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Solidarity as a normative framework for European competition law

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INTRODUCTION

As an area of exclusive competence to the European Union (EU) under *Article 3(b) of the Treaty on the Functioning of the European Union (TFEU)*,[1] competition law has been one of the Union's most effective way to shape the functioning of the internal market, and extend its influence outside of its borders. The Commission's enforcement of antitrust and merger control rules has led to important reshaping of key markets, such as the energy sector; and instigated important changes in evolving markets, with decisions like *Google Android*[2] having ripple effects across continents. The diverse caselaw stemming from the EU's competition law enforcement since its inception initiated much academic debate, ranging from the importance of intention in *Article 101 TFEU*[3] cases to technical discussions regarding the "as efficient competitor" test. However, an overarching discussion about competition law's role in helping the Union reach its wider objectives, outside the strict remit of the internal market, has yet to be set in motion.

European competition law is different from national competition law as it exists within the peculiar context of the novel creation of an integrated Union of states, with no direct comparable legal form in the world. Specifically, the EU's antitrust provisions were created to support economic integration between Member States; the Commission using its competition law toolkit to strengthen market integration. As such, European competition law is a purposive body of law, being a way for the Union to achieve its economic integration goals. This is different from the more traditional evolution of national antitrust provisions, which is more reactive, adapting to the economic and social evolution of countries. Given this, it is argued that Union competition law is burdened with the responsibility of assisting the EU in reaching its wider objectives, specifically those relating to the evolution of the internal market.

The Union's goals are detailed in *Article 3 Treaty on European Union (TEU)*,[4] the provision most relevant to this study being *Article 3(3)*. In this multi-paragraph provision, the EU not only aims to establish an internal market, but also sets out to build a "highly competitive social market economy" that would promote full employment and social progress; and aims to promote economic, social and territorial cohesion, and solidarity between Member States.[5]

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[1] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01
[2] Case T-604/18 Google and Alphabet v Commission (Google Android) [2022] I-541
[3] Ibid, Article 101
[4] Consolidated version of the Treaty on European Union [2012] OJ C326/13, Article 3
[5] The provision reads specifically : « 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

Immediately noticeable from this is the inherent dichotomy between the "market" and the "social" elements in this provision. On one hand, the EU aims to build an internal market that would lead to economic growth and price stability, explicitly putting in place a market-based economy within the Union. On the other, it also clarifies its intention to promote social justice and protection, and to build solidarity links between its Member States. The EU aims to build a "social market economy" that would benefit both economic growth and social progress, enabling European citizens to reap the economic benefits of the internal market while continuing to enjoy the social protection afforded to them by the European social model that characterises most of the Union's Member States. However, very little is detailed about the way in which these goals are to be reached, more precisely, there is no explicit mention as to how these goals are to be reached in tandem with each other.

With this in mind, this study aims to explore European competition law's role in reaching both of these goals, and analyse whether it possesses the normative legal legitimacy to implement solidarity within the market. It will be submitted that competition law is one of the EU's most efficient tools in bridging the gap between solidarity and the market, but that its provisions cannot be used to promote all forms of solidarity. To support this claim, this study will be divided into three parts. Firstly, an analysis of what is meant by "solidarity" will be put forward, focusing specifically on the normative understanding of the term within the EU's context (I). Secondly, it will be argued that European competition law is a purposive body of law with a malleable set of goals (II). Finally, an analysis drawing from the two previous sections will attempt to illustrate the different manners in which European competition law can be used in a purposive manner to promote solidarity within the Union (III).

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. […]"

I. Solidarity and the market in EU law: the social market economy and the EU's dual commitment

The EU was built upon the foundations of the European Economic Community, which aimed to foster economic integration between its members. It is therefore unsurprising that economic integration through the internal market is the EU's flagship project, at the potential detriment of the social element. Despite the EU's 'dual commitment' to achieving market freedoms without hindering its Member States' social welfare systems, it has been argued that there is a strong imbalance between the 'market' and the 'social' in the EU.[6] As the EU attempts to create a social market economy, can this imbalance be solved? It will be argued that the search for an internal market has come at the expense of the creation of social rights, due to an over-constitutionalisation of market freedoms. Despite attempts from the CJEU to equilibrate this imbalance, this is not enough for the EU to truly achieve its 'dual commitment'. It is submitted that narrowing the scope of action of the EU regarding its social element, to concentrate instead on solidarity, would lead to more concrete results and allow for European competition law to bridge the gap between solidarity and the market.

A. The EU as a competitive social market economy

The EU was built upon the idea that integrating its Member States' economies would prevent further conflict and war. As such, the economic integration of the EU is its main driver of evolution and interdependencies; achieving a fully-fledged internal market effectively being the Union's main achievement, from which other aspects of integration ensue. The method to this success is the removal of barriers to trade and movement within the EU, through the use of negative integration. However, such barriers to trade and movement can stem from acquired social and welfare rights for each Member State, such as the protection of workers. As such, the process of economic integration can come at the cost of social rights, creating a fundamental tension within the EU. It is argued that the Court's judicial activism in this area has elevated the internal market provisions of the treaties to quasi-constitutional functions, and has

[6] S.Garben 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' [2017] European Constitutional Law Review 13 pp.23-61

maximised the Court's control over the substance of Member State policies. Following *Cassis de Dijon*,[7] it appears that the main thrust of judicial action at EU level has been to extend the reach of negative integration, at the expense of Member States' policies and citizens' social rights, to create a commodified social sphere.

1. The EU's ambition in building a social market economy

The Lisbon Treaty[8] attempted to remedy this central tension by reshaping the goals of the EU into achieving a 'highly competitive social market economy', in which the EU market rules could also be read as social market rules. A social market economy could be defined as an economic order built on an open market and free competition, which enables the allocation of resources also by other means, such as redistributive social policies; effectively recognising that the open market is not always an adequate substitute for welfare regimes.[9] *Article 3 TEU*[10] conceptualises the EU as a social market economy, which is given force across all EU policies in *Article 9 TFEU*.[11] However, it is argued that the EU's conception of a social market economy does not encompass the social and economic as being equal, but rather as the former serving the latter. The EU was built first and foremost as an economic community, its subsequent evolution and policies mostly emerging from the market and functioning in relation to it. As such, the evolution of the EU as a supranational power finds its roots in ordoliberalism, where the State emerges as an institution responsible for the functioning of a space of economic freedom, rather than the market emerging from the State. This is demonstrated by the *TFEU's Social Title*.[12] While having resulted in a rich social acquis at EU level, the Social Title mostly allows for the EU social question to function in relation to other policies, rather than being a policy goal in itself. It therefore includes safeguards to ensure that the measures are not overly biased towards the social, as seen in *Article 153(2)(b),*[13] concentrated on the creation of

[7] Case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECJ
[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1
[9] D. Damjanovic "The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Economy" [2013] CMLR 50 pp.1685-1718
[10] N4
[11] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, Article 9
[12] Ibid, Title X Social Policy
[13] Ibid, Article 153(2)(b) which reads that the European Parliament and the Council « may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall

minimum requirements. The EU does not possess the competences to pursue goals of modernisation of social requirements, focusing rather on rights that could be potentially affected by internal market policies, such as the protection of workers, seen in *Article 153(1) TFEU.*[14] Overall, given the EU's ordoliberal traits, it is argued that the social is construed as being ancillary to its wider economic objectives, mostly focusing on including labour in the market rather than protecting it from market forces.

Moreover, the EU's lack of political power to solve structural issues between the 'market' and 'solidarity' is symptomatic of an architectural deficit in archiving its goal of building a social market economy. Firstly, it is not possible for the political process to offset this unbalance. The constitutionalisation of market freedoms at EU level, upheld by the CJEU's case law, has limited member states' regulatory capacity in all policy areas, regardless of whether they fall within the area of member state autonomy.[15] This is in line with the EU's overall structure as being informed by the market, and to evolve alongside it. Secondly, the EU's architecture, in bringing together Member States with different conceptions of the role of the welfare state, has led to an overall downward regulatory spiral; creating structural asymmetries between Member States. *Scharpf* draws a distinction between Liberal Market Economies (LME) and Social Market Economies (SME), arguing that SME depend on EU legislation and decisions to change their policies, while LME are less prone to this influence.[16] Indeed, LME do not possess the same amount of entrenched social rights as SME do, effectively making them less prone to the CJEU-imposed negative integration, given their relatively low level of social regulation and minimal welfare states. In turn, SME have had to adjust their welfare systems to meet EU standards. Given the existence of conflicting positions within the EU, there is no incentive as a bloc to legislate upwards to change the liberal-leaning status quo. Political attempts to put forward legislation to limit the reach of economic liberalisation being easily blocked by the veto of liberal governments. As such, the structural differences between Member States indicates that it can only partially achieve its goal of a social market economy, having focused mostly on the latter part of the objective.

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avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings."

[14] Ibid, Article 153(1)(c) which reads that the Union shall support and complement the activities of the Member States related to the « social security and social protection of workers »

[15] Scharpf, 'De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice' in Garben and Govaere (Eds.), *The Division of Competences between the EU and the Member States* (Hart 2017) 284

[16] Scharpf "The asymmetry of European integration, or why the EU cannot be a 'social market economy" [2010] Socio-Economic Review 8

2. The structural difficulties preventing the achievement of this objective

This tension cannot be resolved by political and judicial means, but requires a fundamental rethinking of the market freedoms. It is argued that in order to truly align economic integration with transnational solidarity, it would be necessary to de-constitutionalise the internal market provisions, and to demote the internal market to a special policy domain. This would entail removing the four freedoms from the Treaties and the EU Charter of Fundamental Rights, so that the market freedoms are no longer elevated above the social.[17] Demoting the internal market to a special policy domain from its current central position in the EU's functioning would allow for the development of a truly European social and solidarity drive. Effectively, this would allow for a redesign of the EU's objectives, and to move away from the paradigm of the EU being built around its internal market and for its policies to serve it.

