

## Consumer Welfare in Financial Services: A View from EU Competition Law

by

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### *Abstract*

The paper analyses to what extent financial consumer protection forms part of the competition law objective of consumer welfare that EU competition law nowadays adheres to. It argues that while EU consumer law more generally aims at protecting

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the final consumer, EU financial consumer protection instruments often protect a broader spectrum of customers. This wider notion of the consumer can also be found in EU competition law, where the consumer is usually likened to any customer. A notable difference between EU financial consumer protection and EU competition law, however, is that they place a different emphasis on structural goals and inherently individual components. In EU competition law, the structural protection of competition is thought to eventually protect consumers. By uniting individual and structural aspects of consumer welfare, as well as by combining reactive and proactive consumer protection, EU competition law and EU financial consumer protection law can together achieve a financial protection of consumers that naturally goes beyond what each area of the law could achieve alone. A stringent approach, however, would require the development of a comprehensive EU financial consumer law which includes both dimensions.

### *Résumé*

L'article analyse dans quelle mesure la protection financière des consommateurs fait partie de l'objectif du bien-être des consommateurs en matière de droit de la concurrence, auquel le droit européen de la concurrence adhère actuellement. Il soutient que le droit de la consommation de l'UE vise généralement à protéger le consommateur final, mais les instruments de protection financière des consommateurs de l'UE protègent souvent un plus large éventail de clients. Cette notion plus large du consommateur se retrouve également dans le droit européen de la concurrence, où le consommateur est généralement assimilé à un client. Une différence notable entre la protection financière des consommateurs de l'UE et le droit de la concurrence de l'UE est l'accord d'une importance différente aux objectifs structurels et aux composantes intrinsèquement individuelles. Dans le droit de la concurrence de l'UE, la protection structurelle de la concurrence est considérée de protéger éventuellement des consommateurs. En unissant les aspects individuels et structurels du bien-être des consommateurs et en combinant une protection réactive et proactive des consommateurs, le droit de la concurrence de l'UE et le droit de la protection financière des consommateurs de l'UE peuvent ensemble assurer le niveau de la protection financière des consommateurs allant au-delà de ce que chaque domaine juridique pourrait atteindre toute seule. Une approche stricte nécessiterait toutefois l'élaboration de droit européenne de la consommation dans le secteur financière complète, qui engloberait les deux dimensions.

**Key words:** banking markets; capital markets; consumer protection; consumer welfare; EU competition law; financial markets; financial services; insurance markets; welfare standard.

**JEL:** D18, G20, I31, K21, L40

## I. Introduction

The financial services sector, consisting of banking markets, capital markets and insurance markets, is ‘the lifeblood of the real economy’ (European Commission, 2016). Sector-specific regulation subjects financial services to close scrutiny in the European Union (EU), and consumers in Europe enjoy particular protection in financial services because of the significance of financial services for everyday life – one merely needs to think of bank accounts, credit card payments, mortgages and loans. Financial services regulation pertains to the single market project of the European Union, and the application of EU competition law in this sector needs to be seen as an integral part of this (similarly, see Banasevic, Ryan and Wezenbeek, 2014, § 11.220). As today’s EU competition law strongly relies on a consumer welfare standard, it might be able to contribute to protecting consumers in the area of financial services. This particular aspect of EU competition law is explored in this paper. It asks to what extent financial consumer protection as understood by financial consumer protection law is congruent with consumer welfare as pursued by the EU competition laws. It starts from the hypothesis that financial consumer protection has an inherently individual component to it,<sup>1</sup> while the competition laws take a more general and structural approach to competition that is then thought to eventually translate into consumer welfare. Thereby, the role that considerations of financial consumer protection have when analysing consumer welfare under the competition rules is distinct from other areas of the law.

By exploring recent EU case law in the financial services sector, the paper analyses possible points of convergence and divergence between financial consumer protection in a more traditional sense and consumer welfare in financial services markets as an expression of consumer welfare as it is pursued by the EU competition laws. It scrutinizes how consumer welfare aspects were considered in selected cases, and to what extent consumer welfare led to the resolution of the case. This will then allow for a comparison of consumer welfare as understood by financial consumer protection law, and consumer welfare under the EU competition rules.

The paper concludes with some suggestions on how financial consumer protection could be further developed in the European Union, in particular by submitting that a more comprehensive approach to EU competition law and EU financial consumer protection law could achieve greater and perhaps also more coherent consumer protection. This would allow policy makers to

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<sup>1</sup> It needs to be acknowledged, however, that financial consumer protection laws also have structural components, such as when regulating financial market places.

combine the proactive and reactive components of these areas of the law, as well as their individual and structural approaches, in the interest of the European consumer.

## **II. Consumer welfare in financial services markets: the role of EU competition law**

### **1. General thoughts**

In the US, it has been held that antitrust and consumer protection law are ‘the two component parts of an overarching unity’ (Averitt and Lande, 1997, p. 713<sup>2</sup>), namely consumer sovereignty. Both US antitrust and US consumer protection law are seen as having the task to increase consumer welfare (Wright, 2012, p. 2216, 2218). While the antitrust laws should keep the markets competitive by focusing on factors that are external to consumers, the consumer protection laws should enable consumers to choose well amongst the market options available by focusing on factors that are internal to consumers (Averitt and Lande, 1997, p. 713, 716 f, 718, 729 f). The recent setting-up of the Consumer Financial Protection Bureau (CFPB) in the US has led to some controversy, as it saw a shift in competences over financial consumer protection from the Federal Trade Commission (FTC) to the CFPB – and thus a separation of the two strands of consumer law in financial services that some considered unwarranted (Wright, 2012, p. 2219). In the EU, several Directorates General of the European Commission share the competences for consumer law understood in this bifurcated way. Of particular relevance are the Directorate General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) on the one hand, and the Directorate General for Competition (DG COMP) on the other hand. While DG COMP both develops EU competition policy and acts as the prime enforcer of the EU competition laws, DG FISMA is focused on developing the EU policy on banking and finance – with implementation and enforcement largely delegated to the Member States.<sup>3</sup>

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<sup>2</sup> Arguing that consumer choice rather than overcome price and efficiency models should guide antitrust, see Averitt and Lande, 2007.

