

BEYOND THE ECONOMIC APPROACH: WHY PLURALISM IS IMPORTANT IN COMPETITION LAW

BARBORA JEDLIČKOVÁ *

I INTRODUCTION

Due to the nature of competition law, which deals with business behaviour affecting the economy, it is not surprising that it is economic and not legal theories which have shaped the ‘modern’ approach. The dominant theoretical stream in competition law is welfare economics, informed by the neoliberal thinking of the Chicago and Post-Chicago Schools. In order to determine the anti-competitiveness of certain conduct, welfare economics applies a consequentialist approach by determining economic harm; anticompetitive harm occurs if total or consumer welfare¹ and efficiency decrease.

Despite the influence of the main theoretical stream encompassed by welfare economics, there is no unified agreement among scholars on the level of the incorporation of welfare economics into the legal and policy approaches to competition law. This is due to the differences between competition/antitrust-law approaches in various jurisdictions and the influence of other theoretical streams and historical and jurisdictional factors. Particularly in the European Union (EU), scholars and practitioners take different positions on EU competition law with regards to the combination of welfare economics and the deontological influences, usually referred to as a form-based approach.² On one side are the proponents of Post-Chicago welfare economics, who argue that an economic approach is lacking in the EU, or support the trend towards a more economic approach.³ On the other side are scholars who argue that there is too much economics in the EU approach or that EU competition law should not

* Lecturer, T C Beirne School of Law, University of Queensland.

¹ The standard used by the Chicago School was ‘total welfare’. However, the connotation ‘consumer welfare’ was used in one of the most influential Chicago-School books: R H Bork, *The Antitrust Paradox: A Policy at War with Itself* (The Free Press, 1978). In his book, Bork referred to ‘consumer welfare’ when de facto describing total welfare on pp. 50, 91; Kenneth Heyer, ‘Consumer Welfare and the Legacy of Robert Bork’ (2014) 57 *Journal of Law and Economics* 1. A reference to Bork’s ‘consumer welfare’ was made, for instance, in the US case of *Reiter v Sonotone Corp* 442 US 330 (1979) 343. Nevertheless, it is the consumer welfare standard, meaning consumer surplus, which has been applied in many jurisdictions including the EU (see, e.g., Doris Hilderbrand, ‘The equality and social fairness objectives in EU competition law: the European school of thought’ (2017) 1 *Concurrences Competition Law Review* 41, 48-49).

² Wouter Wils, ‘The Judgement of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance’ (2014) 37(4) *World Competition* 405, 421–422, 424.

³ There was a fruitful discussion about this point in the EU with regards to the case of *Intel v European Commission* (T-286/09) [2014] ECR II-0000. See, e.g., Julie Clarke, ‘The Opinion of AG Wahl in the Intel Rebates Case: A Triumph of Substance over Form?’ (2017) 40(2) *World Competition* 241; Nicolas Petit, ‘The Advocate General’s opinion in *Intel v. Commission*: Eight points of common sense for consideration by the CJEU’ (2017) 1 *Concurrences Competition Law Review* 1, 32; Pablo Ibáñez Colomo, ‘Making Sense of a Perpetual Controversy’ (Working Paper No 29, London School of Economics and Political Science, 26 November 2014). Akman suggests a more modern economic approach to the EU’s concept of ‘abuse’ in Article 102 of TFEU including considerations of exploitation, exclusion and a lack of efficiency increase in Pinkar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing, 2012) 300–327. See generally Anne Witt, *The more economic approach to EU antitrust law* (Hart Publishing, 2016).

incorporate more of the Post-Chicago School's influence than it already does.⁴ The different spectrum of opinions includes the underlying assumption that there are conceptualised tensions among different theoretical streams, primarily between a more formalistic, deontological approach and the welfare economics consequentialist approach.⁵ The focus on these tensions is one way to perceive the situation.

However, when reading through these critiques, it is obvious that not all welfare economists are strict consequentialists. Similarly, the proponents of a more deontological approach do not necessarily dismiss the consequentialist approach of welfare economics. For instance, Wils, who is critical of proponents of the 'so-called more economic approach' still argues that in competition law '[b]oth intellectually and institutionally, economic and legal analysis should be integrated'.⁶

Thus, the other way to look at the differences between consequentialist and deontological accounts is that these two could be joined into a more holistic, or pluralistic, approach to competition law.⁷ This was the preferred analytical lens for Laura Guttuso's developing theoretical concept of anti-cartel law enforcement.

In her uncompleted PhD thesis, Laura proposed to conceptualise an approach for the enforcement of anti-cartel law which would 'move beyond a conventional outlook purely based on utilitarian theories of optimal deterrence and economic efficiency...'.⁸ As part of the novelty of her thesis, she aimed for 'a more holistic assessment...'⁹ of this area of competition law by utilising a pluralistic strategy. She wanted to defend 'the proposition that theories of optimal deterrence purely focusing on a social efficiency test fail to fully capture *rights-based considerations* founded on procedural fairness and social justice'.¹⁰ In that regard, she was aiming for conceptualising a holistic approach which would 'bring together deontological principles of justice and procedural fairness with economics-based notions of optimal deterrence'.¹¹ She argued that 'if brought together effectively ... it should be possible for these principles to co-exist and to reinforce one another'.¹²

Laura's pluralistic strategy with regards to the holistic theoretical framework is highly valuable. It is not only the correct strategy for Laura's PhD topic but for competition law in general. The achievement of such an approach, as contained in Laura's PhD thesis, necessitates a thorough, deep, and all-inclusive analysis of a specific area of competition law. The starting point of such an analysis should identify the shortcomings of the monistic economic approach. This is, indeed, the main focus of this article in which I provide arguments for utilising a pluralistic approach by explaining

⁴ See e.g., Bruce Wardhaugh, 'Intel, Consequentialist Goals and the Certainty of Rules: The Same Old Song and Dance, My Friend' (2016) 11(2) *The Competition Law Review* 215; Wils, above n 2, 410–414; Ingo Schmidt, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic vs. Static Efficiency' (2007) 28(7) *European Competition Law Review* 408. The legitimacy of consumer welfare as the objective of Article 82 of the TFEU is questioned in Lisa Lovdahl, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2013) 84–112. See also Aaron Edlin and Joseph Farrell, 'Freedom to Trade and the Competitive Process' in R D Blair and D D Sokol (eds) *Oxford Handbook of International Antitrust Economics* (Oxford University Press, 2014) 271, 278–279.