However, it is argued that this project faces too many obstacles to truly come to fruition. Firstly, despite some of the tensions stemming from difficult harmonisation of standards, the internal market is still the main driver of integration within the EU. Not only has it led to the removal of its internal borders, it has enabled both the EU and its Member States to gain significance on the global stage, providing the incentive for more countries to join. As such, the internal market is the EU's flagship project because it is what enables it to create interdependencies between countries, effectively transcending the national sphere to reach the Union level, as can be seen with the predominance of EU competition and internal market law. Secondly, while economic matters have mostly transcended the national sphere, social matters firmly remain a national affair, given how inter-linked they are with national identity. The *Laval* and *Viking*[18] and the *Dano*[19] cases showcase the imminent sensitive nature of such matters. The former demonstrating that encroaching on a national social acquis is controversial, the latter illustrating the sensitive nature of welfare rights allocation and the need for the EU to avoid interfering with the national redistributive element of solidarity. Finally, the constitutionalisation of market freedoms is precisely a symbol of the entrenched nature of the unbalance between the economic and the social in the EU. The legal and political consensus on the importance of these freedoms stems from decades of incremental economic integration and relies heavily on the output legitimacy generated by the success of the internal market. On

[17] N15
[18] Case C-341/05 Laval un Partneri [2007] I-1176 ; Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] I-10779
[19] Case C-333/13 Elisabeta Dano, Florin Dano v Jobcenter Leipzig [2014] I-2358

the other hand, the EU's commitment to the social solely dates back from the 2007 Lisbon reforms, which has not allowed for a similar amount for incremental and concrete achievements.

The EU's ambition to realise a fully-fledged social market economy, while commendable, is therefore hindered both by the differences in economies within the bloc and the inadequate legal architecture of the Union, which prevents effective political thrust coming from the Commission. Due to this, it is argued that the building of a social market economy across the continent should be done incrementally. To isolate the Union's action into workable segments would allow for its legal tools to be used in a more purposive manner, enabling more output. A focus on solidarity, particularly on how solidarity can be included into market dynamics, is an avenue to explore.

B. The triptych of EU solidarities and their relationship to the market

Solidarity remains a highly polysemic concept, which cannot be solely constrained to the Union's ambition of creating a social market economy. In order to systematically analyse the interaction between the 'market' and 'solidarity', it appears necessary to segment the latter notion into workable norms. These might be addressed by different areas of European law, from free movement to refugee allocation, and might not all be relevant to the application of European competition law. As such, it is argued that there is no single European solidarity, but rather European solidarities, creating 'islands of solidarity' within the EU. Using *Sangiovanni's* model,[20] one can construe three discernible dimensions of solidarity in the Union, which both compound into and legitimate the EU's 'dual commitment' to social and Member State solidarity, as presented below.

In *Solidarity in the European Union*, Sangiovanni exposes his thesis on European solidarity, arguing that while it is not possible to define a singular European solidarity that would encompass all of EU law's actions, one can segment the Union's action into different solidarities, touching upon different levels of integration. These are (1) national solidarity, which defines obligations from national states to their citizens and residents; (2) member state solidarity, which defines obligations among EU Member States; and finally (3) transnational

[20] A.Sangiovanni 'Solidarity in the European Union' [2013] Oxford Journal of Legal Studies 33(2)

solidarity, which defines obligations among EU citizens as such, and could also refer to the EU's external action. These solidarities are respectively applicable from the lowest level of integration (national territory) to the highest one (the EU in its entirety an entity in the international sphere). Because of these differences in levels of integration, these 'islands of solidarities' do not possess the same relationship to the 'market', and might therefore not be similarly dealt with by EU competition law. These norms will now be presented with the specific point of view of their relationship with the market.

1. National solidarity

National solidarity could be defined as 'social welfare', referring to all that encompasses the social acquis that has become ubiquitous with the European social model, notably the production of collective goods at the national level (e.g. a collective healthcare system). Given that the nature and development of these collective goods is inherently ingrained in the cultural and economic context of each Member State, national solidarity is the type of solidarity most at risk from being denatured by the supranational criteria of the single market. Indeed, partisans of the theory of negative integration would argue that the building of the internal market has come at the expense of social standards in Member States, effectively eroding the European social acquis in favour of reaching economic integration.

Using the evolution of free movement caselaw, it is possible to illustrate the imbalance between the market and social provisions within the EU. While *Article 151 TFEU* states that the internal market shall have as its objective the harmonisation and improvement of living and working conditions,[21] the Court's action in this area has generally led to a worsening of these conditions (*Garben*).[22] At first, the ECJ conducted a relaxed proportionality review when balancing social and market goals, as demonstrated in cases such as *Criminal Proceedings against Alfred John Webb*[23] and *Rush Portuguesa Lda v Office national d'immigration*.[24] In both cases, the social

[21] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, Article 151 which reads "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. […]"
[22] N6
[23] Case C-279/80 Criminal Proceedings against Alfred John Webb [1981] I-314
[24] Case C-113/89 Rush Portuguesa Lda v Office national d'immigration [1990] I-01417

measures at stake were held to be justified, and not to hinder free movement provisions. However, *Laval* and *Viking*, combined with *Rüffert*,[25] was a turning point demonstrating the Court's willingness to embrace a 'market without rules'. Indeed, the Court in these judgments widened the already broad definition of potential restrictions on free movement provisions. In these cases specifically, the Court held that the nature of collective action as a fundamental right did not preclude it from coming within the scope of free movement provisions, and could not be used to prevent social dumping within the EU. In essence, the EU's highest judicial body favoured the liberalisation of free movement against the right to collective action, showing a gradual change in priority in both European legal interpretation and policymaking. Further following cases, such as *Commission v Spain*[26] showcase a similar line of reasoning and form in context a coherent line of cases opposing the 'social' and the 'market'.

The aforementioned cases are symptomatic of negative integration in favour of the internal market, in which harmonisation across the continent is achieved through the lessening of social solidarity to favour the application of free movement provisions. These judgments are particularly significant when taking into account that the market has much less to lose than the social. To clarify, a judgement accepting national social restrictions would still allow Member States to adopt more market-friendly rules; while on the other hand, a judgment condemning a national social rule prohibits all other Member States from adopting or maintaining such a rule. As such, national solidarity is most at risk from the EU's market rules; which is why it has mostly been shielded from the application of European competition law, as will be detailed in section III.A.

2. Member State solidarity

While national solidarity is mostly at risk from the market, it is submitted that Member State solidarity stems from, and is maintained by, the market. Indeed, the EU finds its origin in an economic union, dating back to the European Coal and Steel Community. The preamble of its founding text, the *Treaty of Paris*,[27] calls for the creation of a de facto solidarity between members following concrete actions undertaken by them. By achieving practical achievements as a union, such as the creation of a barrier-free trade area, and the establishment of both legal

[25] Case C-346/06 Dirk Rüffert v Land Niedersachsen [2008] I-01989
[26] Case C-576/13 Commission v Spain [2014] I-2430
[27] Treaty Establishing the European Coal and Steel Community [1962]

and economic ties between members, it was assumed that inter-dependencies would be created. These dependencies would effectively require unity and solidarity between members, given their choice to link their economies together. As such, economic solidarity between Member States is necessary to avoid the collapse of the EU's internal market as a unit.

The most striking example of this de facto solidarity stemming from the dependencies generated by economic integration is the EU's response to the Covid-19 pandemic. While the Union's initial reaction was to return to pre-Schengen-like border control and for each Member State to isolate themselves, the EU came out of the crisis more united. Indeed, the bloc's most permanent response to the economic shock caused by the pandemic was to strengthen the Economic and Monetary Union (EMU) by rebalancing its economic and monetary element. This could only be described as a watershed moment in the process of European integration, drawing the Union members closer and becoming akin to the functioning of a federalist state.[28] Indeed, the €750bn Next Generation EU (NGEU) package available for economic recovery empowers Member States through the open method of coordination to borrow money on financial markets, to transfer resources to other Member States, as well as re-align EU economics towards a common objective. Through the state mutualisation of debt, the architecture of EU economic governance shifted to a federalist structure, effectively entrenching de facto solidarity into a legal form. Similarly to the Eurocrisis, the Covid-19 pandemic acted both as a signal that European economies had become too inter-dependent to afford the failure of a single one; and a vector for further integration.

To summarise, the interdependence created by the internal market and EMU has created a de facto solidarity between Member States that has transformed through crises into a legal obligation. Further integration has been concomitant with further solidarity, stemming from the market linking all Member States' economies. Contrary to national welfare, Member State solidarity is not a norm that has been present in discussions on EU competition law, but it will be argued in III.B that there is scope to include it into its legal framework, particularly to build so-called "European champions".