<sup>3</sup> See DG FISMA, [https://ec.europa.eu/info/departments/financial-stability-financial-services-and-capital-markets-union\\_en](https://ec.europa.eu/info/departments/financial-stability-financial-services-and-capital-markets-union_en) (accessed 1 June 2018) and DG COMP, [https://ec.europa.eu/info/departments/competition\\_en](https://ec.europa.eu/info/departments/competition_en) (accessed 1 June 2018). There is also a Directorate General for Justice and Consumers, which watches over consumer protection more generally.

An ongoing UNCTAD project on financial consumer protection in the banking sector is investigating ways for financial consumer protection to promote growth, enhance financial stability and increase consumer welfare. The project names five central aspects of financial consumer protection, namely inclusion, transparency, knowledge, sustainability and redress (UNCTAD, n.d.). These aspects point to the internal factors that were mentioned above. The G20 High-Level Principles on Financial Consumer Protection, developed by the OECD in 2011, also call for financial consumer protection to lead to an equitable and fair treatment of consumers, to disclosure and transparency, financial education and awareness. They equally mention the importance of competitive markets for consumer welfare (OECD, 2011). In many of these documents, individuals and SMEs are regarded as those worthy of financial consumer protection (for instance, see OECD, 2014, p. 2).

## 2. Consumer welfare in EU financial consumer protection law

The understanding that EU financial consumer protection law has of consumer welfare is the necessary starting point for the present inquiry. In general, EU consumer protection laws apply to consumers, whereby consumers are understood to be natural persons that are acting for purposes which are outside their trade, business, craft or profession.<sup>4</sup> EU financial consumer protection, however, is a special case in this respect, as it sometimes relies on this narrow conception of the consumer while at other times offering much broader protection to buyers of financial services. Two aspects of EU financial consumer protection are of particular interest for the present inquiry: the nature of the protection offered, and the nature of the customers to whom that protection is afforded. A short overview on some important instruments of EU financial consumer protection shall give some insight into this.

First, in the area of investment services, the Prospectus Regulation of 2017 sets out rules for disclosing information when offering securities to the public, or when admitting securities to trading on regulated markets. It does so with the explicit aim of protecting investors, and mentions both consumer and investor protection more generally as an aim within capital markets.<sup>5</sup>

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<sup>4</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.04.1993, p. 29, art. 2(b); Directive 2011/83/EU of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, p. 64, art. 2(1).

<sup>5</sup> Regulation (EU) No 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, OJ L 168, 30.06.2017, p. 12, art. 1(1), recitals 3, 4 & 7 ('The aim of this Regulation is to ensure investor protection and market efficiency.').

The prospectus obligation has the aim of informing consumers, namely retail investors, of investment services and their risks (Colaert and van Dyck, 2010, p. 396). However, the prospectus obligation can be limited where only qualified investors are affected.<sup>6</sup> In a similar vein, the Directive on Collective Investment in Transferable Securities (UCITS Directive) foresees information obligations to protect investors.<sup>7</sup> The Directive on Financial Instruments Markets distinguishes between retail and professional clients, laying down different rules for these two groups of customers.<sup>8</sup> The same distinction can be found in the Regulation on packaged retail investment products.<sup>9</sup> In order to fully protect private investors, EU law also regulates financial institutions through which private investors acquire securities. The regulation of these institutions goes far beyond the mere provision of information, and can be seen as one of the structural components in EU financial consumer protection law (Colaert and van Dyck, 2010, p. 397–398, 409).<sup>10</sup> The EU also foresees rules on credit rating agencies that are aimed at protecting investors and restoring market confidence (European Commission, n.d.).<sup>11</sup>

Secondly, in the area of credit services the EU adopted a Consumer Credit Directive in 2008 which, in the words of the European Commission, ‘aims at fostering the integration of the consumer credit market in the EU and ensuring a high level of consumer protection by focusing on transparency and

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<sup>6</sup> *Ibid.*, art. 1(4)(a).

<sup>7</sup> See Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32, as amended by Directive 2014/91/EU of 23 July 2014, OJ L 257, 28.08.2014, p. 186.

<sup>8</sup> Directive 2014/65/EU of 15 May 2014 on markets in financial instruments, OJ L 173, 12.06.2014, p. 349, art. 4(1)(10)–(12).

<sup>9</sup> Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352, 9.12.2014, p. 1, art. 4(6) (‘retail investor’).

<sup>10</sup> In this respect, see Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID II), OJ L 173, 12.06.2014, p. 349; Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments (MiFIR), OJ L 173, 12.06.2014, p. 84. These two legal frameworks started to apply from 3 January 2018. MiFID II distinguishes between retail and professional clients, affording more protection to the former; see MiFID II, art. 4(1)(10) & (11).

<sup>11</sup> Regulation (EU) No 462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.05.2013, p. 1; Directive 2013/14/EU of 21 May 2013 amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of over-reliance on credit ratings, OJ L 145, 31.05.2013, p. 1.

consumer rights.<sup>12</sup> This Directive only benefits the consumer, ie ‘a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession.’<sup>13</sup> In credit services, there is thus a distinction between natural persons acting outside their professional remit, and professionals. Amongst others, the Directive aims at protecting consumers by guaranteeing consumer confidence.<sup>14</sup> It has been questioned, however, whether that Directive should not also extend to small businesses which have a bargaining power that is comparable to consumers as understood by the Directive (Colaert and van Dyck, 2010, p. 381).

Another area in which the EU has adopted consumer protection rules is that of banking and payment services. Here, there is generally no distinction between final consumers and other customers (traders). Instead, the rules frequently foresee protection based on specific interests, such as the interest of an account holder, or the interest of an online banking user (Colaert and van Dyck, 2010, p. 430). The Payment Services Directive, for instance, mentions that safe electronic payments should benefit consumers, merchants and companies, but it also recognizes that ‘consumers and enterprises are not in the same position, they do not need the same level of protection.’<sup>15</sup> Accordingly, while some of the provisions apply across the board, there is sometimes an opt-out if the payment service user is not a consumer.<sup>16</sup> However, while the Payment Services Directive notes that it focuses on final consumers, it at the same time allows Member States to extend protection under the Directive to micro-enterprises – thus acknowledging their inferior bargaining power.<sup>17</sup>

To sum up, financial consumer protection instruments in the EU have a strong individual component and often follow the information paradigm, but there is also a structural element present which aims at boosting confidence in the financial markets. Contrary to most other consumer laws, it is not

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<sup>12</sup> European Commission, *Consumer Credit Directive*, [http://collections.internetmemory.org/haeu/20171123130349/http://ec.europa.eu/consumers/financial\\_services/consumer\\_credit\\_directive/index\\_en.htm](http://collections.internetmemory.org/haeu/20171123130349/http://ec.europa.eu/consumers/financial_services/consumer_credit_directive/index_en.htm) (accessed 1 June 2018).

