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Normative Goals in Merger Control

Why Merger Control Should Not Attempt to Achieve "Better" Outcomes than Competition

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ABSTRACT

Critical observers state that current antitrust policies fall short of addressing the wider societal implications of a market economy, inter alia in merger control. The interests of employees in decent wages, merger impacts on the environment, or the pursuit of a governmental industrial policy are claimed to deserve recognition beyond the traditional consumer welfare paradigm. This article voices skepticism. Such postulates can jeopardize an important achievement: to have bestowed on consumers the mandate of being the ultimate sovereign over the outcomes of the competitive process. Antitrust agencies would become exposed to a plethora of irreconcilable societal expectations and rent seeking efforts. This would lead to an increased politicization of merger enforcement, and it would weaken competition as a design-principle for a market economy. This article claims that society at large is better served with a merger control regime that devotes itself to consumer welfare through competition as a mono-teleology.

Keywords: mergers, consumer welfare, environment, industrial policy, labour markets

JEL: K21, L38, L40, L41

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I. INTRODUCTION

Decades after the proclamation of the more economic approach[1], the antitrust community witnesses the emergence of a new school-of-thought.[2] The challenge of climate change[3] and sustainability,[4] employees' wages,[5] a general inequality of wealth distribution,[6]

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1 *See* Mario Monti, *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003: "In making this revision, we have shifted from a legalistic based approach to an interpretation of the rules based on sound economic principles. … The need to ensure legal certainty while at the same time developing greater sophistication in the economic analysis also applies to the merger control field."; Anne C Witt, *The More Economic Approach to EU Antitrust Law* (2016); Gregory J Werden, Consumer welfare and competition policy, in Josef Drexl, Wolfgang Kerber & Rupprecht Podszun (eds), *Competition Policy and the Economic Approach* (2011) 11-43; Christian Kirchner, *Goals of Antitrust and Competition Law Revisited*, in Dieter Schmidtchen, Max Albert & Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (2007) 7-26.

2 *See* Barak Y Orbach, *The Present New Antitrust Era* (2019) 60 William & Mary Law Review 1439-1463, who speaks of a new antitrust era.

3 Simon Holmes, *Climate Change, Sustainability and Competition Law* (2019), available at: https://www.law.ox.ac.uk/sites/files/oxlaw/simon_holmes.pdf (last accessed 23 December 2019); SUZANNE KINGSTON, GREENING EU COMPETITION LAW AND POLICY (2011)..

4 Sarah Beeston, *Competition Law and Sustainability Initiatives*, in Juliane Kokott, Petra Pohlmann & Romina Polley (eds), *Festschrift für Dirk Schroeder* (2018) 111-125; JULIAN NOWAK, ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENTS LAW (2016); Julian Lund, *Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview*, Lund University Research Paper Series, LundLawCompWP 3/2019, Dec. 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484964 (last accessed 23 December 2019).

5 Recent empirical studies show a correlation between an increase in demand side concentration on the relevant labour markets and a decline of the wages paid there, *see*, e.g., José Azar, Ioana E Marinescu & Marshall Steinbaum, *Labor Market Concentration* (2018), available at: https://ssrn.com/abstract=3088767 (last accessed 23 December 2019); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (2018) NBER Working Paper No. 24307, available at: https://www.nber.org/papers/w24307 (last accessed 23 December 2019); David Autor, David Dorn, Lawrence F Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms* (2017) NBER Working Paper No. 23396, available at: https://www.nber.org/papers/w23396 (last accessed 23 December 2019); Wyatt J Brooks, Joseph P Kaboski, Yao Amber Li & Wei Qian, *Exploitation of Labor? Classical Monopsony Power and Labor's Share*' (2019) NBER Working Paper No. 25660, available at: https://www.nber.org/papers/w25660 (last accessed 23 December 2019). On policy implications *see* Suresh Naidu, Eric A Posner & E Glen Weyl, *Antitrust Remedies for Labor Market Power* (2018) 132 Harvard Law Review 537-601; Ioana E Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets* (2019) 94 Indiana Law Journal 1-32; Herbert Hovenkamp, *Competition Policy for Labour Markets* (2019) DAF/COMP/WD(2019)67, OECD Roundtable on Competition Issues in Labour Markets, available at: https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdff (last accessed 23 December 2019); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets* (2019) 33 Journal of Economic Perspective 69-93.

6 Lina Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and its Discontents (2017) 11 Harvard Law & Policy Review 235-294; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate* (2018) 9 Journal of European Competition Law & Practice 131-132; Jonathan B Baker & Steven C Salop, *Antitrust, Competition Policy, and Inequality* (2015) 104 Georgetown Law Journal 1-28; Ioannis Lianos, The Poverty of Competition Law – The Short Story, in Damien Gerard & Ioannis Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2018) 45-87. Taking a critical stance Daniel A Crane, *Antitrust and Wealth Inequality* (2016) 101 Cornell Law Review 1171-1228; Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth* (2017). Faculty Scholarship at Penn Law. 1769/ CPI Antitrust Chronicle October 2017 1-7, available at: https://scholarship.law.upenn.edu/faculty_scholarship/1769/ (last accessed 23 December 2019).

national or EU-industrial policy[7], or gender equality[8] are perceived as to constitute issues worthy of recognition in antitrust law enforcement. Consumer welfare and economic efficiency are considered insufficient guiding principles for tackling the competitive perils of our age. This concerns cartels, abuses of dominance, as well as the merger control laws. This article will focus on the latter.

Albeit not exclusively a competition law concern, the aforementioned topics are being argued as to have something to do with the functioning of markets and therefore to bear a natural link to matters of antitrust. This is where the argument becomes full circle: the more economic approach resting on the consumer welfare standard is made responsible for antitrust policy becoming agnostic towards normative implications of antitrust law. In this article, the term 'normative' describes those societal goals that are argued to fall outside of the scope of what is captured by the consumer welfare standard. Consumer welfare, in this article, means consumer surplus[9], since this is the most commonly used[10] meaning of it in antitrust. Also, to avoid confusion, it must be stressed that this article is not about the question as to whether competition or economic welfare have an ethical dimension and what impact that might have on the construal and the enforcement of the antitrust laws.[11] This article is about those goals that fall outside the consumer welfare paradigm.

In the following, I venture to analyze the aforementioned observations. The article will first assess the intellectual streams behind this most recent call for normativity in antitrust (at II.). It will then home in on the consumer welfare standard. The article will test the reproach that consumer welfare tends to neglect societal goals other than low prices (at III.). Subsequently, the analysis will elaborate on the intricacies of balancing consumer welfare against normative goals (IV.). It will end with general conclusions (V.).

II. THE CALL FOR NORMATIVITY IN ANTITRUST

The call for extending the reach of the antitrust radar to normative goals can be heard on both sides of the Atlantic, and it comes in various tunes. The most vocal strand of literature currently resonates from the US. It frames itself as the "Neo-Brandeis School". Notable

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7 *See* Peter Altmaier, Bruno Le Maire & Jadwiga Emilewicz, *Modernising EU Competition Policy*, 4 July 2019, available at: https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4 (last accessed 23 December 2019).

8 Sarah Long, *Gender Inequality, Market Distortion and Consumer Welfare: A Call to Action for Competition Authorities* (2019) Journal of European Competition Law & Practice 267-268.

9 Consumer surplus, in loose words, is the delta between the consumer's willingness to pay and the actual price of a service or good.

10 Pieter Kalbfleisch, *Aiming for Alliance: Competition Law and Consumer Welfare* (2011) Journal of European Competition Law & Practice 108, 111: "In economic terms, consumer welfare is the consumer surplus." Some authors, however, give it a different meaning or use deviating terminology, on these terminological and conceptual issues *see* Barak Y Orbach, *The Antitrust Consumer Welfare Paradox* (2010) Journal of Competition Law & Economics, 133-164; some economists prefer to speak of "consumer surplus" instead of consumer welfare and to use the notion of "welfare standard" to describe "net social welfare", *see*, for example, Damien J. Neven & Lars-Hendrik Röller, *Consumer surplus vs. welfare standard in a political economy model of merger control* (2005) International Journal of Industrial Organization 829-848.

11 On that *see*, e.g., Maurice E Stucke, *Morality and Antitrust* (2006) Columbia Business Law Review 443-543; Alfonso Lamadrid de Pablo, *Competition Law as Fairness* (2017) 8 Journal of European Competition Law & Practice 147-148; OLES ANDRIYCHUCK, THE NORMATIVE FOUNDATIONS OF EUROPEAN COMPETITION LAW (2017); Stefan Thomas, *Der Schutz des Wettbewerbs in Europa - Welcher Zweck heiligt die Mittel?* (2011) Juristenzeitung 485-495.

proponents are – among others – *Lina Khan, Sandeep Vaheesan* and *Tim Wu*.[12] Relying on principles voiced by former Justice *Louis Brandeis*,[13] they argue that the effects doctrine and the focus on consumer welfare have rendered antitrust policy too restricted in scope and failed to keep markets open and competition free.[14] The *Neo-Brandeisians* therefore advocate the idea of taking into consideration the wider societal implications of market conduct. *Lina Khan* states:[15] "The Chicago School focus on 'consumer welfare,' by contrast, does focus antitrust law on one particular outcome—the supposed welfare of the consumer. This has warped America's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers. The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs".

