

SINGAPORE'S COMPETITION REGIME AND ITS OBJECTIVES: THE CASE AGAINST FORMALISM

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Despite more than ten years since Competition Law was first introduced in Singapore, a clear consensus on its underlying objectives remains elusive. In this article, we put forth a normative case for why Singapore's competition authorities should prioritise the promotion of economic welfare, as opposed to a more pluralistic approach that pursues competing objectives of equal standing. We argue that the normative bases for many of the rules in EU Competition Law are inconsistent with Singapore's Competition regime, and that such rules are not suitable for direct importation into Singapore. In particular, we illustrate how an overt reliance on EU case law as persuasive authority has resulted in a "formalistic" approach to Competition Law, where presumptions of law allow competition authorities to infer liability upon proof of certain conduct. Henceforth, we suggest that competition authorities in Singapore should exercise considerable caution in their application of EU law in individual cases.

I. INTRODUCTION

Almost forty years after Robert Bork's seminal work in "*The Antitrust Paradox*",¹ competition regulators, scholars and practitioners are still engaged in a vigorous debate on what the *crux* of competition policy² should be. Lamenting the failure of the United States ("US") Federal Courts then to expound the purposes of antitrust, Bork argued:

"Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values

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¹ Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1993).

² In this Article, we will use terms "Antitrust" and "Competition Law" as interchangeable synonyms. We define "Competition Policy" as the overall competition framework in which Competition Law operates. Competition Policy would thus encompass practices not strictly defined as Competition Law, such as prevailing enforcement norms and attitudes.

arises? Only when the issue of goals has been settled is it possible to frame a body of substantive rules”.³

To Bork, antitrust had but a *sole* legitimate goal: the goal of maximising economic efficiency, or the logical corollary of promoting economic welfare.⁴ Writing ahead of his time, Bork could not have envisaged the winds of change about to radically transform prevailing antitrust policy. In “The Antitrust Paradox”, Bork had expressed his pessimism that antitrust policy would develop along the lines that he had advocated. On this issue, however, Bork was mistaken. Within just a few years of its publication, antitrust policy in the US began to evolve in the direction that “The Antitrust Paradox” had urged but that its author had failed to predict. Across the Atlantic, however, Bork’s thesis did not receive the same level of fanfare that the US Federal Courts had provided in abundance.⁵ Bork’s thesis stood at one end of a hypothetical spectrum where the enhancement of economic efficiency and the promotion of economic welfare were the only permissible objectives of contemporary Competition Policy—other objectives would have no role to play.⁶ At the other end of the spectrum lay the view that Competition Policy is based on multiple values, which cannot be reduced to an exclusive concern for economic efficiency and welfare. These values encompass much broader considerations, reflecting a “society’s wishes, culture, history, institutions, and perceptions of itself, which cannot, and should not be ignored”.⁷ Many European jurists were strong proponents of similar views,⁸ and the Court of Justice of the European Union (“CJEU”)⁹ was reluctant to accept the proposition that Bork had proposed earlier.¹⁰

Times have changed. In recent years, as part of a series of reforms which the European Commission (“EC”) terms as the “modernisation” of European Union (“EU”) Competition Policy,¹¹ the EC promotes the view that EU Competition Policy should focus on enhancing economic efficiency, which it believes will promote consumer

³ Bork, *supra* note 1 at 50.

⁴ *Ibid* at 79.

⁵ A series of Supreme Court precedents endorsed Bork’s thesis with approval. See *Continental T.V. Inc. v GTE Sylvania, Inc.*, 433 US 36 (1977) [*Sylvania*], *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977), and *Broadcast Music, Inc. v Columbia Broadcasting System*, 441 US 1 (1979).

⁶ See Donald Hay, “The Assessment: Competition Policy” (1993) 9 *Oxford Review of Economic Policy* 1.

⁷ See R Shyam Khemani, ed, *A Framework for the Design and Implementation of Competition Law and Policy* (Washington: World Bank Publications, 1999) at 1-2.

⁸ Eg, D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 1998).

⁹ The CJEU comprises of both the Court of Justice [ECJ], and the General Court [GC], formerly known as the Court of First Instance [CFI].

¹⁰ Many EU Competition Law cases *post* “The Antitrust Paradox” did not accept the proposition that the purpose of the Competition Policy was to enhance economic efficiency and promote economic welfare. Eg, *British Airways plc. v Commission*, C-95/04 P, [2007] ECR I-2331 [*British Airways*].

¹¹ The “Modernisation” of EU Competition Law refers to the major reform in the enforcement of EU Competition Law that accompanied the enactment of Regulation 1/2003 in 2004. Prior to the “Modernisation” reforms, there have been occasional departures from the generally formalistic approach adopted by the CJEU. For example, in *Ahlstrom Osakeyhtio v Commission*, C-89/85, [1993] ECR I-1307 [*Wood Pulp II*], an inference of liability under Art 101(1) (then Art 85(1)) from parallel conduct was struck down by the ECJ on the basis that the close succession of price announcements could be explained by the natural operation of the market. Similarly, in *Delimitis v Henninger Brau AG*, C-234/89, [1991] ECR I-935 [*Delimitis*], the ECJ held that exclusive purchasing agreements do not appreciably restrict competition under Art 101(1) (then Art 85(1)) unless they also have the effect of foreclosing market access to competitors. One commentator suggested that these departures had limited impact in the subsequent

welfare. This effort to stray away from a pluralistic conception of Competition Policy to an efficiency-based, US-style conception¹² of the objectives of Competition Policy has brought considerable consternation amongst several jurists.¹³ But the discomfort does not just manifest itself at an academic level. What is of greater concern is the apparent dissonance between the CJEU and the EC with regard to the objectives that EU Competition Law should pursue. Barring a few exceptions,¹⁴ the CJEU has often adopted a policy of strong adherence to established case law—case law that is often steeped in a philosophy centred around the protection of competitors and the upholding of the structure of competition.¹⁵ What is clear is that this will often conflict with the EC's goal of upholding consumer welfare and economic efficiency.

It is against this contextual backdrop where Competition Authorities and Courts in a small, open jurisdiction like Singapore come to a proverbial “crossroads” of sorts. Having chosen to model the Competition Act 2004¹⁶ after its counterpart in the United Kingdom (“UK”),¹⁷ antitrust authorities¹⁸ in Singapore must now interpret provisions in the Act in light of objectives that the *Singapore* Legislature¹⁹ has chosen to pursue. This, in turn, raises difficult, but critical questions. Is there a clear consensus on the precise objective(s) of Competition Policy in Singapore? If not, is there a normative framework that can be put forth regarding the prioritisation of competing objectives? Does the consumer protection role of the Competition and Consumer Commission of Singapore (“CCCS”) conflict with its role as a competition watchdog? To what extent should Singapore's Competition Regime incorporate objectives that drive Competition Policy in the EU, and by extension, around the world?

development of EU Competition Law. In particular, the EC has “paid lip service” to *Delimitis* by applying a severely limited version of the *Delimitis* test in cases like *Schöller Lebensmittel GmbH* [1993] OJ, L 183/1 and *Langnese-Iglo GmbH* [1993] OJ, L 183/19; restricting *Delimitis* to tying and exclusive purchasing arrangements while excluding franchising and exclusive distribution agreements from its scope. See B Hawk, “System Failure: Vertical Restraints and EC Competition Law” (1995) 32 CML Rev 973 at 982-983. The EC continued with its formalistic approach in enforcement up till the “Modernisation” reforms. These reforms attempt to bring EU Competition Law in line with modern economic thinking on efficiency and consumer welfare, and encompasses changes in the interpretation and application of substantive Competition Law. The modernisation reforms are also known as the “more economic” approach. See P Lowe, *Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy?* (27 March 2007), online: <http://ec.europa.eu/competition/speeches/index_2007.html>.

¹² Modern day US antitrust policy remains predominantly concerned with the enhancement of economic efficiency and welfare, even with the drop in enthusiasm for Chicago School Economics. See *Leegin Creative Products Inc v PSKS Inc.*, 127 US 2705 (2007).

¹³ Eg, Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? : Non-efficiency Considerations Under Article 101 TFEU* (New York: Kluwer Law International, 2012).

¹⁴ See *Osterreichische Postsparkasse AG v Commission*, T-213/01, [2006] ECR II-1601 and *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, [2006] ECR II-2969. The latter case relates to the General Court's decision.

¹⁵ See *Europemballage & Continental Can v EV Commission*, C-6/72, [1973] ECR 215 [*Continental Can*] and *British Airways*, *supra* note 10.

¹⁶ Cap 50B, 2006 Rev Ed Sing [Competition Act].

¹⁷ *Competition Act 1998* (UK), c 41 [UK Competition Act 1998].

¹⁸ In this article, we define “antitrust authorities” as the assigned enforcers and interpreters of Competition Legislation in the particular nation-state. In Singapore's context, antitrust authorities refer to the Competition Commission of Singapore [CCS] from 2005-2018, the Competition and Consumer Commission of Singapore [CCCS] from 2018 onwards, the Competition Appeals Board [CAB], and the Supreme Court of the Republic of Singapore.

¹⁹ And pointedly, not what other states have decided for their own Competition Regimes.

This article is an attempt at shedding light on some of these questions. While we do not completely eschew a pluralistic approach to Competition Policy,²⁰ we propose a normative case for why the antitrust authorities in Singapore should prioritise the objective of economic efficiency over other objectives, insofar as they are mutually incompatible. Two key insights inform this thesis. The first insight draws on the literature regarding “legal transplants”, an important phenomenon that permeates the jurisprudence of nation-states that were once colonies.²¹ Perhaps as a result of path dependence, or due to “historical and jurisprudential ties”²² that Singapore shares with the UK, Singapore has continued to maintain the practice of modelling new-fangled legislation on the commercial law statutes of the UK. However, many Comparative Law scholars have stressed that the mere importation of a legal rule without proper adaptation to local conditions will be susceptible to failure.²³ Social, political, and economic factors “that are present in the legal system of origin may not be present in the host country, or may be present with substantial variations” that are not apparent at first sight.²⁴ These arguments are especially relevant in determining the future direction of development of Competition Policy for a relatively late adopter like Singapore.²⁵ We contend that Competition Policy in Singapore must be determined pursuant to the larger context of how the Singapore Government, given the inherent constraints of Singapore’s macro-economy, determines its interactions with private markets.²⁶ Viewed in this light, Competition Policy presents itself as just one of the many available tools available to pursue the legitimate objectives of Singapore’s economic policy. Given the Government’s predominant focus on inclusive macro-economic growth in its economic policy, we argue that isolating the primary

²⁰ A brief description of the theoretical literature on the various objectives driving Competition Policy will be elucidated in Part II. This Article, however, will not engage in a full-blown normative evaluation of the relative merits and shortcomings of the various theories, or a theoretical evaluation of goal pluralism versus goal unitarism. Such an analysis would require an in-depth discussion of the philosophy underlying these objectives. An entire monograph would be required for a proper evaluation of such concepts. See Ioannis Lianos, “Some Reflections on the Question of the Goals of EU Competition Law” (2013) CLES Working Paper Series 3/2013 for a detailed exposition on some of these arguments.

²¹ In the eighteenth and nineteenth centuries, entire systems of law migrated from the colonial empires to the colonies. When these colonies gained independence, local legislatures had to decide whether to depart from the transplanted laws. The same legislatures would also have to decide whether to base their new legislation on similar legislation enacted in their former colonial masters. See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1974).

²² See Burton Ong, “The Origins, Objectives and Structure of Competition Law in Singapore” (2006) 29(2) *World Competition* 269-284 [Ong, *Origins*].

²³ See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (New York: Oxford University Press, 1992).

²⁴ See Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, “The Transplant Effect” (2003) 51(1) *Am J Comp L* 163. In the context of Singapore, the Court of Appeal has also noted that foreign cases (with regard to an issue of constitutional interpretation) should be approached “with circumspection because they were decided in the context of their unique social, political and legal circumstances”; see *Lim Meng Suang & Anor v AG and Anor* [2015] 1 SLR 26 (CA) at para 48.

²⁵ For similar analyses in the context of Corporate Law and Insurance Law, see Umakanth Varottil, “The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony” (2015) NUS–Center for Law and Business Working Paper No 2015/01 and Christopher C Chen, “Measuring the Transplantation of English Commercial Law in a Small Jurisdiction: An Empirical Study of Singapore’s Insurance Judgments Between 1965 and 2012” (2014) 49(3) *Tex Intl LJ* 469.

²⁶ A full exposition of these ideas will be presented in Part III below.

role of Competition Policy to that of achieving economic efficiency is not only *consistent* with broader economic objectives; it is also normatively desirable insofar as it promotes an efficient *means* of achieving those aims. The second insight draws on legal authority detailing the analytical framework of statutory interpretation in Singapore. We illustrate how ministerial speeches made in the Second Reading of the Competition Bill militate towards the argument that the promotion of economic efficiency was intended by the Singapore Parliament to be the primary objective of the Competition Act.

A significant corollary follows these observations. Despite more than ten years of enforcement of the competition rules in Singapore, Singapore's antitrust authorities (*ie* the CCCS and the Competition Appeals Board ("CAB")) continue to heavily rely on EU case law as persuasive authority in their infringement decisions.²⁷ As we will show, this has resulted in what antitrust scholars have termed a "formalistic" approach to Competition Law—liability is often established pursuant to presumptions of law that allow the authorities to infer liability upon proof of certain conduct. The "formalistic" approach stands in contrast to its "effects-based" counterpart, where the authorities are required to establish actual anti-competitive effects in the relevant market. We set out how a "formalistic" approach to Competition Law may be led by non-efficiency objectives; and how an overtly "formalistic" approach may be inefficient, thereby subverting the welfarist objective of economic efficiency. Henceforth, we suggest that antitrust authorities in Singapore should exercise considerable caution in endorsing the application of EU law in individual cases.

