on the legacy of the Reagan administration, Broder noted that the enforcement of mergers was then no longer hostile towards 'potentially troublesome mergers and acquisitions', having as a consequence that antitrust enforcers helped the transactions in question to go ahead.<sup>15</sup> Neither did the Bush administration make any attempt to block mergers.<sup>16</sup>

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<sup>9</sup> See L Kaplow, 'On the choice of welfare standards in competition law', in D Zimmer (ed) *The Goals of Competition Law* (Edward Elgar, 2012), 12; on the potential of redistribution to inhibit 'the natural incentives of individuals to act in a capital-enhancing manner', see R Muşetescu, 'Competition Policy: Between Economic Objectives and Social Redistribution' *Economics & Sociology* 5 (2012), 119.

<sup>10</sup> RJ Van den Bergh and PD Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet & Maxwell, 2011), 11.

<sup>11</sup> See Kaplow, cited above, 12.

<sup>12</sup> R Hofstadter, 'What Happened to the Antitrust Movement?', in ET Sullivan (ed) *The Political Economy of the Sherman Act. The First One Hundred Years* (Oxford University Press, 1991), 23.

<sup>13</sup> A Oberschall and EM Leifer, 'Efficiency and Social Institutions: Uses and Misuses of Economic Reasoning in Sociology', *Annual Review of Sociology* (1998) 12, 248.

<sup>14</sup> MA Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change* (University of North Carolina Press, 1991), 3.

<sup>15</sup> See D Broder, *US Antitrust Law and Enforcement: A Practice Introduction* (Oxford University Press, 2016), 9, para 1.31.

<sup>16</sup> *Ibid*, 11, para 1.42.

As Foer explained, the justification for this deliberate exclusion of social goals tied to political ones was based on the perception of subjectivity, which could later be negatively affixed to antitrust decision-making.<sup>17</sup>

However, it is no longer possible to validly claim enforcing antitrust laws solely with objective economic criteria in mind means that kind of enforcement would always be effective in eliminating various biases or even a misuse of economic theories. The salience of economics should not make sociological factors less valuable for the modern analysis of antitrust laws. As Duesenberry once noted, '*Economics is all about why people make choices, while sociology is all about why they don't have any choices to make*'.<sup>18</sup> By paying attention to the socio-economic factors that could adversely affect social welfare, antitrust enforcement could better service the public, rather than corporate interests.

It has been argued elsewhere<sup>19</sup> that the congressional debates on both the Sherman and the Clayton Acts do not reveal any interest in efficiency as an objective of antitrust policy. Indeed, making efficiency the goal of antitrust 'may signify a false consensus'.<sup>20</sup> In contrast, Bork famously stirred up controversy by arguing that the task of antitrust law has to be seen as an 'effort to improve allocative efficiency without impairing productive efficiency so greatly so as to produce either no gain or a net loss in consumer welfare'.<sup>21</sup> Otherwise, antitrust laws could negatively affect consumer welfare. Despite his nebulous use of 'consumer welfare', Bork succeeded in imposing<sup>22</sup> it as a legitimate, even if unwritten, goal of the US antitrust law.

Attempting to place efficiency in a wider context of market outcomes, modern industrial organization refers to a situation where '*it is impossible to find some small change in the allocation of capital, labor, goods or services that would improve the well-being of one individual in the market without hurting any other*'.<sup>23</sup> From the perspective of firms producing

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<sup>17</sup> A Foer, 'On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust', *Antitrust Bulletin* 60 (2015) 2, 116.

<sup>18</sup> J Duesenberry, 'Comments on Becker's 'An economic analysis of fertility', in *Demography and Economic Change in Developed Countries* (Princeton University Press, 1960), 231-40.

<sup>19</sup> Elzinga (1977) cited above.

<sup>20</sup> Foer, cited above, 108.

<sup>21</sup> See R Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, New York, 1978), 91.

<sup>22</sup> On Bork's influence, see GL Priest, 'The Abiding Influence of the Antitrust Paradox,' *Harvard Journal of Law & Public Policy* (2008), 455.

<sup>23</sup> L Pepall, D Richards and G Norman, *Industrial Organization: Contemporary Theory and Empirical Applications* (Blackwell Publishing, 2008).

goods or offering services, measuring their own price efficiency is something that looks primarily at the difference between the maximum amount a consumer could spend and the actual price that the consumer ultimately pays. Similarly, if one seeks to measure labour efficiency for the other side of the market, then firms will have to look at the maximum and minimum salary which could be paid to maximize profits. Therefore, an evaluation of efficiency as desired by firms clashes with the pursuit of efficiency as a market outcome servicing the public at large.

In the probability of a merger scenario, competition authorities engage with a long established analysis to determine the kind of efficiencies brought about by the merger itself. It is, however, assumed that if the merger will lead to a reduction in variable costs, this will create an incentive for the merged entity to subsequently reduce prices to the benefit of consumers. Commentators have suggested that any reductions in fixed costs, including cuts in the number of office staff, will not adversely affect pricing.<sup>24</sup> Most of the so-called 'efficiencies' brought about by a merger have to be 'specific', i.e., any reductions in costs have to be the result of the merger and be verifiable, and must benefit consumers.<sup>25</sup> These efficiencies reduce production costs per unit. It is believed that this will later increase the margins and offer the company involved an incentive to reduce the unit price.<sup>26</sup> While the whole process will benefit final consumers through further price reductions, it becomes nonetheless clear that

*'many mergers are allegedly beneficial because of their elimination of all sort of redundancies, which very often include labor. Unemployment compensation and related costs are externalities of such mergers that are unrecognised in the antitrust analysis'.<sup>27</sup>*

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<sup>24</sup> D Gore, S Lewis, A Lofaro and F Dethmers, *The Economic Assessment of Mergers under European Competition Law* (Cambridge University Press, 2013).

<sup>25</sup> See M Kellerbauer, 'Beurteilung von Zusammenschüssen', in W Berg and G Mäsch (eds) *Kommentar zum Deutsches and Europäisches Kartellrecht* (Luchterhand Verlag, 2015), 1493; D Gore, S Lewis, A Lofaro and F Dethmers, *The Economic Assessment of Mergers under European Competition Law* (Cambridge University Press, 2013), 305; on specific efficiency gains, see A Lindsay and A Berridge, *The EU Merger Regulation: Substantive Issues* (Sweet & Maxwell, 2012), 598; U Schwalbe and D Zimmer, *Law and Economics in European Merger Control* (Oxford University Press, 2009), 337.

<sup>26</sup> On efficiencies created by economies of scale, see e.g. P Belleflamme and M Peitz, *Industrial Organization: Markets and Strategies* (Cambridge University Press, 2011), 377; DE Waldman and EJ Jensen, *Industrial Organization: Theory and Practice* (Pearson, 2013), 39.

<sup>27</sup> See e.g. A Foer, 'On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust', *Antitrust Bulletin* 2015.



Also, it can be recognised that there are many other efficiencies stemming, for example, the specialisation of labour, i.e., workers are able to perform certain tasks more efficiently; the operation of higher capacity equipment which requires less labour,<sup>28</sup> or as a result of sharing managerial or sales expertise.<sup>29</sup>

Leaving aside the resultant price efficiency, this positive side of mergers comes at the expense of considerable staff redundancies and, as a result, job losses. To date, there is limited empirical research on the negative effect of mergers on job prospects in the long run.