A similar strand of thinking to push antitrust beyond consumer welfare is spreading in the EU. Legal scholarship points out that the antitrust laws are not confined to safeguarding economic efficiency. They can also, so it is argued, embrace non-economic goals, which makes antitrust law a – metaphorical – "sponge".[16] Competition Commissioner *Margrethe Vestager* has recently alluded to the broader societal context with respect to the aims of antitrust enforcement. Her predecessors *Joaquín Almunia* and *Neelie Kroes* as well as former Director

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[12] *See*, e.g., TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lina M Khan, *Amazon's Antitrust Paradox* (2017) 126 Yale Law Journal 710-805; Lina M Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents* (2017) 11 Harvard Law & Policy Review 235-294; Lina M Khan, *The New Brandeis Movement: America's Antimonopoly Debate* (2018) 9 Journal of European Competition Law & Practice 131-132; Lina M Khan, *The Ideological Roots of America's Market Power Problem* (2018) 127 Yale Law Journal Forum 960-979; Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?* (2018) 127 Yale Law Journal Forum 980-995; Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages* (2019) 78 Maryland Law Review 766-827; Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy* (2019) 124 Penn State Law Review 1-55.

[13] Most known for a series of essays published in "Harper's Weekly" between November 1913 and January 1914 (published as a book under the title, *Other People's Money and How the Bankers Use It* (1914)). *See* also Justice Brandeis' dissenting opinion in Louis K. Liggett Co. v. Lee, 288 U.S. 517, 580: "There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that, by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired, and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome, and that only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty." On the idea of bigness as a threat to competition *see* Barak Y Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness* (2012) 85 Southern California Law Review 605-655.

[14] *See* also Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?* (2018) 127 Yale Law Journal Forum 980, 990, alleging that the consumer welfare paradigm in focusing on consumer effects "*ignores other critical manifestations*" of power.

[15] Lina M Khan, *The New Brandeis Movement: America's Antimonopoly Debate* (2018) 9 Journal of European Competition Law & Practice 131-132; Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?* (2018) 127 Yale Law Journal Forum 980, 990: "Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations."

[16] Ariel Ezrachi, *Sponge* (2017) 5 Journal of Antitrust Enforcement 49-75; *see* also Ariel Ezrachi, *The Goals of EU Competition Law and the Digital Economy* (2018) Oxford Legal Studies Research Paper No. 17/2018, available at: https://ssrn.com/abstract=3191766 (last accessed 23 December 2019). *See* also Ioannis Lianos, *Polycentric Competition Law* (2018) 71 Current Legal Problems 161–213.

General Sir *Philip Lowe* made strong cases for consumer welfare as the ultimate goal of competition law[17], and *Neelie Kroes* in particular expressed her sympathy to "aggressive competition – including by dominant companies".[18] While *Margrethe Vestager* also has stated that, in the context of merger control, consumer welfare is taken into account,[19] she now strikes a more accommodating tone. In a speech, she advocated antitrust law to promote that markets work "*more fairly*" in order to "*make our society a better place to live*".[20] *Andreas Mundt*, President of the German Bundeskartellamt, has also recently alluded to "fair" competition as the goal of antitrust.[21] Whereas consumer welfare, fierce competition, fairness, and a better place to live do not contradict each other[22], they are not tantamount topics either. The fairness paradigm, as mentioned in those statements, can possibly be seen as to suggest the introduction of a normative concept into antitrust, which might be broader than mere consumer welfare. It

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[17] Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, European Consumer and Competition Day, London, 15 September 2005: "Consumer welfare is now well established as the standard the Commission applies when assessing mergers", available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 (last accessed 23 December 2019); Joaquín Almunia, *Competition and consumers: the future of EU competition policy*, European Competition Day, Madrid, 12 May 2010: "All of us here today know very well what our ultimate objective is: Competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions.", available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_233 (last accessed 23 December 2019); Sir Phillip Lowe, speech "Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?", available at: https://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf (last accessed 23 December 2019): "Ladies and Gentlemen, my overall message is short and simple. Yes, consumer welfare and efficiency are the new guiding principles of EU competition policy. Whilst the competitive process is important as an instrument, and whilst in many instances the distortion of this process leads to consumer harm, its protection is not an aim in itself. The ultimate aim is the protection of consumer welfare, as an outcome of the competitive process." *See* also Svend Albæk, Consumer Welfare in EU Competition Policy, in Heide-Jørgensen/Bergqvist/Neergaard/Poulsen (eds), *Aims and Values in Competition Law* 67 (2013). For the US *see* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) 2: "The only articulated goal of the antitrust laws is to benefit consumers…"

[18] Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82 Speech at the Fordham Corporate Law Institute New York, 23rd September 2005, SPEECH/05/537, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_537 (last accessed 23 December 2019).

[19] Margrethe Vestager, *Competition in Changing Times*, FIW Symposium, Innsbruck, 16 February 2018: under the headline "The consumer welfare standard in merger control" she stated: "When we look at a merger, our responsibility is clear. We're here to make sure consumers don't suffer." Available at: http://freshfields.images.vuelio.uk.com/file/1454430445/47273952304/width=-1/height=-1/format=-1/fit=pad/rev=0/t=422290/e=never/k=a7718d0f/20180216-SpeechbyCssrVestager-Competitioninchangingtimes-FIW(002)1.pdf (last accessed 23 December 2019).

[20] Margrethe Vestager, *Fairness and competition*, GCLC Annual Conference, Brussels, 25 January 2018, available at: https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en (archived page, last accessed 23 December 2019): "And the fact is, the competition rules aren't there just because we think that competition is a good thing in itself. Like any of the other rules that govern our world, we have competition rules because we believe they **make our society a better place to live**. That they make our markets **work more fairly** for consumers." (emphasises added).

[21] Andreas Mundt, *Wettbewerb und Fairness – wie Europa den richtigen Rahmen setzt*, in Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb e.V. (Ed.), Jahrbuch 2019, Heft 269 (2020), 3-14. *Mundt*, however, while positing fair competition as a goal of antitrust, does not commit to a certain conceptualization of fairness in antitrust.

[22] On that *see* Juliane Kokott & Daniel Dittert, *Das Konzept der Fairness im europäischen Wettbewerbsrecht*, in Juliane Kokott, Petra Pohlmann & Romina Polley (eds), *Festschrift für Dirk Schroeder* (2018) 407-413.

can, by the nature of the ambiguity of the fairness concept, reach outside the realm of economics entirely.[23]

The debate has grown out of its academic infancy. EU merger cases provide examples for the clash of consumer welfare with normative goals. In *Bayer/Monsanto*,[24] for example, third parties argued against an approval of the transaction citing concerns about food safety, the environment and the climate[25] over the products of the merged entity. The petitioners feared, among other things, that agrochemicals being produced more efficiently as a result of the transaction would pose ecological risks. Although the Commission did not cater to these observations in its decision, the example shows how the idea of normative goals in antitrust can become an argument to challenge the outcome of an economic effects-analysis.[26] In a similar vein, the merger prohibition in *Siemens/Alstom*[27] was criticized by the German and the French governments for its alleged failure to reflect the wider industrial interests of the bloc. It was posited that the antitrust watchdog ought to have balanced the EU's interest in countering a highly subsidized Chinese train production in its overall conclusions on the proposed merger. The German and French governments subsequently conjured up ways to amend the merger

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[23] While the concept of "envy free allocation" integrates aspects of fairness into welfare analysis (on that *see* ROGER A. MCCAIN, WELFARE ECONOMICS: AN INTERPRETATIVE HISTORY, Chapter 8, 1st Ed (2019)), the notion of "fairness" in itself is not coined to a specific school of thought or concept in economic terms. It can be broader and comprise a plethora of societal perceptions of what is right and appropriate. Some authors seek to reconcile fairness and its emanations with the concepts of antitrust law, *see* Alfonso Lamadrid de Pablo, *Competition Law as Fairness* (2017) 8 Journal of European Competition Law & Practice 147-148. With a critical view on fairness as a principle for policy Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (2001) 114 Harvard Law Review 961-1388; critical about the use of moral vocabulary when describing the aims of a free economy *see* Richard A Posner, *Law and Economics Is Moral* (1990) 24 Valparaiso University Law Review 163-173. For a discussion on the moral concepts and the law *see* Richard A Posner, *The Problematics of Moral and Legal Theory* (1998) 111 Harvard Law Review 1637-1717. On the idea of attributing to antitrust law an element of morality beyond mere utilitarian efficiency considerations *see* Maurice E Stucke, *Morality and Antitrust* (2006) Columbia Business Law Review 443-543.

[24] Case M.8084 *Bayer/Monsanto*. *See* Commission Press Release, 21 March 2018, IP/18/2282: "During its investigation, the Commission has been petitioned through emails, postcards, letters and tweets expressing concerns about the proposed acquisition. The Commission's mandate under the European merger control rules is to assess the merger solely from a competition perspective. This assessment must be impartial and is subject to the scrutiny of the European Courts. Other concerns raised by the petitioners relate to European and national rules to protect food safety, consumers, the environment and the climate. While these concerns are of great importance, they cannot form the basis of a merger assessment. Please also *see* Commissioner Vestager's response to the petitions published in August 2017.", available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2762 (last accessed 23 December 2019).

[25] Commission Press Release 22 August 2017, Mergers: Commission opens in-depth investigation into proposed acquisition of Monsanto by Bayer, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2762 (last accessed 23 December 2019). *See* also Ioannis Lianos with Dmitry Katalevsky, *Merger Activity in the Factors of Production Segments of the Food Value Chain: - A Critical Assessment of the Bayer/Monsanto merger*, Centre for Law, Economics and SocietyPolicyPaper Series: 2017/1, available at: https://discovery.ucl.ac.uk/id/eprint/10045082/1/Lianos_cles-policy-paper-1-2017.pdf (last accessed 23 December 2019).