This article proceeds as follows. Part II reviews the common objectives, or rationales that drive Competition Policy in two of the world's largest competition regimes—the EU and the US.²⁸ In Part III, we put forth a normative case for why Singapore's competition authorities should prioritise the promotion of economic welfare over competing objectives, as opposed to a more pluralistic approach that pursues multiple objectives of equal standing. Part IV illustrates how the Singapore's antitrust authorities have overtly relied on EU case law as persuasive authority, and how this has led to a "formalistic" approach to Competition Law. Drawing on Law & Economics literature, we also demonstrate how an overtly formalistic approach to Competition Law may be inefficient, thereby subverting the welfarist approach of promoting economic efficiency. This suggests that the methodical application of EU Law in individual cases may not be desirable. Part V concludes.

II. COMMON OBJECTIVES OF COMPETITION POLICY

In this Part, we attempt to provide some background on the theoretical underpinnings of the various objectives informing Competition Policy in both the EU²⁹ and US regimes.

²⁷ We will develop these arguments in Part V below.

²⁸ The Comparative aspect of this Article will focus on the jurisdictions of the EU and the US. The two jurisdictions have a disproportionately large impact on antitrust norms around the world. Almost every Competition Law regime has some elements of either jurisdiction's Competition Policy. In Australia, for example, the Trade Practices Act 1974 adopts the approach taken in the Sherman Act, the antitrust legislation in the US.

²⁹ An extensive review of these concepts is, of course, outside the scope of this Article. The elucidation of the common objectives that drive antitrust policy around the world is ubiquitous and can be found in

A. *Enhancing Economic Efficiency and Promoting Economic Welfare*³⁰

The prevailing orthodox view³¹ in antitrust scholarship today is that Competition Policy exists to maximise economic welfare, thereby creating an “economically efficient” state of affairs.³² To illustrate, it is appropriate to compare the differences between perfectly competitive markets and its deviations.

Perfectly competitive markets are attractive because in a static setting, they achieve allocative and productive efficiency without the need for any state intervention. Because perfectly competitive markets³³ comprise many sellers and buyers, each seller cannot influence the market price, and will thus expand output to the point where the marginal cost equals the market price, resulting in allocative efficiency. As perfectly competitive markets have no barriers to entry, firms that do not produce goods at the lowest possible cost will be forced out of the market by firms that are able to do so, resulting in productive efficiency. Furthermore, dynamic efficiency is achieved as competition stimulates innovation in competitors to produce newer and better products.³⁴ In such circumstances, both consumer and producer surpluses are maximised, leading to maximum economic welfare. The consumer surplus, being the difference between the consumers’ willingness to pay for that good or service, and the actual market price for which that good or service is available for sale, is maximised under perfect competition. Likewise, the producer surplus, being the difference between the revenue the producers makes by selling the good or service in question and the variable costs of producing it, is maximised as well.³⁵

Deviations from the perfectly competitive market lead to losses in efficiencies and welfare. In the extreme case, a monopolist is not constrained by competitive forces and will price the good it produces as high as the market will allow it to. The optimal monopoly price is still affected by demand, as when the price rises some consumers will not purchase the monopolist’s product but purchase something else instead. However, the higher-than-competitive price causes a reduction in the quantity of the good available in the market, which results in a redistribution of wealth from consumers to the monopolist. The result is that the market is allocatively inefficient,

any good Competition Law textbook. See Jones & Sufrin *et al.*, *EU Competition Law: Text, Cases, and Materials*, 6th ed (Oxford: Oxford University Press, 2016).

³⁰ Note that we define the objectives of “enhancing economic efficiency” and the “promotion of economic welfare” as synonyms in this Article. We do not make any distinction between the two concepts.

³¹ Almost every textbook on Competition Policy or Competition Law begins with a chapter on basic microeconomic theory. For a non-orthodox view of Competition Law, see Michael W Dowdle, “On the Public-Law Character of Competition Law: A Lesson from Asian Capitalism” (2015) 38 *Fordham Intl LJ* 301.

³² For a formal exposition of these concepts, see Hal R Varian, *Microeconomic Analysis* (New York: Norton & Company, 1992). We will hereby term this objective as the “welfarist approach”.

³³ *Ibid.* The usual assumptions underlying perfectly competitive markets are as follows: 1. there is a large number of buyers and sellers of the product and they act independently; 2. the products are identical and homogenous; 3. all buyers and sellers have perfect information about market prices and the nature of the goods sold; 4. there is free entry in and free exit out of the market (*ie* there are no barriers to entry or exit); 5. transaction costs are close to zero; 6. buyers and sellers are price takers as each buyer or seller is assumed to be unable to individually affect the market price.

³⁴ Varian, *supra* note 32.

³⁵ *Ibid.*

and suffers a loss in total economic welfare as compared to a perfectly competitive market.³⁶

It is the loss to efficiency and welfare that justifies the intervention of the state through Competition Law. While both perfectly competitive markets and true monopolies are rarely observed in reality,³⁷ the general hypothesis based on the stylised model is that competition tends to increase economic welfare, and that striving towards a goal of “workable competition” can enhance economic welfare.³⁸ Therefore, attempts by firms in a particular market to maintain prices at an artificially high level³⁹ should attract legal sanction by Competition Law.

It is sapient to note that from a welfarist point of view, Competition Law exists merely as a means to an end—the end being the maximisation of economic welfare—and is not perceived to be an end in and of itself.⁴⁰ There are many situations where deviations from the competitive process result in productive efficiencies, or where an inquiry into alleged anti-competitive conduct may prove to be costly. Pursuant to such a point of view, an optimal competition regime would have to consider these benefits and costs in evaluating whether economic activity amounts to an infringement or not. In the context of our analysis of Singapore's competition regime, this is a particularly important point—legislative bills refer to regulatory costs as an important factor in the design of Singapore's competition rules, and productive efficiencies are often invoked as a justificatory exception to activities that would otherwise restrict competition.⁴¹

B. Distributional Concerns

Beyond enhancing economic efficiency, most jurisdictions regard the promotion of consumer welfare as an important or primary objective of their competition policies.⁴² Scholars that argue for the primacy of consumer surplus over economic welfare do so on two main grounds.

First, it has been argued that in practice, the total welfare standard is distributional and engages implicit value judgements. This is because the total welfare standard will likely benefit producers more than consumers—producers are more likely to invest resources in a competition dispute; producers have significant informational advantages that affect antitrust analysis; also, empirically, producers tend to start

³⁶ *Ibid.*

³⁷ In contemporary industrial economics, the usual area of study concerns markets that lie in between the two extremes. In such settings, firms will often behave strategically and the field of game theory is often used to draw conclusions on efficiency implications. See generally D Fudenberg and J Tirole, *Game Theory* (Cambridge: MIT Press, 1991) at 393, J F Nash Jr, “The Bargaining Problem” (1950) *Econometrica: Journal of the Econometric Society* 155, J W Friedman, “A Non-Cooperative Equilibrium for Supergames” (1971) 38(1) *The Review of Economic Studies* 1 and D Abreu “On the Theory of Infinitely Repeated Games With Discounting” (1988) *Econometrica: Journal of the Econometric Society* 383.

³⁸ The idea of “workable competition” is the notion that Competition Policy should attempt to achieve the best competitive arrangement practically possible. See John M Clark, “Toward a Concept of Workable Competition” (1940) *The American Economic Review* 241.

³⁹ Ideally, from the firms' perspective, the optimal price would be close or equal to the monopoly price.

⁴⁰ Bork, *supra* note 1.

⁴¹ Further discussion of these concepts will be forthcoming in Part III.

⁴² See EC, *Guidelines on the application of Article 101(3) TFEU*, [2004] OJ, C 101/97.

off in a better bargaining position as compared to consumers.⁴³ Furthermore, the marginal utility of a dollar in the hands of a producer is likely to be lower than in the hands of a consumer, since it has been shown empirically that consumers are likely to be poorer than producers.⁴⁴ Other scholars have critiqued existing instruments that purport to redistribute wealth in a more efficient manner. For example, Ioannis⁴⁵ argues that it is *only* when the question of fair and equitable income distribution is addressed by the political system that it will become legitimate for Competition Law to focus exclusively on economic efficiency. In the absence of an adequate mechanism for the EU to mitigate distributional consequences across EU Member States, Ioannis asserts that the protection of consumers remains an integral objective of EU Competition Policy.⁴⁶

The second argument is based on a deontological concept of “fairness” to consumers. Kirkwood and Lande⁴⁷ argue that the transfer of welfare from consumers to producers as a result of monopoly pricing is inherently unfair, and that antitrust law’s purpose should be to protect “consumers in the relevant market from practices that deprive them of the benefits of competition and transfer their wealth to firms with market power”.⁴⁸

Most economists, however, consider that Competition Law should not be concerned with the distribution of welfare between producers and consumers—it is the total welfare of both that should matter.⁴⁹ It is argued that Competition Policy is a poor tool to redistribute surpluses, because Competition Enforcement cannot and does not take a comprehensive view of distribution.⁵⁰ Other policy instruments, such as progressive income taxation, can redistribute that surplus more efficiently than Competition Policy in accord with notions of equity.⁵¹ In Singapore’s context, the issue of whether Singapore’s antitrust authorities should consider consumer welfare objectives in its enforcement of Competition Policy is particularly pertinent, given the authorities’ newly vested role as a consumer protection agency.⁵²

C. Market Integration

The objective of promoting market integration is specific to EU Competition Policy.⁵³ In the EU context, the goal of the single market imperative is to dismantle artificial

⁴³ See Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing, 2009) and Joseph F Brodley, “The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress” (1987) 62 NYUL Rev 1020.

⁴⁴ Varian, *supra* note 32.

⁴⁵ Ioannis, *supra* note 20.

⁴⁶ *Ibid.*

⁴⁷ John B Kirkwood and Robert H Lande, “The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency” (2008) 84 Notre Dame L Rev 191.

⁴⁸ *Ibid* at 193.

⁴⁹ See Bork, *supra* note 1 at 90-91.

⁵⁰ See Joseph Farrell and Michael L Katz, “The Economics of Welfare Standards in Antitrust” (2006) 2(2) Competition Policy International 9.

⁵¹ See Dennis W Carlton, “Does Antitrust Need to be Modernized?” (2007) 21(3) The Journal of Economic Perspectives 155.

⁵² In Part III, we consider the relevance of such arguments.

⁵³ As Jones and Sufrin note, the role of EU Competition Policy as “an instrument of single market instrument is *absolutely crucial* to an understanding of EU Competition Law... It differentiates EU Law from

trading barriers between Member States, which are created by private undertakings engaging in anti-competitive practices.⁵⁴ Competition rules are necessary as it would be pointless to dismantle state measures (by means of the free movement provisions) if they could be replaced by similar measures of a private nature.

The objective of market integration, while often characterised as a political one, was essentially developed to improve economic performance. Firms in isolated national markets could not exploit efficiency advantages when the minimum efficient scale of production greatly exceeded national demand.⁵⁵ With the integration of different markets of similar products and the integration of production factors (such as labour), firms are able to expand, make their operations more efficient, and are incentivised to specialise. These benefits in turn boost the competitiveness of European firms vis-à-vis other competitors in the global markets.

The CJEU has repeatedly stressed the fundamental objective of the competition rules as a means to achieve the single market. As a predecessor to the Treaty of Lisbon in 2009, Article 3(1)(g),⁵⁶ of the Treaty of Rome explicitly defined one of the “activities” of the European Community (now the EU) as being “a system ensuring that competition in the internal market is not distorted”. In *Eco Suisse China Time Ltd. v Benetton International NV*,⁵⁷ the CJEU noted that:

“According to Article [3(1)(g)] EC..., Article [101] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community, and in particular, for the functioning of the internal market”.⁵⁸

More recently, the EC has reconceptualised competition and market integration as serving a common end, rather than seeing competition as a means of advancing the single market. However, many scholars opine that the “unification imperative” continues to supply much of EU Competition Law’s legitimacy, and also continues to generate the conceptual framework for the development and application of its substantive norms.⁵⁹

D. Ordoliberalism

Another common objective of Competition Policy is the protection of an individual, or a firm’s economic freedom, namely “an individual’s ability to participate in the economy with minimal outside interference”.⁶⁰ This objective is based on values

any other system of Competition Law, whether in the Member States, the US, or elsewhere”. See Jones & Sufrin, *supra* note 29.

⁵⁴ See Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (New York: Kluwer Law International, 2009).

⁵⁵ See David J Gerber, “The Future of Article 82: Dissecting the Conflict” in Ehlermann and Marquis, eds, *European Competition Law Annual 2007* (Oxford: Hart Publishing, 2008).

⁵⁶ In *Konkurrensverket v TeliaSonera Sverige AB* C-52/09, [2011] ECR I-527, the CJEU confirmed that the replacement of Article 3(1)(g) with a protocol has no legal consequence.

⁵⁷ *Eco Suisse China Time Ltd. v Benetton International NV*, C-126/97, [1999] ECR I-3055 [*Eco Swiss China*].

⁵⁸ *Ibid* at 3092.

⁵⁹ Gerber, *supra* note 8.