It has been argued that, after the implementation of a merger, the merged entity has to strike a difficult balance between the need to reduce labour costs and the need to minimise workplace disruptions.<sup>30</sup> The common belief is that implementing job cuts could see the merged entity having its own performance adversely affected due to a potentially very high staff turnover. However, this phenomenon was common in the US commercial banking industry where aggressive staff replacements took place with the aim of reducing labour costs.

Of course, there is further scope for achieving efficiency following the elimination of duplicate job descriptions. However, any cuts of previously available jobs means an increasing burden on existing employees. Other exceptional cases have emerged in the process of privatisation where outdated technologies had to be eliminated and, as a consequence, many jobs were lost. In the long run, other jobs have also been created, making the previous losses a painful, but short-term, economic shock.

#### **IV. An Assessment of the Impact of Mergers & Acquisitions on Employment**

This section seeks to examine the impact of mergers and acquisitions on employment. As mentioned earlier, there is a gap in the empirical literature on this issue. Drawing on the

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<sup>28</sup> See e.g. P Nelson and D Smith, 'Efficiencies in Antitrust Analysis: A View from the Middle of the Road', *Antitrust Bulletin* 60 (2015) 2, 134.

<sup>29</sup> See D Teece, 'Economies of Scope and the Scope of the Enterprise', *Journal of Economic Behaviour & Organization* (1980), 223.

<sup>30</sup> See e.g. I Walter, *Mergers and Acquisitions in Banking and Finance* (Oxford University Press, 2004).

efforts of a previous study<sup>31</sup> on the negative consequences of mergers and acquisitions, which highlighted large scale job losses, the European Restructuring Monitor identified 3.7 million job losses as a result of the restructuring activity undertaken during 2002 to 2007. Approximately 6.5% of these job losses were caused by mergers and acquisitions, that is, 240,000 jobs during a five-year period.

2002	2003	2004	2005	2006	2007	2002-2007
6.6	2.9	3.8	5.3	11	9.9	6.5

Some of the high profile cases of job losses involved various sectors of the economy from pharmaceuticals, oil, steel, telecommunications, banking, to the automobile industry. Prominent examples are, for example, the acquisition of Schering by Bayer with nearly 5,350 job cuts, of which 3,150 were in Europe; Statoil-Norsk Hydro, with 3,500 redundancies; Arcelor and Mittal Steel, with 2,700 direct and 2,280 indirect job losses; 1,000 jobs at Neuf Telecom and Cegetel; 2,600 jobs at ABN AMRO and Royal Bank of Scotland/Fortis/Banco Santander; 7,500 jobs at Fortis bank; 11,300 jobs at Renault and Automobile Dacia; and 2,250 jobs at Boots and Alliance UniChem.

Drawing on the data provided by the European Union Restructuring Monitor, the table below identifies the type of restructuring activities involving mergers and acquisitions in Europe. The data highlight the creation of any planned jobs against imminent job losses. For the period under review of just four years, the results show that only 1,420 new jobs had been created for 56,703 job cuts, that is, one newly created job for every 40 job cuts. This result challenges the previously held assumption that mergers and acquisitions are positive in the sense that they bring about economic growth and therefore better job prospects. It exposes a net economic benefit of around 2.5% (1/40 ratio) in terms of job prospects.

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<sup>31</sup> See the European Foundation for the Improvement of Working and Living Conditions, 'EMR case studies: The consequences of mergers and acquisitions', 2008.

The above findings are limited to the period between 2013 and 2016 but do not include major economic shocks, for example, post-‘Brexit’<sup>32</sup> job prospects. The majority of mergers have had a devastating impact on jobs, despite assumptions that labour costs are not to be seen as an incentive to merge. It could also be argued that in the long run, more jobs could eventually be created, but the facts have revealed the opposite.

The vast majority of mergers notified to the European Commission’s Directorate-General for Competition are approved and, even where these approvals may be subject to conditions; thus, from 21 September 1990 to 31 August 2016, this accounted for an insignificant percentage (0.3%),<sup>33</sup> that is, 25 blocked mergers out of a total of 6,299 notified mergers. A tiny fraction of mergers have been the subject of a prohibition decision under Article 8.3 of the EU Merger Control Regulation 139/2004. One good reason for a tempered criticism of the blocking of this tiny fraction is given by an American commentator, who recently noted that *‘indeed, the competition authorities of the European Commission (EC) have been even more aggressive in pursuing their enforcement agenda than have their U.S. counterparts’*.<sup>34</sup> Other commentators have claimed that blocking a merger could eventually lead to the market exit of a poorly performing firm.<sup>35</sup>

Historically, the introduction of European merger control rules led to controversy over whether this gap in the Treaty of Rome was left intentionally, with the purpose of a late introduction of a national industrial policy.<sup>36</sup> The subsequent exploration of the historical roots of the Treaty provisions revealed that a later introduction of merger control had already been envisaged by the Spaak report.<sup>37</sup> Koch concluded that in the 1950s, there was

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<sup>32</sup> For an insightful contribution on Brexit more generally and its political context, see P Craig, ‘Brexit: A Drama in Six Acts’, *European Law Review* (2016); Oxford Legal Studies Research Paper no 45/2016.

<sup>33</sup> Recent statistics are available at <http://ec.europa.eu/competition/mergers/statistics.pdf>. For an analysis of this aspect and the procedure under the Merger Control Regulation, as amended by the Implementing Merger Regulation 1269/2013, see, e.g., AD Chirita, ‘Procedural Rights in EU Administrative Competition Proceedings: *Ex Ante* Mergers’, in C Cauffman and Q Hao (eds) *Procedural Rights in Competition Law in the EU and China* (Springer Verlag, 2016), 62.

<sup>34</sup> Broader (2016), cited above, 13, para 1.47.

<sup>35</sup> See MA Jamison and JA Hauge, ‘Adding Dimension to Merger Analysis’, *Journal of Competition Law & Economics* (2016), 6, drawing on this point raised earlier by A Oytchinnikov, ‘Merger Waves Following Industry Deregulation’, *Journal of Corporate Finance* 51 (2013).

<sup>36</sup> O Koch, ‘Fundamentals of European Merger Control’, in G Hirsch, F Montag, FJ Säcker, P Marsden and R Murray (eds) *Competition Law: European Community Practice and Procedure* (Sweet & Maxwell, 2008), 1903, para 51007.

<sup>37</sup> On the history of the European competition rules, see AD Chiriță, ‘A Legal-Historical Review of the EU Competition Rules’ *International & Comparative Quarterly* 63 (2014), 282.

simply no political appetite for merger control.<sup>38</sup> This was felt to be beneficial, as, after many years of growing concentrations of power, calls followed to introduce merger control. As has already been explained, the economic regulation of mergers did not particularly harm the agglomeration of market power, as the overwhelming majority went ahead to obtain approval by the EU Commission. It is therefore doubtful that the enforcement has, indeed, achieved what was initially hoped for, namely, the keeping of near monopoly grown concentrations apart from each other. This constructive criticism goes hand in hand with pertinent evidence provided by economic experts. Upon the closer examination of thirteen mergers, Gore, Lewis, Lofaro, and Dethmers raised concerns over these mergers being ultimately cleared unconditionally, despite a clear picture that was indicative of dominance.<sup>39</sup>

Date	Country	Company	Sector	New jobs	Job losses
05/04/2016	Ireland	<u>Paddy Power</u>	Arts /entertainment	0	250
05/04/2016	United Kingdom	<u>Paddy Power</u> <u>Betfair</u>	Arts / entertainment	0	350
15/03/2016	Sweden	<u>Orbit One</u>	Manufacturing	0	40
16/02/2016	Germany	<u>DZ Bank</u>	Financial services	0	700
01/02/2016	Netherlands	<u>Vivat</u>	Financial services	0	900
25/01/2016	Ireland	<u>Intuity</u>	Information / communication	100	0
14/12/2015	World	<u>Shell</u>	Mining / quarrying	0	2,800
03/12/2015	Belgium	<u>GlaxoSmithKline</u>	Manufacturing	0	170

<sup>38</sup> Koch (2008), cited above, 1904, para 51008.