[26] Indeed, *Margrethe Vestager* wrote a reply to the more than 55.000 petitions and stated: "Many of you warn about potential negative effects linked to Monsanto's and Bayer's products, including risks for human health, food safety, consumer protection, the environment and the climate. It goes without saying that Bayer and Monsanto have been – and will continue to be – bound by the strict rules we have in place to address all these issues. While these concerns are of great importance, they do not form the basis for a merger assessment. … We assess whether the transaction would lead to competition concerns due negative effects on prices, less choice and less innovation as well as increased dependence on few global suppliers.", *see* Margrethe Vestager, Reply to a petition, 22 August 2017, https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf accessed 12 November 2019 (last accessed 23 December 2019).

[27] Case M.8677 *Siemens/Alstom*.

regulation in order to account for industrial policy considerations. This initiative revived a debate on whether and to what extent industrial policy should be an element of European merger control that had already been fought out in the 1980s. At the end of the legislative consultations in preparation of the enactment of the EC-Merger Regulation, the competition advocates had won, confining the EUMR to a competitive assessment.[28] The criticism of the Commission's decision in *Siemens/Alstom*, however, created a heavy blow to this established stance. France and Germany, together with the Polish government, released a joint initiative to modernise EU competition policy.[29] This intergovernmental proposal assumed that the Competitiveness Council should guide the Commission's merger enforcement "strategy". This strategy should be shaped, so it was argued, at "a political level…in agreement with the respective Presidency," and the new framework should provide the opportunity for recognizing "the competitiveness of EU industrial sectors in order to provide input into the European Commission's strategy and policy."[30] Those proposals got stuck amid more urgent matters of European politics. Yet the idea behind them clearly points towards a merger regime that is capable of balancing societal goals against direct consumer benefits.

Another recent topic for normativity in merger control is decent wages. Studies claim to have found a correlation between an increase in demand-side concentration on the labour market and a decline in the level of wages.[31] Such findings do not strike as particularly surprising, given that the demand for labour is not fundamentally different from the demand for any other input, so that bargaining power on the demand side will most likely effect prices on the supply side for labour.[32] This in itself, however, is not likely to precipitate any harm to consumers.[33] On the contrary, a reduction in labour costs can allow for downstream price reductions. As far as the situation between employees and employers is concerned, the negotiation of wages is a matter of inter-party rent shifting. Antitrust law, however, is about making sure that competition increases total welfare and – if a consumer welfare standard is applied – the consumer's share is as great as possible.[34] It is not, however, about ensuring

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[28] On this historical debate *see* Thorsten Käseberg & Arthe Van Laer, Competition Law and Industrial Policy, Conflict, Adaption, and Complementarity, in Kiran Klaus Patel & Heike Schweitzer (eds), *The Historical Foundations of Competition Law* 162-185 et seqq. (2013).

[29] *See* Peter Altmaier, Bruno Le Maire & Jadwiga Emilewicz, *supra* note 7.

[30] *See* Peter Altmaier, Bruno Le Maire & Jadwiga Emilewicz, *supra* note 7, at 3.

[31] José Azar, Ioana E Marinescu & Marshall Steinbaum, *supra* note 5; José Azar & Xavier Vives, *supra* note 5; Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *supra* note 5; David Autor, David Dorn, Lawrence F Katz, Christina Patterson & John Van Reenen, *supra* note 5; Wyatt J Brooks, Joseph P Kaboski, Yao Amber Li & Wei Qian, *supra* note 5.

[32] *See* e.g. Stefan Thomas, Ex-ante and ex-post control of buyer power, in Di Porto/Podszun (Ed.), *Abusive Practices in Competition Law* (2018) 283.

[33] That is unless you conceive of persons in their capacity as employees as consumers and define their salary as a source of consumer welfare. Such a consumer welfare concept, however, will eventually become so broad that it can hardly serve as a proper guidance for antitrust enforcement. It would involve far reaching balancing exercises in that one would have to weigh price reductions benefitting end-consumers against the effects that a reduction in salary has on a small group of employees. For a critical evaluation of labor antitrust considerations *see* Hiba Hafiz, *Labor Antitrust's Paradox* (2019) University of Chicago Law Review (forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3393039 (last accessed 23 December 2019).

[34] There is an ongoing scholarly debate on whether total welfare or consumer welfare is the appropriate standard for antitrust enforcement, *see* Louis Kaplow, On the Choice of Welfare Standards in Competition Law, in Daniel Zimmer (ed), *The Goals of Competition Law* (2012) 3-26; Damien J Neven & Lars-Hendrik Röller, *Consumer surplus vs. welfare standard in a political economy model of merger control* (2005) 23 International Journal of Industrial Organization 829-848; Barak Y Orbach, *The Antitrust Consumer Welfare Paradox* (2010) Journal of Competition Law & Economics 133-164; An Renckens, *Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense* (2007) Journal of Competition Law & Economics 149-179; Bruce R Lyons, *Could Politicians be More Right than Economists? A Theory of*

appropriate shares of contractual rents between bargaining entities as an end in itself. The latter is a matter of distribution of rents, not of increasing welfare.[35,36] Nonetheless, some legal scholars argue, in the light of the aforementioned studies, that merger control should look at the effects of a transaction on the appropriateness of wages.[37] That implies a shift in merger assessment. Lower input costs are not considered as an economic efficiency. Instead, decent wages are perceived as something that warrants protection as an end in itself through merger control even if no inefficiencies[38] are being created.[39] Distribution of wealth, one could say, trumps over economic efficiency.[40]

It would be fascinating to speculate about the societal dynamics behind the emergent ideas of normative goals in antitrust.[41] The development echoes, on many accounts, the "drumbeat"[42] of a broader societal postulate to tie the legal order and law enforcement more closely to normative concepts and values unrelated to consumer welfare.[43] The shift from efficiency towards normativity can therefore possibly be conceived of as a public narrative vocalizing the concomitant individual fears of becoming irrelevant in the face of globalization and technology. This article, however, is not intended to assess societal causalities behind this

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Merger Standards, Revised CCR Working Paper CCR 02-1, Version 15 May 2002, available at: http://competitionpolicy.ac.uk/documents/107435/107587/ccp2-1.pdf (last accessed 23 December 2019). In this article, I stick to consumer welfare as it is the default standard under EU antitrust law enforcement.

35 Welfare is not affected unless firms seek to reduce employees' wages by strategically reducing demand for this type of labour. If such a reduction takes place, it can reduce welfare in the same way as a monopsonistic reduction of purchases on markets for goods can reduce the optimal quantity. Yet if such an effect on the optimal quantity is absent, the mere exercise of bilateral bargaining power with no effect on quantity will most likely only lead to a rent shifting between the negotiating parties. *See* on the difference between bilateral bargaining power and single price monopsony in antitrust analysis Stefan Thomas, *supra* note 32.

36 The ECJ has even decided that Article 101 TFEU is not applicable to collective bargaining on labour markets in order not to interfere with the process of rent adjustment between the – collectively – negotiating parties, *see*, e.g., Case C-67/96 Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] E.C.R. I-5751, para 59: "It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."

37 *See* Suresh Naidu, Eric A Posner & E Glen Weyl, *supra* note 5.

38 As mentioned before, a strategic reduction in the demand for a type of labour could create inefficiencies (*see* footnote 35). Yet if bilateral bargaining power is used to reduce wages without any decline in quantity, such inefficiencies will be absent.

39 It is conceivable that a reduction in wages leads to detrimental effects that ultimately harm consumers. By analogy to theories of harm established in other fields of the economy, low wages might bear negatively on innovation. It is not clear, however, if and to what extent such assumptions would be justified. The argument made by the proponents of a labour market effects-analysis, however, does not depend on such a theory of consumer harm. Rather, it is considered to reflect a genuine interest of employees as a standalone factor in merger policy.

40 On "distributive justice" in antitrust analysis s*ee* Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws* (1982) 51 George Washington Law Review 1-31.

41 In fact, it is embedded in a broader stream of thinking that is sometimes described as "antitrust populism", *see* Carl Shapiro, *Antitrust in a time of populism* (2018) 61 International Journal of Industrial Organization 714-748; Barak Orbach, *Antitrust Populism* (2017) 14 NYU Journal of Law & Business 1-25. On the global rise of populism *see* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016).

42 This figurative speech is used by Lina M Khan to describe the societal relevance of Neo-Brandeis, *see* Lina M Khan, *supra* note 15, at 132.

43 *See*, e.g., the argument that the law should protect consumer rents from being skimmed by perfect price discrimination through artificially intelligent agents, although this is not in itself harmful to societal welfare without more, Gerhard Wagner & Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions* (2019) 86 University of Chicago Law Review 581-609.

stream of thinking.[44] Neither is it the purpose to evaluate normative concepts ethically or to delve into the debate on whether wealth or economic efficiency are values after all.[45] They most likely are not, since they merely help to achieve other goals. Yet definite answers on these questions are not dispositive to the further analysis. Rather, the research focus will rest on the legal and societal tradeoff that would come along with an integration of normativity into merger enforcement.

