TILBURG UNIVERSITY

TILEC

TILEC Discussion Paper

DP 2022-007

Balancing in Competition Law

By

Giorgio Monti

March 24, 2022

ISSN 1572-4042

ISSN 2213-9419 https://ssrn.com/abstract=4065868

Balancing in Competition Law

Giorgio Monti, Tilburg Law and Economics Center, G.Monti@tilburguniversity.edu

ABSTRACT

By reference to case-law and soft law in three jurisdictions (Canada, US and EU), this paper explores how courts and agencies carry out balancing exercises in the application of competition law. The paper identifies three approaches: utilitarian balancing, consumer welfare balancing, and constitutional law balancing. Each is discussed on its own merits, the three are compared, and it is suggested that the choice of balancing approach is an indicator of the policy choices made about the role of competition law in the economy. The main finding is that for all the talk of balancing, this is an exercise that is not utilized in many instances and that, at least insofar as the EU is concerned, there is an attempt to marginalize this approach.

JEL Classification: K21, K23, L40

1. Introduction

The language of balancing is used widely in competition law. For instance, the rule of reason in the US is said to include this component as courts are asked to balance the pro and anti-competitive effects of business practices.[1] In Article 101(3) TFEU the decision-maker is expected to balance the restriction of competition with some other possible benefits.[2] When we speak of balancing, what do we mean? What does a court or a competition authority do when it balances? This inquiry is at the heart of this paper.

In section 2 we start by explaining the notion of 'utilitarian balancing', based on the well-known Williamson trade-off model and examine how this is implemented in Canada's merger control system. This is the type of balancing approach that appears closest to the way balancing is described by courts and competition authorities. After all, competition law is now grounded in economics and utilitarianism appears a good fit. However, we show that on a closer look the US and EU systems of merger control do not apply this approach to balancing and even in Canada there have been reservations about its deployment. We close this section by discussing why utilitarian balancing has not been applied successfully even if it is the best fit if agencies carry out an economic appraisal of mergers.

One of the reasons why utilitarian balancing might not fit in the field of competition law is that many agencies apply a consumer welfare standard rather than a total welfare standard. The European Commission has made a clear commitment to consumer welfare as the basis for

[1] *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001): "courts routinely apply a balancing approach" requiring plaintiff to "demonstrate that the anticompetitive harm . . . outweighs the procompetitive benefit."

[2] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 11: 'The balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 81(3).' See C. Townley *Article 81 EC and Public Policy* (Hart Publishing, 2010) ch.7 for an account of balancing competition and non-competition interests.

assessment and in section 3 we discuss what consumer welfare balancing might look like. We show that consumer welfare balancing does not fit the legal framework in the EU and that it is not a form of balancing at all.

In section 4 we turn to what I label 'constitutional law balancing', which proves to be an approach that fits with the framework applicable in the EU and the US when these jurisdictions turn to carry out a balancing exercise for the review of anticompetitive agreements. While constitutional law balancing fits well with the structure of inquiry in competition law, applying this approach also reveals some problems that agencies and courts need to confront because of some of the inherent features of this balancing exercise.

The method applied in this paper is not that of comparative law: while differences among the three selected jurisdictions are observed and the implications of this are noted, the aim of the paper is to map different approaches to balancing and use the case-law to discuss which method offers a best fit for the approach found in competition law. All three jurisdictions have mature systems of competition law and whose agencies have taken great pains to flesh out their competition laws.

Two further preliminary considerations should be borne in mind. First, sometimes agencies or judges carry out a balancing exercise tacitly by determining the scope of application of competition law or designing doctrine in such a way that competing interests are balanced ex ante. For example, a refusal to deal with rivals by a dominant firm is only considered an antitrust offence under very restrictive conditions, which serves to balance competition with incentives to innovate. These types of balancing are outside the scope of this inquiry, which focuses exclusively on instances where the decision-maker claims expressly to be carrying out a balancing exercise. Second, the focus is not on what we balance, but how we balance. The discussion of what to balance is very controversial: according to some practices that restrict competition may only be saved by a showing of efficiency; according others, practices that restrict competition may be saved by reference to other public interests like sustainability or inequality.[3] In order to make sure that the argument is focused primarily on the method of balancing we will use examples of cases that take the narrow view.

The discussion is relevant for competition law generally: do actors in the antitrust community balance? If so what do they do when they balance? And what does the choice of balancing method tell us about the role competition law plays?

2. The utilitarian balancing model

2.1 The Canadian approach in merger control

The best illustration of the utilitarian balancing model is found in the work of Oliver Williamson in the late 1960s. He noted how merger efficiencies might at times outweigh the deadweight loss

[3] Compare Townley (above n 2) and O. Odudu 'The Wider Concerns of Competition Law' (2010) 30(3) Oxford Journal of Legal Studies 599.

from a merger and speculated whether in such circumstances mergers should be allowed.[4] The model is well-known and much discussed in the economics literature.[5] A jurisdiction that has adopted and applied a version of this approach is Canada in section 96(1) of the Competition Act. A merger which risks substantially lessening competition will be allowed if the Tribunal

> finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order [to prohibit the merger] were made.[6]

The *Superior Propane* saga allows us to illustrate the working of the utilitarian balancing model.[7] This was a 2 to 1 merger in the market for retail propane and the following facts emerged: as a result of the merger there would be a deadweight loss of $6 million per year, a wealth transfer from consumers to the merged entity of $40.5 million per year, and an efficiency gain of $29.2 million per year. The first time Competition Tribunal considered the merger it applied a utilitarian balancing approach: wealth transfers were deemed irrelevant and the Tribunal considered that the merger should be authorized because the efficiency gains were larger than the deadweight loss. This is a vivid illustration of the Williamson trade-off model: the merger is cleared because the negative welfare effects are outweighed by the positive effects.[8]

After an appeal, it was held that some of the wealth transfer should also count as a negative effect. Thus the second time the Tribunal reviewed the merger it applied a 'balancing weights' approach: the Tribunal had regard to harm the merger would inflict on poorer consumers who had no alternative to buying propane for heating and assign this loss some additional weight. In applying this approach the Tribunal found that the wealth transfer from low-income households to the merged entity was $2.6 million per year. Since a dollar to a poor household is worth more than an extra dollar to the shareholders of the merged entity, the Tribunal considered that this loss should be given more weight. However the Tribunal noted that even if it doubled it (so that

[4] O. Williamson, Economies as an antitrust defense: the welfare trade-offs'(1968) 59 AER 954

[5] G. Bet and R.D. Blair, 'Williamson's Welfare Trade-Off Around the World' (2019) 55 Review of Industrial Organization 515 for a literature review.

[6] Competition Act (R.S.C., 1985, c. C-34), section 96(1).

[7] The case has a convoluted procedural history. Four judgments were rendered. First, the Competition Tribunal held that the merger was saved by the efficiency defence, applying a total surplus standard (*Commissioner of Competition v. Superior Propane Inc.*, 2000 CACT 15 (CanLII)). On appeal the Court of Appeal held that the Tribunal had applied too narrow a view of the negative effects by focusing only on deadweight loss and should also have looked at the harm the merger could cause to consumers and customers (*Canada (Commissioner of Competition) v. Superior Propane Inc.,* 2001 FCA 104 (CanLII)). The case returned to the Competition Tribunal who applied the decision of the Court of Appeal on the negative effects and suggested that the harm to poor consumers should be afforded extra weight. Even with this approach the efficiencies were larger than the negative effects (*Commissioner of Competition v. Superior Propane Inc.,* 2002 CACT 16 (CanLII)). This was appealed and the Court of Appeal approved of the judgment of the Tribunal (*Canada (Commissioner of Competition) v. Superior Propane Inc.,* 2003 FCA 53 (CanLII)).