[28] F. Fabbrini 'The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic' [2022] Journal of Common Market Studies 60(1) 186-203

3. Transnational solidarity

Transnational solidarity recoups the two key elements of national solidarity and member-state solidarity to create a larger and transverse conception of solidarity. Indeed, national solidarity refers to the wellbeing of people, and Member State solidarity to that of nation states. As such, transnational solidarity is interpreted as the relation between European citizens across the continent, and beyond. It is argued here that in a more tangible manner, transnational solidarity encompasses the responsibility that the EU as an institution (i.e. the Commission and the Parliament) owes to its citizens, as well as to the world.[29] This responsibility is partially fulfilled through the doctrine of direct effect, granting European citizens evolving civil, political, and social rights. For instance, the right to move and reside freely within the territory of the Member States (*Article 21 TFEU*),[30] the right to vote and stand as a candidate to European Parliament and municipal election (*Article 22(1) TFEU*),[31] or the right to diplomatic protection in the territory of a non-EU state by the diplomatic authorities of another Member State in case where their own country does not have diplomatic representation there *(Articles 20(2)(c) and 23 TFEU*[32], and *Council Directive (EU) 2015/637*).[33]

More broadly, one could also make the argument that transnational solidarity from the EU also refers to its responsibility towards non-EU citizens. Indeed, under *Article 3(5) TEU*,[34] the EU is enabled to contribute to "peace, security, the sustainable development of the Earth, solidarity and the mutual respect among people [...] and the protection of human rights". In this sense, the term 'transnational' refers to solidarity beyond the bloc's borders. An adequate illustration

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[29] N20

[30] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, Article 21(1) which reads "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

[31] Ibid, Article 22(1) which reads « Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. […]"

[32] Ibid, Article 20(2)(c) reads that citizens of the Union shall enjoy « the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State"; Article 23 reads "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection."

[33] Council Directive (EU) 2015/ 637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC [2015] OJ L106/1

[34] Consolidated version of the Treaty on European Union [2012] OJ C326/13, Article 3(5)

is the EU's support to Ukraine following its aggression from Russia, the Union pooling its resources through the so-called "Team Europe" to make available funds for Ukraine and its citizens, culminating to €52 billion in support.[35] Tangible action such as 'Solidarity Lanes' has also been taken to support the Ukrainian economy, creating essential corridors for Ukraine's agricultural exports and to import essential goods within the country.[36] These measures go beyond the EU's borders, and function in a transverse fashion, Member States working together for a supranational goal.

However, while national solidarity is at risk from the market, and Member State solidarity stems from it, transnational solidarity mostly operates outside of it. As detailed above, it mostly stems from legal rights, which legitimate the EU's action towards its citizens, or from political action, such as the decision to support Ukraine. These operational mechanisms transcend the EU's originalist nature as a market, and reflect its evolution into a legal and institutional entity, with political objectives. Due to this, it is submitted that it is difficult to apply this legal norm to competition law's framework, and to secure more tangible output for both the EU citizens and the Union as an entity, it is more relevant to focus on national and member-state solidarity in the proposed framework.

4. The EU's dual commitment

Following from this, and maintaining that transnational solidarity is not equally relevant to this proposition, it is necessary to understand the double sidedness of "solidarity" as understood in an EU setting. As the EU develops, it retains its "dual commitment" to both preserve national solidarity at the basis of the 'European Social Model', or the welfare state; and to deepen solidarity among Member States. This dual commitment acts both as a response to the EU's Member States' national guarantee to build a social state, and to the EU's unique organisation. Indeed, countries' accession to the EU cannot come at the detriment of their citizens' social rights. Nor can Member States be isolated from each other given the highly integrated nature of the Union and its emphasis on building a cohesive whole. As such, the EU is committed both

[35] European Commission « EU Assistance to Ukraine » < https://eu-solidarity-ukraine.ec.europa.eu/eu-assistance-ukraine_en>
[36] Directorate-General for Mobility and Transport « Solidarity Lanes : Latest Figures – April 2024 » 16 May 2024 < https://transport.ec.europa.eu/news-events/news/solidarity-lanes-latest-figures-april-2024-2024-05-16_en>

to national solidarity and social welfare, and to solidarity between Member States and the obligations this entails. When discussing the potential ways that EU competition law can include more solidarity within its framework, it is therefore key to balance both solidarities, to fulfil the Union's dual commitment.

This first section exposed how the EU was fundamentally structured around the internal market, which served as an instrument of integration upon which subsequent policies were developed. While the internal market was successful in building the foundations of European integration, this has come at the expense of some social rights, particularly regarding social welfare systems and their interaction with free movement rules. The introduction of the social market economy in the *Lisbon Treaty*[37] was an attempt to remedy this imbalance between the social and the market, but did not lead to concrete impact towards a more social and solidary Union. However, this does not signify that solidarity as such is not present within the bloc. It is present through different forms, at different levels of integration. By focusing on these different forms, it is possible to enable the EU's legal tools to facilitate the introduction of solidarity mechanisms in the market. More specifically, national solidarity and Member State solidarity are key elements to centre around. The EU's competition provisions could serve as devices to introduce solidarity in the market.

[37] N8

II. European competition law as a purposive legal instrument

Having defined and subsequently narrowed the different normative understandings of "solidarity" within the context of the EU, the normative objectives that European competition law could strive for have been elucidated. Before proposing a framework in which competition law could serve as a tool to strengthen the normative place of solidarity within European law, it is necessary to explore the framework in which antitrust law operates. More specifically, it will be argued that European competition law operates in a legal framework that enables it to serve as a means to strive for objectives more far-reaching than competition in itself. The claim that EU competition law can be used in a purposive manner will be defended in two ways. It will be recalled that competition law was originally used as an agent of integration at the birth of the internal market (II.A), before arguing that caselaw and evolving political priorities have modified the current goals of competition law, to include more context-specific objectives (II.B).

A. European competition law as an agent of market integration

Contrary to national antitrust legal systems, it is impossible to dissociate European competition law from the normative paradigm of EU law in which it operates. While Union competition law has developed outside of the strict bounds of EU law as the internal market develops, it was originally meant to pursue the aim of market integration, as a tool to build the internal market. This paradigm can be traced back to *Article 3(1)(g) EC*,[38] which provides that one of the activities of the Community is to put in place a system ensuring that competition in the internal market is not distorted. In this Article of the *Treaty establishing the European Community*, it is made clear that the goal of the European Community at that time was the creation and consolidation of the internal market, and to create the adequate legal support to facilitate the well-being of this market. These include freedom of movement *(Article 3(1)(d)),* a common policy for agriculture and fisheries *(Article 3(1)(e)*), as well as transport *(Article*

[38] Consolidated version of the Treaty Establishing the European Community [2002] OJ C325, Article 3(1)(g) which reads that the activities of the Community shall include « a system ensuring that competition in the internal market is not distorted »

3(1)(f)), but competition law serves as a pillar to support all of these policies.[39] European competition law was therefore created as a tool for integration, which was readily pursued by the Court in the 1990s, conceptualising competition law as a tool to favour market integration and free movement of trade between Member States.

A seminal case in European competition law for making an absolute territorial protection prima facie prohibited under *Article 81 TEC*[40] (now *Article 101 TFEU*), *Consten and Grundig*[41] also serves as a confirmation that competition law in the European context is not solely a means to foster competition, but can also be a tool to serve political objectives. While this case from the ECJ has been extensively criticised for the Court's decision to favour a formalist approach compared to a more extensive "by effect" analysis, it serves as a clear doctrinal statement from the Court, establishing market integration as a goal for EU competition law, and more generally showcasing that European competition law can serve political objectives. This is not showcased explicitly by the Court, but rather through the procedure used to decide the case. Indeed, the ECJ introduced in this decision the dichotomy between the "by object" and the "by effect" approach. In "by object" infringements, a violation of *Article 101 TFEU* is found unless evidence showcases that the agreement satisfied the conditions laid out in *Article 101(3) TFEU* (or *81(3) TEC* at the time of the judgment) while a "by effect" infringement places the onus of proof on the person alleging the breach. Despite hundreds of pages of economic evidence provided by the defendants to argue that the territorial protections were intended to prevent free-riding and facilitate entry into the French market, not to restrict competition, the Court stated that there was no need for a deeper economic analysis.

It is argued that the controversial procedural choice to favour a "by object" approach in this factual scenario was a deliberate decision by the judges to highlight the importance of the market integration objective of competition law.[42] The most important finding of the Court is therefore that any agreement which tends to restore the national divisions in trade between Member States frustrates the most fundamental objectives of the Community. Put simply, the potential procompetitive justifications for the agreement did not matter in light of its hindrance of the market integration objective of the Treaty. Such a formalist approach cements market

[39] Ibid, Article 3
[40] Ibid, Article 81 regarding the prohibition of agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the common market
[41] Joined cases 56 and 58-64 Etablissement Consten S.à.R.L and Grundig-Verkaufs-GmbH v Commission of the European Economic Community [1966] I-00299
[42] G.Bacharis « The Court of Justice in the archives project : analysis of the Consten and Grundig case (56/64 and 58/64) » [2021] EUI Working Paper 2021/02

integration as the overarching goal of EU competition law. Crucially, this case shapes EU competition law as being a purposive body of law, meant to serve the interests of the EU as a whole.

Unfortunately, the judgment itself failed to stimulate competition within the internal market, as Grundig eventually bought Consten, becoming a vertically integrated undertaking. This prompted criticism towards the ECJ's potentially overly formalist approach towards market integration, which trumped most other considerations and has been accused of representing an anti-competitive turn for European competition policy. Such criticism has been partially dispelled by the Commission's "more economic approach", enabling more economic investigation into potentially anti-competitive behaviour. Nonetheless, *Consten and Grundig* is still good law, showcasing a deep-rooted desire throughout European legal institutions to maintain its findings.

While the ECJ detailed the market integration objective of competition law through its choice of procedure in *Consten and Grundig*, it was even more explicit in its approach in *Dyestuff*.[43] In response to price increases from nine European manufacturers of dyestuff in different Member States, the ECJ took the view that the role of price competition is to encourage the movement of goods. Indeed, paragraph [115] of the judgement reads:

"The function of price competition is to keep prices down to the lowest possible level and to encourage the movement of goods between the Member States, thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change"

This paragraph is significant, cementing European competition law as a vector for market integration. By explicating that price competition is not an aim in itself for competition law, but rather an objective to be met in order to further market integration through facilitating the movement of goods; the ECJ rejects a non-purposive interpretation of competition law. In the eyes of the Union's highest court, competition as a process is not the end goal of competition law, rather the competitive process serves as a way to facilitate market integration.