In the following, I venture to demonstrate that the call for normativity in merger control is problematic. In part it is based on unjustified criticism of the consumer welfare approach, and in other respect it would lead to conceptual problems within the enforcement system. In a first step, I will lay out why the consumer welfare approach is more powerful than often insinuated. It is capable of adapting to any non-economic affection consumers have, so long as consumers are willing to pay for those affections (sub III.). Subsequently, I will argue that, to the extent that consumers do not have a willingness to pay for normative goals, it would be antithetical to the idea of competition to consider those goals in merger decisions (sub IV.). The authority would balance the promotion of these goals against consumer effects precipitated by the merger. This would involve the attribution of a weight to these normative goals reflecting their societal relevance. That, however, is a political exercise, since the number and quality of potentially relevant normative goals is practically unlimited. The normativity approach assumes to know better than the entirety of consumers how a market should look like. By this trait, the normativity approach deprives just that group of persons, that are at the heart of antitrust, the consumers, of their most precious right in competition: To be the ultimate sovereign over the outcomes of markets. The normativity approach thereby promotes the opposite of what competition is supposed to achieve. Ultimately, antitrust authorities could become subject to undue influence by political stakeholders. This could eventually undermine their role as impartial competition watchdogs.[46]

III. WHY THE CONSUMER WELFARE STANDARD IS NOT A MERE PRICE GAUGING TOOL

The claim for normativity in antitrust law is first and foremost based on the allegation that the consumer welfare approach falls short of embracing the wider societal implications of a market conduct. Two prominent arguments can be identified that deserve closer scrutiny: The consumer welfare approach relies on an effects-analysis and therefore, allegedly, does injustice

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[44] On the role of popular rhetoric and sentiments in the current antitrust debate *see* Thibault Schrepel, *Antitrust Without Romance* (May 28, 2019), NYU Journal of Law & Liberty - 13 N.Y.U. J.L. & Liberty (Forthcoming, 2020), available at: SSRN: https://ssrn.com/abstract=3395001 (last accessed 23 December 2019).

[45] *See*, e.g., on that Ronald M Dworkin, *Is Wealth a Value?* (1980) 9 Journal of Legal Studies 191-226; Ronald M Dworkin, *Why Efficiency?* (1980) 8 Hofstra Law Review 563-590. This debate ultimately leads to the question whether distributive justice is best served by tax law instead of inflating other norms with distributive goals, *see* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income* (1994) 23 Journal of Legal Studies 667-681; Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (2001) 114 Harvard Law Review 961-1388; Louis Kaplow & Steven Shavell, *Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice* (2003) 32 Journal of Legal Studies 331-362; Tay-Cheng Ma, *Antitrust and Democracy: Perspectives from Efficiency and Equity* (2016) Journal of Competition Law & Economics 233-261.

[46] The Commission in its preparatory work for the ECN+-directive has attested to attempts of exercising undue political influence on competition authorities, EU Commission, Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 22.3.2017, COM(2017) 142 final, 2017/0063 (COD), p. 2. For further comments on these findings *see* Stefan Thomas, *Antitrust Enforcement and Political Influence* (2017) Neue Zeitschrift für Kartellrecht (NZKart) 489-491.

to competition as a dynamic process. Competition as a dynamic process,[47] however, deserves protection as an "institution", so it is argued. This view is very popular among German legal scholars,[48] and it has gained traction among the *Neo-Brandeisians* (sub A.). The second argument against the consumer welfare standard is that, since it (conceptually) measures consumer surplus as a monetary amount, it is more or less confined to gauging price effects and foregoes all other non-price effects a merger can have (sub B.). Both arguments, however, are brittle.

A. The problem with the "competitive process" as the ultimate antitrust goal

The idea that competition as a process is a goal superior to mere increases in consumer surplus is a core element of the *Neo-Brandeisian* school of thought.[49] This view is far from new, though. It is the fundamental idea of the ordo-liberal thinking about antitrust that has an important tradition in Germany.[50] The problem with this stance, however, is that it cannot explain in which way colliding freedoms shall be reconciled under the antitrust laws. The freedom to compete and the customer's freedom of choice might collide with the freedom of firms to merge. All these freedoms, however, must be balanced against each other in order to decide an antitrust case. A "total freedom approach" cannot explain how this balancing is supposed to be executed in a scientifically verifiable way.

Therefore, the existing merger control laws in the EU and the US do not rely on "freedom to compete" as their benchmark. Rather, their substantive criteria are deeply rooted in the consumer welfare paradigm. Mergers must be cleared, unless they substantially lessen competition (SLC-Test in Section 7 of the US Clayton Act), or significantly impede effective

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[47] The concept of competition as a dynamic process is closely linked to *Friedrich August von Hayek's* idea of competition as a discovery procedure, *see* Friedrich August von Hayek, *Competition as a Discovery Procedure* (2002) 5 Quarterly Journal of Austrian Economics 9-23.

[48] *See*, e.g., Wernhard Möschel, Competition Policy from an Ordo Point of View, in Alan Peacock & Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (1989) 142-159; Wernhard Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy* (2001) 157 Journal of Institutional and Theoretical Economics 3-13; Wernhard Möschel, *The Goals of Antitrust Revisited* (1991) 147 Journal of Institutional and Theoretical Economics 7-23; Peter Behrens, The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU, in Fabiana Di Porto & Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (2019) 5-25; *see* also David J Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe* (1994) 42 American Journal of Comparative Law 25-84; Lawrence A Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea* (1998) 16 Berkeley Journal of International Law 197-233; Heike Schweitzer, The role of consumer welfare in EU competition law, in Josef Drexl, Reto M Hilty, Laurence Boy, Christine Godt & Bernard Remiche (eds) *Festschrift für Hanns Ullrich* (2009) 511-539.

[49] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) 136: "The 'protection of competition' test is focused on protection of a process, as opposed to the maximization of a value."; Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice* (2018) Competition Policy International, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249173 (last accessed 23 December 2019); Lina M Khan, *Amazon's Antitrust Paradox* (2017) 126 Yale Law Journal 710, 717: "Rather than pegging competition to a narrow set of outcomes, this approach would examine the competitive process itself."; *see* also Marshall Steinbaum & Maurice E Stucke, *The Effective Competition Standard: A New Standard for Antitrust* (2018), available at: https://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf (last accessed 23 December 2019).

[50] *See* Wernhard Möschel, *The Goals of Antitrust Revisited* (1991) 147 Journal of Institutional and Theoretical Economics 7, 9: "The purpose of the GWB is to protect the free process of competition."; Wernhard Möschel, Competition Policy from an Ordo Point of View, in Alan Peacock & Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (1989) 142, 146: "The actual goal of the competition policy of Ordo-liberalism lies in the protection of individual economic freedom of action as a value in itself, or vice versa, in the restraint of undue economic power."; Lawrence A Sullivan & Wolfgang Fikentscher, *supra* note 48, at 222: "They pleaded for a concept of competition that was process-oriented, dynamic, and aimed at political and economic liberty."

competition (SIEC-Test in Article 2 EUMR). The laws rest on the assumption that a lessening of/impediment to competition is acceptable so long as it does not amount to a substantial/significant degree. This substantiality/significance criterion, however, cannot be construed as to relate solely to the reduction in competition, since any (horizontal[51]) merger, irrespective of the market shares of the parties involved, will reduce competition to some extent. If competition as a process were the only goal of merger control, and if this goal trumped over any consumer welfare enhancement, any (horizontal) merger would have to be prohibited *per se*. It would not be convincing to construe the notion of significance as a *de minimis* criterion either. Otherwise, it would be possible to monopolize a market by a series of creeping *de minimis*-transactions. The only economically plausible definition of the *de minimis* threshold, therefore, is whether the consumer harm precipitated by the transaction is offset by concomitant consumer benefits.[52] If it is not, the impediment is significant.

The reason why the merger laws allow for mergers to be cleared is that *despite* the elimination of competition between the merging firms (in a horizontal merger setting), the transaction can bring about efficiencies[53] that ultimately benefit consumers. Indeed, it must always be borne in mind that the effects of a merger are almost never exclusively harmful or exclusively beneficial.[54] Merger efficiencies, especially cost reductions[55], can give the merged entity incentives to lower prices, which can benefit downstream consumers. Also, other non-price related efficiencies might arise, such as improved research & development.[56] If these efficiencies offset the consumer harm that is being precipitated by the elimination of competition between the merging parties, the transaction is cleared. If merger efficiencies, on the other hand, are unlikely to offset the consumer harm of the transaction, it is blocked. The

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[51] For the sake of simplification, the following relates to horizontal mergers. However, it holds true, *mutatis mutandis*, for any other merger-related impediment.

[52] *See* on that Stefan Thomas, T*he Known Unknown: In Search for a Legal Structure of the Significance Criterion of the SIEC Test* (2017) Journal of Competition Law & Economics 346-387.

[53] Lars-Hendrik Röller, Johan Stennek & Frank Verboven, *Efficiency Gains from Mergers*, p. 71 at 4.4 para 13, https://www.academia.edu/9026554/Efficiency_Gains_from_Mergers (last accessed 23 December 2019): "Essentially all horizontal mergers increase market power and reduce allocative efficiency. If this was the only effect of horizontal mergers, a general prohibition against horizontal mergers would be the natural policy. However, mergers also lead to cost-savings and other efficiencies."; MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE (2004) 238: "In the absence of efficiency gains, a merger should be expected to lower both consumer surplus and total welfare. However, it is well established in the economic literature that efficiency gains might offset the enhanced market power of merging firms and result in higher welfare."

[54] *See* generally Oliver E Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs* (1968) 58 American Economic Review 18-36; Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis* (1990) 80 American Economic Review 107-126. That is the very reason why mergers – unlike cartels – are not *per se* prohibited. *See* with respect to this the difference in the approach towards efficiencies of cartels and mergers Stefan Thomas, *supra* note 52, at 366-68.