[8] *Commissioner of Competition v. Superior Propane Inc.,* 2000 CACT 15 (CanLII).

the wealth transfer loss would amount to $5.2 million per year), the efficiency gains would continue to outstrip the anti-competitive effects (the negative effects added up to $11.2 million, the efficiency gains remained at $29.2 million). This approach was approved of on appeal.[9]

The approach taken in Canada has a lot to do with the unique features of its legislation. On the one hand, Canada has a small domestic market and the view was taken that in certain markets one should tolerate high levels of concentration to allow firms to exploit economies of scale and become competitive internationally: consolidation is at times preferred to competition.[10] This offers a mix of economic efficiency and industrial policy as grounds for the efficiency defence. This is confirmed by the non-exhaustive list of indicators provided in the competition law statute: the Tribunal is called upon to consider whether the efficiency gains may 'result in: (a) a significant increase in the real value of exports; or (b) a significant substitution of domestic products for imported products.'[11]

Furthermore, by reference to Section 1.1 of the Competition Act, the Court of Appeal found that there were other purposes in the legislation, for instance 'the ability of medium and small businesses to participate in the economy, and the availability to consumers of a choice of goods at competitive prices.'[12] The Court agreed that section 96 (containing the efficiency defence) 'gave primacy to the statutory objective of economic efficiency',[13] but that this was not at the expense of other statutory objectives. The Court also noted that the Competition Tribunal was composed of people of diverse backgrounds, including consumer groups and labour:

> This, in turn, is an indication that the Act itself is not concerned with "economics" so narrowly conceived as to exclude from consideration under section 96 the redistributive effects of higher prices that consumers will have to pay as a result of the merger, or its impact on small and medium-sized businesses.[14]

The significance of this reflection for the purposes of this paper is twofold. First, it explains the origin of the balancing weights approach developed by the Tribunal: efficiencies are balanced with an eye to adverse distributive consequences: balancing is more complex given the multiple objectives in the law. Second, and more generally, it provides us with the first clue that courts are wary of the utilitarian balancing approach. The other clue pointing us in the same direction is that in the immediate aftermath of this judgment a Bill was introduced to overrule the approach taken here and to redraft the merger laws. However, an election interrupted the Bill's progress and the issue has not resurfaced on the legislative table.[15]

[9] [2003] FCA 63 paragraphs 20 to 25, summarizing the judgment of the Tribunal.
[10] *Tervita v Canada (Commissioner for Competition)* [2015] SCC 3, paragraph 87.
[11] Competition Act (R.S.C., 1985, c. C-34), Section 96(2).
[12] *Superior Propane*, [2001] FCA 104, paragraph 108.
[13] *Superior Propane*, [2001] FCA 104, paragraph 110.
[14] Superior Propane, [2001] FCA 104, paragraph 116
[15] Bill C-249, An Act to amend the Competition Act (Second Session, Thirty-seventh Parliament,

Nevertheless, for the purposes of this article, the Superior Propane saga stands out as unique in that courts carried out a utilitarian balancing exercise, albeit one where greater weight is given to the harms sustained by certain constituencies. This is not the place to discuss whether this approach achieves the results that it claims, the point is to reveal how one may carry out balancing.[16] In this respect, the Canadian experience also raises a number of practical considerations about how to implement a utilitarian balancing approach. These are relevant for understanding the refusal of other legal systems in deploying this approach. They pertain to the balancing method, the burden of proof and the size of the efficiencies, all of which were discussed by the courts.

Regarding the balancing method, in a subsequent judgment the Supreme Court of Canada held that it was for the Tribunal to choose the welfare standard to adopt: it may choose the utilitarian balancing approach (which it called 'total surplus') or the balancing weights approach, whichever best fit.[17] As shown above, in *Superior Propane* the Tribunal was forbidden from using the total surplus test because it ignored the interests of vulnerable households. If so, the first practical question is under what circumstances might utilitarian balancing be tolerated? We might hypothesise that a merger between two manufacturers of electric vehicles that yields considerable productive efficiencies but raises the price of cars that are purchased by relatively wealthy consumers would be assessed without assigning a greater weight on the consumers who pay more since their wealth is such that their losses are not a social concern, indeed such clients are likely to buy the car to signal status.[18] Conversely, for goods that are perceived as more essential for vulnerable consumers a balancing weights approach may be preferred.

A second practical consideration is that when the parties to a merger wish to avail themselves of the efficiency defence they have the burden of proof to show that the efficiencies outweigh the negative effects and that they are merger-specific.[19] The corollary to this (and this is a major point to which we return in section 3 below when discussing EU Law in particular) is that the Commissioner for Competition must first quantify the competitive harm whenever this is

51-52 Elizabeth II, 2002-2003). This would have amended section 96(1) as follows: "In determining, for the purposes of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may, together with the factors that may be considered by the Tribunal under section 93, have regard to whether the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers, including competitive prices or product choices, and that would not likely be attained in the absence of the merger or proposed merger." This, as we shall see later, would have aligned Canada with the approach in the EU and the US.

[16] For criticisms on the merits see Matthew Chiasson & Paul A. Johnson, 'Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation'(2019) 32 CCLR 1, who state that the efficiency defence focuses on cost savings but ignores dynamic efficiencies which are more likely to emerge in a competitive market. As a result, mergers that are allowed under this approach are more likely to harm economic efficiency. For a response, see Brian A. Facey and David Dueck, 'Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation'(2019) 32 CCLR 33 who claim that the defence should be read even more expansively.

[17] *Tervita* above n 9 para 99.

[18] see J.K. Galbraith *The Affluent Society* (1958) ch.10.

[19] *Tervita* above n 9, paras 107 and 113.

possible. If the Commissioner fails then the anti-competitive effects amount to zero, which means that the defendant will see the merger approved upon a convincing account that the merger yields efficiencies. This was the result that obtained in *Tervita*.[20] It is justified by considerations of fairness to the defendant:

> The difficulty with assigning non-quantified quantifiable effects a weight of "undetermined" is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.[21]

The third practical consideration is that the application of the efficiency defence does not require a showing that the efficiencies are significantly larger than the anticompetitive effects. The test in section 96 is such that so long as the efficiency is larger than the harm then the balance will be positive. The Supreme Court notes that of course in merger cases the likely effects are calculated with probabilistic models, but this requires that the Tribunal is sensitive to the risk of error and consider the models carefully.[22]

2.2 The efficiency defence in US and EU merger policy

While both EU and US merger systems contain an efficiency defence, neither system allows for balancing the way that Canada does. On the contrary, efficiency considerations matter only when these can reveal that the merger does not harm competition. The standard in the US and EU is sufficiently similar for these two jurisdictions to be considered together. The approach has been described as 'an instance of balancing done right.'[23] However, this is not quite the kind of balancing we have seen above.

Merger assessment runs roughly as follows: first the theory of harm explains the likely harm to consumer welfare, second the defendant is asked to provide evidence that, contrary to what the competition authority thinks, consumer prices will instead fall. Price is a proxy for anticompetitive effects. The DOJ/FTC Guidelines explain it thus:

> In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a coordinated effects context, incremental cost reductions may make coordination less

[20] *Tervita* above n 9 paras 126-131.
[21] *Tervita* above n 9, para 131.
[22] *Tervita* above n 9, para 154.
[23] H. Hovenkamp Antitrust Balancing (2016). Faculty Scholarship at Penn Law. 1786, p.382.

> likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm.[24]

In the first and third sentence above the efficiencies serve to undermine the theory of harm. This is confirmed in later parts of the Guidelines which explain that a merger is not challenged when "efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market… [if efficiencies are] sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market."[25]

In the second sentence quoted above there is a hint that perhaps the merger might improve one aspect of consumer welfare (new or improved products) while resulting in a price increase. While this might be seen to suggest a balancing effort is required, this is done within the same analytical frame: are consumers worse off or better off? It is not a balance between competing interest but it is an overall assessment of the impact of the merger on consumer welfare.[26]

The European Commission's Guidelines are similar: 'efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.'[27] With respect, it is hard to call this exercise balancing.

