Crisis Cartels:
"Orderly" Downsizing and the Public Interest

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Since 2008 unemployment in the European Union has increased, consumer and industrial consumption has dropped. While the green shoots of economic recovery appear to be spouting, once the economy has recovered, it may the next cyclical downturn may only be a decade or two away. The recent downturn has—at least in the popular conscience—has caused some reflection as to the nature of the market, and the room for the pursuit of social goals within a market-driven society.

In the context of the social and economic structure of the EU, one of the difficulties is balancing market concerns, which incorporate the competition provisions of the Treaties in their underlying structure, with other non-economic or "social" concerns. These social concerns arise in the context of the environment, of health, of social matters such as employment, and–addressed in other papers in this conference—in animal welfare.

This paper investigates the competition and non-competition interests arising from an industry agreed upon plan for the reduction of capacity during an industry-wide "crisis." Given that such arrangements usually involve output restrictions or some understanding on prices, these plans typically violate TFEU Article 101(1). The competition law issue is whether the provisions of Article 101(3) can save such agreements. Questions regarding the improvement of production/distribution of goods, economic progress, allowing consumers a

"fair share" of the benefit, the indispensability of conditions, and the elimination of competition are all germane to the resolution of this point.

However, in addition to the competition provisions, there are other provisions in the European Treaties which could possibly bear on the consistency of such agreements with European law. Of significance are Article 3 TEU's provisions for Union aims, including the desires for balanced growth, a highly competitive social market economy, full employment and social progress. In the post-Lisbon Treaty Era, these provisions may have greater significance, if the view that competition concerns have been deemphasized by that Treaty is correct.

The paper focuses on three such crisis cartels/restructuring arrangements: the *Synthetic Fibres* Matter,[1] the *Dutch Brick Industry* restructuring (*Stichting Baksteen*),[2] and the *UK Dairy Industry Price Initiative*.[3] The former two matters were notified to—and ultimately approved by—the Commission. The latter matter was the subject of a long standing OFT investigation, resulting in fines being meted out to a number of the major UK supermarket chains.

Of relevance to this paper are two factual issues: first, the features of the two former agreements which permitted them to pass muster under (now) Article 101(3), and contrast them with the *Dairy Initiative*. Of particular significance is the explicit recognition of the need for an orderly reduction of industry capacity, as opposed to "price support" of nebulous nature and duration during a downturn (whether the downturn is permanent or temporary). And second, the extent to which consumers as a result of the implementation of the agreed strategy received a "fair share" of the benefits. I note that the Commission took a "flexible" approach to the treatment of such benefits in the two cases it approved.

In this paper, I argue that there are good reasons for adopting such a "flexible" approach in assessing the benefits received by the consumer. These reasons are normative (or "equitable"), which focus on the ability to internalise the costs of restructuring of the industry to those who benefit from the industry, i.e. its consumers. To the extent that industry restructuring involves the underwriting of the social costs of employment displacement occasioned by reducing the workforce in contracting industries, the resulting higher prices means that these costs are passed onto these consumers. In effect the costs occasioned by

[1] Commission Decision of 4 July 1984 (IV/30.810) [1984] OJ L-207/17

[2] Commission Decision of 29 April 1994 (IV/34.456) [1994] OJ L-131/15

[3] OFT Case CE/3094-03, Decision issued 10 August 2011; *Tesco et al v OFT* [2012] CAT 31

reducing capacity in an industry are borne by the beneficiaries of the industry, and not necessarily by society as a whole—which would be the case if the entire social costs were off-loaded onto a (Member State's) social insurance programme.

This paper is organised as follows. In the next section I outline the *Synthetic* Fibres and *Stichting Baksteen* matters. Both of these involved industrial restructuring which included industry-wide collaboration to ensure that the social costs of such restructuring would be mitigated. The collaboration took the form of an agreement which was expressly contrary to the provisions of (now) Article 101(1), yet due to its non-economic benefits was approved by the Commission. Following that discussion, in section two I consider the matter of the *UK Dairy Price Initiative*, the litigation of which was finally concluded in December of 2012. This matter involved politically popular support to the dairy industry (particularly dairy farmers) via collusion with regard to the price of milk and cheese. As popular as this initiative may have been, it was nevertheless a politically popular means of rent-seeking. This initiative serves as illustrative counterfoil to the former two cases.

With these two cases in mind, in the third and fourth sections of the paper, I turn to the Commission's thinking about first orderly industrial restructuring and the use of non-economic considerations in Article 101 to evaluate same. My argument here is that the Commission's economic approach which it has brought in since 2003 appears to be in tension with not only the plain wording of the Treaties, but also with previous case law of the courts. As such there is greater room for non-economic (social) considerations in this sort of evaluation than the Commission gives credit. The purpose of the fifth section is to indicate some means by which these non-economic considerations may be evaluated. My emphasis here is on cost internalisation, noting that the arrangements in *Fibres* and in the *Dutch Brick Industry* attempted to internalise at least some of the social costs of the industrial restructuring to the industry's consumers, while at the same time "giving up" something. Cost internalisation and requiring those who benefit from the industry share the costs of the industrial restructuring captures some of our normative views of fairness. The *Dairy Initiative* did not share this characteristic.

I conclude by suggesting that this internalisation of costs is of importance in the assessment of such crisis cartels. As such, this may be the significant distinction between two matters dealt with by the Commission and the UK case. In the case of the two Commission-approved matters, concerns of "social externalities" were explicitly considered. In the *UK Dairy Initiative*, social concerns appeared not to have entered into the reasoning/justification process at all. I further suggest that these social concerns, whether viewed as part of Article

101(3)'s saving provisions, or as part of an independent non-competition concern (perhaps flowing from TFEU Article 3), are precisely among the considerations which any acceptable public-interest defence to cartelisation must take into account.

I. *Synthetic Fibres* and *Stichting Baksteen*

The 1984 Commission Decision in *Synthetic Fibres*[4] and the 1994 Decision in *Stichting Baksteen*[5] have become the equivalent of leading cases in the Commission's treatment of social considerations in 101(3) analysis.[6] In both cases, the relevant industries were affected by industry specific economic difficulties which were unlikely to be resolved even in the medium to long term. Common to both cases was an industry-wide plan to orderly "downsize" by reducing capacity, while at the same time mitigating the effect of the downsizing on employment.

The 1984 *Synthetic Fibre* Decision concerned nine producers of synthetic fibres, who among them accounted for 70% of Europe's (and 85% of the EEC's) production of synthetic fibres.[7] The industry-wide crisis[8] arose out of improvements in efficiencies in the industry, with demand not rising as fast as had been anticipated.[9] The industry's problems had been

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[4] See note 1

[5] See note 2

[6] See e.g. Francesco Russo, Maarten Pieter Schenkel, Andrea Günster, and Martin Carree *European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases* (Cambridge: Cambridge University Press, 2011) pp 70 – 72; and, Anne C Witt, "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order" (2012) 8 *European Competition Journal* 443 at 449 who use these cases as leading cases for this point.

[7] *Synthetic Fibres* para 7

[8] And, as such it is not the only decision affecting the industry. See e.g. Commission Decision of 23 April 1996 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149—Polypropylene) (86/398/EEC) [1986] OJ L-230/1.

[9] *Synthetic Fibres*, para 28: "The overcapacity is mainly a result of rapid technological advances (introduction of the rapid spinning process, building of larger production units to take advantage of scale economise) and a demand trend which, though not actually falling, has failed to rise as much as expected."

on-going since at least 1972, with the difficulties compounding since 1975.[10] According to industry submissions, accepted by the Commission,[11] to be "economic" capacity must be operated at 85%. By 1977, production had been averaging 70% of capacity.[12] The parties agreed to a capacity reduction plan (the oversight of which would be vested in a trustee with extensive inspection and monitoring powers[13]), by which the total reduction was agreed upon, and then each party would provide its own plan to facilitate the reduction in capacity.[14]

In its assessment of the agreement[15] the Commission noted that the agreement has an anti-competitive effect on inter-state trade.[16] The real issue was whether its provisions could be saved by 101(3). In assessing the benefits of the agreement in light of the requirements of that paragraph, the Commission first noted that although individual firms influenced by market forces should be the judges not only of over-capacity but also to the appropriate response to that situation,[17] this had not happened in the present case.[18] As a result of this failure the producers had coordinated a response of their own in the form of the agreement in question.