[55] This concerns reductions in variable costs or marginal costs, yet even reductions in fixed costs cannot be ruled out as a source for price reductions, *see* on that MICHAEL ROSENTHAL & STEFAN THOMAS, EUROPEAN MERGER CONTROL (2009), paras 512-515.

[56] With respect to the appropriation of research & development efforts, a merger related reduction in competition can create incentives to innovate, *see* US Horizontal Merger Guidelines 2010, § 10, p. 31: "The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations.", available at: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (last accessed 23 December 2019); on the underlying debate regarding innovation competition and horizontal mergers *see* Giulio Federico, *Horizontal Mergers, Innovation and the Competitive Process* (2017) 8 Journal of European Competition Law & Practice 668, 675; Bruno Jullien & Yassine Lefouili, *Horizontal Mergers and Innovation* (2018) 14 Journal of Competition Law & Economics 364, 384; Guillermo Marshall & Álvaro Parra, *Innovation and competition: The role of the product market* (2019) 65 International Journal of Industrial Organization 221, 241; Giulio Federico & Gregor Langus & Tommaso Valletti, *Horizontal Mergers and Product Innovation* (2018) 12, available at: https://ssrn.com/abstract=2999178 (last accessed 23 December 2019).

latter is often the case where dominance is being created or strengthened, because the merged entity might have less incentives to pass efficiencies on to consumers[57], or it might get the opportunity to increase prices due to an increase in market power. The benchmark for reconciling the freedom to merge with the consumers' freedom of choice therefore is not "total freedom". It is consumer welfare. Exclusively relying on "freedom to compete" would be incapable of producing any meaningful analytical result in merger control. The popular adage that "the best way to achieve benefits for consumers is unimpeded competition" sounds compelling, for it is elegantly simple a statement. Yet as is often the case with good rhetoric, it omits half the truth. Sometimes, to restrict competition to some degree can serve consumers even better.

B. Why consumer welfare is not "only about prices"

The allegation that the consumer welfare approach is only about price effects should not be endorsed either. Consumer surplus is the difference between the price that the customer would have been willing to pay for a given quantity (willingness to pay, "WTP"), and the actual price she has paid for this quantity.[58] The greater the delta is, the greater the benefit which the consumer derives from making a contract. Competition tends to increase this delta, since it generally leads, among other things, to lower prices. The common misconception with respect to the consumer welfare approach is that the only way to increase the delta between WTP and price is by reducing price, viz. that consumer welfare is only about price effects. That, however, would be an unconvincing interpretation of the test.[59] The delta can as well grow if WTP rises. By that, the consumer welfare approach can accommodate any consumer preference beyond merely low prices. Those consumer preferences do neither have to be of an economic nature nor do they have to carry in themselves any economic justification at all.

To the extent that consumers of chicken-meat, for example, appreciate when chickens are being raised under high standards of animal welfare, their WTP for animal-welfare-enhanced chicken meat products can be greater than for conventional substitutes. Any merger that helps producing chicken to higher standards of animal welfare can therefore increase animal welfare and consumer welfare at the same time, even if the products will not be cheaper than conventional chicken meat. The product comes closer to the specified consumer demand, so that the delta between WTP and price can increase.

If, on the other hand, consumers do not have a sufficiently increased WTP with respect to animal-welfare-enhanced chicken meat, the production of it will not increase consumer rent if it comes along with a price increase that is greater than the increase in willingness to pay.[60] In the *Chicken of Tomorrow* case in the Netherlands, for example, the Dutch authority (Authority for Consumers & Markets, ACM) examined whether a cooperation between supermarkets, poultry farmers, and broiler meat processors on the animal welfare-friendly production of

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[57] While it must be borne in mind that the pass-on rate will also depend on the marginal revenue function and the marginal cost function.

[58] On the terminology of consumer welfare in this article, which equates consumer welfare with consumer surplus, *see* supra I. INTRODUCTION at notes 9 and 10.

[59] *See* also A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, (October 30, 2018), available at SSRN: https://ssrn.com/abstract=3248140 (last accessed at 23 December 2019).

[60] On ways how the consumer welfare standard can be honed to capture such willingness to pay, including its development in the future, more comprehensively, *see* Roman Inderst & Stefan Thomas, *Prospective Welfare Analysis - Extending Willingness-to-Pay Assessment to Embrace Sustainability*, (25 September 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699693 (last accessed at 27 February 2021); Roman Inderst & Stefan Thomas, *Reflective Willingness to Pay - Preferences for Sustainable Consumption in a Consumer Welfare Analysis*, (27 December 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755806 (last accessed at 27 February 2021).

chicken meat was justified by consumer benefits.[61] The agreement entailed the obligation of Dutch supermarkets to remove regular chicken meat from their offerings and led to higher cost prices. The agency examined whether consumers valued those measures. The analysis revealed "that consumers are prepared to pay more for animal-welfare and environmental improvements, but not for the measures of the Chicken of Tomorrow."[62] Since the WTP only increased to an extent that was insufficient to offset the harm precipitated by the coordination, the agency rejected an efficiency defence and blocked the cooperation. Although this was a cartel case and not a merger, the rationale behind the consumer welfare assessment is the same: The consumer welfare paradigm is able to embrace animal welfare, yet its application is based on economics, not on standalone normative concepts.

Conversely, a merger that caters to consumer demands in that it allows the production of goods or services in a better or cheaper way cannot be blocked on grounds that these enhanced products are undesirable from a societal point of view. The reason is that the merger cannot be blamed for the fact that consumers ignore the societal detriment that certain products or goods may have. To put it in different words: If the problem lies in the product, it is not a lack of competition that is the cause of the unwelcome outcome. It is the consumer preference. Competition is an agnostic principle. A competitive market outcome cannot be "better" in terms of societal goals than the consumers who ultimately determine the outcome of competition. To the extent that consumers act irrationally or irresponsibly, the market outcome will appear to be irrational or irresponsible. The reason for that, however, is the consumer, not a malfunctioning of competition.

Take the *Bayer/Monsanto*[63] merger as an example. Assume that consumers[64] want cheap agrochemicals even though a reduction in their use would benefit the environment. If the merger leads to greater volumes in cheap agrochemicals, it reflects consumer preferences even though it might create negative externalities on the environment.[65] Is this something about which the antitrust agencies should be concerned? No, it is not. This outcome is exactly what markets are supposed to do: cater to consumer preferences.[66] Is the outcome something of concern for the society at large and the legislator? It possibly is, but not as a matter of antitrust. Possibly as a matter of environmental regulation.

The point is that consumers often do want things that deviate from what is considered societally preferable. There are various reasons for why the alleged societal optimum might differ from consumer preferences. It is possible that the persons defining the societal optimum are not the same as the entirety of consumers so that different perceptions of the societal optimum emerge. Also, it is conceivable that people even deviate in their own purchasing decisions from what they would define as optimal for themselves. The so-called privacy

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61 Case 13.0195.66 *Chicken of Tomorrow*.

62 *See* Press Release of 26 January 2015, available at https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition (last accessed 23 December 2019).

63 Case M.8084 *Bayer/Monsanto*.

64 The consumer can be any customer. The consumer welfare approach is not confined to end consumers.

65 Note that I suppose such a negative impact only for the sake of the argument. I do not state that, or under which circumstances, agrochemicals impact negatively on the environment.

66 Accordingly, the question arises whether the analysis of consumers' willingness to pay can be rendered more effective in order to capture consumer preferences which might not emerge at first glance, e.g. with respect to sustainability. Such is different from considering externalities. Roman Inderst and I have elaborated on this in two recent papers, *see* Roman Inderst & Stefan Thomas, Prospective Welfare Analysis - Extending Willingness-to-Pay Assessment to Embrace Sustainability, (25 September 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699693 (last accessed at 27 February 2021); Roman Inderst & Stefan Thomas, Reflective Willingness to Pay - Preferences for Sustainable Consumption in a Consumer Welfare Analysis, (27 December 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755806 (last accessed at 27 February 2021).

paradox[67] can be named here. While consumers state that they appreciate greater protection of their data privacy, they display little willingness to pay more for increased privacy. That, of course, does not mean that the data-protection-regulator should not tackle privacy issues.[68] Also, informational asymmetries that have their root in the complexity of the products, not in a lack of competition, can lead to suboptimal consumer choices.[69] But one cannot blame a lack of competition for that.

One should not make the firms, or the consumer welfare approach, responsible for allegedly "failing" to remedy these issues, so long as consumers do not warrant the societal optimum with a sufficient WTP. In those instances, as fact of the matter, it is neither competition nor the consumer welfare approach that fail. It is the consumer who "fails" to fully embrace what is defined – by certain persons different from the entirety of consumers – as the societal optimum.

IV. ON THE INTRICACY OF BALANCING NORMATIVITY AGAINST CONSUMER WELFARE

Against the afore, the relevant question is not whether normative goals must be considered as an intrinsic element of the protection of competition. The relevant question is whether the pursuit of such normative goals is recognizable *besides* the protection of consumer welfare. It is about whether a dichotomy of goals can be and should be pursued by the merger control laws, that is consumer welfare and normative goals, even though they might eventually conflict with each other.