Rather than balancing, the EU and US guidelines provide a procedural device by which those with better information (here the parties to the merger) have an incentive to produce information that will cast doubt upon the risk that the merger may harm competition. In this framework efficiencies are not balanced against the anticompetitive risk: they serve to rebut the Commission's competition concerns.[28]

This is a fairly limited role of efficiencies and this consideration has not played a meaningful role in the analysis of mergers in the US or the EU.[29] The reason for this is that a case against a merger is usually made by showing that the merger increases market power to such an extent that the

[24] DOJ/FTC Horizontal Merger Guidelines (2010) section 10

[25] Ibid., section 10

[26] In *FTC v. HJ Heinz* Co., 116 F. Supp. 2d 190, 198 (D.D.C. 2000), rev'd, 246 F.3d 708 (D.C. Cir. 2001) at first instance the district court found that the merger of the two smaller baby food producer would create incentives to introduce innovative products to compete with the largest rival. However the court of appeal reversed. For present purposes what matters is that the district court traded off possible higher prices from more concentrated markets with improvements in product innovation. For a review of the case-law, see C. Wilson 'Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies (2020) available at: https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf

[27] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 77.

[28] A. Renckens 'Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense' (2007) 3(2) Journal of Competition Law & Economics 149.

[29] D.A. Crane, Rethinking Merger Efficiencies (2011) 110 Michigan Law Review 347 reviewing US case law and see Monti (2004) and (2022) for a review of the EU decisions.

merged entity is likely to increase prices. It is only rarely that efficiencies will prove that prices will fall, usually the efficiencies will just mean greater profits for the merged entity.

2.3. Why is utilitarian balancing so rare?

One prosaic answer to this question is that it is hard to measure the negative and positive effects, so courts shy away from accepting a balancing test. However the Canadian case-law tells us a different story, for it places the onus on the parties to quantify efficiencies and harm and evidence seems available. We can thus dismiss this answer.

Another pragmatic argument is that of incommensurability: we don't see balancing because it is impossible to balance two things that cannot be compared. As Hovenkamp puts it, balancing is but a 'complex mixture of soft economic and even ideological judgments.'[30] However this is only true in those cases where either the theory of harm is not specified in welfare terms (e.g. harm to the competitive process) and/or the countervailing benefits are non-economic (e.g. social cohesion on college campuses, media diversity). If the legal order embraces a balance of negative and positive economic effects this problem largely goes away.[31] In other words: if we choose to ground competition law in mainstream economics then what we balance is commensurable. The current debates about integrating sustainability in EU competition law show that the use of concepts from environmental economics and more advanced approaches to cost-benefit analysis can serve as a way to integrate a wide range of interest in a welfare calculus.[32] Thus, the incommensurability argument only works if we are called upon to balance one or more non-economic element with a reduction in economic welfare.

A third, related but distinct concern with utilitarian balancing is that, supposing that the efficiencies arise from a reduction in the marginal cost of production, there is no guarantee that the cost savings made by the firm will be beneficial to society: it has been argued that monopolies are likely to invest some of these extra rents in lobbying activities to keep entry barriers higher than they would otherwise be.[33] This argument is different in nature: it accepts balancing but it considers the risk that resources transferred to the firms are misallocated in other ways. However, if this were true, then it would just require an adjustment to the weights of the scale: we would treat some (or all) of the wealth transfers and cost savings as a negative effect of the merger rather than as neutral and we could then still balance.

Fourth, and related, it is said that we reject utilitarian balancing because we adopt a consumer welfare standard. This standard has an inbuilt distributive justice element and so once harm to consumers is shown nothing more can be done to sway the decision against the practice. This

[30] Hovenkamp, above n 22, p.374.
[31] Contra, see R.H. Allensworth 'The Commensurability Myth in Antitrust'(2016) Vanderbilt Law Review 1.
[32] See e.g. G. Monti 'Four Options for a Greener Competition Law' (2020) JECLAP 124 and Hellenic Competition Commission, Staff Discussion Paper on Sustainability Issues and Competition Law (2020) available at: https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.
[33] R.A. Posner, 'The Social Cost of Monopoly and Regulation' (1975) 83(4) Journal of Political Economy 807.

works well to explain the approach in merger cases, in particular the line taken by the European Commission: the theory of harm is based upon harm to consumer welfare that results either directly or indirectly (through reductions in innovation) and the efficiency defence is a quest by the merging parties to show that the merger is in fact pro-competitive in that it yields incentives to improve consumer welfare. In this legal system there is just no place for a utilitarian balancing approach nor for a Canada-style defence. However, this is a claim that the legal order is set in such a way that utilitarian balancing is not present. It does not serve to explain why such balancing is not used more widely.

Fifth, it is claimed that balancing is a political exercise and thus unsuited to a legal order where the decision-maker is a competition authority or a court. There are two answers to this. The first is that this does not apply to utilitarian balancing because there the test is about the overall impact of the merger on total welfare: if this is what the law requires (as in Canada) then the judges and agencies in charge are acting within the scope of the legislation. If anything, it may be said that it is the choice to adopt a balancing weights approach that turns the analysis into a political discussion. A second answer is that, antitrust law and enforcement is a political exercise: it has an effect on how markets are shaped and how society functions. It follows that whether one chooses to balance or not one applies antitrust in a manner that has certain political effects. This is beyond the scope of this paper but it suffices to note that the 'politics' objection is not sufficient to object against utilitarian balancing.

Sixth, it may be claimed that even if we considered utilitarian balancing desirable as a matter of principle, we don't wish to balance because the risk of error is significant. However even this argument is weak unless further specified. Those making this claim would have to show that the risk of error is less without balancing than with and it is not clear how this may be proven. If the test for illegality is that a merger reduces consumer welfare then this is a prediction that is as likely to be wrong as a test which allows the decision-maker to consider possible productive efficiencies as well. The risk of error is pervasive in antitrust, and it is not by itself an argument against balancing. Errors are reduced by procedures to allocate burdens of proof, by thorough judicial review, and by careful management of expert evidence. Some powerful counter-arguments may be made: (i) the more variables you measure, the more likely it is that error creeps in so a consumer welfare standard is less error-prone that a total welfare standard; (ii) the economics-literature on merger control also suggests that for reasons of administrability a consumer welfare standard is more likely to yield results that maximize welfare than the direct application of a total welfare standard.

In my view, the fundamental reason the antitrust community is wary of the utilitarian balancing approach is that it hurts a sense of fairness: 'the market reaches its limits because it comes up against a feeling in many individuals that the system is unfair.'[34] In other words, a utilitarian transposition of an economic approach premised on a Kaldor-Hicks model of efficiency (whereby

[34] P. De Grauwe, *The Limits of the Market* (Oxford, 2019) p.42

a change in the status quo is efficient when those made better off are able (potentially) to compensate those who ae made worse off by the change) is an attitude that society dislikes and an agency saying that it tolerates mergers to monopoly because that maximizes total welfare would risk losing any legitimacy in the eyes of the public. Some may rebut this by pointing out that these concerns about distributive justice apply even in competitive markets: there are always some people who are unable to buy goods, even at the competitive price and yet we tolerate the working of the market system. The response to this is that there is a difference between applying competition law to ensure that the market is as competitive as possible so that as many people as possible are able to afford to buy goods and deciding to reduce consumer surplus in order to favour total welfare. In sum, there is no need to reject the market system as a whole to oppose a Kaldor-Hicks measure of welfare. Here is Amartya Sen's devastating critique:

> 'consider a change from which some people gain and others lose. If the gainers have gained so much that they can compensate the losers and still retain some gain, then it's an improvement according to the compensation test. So you ask the question, Do they actually compensate the losers? No, they don't have to do it—the losers stay losers (all we are checking is whether they could have been compensated). I mean, what kind of an improvement is that? The losers can rightly think this to be a con job.'[35]

This accounts the attempt in Canada to overrule the decision in Superior Propane by amending the competition statute – one critic seeing the approach espoused by the court as Robin Hood in reverse,[36] and this is why in other legal systems we find no decision applying utilitarian balancing.

3. Consumer welfare balancing in the EU

We take as a starting point the statement made by the General Court in *M6 v Commission* where it held that the balancing exercise is to be found in Article 101(3), thus no such balancing should be carried out under Article 101(1).[37] As will be recalled under Article 101(3) TFEU an anticompetitive agreement is saved if it yields some positive effects, if the consumer obtains a fair share of these effects, if the restraint is necessary to achieve these positive benefits, and if there is no elimination of competition. It will be obvious that there is no duty to balance in the words of the Treaty, at least insofar as balancing is understood in the discussion of utilitarian balancing presented above. In other words: nothing in the text of Article 101(3) requires proof that the positive effects that satisfy that provision are greater than the negative effects shown under Article 101(1).