⁶⁰ See Sandra Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Portland: Hart Publishing, 2010).

that are quite different from the more utilitarian objectives of enhancing economic efficiency and promoting economic welfare, and rests on the conception of competition as a process whereby individuals and firms have the deontological right to market participation.⁶¹

Some scholars view the genesis of the right to market participation as coming from humanist values such as social justice, civil liberty, and the equality of individuals as economic subjects.⁶² Intuitively, it is said that highly concentrated economic power cannot be compatible with a liberal, constitutional democracy that vests rights of economic freedom in its citizens. Historically, the view that entrepreneurial freedom needs protection originated from the fear of accumulation of economic and political power by large corporations. Thomas Jefferson himself “viewed large organisations with great suspicion and expressed his preference for the wide dispersion of economic power”.⁶³

A related concept is the European notion of “ordoliberalism”. Conceived in Germany during the 1930s, it became a key school of thought in post-war Germany.⁶⁴ Ordoliberalism values individual economic freedom of action as a means to political freedom, which is defined as a social good. Ordoliberalist competition policy thus prescribed rules of market regulation that protected the conditions of competition. Under such a policy, the process of competition, as an expression of individual economic freedom of action, is seen as a value in itself, and not merely a means by which purely economic objectives—such as efficiency—are to be achieved.⁶⁵ Ordoliberalism is thus hostile to monopolies not because of their effects on efficiency, but because they embody private power, which threatens the economic freedom of other stakeholders in markets. An ordoliberal approach to Competition Law focuses on constraining private power to promote competition as an expression of economic freedom.

While ordoliberalist competition policy has arguably been very influential in the development of EU Competition Policy,⁶⁶ it has often been used as a means to protect competitors, or small and medium enterprises within a certain market. Common examples offered include the use of Competition Law to protect small firms from a dominant firm’s low (though efficient) pricing, or the use of Competition Law to force a dominant firm to give it access to resources it controls upstream, so that the smaller firm can compete with it. As we will see in Section E, the use of Competition Law to protect competitors is often fiercely criticised by commentators who see the predominant objective of Competition Law as the enhancement of economic efficiency and the promotion of economic welfare.

⁶¹ Jones & Sufrin, *supra* note 29.

⁶² Eg, Kenneth G Elzinga, “The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?” (1977) 125(6) U Pa L Rev 1191.

⁶³ See David W Barnes, “Nonefficiency Goals in the Antitrust Law of Mergers” (1989) Wm & Mary L Rev 787.

⁶⁴ See W Möschel, “Competition Policy from an Ordo Point of View” in Peacock and Willgerodt, eds, *German Neo-Liberals and the Social Market Economy* (London: Palgrave Macmillan UK, 1989).

⁶⁵ A rather common example of this is the reasoning provided by the CJEU in *Continental Can*, *supra* note 15, where the CJEU (then the ECJ) held that Article 102 was not only aimed at practices which may cause damage to consumers directly, but also those practices which may impact the functioning of an “effective competition structure”.

⁶⁶ Gerber, *supra* note 8.

E. *Conflicting Objectives*

If Competition Policy in a particular jurisdiction is to pursue multiple, pluralistic objectives of equal standing, enforcers of Competition Law in that jurisdiction immediately face a potential problem. While different objectives of competition policy may largely be mutually reinforcing, they may in certain circumstances come into conflict. Reconciliation may be impossible if objectives are mutually exclusive in a particular sphere of application. Akman has argued that if Article 102 TFEU is an “ordoliberal” provision, then its objective *cannot* be a welfare or efficiency-based one, as interpreting it consistently with such objectives would “go beyond the letter and spirit of it”.⁶⁷

Examples where the objectives of Competition Policy might come into conflict are plentiful. In Section C we described the objective of EU Market Integration as being partly driven by efficiency considerations. However, market integration may conflict with enhancing economic efficiency and promoting economic welfare. In the area of vertical restraints, clauses that specify exclusive distribution within a certain Member State may raise market integration concerns. However, contemporary industrial economics has shown that such business practices are often welfare-enhancing.⁶⁸ In Section B we pointed out that several jurisdictions adopt a consumer welfare objective for their Competition Policy, but such an objective may conflict with the objective of promoting economic efficiency in the “aggregate/total” welfare sense. A merger between two firms in a particular market may potentially raise prices for consumers through allocative inefficiency, but may nonetheless raise aggregate welfare if it results in large productive efficiencies. Indeed, the clearest example of a situation where conflicting objectives arise comes from Section D. The practice of using Competition Law to preclude a dominant firm from efficient pricing so that its smaller competitors are not foreclosed from market participation clearly goes against efficiency and welfare principles. The smaller firms are in effect protected against the rigours of competition and are artificially sustained by Competition Law, even though it would be beneficial for society as a whole for them to cease operations.⁶⁹

Goal conflict is only an issue when enforcers of Competition Law do not express the relative importance of particular objectives and the means to resolve potential conflicts between them.⁷⁰ If certain goals are mutually exclusive, enforcers of Competition Law must make a choice regarding whether to give up some interests in order to achieve others, or to cause as little harm as possible when defending particular interests.⁷¹ This is easier said than done. Despite the widespread acceptance of goal pluralism in EU Competition Policy, the CJEU has not elucidated a consistent framework for the prioritisation of particular objectives.

⁶⁷ P Akman, “Searching for the Long-Lost Soul of Article 82EC” (2009) 29(2) *Oxford J Leg Stud* 267.

⁶⁸ Fudenberg & Tirole, *supra* note 37. Contemporary industrial economics provides numerous justifications for the welfare-enhancing nature of vertical restraints. For example, vertical price restraints could prevent “free riding” by downstream firms trying to capitalize on each others’ price costs. Vertical restraints could also improve economic efficiency by removing double marginalization.

⁶⁹ Fudenberg & Tirole, *ibid.*

⁷⁰ Van Rompuy, *supra* note 13.

⁷¹ Ioannis, *supra* note 20.

III. THE PRIORITISATION OF ECONOMIC WELFARE OVER COMPETING OBJECTIVES: A NORMATIVE CASE

Can issues of goal conflict be reconciled within Singapore's competition regime? In this section, we put forth a *normative* case for why Singapore's competition authorities should prioritise the promotion of economic welfare over competing objectives, as opposed to a more pluralistic approach that pursues multiple objectives of equal standing. Through examining the economic, social and legal environment in which Competition Policy operates in Singapore, we argue that Competition Policy has to be viewed as just *one* of the many tools available to pursue the legitimate objectives of Singapore's economic policy. Given the Government's predominant focus on inclusive macro-economic growth in its economic policy, we argue that isolating the primary role of Competition Policy to that of achieving economic efficiency is not only consistent with broader economic objectives; it is also normatively desirable insofar as it promotes an efficient *means* of achieving those aims.

A. Contextualising Competition Policy as Economic Policy

Competition Policy is a variant of economic policy.⁷² As such, it should be viewed as one of the many tools available to pursue the legitimate objectives of Singapore's economic policies. To that end, it is of utility to identify the characteristics of Singapore's economy, and the broader over-arching objectives that the Singapore government adopts in its macro-economic policies in light of these characteristics. Thereafter, the normative role of Singapore's competition policy should be contextualised pursuant to this framework.

Singapore's macro-economy has often been characterised as being both "small" and "open".⁷³ These characteristics refer to, respectively, the size of domestic markets in Singapore and the volume of trade as a ratio of Singapore's total economic output.⁷⁴ Despite its impressive GDP per capita, the output of Singapore's economy is constrained by both its small population and land area—its real GDP is only ranked 6th amongst its ASEAN neighbours.⁷⁵ The natural constraints that Singapore faces in its economic progression is, however, ameliorated by its reliance on demand generated by trade in place of domestic demand. In 2017, the Trade to GDP ratio of Singapore amounted to almost 400%, with over two-thirds of Singapore's GDP being generated by external demand.⁷⁶ This makes Singapore's Trade to GDP ratio the highest in the world.⁷⁷

In recent years, Singapore's economic policies have largely focused on promoting the inclusive and sustainable growth of the macro-economy for all residents living in

⁷² See W Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago, University of Chicago Press, 1981).

⁷³ Singapore, Committee on the Future Economy, *Report of the Committee on the Future Economy* (Singapore: Committee on the Future Economy, 2017).

⁷⁴ *Ibid.*

⁷⁵ International Monetary Fund, *World Economic Outlook Database April 2018* (2018), online: <www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx>.

⁷⁶ Committee on the Future Economy, *supra* note 73.

⁷⁷ *Ibid.*

Singapore.⁷⁸ The unique characteristics of the Singapore economy described above are significant determinants of the nature and form of the economic policies that advance these objectives. In particular, the small size of markets limits the ability of firms to achieve economies of scale,⁷⁹ so concentrated markets are a natural corollary of small economies. Accordingly, a large body of economic literature suggests that in small and open economies, low regulatory barriers to firm entry, low tax barriers to trade, and the promotion of dynamic efficiency⁸⁰ are critical factors in ensuring the good economic performance⁸¹ of domestic markets.⁸² Liberal trade policies and low regulatory barriers to entry allow non-domestic firms to impose competitive discipline on domestic firms attempting to exploit their market power, while also allowing domestic firms to access global markets to compete with their non-domestic counterparts on an equal footing. On the other hand, in instances where non-domestic competition is not robust, economic policies that promote incentives to innovate are the primary means of ensuring market efficiency.

The principles expounded above are consistent with the economic policies that the Singapore Government has pursued. Many of the initiatives that have been led by the Singapore Government have centred on the liberalisation of trade, the creation of a “business-friendly” environment,⁸³ and the promotion of dynamic efficiency through intellectual property rights.⁸⁴ For example, insofar as its trade policy is concerned, Singapore has over 21 Free Trade Agreements (“FTAs”) and Economic Partnership Agreements (“EPAs”) with its key trading partners, which serve to strengthen trade cooperation by reducing tariff and non-tariff barriers to trade amongst Singapore and its trading partners.⁸⁵ The relationship between such policies and the role of Competition Policy in Singapore will be examined in sub-section (2) below.

1. A consistent approach

At this point, it is sapient to address a fundamental issue that arises here with regard to the broader goals of Singapore's economic policies. When we speak of such broader, overarching objectives, are they predominantly focused on macroeconomic growth? Do other values, such as distributive/equitable concerns, or the recognition of ordoliberalistic rights inform these broader goals?

⁷⁸ Singapore, Economic Strategies Committee & T Shanmugaratnam, *Report of the Economic Strategies Committee: High Skilled People, Innovative Economy, Distinctive Global City* (Singapore: Economic Strategies Committee, 2010).

⁷⁹ Furthermore, firms may not be able to attain a minimum efficient scale (MES) of production. See Evans, Lewis & Hughes, “Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature” (2003) New Zealand Treasury Working Paper No 2003/31.

⁸⁰ See J R Campbell & H A Hopenhayn, “Market Size Matters” (2005) 53(1) *The Journal of Industrial Economics* 1.

⁸¹ The measure of “good economic performance” is done with respect to the benchmark of efficiency.

⁸² And occasionally even dominate the importance of Competition Law. See Lewis & Hughes, *supra* note 79.

⁸³ For example, through the active use of industrial policy, the creation of a low regulatory cost environment and the use of tax incentives to attract investments. See Committee on the Future Economy, *supra* note 73.

⁸⁴ Committee on the Future Economy, *ibid.*

⁸⁵ *Ibid.*

Chua⁸⁶ and Tan⁸⁷ provide persuasive responses to the aforementioned questions. Chua characterises Singapore's economic policies as having a primary focus on macroeconomic growth, noting that "this singular goal is simultaneously the singular criterion for initiating and assessing all government activities, in terms of how an act will aid or retard this growth". Importantly, Tan goes on to construct a framework of how the Singapore Government tends to follow a pragmatic and instrumentalist approach, where officials are willing to adopt any means as long as the ends are successfully achieved through these means. Indeed, we observe little evidence to the contrary establishing that other objectives are vested with equal or greater importance.

We are now in a good position to advance our initial thesis. Given the broader objectives of Singapore's macroeconomic policies, we would argue that the isolation of the primary role of Competition Policy to that of achieving economic efficiency is *consistent* with such aims. On the contrary, the advancement of a pluralistic regime that pursues multiple objectives of equal standing would introduce difficulties in resolving issues where goals conflict across different areas of law. For example, given the importance of preserving dynamic efficiency in domestic markets to achieve macro-economic growth in Singapore, any introduction of a Competition Law-type defence⁸⁸ to an alleged infringement of intellectual property rights should be treated with great caution, with due regard to the potential benefits and costs flowing from the firms' conduct. In light of this, we would suggest that any defence to an alleged infringement of an intellectual property right ("IPR") should come from the IPR regime itself, and not Competition Policy.⁸⁹ This would militate against the existence of such a defence. On the other hand, a purely ordoliberalist approach to Competition Law would give much more weight to the violation of the competitive process in the enforcement of the intellectual property right; and would have little room for determination of the dynamic efficiency considerations that IP policy is meant to advance.

2. An efficient approach

As elaborated upon in Part I, we do not completely eschew a pluralistic approach to Competition Policy. *A fortiori*, we suggest the same for the broader economic aims that the Singapore Government ought to pursue. Indeed, we accept that distributive concerns are justifiable. What is contended, however, is the argument that Competition Policy is a poor tool to redistribute income.⁹⁰ If Competition Policy focuses on the total surplus, other policy instruments such as progressive income taxation can

⁸⁶ B H Chua, *Communitarian Ideology and Democracy in Singapore* (London: Psychology Press, 1997).

⁸⁷ K P Tan, "The Ideology of Pragmatism: Neo-Liberal Globalisation and Political Authoritarianism in Singapore" (2012) 42(1) *Journal of Contemporary Asia* 67.