Such a bifurcated enforcement of the merger control laws certainly would be possible as a matter of law.[70] There is no legal principle stating that the legal order cannot pursue more than one goal. That is pretty obvious. Yet it is questionable whether it would be expedient to do that in the present context with respect to those societal goals that are being discussed here. In the remainder of this article, I want to outline why it would not: First, it would involve an opaque substantive standard when it comes to balancing consumer harm against those normative goals (sub A.). Second, the integration of normative goals into merger control creates problems with respect to the justiciability of merger decisions (sub B.). Third, the consideration of normative goals would raise societal expectations and lead to a politicization of the merger control process (sub C.). It is argued in the following that for these reasons antitrust law should stick with the single purpose of promoting welfare through competition. It should not, however, pursue normative goals *besides* competition. In essence, this postulate is an emanation of the "*Tinbergen principle*". If the government wants to pursue different goals, it needs an equal number of independent linear instruments.[71] Otherwise, the substantive tests to be applied by the respective authorities become opaque, and the enforcers are subjected to perplexing and potentially irreconcilable tasks.

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67 Patricia A Norberg, Daniel R Horne & David A Horne, *The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors* (2007) 41 Journal of Consumer Affairs 100-126.

68 In fact, the EU has taken legislative action, *see* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88.

69 George A Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism* (1970) 84 Quarterly Journal of Economics 488-500.

70 Ariel Ezrachi, *supra* note 16, at 49-75.

71 JAN TINBERGERN, ECONOMIC POLICY: PRINCIPLES AND DESIGN (1964) 53.

A. The Difficulty of Balancing Consumer Harm against Normative Goals

One of the challenges in antitrust law enforcement is the balancing of consumer harm and consumer benefit.[72] The conceptual framework, in economics, for doing that is comparing the delta between WTP and actual price pre-merger and post-merger.[73] Antitrust balancing still poses great difficulty, since it requires quantifying harm and benefit.[74] That is especially intricate when efficiencies other than cost reductions are at issue.[75] Yet this approach, at least, provides a concept for antitrust balancing which lies in comparing consumer surplus pre-merger and post-merger. Quantification is still difficult, but the concept, at least, is clear. Even tough quantification of harm and benefit might be challenging, the consumer welfare paradigm has an inherent value in bringing transparency into antitrust reasoning. The authority might rely on economic presumptions or *prima facie* rules in order to cope with the quantification problems. Yet the agency's assumptions must fit into the overall consumer welfare paradigm, which limits the discretion of the agency.

If normative goals outside the realm of consumer welfare are being integrated into the equation, however, the elements become incommensurable.[76] Normative goals outside consumer welfare can, by definition, not be measured in degrees of consumer surplus. Therefore, it is not possible to compare them to consumer harm being precipitated by a merger in a common unit of measure. The balancing of consumer harm against a normative benefit is a normative exercise in itself. It requires attributing individual weight to consumer harm on the one hand and to a normative goal on the other, before any balancing can be done.[77]

As an intellectual exercise, this might be a feasible undertaking, if one knows what normative goal to consider and which weight to attribute to it. The number of normative goals, however, is potentially unlimited,[78] and their respective societal weight is difficult to determine

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[72] *See* on the issue of balancing in antitrust Herbert Hovenkamp, *Antitrust Balancing* (2016) 12 NYU Journal of Law & Business 369-384; with respect to the EUMR *see* Stefan Thomas, *supra* note 52, at 346-387.

[73] For the sake of clarity: the term "pre-merger price", as commonly used in merger analysis, means the price that would exist absent the merger, which is reflected by the pre-merger scenario. This price is compared to the price that will most likely be found should the merger be consummated. *See* in that respect Marc Ivaldi & Frank Verboven, *Quantifying the Effects from Horizontal Mergers in European Competition Policy* (2005) 23 International Journal of Industrial Organization 669-691.

[74] The relevant question for an effects-based merger analysis with respect to price effects is therefore whether efficiencies brought by the merger are sufficient to create a downward pricing pressure eliminating the incentive to increase prices (so-called upward pricing pressure). Where dominance is neither created nor strengthened, there is no general rule on whether or not efficiencies will offset the competitive harm created by the merger. Any effects will largely depend on how severe the gross upward pricing pressure is in the particular case, and to what extent the merged entity is susceptible to efficiency increases. *See* Stefan Thomas, *supra* note 52, at 346-387. The same rationale holds true, mutatis mutandis, for any other effect, such on quality, innovation etc.

[75] *See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust* (2016) Vanderbilt Law Review 1-69.

[76] Taking a critical stance towards the integration of goals outside of what is enshrined in the antitrust laws therefore Edith Loozen, *Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability*, 56 C.M.L.Rev. 1265 (2019); *see also* Okeoghene Odudu, *The Wider Concerns of Competition Law*, 30 Oxford J. Leg. Stud. 599 (2010).

[77] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2020) Journal of Corporation Law 101, 128: "Just as general welfare proposals, the neo-Brandeisian approach to antitrust also requires a tradeoff — but it would be a far more difficult tradeoff to manage. The neo-Brandeis approach would trade off low prices and high output in favor of a set of goals defined as curbing excessive political power or large firm size, or perhaps values expressed by such things as loss of individual autonomy."

[78] *See*, e.g., the cross-sectional clauses in Articles 8 to 17 Treaty on the Functioning of the European Union ("TFEU"). They address, *inter alia*, the elimination of inequalities (Article 8 TFEU), a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health (Article 9 TFEU), environmental protection (Article 11 TFEU) and consumer protection (Article 12 TFEU) are enshrined as general provisions of the EU. Other cross-

in a transparent and unequivocal fashion. Is the pursuit of a European industrial strategy in train production more important than the European consumers' interest in low prices for trains and ultimately railroad transportation within Europe? To judge on these matters involves a fair amount of political arbitration. What makes this balancing even more difficult in European merger control is the fact that the economic and political interests among the Member States can be affected in different ways and intensities.[79] Employees in some Member States might benefit from a merger approval, while those in others might face lower wages or job losses. All these effects would have to be assessed, weighed and balanced against each other and against a potential consumer harm being brought by a merger. It is not clear in what way a competition authority or a court could consider itself legitimized to undertake such a political exercise as a matter of mere law enforcement, i.e. as the enforcement of a predefined democratic consensus. To quote *Frank Easterbrook*: "When everything is relevant, nothing is dispositive."[80] In attributing weight to those goals, antitrust agencies or courts would effectively enter the remit of de-facto legislation in that they would forge compromises over large societal conflicts of interests on behalf of the society.

When it comes to considering societal goals for merger approvals, reference is often made to the German merger control laws and that of other jurisdictions[81] which provide for special exemptions from merger prohibitions on grounds of public interest.

§ 42 of the German Act against Restraints of Competition (ARC), for example, grants the Federal Minister of Economic Affairs with the power to authorize a merger, which has previously been blocked by the Bundeskartellamt, if the merger, despite its competitive harm,

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sectional clauses relate to industrial policy (Article 173 TFEU) and cultural policy (Article 167 TFEU: "flowering of the cultures of the Member States"). These cross-sectional clauses are neither intended not are they suited, due to the sheer broadness of their scope, to serve as antitrust gauges, *see* Rupprecht Podszun, Außerwettbewerbliche Interessen im Kartellrecht und ihre Grenzen, in Juliane Kokott, Petra Pohlmann & Romina Polley (eds), Eu*ropäisches, Deutsches und internationals Kartellrecht – Festschrift für Dirk Schroeder* (2018) 613, 629. Note, however, that the cross-sectional clauses might gain relevance within a consumer welfare analysis to the extent that deviating preferences among the same consumers – depending on the circumstances in which they are measured – emerge so that the enforcer must chose between them. On that *see* Roman Inderst & Stefan Thomas, *Reflective Willingness to Pay - Preferences for Sustainable Consumption in a Consumer Welfare Analysis*, (27 December 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755806 (last accessed at 27 February 2021).

79 Preferences among Member States can differ substantially, which can lead to difficulties in modelling group preferences. Member State X may prefer nuclear energy (A) to coal (B) to solar energy (C), Member State Y may prefer coal (B) to solar energy (C) to nuclear energy (A), and Member State Z might prefer solar energy (C) to nuclear energy (A) to coal (B). The underlying social choice problem that can occur here is the preference cycle (the *Condorcet paradox*), which means that there is no clear group preference, for details *see* Kenneth Arrow, *Social Choice and Individual Values* (1951).