[35] Sen, Deaton and Besley, 'Economics with a Moral Compass? Welfare Economics: Past, Present, and Future' (2020) 12(1) Annual Review of Economics: https://www.annualreviews.org/doi/full/10.1146/annurev-economics-020520-020136

[36] K.G. Ahmed, 'The Efficiency Defence and Its Interpretation in Superior Propane: Reversed Robinhoodism at Its Worst' (2006) 40 Review Juridique Themis 595. See also above n 14.

[37] *Métropole télévision (M6) and others v Commission*, Case T-112/99, EU:T:2001:215 Paras 72-76 and 107. This is a somewhat naïve reading of some of the cases, see e.g. Marquis (2006) ELRev for a more nuanced analysis.

Current practice of the Commission solves this by requiring that the harm to consumers that results from an infringement of Article 101(1) is compensated by the benefit that the agreement achieves for those consumers when assessed under Article 101(3). The balance then is between the negative effects for consumers and the positive effects for this group. Insofar as this author knows there is only one decision where these effects were estimated, the *CECED* decision where it was found that the agreement to phase out certain washing machines increased the price of the goods but that the full-life cost of the machine (energy efficiency meant consumers paid lower electricity bills) was such that the gains outweighed the losses.[38] This reading is consistent with the ex post rationalization that the Commission has given to this decision in its guidelines.[39] This approach to balancing has been followed in other decisions. While the Commission has yet to find a setting where the impact on consumer welfare was positive, the analytical framework is applied consistently. For instance, in *Cartes Bancaires*, the theory of harm was that the fee structure for members of the Cartes Bancaires network served to exclude rivals and raise the cost of issuing cards: established members would pay a lower fee than new entrants. The Commission examined then whether consumers who suffered as a result would be compensated by the fact that the fee structure stimulated the development of the acquisition market by new member banks but it found that this was not the case: "installation of further ATMs on a market which is already overequipped will not significantly increase the number of withdrawals. If they are not profitable, the excessive installation of ATMs could even result in an increase in costs for consumers by way of higher charges for withdrawals."[40]

This kind of balancing is premised on the Commission designing a theory of harm based on consumer welfare harm and a subsequent discussion about whether there is any feature of the agreement that shows that consumer welfare is enhanced rather than restricted. It should be clear that in advocating this approach the Commission aligns the framework for merger control and that for the review of restrictive practices. This symmetry has a certain attraction in creating a legal system that operates consistently.

However, there are two flaws with this approach to balancing: the first is that one does not often see in Commission decisions a quantification of consumer harm under Article 101(1). *CECED* is the exception to this: in all the other decisions the Commission identifies the kinds of competition harm but does not quantify them. It's quite heroic then to claim that under Article 101(3) the parties have to prove that the consumer is compensated when the loss this party suffers is not quantified by the Commission in the first place. In this context it is helpful to recall the Supreme Court of Canada's admonition to the competition authority discussed above, which required that the harm should be quantified to give the defendant a fair chance at explaining why its conduct is beneficial.

[38] Case IV.F.1/36.718, *CECED* [2000] OJ L187/47, paragraphs 47 to 57.
[39] Guidelines on horizontal Agreements (2011) OJ C 11/1, para 329.
[40] Case COMP/D1/38606, *Cartes Bancaires* (2007) paragraph 484. Finally upheld nearly a decade later in *CB v Commission*, T-491/07 RENV, EU:T:2016:379.

The second flaw is that if one does the balancing in the second condition of Article 101(3) (fair share to consumers) one effectively ignores some of the benefits listed under the first condition of that Article. For example, suppose an agreement reduces production costs by a factor of 5 and causes prices to rise by a factor of 1, then an exemption is only available if the reduction in production costs is passed on to consumers so they get benefits (e.g. new or better quality products) of a factor equal to or greater than 1. Therefore the reduction of production costs (by a factor of 5) becomes irrelevant on the Commission's reading.

The case-law shows that the balance is between the harm to competition and the gains to society identified in the first condition. In other words, we balance the negative effect on competition with the positive effects listed in the first limb of Article 101(3), and not the second. In *Consten & Grunding* for example the applicants stated that their vertical restraint led to an improvement in distribution and the Court held that 'This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages they cause in the field of competition.'[41] On the facts the Court upheld the Commission's decision that the restraint (absolute territorial protection) was not necessary to achieve the gains but for the purposes of this discussion the Court made it clear that the balance is between the negative effects on competition and the positive effects enumerated in the first condition of Article 101(3). The same finding can be made by reference to other judgments of the ECJ.[42] In *Fedetab* the Commission reviewed restrictive practices in the cigarette sector by which manufacturers and wholesalers arranged a system to keep retail prices high, foreclosing market access to supermarkets and protecting small traders. The parties counterclaimed by observing that the agreement improved the distribution of goods by ensuring that small specialized retailers had a good profit margin while preventing supermarkets from competing by selling a reduced variety of cigarettes at lower prices. However the Commission saw no evidence that the agreement improved distribution compared to how cigarettes would be distributed absent the restrictions.[43] On appeal this was confirmed. For the purposes of this paper the key point to emerge from this judgment is that one compares the competition restraints with the improved distribution (an element of the first condition of Article 101(3), not the second). Moreover the Court made it clear that the positive effects under Article 101(3) are not just those that benefit consumers. Under Article 101(3) TFEU:

[41] *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, Joined cases 56 and 58-64, [1966] ECR 299, 348.

[42] See G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law. Pathways to Assess Private Sustainability Initiatives' (2017) 42 EL Rev 635 for a review of a number of judgments.

[43] Cases IV/28.852 - GB-Inno-BM/Fedetab, IV/29.127 - Mestdagh- Huyghebaert/Fedetab, IV/29.149 - Fedetab Recommendation [1978] OJ L224/29 para 119.

> 'the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives *of a different nature* and that to this end certain restrictions of competition are permissible…'[44]

These other objectives are those in the first condition. While the ECJ has not been particularly clear about what counts under the first condition, it is clear that the balance is between these effects and the negative effects on competition and not a consideration of whether, overall the agreement benefits consumers.

Following from this interpretation, the second condition (consumer pass-on) is subject to the first so consumers need not be fully compensated as long as they receive some benefits that are identified under the first condition. This comes from a literal reading of the text: consumers must get 'a fair share of the resulting benefits' – these benefits are those listed in the first condition and which result from the agreement.

However, the Court has given few clues on how to interpret the notion of consumer fair share. In a brief obiter statement the ECJ has considered that innovation is a benefit that counts, and here the consumer benefits are likely to be for future, not present buyers.[45] In another judgment the ECJ considered an agreement among banks to share data about consumer credit rating and it found that a possible benefit of this would be that consumers with a poor rating would get no loans, thereby avoiding the risk of over-indebtedness for them.[46] This case-law suggests that the Court is unlikely to be overly strict in its interpretation of the fair share requirement, but its precise contours have not yet been identified.

Another puzzle with the Commission's approach discussed here is why proportionality plays a role. Recall: efficiencies only matter if there is no less restrictive way of achieving them. However, as we have seen the Commission's approach is that efficiencies count when they serve to enhance consumer welfare, in other words there is no trade-off: consumers are either worse off or better off. In this context to insist that an agreement is the least restrictive is to suggest that competition law is designed to optimize economic performance, and not just to prevent a reduction in consumer welfare. To give an example: an agreement between A and B (call this agreement Y) to improve the quality of their product leads to a price increase of 1 but an improvement in quality of 2. Therefore, the agreement is consumer welfare enhancing. Proportionality provides that if A and B could enter into a different type of agreement which increased price by 0.5 with a similar gain in quality of 2 (call this agreement X), then the Commission would exempt agreement X but Y would fail for lack of proportionality. In my view, this is an unnecessary approach when the legal standard is consumer welfare. If the parties prove that the agreement causes no harm to consumers or that they benefit from this, then the fact

[44] *Heintz van Landewyck SARL and others v Commission*, Joined cases 209 to 215 and 218/78, EU:C:1980:248 para 176 (my emphasis).
[45] *GlaxoSmithKline Services Unlimited v Commission*, C-501/06P, EU:C:2009: 610, 95. There was fuller consideration in the General Court.
[46] *Asnef Equifax*, C-238/05, EU:C:2006:734, para 67-69.

that agreement X would deliver even more benefits is irrelevant. The purpose of competition law on this vision is to ensure consumer welfare does not go down, not that consumer welfare is optimized.