In assessing the requirement that to qualify for an exemption under Article 101(3), the agreement must "contribute[] to improving the production … of goods or to promoting technical or economic progress" the Commission made the following observations:

1. "By reducing capacity, the industry will shed the financial burden of underutilized excess capacity open without incurring any loss of output, since remaining capacity can be operated more intensively."[19]

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[10] *Synthetic Fibres* para 9 – 15

[11] Ibid, para 16

[12] Ibid, para 10

[13] Ibid, para 18

[14] See Shinkel et al (n 6) p 71.

[15] Which was notified to the Commission pursuant to Article 4 of Regulation 17/63

[16] *Synthetic Fibres* paras 25 – 27

[17] Ibid, para 30

[18] The cause of this market failure could be attributed to, inter alia, state aid (para 12), the Prisoner's Dilemma nature of industry-wide downsizing (para 32), intra-firm loss financing (para 39).

[19] Ibid, para 34

2. Reduction in capacity can facilitate specialization, due to each individual undertaking's strengths.[20]

3. Upon restructuring, the industry will return to profitability which will "restore the competitiveness of each party"[21]

4. "The coordination of plant closures will also make it easier to cushion the social effects of the restructuring by making suitable arrangements for the retraining and redeployment of workers made redundant."[22]

Accordingly, the Commission concluded not only that production would be improved and technical and economic progress would also be promoted.[23]

The Commission took a longer-term view of Article 101(3)'s requirement that consumers share in the benefits, briefly noting that their gain is to be found in a re-emerging, healthier and more competitive industry, with "better products thanks to greater specialization."[24] As the agreement (as approved) did not touch upon the parties' autonomy to determine their own output or deliveries,[25] was of limited duration,[26] and required strict compliance with the downsizing plans,[27] the terms of the agreement were viewed as not indispensable to the aim. Likewise, as there was sufficient residual competition from non-parties to the agreement (including undertakings outside the EEA) and from substitutes

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[20] Ibid, paras 34 and 35

[21] Ibid, para 36

[22] Ibid, para 37

[23] Ibid, para 38

[24] Ibid, para 39, the Commission also hints at a benefit to consumers through the elimination of obsolete plants.

[25] Ibid, para 43, however, the agreement—as notified—did, but such clauses were removed prior to approval.

[26] Ibid, para 44

[27] Ibid, para 45

(natural fibres)[28] the agreement did not eliminate "competition in respect of a substantial part of the products in question."

The Commission's reasoning—at least as articulated in the Decision—is thin. There is no attempt to quantify any gains. Indeed the discussion of the social benefits of orderly restructuring is presented without consideration of factors such as the number of those effected, what the proposals for "suitable arrangements" for retraining might be, how the restructuring would be staggered to alleviate the social costs of unemployment in a particular location, and so forth.

Ten years later, in its Decision in *Stichting Baksteen*,[29] the Commission performed a similar sparse evaluation of the purported 101(3) benefits of the arrangement in question. That agreement by members of the Dutch brick industry was designed to alleviate overcapacity and overstock in the industry, conditions which arose from the introduction of new production methods which achieved economies of scale and the substitution of other building materials in the construction process.[30] The industry crisis was such, that due to the then existing imbalance of supply and demand combined with the existing stockpiles of bricks, the industry was unlikely to return to health in the medium term.[31] To restore economic viability to the industry capacity cuts of about 12% needed to be made. The agreement coordinated such a reduction. It included provisions for:

1. The termination of production of "ceramic building materials" at seven sites for a 30 year period, with the dismantling of the relevant production facilities.[32]
2. The prohibition on transferring any of the dismantled plants for use within a 500 km radius of the Dutch border.[33]
3. A prohibition regarding bringing on-stream new production capacity.[34]

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[28] Ibid, paras 50 and 51

[29] Above n 2

[30] Ibid, para 7

[31] Ibid, para 8

[32] Ibid, para 10

[33] Ibid

[34] Ibid, para 13

4. Financing the restructuring by transfer payments within the industry, monitored by an auditor obliged not to divulge individual party's information with other members of the industry;[35] and,
5. "A social plan for the sector has been negotiated with the trade unions, the implementation of which is to be monitored by Stichting Baksteen. The parties will endeavour to ensure, that, in carrying out the restructuring operation, employees are redeployed wherever possible and in accordance with the legal and/or contractual obligations in force in the Netherlands."[36]

In assessing the 101(3) benefits of the agreement, the Commission noted:

1. The reduction in capacity will ensure that the more efficient plants will remain open, facilitating the reduction of fixed costs, thereby leading to a "future increase in the profitability of the Dutch brick industry and, therefore, a return to normal competitiveness."[37]
2. The coordinated restructuring permits the restructuring to "be carried out in acceptable social conditions, including the redeployment of employees."[38]
3. In the long term, consumers will benefit through the re-emergence of a competitive brick industry.[39]
4. There is sufficient residual competition (by both non-parties to the agreement and through imports) to guarantee consumer choice if prices were adversely affected.[40]
5. Due to the nature of the brick-making process, the compensatory payments were essential: firms with only one kiln (about half of the firms involved) could not close that down—other firms had to be provided incentives to close one of their kilns. [41]

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[35] Ibid, para 11; see also para 45 on the Commission's imposition of further non-disclosure obligations on the parties.

[36] Ibid, para 12

[37] Ibid, para 26

[38] Ibid, para 27

[39] Ibid, para 29

[40] Ibid, paras 30 and 31

[41] Ibid, para 34

Points 1 and 2 were regarded as conclusively establishing 101(3)'s technical and economic progress requirements, and point 3 (possibly combined with 1) established the benefit to consumers, and 4 and 5 were regarded as conclusive regarding the limits to the restrictions on competition.

The analysis of the social benefits of the agreement was, at best, terse. Like *Synthetic Fibres*, little hard data were presented in the Decision. Further, the social obligations assumed by the parties to the agreement appeared minimal. As paragraph 12 indicates, these responsibilities only required that employees be redeployed "wherever possible" and in accord with "legal and/or contractual obligations." Parties to the agreement appear to have assumed few additional obligations above this minimum.

It may be that such considerations were legally redundant for the Commission to take into account, but nevertheless added strength to its conclusions. Similar thoughts had been expressed by the Commission two years earlier in its consideration of the Ford/Volkswagen joint venture agreement.[42] That venture would establish a new multi-passenger vehicle production facility in Portugal (which had recently joined the Community). While the Commission noted that other considerations were sufficient to exempt the joint-venture agreement under 101(3), job creation was an "added bonus." The Commission noted:

> In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, *inter alia*, to the creation of about 5 000 jobs and indirectly create up to another 10 000 jobs, as well as attracting other investments to the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also furthers European market integration by linking Portugal more closely to the Community through one of its important industries. This would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account.[43]

[42] Commission Decision of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814—*Ford/Volkswagen*) (93/49/EEC) [1993] OJ L-20/14

[43] Ibid, para 36

The Commission's less formal statements in this regard show an increasing willingness to take employment considerations into account.

In the discussion of crisis cartels contained in its *XIVth (1984) Report on Competition Policy*[44] the Commission noted that among the advantages of the exempted Synthetic Fibres agreement was that it "provides for restructuring operations to be carried out in a socially actable way, by making suitable arrangements for the retaining and redeployment of workers made redundant."[45] By the *XXIIIrd Report* (1993)[46] the Commission noted that it would view how a coordination in a sectoral restructuring agreement would "help[] mitigate, spread and stagger their impact on employment"[47] as considerations which the Commission would take into account in establishing productive efficiencies and economic progress, and would approve agreements containing such provisions so long as the other conditions of 101(3) were met.[48] It was this *Report on Competition Policy* in which the Commission discussed the *Stichting Baksteen* Decision.