⁸⁸ For an example of how such a defence could be established, see *Humber Oil Terminals Trustee Limited v Associated British Ports* [2012] EWCA Civ 36 at para 43.

⁸⁹ See B Ong in S D Anderman, ed, *The Interface Between Intellectual Property Rights and Competition Policy* (Cambridge: Cambridge University Press, 2007) at 411 where the author describes the endogenous (within IP) and exogenous limits (external to IP) on an "IP owner's legal monopoly".

⁹⁰ See Cooter, Robert and Ulen, *Law and Economics* 6th ed (Boston: Addison-Wesley, 2016) at 2. The authors argue: "... like the rest of the population, economists disagree among themselves about redistributive ends. However, economists generally agree about redistributive means".

redistribute that surplus more efficiently in accord with notions of equity. Carlton has saliently noted that “it is better to pursue public policies that maximise output and then worry about distributional questions, rather than to pursue inefficient policies”.⁹¹

Any “balancing” exercise that compares competing trade-offs will involve an assessment of the relative benefits and costs associated with these trade-offs. As Gal⁹² suggests, the trade-off is skewed in favour of economic efficiency in the context of a small economy like Singapore, as it “cannot bear the costs of a competition policy that is prepared to sacrifice economic efficiency for broader policy objectives”. Gal⁹³ argues that when non-efficiency objectives conflict with the objective of promoting economic efficiency and welfare, such antitrust authorities either cannot materially promote these objectives, or can only do so at unacceptable costs.

In trade-oriented economies like Singapore, Competition Policy plays a limited role in regulating market discipline. As some commentators have suggested,⁹⁴ liberal trade policies play a major role in maintaining market discipline in the absence of competition policy. With the aid of such policies, many markets are largely efficient and do not require further intervention, without more. In other words, it seems reasonable to suggest that there would be limited anti-competitive conduct in the Singapore markets, with a correspondingly constrained role for Competition Policy. It would thus be less effective to advance non-efficiency objectives through Competition Policy in Singapore, as compared to other economies where Competition Policy plays a much larger role. Indeed, any intervention of the state through Competition Policy is contingent on a finding that anti-competitive conduct has occurred—a finding that raises the spectre of the large transaction costs that accompany litigation.

B. *The Interpretation of Singapore's Competition Act*

In this section, we focus our analysis on a statutory interpretation of the Competition Act. Given that consistency with parliamentary intention is desirable as a normative outcome, we argue that the prioritisation of economic efficiency in Competition Policy as a predominant objective is in line with such a goal. In sub-section (1), we elucidate the normative basis for why contemporary US and EU competition regimes have departed from their original legislative intent. In sub-section (2), we explain why Singapore is unable to depart from the Competition Act's original legislative intent. We set out the interpretative framework that underlies statutory interpretation in Singapore, and explain how these principles are applied to discern the objectives of the Competition Act. In sub-section (3), we look to extraneous materials to describe the genesis of the competition rules in Singapore, and highlight specific themes that suggest the prioritisation of economic efficiency as the primary goal of Competition Policy in Singapore. Last but not least, in sub-section (4), through examining the structure and wording of the Competition Act, we argue that the legislative

⁹¹ See Dennis W Carlton, “Does Antitrust Need to be Modernized?” (2007) 21 *The Journal of Economic Perspectives* 155.

⁹² M S Gal, *Competition Policy for Small Market Economies* (Cambridge: Harvard University Press, 2009).

⁹³ *Ibid.*

⁹⁴ Lewis & Hughes, *supra* note 79.

exceptions to the liability-establishing provisions are primarily concerned with economic efficiency. Indeed, we observe that the deliberate and systemic exclusion of non-efficiency objectives animates these features of EU Competition Policy.

1. Normative basis for a departure from legislative intention

The starting point of this discussion is the fact that the objectives driving Competition Policy in both the US and the EU⁹⁵ have not been invariant over time. Antitrust enforcers in both the US and the EU have not only shifted their enforcement priorities across the years, but have gone further in explicitly declaring paradigm shifts in the goals that Competition Policy ought to pursue.

Historically, US Competition Policy has undergone large swings in its emphasis on different objectives, largely in accordance with the contemporary political inclination of the Supreme Court. In a systematic historical survey of US Competition Policy from the genesis of the Sherman Act till today, Van Rompuy⁹⁶ describes US Competition Policy as having gone through at least five distinct periods where the Supreme Court pursued wildly different objectives. A stark example of this is provided by *United States v Topco Associates, Inc.*⁹⁷ In that case, the Warren Court condemned as *per se* illegal the assignment of exclusive territories to distributors and failed to consider Topco's arguments that restrictions in intra-brand competition promoted inter-brand competition and enhanced efficiency. It based its reasoning on preserving the right to compete of Topco's competitors:

“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert it with vigor, imagination, devotion and ingenuity whatever economic muscle it can muscle”.⁹⁸

A few years later this reasoning would become heresy. Under *Sylvania*⁹⁹ the Supreme Court engaged in a literal 180 degree change of position from *Topco*, holding that vertical restraints other than resale price maintenance provisions yielded sufficient economic efficiencies to warrant a rule of reason analysis. The purported “fundamental” nature of individual economic freedom that was cherished as a freedom equivalent to other rights enshrined by the Bill of Rights was nowhere to be seen.

It was perhaps these polar oscillations in Competition Policy that prompted Posner to argue that the motives of the legislators are irrelevant in interpreting the Sherman Act:

“No doubt most of the legislators whose votes were essential to the enactment of these statutes cared more about the distribution of income and wealth and welfare

⁹⁵ The Singapore Competition Act 2004 was modelled after the UK Competition Act 1998 (*supra* note 17), and the UK Competition Act 1998 was in turn modelled after the EU Competition Rules now to be found in the TFEU.

⁹⁶ Van Rompuy, *supra* note 13.

⁹⁷ *United States v Topco Assocs. Inc.* 405 US 596 (1972) [*Topco*].

⁹⁸ *Ibid* at 610.

⁹⁹ *Sylvania*, *supra* note 5.

of small business and particular consumer groups than they did about allocative efficiency, especially since the economics profession itself had no enthusiasm for antitrust policy... *But these legislators did not succeed in writing into the statutes standards that would have enabled judges to order these goals and translate them into coherent, administrable legal doctrine without doing serious and undesired damage to the economy.* For guidance the courts turned elsewhere. After a century and more of judicial enforcement of the antitrust statutes, there is a consensus that guidance must be sought in economics. There is no generally accepted principle of statutory interpretation that shows that the courts were wrong to go this route".¹⁰⁰

Scholars who disagreed with Posner did not fare much better. In passing the Sherman Act, it was highly debatable that Congress had prescribed a discernible policy behind it.¹⁰¹ Rather, the relevant policies seem to have only emerged later after years of judicial development of antitrust principles. Bork himself appealed to legislative history in arguing that Congress had shown no support for non-efficiency objectives,¹⁰² but many legal historians have illustrated significant errors with this particular proposition.¹⁰³

Regardless of the epistemological truth vis-à-vis these arguments, it is difficult to see how the US Federal Courts may practicably decipher the "true" intention of Congress back when the Sherman Act was passed into law without substantially overturning a significant portion of existing Antitrust Law.

Similarly, the trans-national nature of EU Competition Policy implies that inferring fundamental objectives from the *travaux préparatoires* (preparatory works) of the competition rules in the European Economic Community ("EEC") Treaty will be a considerably difficult task.¹⁰⁴ The ultimate provisions found in the EEC Treaty may ultimately reflect a political compromise between states pursuing different objectives.¹⁰⁵ When interpreting the substantive content of the competition rules, it is also rare to observe references by the CJEU to any of the *travaux préparatoires* of the aforementioned competition rules. Rather, the CJEU seems to prefer references to what it considers valid sources of EU Law that elucidate the activities promoting the EU.¹⁰⁶

2. A purposive interpretation of the Competition Act

Unlike the US and the EU Competition Regimes, however, there is a cogent reason for why the legislative intention regarding the objectives that Singapore's Competition Regime ought to pursue cannot be ignored—section 9A of the Interpretation Act ("IA") mandates that a purposive interpretation is to be applied to all Singaporean

¹⁰⁰ See Richard A Posner, *Antitrust Law* (Chicago: University of Chicago Press, 2009) at 24-26.

¹⁰¹ See Rudolph JR Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford: Oxford University Press on Demand, 2000).

¹⁰² Bork, *supra* note 1.

¹⁰³ Peritz, *supra* note 101.

¹⁰⁴ Akman, *supra* note 67. Compare Anca D Chiriță "A Legal-Historical Review of the EU Competition Rules" (2014) 63 ICLQ 281.

¹⁰⁵ Akman, *ibid.*

¹⁰⁶ *Eco Swiss China*, *supra* note 57.

statutes.¹⁰⁷ As such, an interpretation which supports the purpose of a statute is to be preferred over other interpretations. In *Attorney-General v Ting Choon Meng*.¹⁰⁸ Menon CJ laid down the approach towards the purposive interpretation of statutes under section 9A of the IA (at [59]):

“... [T]he court’s task when undertaking a purposive interpretation of a legislative text should begin with three steps:

(a) First, ascertaining the possible interpretations of the text, as it has been enacted. This however should never be done by examining the provision in question in isolation. Rather, it should be undertaken having due regard to the context of that text within the written law as a whole.

(b) Second, ascertaining the legislative purpose or object of the statute. This may be discerned from the language used in the enactment; ... it can also be discerned by resorting to extraneous material in certain circumstances. In this regard, the court should principally consider the general legislative purpose of the enactment by reference to any mischief that Parliament was seeking to address by it. In addition, the court should be mindful of the possibility that the specific provision that is being interpreted may have been enacted by reason of some specific mischief or object that may be distinct from, but not inconsistent with, the general legislative purpose underlying the written law as a whole. ...

(c) Third, comparing the possible interpretations of the text against the purposes or objects of the statute. Where the purpose of the provision in question as discerned from the language used in the enactment clearly supports one interpretation, reference to extraneous materials may be had for a limited function—to confirm but not to alter the ordinary meaning of the provision as purposively ascertained...¹⁰⁹

Thus, to ascertain the legislative purpose of the statute, the starting position is to consider the language of the statute.¹¹⁰ However, this approach does not seem to be practicable for many provisions¹¹¹ of the Competition Act. As an example, it is difficult to establish the underlying legislative objective of section 34 of the Competition Act merely from the structure and language of the legislation. The bifurcated structure of section 34 as a liability-imposing provision, and the corresponding Net Economic Benefit exception¹¹² allows for at least two competing inferences insofar as its underlying objectives are concerned. Odudu¹¹³ has argued that if the primary objective

¹⁰⁷ Indeed, we do not observe a similar statutory requirement in both the US and the EU. In the UK, purposive interpretation was only definitively accepted by the House of Lords in 1993 pursuant to *Pepper v Hart* [1993] AC 593 (HL). However, the principle would only hold when the traditional methods of statutory construction were in doubt or would result in an absurdity. Prior to this, there was a self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation.

¹⁰⁸ [2017] 1 SLR 373 (CA) [*Ting Choon Meng*].

¹⁰⁹ Although Menon CJ rendered a dissenting opinion in the SGCA decision of *Ting Choon Meng*, his three-step framework has been affirmed by the SGCA in subsequent cases, such as *Tan Cheng Bock v AG* [2017] 2 SLR 850 (CA), and more recently in *PP v Lam Leng Hung* [2018] 1 SLR 659 (CA) [*Lam Leng Hung*].

¹¹⁰ *Lam Leng Hung*, *ibid* at para 167.

¹¹¹ This includes provisions that establish liability.

¹¹² *Competition Act*, *supra* note 16, Third Schedule.

¹¹³ O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford: Oxford University Press, 2006) at 128-129.

of Competition Law is to enhance economic efficiency, then the scope of Article 101(1) TFEU should be concerned with allocative inefficiencies. Any analysis under Article 101(3) TFEU would thus focus on countervailing productive efficiencies that offset the allocative inefficiencies in Article 101(1). On the other hand, Monti¹¹⁴ has argued that the TFEU is consistent with a pluralistic approach to Competition Law. In his opinion, Article 101(1) is ordoliberalist in nature, but the Net Economic Benefit exception allows efficiency considerations to trump such ordoliberalist objectives under certain narrow circumstances defined in Article 101(3).

As the structure of the Competition Act is consistent with multiple plausible inferences as to its underlying objectives, one would have to resort to extraneous materials to discern Parliament's intentions for the purpose of clarifying or confirming the meaning of a statutory provision, pursuant to section 9A(2)(a) of the IA.¹¹⁵ As noted by the Singapore Court of Appeal ("SGCA") in *PP v Lam Leng Hung*,¹¹⁶ these materials include legislative developments that occurred at or around the time when the Act in question was being promulgated. The point may be stressed that Competition Law, like any other area of commercial law in Singapore, does not belong to a *sui generis* category and has to be interpreted in light of the objectives that the Singapore Parliament chose to adopt in drafting the Competition Act.

Furthermore, Singapore's Competition Regime has a relatively short history compared to similar regimes in the US and EU. As expounded earlier, the US and the EU have a long history of Competition Policy, with significant changes in the countenanced objectives that drive those Competition Regimes over time. In such regimes, a renewed thrust to interpret provisions in light of a fidelity to the "drafter's intention" may not only be politically unacceptable, but also disruptive to existing case law expounded by antitrust authorities. As a relatively late adopter of Competition Law, however, Singapore's Competition Regime does not come beholden with such historical baggage. In adopting its Competition Regime, one has to recognise that Singapore Government carried out a "deliberate and far-ranging examination of other Competition Policy systems".¹¹⁷ As we will discuss in sub-section (4), the deliberate structural modifications made to the Anglo-European Competition Law framework on which the Competition Act was modelled after will merit greater scrutiny.

