



UPPSALA
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Consumer Welfare & Market Definition in EU Competition and IE Law

Research Questions

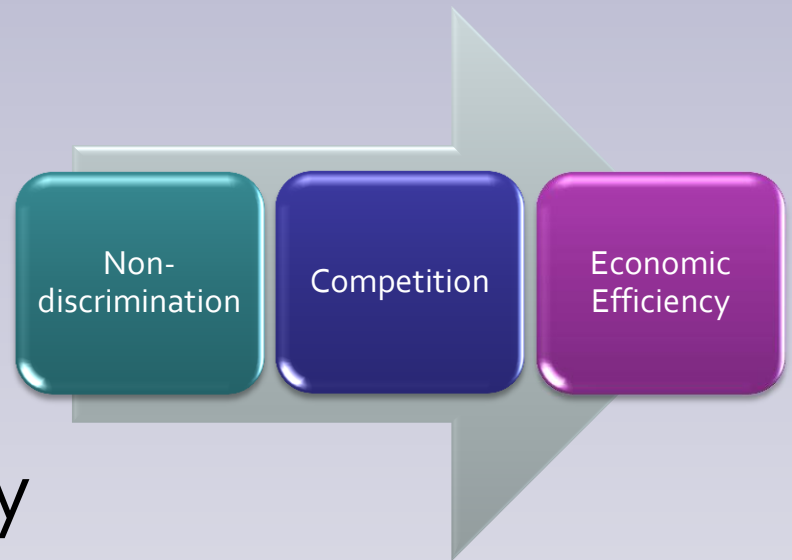
1. Are **welfare** and **economic efficiency** as understood by EU & WTO outdated (normatively wrong)?
2. How could we apply a *different* welfare concept through **market definition**?

Aim of the research

1. Argue that we should **tip the balance** more towards non-economic values
2. Without challenging **open markets, free trade and development**

Goals-Process-Methodology

- Common goals
 - consumer welfare
 - economic efficiency
- Common process
- Common methodology
 - Like products – DCSP
 - SSNIP test

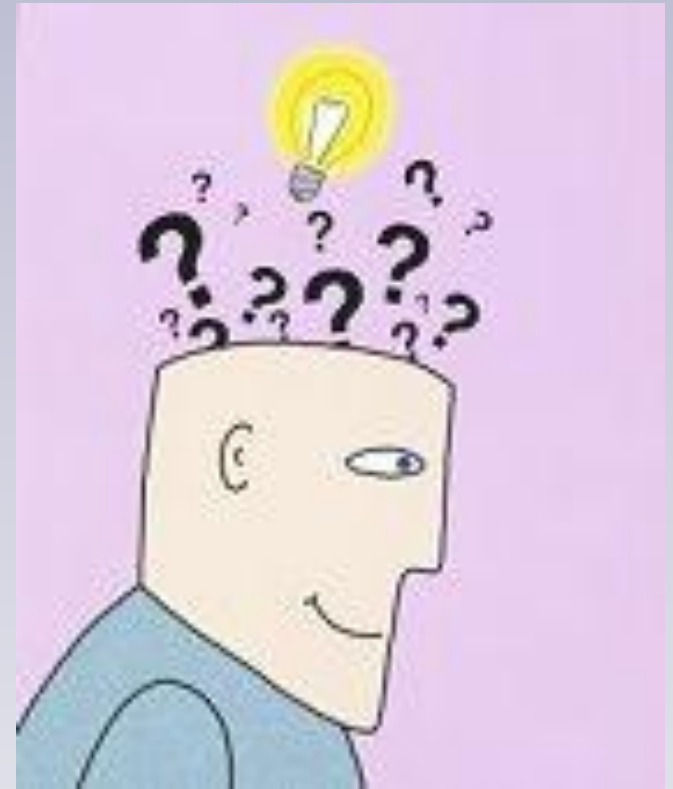


The Common Problems

- 1. Consumer / Welfare definition**
- 2. Market definition**

Consumer?

- Rational
- Self-interested
- Wealth-maximising
- Informed



Welfare?

- What do we mean by that?
- How do we measure welfare?
- What is it exactly that we measure?
(cf Bhutan Gross National Happiness)
- Whose welfare counts? (Inbuilt inequality?)
- *Real versus perceived* welfare

Welfare?

- Other values as part of human welfare

Economic welfare promotes these (but not necessarily)

- Sustainability – Rich and diverse environment
- Labour rights and standards
- Health
- Human rights
- Possibilities to flourish and pursue a meaningful life



Market Definition

- If we re-evaluate the common aims, then we need to change the methodology
- Aims-and-effects doctrine (WTO)
Rule of Reason (EU) } **Rejected**
- Take a step back → **definition of relevant market**

Relevant Product Market

- Commission: 'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'
- Demand- & supply-side substitutability
Own-price elasticity of demand

SSNIP Test

- Small but significant non-transitory increase in price (indicates cross-price elasticity of demand)
- Focus on price – marginal consumers
- Price & consumer choices may or may not reflect non-economic values

Judging “likeness” (eg *Japan - Alcohol*)

Likeness (substitutability)

Objective

Subjective

Physical
characteristics

End-use

Tariff
classification

Consumers'
preferences
Demand
Substitutability

Supply
Substitutability

Process/Method of Production

- “Like”?
- WTO judicial panel i unadopted *Tuna/Dolphin*: like despite difference in method of production

Unlike – WTO

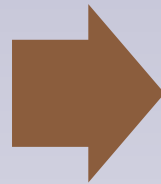
Difference in method
of production an
objective difference



EU can distinguish
between such
products without
breaching GATT/GATS

Unlike – EU

Difference in
method of
production an
objective difference



Commission can
define narrower
markets – intervene
more easily

Implications for Competition Law

- Art 101(1) TFEU
 - Art 101(3) TFEU
- Art 102 TFEU
- Mergers Regulation

Possible Criticism

- Contrary to free markets, development & economic theory?
- Risk of protectionism?
- Cultural neo-colonialism / Arrogance?
- Exceptions from TFEU/GATT/GATS enough?

Response to Criticism

- Post-Chicago school, beyond economic orthodoxy
- Different jurisprudential bases (consequentialism – value pluralism – natural law)
- Different theories of justice can justify law as an instrument of governance – Not given that it has to be utilitarianism

Other contenders: egalitarianism, libertarian theories, international theories of justice

Response to Criticism

- Safeguards
 - Non-discriminatory measures
 - Soft measures first
 - International negotiation
- Exceptions not morally/legally the same
- Examples already exist in case-law
(*Schmidberger, Omega, Wouters, Mecca Medina, EC-Asbestos*)