<sup>39</sup> See the helpful table of cases drawn by D Gore, S Lewis, A Lofaro and F Dethmers, *The Economic Assessment of Mergers under European Competition Law* (Cambridge University Press, 2013), 165-76.

01/12/2015	France	<u>Société nationale Corse Méditerranée (SNCM)</u>	Transportation / storage	0	583
13/11/2015	France	<u>Futurol</u>	Construction	0	228
30/10/2015	United Kingdom	<u>Caparo</u>	Manufacturing	0	43
28/10/2015	Spain	<u>LafargeHolcim</u>	Manufacturing	0	99
26/10/2015	France	<u>Gérard Darel</u>	Manufacturing	0	130
21/10/2015	France	<u>Brit Air</u>	Transportation	0	66
21/10/2015	Netherlands	<u>Q8 Europort</u>	Manufacturing	0	100
24/09/2015	France	<u>3SI Holding</u>	Retail	0	140
11/09/2015	Sweden	<u>SSAB</u>	Manufacturing	0	270
01/09/2015	Spain	<u>Vodafone Spain</u>	Information / communication	0	1,059
31/08/2015	Austria	<u>Baumax</u>	Retail	0	400
06/08/2015	World	<u>Merck</u>	Manufacturing	0	2,585
21/07/2015	France	<u>Alcatel Lucent EU</u>	Manufacturing	0	83
16/07/2015	France	<u>Hop!</u>	Transportation / storage	0	250
09/07/2015	France	<u>L'Express-Roularta</u>	Information / communication	0	240
25/06/2015	France	<u>La Dépêche - Journaux du Midi</u>	Information / communication	0	350

25/06/2015	France	<a href="#">La Dépêche - Journaux du Midi</a>	Information / communication	0	300
12/06/2015	Norway	<a href="#">Coop Norge</a>	Retail	0	500
29/05/2015	France	<a href="#">Alma Consulting Group</a>	Professional services	66	156
19/05/2015	France	<a href="#">Lafarge</a>	Manufacturing	37	166
15/05/2015	Italy	<a href="#">Olivetti</a>	Manufacturing	0	75
05/05/2015	World	<a href="#">Lafarge</a>	Manufacturing	37	380
04/05/2015	Italy	<a href="#">Ansaldo Breda</a>	Manufacturing	0	282
29/04/2015	Spain	<a href="#">BBVA</a>	Financial services	0	1,557
28/04/2015	France	<a href="#">Verreries de Manières</a>	Manufacturing	0	119
24/03/2015	Poland	<a href="#">Alior Bank</a>	Financial services	0	1,000
09/03/2015	Italy	<a href="#">Firema Trasporti</a>	Manufacturing	0	119
05/03/2015	Poland	<a href="#">Bank BGŻ</a>	Financial services	0	1,800
26/02/2015	Germany	<a href="#">Noelke</a>	Manufacturing	0	144
19/02/2015	Croatia	<a href="#">OTP Bank</a>	Financial services	0	124
19/02/2015	France	<a href="#">Abattoirs Industriels de la Manche</a>	Manufacturing	0	314
15/01/2015	Spain	<a href="#">Barclays Bank</a>	Financial services	0	975
08/01/2015	Malta	<a href="#">Autobuses de León (Malta Public Transport)</a>	Transportation / storage	300	0

24/12/2014	France	<a href="#">Arc International</a>	Manufacturing	150	550
17/12/2014	United Kingdom	<a href="#">Dixons Carphone</a>	Retail	0	400
11/12/2014	Netherlands	<a href="#">Wegener</a>	Information / communication	0	275
11/12/2014	Finland	<a href="#">M-Brain</a>	Information / communication	0	32
05/12/2014	France	<a href="#">Tilly Sabco Bretagne</a>	Manufacturing	0	118
05/12/2014	Spain	<a href="#">Vodafone</a>	Information / communication	0	1,000
01/12/2014	France	<a href="#">Altia</a>	Manufacturing	0	41
01/12/2014	Germany	<a href="#">Sachtleben</a>	Manufacturing	0	527
19/11/2014	Germany	<a href="#">Hansa Group</a>	Manufacturing	0	100
11/11/2014	Germany	<a href="#">Riha Wesergold</a>	Manufacturing	0	180
29/10/2014	France	<a href="#">Mobilier européen</a>	Retail	0	1,003
27/10/2014	France	<a href="#">Caddie</a>	Manufacturing	0	252
24/10/2014	United Kingdom	<a href="#">Monarch Airlines</a>	Transportation / storage	0	700
18/10/2014	Germany	<a href="#">Telefónica</a>	Information / communication	0	1,600
16/10/2014	Netherlands	<a href="#">Ziggo</a>	Information / communication	0	450
07/10/2014	France	<a href="#">Peugeot Motocycles</a>	Manufacturing	0	90

29/09/2014	France	<a href="#">Gad</a>	Manufacturing	0	289
17/09/2014	France	<a href="#">Isoa</a>	Manufacturing	0	114
16/09/2014	Spain	<a href="#">Orange</a>	Information / communication	0	550
05/09/2014	Germany	<a href="#">iSoft</a>	Information / communication	0	70
01/08/2014	Finland	<a href="#">Starkki and Puukeskus</a>	Retail	0	100
25/07/2014	France	<a href="#">CEIT</a>	Manufacturing	0	131
17/07/2014	World	<a href="#">Microsoft</a>	Information / communication	0	18,000
18/06/2014	France	<a href="#">Pixmania</a>	Retail	0	187
17/06/2014	Sweden	<a href="#">Sydsvenskan</a>	Information / communication	0	160
14/06/2014	Poland	<a href="#">Boryszew</a>	Manufacturing	130	0
06/06/2014	France	<a href="#">Jardiland</a>	Retail	0	230
30/04/2014	Italy	<a href="#">General Montaggi</a>	Construction	0	100
26/04/2014	Germany	<a href="#">Gardner Denver Deutschland</a>	Manufacturing	0	87
10/04/2014	France	<a href="#">Manufacture vosgienne de meubles (MVM)</a>	Manufacturing	0	43
31/03/2014	United Kingdom	<a href="#">Creative Foods</a>	Manufacturing	0	149
26/03/2014	France	<a href="#">NextiraOne France</a>	Manufacturing	0	277