<sup>13</sup> Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers, OJ L 133, 22.05.2008, p. 66, art. 3(a).

<sup>14</sup> *Ibid.*, recital 8.

<sup>15</sup> Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (PSD 2), OJ L 337, 23.12.2015, p. 35, recitals 5, 53 (direct quote). The rules of PSD 2 started to apply on 13 January 2018.

<sup>16</sup> This is the case for the transparency provisions of title III and some rights and obligations as provided for in title IV; see Directive (EU) 2015/2366, arts 38(1), 61(1) and (2).

<sup>17</sup> Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, OJ L 337, 23.12.2015, p. 35, art. 38(2): ‘Member States may apply the provisions in this Title to microenterprises in the same way as to consumers.’

only individuals in their private capacity that are protected, but also small businesses or the users of financial services more generally.

### 3. Consumer welfare in EU competition law

It is generally acknowledged that EU competition law as it stands today pursues two main policy goals: market integration and consumer welfare.<sup>18</sup> The goal of market integration goes back to the very beginning of EU competition law in the 1950s and is well-reflected in the Treaty provisions and continues to be re-affirmed by the European courts (similarly, see Whish and Bailey, 2018, p. 23, 52; calling this the ‘paramount goal’ of EU competition law, see Buttigieg, 2009, p. 47).<sup>19</sup> The Treaty provides for an internal market to be established among the currently 28 Member States<sup>20</sup> of the European Union with a combined population of over 500 million.<sup>21</sup> An inherent feature of this internal market is the protection of competition.<sup>22</sup>

Concerning the second main goal of EU competition law, consumer welfare, the European Commission only started introducing this standard in the 1990s

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<sup>18</sup> It has also been claimed that, at the outset, the aim of Articles 101 and 102 TFEU was to safeguard individual economic freedom (see Cseres, 2005, p. 248). While US antitrust has purely economic goals, EU competition law has added purely political goals (such as market integration) to its policy objectives (see Blair and Sokol, 2013, p. 2497, 2510, 2541). The first US case to acknowledge that consumer welfare represents the goal of antitrust law dates from 1979, whereas EU competition law first mentioned consumer welfare in a soft law instrument from 1997 (see Daskalova, 2015, p. 133, 134 n 2, 142 n 33; European Commission, Green Paper on Vertical Restraints in EU Competition Policy (22 January 1997) COM(96) 721 final; US Supreme Court, *Reiter v Sonotone* (1979) 442 US 330, 343 with reference to: Bork, 1978, p. 66). The reliance of US antitrust law on consumer welfare as its only goal, however, has been critically questioned as it does not provide an unequivocal standard (see Orbach, 2011, 133; First, 2009, p. 199, 204).

<sup>19</sup> This goal of EU competition law was recently re-confirmed by the CJEU in Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia v GlaxoSmithKline* EU:C:2008:504, para 65 (containing references to earlier cases); Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline v Commission* EU:C:2009:610, para 61; Joined Cases C-403/08 & C-429/08, *Football Association Premier League & Karen Murphy* EU:C:2011:631, para 139.

<sup>20</sup> Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden and the United Kingdom. The United Kingdom invoked Article 50 TEU on 29 March 2017 and is the first Member State in the history of the EU set to withdraw from the Union (‘Brexit’); see European Commission, *Brexit Negotiations*, [https://ec.europa.eu/commission/brexit-negotiations\\_en](https://ec.europa.eu/commission/brexit-negotiations_en) (accessed 1 June 2018).

<sup>21</sup> See Treaty on European Union (TEU), OJ C 202, 26.10.2012, p. 13, art. 3(3).

<sup>22</sup> Protocol (No 27) on the internal market and competition, OJ C 202, 7.06.2016, p. 308.



based on the teachings of the Chicago School, and ‘without any intervention by the legislator’ (Weitbrecht, 2008, p. 81, 85, calling this a fundamental change). It has been the stance of the European Commission for more than a decade now that consumer welfare is ‘well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources’ (Kroes, 2005).<sup>23</sup> This continues to be the case to this day (see, for instance, Vestager, 2017). The General Court soon followed suit (for a more elaborate discussion, see Daskalova, 2015, p. 151). In two judgments from 2006, the General Court alluded to consumer welfare as the aim of EU competition law. In *Österreichische Postsparkasse*, it stated that ‘the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers.’<sup>24</sup> In its *GlaxoSmithKline* judgment, the General Court held that the goal of Article 101(1) TFEU was ‘to prevent undertakings ... from reducing the welfare of the final consumer of the products in question.’<sup>25</sup> The General Court also emphasized that the Commission had, in this particular case, conducted its legal analysis under this consumer welfare standard.<sup>26</sup> Upon appeal, however, the Court of Justice found that the General Court’s conclusion on consumer welfare was supported ‘neither [by] the wording of Article [101(1) TFEU] nor the case-law.’<sup>27</sup> Instead, it held that the finding of an anti-competitive object did not require proof that final consumers were harmed, and that Article 101 TFEU protected ‘not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’<sup>28</sup> This, one could say, was an important blow to those advocating consumer welfare as the necessary standard of the EU competition rules – amongst others the

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<sup>23</sup> In 1993, then-Commissioner Van Miert had still asserted that EU competition policy was concerned with economic, political and social goals: the promotion of efficient production, market integration, and safeguarding a pluralistic democracy (see Van Miert, 1993); in the literature, it has also been argued that the European Commission may be relying on consumer welfare as a rhetorical device more than as an actual standard of assessment (see Akman, 2009a, p. 71)).

<sup>24</sup> Cases T-213/01 & T-214/01, *Österreichische Postsparkasse v Commission* EU:T:2006:151, para 115. The General Court deduced this interpretation from the wording of Article 101(3) TFEU.