On the contrary, the requirement of indispensability plays a role in the interpretation of Article 101(3) argued for in this paper and supported by the ECJ's case-law: if the positive effects are of a different nature from the negative effects then the requirement that the agreement is necessary to achieve the positive effects makes sense because one should not authorize agreements when less restrictive alternatives would deliver the same benefit. Here the Commission is obliged to optimize the two competing interests. We develop this further in the following section.

Summing up: balancing under a consumer welfare standard is not really a method of balancing. It is about the defendant disproving the theory of harm by showing that the agreement does not reduce but actually improves consumer welfare. This is not to say that abandoning any effort to balance is bad policy. From the perspective of a competition authority this approach allows it to pursue cases in a consistent manner and keep itself focused on a narrow mandate of safeguarding consumer welfare. It avoids the risk of politicians pushing an agency to consider other kinds of positive effects. However, as suggested here, EU competition law does not allow a consumer welfare approach to balancing, so there is a mismatch between the Treaty language and the ECJ's case-law on the one hand and the Commission's approach on the other. Nevertheless, even if we agree with the Commission's approach to consumer welfare, the role of indispensability seems irrelevant. Some answers on how to best interpret Article 101(3) once we have worked out that the balance can be between different interests may be found in the next section.

4. Constitutional Law Balancing

Before discussing what constitutional law balancing is all about, it is helpful to trace the US debate on antitrust balancing when it comes to the application of the rule of reason under section 1 of the Sherman Act, which is as problematic as the application of Article 101 TFEU, even if the two approaches differ somewhat.[47] As will be seen both systems can be explained by reference to constitutional balancing.

4.1 Balancing in US antitrust under the rule of reason

Turning to the rule of reason there is some consensus among scholars and courts that the analysis contains four stages.[48] During the first stage the burden is on the plaintiff to show market power and anticompetitive effects. If this is demonstrated, then during the second stage the defendant

[47] R. Whish an B. Sufrin 'Article 85 and the Rule of Reason' (1987) YEL 1. G. Monti, EU Competition Law and the Rule of Reason Revisited TILEC Discussion Paper DP 2020-021 for comparative accounts.
[48] H. Hovenkamp 'The Rule of Reason' (2018) 70 Florida Law Review 81., M.A. Carrier 'The Four-Step Rule of Reason' (2019) 33(2) Antitrust 50. https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf

is entitled to establish that the agreement brings some efficiencies that justify the restriction of competition. In the third stage the burden shifts back to the plaintiff to demonstrate that the efficiencies may be achieved in a manner which is less restrictive of competition than that selected by the defendant. If there are less restrictive alternatives the agreement is illegal, but if the restriction is necessary to yield the efficiencies then the fourth and final step is that the court balances the anti-competitive effects and the efficiencies to determine the legality of the practice.

Professor Hovenkamp's study of the US Supreme Court case-law reveals that few judgments mention the role of balancing and none engage with balancing in a meaningful sense.[49] A thorough exploration of all reported judgments by Professor Carrier leads him to conclude that very few cases reach the balancing stage: 4% between 1977 and 1999 and 2% between 1999 and 2009, and of these balancing normally leads to victory for the defendant.[50] Two comments may be made of these statistics. The first, fundamental, critique was made by Professor Kaplow: these numbers count appeals decisions where you do not expect courts to balance.[51] Balancing is a matter of fact and would occur at first instance, likely in jury trials and thus not in reported cases. Second, even if we believe that this case-law is helpful, Carrier's counting is overly optimistic on a closer look at those cases where he claims there is balancing.

In *US v Visa* the plaintiff showed that Visa and Mastercard had enacted rules prohibiting their member banks from issuing cards using any payment system other than Visa or Mastercard and that this exclusionary rule harmed competition by preventing market access by competing credit card companies. The defendants tried to show that the exclusionary rule promoted cohesion of the network, but the district court found that 'defendants have offered no persuasive procompetitive justification' for the rule.[52] It is true that on appeal the court held, summarizing the findings of the District Court, that 'defendants have failed to show that the anticompetitive effects of their exclusionary rules are *outweighed* by procompetitive benefits.'[53] However, there is no balancing as such on the facts: the plaintiffs proved harm and the defendants failed to produce convincing evidence of efficiencies. The same finding obtains when we look at *California Dental Association*: the Supreme Court held that advertising restrictions should be evaluated using the rule of reason and remanded this to the FTC. When the case returned in the 9th Circuit the court concluded that the pro-competitive justifications were more persuasive than the plaintiff's case. The court did not balance a negative effect on consumer welfare with a positive effect. Its conclusion was: 'because CDA's advertising restrictions do not harm consumer welfare, there is no antitrust violation.' In other words, the FTC had failed to demonstrate substantial

[49] Hovenkamp, above n 22.

[50] M.A. Carrier, 'The Real Rule of Reason: Bridging the Disconnect' [1999] Brigham Young University Law Review 1265 and M.A. Carrier, 'The Rule of Reason: An Empirical Update for the 21st Century'[2009] 16 George Mason Law Review 827.

[51] L. Kaplow 'Balancing Versus Structured Decision Procedures: Antitrust, Title VII Disparate Impact, and Constitutional Law Strict Scrutiny' (2019) 167 U. Pa. L. Rev. 1375, 1406.

[52] *US v. Visa USA, Inc.*, 163 F. Supp. 2d 322, 406 (2001).

[53] *US v. Visa USA, Inc.*, 344 F.3d 229, 243 (2d Cir. 2003).

evidence of an anticompetitive effect.[54] The case failed because the court found the evidence of pro-competitive effects more compelling. The other three cases that are mentioned as being about balancing are similar: while the courts state that the balance is positive, they also find that the practices in question are not anticompetitive to start with.[55] The Courts' statements on balancing are at most obiter and provide no explanation of how to balance positive and negative effects.

According to Hovenkamp, one reason that accounts for the absence of meaningful engagement with balancing is incommensurability. This is a somewhat strange claim to make about the US system. One conventional belief is that the US antitrust system is one where the rule of reason balances the same effects: the impact that conduct has on economic welfare. Indeed, if we look back at the *Visa* and *California Dental* judgments discussed above, the counterarguments were about the restraint improving the working of markets. In this case the negative and positive effects are not incommensurable. Likewise, the *FTC v Actavis*, which Hovenkamp suggests rises incommensurability issues, is not a particularly convincing example. He refers to a passage where the majority judgment refers to earlier case-law as being about balancing the 'privileges of the patent holder' with the public interest protected by the Sherman Act.[56] However, this passage is not the decisive aspect of the case. When exploring the substance of the issue at play the majority considers the harm to consumers on the one hand with the efficiency of patent settlement and the possibility that the payment is so that the beneficiary provides services for the patentee on the other. If there is a balance then it is between the delayed entry on the one hand and the efficiency of the payment on the other. Again then it may be difficult to compute the latter effect but the two effects are not incommensurable.

Having found an absence of balancing, two approaches are possible. According to Professor Newman a desirable way forward is to allow practices which restrict competition when the conduct in question solves a market failure. On this view, there is no need to balance because the defendant's argument shows that the market will work better as a result of the restraint. This is akin to the consumer welfare approach taken by the Commission. In other words, there is no balancing: the defendant rebuts the plaintiff's theory of harm by an account that proves that the conduct improves the functioning of markets.[57]

A second approach is to make reference to some controversial cases where there is some balancing and examine what courts are doing. The most important example for a discussion of balancing is *O'Bannon v NCAA.*[58] This is a case where the plaintiff satisfied the court that the

[54] *California Dental Ass'n v. Federal Trade Commission*, 224 F.3d 942, 958 (9th Cir. 2000).
[55] *County of Tuolumne v. Sonora Community Hospital* 236 F.3d 1148 (9th Cir. 2001); *Paladin Associates, Inc. v. Montana Power Co.*, 328 F. 3d 1145 (9th Circuit 2003); *Reifert v. South Central Wisconsin MLS Corp*., 450 F.3d 312 (7th Cir. 2006).
[56] Referring to *United States v. United States Gypsum Co.,* 333 U. S. 364, 390–391 (1948).
[57] J.M. Newman 'Procompetitive Justifications in Antitrust Law' (2019) 94 Indiana Law Journal 501.
[58] For criticism of this judgment see Newman (Ibid). See also two important papers, C.S. Hemphill 'Less restrictive Alternatives in Antitrust Law 116(4) Columbia Law Review, R.H. Allensworth 'The Commensurability Myth in Antitrust'(2016) Vanderbilt Law Review 1.