II. *The UK Dairy Price Initiative*

Since the late 1960s, consumption of milk in the UK has been in a downward decline. In addition to the annual 1-2 % decrease in consumption since that time,[49] milk yields have increased[50] leading to a constant annual production (in 1995-2005) of roughly 14bn litres/per annum , in spite of culling of heards and exit from the industry in the wake of the 2001 BSE outbreak.[51] The UK output is approximately twice the level of domestic liquid milk consumption. The remainder of the liquid milk is processed into other dairy products (cheese, milk powder, butter, yoghurt and condensed milk). One quarter of the total liquid

[44] Available at: http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB4184822

[45] Ibid, point 82

[46] Available at: http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650

[47] Ibid, point 85

[48] Ibid

[49] OFT Decision (note 3) para 4.14

[50] Ibid, para 4.5

[51] Ibid

milk production is rendered into cheese[52] which (along with butter) is subject to competition from imported products.[53] Additionally, although the dairy market is managed by intervention purchases of butter and skimmed milk powder under the Common Agricultural Policy, the floor prices were set in Euros, thus the relative value of the Euro to Sterling influences the price.[54] With the liberalisation of raw milk supply in 1994, the intervention price served as the floor for the amount which the dairy farmer received for the raw milk (the "farmgate price").[55]

In addition to price considerations, consumption changes since 1980 affected the distribution opportunities for fresh liquid milk (FLM). The OFT noted, "In 1980, doorstep sales accounted for almost 90 per cent of household milk sales, by 2002 this share had fallen to just over 20 percent."[56] By 2003 the main suppliers to households were the large grocery chains, supplying 65 per cent of milk to households.[57] These large grocery chains required supply through larger milk processors, to satisfy the chains' concerns particularly regarding quality and constant supply (particularly daily deliveries to stores).[58] At the relevant time, there were four milk processors acceptable to the chains,[59] Due to, inter alia, overcapacity in the processing industry, the homogeneity of the product and the transparency of the farmgate price of milk, the chains had significant buyer power over the processors.[60] A consequence of this was that retailer margins on milk had increased since 1994.[61]

With the decline in farmgate price for and the increase of retail margins on milk, the dairy farming industry believed that processors and retailers "might be able to subsidise an

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[52] Ibid, para 4.12

[53] Ibid, para 4.60

[54] Ibid, paras 4.8 – 4.11

[55] Ibid, para 4.11

[56] Ibid, para 4.15, referring to the Competition Commission, *Arla Foods amba and Express Dairies plc: A Report on the Proposed Merger* (Cm. 5983) (London: HMSO, 2003) (hereafter "*Arla/Express Report*") para 3.68

[57] Ibid, para 4.16, referring to the *Arla/Express Report*, ibid, para 5.97

[58] Ibid, para 4.21

[59] Ibid, para 4.19

[60] Ibid, para 4.28

[61] Ibid, para 4.63 – 4.65, 5.3

increase in farmgate prices and began lobbying to achieve this."[62] This action consisted of lobbying Parliament, blockading processors' and supermarkets' depots. Further:

> One farmer pressure group, Farmers For Action ('FFA'), actively attempted to co-ordinate a FLM retail price increase to subsidise a farmgate price increase. As part of this plan FFA sought written statements from retailers confirming their willingness to increase FLM retail prices. These written commitments were usually provided on the basis that other retailers would take similar action. FFA then disclosed these letters to other retailers to facilitate further commitments to increase prices.[63]

One retailer, Tesco, alerted the OFT to the plan. The OFT promptly replied, advising that in spite of the hardships facing the dairy industry, the proposed arrangement was likely a breach of UK competition law, and sought assurances that "this initiative on milk prices will go no further."[64]

Notwithstanding this guidance from the OFT the supermarket chains and processors implemented "price initiatives" on cheese in 2002 and milk in 2003. These initiatives involved a coordinated increase in the wholesale and retail prices of cheese and milk which was then—in turn—passed on to the farmers as an increase in the farmgate price for milk. The effect on the consumer was an increase of 2 pence/litre for milk and £200 per metric ton of cheese (felt at the retail level). From a legal perspective, the coordination was done by way of transferring information between the chains via the suppliers (a "hub and spoke"/A-B-C cartel).

After an immunity application by one of the processors, the OFT began an investigation, which resulted in a number of processors and chains accepting "early resolution," the case against one chain dissolving, and the case against another chain (Tesco) resulting in protracted litigation over the nature and extent of its involvement. In mitigation the parties made representations to the OFT regarding their participation in and responsibility for the arrangement. As the OFT was to note,[65] these representations focused on three points:

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[62] Ibid, para 5.4

[63] Ibid, para 5.5

[64] Ibid, para 5.11

[65] Ibid, para 5.16

1. The motivation was to financially assist the dairy farmers and the participants did not profit from the coordinated activity
2. The agreement was a result of the pressure impose by the farmers' groups ; and,
3. The activity had implicit, if not explicit, governmental support.

None of these concerns were viewed by the OFT to justify the practice.[66] It should also be parenthetically noted that there was, and still is, strong support from the British public for farmers to receive a greater share of the proceeds of the sale of dairy products.[67]

III. Orderly Industry Restructuring

All three industries were in a period of significant long term decline, caused by changes in consumption resulting from matters which included improved technology (all three), substitution of other materials (fibres, bricks), and change of habits/tastes (milk, synthetic fibres). The crises facing these industries were not (at least entirely) recession induced or resulting from a (general) economic downturn.

These industry specific downturns left significant overcapacity within the industry, which if the industry was to return to a competitive state, needed to be reduced. Indeed, these industries exhibit features of industries where structural overcapacity is unlikely to be addressed by market forces. Further, the Commission—in amicus curiae observations—in another beef industry matter, noted that the industrial features where market forces alone would not address capacity issues:

> Giving up capacity is costly for the firms. This can occur in increasing returns industries where firms have large fixed costs and/or marginal costs which decrease

[66] Ibid, paras 5.18 – 5.47

[67] Steven Morris, "Mild cheddar no longer a big cheese as shoppers demand a stronger flavour" *The Guardian* (19 November 2013), (available at: http://www.theguardian.com/lifeandstyle/2013/nov/19/cheese-mild-shoppers-demand-stronger-mature-cheddar-blue/print), who notes a recent marketing study which reports that 66% of the British public support farmers receiving more money from the sales of milk and cheese.

> with output. For these firms, surrendering capacity is costly because it means a lost opportunity to gain market share and thereby reduce costs of production. It can also occur in industries with significant sunk costs as these would also contribute to the costs of capacity.
>
> Stable, transparent and symmetric market structures. Firms are unlikely to participate in a costly war of attrition unless they perceive a chance of winning. Therefore war will tend to take place between firms of similar sizes and cost structures and in relatively stable and transparent where their interests (and perceptions thereof) are sufficiently aligned to maintain capacity at an excess level. On the contrary, in heterogeneous market structures some firms would normally suffer more than others from over-capacity and would be more likely to move first and release capacity.[68]

Such reductions in the three industries in question would involve the unpalatable decommissioning of assets of substantial value. Further, if done in an unstructured way may have imposed significant (and potentially avoidable) social cost. In *Dutch Brick Industry*, for instance, the closure of a single kiln would have different consequences for a one-kiln or a multi-kiln firm. Likewise, in the *Dairy Initiative*, the reduction in capacity (or closure of) a single farm will have a similar economic effect on the individual farm owner. If farm closing is regionally concentrated, the economic consequences will have more significant effects which will adversely affect particular regions.