80 Frank H Easterbrook, *Limits of Antitrust* (1984) 63 Texas Law Review 1, 12.

81 On an Australian case *see* Charles McConnell, *ACCC to assess first merger authorisation application*, 02 May 2019, available at: https://globalcompetitionreview.com/article/1190891/accc-to-assess-first-merger-authorisation-application (last accessed 23 December 2019). The New Zealand Commerce Commission has in 2019 published its new draft *Authorisation Guidelines* relating to the public benefit test that may allow to authorize a merger despite it substantially lessening competition. The draft guidelines reflect the latest jurisprudence in New Zealand and propose broadening the analytical scope beyond economic welfare standards and accounting for "benefits or detriments" relating "to matters such as the environment, health, media or social welfare" when deciding on merger authorizations for reasons of public benefit. *See* New Zealand Commerce Commission: Consultation – July 2019 Authorisation Guidelines, para 37, available at: https://comcom.govt.nz/__data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August-2019.PDF (last accessed 23 December 2019); on that *see* Charles McConnell, *New Zealand to apply 'modified total welfare approach' to authorisations*, 16 August 2019, available at: https://globalcompetitionreview.com/article/1196407/new-zealand-to-apply-%E2%80%98modified-total-welfare-approach%E2%80%99-to-authorisations (last accessed 23 December 2019).

will help to achieve superior goals of public interest.[82] Is this provision a potential blueprint for integrating normative goals in merger assessment on EU level? Hardly so. First of all, it should be noted that the ministerial authorization in § 42 ARC meets with objection for its conceptual vagueness and the degree of political interference in the competitive process that it entails.[83] In several cases[84], the granting of a ministerial authorization was criticised for its failure to address the gravity of the competitive harm and to realistically assess the possibility to create societal benefits.[85] The alleged benefit to society can be overstated by the political stakeholders, and it may lack sound economic reasoning. Empirical economic evidence suggests that this is a real problem.[86]

Yet more importantly, § 42 ARC raises serious questions about the democratic responsibility for such decisions, and it is hard to see how those issues could be resolved on EU level. Since § 42 ARC is considered a political decision, the law awards the power to the Minister of Economic Affairs, who is a member of the Federal Government. This governmental link safeguards that political interferences with the merger control process are democratically legitimized. The government answers to the parliament and ultimately the vote of the German people. When the EUMR is concerned, however, it is not conceivable which authority under EU-law could claim to have a comparable democratic legitimization to undertake a balancing of normative societal goals against consumer rent on behalf of the entirety of the EU and its Member States. While the German and the French governments have devised the idea of granting the Council the power to override the Commission's merger decisions[87], that proposal

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[82] Examples of such goals are the national security of energy supply or the protection of know-how and research capabilities of German firms.

[83] Rupprecht Podszun, *Die Ministererlaubnis – Einbruch der Politik ins Recht der Wirtschaft* (2016) Neue Juristische Wochenschrift 617; Stefan Thomas, *Die Auswirkungen des SIEC-Tests auf den Anwendungsbereich der Ministererlaubnis: Wohlfahrtsstandards und politische Verantwortlichkeit in der deutschen Fusionskontrolle* (2018) Zeitschrift für Wettbewerbsrecht (ZWeR) 246-271.

[84] *See* for an overview on the decisional practice Stefan Thomas, in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht*, 6th Ed. 2020, § 42.

[85] Reference can be made to the two last ministerial authorizations where the German Monopolies Commission (advisory committee to the Minster of Economic Affairs) came to the conclusion that the purported benefits to society would most likely not be achieved by the ministerial authorization and in any event not offset the competitive harm, *see* Monopolkommission special opinion No 70 Edeka/Tengelmann and special opinion No 81 Miba/Zollern, both available at: https://www.monopolkommission.de/de/gutachten/sondergutachten/sondergutachten-ministererlaubnis.html (last accessed 23 December 2019). In the *EDEKA/Tengelmann* case, the granting of the ministerial authorization even led to the resignation of the president of the Monopolies Commission, Daniel Zimmer, out of protest over the ministerial decision.

[86] Oliver Budzinski & Annika Stöhr, *Public Interest Considerations in European Merger Control Regimes* (August 10, 2019), available at SSRN: https://ssrn.com/abstract=3439933 (last accessed 23 December 2019): "Moreover, our ex-post analysis shows that the empirical record of past public interest-motivated interventions is questionable with only few interventions yielding the desired effects."

[87] *See* Peter Altmaier & Bruno Le Maire, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019, https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2 (last accessed 23 December 2019): "Updating current merger guidelines to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets. This would enable a more dynamic and long-term approach to competition, at the global scale. This could entail adapting regulation no 139/2004 and current merger guidelines. Consider whether a right of appeal of the Council which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions."

has rightly found little endorsement among practitioners[88] and scholars.[89] The Council does not have any direct democratic legitimization derived from the European Parliament. It is an intergovernmental organ. Moreover, it is unclear in what way the interests of Member States, that can be affected in different ways and intensities by the merger decision, could be reconciled in a coherent and transparent way by the Council. Above all, as a matter of the rule of law, the Council's decision would have to be justiciable. Justiciability, however, would mean that ultimately the Court of Justice would decide on these societal compromises on behalf of the European people. While the skills of the Court of Justice are undisputable, it is questionable whether in a system of separated powers such tasks can be bestowed on the judiciary, especially when it affects several sovereign states within the EU. As *Robert Bork* wrote many years ago: "In fact, if we are going to take into account all this vague political rhetoric that many people find so attractive, not only is it questionable which way the rhetoric leads, not only is it intellectual mush, but I think it makes the law unconstitutional in a real sense because now you have handed the judge a complete delegation of power to consider anything he wants to consider in deciding a case. He has become a legislator."[90]

B. Justiciability Issues

The possibility of a judicial review of executive decisions is pivotal for any legal system governed by the rule of law.[91] Besides the conceptual balancing issues and the concomitant question about political legitimization, the integration of normative goals into merger control creates further problems. In fact, any term of law needs a concept or a standard on which it is based so that the law becomes judiciable.[92] While the finding of a significant impediment to

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[88] *See* Österreichische Bundeswettbewerbsbehörde (Austrian Competition Authority), Positionspapier zu nationalen und europäischen Champions in der Fusionskontrolle, November 2019, available at: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Positionspapier_European_Champions_DE.pdf (last accessed 23 December 2019).

[89] *See*, e.g., the public letter signed by 92 high-profile competition lawyers and economists from 21 member states pushing back against those proposed changes to EU merger control, available at https://res.cloudinary.com/gcr-usa/image/upload/v1556637328/Open_letter_on_EU_competition_policy_FINAL_dtavjw.pdf (last accessed 21 December 2019).

[90] Robert H Bork, *Panel Discussion: Merger Enforcement and Practice* (1981) 50 Antitrust Law Journal 233, 238; *see* also Donald F Turner, *The Durability, Relevance, and Future of American Antitrust Policy* (1987) 75 California Law Review 797, 798: "The pursuit of these goals would broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved."

[91] Judicial review has two important functions. It increases the accuracy of decisions thereby reducing the social costs of errors, on that *see* Steven Shavell, *The Appeals Process as a Means of Error Correction* (1995) 24 Journal of Legal Studies 379-426; Andrew F Daughety & Jennifer F Reinganum, *Appealing Judgements* (2000) 31 Rand Journal of Economics 502-525. Moreover, and possibly more importantly, it provides individual justice, which is an indispensable element of the rule of law, *see* Heike Schweitzer, Judicial Review in EU Competition Law, in Ioannis Lianos & Damien Geradin (eds), *Research Handbook on European Competition Law* (2013) 491: "fundamental ingredient of any legal system operating under the rule of law."

[92] A definition may merely set a standard, which leaves discretion to the authority, yet even such a standard requires an underlying concept describing in an abstract manner which criteria determine whether the standard is met or not. *See* on the distinction between "rules" and "standards" Louis Kaplow, *Rules versus Standards: An Economic Analysis* (1992) 42 Duke Law Journal 557-629; Daniel A Crane, *Rules Versus Standards in Antitrust Adjudication* (1992) 64 Washington & Lee Law Review 49-110. That is without prejudice to the question which person or institution renders this definition (the legislator, the authority, the judiciary, the academia, or a combination of those) and when (ex-ante or ex-post). The point is: one cannot give a reason for why a rule or a standard is fulfilled, unless one defines the requirements for it in the first place. Simply "finding" it to be fulfilled would not be an explanation. It would be arbitrariness. Therefore, standards also create a demand for specification. *See* Isaac Ehrlich & Richard A Posner, *An Economic Analysis of Legal Rulemaking* (1974) 3 Journal of Legal Studies 257, 261; Richard A Posner, *The Problems of Jurisprudence*

effective competition involves a great deal of economic analysis, for which the Commission enjoys a margin of appreciation, the decision to block a merger or to clear it is solely defined by the finding of a significant impediment.[93] That means that the Commission cannot clear a merger despite the finding of an SIEC upon its own discretion, and vice versa. The Commission, when having found an SIEC, is bound by the law. Unobjectionable mergers must be cleared, and those that fulfil the requirements for a prohibition must be blocked. The SIEC test, despite the broadness in scope and the flexibility it provides with respect to the analytical tools, is a legal standard emanating from the convictions of the legislator. Merging parties[94] can therefore challenge an unjustified prohibition inasmuch as third parties[95] can challenge an unwarranted approval. The identification and weighing of societal goals outside the consumer welfare paradigm and their balancing against consumer harm, however, is a highly political matter due to the vagueness of the definition of those normative goals. While there are many legal emanations of certain societal goals, like in the laws on environmental protection or in labour law, what the legal order lacks is a grade system by which the importance of these goals can be measured for the event that they must be balanced against each other or against consumer welfare. These normative goals are not supposed to function as directly applicable notions in antitrust law enforcement.[96] While merger decisions must be justiciable on grounds of the rule of law,[97] the consideration of a practically unlimited set of societal goals outside consumer welfare would likely deprive any decision based on them of a legally conclusive and clear foundation.

It might not come as a surprise that the German legislator by the 9th antitrust amendment act has raised the bar for third party challenges of ministerial merger authorizations under § 42 ARC to an extent that such have become practically impossible.[98] Ministerial authorizations,

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(1990) 44: "In a regime of standards, the principles or policies that in a regime of rules would determine the content of the rules are used to determine the outcome of particular cases."

93 *See*, e.g., Case C-413/06 P *Bertelsmann and Sony Corporation of America v. Impala* [2008] E.C.R. I-4951, para 145: "[W]hile the Court of First Instance must not substitute its own economic assessment for that of the Commission for the purposes of applying the substantive rules of the Regulation, that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. … Not only must the Community judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it." *See* also Case C-525/04 P *Spain v. Lenzing* [2007] E.C.R. I-9947, paras 56-57; Case C-323/00 P *Dradenauer Stahlgesellschaft v. Commission* [2002] E.C.R. I-3919, para 43.