NCAA's rules against allowing athletes to profit from their name and likeness and capping their scholarships were restrictive of competition: athletes suffered antitrust injury as a result of these limitations. The court accepted two defences: that the rule preserved amateurism in sport and that it served to integrate academics and athletics. As to the first defence, the NCAA argued that the economic value of college sport was precisely that the athletes were amateurs: consumer demand would fall if they athletes were not seen as amateurs. On this metric one can measure and compare the adverse economic effects of the rule on the relevant market for the provision of sporting talent with the positive economic effects: absent ticket sales the athletes would not be able to attend college and play sport because there would be no funding for the scholarship. Granted, proving the pro-competitive effects here may be tricky and the court reviewed and rejected some expert evidence. The second justification was that the agreement ensured athletes got an education and so it improved the quality of their college years. This too allows for comparing like with like: college players are under-paid for their services on the field but gain a good education. However the court saw no link between the pay cap and the quality of education. Instead, ultimately the court said that the balance between athletics and academics boiled down to the fact that by not overpaying athletes the rules 'prevent the creation of a social "wedge" between student-athletes and the rest of the student body.'[59] This raises serious issues of comparison between competition and non-competition considerations.

What is striking about this judgment, from the perspective of the balancing question examined here, is that neither the district court nor the appeal court actually do anything approximating utilitarian balancing. In contrast, both courts are somewhat skeptical about the weight of the NCAA claims: neither court is convinced that amateurism is the principal driving force for NCAA sports' popularity and the integration argument is read in a manner which gives it a lot less weight than claimed by the NCAA. And yet the overall outcome of the case is that the agreement (as modified) was found to be lawful under the Sherman Act. Had the court applied a utilitarian balancing model we would have expected a finding that the positive effects were greater than the negative effects. Had the court applied a consumer welfare balancing approach we would have expected an indication that the negative effects on consumers were compensated by the positive effects. However on this point it is worth noting that the negative and positive effects occurred in different markets. The restriction on competition had been found in the market for college education: absent the agreements capping scholarships colleges would compete to offer better salaries. The first benefit occurred in a related, but different market: that for sporting exhibitions. The second was a non-market benefit about social life on campus. The court did not seem perturbed by the fact that the benefits did not occur in the same market as the harm.[60]

[59] *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1003 (N.D. Cal. 2014), affirmed in part, reversed in part in 802 F.3d 1049 (9th Cir. 2015). However for the purposes of this paper the 9th circuit accepted the factual findings of the district court. See subsequently *In re NCAA*, 958 F.3d 1239 (2020), upheld in *Alston v NCAA* 594 US ___ (2021).

[60] In EU Law this point has been discussed extensively see Guidelines on the application of Article 81(3) of the Treaty above n 2, para 43 "in general… efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market."

4.2 Lessons from constitutional law?

Having shown that neither the ECJ's case-law on Article 101(3) nor the US judgments on restrictive practices apply an approach resembling utilitarian balancing and they do not require the application of a consumer welfare assessment, how might their approach be characterized from the perspective of balancing? Robert Alexy's approach in the field of constitutional law proves helpful:

> The Law of Balancing shows that balancing can be broken down into three stages. The first stage is a matter of establishing the degree of nonsatisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first.[61]

This approach sees balancing as the third step of the proportionality test, which also includes an assessment about the suitability and necessity of the act in question.[62] This is applicable to the judicial review of legislation. Suppose (taking one of Alexy's examples) we have a law that requires cigarette companies to include a health warning on labels. There is a clash between the economic interests of the cigarette maker and the health interests of the user. The state seeks to protect the latter by harming the former. Suitability asks whether the health warning does bring about an improvement to health. Necessity asks whether there are any less restrictive means of achieving the health objectives (e.g. could the state not inform citizens of the risks to health via TV advertisements?). Then we apply the law of balancing. In constitutional law Alexy claims that the balancing approach does not require accurate measurement of the two principles at play, but an analysis of the relative importance of each. A law requiring that cigarette packages contain a health warning harms the economic interests of the manufacturer but benefits the health of the consumer. Applying the law of balancing the court can determine the seriousness of the economic harm caused by state action, the likely gains in health and then work out if infringing the former justifies the gains.[63]

This resembles utilitarian balancing but with one key difference: balancing in constitutional law is about assessing the relative importance of the two competing interests, not about finding that society as whole is better off from the practice under challenge.[64] If we applied a utilitarian

[61] R. Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16(2) Ratio Juris 131, 136.
[62] See, generally K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).
[63] a 'balancing exercise between the severity of the restriction and the importance of the public interest pursued.' K. Moller, 'The Proportionality of Lockdowns' LSE Legal Studies Working Paper No. 13/2021 p.2. See also Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002).
[64] An explicit position on this is found in G. Letsas, 'Proportionality as Fittingness: The Moral Dimension of Proportionality' (2018) 71 Current Legal Problems 53 who observes that the principle of proportionality is ill-suited to express the logic of utilitarian calculations. See also K. Moller 'Proportionality: Challenging the critics'(2012) 10(3) Icon 709 who gives the example of a rule requiring a person to be killed because the organs from this person would save the lives of five people. He takes the view that counting numbers is not the way to balance in this

balancing approach to the cigarette health warning example we would reason differently: we would maximise total welfare and this might mean to allow an order for the closure of all cigarette manufacturers if the cost of this is less than the gain in health. A utilitarian balancing approach is indifferent to distributional effects, and it is also indifferent to rights. In contrast, constitutional balancing tries to preserve the rights of all rights holders to some extent (e.g. those of the cigarette maker as well as those of the smoker and passive smoker). It may well be that even under this approach the rights of one side are reduced to zero because the harm that is imposed by one side is so large, but the endeavor is to begin by identifying whether the two competing claims have legitimacy as rights-claims and then to examine how to strike a fair balance between them.[65]

We can see how this is operationalized by reference to a judgment of the European Court of Human Rights, *Hatton v UK*. The government wanted to increase the frequency of night landings at Heathrow Airport. This created a clash between the residents' rights to sleep at night with the state's interest in increasing landing slots at Heathrow Airport for the greater economic good.[66] The Grand Chamber of the Court did not apply the utilitarian perspective which was presented to it on a plate (Ronald Coase fans would love the case): evidence revealed that house prices did not go down as a result of the increased number of night landings. A utilitarian balancer would have used this indicator to say that the agreement maximized total welfare: the winners could potentially compensate the losers. In balancing using constitutional law principles, the court found it legitimate to interfere somewhat with the residents' right to privacy because it appeared that few people were adversely affected and the Government monitored the noise effects and consulted with residents. The interference of the right was reasonable in the circumstances.[67]

If we generalize form this example, the concept of balancing here is therefore not so much about weighing the two interests and deciding to favour one at the expense of the other because this means that overall society is better off, but to ask if the state's choice is a reasonable accommodation of the two competing interests because both have a legitimate place in society.[68]

---

instance, yet this is how a utilitarian might reason (p.719). Later in the same paper he addresses this again: 'Cost-benefit balancing can thus be contrasted with the wider "practical reasoning" which provides us with an answer as to which of the two values takes priority in spite of the absence of a common measurement.' (p.721).

[65] For example Moller (above n 61 p.10) takes the view that a balancing approach requires the state 'to balance the relevant considerations and find the solution which leads to the least harm overall.' This is quite close to how a utilitarian reasons. However, his overall approach to balancing requires the reaching of decisions that are legitimate and the benchmark for this is not utilitarianism, but a focus more on proper discourse among competing visions of how to handle the social problem at stake (pp.12-13).