This purposive interpretation of competition law was also adopted by the European Commission in its *Bayer* decision.[44] In this decision concerning parallel imports and export

[43] Case C-48/69 Imperial Chemical Industries Ltd. v Commission of the European Communities [1972] I-00619
[44] Commission Decision of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty 96/478/EC

bans, the Commission clarified at paragraph [190] of its decision that one of the reason these export bans violated *Article 101 TFEU* was their effect of "artificially partitioning the common market and preventing the creation of a single market between the Member States". Reminding further in the paragraph that the creation of the single market is one of the "fundamental objectives" of the European Communities (now European Union). This decision therefore illustrates the EU's executive organ's desire to adopt the Court's reasoning on the goals of European competition law. Moreover, this is illustrative of a mandate that the Commission holds that is not assigned to national competition agencies: to not only to supervise the creation of a single market but also to ensure that competition is not distorted within it. Contrary to national markets whose existence sprung organically with the development of the national state, the EU single market is a purely political and legal creation, whose existence needs to be legitimated and supervised. As such, the Commission is burdened with using all the tools made available to it by the Treaties to maintain this market. It is submitted here that competition law is one of its most effective devices to do, justifying why both the Commission and the Court made this function explicit in their decisions, as detailed above.

B. The emergence of new objectives

Competition law in the Union was therefore originally conceived as a tool to favour the creation of a single market, at the risk of minimising the importance of economic evidence and potential positive effects on trade of market-sharing agreements. However, it is argued that the internal market aim having been mostly achieved, reaching a state of *fait accompli*, Union competition law is now burdened with a wider multiplicity of goals, including non-economic ones such as fairness, and strictly economic ones such as efficiency. As an exclusive EU competence, competition law holds a central role in the development of not only the internal market, but the EU as a whole. It is primordial to understand competition provisions in the context of the Treaty in which they are found, and the overarching legal framework in which they operate. Due to this, it is argued that European competition law has now evolved into a tool to reach objectives broader than that of market integration.

This is supported by the ECJ's *Albany* decision, in which the Court argued that European competition law should not be used to undermine the effectiveness of *Article 3 TEU*.[45] In this

[45] Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] I-5863

seminal case regarding whether pension funds should be regarded as an undertaking, the Court adopts a holistic view, interpreting the provisions of the Treaty establishing the European Communities as a whole (at paragraph [60] "it therefore follows from an interpretation of the provisions of the Treaty as a whole"). By adopting such a holistic view, the Court intentionally takes into account the Treaty's social objective, reminding at [75] that the operation of a sectoral pension fund is based on the principle of solidarity. Following from this, the ECJ concludes that derogations from the general rules of the treaty, particularly those to do with competition and taxation (*Article 90(2) TEC*[46] on internal taxation on products of other Member States especially is mentioned at [103]), are necessary in order to reconcile Member States' interests in the public sector with the preservation of the unity of the common market.

This judgement showcases a slight shift away from the more dogmatic approach adopted in *Consten and Grundig*, in which the Court did not follow a balanced approach to the facts, preferring a strict "by object approach". By explicitly balancing the social title of the TEC with its competition provisions, the Court steps away from the sole market integration goal, and forges a path for competition law to be used as a more holistic tool that does not hinder the maintaining of the European social model. This is a clear instance from the legal institution of attempting to follow the EU's "dual commitment", maintaining competition provisions that enable the common market and thus member-state solidarity, while protecting social provisions in line with national solidarity.

1. The policy goals of European competition law

Following this judgment and throughout the start of the twentieth century, both the Commission and the ECJ advocated for a more diversified approach to European competition law. It is submitted that a more pluralist agenda than solely market integration has been followed by the Commission, with a multiplicity of goals emerging. *Stylianou and Iacovides'* empirical investigation into these goals provides an ideal starting point.[47] The goals presented in this investigation can be divided into two categories. The first encompasses goals that are focused on the process of competition rather than its output, these include efficiency, economic freedom and protection of competitors, market structure, and the competitive process. On the other hand,

[46] Consolidated version of the Treaty Establishing the European Community [2002] OJ C325, Article 90(2)
[47] K.Stylianou and M.Iacovides 'The goals of EU competition law: a comprehensive empirical investigation' [2022] Legal Studies 42 620-648

some goals refer to the output of the competitive process, and the results it attempts to generate. These include welfare, fairness, and single market integration. This second category is the one of most interest to this thesis.

However, a caveat exists: while the Commission pursues goals related both to process and outcome of competition in its enforcement, its decisional practice denotes a prioritisation of process over outcome.[48] Indeed, an investigation into the Commission's decisions showcases that the main goal pursued is that of market structure, with the protection of the competitive process coming second. The goal of market structure in this instance is interpreted as the maintaining of an effective competition structure, and protecting competition as such. These two goals are related to each other, and stem from the desire to protect a market structure that is built around an effective competitive process; it is therefore unsurprising to find them tied at the top of the institution's priority list. This is supported by the Court's caselaw, which also demonstrates an intention to prioritise the process of competition over outcome. Even more, the protection of the process of competition and market structure are the only two goals that the Commission and the Court fully agree upon.[49] Evidence of both institutions' preference for process over outcome can render the inclusion of solidarity as a goal for and norm within competition law difficult.

Nonetheless, it is surprising to find such an emphasis on market and the competitive process from the Commission, as it goes against its announced policy priorities in its speeches. Indeed, an analysis of Commissioners' speeches demonstrates that welfare is the most prevalent policy goal supported by the body, most particularly from Commissioner Neelie Kroes (2004-2009, under the first Barroso presidency). Moreover, in speeches throughout her tenure as Competition Commissioner Margrethe Vestager presented a people-centred vision of competition law, arguing that the only policy goal for markets is to "serve the people".[50] This approach is compounded by the Commission's stated new competition policy, modelled over the Von Der Leyen's Commission goals. These new goals are threefold: to support the Green Transition, the Digital Transition and a resilient internal market. The Commission concurrently re-establishes its perceived addressees of competition policy, which are people living in the EU, as consumers, workers and business owners. It therefore appears that the Commission is aiming to adopt a more holistic approach to competition enforcement, with a renewed emphasis on

[48] Ibid, page 639
[49] Ibid, page 643
[50] Margrethe Vestager, Schumpter Award Acceptance Speech (19 May 2022) «In a nutshell, [competition policy] makes markets work for people, not the other way around »

welfare-driven goals that might fall outside the remit of the protection of the competitive process.

2. New objectives pursued by European competition law

It has been established that the Commission pursues several policy goals in its enforcement of European competition law, these are not limited to its speeches but can also be found in its decisions and the CJEU's caselaw. Detailing which outcome-based goals have been pursued by the Commission will assist in conceptualising how solidarity can also be an objective of European competition.

a) Innovation

The Commission's settlement decision in the *Car Emissions* cartel showcases the institution's ambition to broaden the scope of competition law enforcement, to include innovation in its remit.[51] Following an immunity procedure under the Leniency Notice initiated by Daimler, the Commission found in its 2021 decision that Daimler, BMW and the Volkswagen group had breached *Article 101 TFEU*, resulting in a €875 million fine. The manner the Commission found that *Article 101* was breached is novel in its approach. Rather than colluding on prices or quantities, as traditional in cartel cases, the enforcement agency found that the car manufacturers had colluded on technical development in the area of nitrogen oxide cleaning. More specifically, the undertakings were found to have possessed technology that could reduce harmful emissions beyond what is required by *Directive 2007/46/EC*,[52] which establishes a framework for the approval of motor vehicles, as well technical units intended for these vehicles. The decision details that the car manufacturers avoided competing on using the technology's full potential, to go further than the requirements of the 2007 Directive.

The theory of harm caught in this decision is therefore the limitation of the technical development and competition on innovation. At paragraph [224] of the decision, the Commission highlights that innovation is of public interest, hinting at the gravity of the infringement, but also at its determination to use the EU's competition provisions to reach goals outside the strict remit of price competition. The Competition Commissioner at the time

[51] Case AT.40178 Car Emissions, Commission Decision [2021]
[52] Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive)

Margrethe Vestager also called attention to the fact that innovation in this area was essential for the Union to reach its Green Deal objectives, and renewed the institution's commitment to take action against conduct that hinders the reaching of this goal. This highly technical case serves as an explicit engagement from the Commission to use competition provisions to pursue the goal of innovation, focusing on its outcome, or rather lack thereof.

The *ENI* case is another example, albeit less explicit, of the Commission's action regarding the hindrance of innovation in the market.[53] This 2010 commitment decision under *Article 102 TFEU* targets strategic underinvestment from the Italian gas incumbent, which was accused of inadequately investing in a transport holder from Tunisia. The lack of investment and innovation in its infrastructure was considered by the Commission to amount to a refusal to deal on ENI's part by intentionally limiting capacity, and therefore to an abuse of dominance. While other theories of harm were also present in this case, namely capacity hoarding and degradation, the agency's focus on strategic underinvestment underlines an implicit obligation on large incumbents to continue innovating, and not to use their dominant position as a justification to their lack of innovation. In this specific commitment decision, ENI agreed to behavioural remedies, specifically to divest its stakes in its transmission system operator to prevent further situations of strategic underinvestment.