⁵ See e.g., Wardhaugh, above n 4; Wils, above n 2; Colomo, above n 3, 3.

⁶ Wils, above n 2, 420.

⁷ Arguably, the current approach to EU competition law involves elements of both accounts.

⁸ Laura Guttuso, *In Pursuit of Cartels – A Critical Analysis of the Dynamics Between Public and Private Enforcement* (Confirmation of Candidature Document, University of Queensland, 2015) 2.

⁹ *Ibid* 7.

¹⁰ *Ibid* (emphasis added).

¹¹ *Ibid* 34.

¹² *Ibid*.

why a purely economic account cannot provide the best legal approach to competition law.

I commence with exploring the historical roots of the first theoretical schools dealing with competition/antitrust law and the historical journey which shaped welfare economics into the current dominant theoretical framework of competition law. This will lead us to Europe and the United States of America (US). After that, I explain the shortcomings of the consequentialist, welfare economics approach, arguing for the inclusion of the deontological account using the objective of competition/antitrust law in the EU and US as an illuminating example. This will provide the final basis for outlining a pluralistic approach to the objective of competition law.

II A BRIEF HISTORICAL OVERVIEW: WHY ARE WE WHERE WE ARE?

The theoretical cradle of modern competition law emerged in Europe and the US with liberalism and neoliberalism being two relevant theoretical streams. In the eighteenth century, Europe gave birth to classical liberalism. Its famous French doctrine of *laissez faire* promoted freedom from government power, including a market free from government intervention. This idea then spread to other parts of Europe, including Great Britain, Austria, and Germany. For instance, this doctrine was supported by classical economists, including Adam Smith and his idea of the ‘invisible hand’,¹³ which was later used in connection with competition/antitrust law.¹⁴ In the nineteenth century, John Stuart Mill introduced the concepts of political economy¹⁵ and was a proponent of utilitarianism.¹⁶ At the end of the nineteenth century, Austrian scholars, primarily Eugen Bohm-Bawerk and Carl Menger, recognised the benefits of competitive markets and advocated that the competitive process be protected by law. Although such law was not put into practice in Austria at the time, it provided some ideological basis for the German neoliberalistic stream, ‘ordoliberalism’, centred in the ‘Freiburg School’ and developed between the 1930s and 1950s.¹⁷ Its founders provided a specific theoretical framework for competition law, explaining the important role it played in a democratic society.¹⁸

Ordoliberalism combines classical liberalism and its central concept of freedom with ideas of social security and social justice. It recognises two restraints on freedom. First, it supports the freedom from government power of classical liberalism. Second, ordoliberalism goes beyond classical liberalism by also recognising that power in the

¹³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press, 1776).

¹⁴ See, e.g., Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962).

¹⁵ John Stuart Mill, *Principles of Political Economy* (Parker Son and Bourn, 1848).

¹⁶ John Stuart Mill, *Utilitarianism* (Parker Son and Bourn, 1863). Its relevance to competition law is discussed for instance, in Wardhaugh, above n 4. Guttuso referred generally to ‘utilitarian theories’ with regards to welfare economics and optimal deterrence. For instance: ‘the utilitarian tradition, which judges the wider enforcement model, and the tort system within it, solely on the basis of the system’s capacity to maximise efficiency and collective welfare to society, primarily through optimal deterrence’, see Guttuso, above n 8, 2 (drafted Chapter 2 ‘Theoretical Framework’).

¹⁷ Massimiliano Vatiro, ‘The Ordoliberal Notion of Market Power: An Institutional Reassessment’ (2010) 6 *European Competition Journal* 689, 689–91; David Gerber, ‘Europe and the Globalization of Antitrust Law’ (1999) 14 *Connecticut Journal of International Law* 15, 26; David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press, 1998) 6, 16, 43–44.

¹⁸ For the detailed explanation of the link between democracy and competition law within the ordoliberal theoretical framework see Elias Deutscher and Stavros Makris, ‘Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus’ (2016) 11(2) *The Competition Law Review* 181.

hands of private economic entities, such as monopolists and cartel participants, can restrict freedom. Economic competition is central to achieving liberty and creating an economic market undistorted by public and private power.¹⁹ Although an economy that protects competition leads to increased efficiency and greater overall welfare and thus social stability, it is the process of competition that is the key for such positive outcomes.²⁰ Therefore, ordoliberalism defends the notion that the function of competition law is to protect the competitive process and ensure that no private group or individual has too much economic power or uses it to restrict competition.

Ordoliberals claim that competition law should also ensure social justice. Competition law can enable social justice in the form of fairness by protecting the competitive process by aiming to provide equal opportunities for competitors in the market. This is achieved by prohibiting anticompetitive private economic power, such as cartels, from interfering with the competitive functioning of the market.²¹

Ordoliberalistic ideas and the related concept of the social market economy promoting European integration and economic and social development²² have influenced the current EU, German, and other European competition law regimes.²³ At the same time, their German origin was unpopular after the Second World War and this limited the use of ordoliberalism.