[66] Case no. 36022/97 (8 July 2003) (ECtHR)

[67] This case is also discussed by Moller(above n 62) p.721: 'the Court balanced the two values against each other in the sense of practical reasoning, determining how much noise pollution one can legitimately impose on the residents in the interest of a specific economic advantage. So while the Court did not engage in balancing of a cost-benefit kind, it still makes sense to call its reasoning a "balancing" exercise.' This is a little odd because it appears to subsume utilitarian balancing (cost-benefit analysis) among the models of balancing while in my view constitutional balancing would eschew exclusive reliance on this method.

[68] More generally, see K. Moeller *The Global Model of Constitutional Rights* ch 6 where he describes balancing as a form of moral reasoning.

Such balancing takes into account the size of the two interests but also considers the manner in which the state elected to interfere with the rights of residents and the procedures of monitoring and consultation meant that the risk of large adverse harm to residents was avoided. This suggests constitutional law balancing has a procedural element (inclusive discussion) and a deliberative element wherein all reasons and evidence is publicly available and a decision is reached taking due account of competing interests. It might well be that this process means that the decision is reached on utilitarian principles but this is unlikely for the reasons we have discussed earlier.

4.3 The constitutional balancing approach in antitrust?

Constitutional law then uses the notion of balancing in a manner that is very different from the one applied by Williamson at the start of this paper. There is also an institutional difference: in the constitutional law cases the court is evaluating the choice of the state to curtail rights. Conversely in competition law the decision-maker (court or competition authority) is the one doing the balancing having regard to the effects of the agreement it reviews and determines whether the firm's conduct should on balance be allowed. This difference is not sufficient to make it implausible to transplant the test: state action is reviewed because the state has a monopoly over the regulation of conduct and antitrust applies to firms with sufficient market power to make a difference to the operation of the market. Since both rules are concerned with power (public and private) the two rules are close enough to examine if it may prove helpful to use the approach to balancing in constitutional law to think about competition law.[69]

The constitutional approach to balancing may be used to explain Article 101(3) TFEU, for example. This provision, recall, serves to exempt an agreement which restricts competition when the agreement yields a positive effect. Balancing the harm to competition with the positive effects is executed through the other three requirements of the article: (i) that 'users' obtain a fair share of the benefits; (ii) that the restriction is necessary to yield the benefits and (iii) that competition is not eliminated. Of these the second and the third are consistent with constitutional balancing for they seek to minimize the harm to one of the interests: competition. In other words, the architecture of Article 101(3) provides that a reduction of competition may be allowed if there is a compensating benefit but in a setting where competition is reduced only to the degree necessary to achieve the other goal and then only if we do not eliminate competition altogether. This comes very close to the framework designed by Alexy: is the restriction suitable to bring about the benefit? is it necessary? and is the overall balance fair?

The one requirement that does not fit so comfortably with this approach is that under Article 101(3) it is required that the 'user' obtains a fair share of the benefit, to which we now turn. One reading of the 'user' fair share requirement is that the agreement cannot just benefit the parties to the agreement. This is in contrast with the Williamson model where the improvement in productive efficiency suffices. In the Williamson model, it is assumed that this improvement has

[69] On the public/private power discussion see G. Amato *Antitrust and the Bounds of Power* (1997)

a social value because resources are put to better use. However the legislator in the EU demands a concrete demonstration that there is a third party who gains. This reading is consistent with a constitutional balancing approach because it seeks to identify a specified beneficiary of the gains that the agreement brings. Here the legislator decided a priori that balancing requires paying particular attention to one group. It may also be said to be consistent with a concern over distributive justice.[70]

Moreover, the requirement that the agreement must not eliminate competition is consistent with constitutional balancing because some considerations are so powerful that they cannot be overshadowed completely.[71] In EU economic law, competition is as high ranking a value as rights are in a constitutional context: we can tolerate some reduction of rights, but we do not tolerate their extinction.[72]

Thus, Article 101(3) sets out a number of preliminary conditions to be fulfilled before the Commission is asked to balance. These conditions are designed in such a way as to reduce the need for balancing by forcing the party to prove that the restriction will yield benefits and no less restrictive alternative would do the same while ensuring that there remains some meaningful competition in the market. Once this is shown then the Commission is empowered to make a call on whether to allow the restriction.

A similar account may be used to explain the US approach under the rule of reason in a case like *O'Bannon* discussed above. The restraints are reasonable when the court takes a view that there is a fair balance between the protection of NCAA athletes and the promotion of amateur sport. The restrictions were found to be suitable to secure demand for amateur sport, it was found that the restrictions were necessary as no less restrictive alternative as found and the agreement affords a fair outcome to both sides: student athletes find a somewhat competitive labour market (different colleges can offer somewhat different benefits) and the nature of amateur sport is retained, satisfying the demand side. Some restriction of competition in the labour market is tolerated when this allows for an improvement in the welfare of spectators.

However, the most recent US Supreme Court cases might indicate that it is not happy with this approach because the rule of reason test has been reformulated. In *Ohio v American Express* the court found that the rule of reason is a 'three-step burden shifting framework' by which the plaintiff has to prove anticompetitive effects, after which the burden switches to the defendant to show a procompetitive rationale and if successful then the burden shifts back to the plaintiff to prove that the procompetitive efficiencies could be reasonably achieved through less

[70] G. Monti *EC Competition Law* (2007) p.80.

[71] e.g. in constitutional law some rights are non-derogable.

[72] Treaty on European Union, Protocol (No 27) on the internal market and competition [2008] OJ L115/309 provides that 'the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.' In other words the value of competition is placed high up the hierarchy.

anticompetitive means.[73] Observe how under this formulation there is no balancing step by which we ask of the procompetitive gains outweigh the anticompetitive risk. Instead, emphasis is placed on the proportionality of the restraint. Again, this is very similar to Alexy's approach by which the court evaluates the suitability and necessity of the restraint but it avoids an express balancing of the two effects. This is hard to explain. Those who have been critical of the majority position in Ohio might attribute this omission as further evidence that the Supreme Court sides with defendants: not only does the judgment make it more difficult to establish anticompetitive harm in cases of two sided markets but the omission of balancing means that, should the plaintiff succeed in demonstrating anticompetitive effects the defendant may still survive condemnation merely upon proof of efficiencies without needing to show that these outweigh the harm. A more charitable reading however might be that when the Supreme Court speaks of pro-competitive effects it indicates that the defendant has to show that the overall effects of the practice are positive or as Newman suggests, that the defendant's practices solve a market failure.[74]

4.4 Constitutional law balancing is not a panacea

The constitutional law approach to balancing has salience for those who believe that competition law is to be embedded in the legal order to which it belongs rather than be administered as an autonomous law. In other words, it is supported by those who take the view that law constitutes markets, not the other way around.[75] On this basis, balancing is necessary as an ingredient by which the state can evaluate the market's performance and make a call on whether less competition in exchange for greater efficiency should be tolerated in specific circumstances. By embedding markets into the legal order a decision-maker is compelled to examine how to shape the application of law to ensure that it is consistent with the policies that a society pursues through its regulatory order.

Furthermore, constitutional law balancing seems to afford a better fit with how EU and US competition law apply when competing interests are at play even if as we have shown above the fit is not entirely snug. However, just because there is fit, this does not mean that such an approach is satisfactory. On the contrary, the criticisms that have been made of this balancing approach in constitutional law are just as applicable in the antitrust domain.

One set of problems is about how to operationalize this approach: (i) What sort of interests do we take into account? (ii) Should we only take into consideration the interests of those who are privy to the litigation or also of others? (iii) How do we decide that a particular interest has enough weight to make it worthy of protection? In constitutional law, 'sometimes the Court looks at actual numbers, but frequently it adopts a seat-of-the-pants approach, freely speculating on

[73] 585 U. S. ____ (2018) (available at: https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf) p.9 and repeated with approval in *Alston v NCAA* 594 US ___ (2021).
[74] above n 57.
[75] E.g. M. Callon (ed*) The Laws of the Markets* (1998) for essays in this mold.

the real world consequences of particular rules.'[76] These questions have bedeviled constitutional balancers for decades and they recur in contemporary competition law as well.