<sup>25</sup> Case T-168/01, *GlaxoSmithKline v Commission* EU:T:2006:265, para 118.

<sup>26</sup> Case T-168/01, *GlaxoSmithKline v Commission* EU:T:2006:265, para 118.

<sup>27</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline v Commission* EU:C:2009:610, para 62.

<sup>28</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline v Commission* EU:C:2009:610, para 63.

Commission. As will be seen below, this initially hard stance by the Court has softened over time.

Although based on the US understanding of consumer welfare, the concept of consumer welfare takes on a meaning particular to the EU under EU competition law (Weitbrecht, 2008, p. 85 f, underlining that this specific European approach can be seen in the fact that identical merger cases were decided differently in the EU and the US). While consumer welfare in economics is understood to be the sum of consumer surplus, in EU competition law consumer welfare is not necessarily understood on such an individual basis. Contrary to the consumer protection laws, competition law is often understood to pursue a particular aspect of consumer welfare, namely that of economic wellbeing – or interest – of consumers broadly construed (Ioannidou, 2015, p. 24). In a number of early and more recent cases (see on these Whish and Bailey, 2018, p. 19 f), the European Court of Justice has underlined that consumer harm can also stem from harm to the competitive structure of the market.<sup>29</sup> This can be called a structural approach to consumer welfare that is peculiar to competition law. As the Court has held, the ‘competition rules of the Treaty [are] designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.’<sup>30</sup> This points to a very broad understanding of what consumer welfare entails, likening it more to a general framework than to a readily applicable standard of assessment. By relying on this framework, competition law implicitly assumes that fostering competition will result in more consumer welfare (Decker, 2017, p. 151, 156). Consumer welfare – together with competition as such – was mentioned in the Court’s 2012 case of *Post Danmark I*, where the Court held that a company must show that its efficiency gains from an abusive conduct outweigh negative effects on consumer welfare.<sup>31</sup> In its 2014 *Intel* judgment, the General Court argued that under Article 102 TFEU it is not only practices that directly harm consumers that are caught, but also practices that may affect consumers ‘through their impact on an effective competition structure.’<sup>32</sup> This is also supported by the Treaty, which in its Protocol on the internal market and competition sets out that the internal market referred to in Article 3 TEU shall include ‘a system

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<sup>29</sup> Case 6/72, *Europemballage and Continental Can v Commission* EU:C:1973:22, para 26; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline v Commission* EU:C:2009:610, para 63.

<sup>30</sup> Case C-08/08, *T-Mobile Netherlands* EU:C:2009:343, para 38.

<sup>31</sup> Case C-209/10, *Post Danmark v Konkurrenserådet (Post Danmark I)* EU:C:2012:172, para 42.

<sup>32</sup> Case T-286/09, *Intel v Commission* EU:T:2014:547, para 105, with reference to Case C-95/04 P, *British Airways v Commission* EU:C:2007:166, para 106.

ensuring that competition is not distorted.<sup>33</sup> Consumer welfare is therefore understood in a rather broad sense by the European courts, and consumer harm can arise both directly from the conduct in question, or indirectly, through the conduct's impact on the competitive market structure.

With EU competition law's roots usually traced back to ordoliberalism (on this, see Gerber, 1994, p. 25; Gerber, 2001, p. 232 ff; contesting this finding, see Akman, 2009b, p. 267), it has been questioned to what extent the consumer welfare standard advocated today coincides with an ordoliberal approach. In this respect, many tenets of ordoliberalism may find themselves challenged in the face of the generally accepted consumer welfare approach (Ahlborn and Grave, 2006, p. 197, 217). The focus on the utilitarian goal of consumer welfare can be seen as a shift from the Freiburg School's deontological understanding of competition – which wants to protect competition for its own sake, regardless of the final outcome – to a more utilitarian view of competition as adopted by the Chicago School, which is based on welfare considerations (on the difference between the utilitarian and the deontological approach to competition, see Andriychuk, 2015, p. 575, 578). Apart from this very fundamental question, there are many more unsettled questions concerning the intricacies of the consumer welfare approach under EU competition law. While consumer welfare is a concept that competition law has borrowed from economics, these two disciplines do not understand the concept to have the same meaning (Orbach, 2011, p. 133 f). In this sense, it is a shared concept with different conceptions (for a similar conclusion on the nature of the market definition concept in competition law, see Robertson, forthcoming). In a similar vein, it is an unsettled question whether consumer welfare as pursued under EU competition law should maximise overall consumer welfare or consumer surplus in an economic sense, or whether it should (also, or perhaps primarily) target competitive wrongdoing aimed at individual consumers (welfare, it has been argued, is highly subjective and as such cannot be easily generalized; see Daskalova, 2015, p. 136). Some have argued that consumer surplus<sup>34</sup> might be a first indicative benchmark for assessing consumer welfare, but that other aspects of consumer welfare, which go beyond this price-based criterion, should also form part of the competition law analysis – even if it is not quite clear how, economically speaking, this can be done (Daskalova, 2015, p. 136 f). Others have cautioned that through its narrow focus on a particular relevant market, antitrust is in any case not well-placed to promote consumer welfare in an economic sense (Orbach, 2011, p. 140 f). Another open question concerning consumer welfare relates to the time horizon that is applied. Should short-term

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<sup>33</sup> Protocol (No 27) on the internal market and competition, OJ C 202, 7.06.2016, p. 308.