Both cases taken together illustrate the Union's use of its antitrust provisions to promote innovation within the internal market, focusing particularly on the public interest outcome of its decisions. The *Car Emissions* decision underscores competition law's responsibility in facilitating the Union's work in reaching its environmental goals, while *ENI* clarifies the important role played by incumbents in regulated industries such as energy, and their responsibility in innovating and serving the interests of European consumers. The EU's competition provisions in these cases were used in a purposive manner, to serve as a way to promote innovation and investment in the Union's key industries.

b) Public interest

The 2021 *Aspen* commitment decision illustrates how competition law can be used in a purposive manner in the pursuit of the public interest, or public health in this specific factual scenario.[54] While the theory of harm pursued in this decision is traditional, excessive pricing under *Article 102(a) TFEU*, the concerned product is what makes this case so delicate. Aspen

[53] Case COMP/39.315 – ENI Commission Decision (29 September 2010)
[54] Case AT.40394 Aspen Commission Decision (10 February 2021)

Pharmacare possessed the patent for life-saving cancer medicine, and commercialised this product with a 90% profit margin, compared to an average of 25%-30% profit margin for comparable firms. The medicine has no substitutes in Europe. The facts of the case therefore extend further than excessive profits, to include concerns over public spending for health authorities and ethical concerns regarding human dignity in access to medicine. In paragraphs [21-22] of the commitment decision, the Commission brings light to the fact that health systems in the Union rely on reimbursement policies to contain spending while providing accessible healthcare, and that Aspen's power to unilaterally withdraw life-saving products from reimbursement lists leads to an unbalanced price negotiation process between the patent holder and reimbursement authorities of Member States. By intervening in this situation, the Commission is effectively assisting national public authorities in limiting their spending and providing a reasonable standard of healthcare, much akin to national solidarity.

The price commitments detailed in paragraph [210] would lead to an average 73% price reduction across the Union, while also putting in place price-ceilings, functionally balancing the relationship between the undertaking and national reimbursement authority. Such a strong decision from the Commission's part, with tangible outcomes on public healthcare systems, demonstrates not only the large reach of competition law, but also its effectiveness. Through these commitments, the Union's competition agency pursued goals in line with *Article 3(1) TEU*, which includes the Union's aim to promote the "well-being of its peoples". The abuse of dominance provisions of the *TFEU* were therefore used in a purposive manner, to assist the Union in reaching goals related to national solidarity and the welfare of its citizens.

c) Fairness

Fairness considerations have been the driving principle behind much of modern legislation, in which the Union's competition provisions are included. As argued by *Kokott and Dittert*, the very existence of common competition rules serve as a token of fair treatment of all undertakings in the common market, creating a level playing field in which all actors are guaranteed equal treatment by both competition authorities and courts.[55] *Dolmans and Lin* offer an alternative interpretation of the concept, arguing that fairness was designed to demonstrate to sceptical social classes that undertakings could not use their influence to the consumer's

[55] Juliane Kokott and Daniel Dittert, 'Fairness in Competition Law and Policy' in Damien Gerard, Assimakis Komninos and Denis Waelbroeck (eds) *Fairness in EU Competition Policy: Significance and Implications* (Bruylant 2020)

detriment,[56] a sentiment they argued is shared by Commissioner Vestager and which has been one of her mandate's priority. This is illustrated by the General Court's 2021 *Google Shopping* judgment, which was the first instance in which one of the Union's courts mentioned fairness so explicitly.[57] At paragraph [433] the General Court argues that undistorted competition implies that competition "takes place on a fair basis", allowing not only entry from new undertakings, but also to prevent dominant undertakings from harming consumer welfare.

It is argued here that the search for a level playing field through the application of fairness as a legal concept in competition law's enforcement is an illustration of the way that EU competition law is used in a purposive manner to change the landscape of certain industries. Using competition provisions to promote fairness effectively changes the business model and landscape of markets, and is therefore an output-based goal. For instance, the *Google Shopping* saga led to a change in the way Google presented its shopping interface, as the Commission argued that its self-preferencing system had led to a reduction in traffic to competing comparison shopping services. This tangible change in interface is illustrative of an output-based goal that was achieved through competition enforcement.

While the *Digital Markets Act* (DMA)[58] is not strictly speaking part of the Commission's competition toolkit, it does offer another illustrative example of how fairness is wielded by the institution to reshape markets in a purposive manner. Market contestability is one of the Act's main goals, *Article 6*[59] creating a blanket prohibition of self-preferencing in a manner similar to that found in the *Google Shopping* case[60]; enabling gatekeepers to allow the installation of third-party software applications; as well as introducing the requirement for gatekeepers to apply transparent, fair and non-discriminatory conditions when ranking services. Through these obligations, the *DMA* attempts to reshape the digital market landscape in a way that better serves consumers and allows entry from competitors. It is submitted that these provisions were heavily inspired by the Commission's competition dealings with these gatekeepers, using the outcome from its cases against them to shape the Act. As such, competition enforcement in the EU since the start of the century has been shaping markets in a purposive manner, through the

[56] Maurits Dolmans and Wanjie Lin 'How to avoid a fairness paradox in competition policy' in Damien Gerard, Assimakis Komninos and Denis Waelbroeck (eds) *Fairness in EU Competition Policy: Significance and Implications* (Bruylant 2020)
[57] Case T-612/17 Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission [2021] I-763
[58] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)
[59] Ibid, Article 6
[60] N57

lens of fairness, to build more equitable markets. The norm of "fairness" as detailed by the General Court and the *DMA* has a broader reach than most Chicago-School standards, being more akin to a vision of competition law shared by the Neo-Brandeisian school, arguing for broader social goals for antitrust.[61] Its application in a European context presupposes the building of a fairer internal market, and in turn, a fairer Union, showcasing how competition law can be used purposively to strengthen the bloc.

This section argued that since its instigation, European competition law has been construed as a tool to serve the Union's goal, and is not a body of law that functions in isolation. Given the Union's unique nature as having been built from and around an internal market, the role of the body of law directing undertakings' actions within this market is crucial in assuring the well-functioning of the EU. It has been demonstrated that antitrust's goal was initially to serve the purpose of market integration, as detailed in *Consten and Grundig*; which construed competition law as a purposive body of law. However, as the EU developed and Member States became more integrated, market integration functionally became a *fait accompli*, and did not require competition law to maintain this integration. Competition law therefore needed to reinvent its purpose, which was done incrementally through the mandates of consecutive Competition Commissioners, to develop a wide panel of policy goals, including welfare and fairness. A shift has occurred over the years, allowing these goals to become protean and malleable as the aims of the EU transform as well. It was demonstrated that the Court and the Commission's caselaw adapted to these changes, using competition provisions to reach goals related to innovation, environmental standards, public health, and creating a level-playing field. Following from this, it is submitted that European competition law not only can be used in a purposive manner, to reach a wide range of goals, but has been used in such a manner since its creation. It is argued that there is therefore scope to reshape the Commission's and ECJ's interpretation of these provisions in a way that serves the EU's dual commitment to solidarity.

[61] R.Whish, D.Bailey Competition Law (10th Edition) (OCL 2021), Chapter 1

III. Bridging the gap between solidarity and the market: European competition law's role

Having established the objective of the EU in building a social market economy, and the different norms of solidarity within this framework, the potential role of European competition in helping to build this social market economy was analysed. The prospect of competition law as a purposive body of law was proven, having showcased that caselaw both from the ECJ and the Commission determined that European competition law is meant to assist in advancing the single market and reaching a multiplicity of goals. As such, it is submitted that there is scope to re-interpret *Articles 101 and 102 TFEU*, as well as the merger regulations, in a purposive way to include more discussions of solidarity in their application. Regarding the EU's competition provisions through their output, and including discussion as to whether their output leads to more solidarity within the Union, would reinforce the social market economy the Union is attempting to build.

To support this claim, two instances of the market's interaction with solidarity will be analysed. Firstly, European competition law's interaction with national solidarity will be discussed. It will be argued that competition law case law established that Member States have a role in establishing a balance between national solidarity and market economics, and that the Court historically shielded national solidarity from the impact of the market (III.A). Secondly, it will be defended that while national solidarity cannot be included within the functioning of competition law, Member State solidarity could be. Drawing from the functioning of regulation and merger control, it will be argued that it is possible to create a framework in which member state solidarity is inherent to the application of European competition law (III.B).

A. Competition and national solidarity, fundamentally at odds

As established in part I.B, national solidarity is at the foundation of the European social model, and one part of the Union's dual commitment to solidarity. Its relationship to the market, and to competition law, is that of opposites. Indeed, the functioning of social welfare inherently goes against market economics. Taking a national healthcare system as an illustration: national healthcare systems typically function through public funding, which is made possible partially through direct taxation and partially through public debt. In a proportional taxation system, some individuals will pay more taxes than others, depending on income. However, this does not signify that their treatment will be preferential from that of those who did not pay as many taxes; contributions are different but treatment is not. Similarly, an individual who has to go through chemotherapy does not have to financially contribute more to the healthcare system as someone who never needed to go to the hospital. As such, while demand varies, the price paid by the "consumers" remains the same (although typically proportionally to their income). Fundamentally, national solidarity is disproportional, offer and demand not necessarily matching. To create a healthcare system based on market economics would inevitably exacerbate inequalities and prevent the proper treatment of those who cannot afford to pay the market price. A similar logic can be applied to other public services, such as education.

Stemming from this observation, a question therefore arises, what is the role of competition law in national solidarity? As the internal market and competition law develops and deepens, the relationship between a Union-wide competition system and individual Member States' national solidarity systems can be strained. As theorised by *Garben*,[62] the social has much more to lose than the market, the adoption of more market-friendly rules within the EU and the deepening of the internal market can only come at the expense of the social acquis. Competition law, as a body of law intended to promote the internal market and favour competition between undertakings across the bloc, can be a risk to national solidarity. This creates a tension between Member States' commitment to their population to maintain their national welfare system, and the Commission's ambition to strengthen the application of competition law. It is submitted that this tension is partially resolved both through the responsibility of Member States to find a balance between national solidarity and the application of competition law, and the ECJ's deliberate exclusion of national solidarity from the scope of competition law.