3. *The legislative objectives of Singapore's competition regime*

(a) *A brief history*: The genesis of the competition rules in Singapore began with two key driving forces. The first was that of the Economic Review Committee ("ERC") Report¹¹⁸ in 2003, which proposed that generic Competition Law would prove beneficial in encouraging the growth of private enterprise in markets that were traditionally dominated by large and resource-rich Government-linked-companies. The second was that of the bilateral Free-Trade Agreement between the US and Singapore ("USSFTA"), which required Singapore to "adopt measures [proscribing]

¹¹⁴ See Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007) at 25-26 for an alternative inference from the structure of the then Art 81 of the EC Treaty.

¹¹⁵ *Lam Leng Hung*, *supra* note 109 at para 71.

¹¹⁶ *Ibid* at para 170.

¹¹⁷ Ong, *Origins*, *supra* note 22 at 280.

¹¹⁸ Economic Strategies Committee, *supra* note 78.

anti-competitive business conduct with the objective of promoting economic efficiency and consumer welfare¹¹⁹” to prevent private enterprises from engaging in anti-competitive conduct that would subvert bilateral trade and investment.¹²⁰

After extensive comparative studies were made of Competition Regimes in other commonwealth nation-states,¹²¹ the Ministry of Trade and Industry decided to model the Competition Act 2004 after the UK Competition Act 1998, which was in turn modelled after the EU Competition Rules.

(b) *Second reading of the Competition Bill*: For advocates of non-efficiency objectives, the ERC Report provided some indication of the adoption of these objectives in justifying the enactment of a generic Competition Law by suggesting that a generic Competition Law should be enacted to “create a level playing field for businesses, big and small, to compete on an equal footing”. In the EU, “competition on the merits” or the conception of “fair competition” has often been associated with the ordoliberalist protection of individual economic freedom.¹²² On the other hand, an economic, welfarist approach sits uncomfortably with this notion of “fair competition”, as it is only the ultimate effect of business conduct on economic welfare, and not the process of “fair” competition that matters.

This notion was subsequently superseded by more explicit references to the welfarist objectives of Competition Policy. In the Second Reading of the Competition Bill leading to the enactment of the Competition Act 2004, the then Senior Minister of State for Trade and Ministry, Dr Vivian Balakrishnan, explicitly stated that the “objective of the Bill was to promote the efficient functioning of our markets and hence enhance the competitiveness of our economy”.¹²³ There was no mention of other non-efficiency considerations that would drive the protection of the competitive process.

Following Dr Vivian Balakrishnan’s speech, a Member of Parliament, Mr S Iswaran elaborated on what Dr Balakrishnan had expounded earlier:

“... we think [the] objectives [of the Competition Bill] are laudable. It seeks to protect and promote the competitiveness of the Singapore economy as a whole. *This will ensure efficient allocation of resources, productivity and ultimately higher economic growth for Singapore.* At the same time, through this process, it will also accrue benefits to the consumers and businesses in Singapore. At the outset, Sir, we think we need to be clear. *Competitiveness does not equate with competition.* The key element here is in facilitating a competitive economy, the critical ingredient is what some have called “contestability”. In other words, whether there is one, a few or many players in a given market, it is the potential and actual competition. In other words, the competition from the existing players in the market *and also the potential for new entrants to come in and lead really ensure a competitive framework.* And it is important that, in that regard, when we

¹¹⁹ See Article 12.2(1) of the USSFTA. The influence of the unitary goal framework that contemporary US antitrust policy adopts is clearly observable in this clause.

¹²⁰ *Supra* note 117.

¹²¹ *Supra* note 118.

¹²² See Ulf Adolphson, *Article 102 TFEU, Aimed at Serving the Ordoliberal Agenda or European Consumers?* (Uppsala: Uppsala Universitet, 2010).

¹²³ *Parliamentary Debates Singapore: Official Report*, vol 78 at cols 863-870 (19 October 2004) (Dr Vivian Balakrishnan).

look at any market-related issues and competition, this be borne in mind. *Ultimately, the objective is fair competition and it is not to protect individual players or competitors in the market.*¹²⁴

Mr Iswaran noted that the concept of “competitiveness” was not the same as the concept of “competition”¹²⁵—a market with limited to no competition could nevertheless be contestable should conditions be amenable for firm entry. The Competition Regime in Singapore aims to preserve the contestability of markets, but not the process of competition *per se*. This goes against the argument that the individual economic freedom of firms and consumers to market participation was a social good to be protected as an end in itself. Importantly, an *instrumentalist* approach to Competition Law was countenanced¹²⁶—Competition Law in Singapore is only useful insofar as it aids in enhancing market efficiency. Indeed, in Singapore’s context, the notion of “fair competition” may be analogous to business conduct that does not detract from the efficiency functioning of markets in Singapore. Citing Mr S Iswaran’s speech with approval, Dr Balakrishnan noted that:

“... I was struck by Mr Iswaran’s point that competition does not equal competitiveness. It is worth reflecting on this because the purpose of this piece of legislation is to ensure that we have an *efficient functioning market in Singapore* and, ultimately, a competitive economy with competitive firms. Merely creating the forms of competition is not sufficient. *And, in fact, although this is called the Competition Act, we must remember that this is a means to an end.*¹²⁷”

This repudiation of the achievement of the competitive process as an independent social good to be pursued by the antitrust authorities was perhaps the clearest indication of Singapore’s legislative intention to use Competition Policy as an instrumental tool to promote economic efficiency as the predominant objective over other competing goals.

(c) *The Enterprise Singapore Board Act and the CCCS*: On 1 April 2018, the Competition Commission of Singapore was renamed pursuant to the Enterprise Singapore Board Act.¹²⁸ The legislative amendments house both competition and consumer protection policies under a single agency, the Competition and Consumer Commission Singapore (“CCCS”).¹²⁹ Previously, consumer protection policies were undertaken by the Enterprise Singapore Board. This recent merger is a departure from the position which Singapore previously took, which was to adopt a dual agency design in

¹²⁴ *Parliamentary Debates Singapore: Official Report*, vol 78 at cols 872-874 (19 October 2004) (Mr S Iswaran).

¹²⁵ See Tan, *supra* note 87. The author suggests that “Pragmatists are willing to adopt any means as long as the ends are successfully achieved through these means. *‘The ends justify the means’* is the basic principle behind Singapore’s results-orientated policies and decisions. Often, this means that the focus is on exercising technical and instrumental reason to formulate and implement solutions, while the outcomes and goals are kept beyond the horizon of critical reason”.

¹²⁶ *Ibid.*

¹²⁷ *Parliamentary Debates Singapore: Official Report*, vol 78 at cols 905-907 (19 October 2004) (Dr Vivian Balakrishnan).

¹²⁸ Bill No. 3/2018, *Enterprise Singapore Board Bill*, 1st Sess, 13th Parl, 2018.

¹²⁹ Following the amendments in 2018, the CCCS now administers both the Competition Act and the *Consumer Protection (Fair Trading) Act* (Cap 52A, 2009 Rev Ed Sing) [CPFTA]. See the *Enterprise Singapore Board Act* (No 10 of 2018, Sing), ss 68-69 for the amendments.

the area of competition and consumer protection laws, given that there are different economic issues underpinning each policy.¹³⁰ A closer look at the 2018 amendments reveal that the Consumer Protection role undertaken by the CCCS is a limited one. Given its limited nature, we argue that the new role is unlikely to conflict with CCCS' existing role as a competition watchdog.

Dual agency designs may lead to clashes in the different objectives underpinning Competition and Consumer Protection Policies, by way of regulatory conflict. Regulatory conflict arises, where regulatory powers are vested in the agency,¹³¹ and the creation of regulations for one objective is at the expense of the other.¹³² For example, where consumers may be willing to settle for lower quality goods or services, consumer protection by way of mandatory standards may unduly inhibit competition as firms are no longer able to compete on such parameters. Other classic cases include prohibitions on comparative advertising, and transparency and posted price requirements which may facilitate collusion. Under the 2018 amendments, the CCCS is only given investigation and enforcement powers under Part IIIA of the Consumer Protection (Fair Trading) Act ("CPFTA") to address unfair practices suffered by consumers. Furthermore, the CCCS is not given regulatory powers, and the power to create consumer protection regulation is vested in the Minister under the CPFTA. Given that the unfair practices prohibition is only a limited one under the CPFTA,¹³³ and that CCCS is unable to expand the prohibitions, we would argue that the risk of regulatory conflict is exceedingly minor.

A critical question remains as to whether the amendments to the Competition Act have altered the objectives which the Singapore competition regime seeks to achieve. We argue that it does not. The amendments to the Competition Act largely relates to the advocacy role which CCCS performs, vis-à-vis its role as a Competition and Consumer Protection "watchdog".¹³⁴ While sections 6(1)(ea)-(ec) of the Competition Act *prima facie* include the promotion of fair trading practices and the prevention of suppliers in Singapore from engaging in unfair practices, the actual powers are conferred and limited by the CPFTA. These amendments do not alter any other provisions in the Competition Act, and it is submitted that as such, consumer protection considerations are not imported into the Competition Act via the 2018 amendments.

4. Inferences from the structure and wording of the Competition Act

Through examining the structure and wording of the Competition Act, we also draw inferences to suggest that the predominant objective of Singapore's competition regime is that of promoting economic efficiency. Such inferences are drawn from the

¹³⁰ See the written submissions of Singapore in Global Forum on Competition, *The Interface between Competition and Consumer Policies*, DAF/COMP/GF(2008)10 (Paris: February 2008).

¹³¹ Eg, the Federal Trade Commission, which has rule-making powers under the FTC Act to prohibit or mandate actions to address other proscribed conduct. For a discussion of the FTC's role as a regulator, see William E Kovacic, *The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices* (Washington DC: Federal Trade Commission, 2009) at 124-127.

¹³² Global Forum on Competition, *supra* note 130 at 20.

¹³³ An "unfair practice" is defined under section 4 of the CPFTA, and includes conduct specified in the Second Schedule.

¹³⁴ Section 6(1)(f) of the Competition Act provides for the CCCS' advisory role on competition and consumer protection matters.

deliberate and systemic exclusion of non-efficiency objectives that animate certain features of EU Competition Policy.

EU Competition Law requires defendants who claim a defence of a “net economic benefit” to an alleged infringement of Article 101(1) TFEU to prove that consumers receive a “fair share” of the resulting benefits. This underlies the consumer welfare-oriented approach in the EU that prioritises consumer welfare over producer welfare. The EC has noted that the positive effects arising from a prima facie anti-competitive agreement must partially compensate for the negative effects on consumers such that they are not in a worse-off position.¹³⁵

Despite the similarity in statutory wording with the EU provision, Singapore has deliberately removed the specific requirement of consumers receiving a fair share of efficiency benefits from its equivalent defence of a “net economic benefit” in the Third Schedule of the Competition Act.¹³⁶ This was a deliberate attempt to preclude considerations of distributive justice from the overview of Singapore’s antitrust enforcers. In *Abuse of Dominant Position by SISTIC.com Pte Ltd*, the CCCS noted that:

“... [g]iven that the competition policy in Singapore adopts the total welfare standard instead of the consumer welfare standard, the [C]CCS has renamed the OECD’s ‘consumer welfare balance’ test as ‘proportionality’ test to reflect the policy difference”.¹³⁷

The treatment is similar for other specific areas of Singapore Competition Law. In the EU, vertical restraints are often treated with suspicion due to their potential to divide the single market along territorial lines. These considerations do not hold weight in Singapore. This may have led to the blanket exemption of all vertical restraints, unless otherwise specified by the Minister for Trade and Industry, from the section 34 prohibition in the Competition Act.¹³⁸ The rationale for the exclusion of these restraints from overview has been explicitly stipulated by the CCCS to be based on efficiency considerations¹³⁹:

“... Vertical agreements, as defined in the Third Schedule to the Act (“the Third Schedule”), are excluded from the section 34 prohibition in the first instance... In

¹³⁵ *Supra* note 42.

¹³⁶ The purview of consumer protection in Singapore was instead passed to that of another Government agency, the Standards, Productivity and Innovation Board [SPRING]. On 15 August 2016, the *Consumer Protection (Fair Trading) (Amendment) Bill* (“Amendment Bill”) was introduced for first reading in Parliament. The amendments proposed by the Ministry of Trade and Industry seek to strengthen the civil measures that may be taken under the CPFTA against errant retailers who persist in unfair trading practices and attempt to side-step injunction orders. The main amendments in the Amendment Bill relate to the appointment of the SPRING as the administering agency for the CPFTA as well as relating to SPRING’s and the Courts’ powers in the administration of the CPFTA. Although the purview of consumer protection in Singapore is now managed by the CCCS, we submit that there has been no subsequent change to the scope of the Competition Act, see Part III(B)(3)(C) above.

¹³⁷ [2010] SGCCS 3 at 111 [*SISTIC Infringement Decision*].

¹³⁸ Section 34 of the Competition Act is Singapore’s equivalent of Article 101 TFEU in the EU.