12/03/2014	Germany	<a href="#">Bosch Solar Energy</a>	Manufacturing	0	350
05/03/2014	Germany	<a href="#">PBC Banking Services</a>	Financial services	0	300
26/02/2014	France	<a href="#">Call Expert</a>	Administrative services	0	507
14/02/2014	Sweden	<a href="#">Sparbanken Skane</a>	Financial services	0	200
06/02/2014	France	<a href="#">Mory Ducros</a>	Transportation / storage	0	2,850
31/01/2014	France	<a href="#">Jean Caby</a>	Manufacturing	0	120
11/01/2014	Netherlands	<a href="#">Be Informed</a>	Information / communication	0	140
29/11/2013	United Kingdom	<a href="#">Menzies Hotel</a>	Hotel / restaurants	0	155
28/11/2013	Germany	<a href="#">Conergy SolarModule</a>	Manufacturing	0	80
07/11/2013	Spain	<a href="#">Caja Badajoz</a>	Financial services	0	193
06/11/2013	Belgium	<a href="#">Mediahuis</a>	Information / communication	0	138
04/11/2013	Czech Republic	<a href="#">Telefonica Czech Republic</a>	Information / communication	0	2,000
30/10/2013	France	<a href="#">La Redoute</a>	Retail	0	1,178
30/10/2013	France	<a href="#">Europeenne Food</a>	Retail	0	218
22/10/2013	France	<a href="#">Calaire Chimie</a>	Manufacturing	0	111
30/09/2013	France	<a href="#">Sodetal</a>	Manufacturing	0	173
08/08/2013	Bulgaria	<a href="#">Ledenika</a>	Manufacturing	300	0
22/07/2013	Romania	<a href="#">Autoritatea de Supraveghere Financiara</a>	Public administration and defence	300	0

19/07/2013	France	<u>Sony</u>	Manufacturing	0	168
25/06/2013	Austria	<u>Hutchison 3G Austria</u>	Information / communication	0	170

The European merger control rules were introduced in 1989, sixteen years after the presentation of a first draft proposal in 1973.<sup>40</sup> The legal basis for the enactment of the merger regulation was Article 3 TEU in conjunction with Protocol 27 on the Internal Market and Competition, which seeks to safeguard undistorted competition within the internal market.<sup>41</sup> However, a closer examination of the 26 years the notification system has been in existence shows the overall enforcement of this area remains relatively modest.

The assessment of mergers has been based on legal and economic considerations, rather than the social impact that a particular merger might have, for example, on job prospects. Otherwise, the analysis of the so-called ‘efficiencies’ brought about by the proposed merger could have been endangered by political and social considerations, including job insecurity.

There is no explicit recognition of the creation, loss, or maintenance of jobs in Regulation 139/2004. Indeed, Article 21 (4) of this Regulation allows Member States to ‘*take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law*’. Comparatively, under the US antitrust law, the Bank Merger Act of 1966 offers a similar objective justification for disapproval of a merger where ‘*the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served*’.<sup>42</sup>

Under the EU Merger Control Regulation, the protection of jobs could be seen to fall under the ambit of a ‘legitimate interest’. Another legal obstacle against this projection is the fact that Article 21 (4), second sentence, includes under the concept of ‘public interest’, ‘public security, plurality of the media and prudential rules’. This shortcoming could be overcome by reliance on the last paragraph of Article 21 (4), which mandates that ‘any other public interest’ be communicated to the Commission for an evaluation. However, blocking a merger

<sup>40</sup> See M Kellerbauer, ‘Erwägungsgründe zur FKVO’, in W Berg and G Mäscher (eds) *Kommentar zum Deutsches and Europäisches Kartellrecht* (Luchterhand Verlag, 2015), 1433.

<sup>41</sup> *Ibid*, 1433.

<sup>42</sup> Broder (2016) cited above, 26, para 2.34.

on the grounds of a social (public) interest would normally attract criticism for being based on pure politics, rather than on economic considerations. In any case, it has already been recognised that merger decisions are not merely legal, but also economic or political decisions.<sup>43</sup>

Since the legitimacy of politics in merger control is at best as dubious as the perception of the immorality of politicians in the eyes of the general public, the search for the objective of competition policy could offer some useful insights into whether sociological aspects should necessarily concern economics. The primary objective of a 'highly social market economy, aimed at full employment' embedded in Article 3 (3) TEU<sup>44</sup> could be usefully interpreted in conjunction with Article 21 (4) of the EU Merger Regulation. Secondary legislation could be applied in a constructive manner for the delivery of 'full employment' by clarifying that, *ex post*, following a merger implementation, new jobs must be created and existing ones cannot be eliminated to take advantage of cheaper labour, thereby resulting in social dumping. Most mergers rely on relocation to areas where a corporation can effectively cut down on labour costs, which contributes to a social phenomenon, known as dumping, being actively pursued, rather than discouraged. The case law of the European Court of Justice has recently referred to the phenomenon of social dumping. In his Opinion, Advocate General Wahl referred to '*provisions designed to prevent social dumping, which are negotiated and included in a collective agreement on behalf of and in the interests of workers*' and concluded that these provisions are '*in principle to be regarded as improving directly their employment and working conditions*'.<sup>45</sup> The Advocate-General considered that it is for the competent court to '*determine whether there exists a real and serious risk of social dumping*'.<sup>46</sup>

One could also recall here that the general objective of the European Union is working for 'the sustainable development of Europe'. This is based on 'balanced economic growth and price stability' and 'a highly competitive social market economy', both of which represent the necessary layout for achieving sustainable development. Efficiency is not explicitly mentioned in the context of the above wider objectives, but has to be seen as a means to this end or as

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<sup>43</sup> F Rittner and M Kulka, *Wettbewerbs- und Kartellrecht* (C.F. Müller Verlag, 2008), 381.

<sup>44</sup> It is worth recalling that the area in question is one of 'shared' competence of the EU with its Member States. More generally, see M Rönömar, 'Labour and equality law', in C Barnard and S Peers (eds) *European Union Law* (Oxford University Press, 2014), 593.

<sup>45</sup> Opinion of AG Wahl, Case C-413/12, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 11 September 2014, para 83.

<sup>46</sup> *Ibid*, para 89.

‘part of this goal’.<sup>47</sup> To exacerbate the drafting complexity of the Treaty of Lisbon, one could also add that the principle of ‘open markets with free competition’ based on an ‘efficient allocation of resources’ was mentioned under Article 119 TFEU.<sup>48</sup> The latter provision has placed competition as an economic policy in the context of macroeconomics based on price stability, sound public finances and monetary conditions, and a sustainable balance of payments. This kind of configuration makes competition an economic policy that integrates two sides of the same coin: micro-and macroeconomics.

It can also be argued that the ideal of price and wage efficiency at microeconomic firm level is intertwined with macroeconomic principles of price stability and employment, including job creation. Furthermore, it is advanced that the ideal of price efficiency can never be maintained in the long run, for example, in the presence of inflation or of a huge public debt. Similarly, the requirement of Protocol 27 on ‘Internal Market and Competition’ that competition within the internal market should not be distorted cannot allow an uneven playing field of tax competition,<sup>49</sup> whereby certain Member States will misuse tax incentives to attract foreign corporations through an extremely low tax base for corporate profits. Inevitably, this kind of competition based on tax levels, which could be seen in the *Apple* case,<sup>50</sup> is never based on efficiency or merit alone. Rather, it dangerously distorts the macroeconomic principles based on free competition with open markets. It is also the first time that a Commissioner for Competition has chosen to tackle the massive inequality arising from extremely low taxed corporate profits. By setting an welcome precedent of this kind – to the despair of several commentators distraught at losing sight of economic efficiency for re-distributive taxation - the enforcement of competition ventures, indeed, into uncharted territory, but it does so bravely, as many more corporations could soon follow the same kind of much-needed treatment. Tackling this well-known distortion of competition through ‘tax competition’ has both the legitimacy and the support of Protocol 27 in conjunction with Title VII on ‘Common rules on Competition, taxation and approximation of laws’. Furthermore, the

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<sup>47</sup> See H Schweitzer, ‘Efficiency, political freedom and the freedom to compete – comment on Maier-Rigaud,’ in D Zimmer (ed) *The Goals of Competition Law* (Edward Elgar, 2012), 171.