[62] N6

1. The role of Member States in establishing a balance between national solidarity and the market

Following from *Duphar v The Netherlands,*[63] it was established that Union law does not detract from the powers of the Member States to organise their social security system. In this specific case, provisions intended to protect the consumption of medicine to preserve the financial stability of the Dutch health-care insurance schemes were not found to be an illegitimate barrier to trade. The creation and development of the internal market should therefore not come at the expense of national social security systems, and Union law enables Member States to protect their national welfare system, to a certain limit.

Indeed, it is settled case-law that the competition provisions in European law, read in conjunction with *Article 5 TEU*[64] regarding the conferral of competences to the Union, require the Member States to refrain from introducing measures that may render the competition rules ineffective. In 1988, the Court in *Van Eycke* at paragraph [16] declared that Member States cannot maintain in force measures that render competition rules ineffective for undertakings.[65] More specifically, Member States cannot deny undertakings their responsibility for taking decisions that affect the economic sphere, or require the adoption of agreements that would be contrary to the values defended by *Article 81 TEC* (now *Article 101 TFEU*). This was further supported in *Reiff* at paragraph [14][66] and in *Delta Schiffahrts-und Speditionsgesellschaft* at paragraph [14].[67] These decisions from the Court provide an effective way to curtail attempts from Member States to reduce the effect of Union economic law on their welfare systems. Effectively, these requirements create a form of dual responsibility for Member States. *Duphar*[68] highlights the fact that these governments do owe a responsibility to their citizens to maintain a social security system, while the following cited case-law ensures that this is not done in a way that hinders their responsibility towards the Union to respect Union law. As such, a balancing exercise is necessary from Member States, supervised by the Court.

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[63] Case 238/82 Duphar v Netherlands [1984] ECR 523
[64] Consolidated version of the Treaty on European Union [2012] OJ C326/13, Article 5
[65] Case C-267/86 Van Eycke v ASPA [1988] I-04769
[66] Case C-185/91 Reiff [1993] ECR I-5801
[67] Case C-153/93 Federal Republic of Germany v Delta Schiffahrts-und Speditionsgesellschaf [1994] I-2525
[68] N63

2. The Court's intentional shielding of national solidarity from the market

The responsibility to protect the European social acquis from the functioning of the market is not the sole responsibility of Member States. The European Court of Justice has developed a considerable line of caselaw protecting national solidarity from the impact of the market, using the definition of solidarity as a defensive mechanism to prevent instances of undertakings using competition law to undermine social welfare. The main legal tool used in order to shield solidarity from the market is the definition of an "undertaking". Under *Articles 101 and 102 TFEU*, European competition law only applies to undertakings or associations of undertakings, to negate the definition of a social body as an undertaking is therefore to it from the impact of competition law, as will be demonstrated.

Höfner and Elser[69] is the seminal case on which this line of caselaw is built upon. In its decision, the Court defines an undertaking as an entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Public entities can therefore be considered undertakings, as long as they engage in an economic activity, as such, *Articles 101 and 102 TFEU* do not address entities, but rather activities. This led *Advocate General Jacobs* to establish in his Opinion on the *AOK-Bundesverband* case that the meaning of undertaking in competition rules is purely functional, focusing on the type of activity performed rather than the characteristics of the actors which perform it.[70] In *Albany*, the same Advocate General also highlighted that the definition of undertaking now served a dual purpose in European competition law, which was to (1) make it possible to determine the categories of actors to which the competition rules apply and (2) to establish the entity to which a certain behaviour is attributable.[71]

This functional approach enables the *TFEU* to incorporate a divide between public and private activities, which is not present in the Treaty, as well as resolve any difficulties posed to the Court in distinguishing private activities from public ones. For the Court to adequately establish if an entity is an undertaking, *Odudu* contends that the term "economic activity" contains three cumulative elements, which are the offer of goods or services, the bearing of risk and the potential to make profits.[72] The latter two elements are the most decisive when establishing if

[69] Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] I-01979
[70] Opinion of Advocate General Jacobs AOK-Bundesverband and others [2003]
[71] Opinion of Advocate General Jacobs Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999]
[72] Odudu, 'The Meaning of Undertaking within Article 81 EC' 7 CYELS 221

an entity is engaging in national solidarity. *Odudu* further contends that the Court in *Höfner*[73] identified entities in the private sphere as being economic actors characterised as rational maximisers of self-interest. This signifies that undertakings as defined in European competition law are akin to the homo economicus in the market, making rational decisions and driven by profit. Following from this, an entity that does not act in a rational way that maximises self-interest cannot therefore be considered an undertaking, and cannot be subject to the application of competition law. This is the reasoning adopted by the Court in the following cases.

a) Poucet and Pistre

In *Poucet and Pistre*, a social affairs court in France submits a question to the ECJ, asking if social security funds can be considered to hold a dominant position under *Article 86 TEC* (now *Article 102 TFEU*).[74] To answer this question, the Court is required to establish if such entities can be defined as undertakings. The Court starts by highlighting that these entities embody the principle of solidarity, defined in this instance as a system in which contributions are proportional to the income of the contributor but benefits are identical for all those who receive them (paragraphs [8] and [10]). Using the definition of economic entity developed in *Höfner and Elser*,[75] the judges looked at the functioning of the relevant entities, finding them to be non-profitmaking. The lack of profit hints at the fact that these entities do not act as market actors, and therefore cannot be considered as undertakings. Stemming from this conclusion, the Court declared that such sickness funds cannot be found guilty of abusing a dominant position (paragraph [21] of the judgment).

It is argued here that the Court could not come to another conclusion without hindering the French social security system. Indeed, the plaintiffs brought this case to seek the annulment of orders served to them to pay social security contributions to social insurance funds aimed at self-employed persons. The contributions to these funds allow self-employed persons across the French territory to be protected in cases of sickness or maternity. If the Court were to follow the plaintiffs' argument that the mandatory contributions to these funds from self-employed individuals were akin to an abuse of dominant position, this would effectively open the possibility for these contributions to be made optional for entrepreneurs. In such a scenario, the sickness funds would function similarly to private insurances, frustrating the solidarity mechanism that defines such social funds. As such, to declare these entities as undertakings

[73] N69
[74] Joined Cases C-159/91 and C-160/91 Christian Poucet contre Assurances générales de France et Caisse mutuelle régionale du Languedoc-Roussillon [1993] I-00637
[75] N69

would go against the principle of national solidarity. It appears that the decision from the Court is wholly deliberate, shielding away social entities functioning on the principle of national solidarity from market mechanisms, and therefore shielding them from competition law.

b) Sodemare

The factual scenario presented to the Court in *Sodemare* is slightly more complex, and raises important questions about the relationship between social security systems and private operators.[76] The plaintiff in this case is Sodemare, a Luxembourg-based entity operating care-homes for the elderly in Italy. Under an Italian law regarding the organisation and functioning of local health and welfare centres, private entities wishing to be affiliated with local social welfare services and to receive a specific daily reimbursement ceiling for each resident it cares for, must be non-profit making. Put simply, they cannot be engaged in an economic activity, but rather a social one. Sodamare and other entities took issue with this requirement and brought their grievances to the Administrative Court for the Lombardy Region, which in turn referred several questions to the ECJ. Most relevant to this analysis is the fifth, which asks if such legislation is compatible with *Articles 81 and 82 TEC* (*currently Article 101 and 102 TFEU*), as it allows only companies with a particular legal structure to compete on the market, all while enabling them to present themselves as a largely unitary organisation.

The Court largely dispels the local court's concerns over the application of competition law in this case. Reminding the caselaw in *Centro Servizi Spediporto*[77] and *DIP and Others*,[78] the Court holds that these rules do not delegate powers from the public authorities to private economic operators, and crucially, do not provide these undertakings a dominant position or create sufficiently strong link between them to give rise to a collective dominant position. In this situation, there is no reason for *Articles 81 and 82 TEC* (*Articles 101 and 102 TFEU*) to apply. In this situation, rather than focusing on the role of public authorities as in *Poucet and Pistre*,[79] the Court looks at the activity performed by the private entities in caring for the elderly. As the agreement between the private care homes and the public authorities partially subvening to their activities is based on notions of national solidarity, it appears legitimate for the Member State to reserve these subventions to non-profit-making entities. In this judgment, the notion of undertaking can be segmented depending on activity performed by the entity. Sodemare is a

[76] Case C-70/95 Sodemare SA and Others v Regione Lombardia [1997] I-3422
[77] Case C-96/94 Centro Servizi Spediporto v Spedizione Marittima del Golfo [1995] ECR 1-2883
[78] Joined Cases C-140/94, C-141/94 and C-142/94 DIP and Others v Comune di Lassano del Grappa and Comune di Chioggia [1995] ECR 1-3257
[79] N74

private, profitmaking entity, but would not be considered as an undertaking in European competition law when it is engaging in non-profitmaking activities in agreement with local Italian administrations. Once again, the Court clearly delineates purely economic activities from solidarity-driven ones, in order to prevent competition law from impeding on the maintaining of a social welfare system.

c) FENIN

Perhaps most cited in this strand of caselaw is *FENIN*,[80] and is the most relevant to demonstrate the necessity of separating national solidarity from the enforcement of competition law. FENIN stands for Federación Española de Empresas de Tecnología Sanitaria, and represents Spanish manufacturers of medical equipment. The Federation originally lodged a complaint to the Commission for abuse of dominant position under *Article 82 TEC* (now *Article 102 TFEU*), arguing that the regular delays in payment from the national Spanish healthcare system (Sistema Nacional de Salud, or 'SNS') amounted to an abuse of dominant position as the SNS represents more than 80% of the turnover for the members of FENIN. The organisation's main argument was that its members could not exert commercial pressure on the SNS given its dominant position in the Spanish market for medical goods and equipment. The Commission rejected this claim, considering that the SNS was not engaged in an economic activity and therefore could not be considered an undertaking under competition law, as did the Tribunal on appeal.