The main boom of Western European competition law legislation took place after WWII in the 1950s,²⁴ whereas the current US antitrust law started its modern competition/antitrust law regime much earlier, with the enactment of the *Sherman Act*²⁵ in 1890. The US-born neoliberal theoretical streams followed several decades later. They involve two schools: the Harvard School, formed in the 1930s, and the Chicago School,

¹⁹ Walter Eucken, *The Foundations of Economics* (Terence Wilmot Hutchinson, 1950) 152–56, 269–70; David Gerber, ‘Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe’ (1994) 42 *American Journal of Comparative Law* 25, 43, 49–50.

²⁰ See, e.g., Walter Eucken, ‘What Kind of Economic and Social System?’ in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Palgrave Macmillan, 1989) 41–43.

²¹ Ludwig Erhard, ‘Freie Wirtschaft oder Planwirtschaft?’ *Die Neue Zeitung*, 7 April 1947; Franz Böhm, ‘Rule of Law in a Market Economy’ in Alan Peacock and Hans Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (Palgrave Macmillan, 1989) 51–54; Gerber, above n 19, 37–38.

²² See, e.g., David Gerber, ‘Anthropology, History and the ‘More Economic Approach’ in European Competition Law — A Review Essay’ (2010) 41 *International Review of Intellectual Property and Competition Law* 441, 445.

²³ See, e.g., Doris Hilderbrand, ‘The equality and social fairness objectives in EU competition law: the European school of thought’ (2017) 1 *Concurrences Competition Law Review* 1, 41; Sebastian Dullien and Ulrike Guérot, ‘The Long Shadow of Ordoliberalism: Germany’s Approach to the Euro Crisis’ (Policy Brief No 49, European Council on Foreign Relations, February 2012). The differences between the objectives of EU competition law and US competition law are commonly referred to as the main reason for differences in approaches to EU competition law and US antitrust law. However, it is also the different neoliberalist streams which have influenced the differences in approaches to US antitrust law and EU competition law. Compare e.g., Barbora Jedličková, *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law* (Edward Elgar Publishing Limited, 2016) Chapters 3, 4.

²⁴ Although some European countries introduced competition-law legislation before the WWII, such legislation usually dealt with only some forms of anticompetitive behaviour, typically cartels (for instance *Zakon o kartelech a soukromých monopolech* (Czech) 1934 c. 141/1934 Sb.; *Kartellverordnung gegen Missbrauch wirtschaftlicher Machtstellung* (Germany) 2 November 1923, RGBl, 1923, 1067; ‘*Freedom of Associations Act*’ (Austria) BGBl 43/1870, §4).

²⁵ *Sherman Antitrust Act 1890* 15 USC §§1–7, 26 (‘*Sherman Act*’).

formed in the 1950s.²⁶ The Harvard School theory was based on the empirical studies of American industries. On these bases, it conceptualised a structure-conduct-performance paradigm, which explains how certain markets lead to certain types of conduct and performance. It proclaims that the structure of the market influences firms' conduct, which then determines market performance.²⁷ Harvard School scholars believed that competitors would choose non-competing over competing. Therefore, they were suspicious of any situation other than what they described as competitive conditions.²⁸

In the 1950s, the Chicago School was established as a critique to the Harvard School. The School was sceptical about antitrust law and the Harvard School approach. Chicago School scholars were proponents of the laissez-faire doctrine, believing in the invisible hand of the market and thus the self-correction of free markets.²⁹ The Chicago School centred its theory around efficiency as the objective of antitrust law, arguing that many of the imperfections of competition were not a result of restricting competition but, rather, arose from competition itself, where firms try to find ways to be more efficient than their rivals. It believed that a free market led to maximising efficiency, with inefficiency occurring only randomly in the free market, and therefore advocated for only occasional use of antitrust law.³⁰ The Chicago School was followed by Post-Chicago scholars, who are less sceptical: they have recognised that free markets do not always maximise efficiency, proving this via empirical studies and game theories.³¹

The neoliberal stream of the Chicago and Post-Chicago Schools encompasses a consequentialist-type approach, while the Harvard School and the European ordoliberalism represent a more deontological approach. The consequentialist approach sees the rightness in conduct when such conduct leads to good consequences. In the case of the Chicago and Post-Chicago Schools, the negative consequences in the form of decreased efficiency and welfare, which can be detected from increased prices and decreased output, quality and innovation, prove economic harm and anticompetitive behaviour. Therefore, the goal of competition/antitrust law is good, pro-competitive outcomes and the maximising of efficiency and welfare in particular.³²

²⁶ Herbert Hovenkamp, 'The Harvard and Chicago Schools and the Dominant Firm' in Robert Pitofsky (ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Analysis on U.S. Antitrust* (Oxford University Press, 2008) 109.

²⁷ See e.g., Herbert Hovenkamp, 'Harvard, Chicago, and Transaction Cost' (2010) 55 *Antitrust Bulletin* 613, 615–616; Joe Bain, *Essays on Price Theory and Industrial Organization* (Little, Brown and Company, 1972); H M Mann, 'Seller Concentration, Barriers to Entry, and Rates to Return in Thirty Industries, 1950–1960' (1966) 48 *The Review of Economics and Statistics* 296.

²⁸ See e.g., Bain, above n 27; Edward S Mason, *Economic Concentration and the Monopoly Problem* (Harvard University Press, 1957); Joe Bain, *Barriers to New Competition* (Harvard University Press, 1956); Ward S Bowman Jr, 'Toward Less Monopoly' (1953) 101 *University of Pennsylvania Law Review* 577.

²⁹ See e.g., Freidman, above n 14.

³⁰ See Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition and Its Practice* (Thomson West, 4th ed., 2011), 71–72; Richard Posner, 'The Rule of Reason and the Economic Approach: Reflections on the *Sylvania* Decision' (1977) 45 *The University of Chicago Law Review* 1; Robert Bork, 'The Rule of Reason and Per Se Concept: Price Fixing and Market Division' (1966) 75(2) *Yale Law Journal* 373.