<sup>34</sup> The opposite of consumer surplus is, of course, consumer detriment; see on this concept Evans, 2007, p. 26.

consumer welfare be the primary objective, or long-term consumer welfare – or something in-between? (Whish and Bailey, 2018, p. 20, with reference to Bork, 1978). The time horizon is essential because it may completely alter the analysis and its outcome. Long-term benefits may require us to tolerate short-term consumer loss, or vice versa. Overall, it is perhaps the case that competition law pursues an idealized, standardized or generalized version of consumer welfare which does not quite coincide with the mathematical adding up of individual consumer surplus in an economic sense. One issue that needs to be highlighted under the EU consumer welfare standard is that EU competition law does not understand the ‘consumer’ in consumer welfare to only be a final consumer in the form of an individual, natural person – as consumer protection laws generally would.<sup>35</sup> Instead, the term consumer is seen as interchangeable with the term customer, thus also including corporate customers within the competition law understanding of consumers (Akman, 2010, p. 315). For instance, in its 2004 Notice on the application of Article 101(3) TFEU, the European Commission underlines that ‘consumers within the meaning of Article [101(3) TFEU] are the customers of the parties to the agreement and subsequent purchasers.’<sup>36</sup> Indeed, including only final consumers in the competition law understanding of consumer welfare would mean that any breach of the competition laws would need to be traced in order to ascertain whether final consumers are eventually harmed by the conduct in question – a time-consuming, cumbersome and frequently impossible exercise that would severely limit the administrability of competition law enforcement (see also Daskalova, 2015, p. 140). Instead, the Commission presumes harm to final consumers from competitive harm to intermediate customers.<sup>37</sup> As competition law’s focus on consumers is case-dependent, it has been argued that EU competition law entertains a ‘chameleonic’ concept of the consumer (Albors-Llorens and Jones, 2016, p. 91). This, one can argue, is a fundamental difference between what general consumer protection laws try to achieve, and what competition law intends to achieve – but it leads to similar consumer welfare approaches under EU financial consumer protection laws and EU competition law.

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<sup>35</sup> In a recent comparison of the concept of the consumer in competition, regulatory and consumer protection policies, Decker ignores this aspect of EU competition law and instead only focuses on the final consumer (Decker, 2017, p. 151 n 1).

<sup>36</sup> European Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p. 97, para 84.

<sup>37</sup> European Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005), para 55. For an analysis of this statement, and tracing its hidden remnants in the 2009 Guidance Paper, see Akman, 2010, p. 317 f.

#### **4. Consumer welfare as applied to financial services markets by EU competition law: selected cases**

Having made these general observations on the approach to consumer welfare under EU competition law, it is now time to explore some recent EU case law in the financial services sector (for a more comprehensive overview on financial services cases under EU competition law – albeit not focusing on consumer protection issues – see Lista, 2013; Banasevic, Ryan and Wezenbeek, 2014).<sup>38</sup> This analysis has the objective to discern (1) which particular kind of consumer the Commission or Court has in mind in that particular case, (2) how the theory of harm in the case at hand is linked to consumer harm, and (3) how consumer welfare is understood in a case. It strives to find possible points of convergence and divergence between financial consumer protection in a more traditional sense and consumer welfare in financial services markets as an expression of consumer welfare as it is pursued by the EU competition laws. Cases will be drawn from antitrust (Articles 101 and 102 TFEU) as well as from merger control (Regulation 139/2004).<sup>39</sup>

##### **4.1. Antitrust cases (anti-competitive agreements and abuse of dominance)**

Article 101 TFEU is one of the few legal provisions which directly mentions consumers. Where an agreement restricts competition in contravention of Article 101(1) TFEU, it may be redeemable under Article 101(3) TFEU under four cumulative conditions. One of these conditions – and a central one – is the need for the agreement to pass on some of the benefit arising from the anti-competitive agreement to consumers. The term consumer as understood by this provision, however, is much broader than the final consumer (on this see also Faull and others, 2014, § 3.495).

A cartel procedure which was brought to the attention of the European Commission through a leniency application led to a settlement decision in late 2013. The case became known as the *Euro Interest Rate Derivatives* case. It also led to a fining decision against three banks which did not participate

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<sup>38</sup> Although it has been argued that financial services should not be subject to the competition rules, this argument was very early on rejected by the Court of Justice; see Case 172/80, *Züchner v Bayerische Vereinsbank* EU:C:1981:178, paras 6–9.

<sup>39</sup> There is also abundant case law from state aid law (Article 106 TFEU) in the financial services sector, particularly following the nationalization of banks in the course of the financial crisis in the 2000s (see European Commission, 2012a). State aid cases, however, will not be considered in the following.

in the settlement, and were thus jointly fined €485 million in late 2016.<sup>40</sup> The settlement decision of 2013 makes clear that the parties in question entered into agreements and concerted practices that distorted competition in the sector of Euro interest rate derivatives. In particular, they manipulated the EURIBOR, a benchmark interest rate depicting the cost of interbank lending for various maturities. The EURIBOR is calculated based on submissions of 44 panel banks every trading day, and all of the undertakings concerned were panel banks at some point during the time in which the anti-competitive practices were implemented.<sup>41</sup> The manipulation was contingent on the preferences of the participating undertakings, which depended on their particular trading positions or exposures. The conduct at issue included communication through several channels, information sharing, alignment of submissions and similar activities.<sup>42</sup> The Commission concluded that such conduct has the object of restricting competition under Article 101(1) TFEU. It underlined that this provision 'is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.'<sup>43</sup> It saw no scope for applying an individual exemption under Article 101(3) TFEU.

*CDS Information Market* (2016) was another proceeding under Article 101 TFEU concerning financial services, namely unfunded credit derivatives. This case was resolved through two commitment decisions, one relating to The International Swaps and Derivatives Association (ISDA) and one relating to Markit. ISDA as an association of undertakings was investigated for its decisions on the licensing of its 'Final Price' for trading credit default swaps on exchanges.<sup>44</sup> The Commission was concerned that this decision foreclosed exchanges from the market for exchange-traded unfunded credit derivatives over a period of three years, thereby preventing or delaying the emergence of this new market.<sup>45</sup> Markit, a company offering financial information and services, was also held to be an association of undertakings which had refused

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<sup>40</sup> European Commission, Case AT.39914 – *Euro Interest Rate Derivatives* (7 December 2016). There is no public version of this decision available yet; but see Vestager, 2016.

<sup>41</sup> European Commission, Case AT.39914 – *Euro Interest Rate Derivatives* (4 December 2013) paras 1, 5 f.

<sup>42</sup> *Ibid.*, paras 32–40.

<sup>43</sup> *Ibid.*, para 58. Here, the Commission cited to Case C-08/08, *T-Mobile Netherlands* EU:C:2009:343, para 38.

<sup>44</sup> European Commission, Case AT.39745 – *CDS Information Market (ISDA)* C(2016) 4583 final, paras 2, 31 (European Commission); European Commission, Case AT.39745 – *CDS Information Market (Markit)* C(2016) 4585 final, para 2.