The Court takes a similar approach, reminding in its judgment that a national healthcare like the SNS is funded from social security contributions and provides services free of charge on the basis of universal cover. As such, the SNS operates according to the principle of national solidarity. While FENIN acknowledges that the SNS's activities are of a purely social nature, it contends that it operates as a market actor when purchasing medical equipment from its members, and such should be considered as an undertaking for that segment of its activities. The Federation therefore puts forward the innovation to separate the 'social' aspect of national welfare systems from its 'market' role. From FENIN's perspective, one could reason that the SNS is indeed acting as a market actor, as it is engaging in purchasing goods on a market. However, the Court correctly points that this is not the core of the SNS's activity, and that it is not possible to dissociate the activity of purchasing goods from their subsequent use. This aligns with the functional approach to defining an undertaking presented by *Advocate General*

[80] Case C-205/03 Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities [2006] I-06295

Jacobs.[81] While in essence, the SNS is indeed engaging in activities of a different nature when purchasing goods and when providing healthcare services, the former is imperative to perform the latter. Functionally, both activities operate as one. As such, the SNS as a whole does not operate in a similar fashion to that of profit-making market actor, and its behaviour when engaging in purchasing goods does not amount to that of an undertaking.

It is submitted here that this judgment highlights the tenuous difference between entities that are considered undertakings in competition law, and those that are; but mostly serves as a clear reminder from the Court that national solidarity cannot be subject to the same rules as traditional market activities. Firstly, the SNS does perform an economic activity as defined by *Odudu* when purchasing medical equipment.[82] It purchases goods; takes a risk by doing so (e.g. the goods need to be of the adequate standard of quality); and does carry the potential to produce profit (e.g. if it chose to sell the goods afterwards). In the narrow sense, the SNS acts as an undertaking when engaging in purchasing activities. However, it is what it does once it has purchased the goods that negates this classification, choosing instead to pursue a non-profitmaking activity. In this case, it is the output of the activity that is relevant, even if at first glance it could constitute an economic activity. The Court's focus on the output of the activity emphasises the need to closely evaluate what makes an "undertaking" in such situations.

Secondly, while the aforementioned distinction between entities that are undertakings and those that are not illustrates why national solidarity *cannot* be subject to competition rules, this judgment also highlights why it *should* not be. As argued by FENIN, the SNS's delays in payment amount to an abuse of dominance (at paragraph [4] of the judgement). If FENIN were trading with a for-profit dominant undertaking, such payments would most probably amount to "unfair trading conditions" under *Article 102 (a) TFEU* and therefore to an abuse of dominance. This is justified by the fact that such entities are expected to function in market conditions, and to adapt to changes in the market. This is not possible for solidarity-driven entities, whose main focus is typically the wellbeing of others. In the case of the SNS, its main priority is its patients' well-being, and it should remain so even in situations of economic deficit. To require the SNS to pay on time might come at the detriment of its patients' safety and health, going against the key principle of a healthcare system. Ideally, both goals should be met, to prevent delayed payments to suppliers such as FENIN, but it cannot be ethically expected to favour this latter goal over the former. To hold national solidarity to the same standards as

[81] N70
[82] N72

profit-making entities would negate their purpose, which is why not only can they not be subject to competition rules, but also should not.

These cases detail how the ECJ has historically shielded national solidarity from the reach of European competition law. The Court has been explicit in its treatment of national welfare systems, construing them as functioning outside of market rules, given the inherently sensitive nature of their activity. Functionally, the Court has slowly built a clear separation between the scope of competition law and activities linked to national solidarity, reaching the point where they do not intersect. As such, this strand of the EU's 'dual commitment' to solidarity operates outside of the market, and cannot function within it. Paradoxically, by not intervening within this sphere, European competition law is favouring solidarity. Indeed, the EU's dual commitment to solidarity is clearly made of two strands, one of which operates at the national level (national solidarity) and the second at Union level (Member State solidarity). As a transnational body of law, Union competition law cannot adequately serve the interests of national welfare systems, which function inherently to serve the interests of their own polity and whose priorities are not in line with those of the internal market. It is submitted that shielding these systems from the reach of European competition law is to facilitate the completion of the EU's dual commitment. While European competition law can indeed be used purposively, it is not its purpose to serve this specific component of solidarity in the EU; and its enforcement has therefore been rightfully separated from it.

B. Competition law and Member State Solidarity, scope for convergence

It has been argued in the previous section that European competition law is not the adequate tool to stimulate national solidarity in the EU, the following one will contend that it can be a tool to prompt more Member State solidarity. It will be defended that it is possible to include aspects of solidarity within the functioning of the internal market, which would lead to a more integrated and stronger Union. A key element of this contention is the functioning of regulated key industries, which have been regulated at an EU-wide level in a manner that facilitates Member-State solidarity. The *2022 gas storage regulation* will serve as an illustration. Following from this, it will be submitted that more solidarity within the market at a European

level would increase the EU's competitiveness on a global scale, by helping to build European industrial champions.

1. Key industries, the example of Regulation 2022/1032

It is submitted that solidarity can, and has been, successfully integrated within the functioning of markets. Solidarity is a key part of markets in regulated industries, not only through the designation of some activities as services of general economic interest to ensure effective provision of a service with high social stakes; but also through the concept of universal service. Guaranteeing universal service, through more profitable parts of an industry subsidising those that are not, to ensure equal access to a service on a territory is quintessentially solidary. Of particular interest in this case is the energy sector, due to its essential and sensitive nature. The energy crisis that hit the EU following Russia's invasion of Ukraine in February 2022 highlighted the Union's precarious energy supply and its dependence on exterior supply. Natural gas supply was particularly concerning for the EU, being the primary source for many Member States, triggering the need for new emergency measures.[83]

One of these measures was the voting into law of *Regulation 2022/1032* on gas storage, which focuses on volume available of the commodity within the Union.[84] Specifically, the regulation introduces filling targets and burden sharing, to ensure that the bloc as a whole maintains a regular supply of natural gas. It is argued that both mechanisms are intrinsically solidary. *Article 6b* implements filling targets, stating that Member States shall take "all necessary measures", including potential financial incentives or compensation for market participants, to meet filling targets. These measures can include requiring gas suppliers to store minimum volumes of gas in storage facilities *(Article 6b(a))*; requiring storage system operators to tender their capacities to market participants *(Article 6b(b))* and to release unused booked capacities *(Article 6b(g))*; or even to provide discounts on storage tariffs *(Article 6b(j))*. These measures demonstrate a bridge between the public interest and market-based measures, Member States being incentivised to use the latter in order to serve the former.

[83] IEA (2023) Gas Market Report Q1 2023
[84] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage

Crucially, the success of the burden sharing mechanism detailed in *Article 6c* is contingent on the meeting of these filling targets. Indeed, the new regulation calls for the creation of a solidarity mechanism between Member States, in which a Member State without underground gas storage facilities can develop a burden-sharing mechanism with one or more Member States with such facilities, notifying the creation of this mechanism to the Commission. This mechanism is an explicit illustration of Member State solidarity within a market context. *Article 6c* responds to a factual storage unbalance between Member States across the Union and provides a remedy through the use of solidarity, ensuring that all Member States have access to emergency supplies of gas, showcasing a deep-rooted desire to not only protect European consumers, but also to uphold the value of solidarity in line with *Article 3(3) TEU.*

In addition, Member States without these facilities are also enabled under *Article 6c* to provide incentives or financial compensation to market participants or transmission system operators for potential shortfall in revenues as a result of compliance with their storage obligations pursuant to the regulation. This exemption from state-aid rules showcases an understanding from European law-making institutions that sensitive commodities such as energy require a balanced approach between market mechanisms and solidarity mechanisms from Member States. Overall, *Regulation 2022/1032* translates into reality *Article 3 TEU's* goals of a social market economy, coupled with solidarity among Member States. Not only does it encourage burden sharing between Member States, it allows the internal market to serve the interests of the Union, allowing for undertakings across countries to share infrastructure and collaborate on transmission systems. In this instance, it appears that the internal market and economic integration serves the security and social interests of the Union, rather than these interests being sacrificed to the functioning of the internal market. While restricted to the sensitive commodity of gas, this novel solidarity mechanism between Member States opens the door to further discussion on the coupling of market-based measures and the value of solidarity.

2. European industrial policy, competition law and Member State solidarity

Article 3(3) TEU establishes that the Union shall not only develop an internal market and a highly competitive social market economy, but also sets the objective of balanced economic growth, aiming at full employment and social progress. Combined, these goals can be compounded into a larger goal of building a competitive Union on the global scale, while ensuring growth for its citizens. Further integration and solidarity between Member States is intended to stimulate the Union's competitiveness, aided by a strong competition law enforcement. While the EU did indeed experience strong economic growth in its inception, it is now falling behind other economic powerhouses, namely the United States (US) and China. Protectionist measures from both countries, such as the *Build America Buy America Act*[85] in 2021, have stimulated growth and favoured the development of large companies on a global scale, which Europe is struggling to replicate. Real wages in the EU have diminished in the past year,[86] while those in the US have risen;[87] growth is slow; and most importantly for European competitiveness, very few of the global top 100 companies are European.