³¹ See e.g., E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing, 2010) 41; David Evans and A Padilla, 'Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach' (2005) 73 *The University of Chicago Law Review* 73, 74, 78–80.

³² See e.g., Richard Posner, *Antitrust Law* (University of Chicago Press, 2nd ed, 2001) 21, 194–196; W S Comanor, 'Antitrust Policy Toward Resale Price Maintenance Following *Leegin*' (2010) 55 *Antitrust Bulletin* 59, 76–77; Hovenkamp, above n 30, 75–77; S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet and

In contrast, deontology focusses on the character of the conduct when determining its rightness. For instance, ordoliberalism recognises as the highest value for competition law the process of competition itself. Negative conduct distorts the competitive process, while conduct which enhances competition is positive.³³ The deontological account of both the Freiburg School and the Harvard School is reflected in their understanding of the objective of competition law. Ordoliberalism aims to achieve ‘complete competition’, a situation where no entity has the economic power to coerce its competitors in the market. The Harvard School refers to ‘workable competition’, which is competition that ensures good performance in a particular market.³⁴

The Chicago and Post-Chicago Schools became influential in the ideology underpinning the application of US antitrust law from the 1970s onwards.³⁵ This approach is referred to as an ‘economic approach’ and is centred on the consequences of conduct. Gradually, the (Post) Chicago welfare economics approach became the dominant theoretical stream in other jurisdictions, including the EU, eventually becoming the dominant theoretical approach to competition/antitrust law across the globe.³⁶ In the EU in the 1990s, the European Commission started to move its competition policy towards a ‘more economic’, effect-based approach centred around consumer welfare.³⁷

Now that we know where we are, I will further explore the methodological outcome of the historical overview of the competition/antitrust law’s theoretical schools. First, I will identify several shortcomings of the current dominant economic approach. These shortcomings justify a pluralistic approach to substantive competition law. Second, I will survey the objective of competition law and outline how deontological and consequentialist economic accounts could be combined with regards to this objective. This will support the argument that deontological and consequentialist approaches can co-exist in a more effective, pluralistic approach.

III CONSEQUENTIALIST ECONOMIC APPROACH AND ITS ISSUES

We have seen that the main focus of the economic approach is proving economic harm, i.e. that a particular conduct is anticompetitive because it decreases efficiency and consumer welfare. Only in a very limited number of forms of (potentially)

Maxwell, 2nd ed., 2002) 11–16; F H Easterbrook, ‘Workable Antitrust Policy’ (1986) 84 *Michigan Law Review* 1696, 1703–1704; W S Comanor, ‘Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy’ (1984–1985) 98 *Harvard Law Review* 983; Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (The Free Press, 1978) 7, 51; see also below.

³³ Some similarities and differences between the Chicago School and ordoliberalism are well explained in Doris Hilderbrand, above n 23, 41.

³⁴ See e.g., Joe Bain, *Industrial Organisation* (Wiley, 2nd ed., 1968) 372; E Mason, ‘The Current Status of the Monopoly Problem in the United States’ (1949) 62 *Harvard Law Review* 1265, 1266–1267.

³⁵ See Jedlickova, above n 23, 91–100.

³⁶ See e.g., Wils, above n 2; Gerber, above n 22.

³⁷ For the ‘more economic approach’ to EU competition law, see e.g., *Commission Notice (EC) 2004/C 101/08 Guidelines on the application of Article 81(3) of the Treaty* [2004] OJ C 101/97 para 13; *Commission Notice (EC) 2010/C 130/01 Guidelines on Vertical Restraints* [2010] OJ C 130/1, [7]; Ken Heyer, ‘A World of Uncertainty: Economics and the Globalization of Antitrust’ (2005) 72 *Antitrust Law Journal* 375, 403.

anticompetitive conduct, such as hardcore cartels,³⁸ would welfare economists agree that such conduct is always or almost always harmful to competition by leading to decreased efficiency and consumer welfare. In the rest of the cases, welfare economists advocate determining whether anticompetitive harm has occurred. This concept involves two groups of issues: (1) issues arising from the nature of law; and (2) issues rooted in the nature of economics and its ability to precisely explain, describe and predict reality.

From the legal and jurisprudential points of view, the strict consequentialist, welfare economics approach does not fully incorporate the rule of law and the nature of law involving rights and responsibilities, and principles which lead to category thinking.³⁹ It has been suggested by some welfare economics proponents that category thinking is undesirable in competition law because it leads to a formalistic approach.⁴⁰ However, the law is typified by category thinking; categorisation provides clarity and legal certainty.

In that regard, Wardhaugh argues that:

[I]n legal reasoning, there is an additional layer of complexity which is added by the necessity of rule of law considerations. Rules, with their ex ante certainty, provide for the predictability, lack of ad hocery and consistency through time necessary for a legal system to be both workable and acceptable as a system of laws... these considerations should be seen as necessary limits to goal-maximisation, rather than being objects of derision or scorn.⁴¹

Indeed, an opposite argument to the proponents of a mere economic approach is that the strict effect-based system rooted in welfare economics can be unnecessarily complex and costly,⁴² undermining legal certainty and clarity.⁴³

When reading specific competition/antitrust law provisions, we can see that not only do they include category thinking, they involve terms with an evaluative, and arguably deontological, character. These include, for instance, the EU notion of ‘abuse’,⁴⁴ or the Australian equivalent of ‘misuse’.⁴⁵ The US *Federal Trade Commission Act* (1914) refers to anticompetitive practices as ‘unfair methods of competition’.⁴⁶ Evaluative, deontological terms are also used in this policy. For instance, as further discussed below, it is common to refer to ‘fairness’ with regards to competition/antitrust law and some forms of anticompetitive conduct, primarily cartels, are perceived to be a form of cheating based on ‘deception, bad faith, fraud and oppression’.⁴⁷

³⁸ Hardcore cartels have been criminalised in approximately 25 jurisdictions including the UK, France, Ireland and Australia. See Stephan Andreas, ‘An empirical evaluation of the normative justifications for cartel criminalisation’ (2017) 37(4) *The Journal of the Society of Legal Scholars* 621, 623.