Coordination can facilitate the inter-party flow of compensation for the closure of "expensive" assets (whether due to high sunk costs, decreasing marginal costs in production, or as a percentage of the undertaking's wealth), coordinate a peaceful solution to the prisoners' dilemma nature of capacity reduction (thus a cartel in the sense of *une entente*—a truce), and in the same way as resolving this prisoners' dilemma, can be used to mitigate social costs arising from the reduction of over-capacity. As the victor (and the costs of

[68] *The Competition Authority v The Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited* (Amicus Curiae Submissions of the Commission to the High Court of Ireland, 2003 No 7764P), available at: http://ec.europa.eu/competition/court/amicus_curiae_2010_bids_en.pdf Commission's footnotes omitted

victory) in an all-out war of attrition is uncertain, so too will be the social fallout of any resulting loss.

Although there may well be reasonable arguments (based on social considerations) that such arrangements may be tolerated, their consistency with the competition rules is far from certain. As noted by Advocate General Trstenjak in her opinion in *Competition Commission v BIDS,* "it must be borne in mind that the fact that a sector is experiencing a cyclical or structural crisis does not mean, according to settled case-law, that Article 81(1) EC does not apply."

Arrangements of the sort found in the three matters are fall under the rubric of Article 101(1)'s prohibitions. They are most certainly agreements between undertakings which limit or control production. In light of the Court of Justice's judgment in *Competition Commission v BIDS*, in considering (at least) crisis cartels, the parties' motivations behind implementing their arrangements are irrelevant to Article 101(1) analysis. As the Court noted:

> In fact, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain. In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (*General Motors* v *Commission*, paragraph 64 and the case-law cited). It is only in connection with Article 81(3) EC that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 81(1) EC.[69]

The court further noted that the proposed restructuring possess the following features:

> The BIDS arrangements are intended therefore, essentially, to enable several undertakings to implement a common policy which has as its object the

[69] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] All ER (D) 235 (Nov), ECR I-8637, para 21

> encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale.
>
> That type of arrangement conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article 81(1) EC is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.
>
> In the context of competition, the undertakings which signed the BIDS arrangements would have, without such arrangements, no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the BIDS arrangements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of EUR 2 per head processed by each of the stayers.
>
> In addition, the means put in place to attain the objective of the BIDS arrangements include restrictions whose object is anti-competitive.[70]

In so far as such arrangements substitute cooperation (coordination) for competition, they violate the provisions of Article 101(1). These types of arrangements, while intending to merely restructure the affected industries nevertheless have a restrictive object.[71] Although, as both the Court[72] and the Advocate General[73] noted, the parties' goal of their arrangement

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[70] Ibid, paras 33 – 36

[71] On this point see also Okeoghene Odudu, "Restrictions of Competition by Object—Where's the Beef" [2009] *Competition Law Journal* 11, and the Opinion of the Advocate General in *BIDS* (n 69) paras 44 – 77. Parenthetically, it may be questioned whether in the light of the recent judgment in Case C-32/11 *Allianz Hungária Biztosító Zrt and others v Gazdasági Versenyhivatal* (NYR), the object/effect distinction will continue to make any significant analytic difference in Article 101(1) analysis.

[72] *BIDS* Judgment, ibid, at para 39: "Finally, the fact that those restrictions, as well as the non-competition clause imposed on the goers, are limited in time is not such as to put in doubt the finding as to the anti-competitive nature of the object of the BIDS arrangements. As

may be relevant for a consideration under Article 101(3) analysis, they are not germane to analysis under 101(1).

As is well known, Article 101(3) exempts agreements from 101(1) prohibitions if the agreements:

- improve the production or distribution of goods or to promoting technical or economic progress,
- allowing consumers a fair share of the resulting benefit

And the agreements:

- do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

These conditions are cumulative.[74]

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the Advocate General observed in point 86 of her Opinion, such matters may, at the most, be relevant for the purposes of the examination of the four requirements which have to be met under Article 81(3) EC in order to escape the prohibition laid down in Article 81(1) EC."

[73] *BIDS* Opinion of the Advocate General (n 69) para 86: "…it is irrelevant that overall production is not reduced as a result of the levies and prices are not increased. In addition, the fact that the levies are to be limited to one year cannot in general rule out the existence of a restriction of competition. Such circumstances may possibly be taken into account under Article 81(3) EC." And para 101: "the aim of BIDS is to create production benefits through economies of scale. However, it is clear from the connection between Article 81(1) EC and Article 81(3) EC that such an aim can only be taken into account under Article 81(3) EC." See also paras 55 – 57 of the Opinion.

[74] *Communication from the Commission: Notice Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08) [2004] OJ C 101/97 (27.4.2004), paras 34 and 42, referring to Case T-185/00 and others, *Métropole Télévision SA (M6)*, [2002] ECR II-3805, paragraph 86; Case T-17/93, *Matra* ECR [1994] II-595, para 85; and Joined Cases 43/82 and

The difficulty in assessing the applicability of 101(3) lies in the ability to quantify the first two points (efficiency gains and benefits to consumers). With the Commission's post-1999 economic approach,[75] the measuring stick is consumer welfare. This approach is stated in the *Guidelines on the application of Article 81(3)*:

> The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.[76]

The difficulty is further compounded by the nature of the cooperation found in crisis cartels and atypical gains which they are designed to promote. Although Article 101(3) is written in such a way to include as relevant all economic efficiencies, in the usual cases of horizontal cooperation, gains are achieved through cost efficiencies and qualitative improvement[77] and the resulting benefit will flow to the consumer in the form of a reduced price or an improved good.

On the other hand, in a crisis cartel situation the efficiency gains are different. For the producers, the gains arise from an *orderly* reduction of excess capacity and the resulting gains from the (future) operation of only the more efficient plants.[78] The cost efficiencies (in the form of savings) will not necessarily be passed to the consumers in the short (or even medium) term. Indeed, within this timeframe, consumers are likely to see the prices of the goods rise.

The consumer benefit from crisis cartels is also a somewhat nebulous concept. In *Synthetic Fibres* and in the *Dutch Brick Industry* cases the Commission viewed these benefits

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63/82, *VBVB and VBBB* [1984] ECR 19, para 61; and, Case T-213/00, *CMA, CGM and others* [2003] ECR II - 913 para 226.

[75] See Witt (n 6) 453 – 455

[76] *Guidelines on the application of Article 81(3) of the Treaty* (n 74) para 13

[77] *Guidelines* ibid para 59; see also Communication from the Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011/C 11/01) [2011] OJ C-11/1, paras 95 – 100

[78] *Synthetic Fibres* para 34 (quoted above, n 19)

to be the long-term resulting competitiveness of the industry,[79] and the benefits to consumers from the cushioning of the social effects of redundancies in the industries.[80]

The Commission's post-1999 "Party Line" regarding the measurement of efficiency appears to have hardened. The *Guidelines on the application of Article 81(3)* require that the purported efficiency gains be susceptible to objective measurement, and both causally and directly linked to the agreement. The general principle is:

> Given that Article 81(1) only applies in cases where the agreement has likely negative effects on competition and consumers (in the case of hardcore restrictions such effects are presumed) efficiency claims must be substantiated so that they can be verified. Unsubstantiated claims are rejected.[81]

Claims of cost efficiency must be not just measurable, but—given the onus placed upon the party claiming the efficiencies[82] —the claims must be verifiable:

> In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.[83]

Where the efficiency claims are in regard to non-cost efficiencies (e.g. quality), similar considerations of proof apply:

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[79] See *Synthetic Fibres* para 36, quoted n 21 above; *Stichting Baksteen* para 26, quoted n 37, above.