<sup>45</sup> European Commission, Case AT.39745 – *CDS Information Market (ISDA)* C(2016) 4583 final, paras 3, 32 f, 36.

to license certain indices for trading credit default swaps on exchanges.<sup>46</sup> The Commission underlined that this would harm investors and, indirectly, their customers.<sup>47</sup> ISDA and Markit both offered commitments to address the Commission's concerns. The Commission found that these commitments would have 'positive effects on the market structure and consumers in the Union.'<sup>48</sup>

In its *MasterCard* (2014) judgment, the Court of Justice had to decide whether to uphold a General Court judgment which had confirmed a European Commission decision finding that MasterCard had restricted competition through the setting of multilateral interchange fees (MIFs) in its payment system, as this restricted competition amongst participating banks providing merchants with services enabling them to accept MasterCard or Maestro cards.<sup>49</sup> The Commission had held that the MIFs ultimately harmed merchants and their customers, and that MasterCard had not shown that any efficiencies created through the MIFs were passed on to these two groups of customers.<sup>50</sup> The Court underlined that even in a two-sided market, efficiency effects must be passed on to all consumers in the relevant markets.<sup>51</sup> The two types of consumers at issue were cardholders on the one hand and merchants on the other.<sup>52</sup> The General Court's judgment was ultimately upheld.<sup>53</sup>

In another case on MIFs, this time relating to the VISA network, the Commission also underlined that MIFs may artificially partition acquiring markets and hamper the objective of an internal payments market, thus harming consumers.<sup>54</sup> As in the *CDS Information Market* case, the Commission underlined the 'positive effects on the market structure and European consumers' that the commitments undertaken by VISA would have.<sup>55</sup>

Article 102 TFEU prohibits the abuse of market power. It has been the subject of debate whether this provision incorporates a consumer welfare standard at all (see Akman, 2009a), as the provision itself does not allude

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<sup>46</sup> European Commission, Case AT.39745 – *CDS Information Market (Markit)* C(2016) 4585 final, paras 2, 8, 31 f.

<sup>47</sup> *Ibid.*, para 33.

<sup>48</sup> European Commission, Case AT.39745 – *CDS Information Market (ISDA)* C(2016) 4583 final, para 54; European Commission, Case AT.39745 – *CDS Information Market (Markit)* C(2016) 4585 final, para 53.

<sup>49</sup> For this summary, see Case C-382/12 P, *MasterCard v Commission* EU:C:2014:2201, para 3.

<sup>50</sup> *Ibid.*, para 11.

<sup>51</sup> *Ibid.*, paras 236 f.

<sup>52</sup> On this, see eg Case C-382/12 P, *MasterCard v Commission* EU:C:2014:2201, para 238.

<sup>53</sup> *Ibid.*, para 259.

<sup>54</sup> European Commission, Case AT.39398 – *VISA MIF* (2014) para 24. For an earlier case on VISA MIFs, see European Commission, Case COMP/29.373 – *Visa International (Multilateral Interchange Fee)* (2002).

<sup>55</sup> European Commission, Case AT.39398 – *VISA MIF* (2014) para 102.

to consumer harm. In a Guidance Paper on Article 102 TFEU published in 2009, the European Commission pointed out that it would henceforth focus on abuses of market power which were most detrimental to consumers.<sup>56</sup> Aspects of consumer welfare that it wanted to take into account included price levels, quality, and consumer choice.<sup>57</sup> As in previous documents, the Commission clarified that it included direct and indirect buyers in its conception of the consumer.<sup>58</sup> Taking up an analytical step which can already be found in the Guidance Paper, the Court of Justice in its 2017 *Intel* judgment alluded to the possibility of objectively justifying an abuse of market power through efficiencies as long as they also benefit consumers.<sup>59</sup>

The *Clearstream* case (2009) concerned the refusal by Clearstream to provide cross-border securities clearing and settlement services, and the fact that it charged discriminatory prices. These abuses were directed at Clearstream's only competitor on the clearing services market, Euroclear Bank (EB).<sup>60</sup> The Commission considered these practices to harm innovation and competition, and concluded that this would result in consumer harm.<sup>61</sup> The General Court, in deciding the case, underlined that Article 102(c) TFEU prohibited the charging of discriminatory prices to the disadvantage of customers.<sup>62</sup> It is clear that these customers are not final consumers.

In 2007, the European Commission published its sector inquiry into retail banking, in which it covered banking services provided to consumers and small and medium businesses.<sup>63</sup> This sector inquiry was intended to highlight which market failures in this sector could be remedied through the application of EU competition law.<sup>64</sup> It concluded that four areas needed the continued attention from the Commission and national competition authorities, amongst others the design and operation of payment systems, credit registers, cooperation between banks and prices set by the latter.<sup>65</sup> It is easy to see how these issues are intricately linked to financial consumer welfare.

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<sup>56</sup> European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings (2009), para 5.

<sup>57</sup> *Ibid.*, para 19.

<sup>58</sup> *Ibid.*, para 19 n 2.

<sup>59</sup> *Ibid.*, paras 28 ff; Case C-413/14 P, *Intel v Commission* EU:C:2017:632, para 140. This is akin to an 'Article 102(3) TFEU.'

<sup>60</sup> Case T-301/04, *Clearstream v Commission* EU:T:2009:317.

<sup>61</sup> *Ibid.*, paras 23, 149.

<sup>62</sup> Case T-301/04, *Clearstream v Commission* EU:T:2009:317, para 170. Ultimately, the General Court upheld the Commission decision.

<sup>63</sup> European Commission, Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking (31 January 2007) COM(2007) 33 final, para 2.

<sup>64</sup> *Ibid.*, para 4.

<sup>65</sup> *Ibid.*, para 53.



## 4.2. Merger cases

Under the European Merger Regulation 139/2004, the European Commission assesses whether a merger is compatible with the internal market.<sup>66</sup> Article 2(1)(b) of that Regulation lists a number of factors which the Commission needs to take into account in its appraisal, amongst them ‘the interests of the intermediate and ultimate consumers’ and ‘technical and economic progress provided that it is to consumers’ advantage.’ This quote again highlights that the concept of the consumer under EU competition law is not limited to the final consumer and might better be portrayed as encompassing any customer. Recital 29 of that same Regulation provides that even where a concentration is thought to be anti-competitive, the efficiencies that it creates can compensate for the potential harm to consumers that it may bring about.