³⁹ Wils, above n 2, 422, 427–428, 430–431.

⁴⁰ See e.g., Jordi Gual et al, “‘An Economic Approach To Article 82’” — Report by the Economic Advisory Group on Competition Policy’ (Discussion Paper No 82, Economic Advisory Group on Competition Policy, July 2005) 5–7, available at <www.ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf>; Wils, above n 2, 421.

⁴¹ Wardhaugh, above n 4, 215, 224.

⁴² Wils, above n 2, 430–431.

⁴³ See also Wardhaugh, above n 4, 215, 221–222.

⁴⁴ *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, OJ C 115/13 (entered into force 1 November 1993) art 102 (‘TFEU’).

⁴⁵ *Competition and Consumer Act 2010* (Cth) s 46.

⁴⁶ *Federal Trade Commission Act* 15 USC §§ 5 (1914).

⁴⁷ *FTC v Sperry and Hutchinson Company*, 405 US 233 (1972); see also *FTC v Gratz* 253 US 421, 427 (1920).

A *Measuring the dynamic competitive processes*

We have seen that, unlike the deontological approach, which tries to determine whether the conduct in question arises from competing or from restricting competition, the core element of the welfare economics approach is to find, and also usually measure, the consequences. Commonly, such an approach tries to determine, in particular cases, what the market in question will look like with the conduct in question and without and whether it will decrease or increase efficiency and welfare. This has significant shortcomings considering that competition is not a static but a dynamic process.⁴⁸ Accordingly, economics cannot provide an all-inclusive means for determining the exact consequences in the market because competition involves many variables, which change over time, and even predictable variables can be difficult to measure. For instance, competition can lead to a new change in the market, such as innovation, which is difficult to predict; however, even if it is predicted, it cannot be measured in the same way that more concrete variables, such as price, can be.

Therefore, the shortcomings of economics involve the criticisms that (1) in individual cases, the determined outcomes do not necessarily represent reality primarily because (2) economics cannot fully evaluate all aspects of the market and competition; and (3) the existence of various theories leads to different conclusions. These issues, arising from the impossibility of the precise measuring of dynamic competition and dynamic efficiency, have been acknowledged by economists themselves.⁴⁹ For instance, Hayek, in his Nobel Prize speech in 1974, pointed exactly to these flaws of economics.⁵⁰ He stated that economics deals with ‘essentially complex phenomena’ driven by humans rather than nature. This involves a number of issues for economics as a science when trying to measure and evaluate data. First, Hayek explains that ‘in the study of such complex phenomena as the market, which depend on the actions of many individuals, all the circumstances which will determine the outcome of a process... *will hardly ever be fully known or measurable*’.⁵¹ The quantitative data available, Hayek pointed out, ‘may not include the important ones’⁵² and certainly will not include all of them.⁵³

Indeed, this is reflected in practice, in the application of law where the economic approach is utilised. For instance, with regards to US merger control law application, Stucke and Grunes highlight that:

[E]conomic factors that were easier to measure (such as the merger’s likely short-term impact on price, output or productive efficiency in narrow defined markets) became disproportionately important. Factors that were harder to assess or measure (like the merger’s impact on innovation, systemic risk, and

⁴⁸ The recent economic development arising from the digital age makes this process even more dynamic.

⁴⁹ See e.g. Schmidt, above n 4. Legal experts also make the same observation. See e.g., Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (Oxford University Press, 2016), Chapter 7.

⁵⁰ Although he referred to competition and markets in the speech, his main area for drawing examples was the labour market.

⁵¹ Friedrich August von Hayek, ‘The Pretence of Knowledge’ (Speech delivered at the Nobel Prize Lecture, Stockholm, 11 December 1974) <www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/hayek-lecture.html> (emphasis added).

⁵² *Ibid.*

⁵³ Hayek then referred to a market equilibrium and supported his claim with a quote from Pareto and a reference to Vilfredo Pareto, *Manuel d’économie politique*, (M Giarde, 2nd ed, 1927) 223–4.

the risks that the increasing concentration of power pose to democracy and individual autonomy) were often ignored or discounted.⁵⁴

Another of Hayek's observations is that there is a tendency for economic theories to 'be formulated in such terms that they refer only to measurable magnitudes'⁵⁵ and that if some (market) effects 'cannot be confirmed by quantitative evidence, they are simply disregarded'.⁵⁶ This leads to 'the fiction that the factors which [the economists] can measure are the only ones that are relevant'.⁵⁷

Finally, Hayek points out that limiting the factors to those which are measurable in economic analysis and included in economic theories means that these theories and that analysis will not necessarily reflect the situation 'in the real world'. Indeed, the economic model analyses:

... are based on assumptions that are at least sometimes inconsistent with observable reality. [The economists] see economic modelling as an analytical tool that provides a means of evaluating conduct. Its role is not, therefore, to represent reality, but to provide a metric for analysing and sometimes predicting the probable consequences of conduct of markets. It provides a standard that can be used in most or all contexts as a basis for predictions and assessment, but not necessarily an accurate representation of reality.⁵⁸

This is further supported by a more recently emerged economic field, behavioural economics. Its proponents explain, among other things, how cognitive human behaviour leads to (or can lead to) different results in reality than those presumed by welfare economics theories and econometrics.⁵⁹

B *Economics and the nature of law*

The shortcomings of economics and its econometrics are even more profound when applying them to the deontological approach, where it is the nature of the conduct in question and not its consequences that matter. Indeed, unlike its consequences, the nature of the conduct is not measurable. In individual cases, by measuring the consequences, we do not get the precise answer as to whether the conduct in question hinders the competitive process or not. The consequentialist approach tells us whether the consequences of a specific practice are good or bad, but not whether the conduct itself is good or bad. For example, a poor business decision, such as an ineffective change in the internal structure of a firm, decreases efficiency and potentially also consumer welfare. However, such conduct is not anticompetitive as it does not have an anticompetitive, negative nature.