¹³⁹ See Competition and Consumer Commission of Singapore, “CCCS Guidelines on the Section 34 Prohibition” (Singapore: CCCS, 1 December 2016) at 2.12-2.14.

general, vertical agreements have pro-competitive effects that more than outweigh the potential anti-competitive effects.¹⁴⁰

A similar observation arises in the section 47 prohibition against abuses of a dominant position. In contrast to its Singapore counterpart, non-exhaustive examples of possible abuses of dominance are explicitly provided for in the wording of Article 102 TFEU. The first example, (a), reads that

“... abuse, may, in particular, consist in: (a) directly or indirectly imposing *unfair* purchase or selling prices or other *unfair* trading conditions”.

Due to the emphasis on “fairness” in the explicit wording of the example, it is often categorised in antitrust scholarship as an instance of “exploitative” abuse.¹⁴¹ Many scholars have argued that the essence of exploitative abuses of dominance is that of the protection of individual economic freedom, as the latter provides a benchmark for the justification of “unfair” terms of trade.¹⁴² However, it is clear that the example sits uncomfortably with the objective of promoting economic efficiency. The deliberate exclusion of this example has led commentators¹⁴³ to suggest that Singapore’s Competition Regime does not encompass “exploitative” abuses of dominance, but only encapsulates “exclusionary” abuses of dominance, which are associated with negative effects on total welfare. Again, this buttresses the argument that Singapore’s Competition Regime places a substantial emphasis on the promotion of economic efficiency.

IV. THE CASE LAW FROM SINGAPORE’S ANTITRUST ENFORCERS: FORMALISM AT HAND

Our analysis in Part III raises a logical corollary—if there is indeed a normative case for why the antitrust authorities in Singapore should prioritise the objective of economic efficiency over other competing objectives, then antitrust authorities in Singapore should exercise considerable caution in endorsing the application of EU law in individual cases. Many of the substantive rules in contemporary EU Competition Law are informed by non-efficiency objectives¹⁴⁴ that are unique to the EU context, and may not be suitable for direct importation into Singapore.

However, despite more than ten years of enforcement of the Competition rules in Singapore, the adoption of EU case law as persuasive authority in various infringement decisions by Singapore’s antitrust authorities has proceeded on a largely

¹⁴⁰ Ong, *Origins*, *supra* note 22. Ong’s argument that the generous attitude towards vertical agreements may also be attributed to the “Government’s desire to reduce regulatory costs” is not entirely persuasive. If there was indeed a desire to reduce regulatory costs given the breadth of agreements covered by a prohibition regulating vertical restraints, the Ministry of Trade & Industry could have easily created “safe harbours” that preclude liability for the vast majority of vertical restraints that do not restrict competition. Furthermore, most multi-national corporations are likely to have operations in both the US and EU where vertical restraints come under further antitrust scrutiny. The reduction in regulatory costs created by a blanket exemption in the Singapore market alone would have been rather minimal.

¹⁴¹ Jones & Sufrin, *supra* note 29 at 351-352.

¹⁴² Adolphson, *supra* note 122.

¹⁴³ See Cavinder Bull and Lim Chong Kin, eds, *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2011).

¹⁴⁴ *Eco Swiss China*, *supra* note 57.

methodical basis. Notably, there has been no explicit recognition of the objectives that Singapore's Competition Policy ought to pursue in any of the infringement decisions thus far. As a starting point, in contrast to early proclamations that claim otherwise,¹⁴⁵ a typical infringement decision by the CCCS would cite a line of EU and UK precedents with approval and proceed to apply them directly to the facts at hand, without further reasoning as to why the foreign precedent was "applicable to the local context and facts" in relation to the current case.¹⁴⁶

The heavy reliance on EU case law as persuasive authority has resulted in what antitrust scholars have termed a "formalistic" approach to Competition Law—liability is often established pursuant to presumptions of law that allow the authorities to infer liability upon proof of certain conduct. The "formalistic" approach stands in contrast to its "effects-based" counterpart, where the authorities are required to establish actual anti-competitive effects in the relevant market. As a formalistic approach focuses on the form of the challenged conduct rather than on its actual effects in the market,¹⁴⁷ conduct will be *prima facie* anti-competitive¹⁴⁸ should it fall within an established category of liability. In Section A, we lay out the case against formalism pursuant to a welfarist approach, and explain how excessive formalism may cause economic inefficiency. In Sections B, C, and D, we attempt to identify elements of Singapore's competition regime that are overtly formalistic, and provide specific details on these problematic aspects of Singapore's competition regime.

A. The Case Against Formalism

A presumption of law mandates the trier of fact¹⁴⁹ to assume, upon proof of the primary fact to the requisite standard of proof, that the secondary fact is true; unless the counterparty facing the presumption can prove otherwise. Presumptions of law have two implications. First, a presumption of law may enable the trier of fact to draw an inference that he would otherwise not have drawn without the presumption. Secondly, because of its mandatory nature, upon proof of the primary fact to the relevant standard, the trier of fact is not allowed to depart from the necessary inference of the secondary fact unless the counterparty is able to prove otherwise. This holds even if the trier of fact would ordinarily make an inference that the secondary fact does not exist.¹⁵⁰ In the context of Competition Law, certain procedural rules may

¹⁴⁵ In *Re Certain Pest Control Operators in Singapore* [2008] SGCCS 1 [*Pest Control Services*], the CCCS noted at para 37 that "the value of any foreign competition cases will depend very much on the overall context and the extent to which the facts of such cases are applicable to the local context and the facts of the present case".

¹⁴⁶ We note that the critique here is limited to the lack of reasoning contained within CCCS's decisions—it does not amount to a claim that CCCS has erroneously applied case law that is unsuitable given the local context of the case.

¹⁴⁷ A formalistic approach also tends to favour rigid rules over a more flexible and context specific standards that weigh competing interests.

¹⁴⁸ The undertaking may ultimately escape liability if it is able to adduce evidence to rebut the presumption pursuant to the relevant standard of proof.

¹⁴⁹ In the context of Singapore's Competition Regime, the CCCS, CAB and the Singapore courts assume the role of trier of fact.

¹⁵⁰ See I H Dennis, *The Law of Evidence* (London: Sweet & Maxwell, 2007).

impose further restrictions on the nature and type of evidence that the counterparty may adduce to rebut the presumption.

The nature of legal presumptions (in favour of competition authorities) increases the probability of a wrongful characterisation of pro-competitive or neutral conduct as anti-competitive conduct. In such a situation, the trier of fact commits a “Type I” error, also known as a “false positive”.¹⁵¹ In contrast, if anti-competitive conduct is wrongly characterised as neutral or pro-competitive conduct, the trier of fact commits a “Type II” error, known as a “false negative”.¹⁵² Pursuant to a welfarist competition regime, all procedural rules should minimise the sum of the welfare costs caused by Type I errors and Type II errors, as well as the costs of the application of the rules.¹⁵³ Importantly, this involves a trade-off between the incidence and magnitude of the consequences following a Type I error vis-à-vis its Type II counterpart—an issue that has sparked massive debate in the antitrust community.

Historically, US Antitrust Law has erred on the side of under-enforcement—the prevention of Type I errors. As Justice Easterbrook¹⁵⁴ argues, anti-competitive effects that escape condemnation will usually be eroded by the market, but the pro-competitive benefits of an incorrectly prohibited action will be lost forever.¹⁵⁵ He also argues that as most forms of collaborative behaviour are efficient, a trier of fact who categorically refuses to condemn such alleged conduct is more likely to be right than wrong.¹⁵⁶ Such views, stemming from the “Chicago School¹⁵⁷” have been remarkably influential in the development of Antitrust Law in the US—many US Courts,¹⁵⁸ Antitrust Enforcement Agencies, and academics have all adopted a bias in favour of tolerating Type II errors. However, Judge Easterbrook’s arguments depend on various underlying assumptions that are both context and fact specific.¹⁵⁹ For example, Justice Easterbrook argues that collusive industries have mostly short lives and that markets are self-correcting, so intervention is often unnecessary in returning the market to an efficient equilibrium.¹⁶⁰ However, these features may not hold true for certain jurisdictions, nor may they hold true for certain industries.¹⁶¹

Christiansen and Kerber¹⁶² illustrate that it is not sufficient to justify a rule of reason approach (which leads to relatively more Type II errors) over a *per se* approach (which leads to relatively more Type I errors) merely where a certain category of

¹⁵¹ Jones & Sufrin, *supra* note 29 at 59.

¹⁵² *Ibid.*

¹⁵³ See Daniel L Rubinfeld, “Econometrics in the Courtroom” (1985) 85 Colum L Rev 1048.

¹⁵⁴ See Frank H Easterbrook, “Limits of Antitrust” (1984) 63 Tex L Rev 1.

¹⁵⁵ *Ibid* at 6. In other words, Justice Easterbrook argues that the social/welfare costs that follow false positives are likely to be more severe than similar costs following false negatives. This follows the typical reasoning justifying the presumption of innocence in Anglo-American jurisprudence, although the presumption of innocence may be legitimised by moral reasons as well.

¹⁵⁶ *Ibid* at 3.

¹⁵⁷ R A Posner, “The Chicago School of Antitrust Analysis” (1979) 127(4) U Pa L Rev 925.

¹⁵⁸ *Eg, Verizon Communications Inc. v Trinko LLP*, 540 US 398 (2004).

¹⁵⁹ Alan Devlin and Michael Jacobs, “Antitrust Error” (2010) 52 Wm & Mary L Rev 75.

¹⁶⁰ Easterbrook, *supra* note 154 at 5.

¹⁶¹ Lewis has argued that the historical performance of dominant firms and monopolised markets in South Africa do not reflect the self-correcting nature of markets in the US. See Barry E Hawk, “International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment” (1982) 51 Fordham L Rev 201.

¹⁶² See Christiansen, Arndt, and Kerber, “Competition Policy with Optimally Differentiated Rules Instead of ‘Per Se Rules vs Rule of Reason’” (2006) Journal of Competition Law and Economics 215.

business conduct has both positive and negative economic effects.¹⁶³ Rather, the optimal rule to be adopted depends on the costs of enforcing such a rule, the relative incidence of cases where such conduct has more positive than negative effects,¹⁶⁴ and the relative magnitude of the consequences following a “wrongful conviction”¹⁶⁵ vis-à-vis similar consequences following a “wrongful acquittal”.¹⁶⁶ As highlighted earlier, these are empirical facts that would depend on the context in which the rule is to be applied.

In contrast to the US Antitrust regime's concern with Type I errors, contemporary EU Competition Law seems to be far more ambivalent.¹⁶⁷ Relative to the US, EU Competition Law has traditionally erred on the side of over-enforcement. We argue that this difference is best explained by the regimes' differing views on the legitimate objectives of Competition Law.¹⁶⁸ In the US, Bork's thesis that antitrust had the sole legitimate goal of maximising economic efficiency was well received by the courts. In contrast, the EU competition regime has been far more pluralistic. In particular, as we have argued earlier, EU Competition Law has been greatly influenced by the school of Ordoliberalism.¹⁶⁹ An ordoliberal approach to Competition Law focuses on constraining private power to promote competition as an expression of economic freedom. As competition is seen as a desirable end in itself and not merely a means by which economic objectives such as efficiency are to be achieved, an ordoliberal regime would err on the side of preventing Type II errors as opposed to Type I errors—the prohibition of conduct that potentially harms the competitive process is countenanced even if it leads to positive welfare efficiencies.¹⁷⁰ This ordoliberal stance has been rightly critiqued by numerous scholars who justify the existence of Competition Law on the basis of consumer welfare and efficiency,¹⁷¹ and is antithetical to the EC's “Modernisation” reforms which bring the goals of Competition Law in line with contemporary industrial economics.¹⁷² Thus, the objection here is not directed against formalism *per se*, but rather *overt* formalism that leads to

¹⁶³ *Ibid* at 238. See also D Waelbroeck, “Vertical Agreements: 4 Years of Liberalisation by Regulation 2790/99 After 40 Years of Legal (Block) Regulation” in Hanns Ullrich, ed, *The Evolution of European Competition Law: Whose Regulation, Which Competition?* (Northampton: Edward Elgar Publishing, 2006).

¹⁶⁴ And vice-versa.

¹⁶⁵ In this setting, a “wrongful conviction” refers to an erroneous inference of prohibiting conduct with positive effects.

¹⁶⁶ In this setting, a “wrongful acquittal” refers to an erroneous inference of permitting conduct with negative effects.

¹⁶⁷ Jones & Sufrin, *supra* note 29.

¹⁶⁸ Although one might also suggest that the difference might be due to the fact that the adverse effects of over-enforcement are more serious in the US as compared to the EU, given that US antitrust laws have been structured to incentivise private enforcement.

¹⁶⁹ Möschel, *supra* note 64.

¹⁷⁰ *Continental Can*, *supra* note 15. The ECJ held that Art 102 was not only aimed at practices which may cause damage to consumers directly, but also those practices which may impact the functioning of an “effective competition structure”.

¹⁷¹ Bork, *supra* note 1.

¹⁷² *Supra* note 11. See The Computing Technology Industry Association, “Competition, Competitors, and Consumer Welfare: Observations on DG Competition's Discussion Paper on Article 82”, Comment, 2006. The author argues: “More importantly, form- and rules-based analysis by its nature cannot capture the full economic complexity of specific market dynamics and therefore risks prohibiting conduct that may promote efficiency or benefit consumers with little or no distortion to competition.”

Type I error costs which outweigh the reduction in costs achieved through both the application of bright-line rules and Type II error costs.