[80] See *Synthetic Fibres* para 37, quoted n 22 above; *Stichting Baksteen* para 27, quoted n 38, above

[81] *Guidelines on the application of Article 81(3)* (n 74), para 55

[82] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ, L-1/1, Article 2

[83] *Guidelines on the application of Article 81(3)* (n 74), para 56

> In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.[84]

Directness in the link between the arrangement and the claimed efficiencies is a form of "remoteness" test to ensure that the claims can be substantiated or are not otherwise speculative. The Commission remarked:

> The causal link between the agreement and the claimed efficiencies must normally also be direct. Claims based on indirect effects are as a general rule too uncertain and too remote to be taken into account. A direct causal link exists for instance where a technology transfer agreement allows the licensees to produce new or improved products or a distribution agreement allows products to be distributed at lower cost or valuable services to be produced. An example of indirect effect would be a case where it is claimed that a restrictive agreement allows the undertakings concerned to increase their profits, enabling them to invest more in research and development to the ultimate benefit of consumers. While there may be a link between profitability and research and development, this link is generally not sufficiently direct to be taken into account in the context of Article 81(3).[85]

A similar approach is taken with the third and fourth conditions (indispensability and elimination of competition with respect to the substantial part of the products in question) of Article 101(3). The third condition, the indispensability of restrictions, uses a somewhat vague, two-pronged test to assess the acceptability of the agreement:

> First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow

[84] Ibid, para 57

[85] Ibid, para 54

> from the agreement must also be reasonably necessary for the attainment of the efficiencies.[86]

Again in a somewhat nebulous manner, the decisive factor of these tests is determined by "whether or not the restrictive agreement individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned."[87]

The fourth condition, no elimination of competition, in effect reiterates the views not just that the goal of Article 101 is the protection of the competitive process, but also that competition between firms is the driver of economic efficiency:

> Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.[88]

Residual (e.g. the competitive forces from firms not party to the arrangement) and potential competition (i.e. the prospect of or actual entry of new firms into the market, should super-competitive returns exist) are the two dynamisms which best serve to act as effective counterweights to the anticompetitive effects of the agreements in question.[89]

In examining the three cartels in question, in the two approved matters, the pro-competitive efficiency gains were viewed as the gains in efficiency which would arise through the revitalisation of the industry. This revitalisation would include elimination of the

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[86] Ibid, para 73

[87] Ibid, para 74

[88] Ibid, para 105

[89] See ibid, paras 107 and 114.

less efficient facilities. As this elimination could occur in an "orderly" fashion, the potentially disruptive social consequences of mass reorganisation of an industry can be mitigated.

From the Commission's reasoning in the two approved matters, it is not clear to what extent this latter point was determinative. If one were to view the concept of "consumer" in an extensive manner, and include all members of society affected by the restructuring, the "consumer" benefits of this sort of orderly reforming of the industry become apparent: by cushioning the economic shock of unemployment, these benefits would flow to those facing unemployment, the communities in which they partake in economic activity, and to those who bear the burden of the social welfare system as a whole. The difficulty with this broad interpretation of "consumer," is that it become so broad that it is likely meaningless: there is nothing to differentiate "consumer" in that greatly extended sense from "member of society."

Distinguishing the *UK Dairy Initiative* from the other two cases is the element of industry restructuring. In *Dairy*, the intended recipients of the funds offered nothing in return for the "premium" which they were intended to receive as a result of the flow through from the grocery chains' coordinated increases in prices. In effect, the plan served as a means by which wealth would be transferred from consumers of dairy products to dairy farmers. While this wealth transfer may have had strong support from a large element of the general public[90] and at least some implicit governmental support, it was simply that: a wealth transfer with no quid pro quo. If there were some gain for consumers, the gain would be more of a "psychic" gain: perhaps this consists in the "feel good factor" which surrounds buying a product and being aware that those who produced it receive a "fair" payment for the labour which went into its production.[91] The benefits to the consumers would not have been passed on in the form of increased consumer surplus in the short term. Also, given that the industry would not be subject to reorganisation with the consequence of its least efficient producers exiting, the plan would not also improve consumer surplus over the long term.

Two observations can be made regarding the *Dairy Initiative* matter. First, had some form of reorganisation been proposed, the results of a 101 analysis motivated by economic

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[90] Although one wonders whether this is a result of an effective public relations campaign mounted by the farmers' union, as opposed to a rational consideration of the costs and resulting benefits achieved from such wealth transfers.

[91] Had the plan been successful, it may have had the effect of converting, by stealth, the bulk of the dairy industry into something which resembles a "fair trade" market.

concerns would be contingent on the details of the reorganisation: particularly in the indispensability of the arrangements and of the arrangement's potential not to exclude residual competition. Given the structure of the milk market, namely that the bulk of the UK fresh milk is sold through chains supplied by processors who were parties to the arrangement, the market is foreclosed to nonparticipants. The cheese market, on the other hand, would continue[92] to face residual competition from imported cheese, but the pound-euro exchange rate and transport costs (driven by the market in crude oil) would serve to limit the effectiveness of this competitive constraint.

The second observation is in regard to the possible non-economic value (or at least of a value which may be difficult to quantify) involved in a social choice of supporting the dairy industry. There may be a prima facie argument that there may be some social value in supporting a dairy industry with its attendant rural way of life. There is both a legal and a normative problem with such an arrangement to promote this vision of the noble farmer. The legal problem is not only is the framework for the selection of which noble vision to promote is itself vague to non-existent, as it stands (or stood, in the case of the British Dairy matter) it is susceptible to capture by well organised, noisy pressure groups. In that event, the only difference between permitted arrangements and their prohibited cousins is the outcome of a popularity contest—not their objective (and hence, to some degree measurable or verifiable) benefits.

The normative problem arises from the foreclosure of competitive opportunities for products produced by those not party to the arrangement, i.e. milk or cheese the price of which had not been fixed. Those products will have been largely removed from the market, with their removal brought not by regulatory process (which may be subject to political check), or through economic forces (i.e. lack of demand), but through the rent-seeking behaviour of an industry. The absence of the usual political, administrative/regulatory or market checks on the withdrawal of substitutes transforms this rent seeking into a form of involuntary wealth transfer from consumers to the dairy farmers.

IV. The Modernisation Programme and the More Economic Approach

In addition to much needed procedural transformation in the form of Regulation 1/2003, the post-1999 modernisation project brought into play a less publicised, but possibly

[92] See the OFT Decision (n 3) para 4.41.

just as influential, change in the Commission's enforcement policy with the so-called "economic approach."[93] This approach, which was initially very subtly introduced into the White Paper[94] which suggested the need for reform, was—inter alia—to a large extent to reinterpret the substance of Article 101 to emphasise economic considerations at the expense of others values.

The result of this is the Commission's present focus on consumer welfare as the sole goal of competition law. In our discussion of the Commission's Guidelines on Article 81 (above) we have seen how this plays out in its Article 101(3) evaluation of the effects (and thus the permissibility) of agreements. There may well be good reason for this focus on economic goals. Economic goals are objective, susceptible to measurement, and as the Commission in the White Paper noted, and by focusing on these ensures that the goals of 101(3) are met, that is "to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations."[95] The truth of this claim is not entirely self-evident.

While there may be some force to an argument which suggests that competition concerns should be somehow ring-fenced to ensure that the outcome of a political process does not hijack the competition regime. Our discussion of the *UK Dairy Price Initiative* showed the dangers which might arise from a successful hijack of the political process were it to be allowed to replace economic considerations. However, the claim that the purpose of 101(3) is to provide a means for an "economic" assessment should be taken with a grain of salt.

While 101(3) analysis will clearly include economic analysis to assess e.g. productive efficiencies, 101(3) does not exclude—either by its words or by case law of the Court of Justice—other sorts of analysis. Indeed, 101(3) speaks of "economic progress" and "fair share," neither of which are strictly economic concepts. Indeed the notion of "fair share"

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[93] Witt (n 6) at 453, see also Chris Townley, "Which Goals Count in Article 101 TFEU? Public Policy and its Discontents" [2011] *European Competition Law Review* 441 at 441 who uses the phrase "Trojan horse" in describing how the Commission introduced the economic approach in the post-1999 reforms.