⁵⁴ Stucke and Grunes, above n 49, Chapter 7.

⁵⁵ Hayek, above n 51.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Gerber, above n 22, 447.

⁵⁹ For instance, behavioural economics includes the prospect theory developed by a Nobel Prize holder, Daniel Kahneman and Amos Tversky 'Prospect Theory: An Analysis of Decision under Risk' (1979) 2 *Econometrica*, 263. Thaler further added to these works by introducing more examples of problems where consumer behaviour was likely to deviate from that predicted by normative models (Richard Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) *Journal of Economic Behaviour and Organization* 1, 39).

If the legal rules of competition law were written just on the basis of consequences, they would not differentiate between conduct which is competitive on merit and conduct which restricts competition. A consequentialist rule based on welfare economics would prohibit conduct which decreases welfare and efficiency and not always conduct which restricts the competitive process. That is why it is competition itself which is at the centre of competition law.

This is reflected in practice and, indeed, in the rules of specific competition-law regimes. For instance, parallel pricing arising from natural oligopolistic behaviour, where the market participants simply observe each other, is not found to be anticompetitive because of the nature of the conduct.⁶⁰ This is despite the fact that legal parallel pricing can lead to similar negative consequences, such as prohibited price cartels.⁶¹ Economics has explained well the way natural oligopolies operate and this has and should inform the law. At the same time, specific legal rules take into consideration the nature of the conduct in order to find certain conduct wrong, find someone liable for the conduct, and justify the punishment for such conduct.

By applying a strictly consequentialist approach, parallel pricing arising from observing the behaviour of other participants in a natural oligopolistic market could be considered anticompetitive and wrong. However, the category thinking of competition law tells us that conduct is wrong and anticompetitive when competitors stop competing and start colluding. In other words, when they cooperate amongst themselves in order to restrict competition in a specific form of multilateral or bilateral conduct. Whereas, in the example of parallel pricing, when competitors compete and make business decisions based on observing the market, the conduct is competitive and, therefore, not wrong.

The fact that the anti-cartel law differentiates between horizontal agreements and unilateral parallel behaviour arising from natural oligopolies shows that this approach is not strictly consequentialist, but rather involves deontological elements. Therefore, it is more pluralistic. Indeed, this is linked to the specific legal rules which prohibit anticompetitive collusion and not parallel unilateral conduct arising from individual business decisions on prices. In the case of parallel pricing in the natural oligopolistic market, nobody colluded, nobody abused or misused her market power and unfairly stopped others from competing. In other words, nobody disturbed the competitive process. This parallel behaviour has negative consequences but it is still competing on merit.

This deontological character of the law should also be reflected in the objective of competition law. Whether it is and to what extent, is briefly surveyed in the next part of this article. The objective of competition law is the central pillar of a particular competition law approach which indicates the potential limits to the consequentialist economic view. How the consequentialist and deontological goals can be merged together to create a pluralistic approach to competition law is discussed in the final part of this article.

IV OBJECTIVES: US AND EU

Differences between the objectives of competition/antitrust law within individual jurisdictions and also over its historical development in one jurisdiction can indicate

⁶⁰ See e.g. *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, 227 (1993) and *Ahlström Osakeyhtiö and others v Commission* (C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-129/85) [1993] 4 CMLR 407, [71] (*Wood Pulp II*).

⁶¹ See, for instance, Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (West Academic Publishing, 5th ed, 2016) 218.

whether a particular jurisdiction at a particular time inclines more towards consequentialist or deontological accounts. It also shows whether a particular competition/antitrust law regime involves anything other than a pure competition law objective. For instance, in the US, the protection of small business was one of the principal objectives of the court's approach to antitrust law in the 1960s and the preceding period.⁶² Partially, this objective reflects the Harvard School theory by focusing on the quantity rather than quality of competition and thus is premised on the idea that more competitors lead to better competition and better performance. Nevertheless, the main purpose of this objective most likely reflects the circumstances and the historical reason for introducing the *Sherman Act* (1890), which was to address the power of big enterprises by protecting small businesses from the restrictions of big enterprise and hence allowing small businesses to compete.⁶³ After the 1960s, the US antitrust law approach went through 'the antitrust counterrevolution',⁶⁴ gradually replacing the objective of protecting small business with an economic approach based on welfare economics.

Unlike the EU, the US *Sherman Act* (1890) does not contain a provision which would outline the objective of antitrust law. Thus, the US antitrust law regime allows for greater flexibility in its interpretation.

Despite the profound influence of welfare economics in both the US and the EU, their approaches to antitrust/competition law differ. There is a long-standing argument that the differences in the approaches between US antitrust law and EU competition law arise from the additional objective of EU competition law, which is the general goal of economic integration of Member States: establishing a fully-effective internal market.⁶⁵ However, this principal objective of the EU is not the only reason for the differences. As highlighted above, EU competition law is also influenced by the deontological account of ordoliberalism. Another aspect influencing the differences of approach to competition/antitrust law is the difference in legal systems between the EU and the US. Unlike the objective of US antitrust law, the objectives of EU competition law are present in the treaties. The interpretive approach by the EU courts has not changed much since the introduction of European Economic Community ('EEC') competition law (today's EU competition law). It is comprised of the general goal of the EU and the related objective of competition law. Besides economic integration, which is central to the EEC, European Community ('EC') and also the EU, it is the protection of competition by promoting and creating a system of undistorted competition that comprises the principal objectives of EU competition law.⁶⁶ The protection of

⁶² See, e.g., *United States v Von's Grocery Co*, 384 US 270, 274-275 (1966); *Brown Shoes v United States*, 370 US 294, 344 (1962); *United States v Aluminum Co of America*, 148 F 2d 416 (2nd Cir, 1945); see discussion in Jedlickova, above n 23, 50-52, 71-73.