<sup>48</sup> See AD Chiriță, ‘Legal interpretation and practice versus legal theory: a reconciliation of competition goals’, in Zimmer (2012), cited above, 123.

<sup>49</sup> For the recent controversy surrounding Apple’s unpaid tax, see also M Vestager, Speech: ‘Why fair taxation matters’, 9 September 2016, Copenhagen Business School.

<sup>50</sup> European Commission, press release IP 162923, ‘State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion’, Brussels, 30 August 2016.

avoidance of tax controls has also been recognised as one of the main reasons for engaging in vertical integration between downstream and upstream firms in order to achieve cost savings based on low corporate tax.<sup>51</sup>

As in economics, where both industrial organization and macroeconomics draw dividing lines between price and wage efficiency, the EU framework deals with competition rules separately from social and employment law. This means that the fixation on efficiency could in theory deliver optimal outcomes when it comes to growth and productivity, but could be less helpful where it sacrifices employment and job prospects.

In an attempt to address this shortcoming, one could look for integration provisions that could re-unite the two areas of concern to achieve a better balance between productivity and job creation. This classical solution seeks to identify a flanking or integration provision elsewhere in the Treaty.<sup>52</sup> For example, Article 9 TEU requires that *'in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment'*. While the provision has been used in the context of European employment law, it can be argued that as an economic policy of the European Union, competition policy has to seek and actively promote at least a 'high level of employment' to reach the desired 'highly competitive social market economy'. The social feature cannot be tied exclusively to social protection without firms or corporations being asked to behave responsibly when it comes to jobs. On the basis of the relevant data, a clear case can be made that competition policy has successfully been used to achieve economic growth while sacrificing the fair cost of labour. This finding is in line with Perrow's critical assessment of mergers and takeovers as being motivated by power struggles among firms within and across markets and the conferral of 'advantages that may have little to do with efficiency'.<sup>53</sup>

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<sup>51</sup> See e.g. J Lipczynski, JOS Wilson and J Goddard, *Industrial Organization: Competition, Strategy and Policy* (Pearson, 2013), 588.

<sup>52</sup> For an attempted integration of consumer protection provisions under the umbrella of competition law to seek the legitimisation of consumer welfare as a policy objective, see AD Chiriță, 'Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU', *World Competition Law and Economics Review* 33 (2010) 3, 418.

<sup>53</sup> C Perrow, *Complex Organizations: A Critical Essay* (Random House, 1985).

Another available avenue is making better sense of Article 151 TFEU, which mentions the promotion of employment aimed at ‘the development of human resources with a view to lasting high employment’.

There are also weaknesses associated with an approach that could ensure competition policy be applied responsibly when it comes to asking businesses to create jobs. For example, job creation is encouraged in the context of small and medium-sized enterprises, but has never been *de facto* imposed or otherwise made conditional on monopolists. Similarly, the legal balancing of efficiencies as a result of a merger does not need to consider its resultant social impact.

Although businesses cannot be expected to offer safeguards for jobs, which could eventually compromise productive efficiency and later harm consumers, there is a greater potential to block international mergers that could destroy local economies, lead to job losses, and amplify social inequality. Critics have argued that, similarly, a competition policy would enforce industrial policy and bring unwanted protectionism. This position is critical in the sense that it does nothing to address the negative impact of the sole fixation on efficiency, and it does not contribute to the social balance of the market economy. Other critics have seen a real conflict between economic efficiency and ‘the reduction of inequality’.<sup>54</sup> They go on further to claim that the European Union’s low levels of economic growth and high unemployment are to be attributed to its ‘excessive concern with equality’, given the European ‘social welfare state’ and its ‘highly regulated labour markets’.<sup>55</sup> Higher protection for employees has generally been blamed for the so-called labour market ‘rigidities’.<sup>56</sup> I can only respectfully disagree on the earlier point when it comes to competition policy intervention; the European Union has rarely tackled issues surrounding inequality for the poor. It did so, however, for the rich when the previous Commission

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<sup>54</sup> See V Navarro and J Schmitt, ‘Economic Efficiency versus Social Equality? The U.S. Liberal Model versus the European Social Model’, *International Journal of Health Services* 35 (2005), 614.

<sup>55</sup> *Ibid*, 614.

<sup>56</sup> In defence of labour protection, see J Shaw, J Hunt & C Wallace, *Economic and social law of the European Union* (Palgrave Macmillan, 2007), 393; for an economic explanation of rigidities, see SD Williamson, *Macroeconomics* (Pearson, 2014), 205.

injected billions of euros of state aid into banks, which were deemed to be too big to fail and so exit the market due to poor performance and management alike.<sup>57</sup>

Ultimately, the historical analysis of the inception of the merger control rules reveals that the late introduction of these rules was due to the lack of consensus over the pursuit of non-economic criteria in the assessment of mergers, in particular, the legal balancing of employment or other industrial policy considerations.<sup>58</sup> A 'politicisation' of merger control was then feared,<sup>59</sup> which has nevertheless happened in the following years.<sup>60</sup>

Therefore, the case can be made that the silence with regard to jobs or unemployment in the EU Merger Regulation be properly acknowledged and that the legal balancing should not be based exclusively on industrial organization criteria without any further consideration of the social impact of the proposed merger.

Nonetheless, the present state of the law is clear in the sense that competition law does not apply to labour relations. The considerations are strictly based on the special regulation of employment contracts. For example, a collective labour agreement that set minimum fees for the supply of independent services could not be challenged as anti-competitive under Article 101 TFEU.<sup>61</sup>

From the interpretation of the available data on new jobs and cuts *ex post* mergers, it can be concluded that the assumption that 'new jobs replace old jobs' is a fallacy, with the exception of losses that could be justifiable due to technological change.<sup>62</sup>

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<sup>57</sup> See AD Chirita, 'The Impact of the European Union Current Crisis on Law, Policy and Society', *Cambridge Yearbook of European Legal Studies* 16 (2014), 272, on the 'efficiency' justification argument raised against bail-outs of inefficient banks or EU Member States.

<sup>58</sup> See Koch, 'Fundamentals of European Merger Control', in G Hirsch, F Montag, FJ Säcker, P Marsden and R Murray (eds) *Competition Law: European Community Practice and Procedure* (Sweet & Maxwell, 2008), 1906, para 51022.

<sup>59</sup> *Ibid*, 1907, 51023.