[94] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (Commission Programme No 99/027) (Brussels, 28.04.1999), see also Witt ibid, p 453

[95] *White Paper*, ibid, para 57

invokes normative concerns—which are neither quantified as "consumer surplus" nor within the exclusive purview of the economist.

Further it is not clear that that this "economic approach" is consistent with the case law of the court. Not only do the courts read the requirements of 101(3) broadly, to include non-economic considerations, but the courts also have read the competition provisions as one treaty provision among many and thus not deserving of some exceptional status.

The Courts' broad reading of 101(3) was recently reaffirmed in *GlaxoSmithKline*[96] in which the ECJ noted:

> … in order to be capable of being exempted under Article 81(3) EC, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. That contribution is not identified with all the advantages which the undertakings participating in the agreement derive from it as regards their activities, but with appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition (see, to that effect, *Consten and Grundig v Commission*, cited above, p. 348 and 349).[97]

While the court only mentioned *Consten and Grundig*,[98] there is also a line of cases which includes *Metro I*, *II*, and *Mêtropole Television*.[99] This line, exemplified by *Metro II* and

[96] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission of the European Communities* [2009] ECR I-9291

[97] Ibid, para 92

[98] The reference to *Consten and Grundig* is somewhat ironical, as in its 2011 Report on Competition Policy, the Commission spoke of its investigation of Telefónica and Portugal Telecom, mentioning the impermissibility of market division (at 17):

> The completion of the single market cannot become a reality if companies conclude agreements to share the market along national borders. Agreements which include noncompete clauses put the integration of the single market at risk. The Commission thus sent a Statement of Objections to Telefónica and to Portugal Telecom, as the companies had agreed not to compete on their respective telecommunications markets within the Iberian Peninsula.

Mêtropole, shows the Courts will interpret 101(3) to permit the achievement of goals other than competition, provided that the restrictions on competition are essential to the achievement of other policy goals. As the court noted:

> As the court pointed out in its judgment in *Metro I*, the powers conferred upon the commission under article 85(3) show that 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 on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.[100]

And in *Mêtropole*, the Court reasoned:

> Admittedly, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty. However, in the present case it should have shown that such considerations required exclusivity of rights to transmit sports events, which the Decision authorizes for the benefit of members of the EBU, and that that exclusivity was indispensable in order to allow them a fair return on their investments (point 71). [101]

The fact that this line of reasoning pre-dates the Commission's economic approach[102] is irrelevant to the weight that this line of reasoning should be given. The case law of the Courts set the framework within which the Commission is bound to operate, and given the

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Presumably, this is a limited recognition that the mandate to promote competition extends beyond merely the protection of consumer surplus.

[99] See e.g. Witt (n 6) at 468 who also notes this.

[100] *Metro I* para 65

[101] *Mêtropole* para 118

[102] As noted by e.g. Witt (n 6) at 464 and 471.

courts' reluctance to not overturn or render inconsistent judgments, this line of cases remains valid.

In addition, the treaties promote a multiplicity of goals of which competition is just one such goal. Article 2 of the Maastricht Treaty (1992) spoke of the Union's goals in the following terms:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

And Article 3 enumerated twenty-one activities of the Community, which include:

> For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the time-table set out therein:
> …
> (g) a system ensuring that competition in the internal market is not distorted; …

With the 2009 Lisbon Treaty, the multiplicity of Union goals is somewhat refocused.

The (new) Treaty on European Union (TEU) now makes no reference to competition. In its place, the Competition references have been moved to Protocol 27, which reads:

> THE HIGH CONTRACTING PARTIES,
>
> CONSIDERING 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,
>
> HAVE AGREED that:
>
> To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

...

And, TEU Article 3(3) now reads:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States.
>
> It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

The Lisbon Treaty omits the twenty-one activities of the community, including ensuring a system of undistorted competition.

While the significance of these changes may be noteworthy for a study of whether (and if so what extent) the groundwork for competition has been changed by the Lisbon Treaty regime,[103] for our present purposes such a survey is irrelevant. We merely need to

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[103] Particularly in the light of former President Sarkozy's remarks after the signing of the Treaty: "Nous avons obtenu une reorientation majeure des objectifs de L'Union. La concurrence n'est plus un objectif de l'Union ou un fin en soi, mais un moyen au service du marché intérieur." (quoted in Ben Van Rompuy, "The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts," *CPI Antitrust Chronicle* December 2011 (1) at 2 (available at http://ssrn.com/abstract=1970081). On the possible refocusing which the Lisbon Treaty may have on the EU's competition agenda, see Bruce Wardhaugh *Cartels, Markets and Crime: A Normative Justification for the Criminalisation*

demonstrate (as we have) that the goals of the EU have included more than competition concerns, and as such these concerns must be balanced with other Union goals.

The primary provision of the treaties which links the EU's policy goals is the (new) Article 7 TFEU, that reads:

> The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

This Article merely codified the case law, which pre-existed the Lisbon Treaty.[104] Articles 9[105] and 11[106] TFEU could be used as footholds to associate employment and environmental considerations with Article 101's competition goals. Both of these goals mentioned in the TFEU are underscored—and perhaps strengthened—by Article 3(3) TEU's exhortations regarding "balanced economic growth … a highly competitive social market economy, … full employment and social progress, and a high level of protection and improvement … of the environment."[107]

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of Economic Collusion (Cambridge: Cambridge University Press; forthcoming, 2014) pp 201 – 4.

[104] See Tom C Hodge, "Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101" (2012) 3 *William and Mary Business Law Review* 59 at 107 who cites Case C-233/94 *Federal Republic of Germany v European Parliament* [1997] ECR I-2441, para 48 and Case C-379/99 *PreussenElektra AG on the Interpretation of Article 30 of the EC Treaty* [2001] ECR I-2159, paras 76 – 81 in support of this view.

[105] Article 9 reads: "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health." This article is new to the Lisbon Treaty

[106] Article 11 reads: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development." This was former Article 6 TEC.

[107] TEU Article 3(3). I suggest that the phrase "a social market economy" is (at minimum) "code" for an ordoliberal conception of the economy with its vision of competion rules and goals: see Wardhaugh, *Cartels* (n 103) p 202.

That the advancing the multiple goals of the Union is a difficult balancing act, the words of the ECJ in *Continental Can* are still salient:

> Article 86 is part of the chapter devoted to the common rules on the Community's policy in the field of competition. This policy is based on Article 3(f) of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted. The applicants' argument that this provision merely contains a general programme devoid of legal effect, ignores the fact that Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim mentioned in (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive.
>
> But if Article 3(f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the Treaty according to which one of the tasks of the Community is 'to promote throughout the Community a harmonious development of economic activities'. Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market.[108]

Give these cross-sector (or linking) clause in Lisbon Treaty not only codify the existing case law on policy linkage, but also appears to limit the role of competition analysis, these words may gain even greater significance. Presumably the refocus of the Union's goals in new Article 3(3) TEU may bunt *Continental Can's* emphasis on undistorted competition. The new objective in balancing Union goals may now be a "highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment" rather than the protection of consumer

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[108] Case Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR-215, paras 23 and 24

surplus for competition's sake.

The foregoing analysis of the case law and Treaty provisions shows three important points. First, that under Article 101(3) analysis it is appropriate to take into account (when the relevant consideration necessitates it) concerns broader than an accounting of consumer surplus. Second, the treaty provisions and structure show that competition is one among several values promoted by the Union. Given the multiplicity of values, it is unlikely that there is a hierarchy value; and, if indeed there is such a hierarchy, it may well not be near the top. Given the emphasis on the Union's promoting a "social market economy" and employment, it may be the case that these goals are nearer to the top of the hierarchy. Competition may be one goal among equals, but it is certainly not *primus inter pares*.[109] Finally, the Commission may be a candidate for censure[110] were it to dogmatically insist on consumer surplus as being the sole goal of competition law[111] or that competition is the main goal of Union internal market policy.[112]

V. Taking into Account Non-Economic Considerations

To the extent that it may be desirable to take non-economic considerations into account into the assessment of arrangements which advance social goals at the possible expense of consumer welfare, at present there are two plausible means to do so. The first would be through explicit consideration of non-economic benefits within 101(3) analysis. This would rely on a non-economic understanding of "fairness" and the use of a broad conception of "consumer." This understanding of "fairness" is found in the plain words of the Treaty, and a wide understanding of who is a consumer is consistent with the Commission's own view,[113] albeit possibly extending the concept somewhat.