Two recent merger decisions in the area of capital markets involved the Deutsche Börse and highlight how the Commission applies these considerations in actual cases. The first was the proposed merger between Deutsche Börse and the New York Stock Exchange (NYSE) Euronext (2012). This was one of the very rare occasions when the European Commission actually declared a merger to be incompatible with the internal market.<sup>67</sup> In fact, out of 6,918 merger notifications that the Commission has received since 1990, it has only declared these concentrations incompatible with the internal market in 27 instances (for these statistics, see European Commission, 2018). This alone goes to show that this particular merger raised serious competition concerns to warrant such a decision – and that the Commission takes financial consumer protection very seriously. NYSE Euronext is a US holding company which operates a number of exchanges both in Europe and in the US, and it is mainly active on the markets for cash listing services, cash trading services, derivatives trading and clearing services, as well as information services and technology solutions.<sup>68</sup> Deutsche Börse, on the other hand, is a listed company based in Germany and is mainly active on a similar set of markets, including cash listing, trading and clearing, derivatives trading and clearing, and cash post-trade services.<sup>69</sup> The companies notified a proposed concentration to the European Commission which would have seen the creation of a new holding company incorporated under Dutch law.<sup>70</sup> This would have led

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<sup>66</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR), OJ L 24, 29.1.2004, p. 1.

<sup>67</sup> European Commission, Case COMP/M.6166, *Deutsche Börse/NYSE Euronext* (2012).

<sup>68</sup> *Ibid.*, para 10.

<sup>69</sup> *Ibid.*, para 11.

<sup>70</sup> *Ibid.*, paras 12–14.

to the creation of the biggest stock exchange worldwide.<sup>71</sup> In its analysis, the Commission looked at five groups of markets separately, namely cash instruments, market data and index licensing, information technology products and services, collateral management and derivatives.<sup>72</sup> It is only in the latter that the Commission saw a significant impediment to effective competition through the concentration.<sup>73</sup> The Commission went on to consider efficiencies that the concentration might bring about, and reached its conclusion of anti-competitiveness despite its emphasis on product innovation that might provide a significant benefit to consumers.<sup>74</sup> In particular, the Commission referred to its Horizontal Merger Guidelines (2004) which contain a section setting out in which way efficiencies must benefit consumers in order to be taken into account.<sup>75</sup> As clarified by a footnote in the Guidelines, the Commission understands consumers to denote both intermediate and final consumers.<sup>76</sup> The notifying parties claimed a number of efficiencies that would benefit intermediate and final consumers, in particular relating to a reduced cost of capital, greater employment, innovation and economic growth. They submitted five economic reports to sustain their claims in this regard.<sup>77</sup> For instance, the notifying parties claimed that their customers would benefit from lower IT and user access costs.<sup>78</sup> However, the Commission was not able to verify these cost savings.<sup>79</sup> The notifying parties also claimed collateral savings for their common members which would directly accrue to users,<sup>80</sup> but the Commission concluded that as competitive pressure would diminish following the merger, price effects stemming from increased market power would outweigh any such efficiency.<sup>81</sup> Furthermore, the notifying parties submitted that liquidity

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<sup>71</sup> *Ibid.*, para 19.

<sup>72</sup> *Ibid.*, para 22.

<sup>73</sup> Finding a significant impediment to effective competition, see *ibid.*, paras 1131 f. No significant impediment to effective competition was found regarding licensing of equity indices, exchange co-location and network connectivity services as well as collateral management services; *ibid.*, paras 52, 98, 113, 167, 197, 216.

<sup>74</sup> For this, the Commission relied on its Horizontal Merger Guidelines; see European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) para 8; European Commission, Case COMP/M.6166, *Deutsche Börse/NYSE Euronext* (2012) para 530.

<sup>75</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) paras 79–84.

<sup>76</sup> *Ibid.*, para 79 n 105.

<sup>77</sup> European Commission, Case COMP/M.6166, *Deutsche Börse/NYSE Euronext* (2012) paras 1145 f.

<sup>78</sup> *Ibid.*, para 1161.

<sup>79</sup> *Ibid.*, paras 1166 ff, 1187.

<sup>80</sup> *Ibid.*, paras 1188, 1234.

<sup>81</sup> *Ibid.*, para 1235.

would increase as a direct result of a reduction in the implicit costs of trading, and that this efficiency would directly benefit customers.<sup>82</sup> However, as the Commission was not able to verify these efficiencies, it could not judge whether they would be passed on to consumers.<sup>83</sup> Concluding that the notifying parties had not provided sufficient evidence that the merger would lead to efficiencies that would be passed on to consumers,<sup>84</sup> the Commission drew attention to the fact that the merger would lead to a near monopoly and any efficiencies – even if likely to be passed on to customers – ‘would have to be particularly substantial.’<sup>85</sup> This threshold was not met, and the merger was prohibited.

In another attempt at a merger, Deutsche Börse and the London Stock Exchange notified their proposed merger to the Commission (2017).<sup>86</sup> This was another of the only 27 mergers that the Commission has prohibited since 1990. While consumer welfare featured prominently in the Commission’s assessment in *Deutsche Börse/NYSE*, consumers were only mentioned in two instances in the 2017 *Deutsche Börse/London Stock Exchange* decision. Instead, the Commission preferred to speak of customers. For instance, the prohibition decision provided some background to the assessment of mergers in the financial infrastructure markets, which also highlighted the two main customer groups at stake: the sell-side and the buy-side. Both customer groups identified were made up of some large corporate entities, including dealer banks, intermediaries, various kinds of funds and large corporations.<sup>87</sup> This demonstrates that consumer welfare in this case was limited to the welfare of corporate customers. However, particularly in the case of pension funds and the like, it is easy to see how the economic wellbeing of these customers will indirectly impact a specific group of final consumers as well.