Further integration and collaboration between Member States could led to more growth, if the EU is to compete on the global scale with large countries the likes of the US and China, it needs to do so as a Union. Industrial policy is a key component of the EU's potential for competitiveness, and it is argued that merger control provisions can be a tool to achieve this. Despite former Commissioner's Kroes' argument about "the great ideological divide" between industrial policy and competition law,[88] merger control does possess the elements that could favour further solidarity between Member States in the internal market. The Commission's 2019 refusal[89] of the *Alstom/Siemens* merger triggered this debate, as the merger was strongly supported by the French and German governments, arguing that these European champions were faced by unfair competition by Chinese state-backed CRRC. The Commission's refusal based on significant overlaps in the parties' activities led to both governments publishing a manifesto calling for a review of merger control rules in the EU to favour the building of a

[85] S.1303 – 117th Congress (2021-2022) Build America, Buy America Act
[86] Publications Office of the EU 'Labour Market and Wage Developments in Europe 2023' [2023]
[87] US Bureau of Labour Statistics, Real Earning Summary [2024]
[88] N. Kroes, 'Industrial Policy and Competition Law Policy" [2006] Fordham International Journal, Vol. 30(5)
[89] Case M.8677 Siemens/Alstom, Commission Decision (6 Feburary 2019)

"European industrial policy fit for the 21st Century".[90] This highly political manifesto called for the uniting of forces on the European level for the sustaining of a strong industry, in line with the economic growth objectives of the Treaties and the building of a social market economy. Regarding competition law, it calls for an updating of current merger guidelines to take greater account of competition at the global level, to create a more dynamic and long-term approach to competition, and favour the building of European industrial champions. This was not the first instance of Member States calling for a renewal of antitrust rules to favour a fiercer EU industrial policy, 19 EU governments having already proposed in a ministerial meeting in December 2018 for a change in antitrust rules to take better account of international markets and competition in merger control.[91] A particular concern was Europe's lag in building European champions that could compete with foreign companies on a global scale in order for the EU to maintain its competitiveness against large economies with proactive industrial strategies.

While controversial due to their political venture into a field of law that is intended to be independent from Member State interference, these statements do raise an important question: can merger control favour the building of a social market economy and strengthen Member State solidarity? It is argued here that with some changes, this is possible.

Firstly, the Commission has traditionally favoured structural remedies in merger control, leading undertakings to let go of strategic assets, favouring non-EU competitors. Behavioural remedies are more flexible, as they can change as the market evolves. For instance, in the *Alstom/Siemens* merger, a behavioural remedy concerning equal access to infrastructure to all competitors could have diminished the merger's effects on competition and potentially led to an approval from the Commission. Such remedies are used more liberally by national competition authorities and have proven their efficiency when dealing with changing markets. For example, the French competition authority in its 2012 merger decision subjected Canal Plus to behavioural remedies as it merged with TPS,[92] but these remedies were alleviated

[90] German Bundesministerium für Wirtschaft und Energie, French Ministère de l'Economie et des Finances 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century'

[91] Jorge Valero '19 EU countries call for new antitrust rules to create 'European champions'' (19 December 2019), Euractiv < https://www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions/>

[92] Autorité de la concurrence , décision n12-DCC-100 du 23 juillet 2012 relative à la prise de contrôle exclusif de TPS et CanalSatellite par Vivendi et Groupe Canal Plus

several years later due to heightened competition on the market from Netflix and Amazon.[93] The Commission could adopt a similar mechanism, potentially leading to the creation of European industrial champions. Secondly, efficiency gains could take on a more important part in the analysis of effects on competition. Currently, the only efficiency gains that can counterbalance the anticompetitive effects of a merger are those that benefit consumers. However, mergers can also lead to efficiency gains that do not directly affect consumers but demonstrate beneficial long-term effects. These can be scale efficiencies, more profitable products, and technological innovation. These are all effects that the EU as a bloc could benefit from to compete on a more global scale, and which would boost the European economy as a whole. Thirdly, and albeit more anecdotally, the Commission's analysis of merger control could be made more efficient by making its authorisation decisions shorter, to focus on a more structural analysis on more tricky refusal decisions. This could liberate time and manpower to focus on the creation and monitoring of behavioural remedies.[94]

These small adjustments to the Commission's approach to merger control could favour a more dynamic industrial policy in the EU, favouring the creation of more competitive undertakings, and in turn stimulating European competitiveness. Sustaining a more competitive European economy by stimulating the building of such undertakings is intrinsically part of Member State solidarity, as it allows all of the Union to benefit from the EU's competitiveness. While this movement was spearheaded by France and Germany, its support by the majority of other Member States showcases that they believe in strengthening pan-European industrial (and digital) champions, convinced that this would benefit the entire EU. Effectively, the EU's competitiveness does depend on Member States coming together to support the creation of these champions, even if they do not directly belong or affect all individual Member States. This mechanism enables the Union as a whole to benefit, given the inherent nature of the internal market. As such, changes to competition law could enable a stronger internal market, based on Member State solidarity, stemming from economic integration between them all.

This last section has aimed to demonstrate two key points. Firstly, that solidarity and the market are not fundamentally at odds, that solidarity mechanisms such as a gas storage burden-sharing mechanism can function in conjunction with market rules. A balance of action is required in

[93] Autorité de la concurrence, decision n17-DCC-92 du 22 juin 2017 portant réexamen des injonctions de la décision n12-DCC-100 du 23 juillet 2012 relative à la prise de contrôle exclusif de TPS et CanalSatellite par Vivendi et Groupe Canal Plus

[94] Arguments broadly based on T.Boillot 'How to reconcile European industrial policy and merger control ?' [2019] Concurrences Issue 2019(2)

such cases, favouring first market mechanisms, before switching to solidarity mechanisms when required by urgent needs. An adequate balance enables the EU to remain a market economy, while integrating the 'social' element of the social market economy. Secondly, the EU could benefit from a slight upheaval of merger control rules to favour further integration on the internal market through the building of European champions, which would favour all Member States. Stimulating the creation of such champions, even if in a selected number of Member States, would boost the Union's overall growth and competitiveness, in an inherent solidary manner.

Following from these remarks, one can come to an overall conclusion on the relationship between solidarity and the market, and competition law's role in bridging both. Section III.A detailed the tenuous relationship between national solidarity and market economics, showcasing that the ECJ's caselaw demonstrates an explicit intention to separate both. In this instance, competition law's role in relation to national solidarity is precisely to not interact with it, as its provisions are not adequate to the specific functioning of its entities. To submit welfare systems to competition rules would negate their purpose and frustrate the quality of their services. On the other hand, III.B. attempted to make explicit the different manners in which Member State solidarity can be wielded in the market, from balancing market mechanisms and solidarity mechanisms, to taking into account the Union's economic interests in merger control. Taken together, both sections illustrate the way in which the EU can fulfil its 'dual commitment' using competition law. The national solidarity strand of this objective should be kept separate from competition provisions, and it is essential to maintain this separation. Both the Commission and the EU's courts should be attentive to continue shielding national solidarity from competition law, and prevent private undertakings from using these provisions unfairly against entities functioning in the welfare system. A purposive approach should be taken in regards to Member State solidarity, using antitrust and merger provisions to facilitate more cohesion between Member States on the market. It is argued that both approaches, defensive on one hand and purposive on the other, is the adequate balance to allow the EU to reach its 'dual commitment'.

GENERAL CONCLUSION

This study attempted to demonstrate four key points regarding the relationship between solidarity and the market in the EU's complex legal context.

(1) Despite the EU's originalist form as a market, built upon the centrality of the internal market project, it has evolved as the Union grew both in size and political power. Reforms since the *Lisbon Treaty* have provided a more important place to the social in its legal and political activities, and solidarity is now an important element to the EU's action. Specific attention was drawn to the Union's dual commitment, which places emphasis on maintaining a high level of national solidarity within Member States to ensure citizens' wellbeing, all while encouraging deeper levels of integration across the bloc through Member State solidarity. This dual commitment formed the key lens through which this study continued, bringing us to our second learning.

(2) In order to contribute to helping the EU reach this dual commitment, it was necessary to showcase that European competition law's normative framework enables it to reach a wide range of goals. It was argued that the Union's competition provisions were initially created to assist in market integration, firmly establishing competition law as a purposive body of law. More goals emerged as market integration became more legally secure, allowing the Commission to use competition law to reach more goals, such as innovation, public interest and fairness. Competition law's action is therefore not reduced to the remit of the market, and could be utilised to further the EU's goals.

This study ambitiously set out to demonstrate that European competition law's purposive nature could enable it to assist the EU in reaching its dual commitment. However (3), its nature is too strongly linked to market logic to adequately enable it to assist in furthering national solidarity. Quite the inverse, it was showcased that the Court was correct in using its powers to shield national solidarity from the impact of competition law, specifically by stating in its caselaw that entities involved in national solidarity were not undertakings in the eyes of competition law. As such, competition law's role in this strand of the EU's dual commitment is to limit its interference with national solidarity.

Finally (4), it was demonstrated that while competition law does not benefit national solidarity, some of its elements could be slightly modified to bridge some of the gap between Member State solidarity and the market. This gap has already been partially filled by regulation in key industries such as natural gas, but this could be extended to other industries. More specifically,

merger control enforcement could take better account of the EU's industrial policy, as this has strong economic consequences across the bloc. Competition law could be wielded by enforcers in a way that favours the creation of European champions, in order to strengthen the EU's economic power and global influence. This is particularly crucial for a Union that contains highly diverse but intrinsically connected economies, that all depend on the wellbeing of the internal market. To strengthen European industrial policy is to strengthen ties between Member States and favour solidarity between them, allowing for solidarity and the market to work together.

This study was evidently limited in scope, and could benefit from further exploration into more specific aspects of European competition law, particularly regarding the Commission's enforcement of Article 101. However, it has attempted to showcase that European competition law is a crucial element to the EU's political and legal project, and does possess the flexibility and legitimacy to aid the EU in addressing its ambitions.

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