And is balancing necessarily to be achieved by continuously perfecting the measurement of different interests? Some constitutional scholars fear that the use of cost-benefit analysis as an aid to balancing precludes a proper participatory discourse on how society is to be shaped.[77] However, as we have seen, constitutional law balancing need not morph into cost-benefit analysis. It is perfectly possible to make a judgment call between two competing interests with other devices of public reason. In other words, there is more than one way to perform constitutional law balancing, some ways are more mechanical (cost-benefit analysis) and some are more overtly engaging in a discussion of values.

Raising these questions reveals how far the antitrust discourse in the EU has sought to escape these difficult issues by retreating to a narrow focus on consumer welfare as the paradigm within which competition law issues are adjudicated. Likewise in the US the balancing step is hardly ever reached, normally cases failing when the defendant is unable to prove anticompetitive effects. Doing so avoids the recourse to balancing expressly. Escaping the difficulties raised by constitutional law balancing however, is not satisfactory if the legislator mandates that this is the approach to be followed. Insofar as EU competition law is concerned, it has been shown that this is a polycentric enterprise where balancing of various considerations is necessary. [78]

5. Conclusion

The first takeaways from this paper are about the substantive law.

1) the role of efficiencies and other justifications plays out differently in merger control and Article 101 TFEU/Section 1 Sherman Act. In merger control in the EU and the US efficiencies can only be successful when they rebut the theory of harm. This explains why there is no decision of the Commission or in the US where efficiencies have operated as a defence: this is not their role. This is not a criticism, it is inherent in the legal framework.[79]
2) In Article 101 TFEU the Commission's soft laws indicate a preference to follow the same approach as in mergers: efficiencies are allowed if they fully compensate the consumer for the loss caused by the restraint. As I have suggested this is a misreading of Article 101(3), which allows reference to other positive effects than those that benefit the consumer. The Commission's approach makes no sense of the conditions in Article 101(3).

[76] T.A. Alienikoff 'Constitutional Law in the Age of Balancing' [1987] 96 Yale Law Journal 943, 974
[77] Alienikoff, pp.274-275.
[78] I. Lianos Polycentric Competition Law, (2018) Current Legal Problems 161.
[79] While Article 2(1)(b) of Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1he EU Merger Regulation copies some of the language of Article 101(3) TFEU, the Article read as a whole provides for an integrated analysis of the negative and positive effects and not for a rule exempting the application of merger control if there are some countervailing benefits.

> Consumer welfare is also an unhelpful paradigm in examining the assessment of restrictive practices under the rule of reason.[80]

When it comes to balancing, drawing up the various sources discussed in this paper, we can suggest the following approaches to balancing in competition law might be applied:

a) Utilitarian balancing: this is the Williamson model where we examine the impact of conduct on total welfare and balance reductions in allocative efficiency with improvements in productive efficiency.
b) Utilitarian balancing with weights: this is a modified Williamson approach where we give more weight to some of the actors' interests because the value of their harm is seen as greater than its monetary value.
c) Consumer welfare balancing: this is where the theory of harm is predicated on say a price increase and the positive effect is based on a showing that consumers gain in other ways, say better quality goods. Some might query whether this is balancing at all, because one is really just assessing the impact of a practice on a single interest.
d) Constitutional law balancing, which is an approach by which the decision-maker examines how far two competing interests can be reconciled. This approach places emphasis on the suitability of the restriction, its proportionality and only if these are shown is there some form of balance, but this is more a balance of interests than a balance based on maximizing utility. In other words we ask, is the harm suffered by the loser fair in light of the gains resulting from the practice.

The choice of balancing model serves as one indicator of the nature of competition law and its role in regulating the economy. In this sense the move from utilitarian balancing to a balancing with weights approach by the Canadian courts evinces a discomfort with a neo-classical vision whereby markets should be regulated solely to maximize social welfare. This approach supports those who have recently drawn on social contract theory to examine the role of competition law in discussing inequality.[81]

The case-law in Canada is also refreshingly clear about the burden on the plaintiff, which is to quantify the harm caused by the restraint under challenge. Too frequently the case-law in the EU reveals the design of a theory of harm which is largely speculative and which makes it in turn very difficult for the defendant to work out the magnitude of gains they have to show to avoid a decision against them. Likewise the Canadian court is open as to the importance of choosing a standard by which to assess efficiencies, allowing for a debate on the degree with which distributive justice considerations should matter. This is not to discredit the approach in the EU

[80] One difference between the two systems which we do not consider here is the range of considerations that may be brought up to defend anticompetitive conduct. Historically the EU has integrated a wider range of factors than the US. Exceptionally in *O'Bannon* and *Alston* as well as in *US v Brown University* and others (1993) 5 F.3d 658 we can find some discussion of tradeoffs between competition and inclusive education.

[81] See e.g. Lianos and Gal's papers in Gerard and Lianos (ed), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2019).

and the US, but to highlight the differences. One reason for the traction of the more economic approach embodied in the Canadian approach is the openness and transparency of the analysis that is recommended. One of the challenges of the EU approach historically has been to provide a clear account of the basis upon which conduct is prohibited: references to the fact that an agreement harms economic freedom prove difficult to apply 'as an independent basis.'[82] A lack of clarity as to the prohibition makes it in turn more difficult to explain how parties can defend their conduct and how enforcers or adjudicators should balance competing interests. The same issue has not been addressed with the same fervor in the US largely because the plaintiff's burden of proof in showing anticompetitive harm is very high.[83]

The choice of the consumer welfare model of balancing instead reflects a very narrow role for competition law. As we have suggested, applying this approach to interpret Article 101(3) effectively reads out a number of positive effects that this provision recognizes explicitly. It is, however, a rational design in the context of the economic approach the Commission espoused in its guidelines since 2004. Using it allows the Commission to apply the same analytical frame whether it discusses a merger or an agreement. From a policy perspective, this is understandable: it creates symmetry and it fits well with an emphasis on consumer welfare. However the approach is not accurate when confronted with the ECJ's case-law.

However, if we reject the first three sets of approaches to balancing we appear to be caught between a rock and a hard place, for the alternative (constitutional law balancing) is a method which appears benevolent in its formulation and fits with some of the cases in the EU and US. but raises a number of questions that require us to reflect upon a wide range of issues about the role of competition law, which agencies tend to avoid discussing. On the other hand, constitutional law balancing also provides a worthwhile challenge: if conduct is forbidden for damaging the competitive process but may be justified for promoting the functioning of the economy read widely, the constitutional approach asks how much of the competitive process can society give up in exchange for possible (economic) gains. And, in light of the present discussions about environmental sustainability, it also asks us to reflect upon the importance of nature for the safeguarding of an economic system based on competition in the first place.[84]

Whether the scope of non-competition considerations is narrow (exclusively considering productive and dynamic efficiencies that may result from an agreement) or broad (considering a range of other public interest) the analytical framework needs sharpening.[85] In this optic, the application of constitutional law balancing requires that we rethink the institutional setting within which competition law decisions are made as well as the substantive tests we apply.

[82] Gerber, *Competition Law and Antitrust* (2020), p.25.
[83] In *Alston* (above n 69) the Supreme Court observed that according to one amicus brief courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect.
[84] On this see Final Report - The Economics of Biodiversity: The Dasgupta Review (2021).
[85] above n 3 for the two views.

Insofar as institutional design, recall that some supporters of balancing in constitutional law consider the relevance of procedures that facilitate participation and recall how the Canadian courts liked the scope of interests protected by competition law with the composition of the tribunal. In EU and US competition law the procedures give little voice to parties who are not directly affected by the decision, but wider consultations might be viewed favourably.[86]

Turning to the substantive test, once we realise that the Treaty mandates that non-competition considerations are to be balanced this requires that we find a mechanism for so doing. In particular it will be important that the plaintiff makes a clear case of the anticompetitive effects. Then, before balancing, the assessment of the suitability and necessity of the restriction of competition are taken into consideration. This will avoid opening competition law to opportunistic collusion by making sure that by the time an agency balances it does so on convincing evidence of the positive effects.

[86] Monti and Mulder above n 42 for a discussion of the role of public consultation in competition law.