94 The addressee of a decision automatically has standing (locus standi), *see* Case C-68/94 *France and Société commerciale des potasses et de l'azote and Entreprise Minière et Chimique v. Commission* [1998] E.C.R. I-1375, paras 48, 62.

95 A third party active in markets affected by the merger will thus generally be considered "directly" affected, *see*, e.g., Case T-177/04 *easyJet v. Commission* [2006] E.C.R. II-1931, para 32; Case T-3/93 *Air France v. Commission* [1994] E.C.R. II-121, para 80.

96 On their potential relevance within a consumer welfare approach in situations where several contradicting consumer preferences emerge from the analysis of the same group of consumers, *see* Roman Inderst & Stefan Thomas, *Reflective Willingness to Pay - Preferences for Sustainable Consumption in a Consumer Welfare Analysis*, (27 December 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755806 (last accessed at 27 February 2021).

97 Antonin Scalia, *The Rule of law as a Law of Rules* (1989) 56 University of Chicago Law Review 1175, 1179: "Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."

98 Section 63 (2) 2 of the German Act against Restraints of Competition now requires for a third party challenge of a ministerial authorization that the decision infringes individual rights of the complainant („Gegen eine Verfügung, durch die eine Erlaubnis nach § 42 erteilt wird, steht die Beschwerde einem Dritten nur zu, wenn er geltend macht, durch die Verfügung in seinen Rechten verletzt zu sein."). Such individual rights, however, will almost never be at stake. Mere economic interests, on the other hand, which can be severely affected, will

once they have been granted, are therefore *de facto* un-justiciable in Germany. It is questionable, however, whether that is a desirable design for a merger enforcement framework. It eventually puts the protection of competition in the particular case at the unfettered discretion of the government.

C. Societal Expectations and Politicization

Normative goals in merger control would thrust the agency into the role of a super-mediator. The agency would have to assess and balance all the interests within a society that might be positively or negatively affected by its decision. Besides the conceptual, practical and legal intricacies that such would provoke, further consequences warrant consideration. The authority would become exposed to the expectations of different societal stakeholders that could be directly or indirectly affected by a merger decision. Employees, non-governmental organizations, trade unions, or national governments, as in *Siemens/Alstom*, could argue to have relevant claims to make. The authority would not be able to confine itself to a competitive assessment of the merger anymore. It would be obliged to enter into an analysis of and reasoning about each and every normative claim that is being made. It would have to explain why a normative goal was accounted for, or why it was not, and why it was able to offset competitive concerns, or why it was not. In complex cases, it would become impossible to reconcile all these claims and interests in a conclusive way.

The broad scope of interests would require the authority to prefer some interests over others. That would eventually cause disappointment in those societal stakeholders that find their particular claims to have been neglected by the authority. Ultimately, the societal perception of the competition authority as an independent and impartial watchdog could be jeopardized. What the proponents of more normativity tend to neglect is that competition can only fulfill its purpose so long as society at large endorses it as a legitimate organizational paradigm for markets. The duty of antitrust authorities and courts therefore goes beyond mere law enforcement. It is about promoting competition as a valuable societal goal in itself.[99] Competition authorities can fulfill this role more effectively if they act beyond group interests solely based on an economic assessment of competitive effects. This limits their exposure to group interests and increases the acceptance of their decisions in society at large.

What is more is that the authority's power to consider normative goals outside economic efficiency would attract political stakeholders to exert undue influence on them. Legislators, governments, or political parties would want to make sure that their perceptions of the appropriate normative goals of society are being prominently reflected in the authority's decision. That is already a problem under the currently recognized antitrust principles,[100] but it would become easier based on an openly normative enforcement concept. The disapproval of the German and French governments of the Commission decision in *Siemens/Alstom* is a colorful example of these risks. If merger assessment were accommodating of normative goals outside consumer welfare, this could boost two negative effects: it could precipitate undesirable political rent seeking, and it could jeopardize the political independence of antitrust authorities.

Public choice theory teaches that special interest groups[101] tend to influence the political process in order to increase their rents at the expense of others. This means that they attempt to

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not suffice for a legal challenge. The trigger for the legislative amendment was the ministerial exemption granted in case B 2-96/14 *Edeka/Tengelmann*, which was later challenged by third parties.

99 On that *see* the authors referred to *supra* note 11.

100 *See* Herbert Hovenkamp, *Progressive Antitrust* (2018) University of Illinois Law Review 71: "In fact, for much of its history progressive antitrust policy has exhibited fairly strong special interest protectionism."

101 On interest groups and their influence on the political process in the US *see* Cass R Sunstein, *Interest Groups in American Public Law* (1985) 38 Stanford Law Review 29-87.

increase *their own rent* by modifying the social or political framework of the economy rather than by increasing their rent through their own economic action within a given framework. Competition, however, is the mechanism of choice in a market economy to increase wealth. In that, competition is a safeguard against any attempt of rent seeking by means other than efficiency. It protects the economy against political rent seeking attacks.[102] Opening antitrust to normativity could invalidate this function of undistorted competition. Adopting a normative antitrust standard, that can be used to implement a variety of public policy goals, would invite special interest groups, and political stakeholders that cater to them, to engage in rent seeking through influencing antitrust authorities.[103] That would be undesirable. The preference of a societal group will be achieved by transferring wealth to it from other groups. This could import societal conflicts into the realm of antitrust at the expense of an effective protection of competition. Moreover, rent seeking activities can harm society at large, because resources are used in an inefficient way.[104] Normativity in antitrust enforcement would therefore directly conflict with the aim of competition to ensure an efficient allocation of resources.

Beyond that, the exercise of undue political influence is one of the most severe threats to the agency's duty of safeguarding competition and keeping markets open. The recent ECN+-directive[105] therefore rightly takes aim at this issue and introduces measures of protection.[106] The most effective immunization, however, is to confine the analytical scope of the agency to competition and thereby consumer welfare. In *Siemens/Alstom*, for example, the Commission was blessed by the fact that the consumer welfare approach has limited it to a competitive effects-assessment. It was in a position to reject any political claims about industrial policy considerations by reference to the conceptual boundaries of substantive merger analysis. The same was true for the *Bayer/Monsanto* case in which the Commission gratefully relied on the

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[102] *See*, e.g., the famous adage by the German legal scholar Franz Böhm, who stated that "competition is the most ingenious disempowerment tool in history", which was not only coined to economic power but also related to political power, Franz Böhm, Demokratie und unternehmerische Macht, in *Kartelle und Monopole im modernen Recht, erstattet für die Internationale Kartellrechts-Konferenz in Frankfurt am Main Juni 1960*, Bd. I, Karlsruhe 1961, 1, 3.

[103] Elyse Dorsey, Jan Rybincek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, Competition Policy International Antitrust Chronicle (April 2018), George Mason Law & Economics Research Paper No. 18-20, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165192 (last accessed 23 December 2019). In order to reduce rent seeking, the antitrust criteria must be defined as clearly as possible, since vagueness can be exploited by interested groups, *see*, e.g., William J Baumol & Janusz A Ordover, *Use of Antitrust to Subvert Competition* (1985) 28 Journal of Law & Economics 247-265. To award antitrust agencies a broad discretion for considering normative goals outside the consumer welfare paradigm can add vagueness to the antitrust criteria.

[104] Michael E DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective* (1991) 14 Harvard Journal of Law & Public Policy 205-223.

[105] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3-33.

[106] *See* Wouter P J Wils, *Independence of Competition Authorities: The Example of the EU and Its Member States* (2019) 42 World Competition 149-169. For a differentiated approach that takes into account the German understanding of the principle of democracy, which is sceptical towards the idea of a totally autonomous authority, *see* Stefan Thomas, *supra* note 46. *See* generally on the independence of competition authorities William E Kovacic, Competition Agencies, Independence, and the Political Process, in Josef Drexl, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach* (2011); Michal S Gal, *Independence of Competition Authorities: From Designs to Practices* (2016) DAF/COMP/GF(2016)12, OECD Global Forum, available at: https://one.oecd.org/document/DAF/COMP/GF(2016)12/en/pdf (last accessed 23 December 2019).

limits of its competitive assessment when considering non-competitive issues, such as climate change, food safety or the environment, irrelevant for its decision.

It is possibly even fair to say that it is due to the absence of any political agenda that antitrust authorities have become such powerful agencies worldwide. In not answering to particular societal stakeholders they are in a position to shape the framework of the economy in a competitive fashion proactively instead of merely transposing a governmental agenda on how market outcomes should look like.

V. CONCLUSIONS

The normativity-concept has such an appeal because it hits on notions that are easy to sympathize with. Fairness, safeguarding employees' interests, or protecting the environment, to name just a few, are objectives that nobody can argue against. However, this does not yet make a coherent antitrust concept. What the normativity approach tends to neglect is that competition is an agnostic principle, and that antitrust enforcement has to respect that. For if it does not, it substitutes the enforcers' convictions of market outcomes for those of the consumers. The proponents of more normativity in antitrust tend to misinterpret market failures, such as negative externalities, as antitrust problems even though their cause might not be a lack of competition in the first place. Apart from warping the substantive standard, the normativity postulate conveys merger enforcement to the brink of a paternalistic control of societal wellbeing. That, eventually, deprives consumers of their most precious right in the realm of antitrust: To be the ultimate sovereign over the outcomes of competition.