The second means is through the explicit use of the policy linking clauses of the treaties, expressly conceding the anti-competitive effect of the agreement in question; yet arguing that on balance the agreement nevertheless advances the Union's goals. In the aftermath of the Lisbon treaty, it is not clear whether the balancing of Union goals could be

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[109] See Hodge (n 104) at 105; Wardhaugh *Cartels* (n 103), p 204

[110] See Witt (n 6) at 471, Wardhaugh ibid p 204, and Hodge ibid, at 130

[111] As the Commission appears to do in the *Guidelines on 81(3)* (n 74) para 34

[112] *Guidelines on 81(3)* ibid, para 13 can reasonably be taken to assert this.

[113] See *Guidelines on 81(3)* ibid, para 86 which takes a broad view of "consumers."

done through large scale "carve outs" of policy exceptions which trump competition considerations or through a more subtly crafted balancing of objectives. Although *Continental Can* relies on the older notion of undistorted competition within the internal market to stress that the non-competition goal must be pursued in the manner which is least restrictive to competition, given the new linking provision of TEU Article 3(3), it is not clear the extent to which this requirement for a least restrictive means is still valid. The present aim is a "social market economy" with ancillary features, not undistorted competition.

The difficulty with both of the two approaches is that, as Witt puts it, "It is a long, expensive and uncertain way from Brussels to Luxembourg, especially as an individual's action for annulment of a Commission decision would first have to be lodged with the General Court."[114] The risk is compounded not just by legal uncertainty, but also that any agreement chosen as a test case would require a deliberate challenge to the Commission and its interpretative and enforcement guidelines.[115] Deliberating alienating enforcement authorities is always a risky legal strategy.

1. Non-Economic Considerations within 101(3)

This approach would take a wider approach than an increase in consumer welfare required by the "resulting benefit" test of Article 101(3). Relying on Williamson's[116] insights in merger analysis, Kokkoris and Olivares-Caminal suggest that in situations of economic crises, competition authorities may wish to adopt a total welfare standard (i.e. the sum of consumer and producer welfare), and that this be prioritised over consumer welfare.[117] While the use of a total welfare standard may be best placed in a merger context, it is not out of place in the context of an industry-wide restructuring arrangement. Similarly, in crisis situations, fine policy should also be adjusted so as not to bankrupt existing firms, thereby

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[114] Witt (n 6) at 471

[115] Witt ibid at 470 – 1

[116] Oliver E Williamson, "Economies as an Antitrust Defence: The Welfare Tradeoffs" (1968) 58 *American Economic Review* 18

[117] Ioannis Kokkoris and Rodrigo Olivares-Caminal *Antitrust Law Amidst Financial Crises* (Cambridge: Cambridge University Press, 2010) p 403

further concentrating an already uncompetitive market.[118] Given the long term consequences of a healthy and competitive industry post-restructuring, these authors note:

> …crisis cartel agreements should not be automatically prohibited and the financial-constraints defence should be taken into consideration during periods of crisis. Intuitively, given a choice between a market with a small number of remaining firms and a market with a significant number of firms which have decided to co-ordinate capacity reduction during the crisis, the latter alternative may be more beneficial to the market in the long term. We should note that in the latter scenario, as soon as the adverse conditions in the market under the crisis cease to exist, the structure of the resulting market is likely to have a greater potential to return to pre-crisis competition levels due to the survival and existence of a larger number of firms.[119]

While a total welfare standard may permit producers to capture some of the gain from a standstill in competition and use this gain to facilitate an orderly restructuring of an industry, this standard is nevertheless susceptible to the same criticisms of a pure consumer welfare standard, which include measurability of non-economic outcomes and intergenerational distribution.

Intergenerational concerns, while not directly a concern in industry restructuring can nevertheless be a concern when benefits (or costs) accrue over a lengthy horizon. Arrangements promoting environmental goals are paradigmatic of these matters. Standard measurements using consumer surplus is difficult, with the difficulty being compounded by the choice of the discount rate to be applied. Such considerations may well serve as an argument to remove intergenerational calculations of costs and benefits outside of the realm of economics to cost-benefit analysis in the wider sense[120] or to a more normative discipline

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[118] This is a point with which the author has sympathy, and suggests that individual criminal sanctions may be a more effective means of securing compliance. See Bruce Wardhaugh, Closing the Deterrence Gap: Individual Liability, the Cartel Offence and the BIS Consultation (2011) 10 *Competition Law Journal* 175.

[119] Kokkoris and Olivares-Caminal (n 117) p 467

[120] See OFT *Article 101(3)—A Discussion of Narrow versus Broad Definition of Benefits: Discussion Note for OFT Breakfast Roundtable* (2010) and H M Treasury *The Green Book: Appraisal and Evaluation in Central Government* (London: TSO, 2011). However, standard

altogether.[121] Indeed a more normative discipline may directly address Article 101(3)'s concerns of fairness.[122] The point though is that a strict economic evaluation on its own is unlikely to be able to adequately address these distributive concerns.

Further a non-economic reading of 101(3) can allow for the internalisation of costs associated with industrial restructuring. To the extent that the costs of industrial restructuring are absorbed by an industry and then passed on to consumers in the form of increased prices, the users of the industry's products (in other words, the consumers) pay the price of this restructuring. Thus to the extent that the costs of the restructuring are captured through these increased prices, and not spread generally to society as a whole, an equitable argument (i.e. based on fairness concerns) can be made that by such cost internalisation, those who benefit from the industry pay the full costs of the industry. This sort of argument is—of course—a parallel to the arguments for internalising other sorts of externalities in the production process. In effect, restructuring an industry can cause social costs in the form of unemployment (with resulting local or regional effects). By imposing those costs on the users of the industry during the restructuring process, these consumers pay a cost for their product which better reflects the full cost of the product.

The limits to this argument, and its normative force, are two. First, to the extent that there is an overlap between all users of the product (including, in particular, past users) and the present and future users of the product, the greater the full costs of the product will be borne by its users. Past users who have ceased using the product will not have incurred the full costs of the product in question, and present users who are new to using the product may pay a cost greater than the full costs of the product. Second, the strength of the argument is contingent upon the degree to which the full social costs are in fact internalised. Although internalising any amount of the cost is presumably appealing (as this pushes the product's

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Cost Benefit Analysis has its limits. An effective analysis must precisely quantify the benefits, indeed this is part of the appeal of the economic approach. But the UK's *Green Book* arbitrarily selects a 3.5% short term and a declining 3 – 1% long term (30 plus years) discount rate: see para 5.49 and Annex 6 (pp 97 – 100). This choice of a discount rate can hardly be an exact measurement, and thus is likely to be a case of precision without accuracy.

[121] John Rawls *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971; revised edition, 1999) pp 251 – 267

[122] Rawls' views are explicitly constructed on the idea of "justice as fairness," see ibid pp. 11, 118 – 123.

price closer to its full costs), this appeal strengthens to the extent that these social costs are more completely reflected in the product's price.

This cost internalising process captures a number of normative advantages which would be precluded by a strict economic focus. This approach specifically regards the distributive consequences of the proposed arrangement, and allows the benefits to be compared across markets (albeit in a limited way). Given the Commission's Guidelines preclude cross-market comparisons[123] and standard economic analysis shows little concern for concerns of distribution[124] this approach may have normative advantages.