⁶³ See Jedlickova, above n 23, 50-52.

⁶⁴ As referred to in Herbert Hovenkamp, *The Antitrust Enterprise: Principles and Execution* (Harvard University Press, 2005) 2.

⁶⁵ See e.g., Gerber, above n 22, 447-448. For the objectives, see *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2008, [2007] OJ C 306/1 (entered into force 1 December 2009) Protocol 27 ('*Libson Treaty*'); TFEU art 3(1)(b); *Automobiles Peugeot SA, Peugeot Nederland NV v Commission* (T-450/05) [2009] ECR II-2533, [22], [43]-[141]; *Sot. Lelos kai Sia EE and others v GlaxoSmithKline AVE Farmakeftikon Proionton* (C-468 to 478/06) [2008] ECR I-7139, [65]-[78] ('*Lelos kai*').

⁶⁶ See e.g., *P GlaxoSmithKline Services Unlimited v Commission of the EC* (C-501/06 P, C-513/06 P, C-515/06 P, C-519/06) [2009] 4 CMLR 2, [55]-[63]; *T-Mobile Netherlands BV v Road van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] 5 CMLR 11, [38]-[39]; *Lelos kai* [2008] ECR I-7139, [66]; *Hoffmann-La Roche and Co AG v EC Commission* (C-85/76) [1979] ECR 461, [91]. The reference to 'undistorted competition' was contained in *Treaty Establishing*

competition from distortion is also reflected in the substantive provisions on competition law of the Treaty of the Functioning of the European Union ('TFEU'), primarily, Article 101(1) TFEU which prohibits 'all agreements between undertakings,... which may affect trade between Member States and which have as their object or effect *the prevention, restriction or distortion of competition* within the internal market'.⁶⁷

Certainly, this places the main emphasis on the competitive process and not just the consequences of the process. In that regard, Wils also finds an approach based on welfare economics insufficient for EU competition law, arguing that:

[T]he (post-)Chicago (consumer) welfarist approach to competition takes a unduly narrow view of the benefits of undistorted competition, by considering only the value of maximal achievement (consumer welfare or efficiency), while neglecting the process values of undistorted competition (including the right to compete on the merits, and equality of opportunity between economic operators).⁶⁸

This leads us to the last part of this article, which will explain how a pluralistic approach should look with regards to the objectives of competition law.

V OBJECTIVE: PLURALISTIC APPROACH

If we proceed on the basis that there is a tension between the deontological and consequentialist goals, we would have to choose between specific deontological or consequentialist goals and argue for either welfare and efficiency, or for a competitive process with specific characteristics such as free or fair or undistorted competition as the objective of competition law. However, if we attempt to merge both accounts, we must respect both deontological and consequentialist objectives, assign a value to them and decide which one is of the highest value.

The above discussion on the shortcomings of the economic consequentialist account and the discussion of the objective of competition law, in particular in the EU, provide arguments for placing the competitive process highest in the hierarchy of the values of competition law.⁶⁹ We have seen that at the centre of competition law is competition itself, with specific provisions for various competition/antitrust law regimes referring to 'competition'. This is not only obvious in the EU, but is also detectable, to a certain extent, in the US, where the *Sherman Act* and the *Clayton Act 1914*⁷⁰ use the

the European Community, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) art 3(1)(g) ('*EC Treaty*'). Since the enactment of the Lisbon Treaty, the reference to 'undistorted competition' is contained in its Protocol 27 which states that 'the internal market as set out in Article 3 of the Treaty on European Union includes a system insuring that competition is not distorted'. *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13, art 3 then refers to 'a highly competitive social market economy'. Some argue that the reference to 'social market economy' adds new social elements to the objective of competition law. See Hilderbrand, above n 23, 41.

⁶⁷ Emphasis added.

⁶⁸ Wils, above n 2, 414.

⁶⁹ For further analysis of the objective of competition law see Barbora Jedličková, 'One Among Many or One Above All? The Role of Consumers and Their Welfare in Competition Law and Policy' (2012) 33(12) *European Competition Law Review* 568; Jonathan Crowe and Barbora Jedličková, 'What's Wrong with Cartels?' (2016) 44 (3) *Federal Law Review* 401.

⁷⁰ *Clayton Antitrust Act* 15 USC § 12–27 (1949).

broader term ‘trade’, prohibiting its restriction, while the *FTC Act 1914*⁷¹ prohibits ‘unfair methods of competition’.⁷²

The question then arises as to what competition is and what kind of competition should be protected. By combining a deontological account with consequentialist welfare economics, we can state that *the competition process* which leads to better *efficiency* and *consumer welfare* should be protected. This leads us back to the question as to what such competition looks like. This is a deontological question of the characteristics of the competitive process, which leads to the best potential to maximise good consequences, welfare and efficiency (the consequentialist element).

We have seen that both EU legislation and the courts refer to ‘undistorted competition’⁷³ as the objective of competition law. They also commonly refer to ‘free competition’⁷⁴ and ‘fair competition’.⁷⁵ Similarly, the Antitrust Division of the US Department of Justice states on its website that ‘[t]he goal of the antitrust laws is to protect *economic freedom and opportunity by promoting free and fair competition in the marketplace*’,⁷⁶ where *free* and *fair* competition provides two characteristics essential for the deontological approach.

Free competition can be understood as competition among entities or individuals which ensures economic freedom and the right to compete. This understanding of freedom is in agreement with Sen’s concept. He explains that individuals should be free to try to achieve their objectives in an environment which is not distorted. Whether they achieve those objectives is a consequence of their abilities.⁷⁷ In order to preserve the right to compete, the competitive process must be free from restriction by both private and public entities. This is in line with the ordoliberalistic understanding of economic freedom.⁷⁸

⁷¹ *Federal Trade Commission Act*, 15 USC §§ 41–58 (1914) (as amended).