Given our normative case for the prioritisation of economic efficiency that was set out in Part III, we would suggest that antitrust authorities in Singapore should exercise considerable caution in endorsing formalistic principles in EU law. Indeed, in Singapore's context, it may be argued that the costs flowing from Type II errors are particularly low. As liberal trade policies allow non-domestic firms to impose competitive discipline on domestic firms attempting to exploit their market power,¹⁷³ anti-competitive effects that escape condemnation are likely to be eroded over time in such markets. In the next few sections, we will elaborate on some of the problems associated with three categories of formalistic rules that have been incorporated into Singapore's competition regime.

B. Formalism in Decisional Practice

1. Object/effect distinction in section 34

Under section 34 of the Competition Act, "agreements... and concerted practices... which have their "object or effect" the prevention, restriction or distortion of competition"¹⁷⁴ are *prima facie* prohibited. The CCCS and the CAB have adhered to EU Law in holding that the words "object or effect" are not cumulative but rather disjunctive conditions.¹⁷⁵ An agreement or concerted practice would thus be caught by section 34 if either its object or effect is the restriction of competition. Importantly, although section 34 provides several examples of "hardcore" restraints which amount to object restraints, this list is non-exhaustive and the category of object restraints is not closed. The object/effect distinction has particular significance in Singapore's competition regime. Since its inception, the CCCS has only ever prosecuted a single effects-type case under section 34 of the Competition Act¹⁷⁶—every other section 34 case has been prosecuted under the "object" limb.

A common interpretation of the disjunctive nature of the object/effect limb suggests that an object infringement presumes that the same infringement has anti-competitive effects.¹⁷⁷ Thus, if alleged anti-competitive conduct falls under the "object" limb of section 34, a restriction of competition is assumed, and the conduct

¹⁷³ See Part III of this Article. See Lewis & Hughes, *supra* note 79.

¹⁷⁴ *Supra* note 16.

¹⁷⁵ *Pest Control Services*, *supra* note 145.

¹⁷⁶ *Re Notification for Decision by Visa Worldwide Pte. Ltd. of its Multilateral Interchange Fee System* [2013] SGCCS 5 [MIF].

¹⁷⁷ *Groupement des cartes bancaires v European Commission*, C-67/13 P, at para 51 (EUR-Lex) [*Cartes Bancaires*]. The Court noted that "Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market (see, to that effect, in particular, *BNIC v Clair*, C-123/83, [1985] ECR 391 at 22). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers."

is deemed to be anti-competitive unless the defendant is able to establish that it satisfies the criterion laid out in any of the exceptions to the Third Schedule of the Act.¹⁷⁸ In accordance with this interpretation, there can be no object type infringement without an accompanying inference of effects.¹⁷⁹

Our earlier analysis suggests that formalistic rules are not necessarily inefficient. Rather, it is overt formalism that gives rise to inefficiency; where Type I error costs outweigh any countervailing benefits.¹⁸⁰ Thus, in adopting a legal test to determine the scope of the “object” limb in section 34, the CCCS should ideally consider the incidence and magnitude of Type I and Type II errors following a wrongful use of the presumption, as well as the costs in pursuing a more involved inquiry. Such an approach would necessitate a reference to economic theory, and would also require an analysis of the factual matrix at hand in determining whether the conduct in question would, *in the usual instance*, be injurious to economic welfare. Indeed, in *Cartes Bancaires*, the ECJ noted that “hardcore” restrictions such as horizontal price-fixing “may be considered so likely to have negative effects... that it may be considered redundant... to prove that they have actual effects on the market”.¹⁸¹ This is in line with a common consensus amongst economists that “naked” cartel activity, while being deleterious to competition, is also unlikely to have any countervailing benefits.¹⁸²

The extent to which the object limb should be extended to non “hardcore” conduct in the Singapore context was an issue that arose in the *Financial Advisers*¹⁸³ case. In *Financial Advisers*, 10 financial advisors were found to have infringed section 34 by object through their conduct of collectively pressurising a platform (iFAST) into withdrawing its marketing of certain insurance products through its online portal. As the alleged conduct did not fall within the usual categories of “hardcore” restraints, the CCCS had to determine whether the conduct at hand amounted to an “object” type infringement. Adopting several EU decisions, the CCCS held that:

“Second, in assessing the object of the agreement and/or concerted practice, CCS is guided by the following principles:

- (i) Infringements by object are by their very nature injurious to the proper functioning of normal competition;
- (ii) The categories of restrictions by object are not closed;
- (iii) Regard must be had to the content of the provisions of an agreement, its objectives, and the economic and legal context of which it forms a part;

¹⁷⁸ Jones & Sufrin, *supra* note 29.

¹⁷⁹ Prior to *Cartes Bancaires*, prior case-law has stated that object and effect were alternative concepts, but some interpret this as meaning not only that there can be effect without object, but also that there can be object without effects. See O Odudu, “Interpreting Article 81 (1): Object as Subjective Intention” (2001) 26(1) Eur L Rev 60.

¹⁸⁰ In other words, inefficiency arises from overt formalism when Type I error costs outweigh the reduced costs in applying bright-line rules together with the reduction in Type II error costs. See Part IV(A).

¹⁸¹ *Cartes Bancaires*, *supra* note 177 at para 51.

¹⁸² Jones & Sufrin, *supra* note 29.

¹⁸³ *Financial Advisers Penalised by CCS for Pressurising a Competitor to Withdraw Offer from the Life Insurance Market* (17 March 2016), CCS 500/003/13, online: CCS <<https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/financial-advisers-penalised-by-ccs>> [*Financial Advisers*].

- (iv) For an agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition; and
- (v) The essential legal criterion is whether the agreement or concerted practice reveals in itself a sufficient degree of harm to competition.”¹⁸⁴

Although the CCCS did endorse the leading EU case on the matter (*Cartes Bancaires*) with approval, the case suggests that the CCCS adopts an extremely broad view of the conduct that would fall under the “object” limb. The CCCS conflated two distinct tests—the “potential impact on competition” test and the “sufficient degree of harm” test, and ostensibly labelled them as being consistent with one another. However, the latter test as expounded by *Cartes Bancaires*¹⁸⁵ was a departure from the former test¹⁸⁶ adopted in earlier decisions such as *Allianz Hungaria*¹⁸⁷ and *T-Mobile*¹⁸⁸; with *Cartes Bancaires* having a much more restrictive test with regard to conduct that would fall under the object limb. The conflation suggested that an overtly formalistic rule¹⁸⁹ would determine whether conduct fell within the object limb. Indeed, a plain reading of the “potential impact on competition” test would render the “effects” limb of section 34 completely otiose, as any agreement that has an actual appreciable adverse effect on competition must necessarily also have a “potential to have a negative effect on competition”.¹⁹⁰

The practical effect of this conflation was not lost on one of the defendants, Avallis, who argued that whilst the CCCS did acknowledge the more restrictive test in *Cartes Bancaires*, it did not apply the test to this case.¹⁹¹ Rejecting this submission, the CCCS noted the content and objectives of the conduct, as well as the “relevant context” in which the conduct operated. It stated that there was a cooperative effort to pressurise iFAST into withdrawing a competitive offer, and that the Parties were concerned that their own customers would switch to iFAST. Furthermore, the CCCS noted that each party contributed significantly to iFAST’s gross revenues and was in a position to pressurise iFAST. The CCCS thus concluded that this analysis was sufficient to establish that the conduct “revealed in itself a sufficient degree of harm to competition”.¹⁹²

It is submitted that this analysis was problematic for many reasons. As Advocate General Wahl has stated in his Opinion, “only conduct whose harmful nature is proven and easily identifiable, in the light of *experience* and *economics*, should therefore be regarded as a restriction of competition by object”.¹⁹³ In order to justify the use

¹⁸⁴ *Ibid* at para 89.

¹⁸⁵ *Cartes Bancaires*, *supra* note 177 at para 58. The ECJ held that the General Court had erred in law when it concluded that the object restrictions should not be interpreted restrictively.

¹⁸⁶ This is the formulation adopted in *T-Mobile Netherlands BV*, C-8/08, [2009] ECR 0000 at para 31 [*T-Mobile*], and *Allianz Hungaria Biztosító Zrt.*, C-32/11 at para 38 (EUR-Lex) [*Allianz Hungaria*].

¹⁸⁷ *Ibid*.

¹⁸⁸ *T-Mobile*, *ibid*.

¹⁸⁹ *Ie*, the test expounded in *T-Mobile* and *Allianz Hungaria*.

¹⁹⁰ See the Opinion of Advocate General Wathelet in *Toshiba Corporation v Commission*, C-373/14 at para 60 (EUR-Lex) and B Y Wong, “Object Restrictions in Singapore Competition Law” [2017] Sing JLS 169 at 182.

¹⁹¹ *Financial Advisers*, *supra* note 183 at para 196.

¹⁹² *Ibid* at paras 193-195 and 197.

¹⁹³ Opinion of Advocate General Wahl in *Cartes Bancaires*, *supra* note 177 at para 56.

of the presumption,¹⁹⁴ reference to economic theory and the factual matrix should have been undertaken as to whether a cooperative effort to pressurise iFAST would have been anti-competitive in the *usual instance*. A cursory examination of the facts suggests that the answer would have been in the negative. Unlike the typical hardcore restriction where an agreement to sustain a supra-competitive price is well supported by the economic literature on repeated games,¹⁹⁵ it is unlikely that the conduct at hand could be characterised as analogous to such instances of explicit collusion. As a starting point, the conduct would have clearly amounted to explicit collusion if the CCCS was able to characterise the conduct as a collective boycott by the undertakings involved.¹⁹⁶ In other words, if there was an established and credible threat that the financial advisory undertakings would pull out their businesses from iFAST if it had not agreed to withdraw its competitive offer for insurance products,¹⁹⁷ there would be good reason for classifying the conduct as an object restriction. This did not reflect the situation in *Financial Advisers*. Firstly, the threat of “pulling out existing businesses” was not credible. An iFAST employee provided a statement to the effect that the withdrawal of the competitive offer was due in part to iFAST’s own subjective opinion that the collective negative reaction would lead to the “FAs not giving them business[es] or deciding to pull out existing business[es]”.¹⁹⁸ There was no objective evidence to suggest that there was a common commitment to withdraw from the iFAST platform should it have refused to accede to the undertakings’ demands. Secondly, there was no “punishment” mechanism in place to disincentivise any of the undertakings from deviating vis-à-vis the collective effort. While the undertakings were motivated by a common interest that iFAST withdraw its competitive offer from the relevant market, we do not observe any evidence to the effect that the concertation was held in place by a threat of reversion to strong competition.¹⁹⁹ Indeed, it is difficult to see how a cooperative effort to pressurise a platform would have been anti-competitive in the *usual instance* without the aforementioned features of a collective boycott—the factual matrix should have been analysed pursuant to a full-blown effects analysis.

One further point may be made. Unlike the typical instance of “naked” cartel activity which is deleterious to competition without any countervailing benefits,²⁰⁰ the conduct here had a significant pro-competitive aspect that was not considered in CCCS’ decision. The relevant product market here involved the distribution of insurance products through various financial advisors and other distribution channels. Consider the alleged anti-competitive restriction—the collective effort to “pressurise” iFAST into withdrawing its offering of insurance products on its online portal. The undertaking financial advisors were particularly concerned

¹⁹⁴ Pursuant to the objective of maximising economic efficiency, as laid out above.

¹⁹⁵ Fudenberg & Tirole, *supra* note 37.

¹⁹⁶ See EC, Commission, *Guidance on Restrictions of Competition “By Object” for the Purpose of Defining Which Agreements May Benefit from the De Minimis Notice* (Brussels: EC, 2014).

¹⁹⁷ It is important to note the parameter of competition on which the firms would collude in this case. Here, each undertaking would have colluded on a common course of action (instead of a common price) – the removal of its individual business from iFAST.

¹⁹⁸ *Financial Advisers*, *supra* note 183 at para 239.

¹⁹⁹ Pursuant to the conventional economic theory on repeated games, a collusive equilibrium is sustained by an implied threat of reversion to strong competition. See Fudenberg & Tirole, *supra* note 37.

²⁰⁰ Jones & Sufrin, *supra* note 29.

that iFAST would “free-ride” on its investments in providing advisory services for potential policyholders. As an employee of one of the defendants pointed out:

“Although the customer segment for Fundsupermart is different from FAs’ customer segment, but with a 50% rebate, customers can get advice from FAs and then go to purchase life insurance products from Fundsupermart for the 50% rebate. FAs then receive nothing for providing advice.”²⁰¹

Nevertheless, the CCCS did not address the validity of these arguments. It argued that alternative objectives are “irrelevant... in assessing whether the conduct has as its object the restriction of competition in Singapore.”²⁰² We do not see why this should be the case. Under a welfarist approach, alternative objectives that lead to pro-competitive effects should be considered as part of the analysis as they directly affect the magnitude of Type I error costs.²⁰³

The ambit of the “object” limb beyond the typical “hardcore” restrictions was also considered in “information sharing” type cases, where the parties were alleged to have entered into anti-competitive disclosures of price-sensitive information to which the CCCS objected. In *Batam Ferry Operators*,²⁰⁴ two ferry service providers shared confidential commercial information including, *inter alia*, price quotations for ferry tickets sold to travel agents with each other. While it is difficult to critique the final outcome of the case on its facts *per se*, the legal test for whether an instance of information exchange would amount to an “object-type” infringement was deeply troubling. Citing *T-Mobile*²⁰⁵ with approval, the CCCS noted that:

“It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.”²⁰⁶

²⁰¹ *Financial Advisers*, *supra* note 183 at para 120.

²⁰² *Ibid* at paras 90 and 209.