A number of insights on consumer financial welfare can be gained from these two merger cases involving stock exchanges. In *Deutsche Börse/NYSE* (2012), it appears that consumer welfare was strongly linked to the structure of the market. Any efficiencies claimed by the notifying parties were countered by an argument based on the near monopoly position of the proposed concentration, and there was little prospect of success in the notifying parties’ arguments. This, one could say, shows how strongly the Commission links the competitive structure of the market to consumer welfare in a broad sense. From *Deutsche Börse/London Stock Exchange* (2017), one can deduce that the

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<sup>82</sup> Ibid., paras 1244, 1300.

<sup>83</sup> Ibid., paras 1301 f. Similarly, see the arguments in paras 1304, 1326 f.

<sup>84</sup> Ibid., para 1335.

<sup>85</sup> Ibid., para 1337.

<sup>86</sup> European Commission, Case COMP/M.7995, *Deutsche Börse/London Stock Exchange Group* (2017) para 1.

<sup>87</sup> Ibid., paras 66–68.

welfare of final consumers was regarded as a necessary consequence of the welfare of corporate customers.

### **III. Reflections on financial consumer protection under EU competition law**

The European Commission relies on EU competition law in order to promote competition in financial services markets – through antitrust cases, merger control and state aid scrutiny. In addition, it also carries out sector inquiries in order to obtain a comprehensive picture of the competitive situation on those markets (see, eg, the 2007 sector inquiries into the business insurance market and the retail banking market; European Commission, 2012b), and to ascertain whether competition enforcement might be warranted. The standard by which the Commission evaluates and assesses possibly anti-competitive occurrences in these markets is that of consumer welfare, which constitutes one of the two main objectives of EU competition law – the other being the realisation of a single market amongst all EU Member States, an objective which is unique and inherent to EU competition law (questioning whether consumer welfare is indeed the standard to be applied when considering the European Court of Justice’s case law, see Akman, 2009a).

The UNCTAD factors of a regulatory approach to consumer protection in financial services mentioned above (section II.1.), and the principles of consumer welfare that could be seen in the overview on EU financial consumer protection laws (section II.2.), are certainly quite distinct from the approach that EU competition law takes when assessing consumer welfare in financial services markets. There is a clear distinction between the internal and the external factors affecting consumers in financial services. While EU financial consumer protection extends to both of these dimensions, EU competition law only relates to external factors, and particularly to the structure of competition on financial services markets. From the case law scrutinized above, it could be seen that the European Commission, as well as the General Court and the Court of Justice, regularly allude to consumer welfare in a general sense when deciding cases in financial services markets. However, they usually presume harm to consumers – which they understand to be any type of customer – from competitive harm to the market structure, or from harm to intermediaries. Consumer harm is deduced from and equalled to structural harm without analysing it in any detail. More often than not, the cases discussed were resolved based on harm to competition or also to competitors – and the result was then seen as being beneficial to the internal market and to its consumers.

Competition law's conception of the consumer as a buyer – be it a final consumer or a corporate buyer – differs drastically from the understanding that consumer protection laws generally have of that term (Akman, 2010, p. 317). This important difference in the conception of the consumer has been referred to as the 'Chicago trap,' (Cseres, 2005, p. 331) cautioning that competition laws have a different understanding of consumer welfare than consumer protection laws. The use of the terms 'consumer' and 'consumer welfare' disguises this important difference between competition laws and consumer protection laws, thereby masking the fact that customer welfare in a broad sense, and the welfare of final consumers in a narrow sense, are not always congruent and, thus, competition law may not always have the intention to benefit final consumers in the sense of consumer protection laws (Cseres, 2005, p. 332; Akman, 2010, p. 319, 324). Phil Evans suggests that when faced with the reality that final consumers are often 'one step removed from the competitive process,' competition law can respond in either of two ways: liken the customer with the consumer, or derive consumer impact from anti-competitive harm to other customers (Evans, 2007, p. 26). It appears that EU competition law has decided to do both (see also Akman, 2010, p. 323).

The 'Chicago trap' arguably does not apply in financial services markets. The consumer *acquis* of the European Union maintains a narrow definition of the concept of the consumer, extending only to natural persons that are not acting in a professional capacity (Loos, 2008, p. 10). As could be seen, this narrow concept of the consumer is considerably broadened in many financial consumer protection laws – such as payment, insurance and investment law – so that the concept of the consumer also encompasses clients, policyholders and investors (Reich and Micklitz, 2014, § 1.37). This brings us full circle in acknowledging that both in EU financial consumer protection law and in EU competition law, the customer is regarded as a consumer – and as worthy of protection. It appears that in this respect EU competition law and EU financial consumer protection law are closer than the latter and EU consumer law more generally.

One important difference between EU competition law and EU financial consumer protection law, however, is that the former is reactive, in the sense that it only interferes in the market when anti-competitive behaviour is suspected, or an anti-competitive merger is being considered. This contrasts with consumer protection laws, where individual consumers in individual situations are targeted and the law is proactive in that it aspires to improve financial services markets in ways that will benefit consumers (Decker, 2017, p. 156). This has been said to reflect 'a general division of labor between policies' (Decker, 2017, p. 152). For this reason, it is possible to view these two areas of the law as complementary (see Decker, 2017, p. 159 with reference

to Averitt and Lande, 1997; OECD, 2008), with consumer protection law focusing on factors that are internal to the consumer and competition law focusing on factors that are external to the consumer (on this see Averitt and Lande, 1997, p. 729; Decker, 2017, p. 159).

It has been remarked that sectors where the protection of the final consumer is (also) at stake – such as in financial services – are often already ‘subject to specific regulation with the purpose of safeguarding consumer interest’ (Daskalova, 2015, p. 140). However, this does not mean that the competition laws and financial consumer protection laws should not work hand in hand in order to further promote consumer welfare. To the contrary, the very fact that EU competition law and EU financial consumer protection law conceptually rely on the same or a similar notion of the consumer gives these two areas of consumer law a good basis from which to start a close cooperation in the interest of consumer welfare. Together, these two areas of the law unite individual and structural aspects of consumer welfare and also combine reactive and proactive financial consumer protection. This means that, if working together, EU competition law and EU financial consumer protection law can achieve a level of financial protection of consumers that naturally goes beyond what each area of the law could achieve alone. In order to harness these synergies, however, a more comprehensive understanding of EU financial consumer law needs to develop which includes both dimensions. The present contribution set out to be a first tentative step in this direction.

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