<sup>60</sup> On this point, in particular 'Independence and Impartiality from Outside: The Case Against Politicisation of the Directorate-General for Competition' see Chirita, 'Procedural Rights in EU Administrative Competition Proceedings: *Ex Ante* Mergers', in C Cauffman and Q Hao (eds) *Procedural Rights in Competition Law in the EU and China* (Springer Verlag, 2016), 81; in defence of politicisation more generally, see M Vestager, Speech 'Independence is non-negotiable', Chatham House, London, 18 June 2015.

<sup>61</sup> ECJ, Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014]. In the same vein, namely 'agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101 (1) TFEU', see e.g. *Albany* [1999]; *Brentjens* [1999]; *Drijvende Bokken* [1999]; *Pavlov and Others* [2000]; *van der Woude* [2000]; *Prevoyance* [2011].

<sup>62</sup> See M Burda and C Wyplosz, *Macroeconomics: A European Text* (Oxford University Press, 2013).

## V. The Macroeconomics of Wage Efficiency

It is advanced that the disciplinary division between micro-and macroeconomics has contributed to the lack of a coordinated implementation of a competition policy that could actively seek to achieve both productivity and jobs. Having set lower prices as a target, competition policy has sought to achieve price efficiency by cutting down labour costs and hurting wage efficiency. Full employment translates into making more jobs available and, at the same time, by maintaining the wages at a lower level than under fierce competition for jobs, it creates stable market conditions for lower labour costs. And lower labour costs contribute directly towards lower prices for goods and services.

As has been argued elsewhere,<sup>63</sup> in a highly competitive EU labour market, a lower wage will not attract many workers, so employers will have to offer other employees a higher wage. As businesses have no interest in raising their own labour costs, inducing unemployment will be seen as positive, as it pushes wages further down. The perils of high unemployment are the existence of fierce competition for jobs with a high demand for jobs and a lower level of offers.

However, there is an illusion of 'real' wages that are higher than these wages would have been during times of lower unemployment with normal competition for jobs, i.e., lower demand and higher numbers of offers. The argument that fierce competition for jobs rewards employees with higher wages is yet another fallacy. Employers could easily divest themselves of higher paid employees and cut down labour costs by hiring younger talent. This phenomenon has also been captured by Advocate-General Wahl when exposing the perils of social dumping by saying that this '*phenomenon might occur through the immediate dismissal of workers or through gradual economisation by not replacing workers whose contract has come to an end*'.<sup>64</sup> In a nutshell, unemployment is the root of the problem, but not the solution.

Advocate General Wahl referred to how 'the elimination of wage competition between workers – which is in itself the very *raison d'être* for collective bargaining – implies that an

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<sup>63</sup> See W Carlin and D Soskice, *Macroeconomics: Imperfections, Institutions & Policies* (Oxford University Press, 2006).

<sup>64</sup> *Ibid*, para 89.



employer can under no circumstances hire other workers for a salary below that set out in the collective agreement'.<sup>65</sup>

He went on to ask the following self-revealing question: *'How could workers credibly ask for a salary increase if they knew that they could be easily and promptly replaced with self-employed persons who would probably do the same job for a lower remuneration?'*<sup>66</sup> Similar to the abovementioned scenario, 'wage efficiency' cannot be taken to represent the 'real' but rather an artificial wage since a larger percentage of the active workforce is never fully employed.

The current rhetoric found in mainstream micro-and macroeconomic textbooks is in sharp contrast to real-life scenarios: first, jobs are restructured at a higher rate than they are being created and, second, higher unemployment creates only an impression of higher 'real' wages than those possibly available under full employment, i.e., perfect labour competition.

## VI. The Macroeconomic Outlook of Full Employment

Over the years, the statistics offered by Eurostat have raised several concerns over unemployment figures which, from a total of 508 million European Union citizens, amounted to an overall 21.651 million, and to 16.634 million in the Eurozone area.<sup>67</sup>

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<sup>65</sup> Opinion of AG Wahl, Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 11 September 2014, para 76.

<sup>66</sup> *Ibid*, para 77.

<sup>67</sup> On the impact of unemployment and challenging the legitimacy of Commissioner Almunia's intervention to rescue banks too-big-to-fail in the European Union through state aid competition policy, see Chirita (2014), cited above, 267, 271.

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>EU-28</b>	62.9	63.4	64.3	65.2	65.7	64.4	64.1	64.2	64.1	64.1	64.9
<b>Euro area (EA-19)</b>	63.0	63.5	64.5	65.5	65.8	64.4	64.0	64.1	63.7	63.4	63.9
Belgium	60.3	61.1	61.0	62.0	62.4	61.6	62.0	61.9	61.8	61.8	61.9
Bulgaria (*)	54.2	55.8	58.6	61.7	64.0	62.6	59.7	58.4	58.8	59.5	61.0
Czech Republic (*)	64.2	64.8	65.3	66.1	66.6	65.4	65.0	65.7	66.5	67.7	69.0
Denmark	75.7	75.9	77.4	77.0	77.9	75.3	73.3	73.1	72.6	72.5	72.8
Germany (*)	65.0	65.5	67.2	69.0	70.1	70.3	71.1	72.7	73.0	73.5	73.8
Estonia	63.1	64.8	68.4	69.8	70.1	63.8	61.2	65.3	67.1	68.5	69.6
Ireland (*)	66.3	67.6	68.7	69.2	67.4	61.9	59.6	58.9	58.8	60.5	61.7
Greece	59.1	59.6	60.6	60.9	61.4	60.8	59.1	55.1	50.8	48.8	49.4
Spain (*)	61.3	63.6	65.0	65.8	64.5	60.0	58.8	58.0	55.8	54.8	56.0
France (*)	63.7	63.7	63.6	64.3	64.8	64.0	63.9	63.9	63.9	64.1	64.3
Croatia	54.7	55.0	55.6	59.0	60.0	59.4	57.4	55.2	53.5	52.5	54.6
Italy	57.7	57.6	58.3	58.6	58.6	57.4	56.8	56.8	56.6	55.5	55.7
Cyprus (*)	68.9	68.5	69.6	71.0	70.9	69.0	68.9	67.6	64.6	61.7	62.1
Latvia	61.0	62.1	65.9	68.1	68.2	60.3	58.5	60.8	63.0	65.0	66.3
Lithuania	61.6	62.9	63.6	65.0	64.4	59.9	57.6	60.2	62.0	63.7	65.7
Luxembourg (*)	62.5	63.6	63.6	64.2	63.4	65.2	65.2	64.6	65.8	65.7	66.6
Hungary	56.8	56.9	57.4	57.0	56.4	55.0	54.9	55.4	56.7	58.1	61.8
Malta (*)	54.0	53.6	53.9	55.0	55.5	55.3	56.2	57.9	59.1	60.8	62.3
Netherlands (*)	73.1	73.2	74.3	76.0	77.2	77.0	74.7	74.2	74.4	73.6	73.1
Austria	66.5	67.4	68.6	69.9	70.8	70.3	70.8	71.1	71.4	71.4	71.1
Poland (*)	51.7	52.8	54.5	57.0	59.2	59.3	58.9	59.3	59.7	60.0	61.7
Portugal (*)	67.6	67.3	67.6	67.6	68.0	66.1	65.3	63.8	61.4	60.6	62.6
Romania (*)	57.7	57.6	58.8	58.8	59.0	58.6	60.2	59.3	60.2	60.1	61.0
Slovenia	65.3	66.0	66.6	67.8	68.6	67.5	66.2	64.4	64.1	63.3	63.9
Slovakia (*)	57.0	57.7	59.4	60.7	62.3	60.2	58.8	59.3	59.7	59.9	61.0
Finland	67.6	68.4	69.3	70.3	71.1	68.7	68.1	69.0	69.4	68.9	68.7
Sweden (*)	72.1	72.5	73.1	74.2	74.3	72.2	72.1	73.6	73.8	74.4	74.9
United Kingdom	71.7	71.7	71.6	71.5	71.5	69.9	69.4	69.3	69.9	70.5	71.9
Iceland	82.3	83.8	84.6	85.1	83.6	78.3	78.2	78.5	79.7	81.1	81.7
Norway	75.1	74.8	75.4	76.8	78.0	76.4	75.3	75.3	75.7	75.4	75.2
Switzerland (*)	77.4	77.2	77.9	78.6	79.5	79.0	78.6	79.3	79.4	79.6	79.8
FYR of Macedonia	:	:	39.6	40.7	41.9	43.3	43.5	43.9	44.0	46.0	46.9
Turkey	:	:	44.6	44.6	44.9	44.3	46.3	48.4	48.9	49.5	49.5
Japan	68.7	69.3	70.0	70.7	70.7	70.0	70.1	70.3	70.6	71.7	72.7
United States	71.2	71.5	72.0	71.8	70.9	67.6	66.7	66.6	67.1	67.4	68.1

