



# THE ROLE OF CONSUMER WELFARE IN COMPETITION POLICY

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CCLP Presentation  
26 November 2010, Oxford



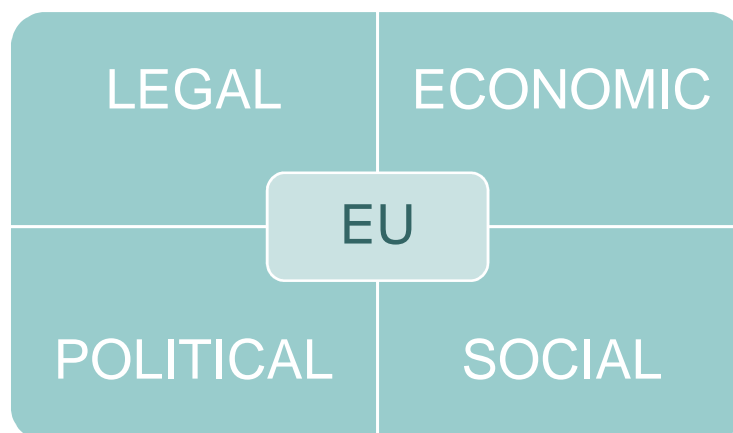
## OUTLINE

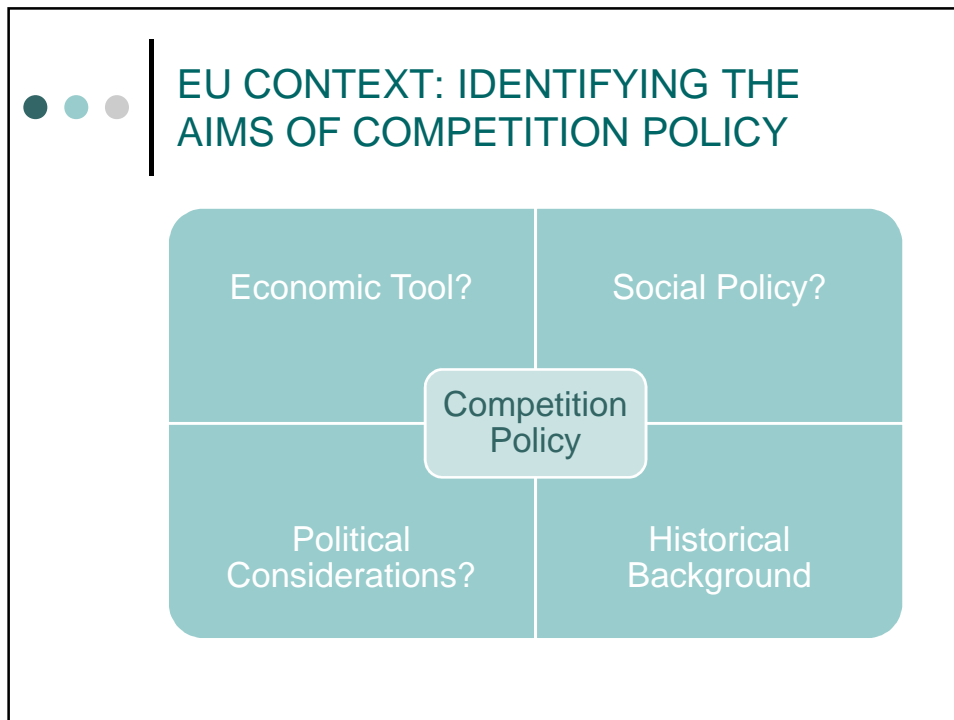
- Following the modernization of EU competition law can 'consumer welfare' be identified as its primary aim?
  - I. Reflections on the Aims of EU Competition Policy
  - II. Defining 'Consumer Welfare': An EU Approach
  - III. Is 'Consumer Welfare' the Primary Aim? – 'Policy approach' v 'Enforcement Approach'