Another advantage possessed by such an arrangement is its plausible superiority to taxation. The orderly reorganisation of an industry can be assisted through targeted taxation of the industry's products, with the tax proceeds being targeted to alleviate the social costs of such restructuring. The economic effect to the consumer is the same: in both cases the consumer pays more for the product, with the increase in price being passed on to those affected by the restructuring—either indirectly (i.e. transfer to the industry which in turn passes it on) or directly (to those affected). While there may be some advantages of government participation in this sort of scheme (perhaps arising from the oversight which such involvement can provide), there are likely to be problems with the practice. In addition to potential state aid concerns, there are administrative expenses involved in implementing the tax and subsidy regime, plus the hazards of government obtaining a revenue stream: there is no guarantee that government may discontinue the fund raising programme, once the difficulty has ended. A time-limited industrial reorganisation supervised by an independent monitoring agency (in the form of the relevant competition authority) may be a more efficient (i.e. less administratively costly) means of transferring these funds without the potential political manipulation of governments who have found a new revenue source.

2. Non-Competition Considerations in the Treaties

An alternative means of ensuring that social concerns can be achieved without competition concerns being used (or seen to be) a block to these objectives is through the use

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[123] See OFT, *Article 101(3)—A Discussion of Narrow versus Broad Definition of Benefits* (n 120) para 4.11, 4.18 – 4.25 and *Guidelines on the application of Article 81(3)* (n 74) para 43.

[124] Which is not shared by CBA (at least in the form as ostensively practiced by the UK government): see *Green Book* (n 120) pp 91 – 100.

of carve-outs based on non-competition policy provisions and the so-called linking clauses in the Treaties. The difficulty is the extent to which those charged with the balancing (or verifying the balancing) can give deference of to one objective at the cost of another objective. Presumably the ECJ's words in *Continental Can* quoted above[125] are still relevant, and that consideration be given to the anti-competitive effect of the proposed arrangement to ensure the pursuit of the social good does not effectively nullify or otherwise impair the Treaties' competition provisions.

While a set of carve outs, or at least some limited carve outs for the pursuit of non-competition goals may be consistent with the words of the Treaties, and particularly the policy mandating clauses of TEU Article 3, the existence of carve outs leaves open legal and institutional issues. The legal issue is the degree of deference given to the non-competition goal and to the means by which is achieved. *Continental Can* shows that at minimum, competition goals cannot be completely discounted.[126] *Wouters*[127] is frequently (and in the present author's mind, correctly) taken as support for the proposition that some national interests may be sufficiently important to override the application of the competition provisions of the Treaties.[128]

Thus, while there is a legitimate justification within both the wording of the Treaty and the case law which interprets these words, that Competition concerns can legitimately be balanced against—and, when appropriate, yield to—other social concerns, there is no guidance as to how broad the deference should be given to given to national social considerations in their "trumping" of competition concerns. Monti remarks:

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[125] Text accompanying note 108

[126] *Continental Can* para 24: "But if Article 3(f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated."

[127] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577

[128] See e.g. Georgio Monti, "Article 81 and Public Policy" (2002) 39 *Common Market Law Review* 1057, 1095: "… national interests are so powerful a consideration that they justify the non-application of the core values of competition law if necessary to protect domestic public policy goals." See also Renato Nazzini, "Article 81 EC Between Time Present and Time Past: A Normative Critique of 'Restriction of Competition' in EU Law" (2006) 43 *Common Market Law Review* 497, 521 – 527.

> This interpretation of *Wouters* means that any restriction on competition necessary to safeguard a national public policy consideration may be allowed to stand. Against this interpretation, it has been argued that *Wouters* stands for the proposition that a restriction of competition is tolerated when necessary for the proper performance of an economic service, a restriction "ancillary to a regulatory function."[129]

Further, given the adjustments made to the Treaty statements of the Unions goals, and their relation to competition which have been made in the Lisbon Treaty, any hints which earlier case law can provide may be of diminished value. I suggest that the de-emphasising of competition should entail a granting greater deference to national social values. Nevertheless, a clear indication of how the scales are balanced is needed, particularly given the (to paraphrase Witt) the long, expensive and risky road to Luxemburg that testing the balance entails.

3. Weighing Non-Competition Goals: Institutional Considerations

A key difficulty in balancing social goals, including competition goals, is one of institutional competency and/or legitimacy. To a great extent, determining social goals and putting into place an agenda based on these goals is the end result of a democratic process. It is not necessarily the purview of the judiciary or a specialised administrative agency. Indeed, in *U.S. v Topco* a majority of the US Supreme Court recognised this point thus:

> There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such

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[129] Georgio Monti *EC Competition Law* (Cambridge: Cambridge University Press, 2007) p 112, who cites Richard Wish *Competition Law* (London: Lexis Nexis; fifth edition, 2003) p 122.

> decisions and courts are ill-equipped and ill-situated for such decision making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.[130]

Such decisions are not legal conclusions.

Similarly, such balancing is not a task for an economist. While the discipline can be useful in assessing the economic benefits of a particular arrangement, it has no special normative insight. Indeed, to the extent which it is not concerned with the distributive consequences, it specifically lacks concerns of fairness. Likewise, competition agencies tend to be overly focused on the competition aspects of a given situation, and—as a result of this—may be unable to give an adequate assessment of competing social values.

However a political solution is not a panacea. Political institutions can be easily "hijacked" by rent seeking groups seeking to pursue their agenda under the guise of performing a social benefit. If the *UK Dairy Initiative* teaches us any lesson, it is this one. A well organised public relations campaign mounted in conjunction with vigorous political lobbying can lead to a public (mis)perception that a rent-seeking arrangement is in the public interest.

The pluralism of values which is found in the EU will exacerbate these concerns regarding political capture and exposes the tensions in attempting to facilitate the consistent enforcement of the competition rules throughout the Union. The political capture of one Member State's legislative process by a rent seeking group, resulting in the promotion of a pseudo-social goal will lead to divergent, and possibly inconsistent, application of the rules.

Conclusion: With a Suggestion

These institutional limits demonstrate the difficulties inherent in addressing non-economic concerns within the scope of Article 101(3), or—more generally—among the provisions of the Treaties themselves. Contra what the Commission may like us to believe, both the wording of the Treaties and the case law of the courts makes it clear that such concerns must be addressed when they arise. The key in assessing concerns may well be in

[130] *United States v Topco Associates, Inc* (1972) 405 US 596, 611-12, 92 S Ct 1126, 1135

the notion of fairness which is specifically raised by Article 101(3). While the result of a political or administrative process may be evidence of something, such results are not on their own evidence of fairness, or that consumers will indeed benefit. The Court of Justice's warning in Continental Can that to easily set aside the competition rules would eliminate the competition provisions. Yet to insist on adherence to the competition rules at the expense of other social goals, renders nugatory those aspects of the Treaty which are concerned with social and environmental development.

The insight from cost internalisation may be an appropriate means to address fairness, and it distinguishes the *Synthetic Fibres* and *Dutch Brick Industry* matters from the *UK Dairy Price Initiative* case. The former two cases involved industrial restructuring, by the industry "giving up" something: the excess productive capacity; and it was done in a manner which mitigated some of the associated costs of restructuring. The costs of giving up this productive capacity were passed onto those who benefitted from the industry: the consumers of fibres and bricks. These costs were not dumped onto the social welfare system in a wholesale fashion.

In the *Dairy Initiative*, by contract, there was no element of internalisation or giving something up in the form of restructuring. As politically popular as the dairy industry's programmes was, it still involved the wholesale transfer of consumer surplus (and hence wealth) to the farmers. This, however, is not to suggest that these sorts of politically popular programmes have no place in the Union, only that their place be limited. The lack of reciprocity—the absence of "giving something up"—may well be a signal that competition concerns should be brought into consideration. While social concerns are indeed important, they cannot be used to surreptitiously bring into play forms of rent seeking behaviour.