(\*) 2011: break in series.

(\*) 2005: break in series.

(\*) 2007: break in series.

(\*) 2013: break in series.

(\*) 2009: break in series.

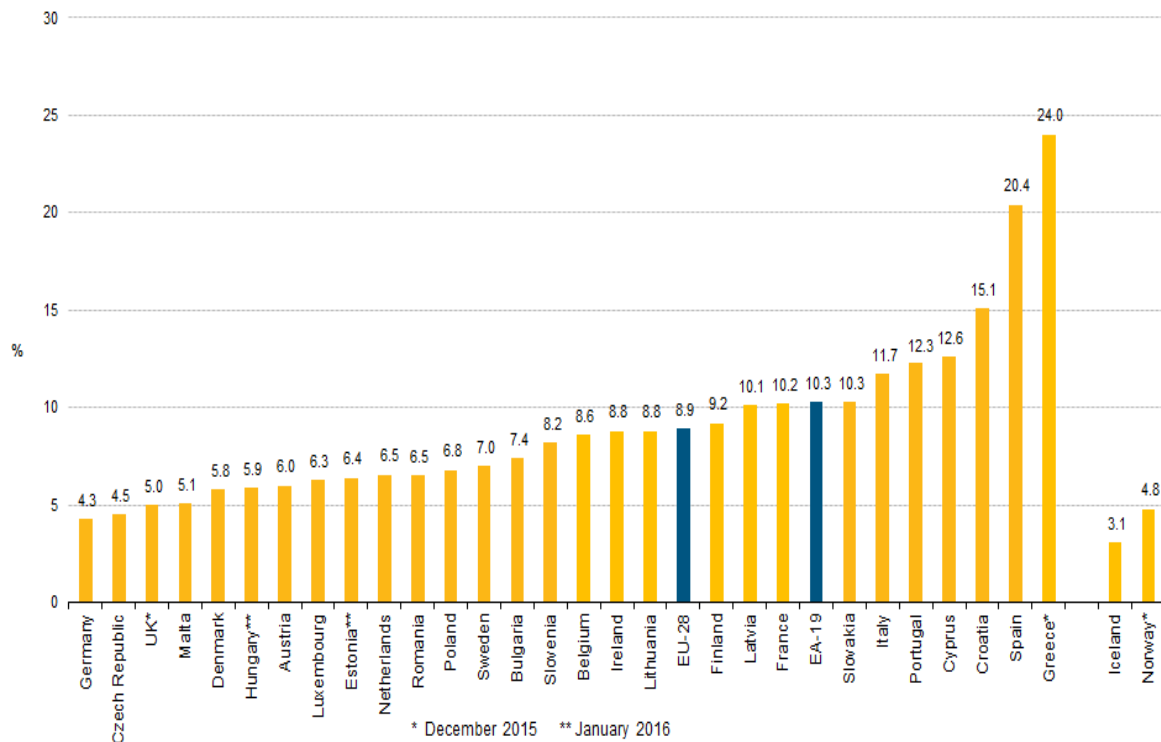
(\*) 2010: break in series.

Source: Eurostat (online data code: ifsi\_emp\_a)

Objectively, the proportion of unemployed in the EU represented 4.26% of the total population, but this proportion is greater when considering the active population.<sup>68</sup> According to the latest data by Eurostat, the employment rate was 64.9%. It follows that 30.84% are not in full employment due to reasons of age, i.e., too young or retired. A few Member States, namely, Germany (4.3%), the Czech Republic (4.5%), and the UK (5.0%), were in full employment as of January 2016, while the remaining Member States displayed higher unemployment, with the worst conditions clearly evidenced in Spain (20.4%) and Greece (24%).<sup>69</sup>

<sup>68</sup> This is according to Eurostat as of February 2016.

<sup>69</sup> The data vary slightly when looking at the latest statistics, which include seasonally adjusted workers, see [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Unemployment\\_rates\\_seasonally\\_adjusted\\_July\\_2016.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Unemployment_rates_seasonally_adjusted_July_2016.png).



Looking at the wider picture from 2004 to 2015, Germany had a higher level of unemployment in the period from 2004 to 2010, fluctuating from 11.2% in 2005 to 7.0% in 2010, but it addressed the issue, moving towards full employment from 2011 with 5.8%, and effectively reaching full employment at 4.6% in 2015. In contrast, the UK was in a better position, as it had full employment in the period from 2004 to 2008 with fluctuations from the lowest level of 4.7% in 2004 to 5.8% in 2008 and had relatively higher levels of unemployment in the following period from 8.1% in 2010 to 6.1% in 2014, reaching 5.3% in 2015. The UK's situation is comparable with that of the US in the sense that higher levels of unemployment dominated the years of the financial crisis from 2009 to 2013 with relatively higher levels of unemployment, which reached a peak of 9.6% in 2010, but it has been moving slowly towards full employment in the last three years (5.3% in 2015).