## REFLECTIONS ON THE AIMS OF EU COMPETITION POLICY

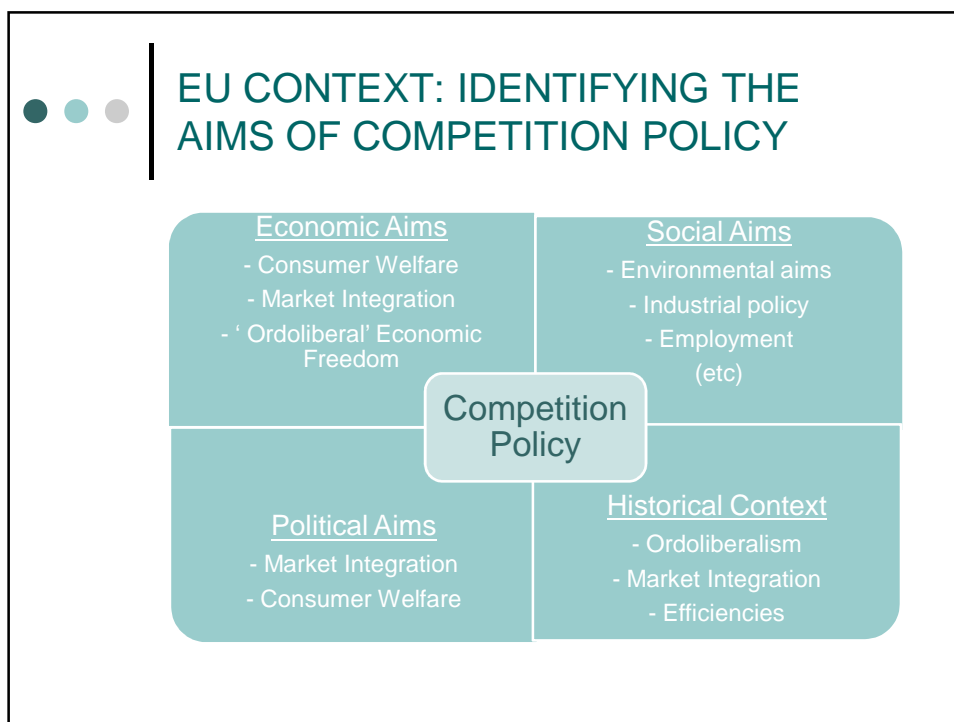
- *Competition policy does not exist in a vacuum: it is an **expression of the current values and aims of society** and is as **susceptible to change as political thinking generally*** [R Whish, *Competition Law* (OUP 2009) 19]
- *'...**Competition policy** cannot be pursued in isolation, as an end in itself, without reference to the **legal, economic, political, and social context**'* [Commission (EC), XXII<sup>nd</sup> Report on Competition Policy, (1992) 13]

## EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY





- ● ● | EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY
- Attempting a categorisation of the aims based on the above quadrants
    - i. Historical, Political and Social Context
      1. EU Competition Law in its Historical Context → Ordoliberal Influence – Competition as a Process
      2. Market Integration Objective → Political or Economic Nature?
      3. EU Competition Law as a ‘Public Policy’ Tool → Environmental, Social, Industrial and Cultural Policy Considerations
    - ii. Economic (and Political) Context
      - ‘Consumer Welfare’ Objective



- ● ● | EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY
- I. Ordoliberalism
    - Focus on market structure - Skepticism towards accumulation of private economic power
    - Preservation of Economic Freedom [Restriction of economic freedom = Restriction of competition]
    - Formalistic Approach - Reflections in the EU jurisprudence [e.g.]
      1. Case C-6/72 *Continental Can v Commission* [1973] ECR 215 para 12
      2. Case *Hoffmann La Roche v Commission* [1979] ECR 462 para 91



## EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

### ii. Market Integration

- Drafters of the Treaty → competition law as a tool for opening the fragmented national markets
- Market integration both as an objective and as a means to enhance competition [Commission (EU), 'Guidelines on Vertical Restraints' (Revised Notice) SEC (2010) 411 para 7]
- Reflections in EU jurisprudence [e.g.]
  1. Joined Cases 56/64 and 58/64 Consten SaRL and Grundig-Verkaufs-GmbH v Commission [1966] ECR 299, 340
  2. C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I – 3055 para 36
- Reinforced after Lisbon Treaty?



## EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

### iii. Public Interest Considerations

- Integration Clauses for a Number of EU Policies
- Reflections in EU jurisprudence [e.g.]
  1. Environmental considerations
    - CECEDE, OJ 2000 L 187/47 paras 30-37, 48
    - DSD, OJ 2001 L 319/1 paras 143-145
  2. Social and Employment consideration
    - T-17/93 Matra Hachette v Commission [1994] ECR-II 595 para 96
    - C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751 para 54
- Changes (or not) after Lisbon Treaty

## EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

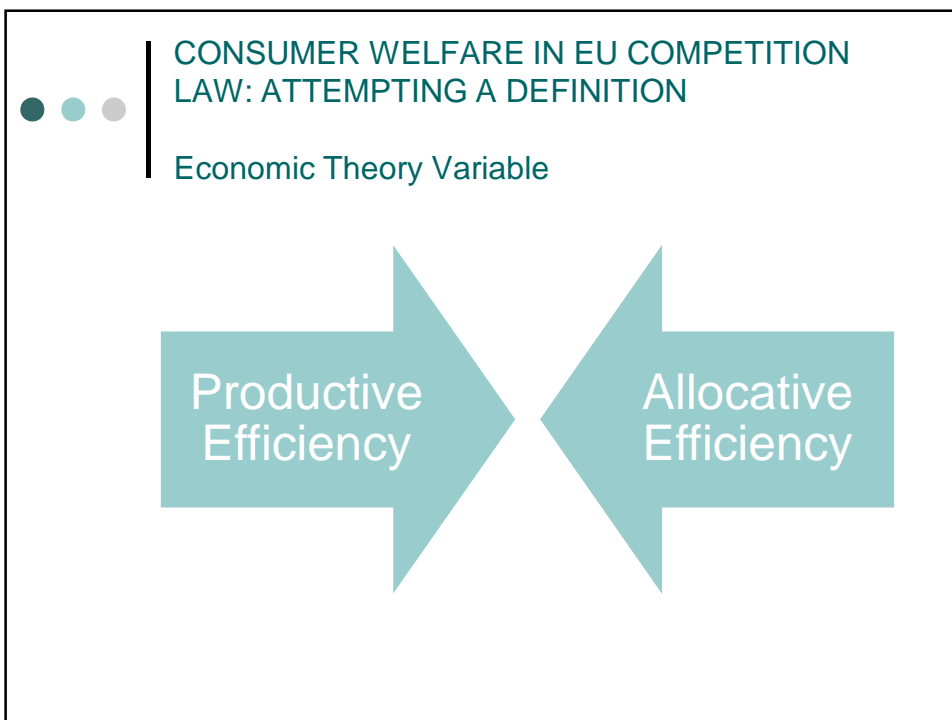
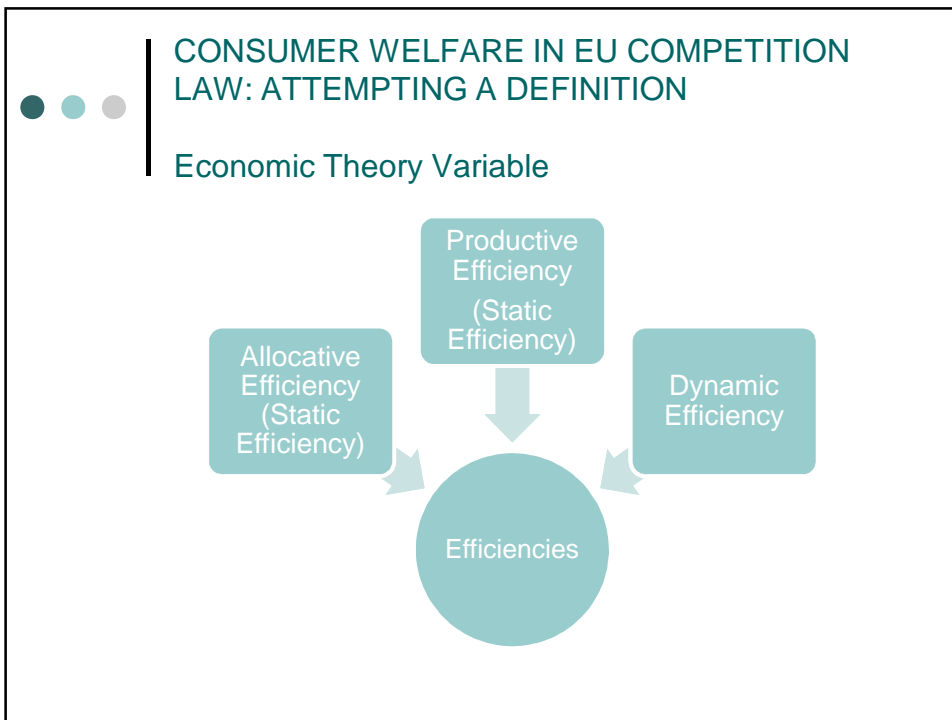
### IV. Consumer Welfare