⁷² See *Federal Trade Commission Act*, 15 USC § 5 (1914).

⁷³ See, e.g., *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (C-322/81)[1983] ECR 3461, [10], [57].

⁷⁴ See, e.g., Article G of the Treaty on the European Union which amends the Treaty of Rome (the EC Treaty): Articles 3(a), 102(a), 105 of the consolidated version of the Treaty of Rome (1992) — the Treaty Establishing the European Community. The TFEU, Article 120, places an obligation on the EU and Member States to act in accordance with the ‘principle of an open market economy with free competition’.

⁷⁵ See, e.g., the reference to ‘steady expansion, balanced trade and fair competition’ in the *EC Treaty*, Preamble; Preamble of the Treaty of Rome; the reference to efficiency and fairness of competition as the primary objectives of the EU (at the time, EC) competition law in Commission, ‘Green Paper on Vertical Restraints in EC Competition Policy’ COM (1996) 721 final, [10]–[13], [25]. In 2015, the EU Commissioner proclaimed that competition enforcement must ensure that the game for competitors is fair (Margrethe Vestager, ‘Competition policy in the EU: Outlook and recent developments in antitrust’ (Speech delivered at Peterson Institute for International Economics, Washington DC, 16 April 2015), <www.ec.europa.eu/commission/2014-2019/vestager/announcements/competition-policy-eu-outlook-and-recent-developments-antitrust_en>).

⁷⁶ Antitrust Division, *About the Division — Mission* (20 July 2015) Department of Justice <www.justice.gov/atr/about/mission.html> (emphasis added). See also *Federal Trade Commission Act*, 15 USC § 5 (1914), describes anticompetitive practices as ‘unfair methods of competition’.

⁷⁷ Amartya Sen, ‘Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms’ (1993) 45 *Oxford Economic Papers* 519, 522–32.

⁷⁸ See, e.g., Gerber, above n 19, 36, 43; Eucken, above n 19, 269–270.

Therefore, *free competition* does not mean competition with many competitors. Instead, the ideal quantity is determined by the characteristics of the market.⁷⁹ Only undistorted competition ensuring economic freedom can maximise efficiency and welfare. On the contrary, a market where competition is restricted by anticompetitive conduct will not achieve its potential of producing the highest possible welfare. This does not mean that every market protected from anticompetitive conduct achieves this, it depends on the abilities and decision-making of all competitors but, unlike the market with restricted competition, it *can* achieve this. A market with sufficient and healthy competition will motivate its participants to win consumers over and increase their profit by trying to be more efficient and thus decrease their price. It can also be more innovative by improving products and services. This is typical of free competition - competition free from anticompetitive behaviour. On the contrary, in a situation where competition is distorted, for instance by price fixing, welfare and efficiency cannot be maximised. In price fixing, prices go up, which has a negative impact on consumer welfare. At the same time, the ensured profit of cartel participants from price fixing may result in a lack of motivation to be more efficient than competitors.

A situation where competition is protected and free from anticompetitive behaviour also ensures *fairness* in the form of 'equal' opportunities. 'Equal opportunity' does not mean that all participants receive the same share in order to assist less able competitors, because this would disturb the competitive process. Such an approach would be a form of restriction of competition itself and thus would not have as its main goal the protection of competition. Instead, the protection of competition means that anyone who is capable can enter the market and compete. How successful he/she will be depends on his/her abilities and decision-making. The most efficient and innovative competitors will receive the highest profits, while the least competitive might even be driven out of the market. This is the nature of undistorted competition, which ensures freedom and fairness and motivates its participants to maximise their efficiency and innovation, which in turn maximises social welfare.⁸⁰ Therefore, maximising efficiency and welfare is the secondary goal, with the principal objective of competition law being the protection of the competitive process, which ensures the right to compete.

VI CONCLUSION

Welfare economics has gradually become essential in competition/antitrust law theoretical frameworks. It provides a consequentialist way of determining the wrongness of conduct under competition law and policy by measuring whether particular conduct decreases welfare and efficiency. Thus, the consequentialist approach sees the competition-antitrust goal as maximising consumer welfare and efficiency.

Unlike consequentialism, the deontological approach protects the competitive process. By protecting the competitive process, consumer welfare and efficiency will most likely flourish, but this is not always assured as it depends on many circumstances. This, together with the shortcomings of these incommensurable approaches, provides scope for merging the two into a pluralistic approach. Thus, the final question of this article was how they could be both incorporated into one. I briefly outlined the best way to solve this potential conflict of consequentialist and deontological understandings of

⁷⁹ For instance, the aeroplane production market will naturally have fewer competitors than the cake production market, due to natural high barriers to entry. Everyone can learn to make cakes but to produce an aeroplane involves very sophisticated knowhow and skills, as well as very high costs.

⁸⁰ Also see references in ordoliberalism: Gerber, above n 19, 41–43; Eucken, above n 19, 27–45.

competition law and its objective by determining the hierarchy of the objectives of competition law and thus assigning the objectives a lower or higher value.

By putting the principal emphasis on the outcomes of examined conduct and not its nature, a strict consequentialist, welfare economics approach does not unveil the substance of the conduct. This is rooted in the determination of whether the conduct is restrictive of competition, such as a price-fixing cartel, or is an enhancement of competition, such as innovation. The welfare economics outcome of the conduct only shows whether it has a positive or negative effect on welfare and efficiency.

Thus, I argued that not the consequences but the competitive process should be placed highest in the hierarchy of values. If competition has the highest value in competition law, it should also be the principal objective of competition law. An approach which allows maximising efficiency and welfare as a secondary goal combines both the deontological and consequentialist accounts.