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
<b>EU-28</b>	9.3	9.0	8.2	7.2	7.0	9.0	9.6	9.7	10.5	10.9	10.2	9.4
<b>Euro area</b>	9.3	9.1	8.4	7.5	7.6	9.6	10.2	10.2	11.4	12.0	11.6	10.9
Belgium	8.4	8.5	8.3	7.5	7.0	7.9	8.3	7.2	7.6	8.4	8.5	8.5
Bulgaria	12.1	10.1	9.0	6.9	5.6	6.8	10.3	11.3	12.3	13.0	11.4	9.2
Czech Republic	8.3	7.9	7.1	5.3	4.4	6.7	7.3	6.7	7.0	7.0	6.1	5.1
Denmark	5.5	4.8	3.9	3.8	3.4	6.0	7.5	7.6	7.5	7.0	6.6	6.2
Germany	10.4	11.2	10.1	8.5	7.4	7.6	7.0	5.8	5.4	5.2	5.0	4.6
Estonia	10.1	8.0	5.9	4.6	5.5	13.5	16.7	12.3	10.0	8.6	7.4	6.2
Ireland	4.5	4.4	4.5	4.7	6.4	12.0	13.9	14.7	14.7	13.1	11.3	9.4
Greece	10.6	10.0	9.0	8.4	7.8	9.6	12.7	17.9	24.5	27.5	26.5	24.9
Spain	11.0	9.2	8.5	8.2	11.3	17.9	19.9	21.4	24.8	26.1	24.5	22.1
France	8.9	8.9	8.8	8.0	7.4	9.1	9.3	9.2	9.8	10.3	10.3	10.4
Croatia	13.9	13.0	11.6	9.9	8.6	9.2	11.7	13.7	16.0	17.3	17.3	16.3
Italy	8.0	7.7	6.8	6.1	6.7	7.7	8.4	8.4	10.7	12.1	12.7	11.9
Cyprus	4.6	5.3	4.6	3.9	3.7	5.4	6.3	7.9	11.9	15.9	16.1	15.0
Latvia	11.7	10.0	7.0	6.1	7.7	17.5	19.5	16.2	15.0	11.9	10.8	9.9
Lithuania	10.9	8.3	5.8	4.3	5.8	13.8	17.8	15.4	13.4	11.8	10.7	9.1
Luxembourg	5.0	4.6	4.6	4.2	4.9	5.1	4.6	4.8	5.1	5.9	6.0	6.4
Hungary	6.1	7.2	7.5	7.4	7.8	10.0	11.2	11.0	11.0	10.2	7.7	6.8
Malta	7.2	6.9	6.8	6.5	6.0	6.9	6.9	6.4	6.3	6.4	5.8	5.4
Netherlands	5.7	5.9	5.0	4.2	3.7	4.4	5.0	5.0	5.8	7.3	7.4	6.9
Austria	5.5	5.6	5.3	4.9	4.1	5.3	4.8	4.6	4.9	5.4	5.6	5.7
Poland	19.1	17.9	13.9	9.6	7.1	8.1	9.7	9.7	10.1	10.3	9.0	7.5
Portugal	7.8	8.8	8.9	9.1	8.8	10.7	12.0	12.9	15.8	16.4	14.1	12.6
Romania	8.0	7.1	7.2	6.4	5.6	6.5	7.0	7.2	6.8	7.1	6.8	6.8
Slovenia	6.3	6.5	6.0	4.9	4.4	5.9	7.3	8.2	8.9	10.1	9.7	9.0
Slovakia	18.4	16.4	13.5	11.2	9.6	12.1	14.5	13.7	14.0	14.2	13.2	11.5
Finland	8.8	8.4	7.7	6.9	6.4	8.2	8.4	7.8	7.7	8.2	8.7	9.4
Sweden	7.4	7.7	7.1	6.1	6.2	8.3	8.6	7.8	8.0	8.0	7.9	7.4
United Kingdom	4.7	4.8	5.4	5.3	5.6	7.6	7.8	8.1	7.9	7.6	6.1	5.3
Iceland	3.1	2.6	2.9	2.3	3.0	7.2	7.6	7.1	6.0	5.4	5.0	4.0
Norway	4.3	4.5	3.4	2.5	2.5	3.2	3.6	3.3	3.2	3.5	3.5	4.4
Turkey	.	9.5	9.0	9.1	10.0	13.0	11.1	9.1	8.4	9.0	9.9	10.3
United States	5.5	5.1	4.6	4.6	5.8	9.3	9.6	8.9	8.1	7.4	6.2	5.3
Japan	4.7	4.4	4.1	3.8	4.0	5.1	5.0	4.6	4.3	4.0	3.6	3.4

: Data not available

Source: Eurostat (une\_rt\_a)

Taking into account the existing disparities in the economic development throughout the European Union, the target of full employment has not been met since 2004. As can be seen from the table above, it has constantly been the case that the EU unemployment figures stagnated around 9%. In fact, the average unemployment rate for the period from 2004 to 2015 was 9.16% and was only slightly higher in the Eurozone area at 9.81%. In contrast, in the US, the target has been met with the exception of the financial crisis period, when from 2009 to 2013, the average unemployment rate stood at 8.66%.

Are there any signs of recovery? The above figures would suggest that, based on the top performing economies of the UK and Germany, the full employment target was met in 2015 in Germany (4.6%) and nearly met in the UK and the US (5.3%). Critics can contradict an exaggerated optimism, as the target has seen modest improvement at 9.4% for the EU and 10.9% in the Eurozone. However, exaggerated pessimism is equally inappropriate, given that these figures represent an EU average of 28 Member States, including two severely depressed economies, i.e., Greece (24.5%) and Spain (22.1%), as well as the worst performing economies, including France (16.3%), Croatia (16.3%), Cyprus (15%), and Portugal (12.6). From the former Eastern European block, with 6.8%, Romania outperforms two

Nordic states, Sweden (7.4%) and Finland (9.4%), at job creation. Given the UK's decision to exit from the EU, there might be further signs of optimism for continental Europe should major international corporations re-locate there and bring an influx of jobs and, as a result, address the present imbalance in certain Member States of the EU. A 'hard' exit could bring a grey prospect and make it impossible for the UK to maintain its already met target of full employment. Therefore, 'Brexit' could soften the EU's overall unemployment rate through newly gained jobs.

The present picture demonstrates that the EU has not yet successfully delivered on its social market economy promise, as it created and maintained clusters of job opportunities in the most influential Member States, which have traditionally been seen as open to economic migration and social dumping. Therefore, the EU must learn its lesson the hard way. Taking the UK as an example, the level of economic development has been uneven, with record numbers of jobs being created in the city of London and fewer opportunities in the rest of the country. Making access to jobs evenly spread throughout the EU could have also reduced the burden of economic migration on public services and prevented the existence of top and bottom performers.

One could also argue that the UK has been the victim of its own economic success and the influential status it has achieved inside the EU during its forty-three years of membership, as while it has been incapable of re-distributing these economic benefits within the UK, it has been unwilling to pass on some of these opportunities to other Member States. There is no active economic migration in the absence of full employment: create unemployment and all talented workers will leave the economy while productivity stagnates.

In conclusion, competition policy should actively focus on the delivery of new jobs instead of being blindly fixated on economic efficiency. This does not mean tolerating inefficient firms; rather, it means asking those firms to redistribute a higher percentage of their corporate profits towards creating new jobs and maintaining existing ones where firms decide to merge.

## VII. Conclusion

This paper has sought to close the gap between the perfect competition ideal of price and wage efficiency by de-constructing the meaning of efficiency from both a micro-and a macroeconomics perspective. As a real-life scenario, the case of mergers and acquisitions has been used to illustrate how the reality of newly created jobs is not on a par with job losses. In the context of mergers, this paper has identified the need for a major overhaul of the efficiency defence with the aim of focusing more actively on job creation, or at least on balancing the number of job cuts with the number of newly created jobs.

Ultimately, this paper arrives at the conclusion that the ideal wage efficiency is not one that aspires to very high wages associated with higher levels of unemployment, but one that seeks to actively address full employment. The latter will enhance the working conditions of the employed workers, although it also offers the opportunity for wages to be pushed further down. In this respect, a viable alternative has to be a pragmatic balance between fierce and aggressive competition (higher wages) and little or no competition (lower wages). A 'highly competitive social market economy' cannot be successful in delivering the desired market outcome of full employment if the foundations of microeconomics are not set up to actively encourage the creation of new jobs.