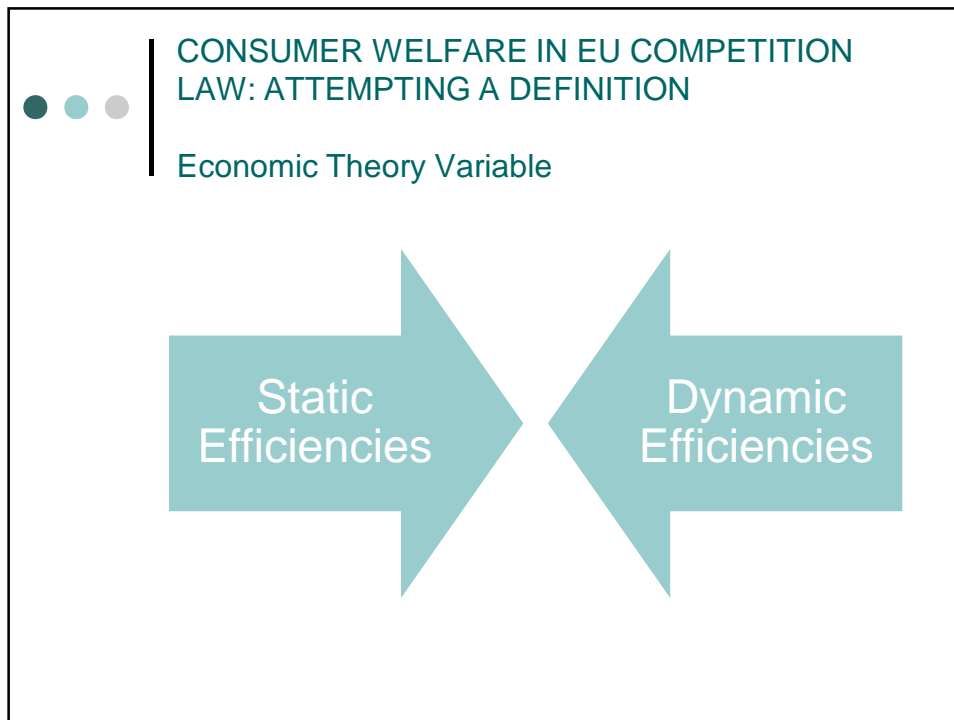
- Consumer welfare dominates Commission rhetoric post 'modernisation' [e.g]
  1. 'Report on Competition Policy 2008' COM (2009) 374 final para 108
  2. 'Guidelines on the application of Article 81 (3) of the Treaty' [2004] OJ C101/ 08 para 85
  3. Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (9 February 2009) C/2009 864 final para 19
- Caveat → Gap between policy pronouncements and enforcement → 'Consumer welfare' often cited in policy documents because it is politically appealing → But what does it actually mean and how it is reflected in competition law enforcement?

## CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION



- Where does EU competition law position itself on the 'consumer welfare' spectrum?
- Where should it position itself?
- Variables shaping the respective answer









## CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

### EU Approach

- Different to the Chicago School Approach – Similar to Post Chicago Approach
  1. Wording of the Treaty Competition Provisions
  2. Commission Pronouncements (e.g. *First Report on Competition Policy*, 12)
  
- Short Term or Long Term Consumer Welfare? (e.g. *case law on exploitative abuses; Microsoft case; Glaxo saga; Commission, Guidelines on [81(3)] para 87; Opinion of AG Trstenjak in Case C-209/07 Competition Authority v Beef Industry Development Society Ltd [56-57]*)



## CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

### EU Approach

- Consumer Notion
  - Consumer → Umbrella Term
  - Instances where the focus was on the final consumer
    1. Commission Policy Documents
 


Staff Working Paper annexed to the 2008 Competition Policy Report [355]
    2. CJEU Jurisprudence
 

Case 27/77 *Tepea v Commission* [1978] ECR 1391 [56], [66-67]; T-168/01 *GlaxoSmithKline v Commission* [118]; Cases T-213/01 and T-214/01 *Oesterreichischer Postsparkasse AG v Commission* [2006] ECR II-1601 [115]; Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Oesterreich AG v Commission* [2006] ECR II-5169 [99]



## FORMING THE 'CONSUMER WELFARE' SPECTRUM IN EU

- Consumer Welfare = Consumer Surplus
- Short Term or Long Term Consumer Welfare?
- From a Normative Perspective Should it be taken as synonymous to Long Term Final Consumer Welfare? Consider:
  1. Interests of Final Consumers not necessarily aligned with intermediate customers and competitors [see Akman, ' "Consumer" versus "Customer": The Devil in the Detail' (2010)(2)JLS 315 ]
  2. As final consumer voice rarely heard in competition policy , this enforcement standard could increase legitimacy

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3. The introduction of the single currency in EU and the combat against trade barriers (either public or private) have brought a significant change in the way that products reach the final consumers; thus, it has been argued that it is very timely to explore consumer interests in retail sectors [Marsden and Whelan in Ezrachi and Bernitz (eds) OUP 2009]
  4. Difficulties of tracing the harm at the level of final consumers → But, in some markets final consumer welfare can act as the appropriate enforcement standard



## 'CONSUMER WELFARE' IN EU COMPETITION LAW ENFORCEMENT

- In CJEU jurisprudence, 'consumer welfare' not the guiding principle. Use of presumptions. Some examples:
  - Article 101 TFEU
    1. *Case C-8/08 T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] 5 CMLR 11 [43]
 

'...It is not necessary for there to be actual [restriction of competition] a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object..' → Restriction between inter firm rivalry = Restriction of competition



## 'CONSUMER WELFARE' IN EU COMPETITION LAW ENFORCEMENT

2. *Case C-501/06P GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2010] 4 CMLR 2 [63]
 

'...Article 81 EC aims to protect not only...but also **the structure of the market, and in so doing competition as such**...for a finding that an agreement has an anti competitive object, it is not necessary that final consumers be deprived of advantages of effective competition in terms of supply and price' ≠ T-168/01 *GlaxoSmithKline v Commission* [118-119], [121] → Limits on parallel trade = Restriction by object



## 'CONSUMER WELFARE' IN EU COMPETITION LAW ENFORCEMENT

### ➤ Article 102 TFEU

1. Exploitative Abuses
  - Few Cases → e.g. *General Motors* [1975] [12];  
*United Brands* [1978] [250-251]
  - Interests of Final Consumers → *1998 Football World Cup* OJ [2000] L5/55 [100]
  - Criticism → Adverse Impact on Long term consumer welfare?



## 'CONSUMER WELFARE' IN EU COMPETITION LAW ENFORCEMENT

### 2. Exclusionary Abuses

- T-201/04 *Microsoft v Commission* [664]
- ...It is settled case law that [Article 82 EC] covers not only practices that may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure. In this case, Microsoft **impaired the effective competitive structure [...] by acquiring a significant market share on that market.**
- ≠ AG Jacobs in C-53/03 *SYFAIT V GlaxoSmithKline Plc* [2005] ECR I-4609 → Restriction of economic freedom of competitors



## 'CONSUMER WELFARE' IN EU COMPETITION LAW ENFORCEMENT

- Joined Cases C-468/06 to 478/06 *Sot Lelos kai Sia EE v GlaxoSmithKline AEVE* [2008] ECR I-7139[57]  
 ... without it being necessary for the Court to rule on the question whether it is for an undertaking in a dominant position to assess whether its conduct vis-à-vis a trading party constitutes abuse in the light of the degree to which that party's activities offer advantages to the final consumers, it is clear that, in the circumstances of the main proceedings, **such an undertaking cannot base its arguments on the premiss that the parallel exports which it seeks to limit are of only minimal benefit to the final consumers** →Market integration objective prevails



## CONCLUSIONS

1. Discerning a primary goal in EU competition law→ 'Sisyphean Task'
2. Following 'modernisation' of EU competition law increased attention on 'consumer welfare' standard.
3. Inconsistency between policy documents and competition law enforcement standard → 'Consumer Welfare' not the standard adopted in EU competition law enforcement
4. Alternative ways to align Commission policy pronouncements and Competition law enforcement → Consumer Involvement in private competition law enforcement