²⁰³ It may be argued that the firms should have pleaded that their conduct fell under the “Net Economic Benefit” exception under the Third Schedule of the Competition Act. However, as Jones argues in A Jones, “Left Behind by Modernisation? Restrictions by Object Under Article 101(1)” (2010) 6(3) Eur Competition J 649, the burden of proof that the firm has to discharge under the “Net Economic Benefit” exception is non-trivial; and requires proof of a series of onerous requirements—including (i) substantiated efficiencies by showing the nature of the claimed efficiencies, the link between the agreement and the efficiencies, the likelihood and magnitude of each claimed efficiency, and how and when each claimed efficiency would be achieved, (ii) that the restrictive agreement as such is reasonably necessary in order to achieve the efficiencies and that the individual restrictions of competition that flow from the agreement are reasonably necessary for the attainment of the efficiencies; and (iii) that the agreement as a whole must not lead to the elimination of competition. Indeed, the difficulty of discharging the burden of proof in an overtly formalistic regime will not result in a substantial amelioration of “false positives” or Type I errors (wrongful condemnations).

²⁰⁴ *CCS Imposes Financial Penalties on Two Competing Ferry Operators for Engaging in Unlawful Sharing of Price Information* [2012] SGCCS 3 [*Batam Ferry Operators*].

²⁰⁵ *T-Mobile*, *supra* note 186.

²⁰⁶ *Batam Ferry Operators*, *supra* note 204 at para 66.

As Meyring²⁰⁷ notes with concern, the “capable of removing uncertainty” test is extremely broad. On a plain reading of the phrase, any concerted practice that amounted to an “effects-type” infringement would also be capable of removing uncertainty between the undertakings—thereby rendering the “effects” limb otiose. Putting this reading of the test aside, however, we argue that the test has little relation as to the pertinent issue at hand—whether information in question would, in the usual instance, be injurious to economic welfare. Indeed, insofar as information exchange is concerned, there are many factors that should be considered in determining the risk of anti-competitive harm. Bennett and Collins,²⁰⁸ for example, argue that the private sharing of disaggregated, confidential information relating to future pricing or output decisions between competitors would clearly militate towards prohibition under the “object” limb. However, none of these factors were considered in the legal test under *T-Mobile*.

2. Parties to an agreement and the duty of public distancing

Presumptions of law take on an additional dimension in EU Competition Law. Properly characterised, some of the procedural rules associated with EU Competition Law go even further than usual presumptions of law by prescribing only *one* mode of rebuttal for the undertaking in question once the EC has proved the primary fact to the relevant standard. In a series of cases pursued under section 34 of the Competition Act,²⁰⁹ the CCCS has endorsed some of these rules with approval. One such set of rules relates to the EU doctrine of “public distancing”²¹⁰. The doctrine of public distancing presumes that an undertaking has subscribed to an anti-competitive initiative once the competition authority has proved its attendance at a meeting at which an anti-competitive agreement is concluded, unless the undertaking is able to adduce evidence of its “firm and unambiguous” disapproval of the initiative. In *Batam Ferry Operators*, the CCCS noted that:

“CCCS is of the view that contact between competitors which would erode the independence of individual undertakings, may take the form of discussions on such issues during meetings, in tele-conversations, and via e-mail communications. So long as information is clearly and unequivocally communicated, it is indistinguishable for the purposes of establishing liability how the communication took place. In line with case law, *liability can be attributed even where a party is a mere recipient of the information, unless the party distances itself from the unlawful initiative.*”²¹¹

²⁰⁷ Bernd Meyring, “T-Mobile: Further Confusion on Information Exchanges Between Competitors” (2010) 1(1) *Journal of European Competition Law and Practice* 30.

²⁰⁸ M Bennett & P Collins, “The Law and Economics of Information Sharing: The Good, the Bad and the Ugly” (2010) 6(2) *Eur Competition J* 311.

²⁰⁹ See *Batam Ferry Operators*, *supra* note 204 and *CCS Fines Capacitor Manufacturers Involved in Global Cartel for Price-fixing and Information Exchange* (5 January 2018), CCS 700/002/13, online: CCS <<https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/ccs-fines-capacitor-manufacturers-involved-in-global-cartel>> [*Aluminium Electrolytic Capacitors*], etc.

²¹⁰ For a formal exposition of the doctrine, see D Bailey, “Publicly Distancing Oneself from a Cartel” (2008) 31 *World Competition* 177.

²¹¹ *Batam Ferry Operators*, *supra* note 204 at para 52.

The doctrine of public distancing is a more specific extension of the general rule that an undertaking is not able to use its unilateral non-implementation of an agreement as a means of rebutting a presumption that an alleged instance of anti-competitive conduct has restricted competition.²¹² In *Pest Control Services*,²¹³ six companies were alleged to be involved in a bid-rigging cartel in the market for pest control services. The undertakings attempted to adduce evidence that there was no intention to implement the cartel agreement. Citing *Tréfileurope v European Commission*²¹⁴ and *Re Polypropylene*,²¹⁵ the CCCS rejected these arguments:

“In the circumstances, the Commission considers that an agreement would still be caught under the section 34 prohibition *even if it was not the intention of an undertaking so agreeing to implement or adhere to the terms of the agreement... The fact that the RH Tender was voided does not affect the Commission’s conclusion that the evidence demonstrates the existence of an agreement and/or concerted practice between PestBusters and Aardwolf to fix prices and for the latter to provide a cover bid for the RH Tender.*”²¹⁶

As to what constitutes effective “public distancing” in EU Competition Law, the CCCS has followed the EU Courts in requiring the defendant in question to alert the other participants that it had no intention to participate in the anti-competitive initiative at the meeting.²¹⁷ Importantly, the communication of this intention must be firm and unambiguous—a definition that is narrowly circumscribed. In *Westfalen v Commission*,²¹⁸ the General Court noted that “silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval”. It is insufficient for the undertaking to show that it did not put the initiatives into effect or that it had left the meeting in question.²¹⁹ Given the strict requirements that the undertaking has to fulfil in establishing an act of “public distancing”, Jones and Sufrin²²⁰ have opined that an undertaking’s failure to publicly distance itself from an anti-competitive initiative is taken to be a tacit acceptance of an offer to collude.

The overt formalism exhibited here is similar to that of the formalism associated with the “object/effect” limb in section 34 of the Competition Act.²²¹ Clearly, if an undertaking were able to evidence that it had not implemented the collusive initiative, it is extremely likely that any attempt by other undertakings to implement

²¹² See *Pest Control Services*, *supra* note 145 at paras 128-129, and also *CCS Issues Infringement Decision for Bid-rigging in Electrical Services and Asset Tagging Tenders* (28 November 2017), CCS 700/003/15, online: CCS <<https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/ccs-issues-infringement-decision-for-bidrigging-in-electrical-services-and-asset-tagging-tenders>> at para 58. Both cases cited Case T-141/89 *Tréfileurope v European Commission* [1995] ECR II-791 [*Tréfileurope*] for the identical proposition.

²¹³ *Supra* note 145.

²¹⁴ *Tréfileurope*, *supra* note 212.

²¹⁵ EC, *Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty*, [1986] OJ, L 230/1.

²¹⁶ *Pest Control Services*, *supra* note 145 at paras 128-129.

²¹⁷ *Supra* note 204.

²¹⁸ *Westfalen Gassen Nederland v Commission*, T-303/02, [2006] ECR II-4567 at para 124.

²¹⁹ *Ibid.*

²²⁰ Jones & Sufrin, *supra* note 29 at 145.

²²¹ See Part IV(B)(1) of the Article.

the initiative would have disintegrated right from the get-go.²²² However, as an undertaking is unable to use its non-implementation of an agreement to rebut the presumption, there is a very real likelihood that liability may nevertheless be imposed on a group of undertakings that have not effected any anti-competitive harm on the relevant market.

Thus, the traditional rationale for the doctrine of public distancing has an independent basis—it is posited that an undertaking's failure to publicly distance itself from an anti-competitive initiative encourages the continuation of the said initiative and compromises its discovery.²²³ In other words, “the likelihood of a cartel is seriously undermined when competitors do not give their rivals reasons to believe that they intend to subscribe to the invitation and comply by it”.²²⁴ In *Aalborg Portland AS v Commission*, the General Court noted that:

“The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.”²²⁵

The doctrine of public distancing thus presents itself as an *ex ante* policy that aims to deter *future* economic collusion. But the traditional rationale seems to rely on the assumption that firms which have no intention of engaging in anti-competitive conduct have nothing to lose by publicly distancing themselves from an anti-competitive initiative. The economic efficiency of such a presumption, however, depends very much on the highly questionable assumption that the failure to publicly distance oneself leads to the additional stability of the collusive equilibrium.²²⁶ However, there is no *a priori* reason why a firm that has attended an anti-competitive meeting should be taken to have subscribed to the anti-competitive initiative discussed there. A firm may rationally wish to attend an anti-competitive meeting to gather more information so that it is able to engage in a swift and profitable deviation once collusion commences.²²⁷

²²² In a market with homogeneous goods, it is not possible to sustain a collusive equilibrium if any single member of the collusive initiative defects—all market demand will go to the defector until the rest of the collusive initiative retaliates. The same reasoning applies to markets with differentiated goods, albeit to a lesser extent. See Fudenberg & Tirole, *supra* note 37.

²²³ *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08 at para 53 (EUR-Lex).

²²⁴ Federico Ghezzi & Mariateresa Maggolino, “Bridging EU Concerted Practices with US Concerted Actions” (2014) 10(3) *Journal of Competition Law & Economics* 647 at 660.

²²⁵ *Aalborg Portland and Others v Commission*, C-204/00 P, [2004] ECR I-123 at paras 82 and 84.

²²⁶ For a complete analysis of the efficiency implications concerning the doctrine of “public distancing”, see Kenneth Khoo, “Regulating the Inferential Process in Alleged Article 101 TFEU Infringements” (2017) 13(1) *Journal of Competition Law & Economics* 1.

²²⁷ Fudenberg & Tirole, *supra* note 37.

Under a rule of public distancing, the firm faces a difficult conundrum. If a firm intends to pursue a profitable deviation, it is effectively punished regardless of whether it publicly distances itself or not. If the firm chooses to engage in public distancing, it reduces its possible payoff from deviation by revealing its deviation to other firms. However, if it chooses not to do so, it reduces its possible payoff from deviation by increasing its expected liability for the periods in which it enjoys supra-normal profits.²²⁸ Again, we face the possibility of penalising firms that would not impose any form of anti-competitive harm on the relevant market.

3. Abuse of dominance

The exhibition of legal formalism is also observed in the lone case concerning an abuse of dominance. In *SISTIC Infringement Decision*,²²⁹ the CCCS held that a dominant ticketing service provider, SISTIC, had contravened section 47 of the Competition Act by entering into exclusive agreements with several important venue providers. The CCCS alleged that SISTIC had foreclosed competition by restricting the choices of event promoters.²³⁰ While the CCCS purported to follow an effects-based approach in its analysis, it relied on formalistic presumptions in establishing the relevant standard of proof, a contentious issue that would later go on appeal to the CAB. Adopting the EC infringement decision of *Prokent-Tomra*,²³¹ the CCCS posited that:

“... it is sufficient to “show that the abusive conduct of the undertaking in a dominant position *tends to restrict competition* or, in other words, that the conduct is *capable of having that effect*”. In other words, it is *sufficient to establish the likely effects* of competition foreclosure for the purpose of the section 47 prohibition.”²³²

On appeal to the CAB,²³³ the CAB had to decide what the legal test for abuse of dominance was for the purposes of the Competition Act. Both SISTIC and the CCCS submitted that it was “common ground that the correct approach in assessing whether the conduct is abusive is an assessment that is effects-based as opposed to form-based”. The only disagreement centred around the exact definition of an effects-based assessment.²³⁴

SISTIC argued that an effects-based assessment required the CCCS to assess the effects of the alleged abusive conduct pursuant to a “total welfare” standard.²³⁵ SISTIC emphasised that under this approach, it was not sufficient to assess whether

²²⁸ Khoo, *supra* note 226.

²²⁹ *Supra* note 137.

²³⁰ Event promoters who wished to hold events at these key venues had no choice but to sell tickets through SISTIC, and so ticket buyers who wished to attend those events had no choice but to buy their tickets through SISTIC as well.

²³¹ EC, *Commission Decision Case Comp/E-1/38.113 of 29 March 2006 relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement*, [2008] OJ, C 219/11.

²³² *SISTIC Infringement Decision*, *supra* note 137 at 112.

²³³ *Re Abuse of Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1 (CAB) [*SISTIC CAB*].

²³⁴ *Ibid* at para 253.

²³⁵ *Ibid* at para 260. In other words, the conduct must have an appreciable adverse effect on economic efficiency with respect to the total welfare of both producers and consumers.

the conduct merely has a “foreclosure effect” or an “adverse effect on competitors”.²³⁶ Thus, an effects-based enforcement would require the CCCS to establish a counterfactual scenario, and so any “effects” would have to be established from the comparison of two scenarios—a “with conduct” and “without conduct” hypothetical.²³⁷ In light of this analysis, the CCCS would not be entitled to rely on form-based assumptions and inferences.²³⁸

SISTIC put forth two arguments in support of its proposed approach. Firstly, SISTIC turned to Parliamentary Debate statements by Dr Balakrishnan,²³⁹ who stated that:

“... Second, abuse of a dominant position. The Bill does not prohibit dominance or substantial market power per se—firms can continue to increase market power through offering cheaper and more innovative products. However, clause 47 prohibits firms from abusing market power in ways that are anti-competitive and which *work against the long term economic efficiency*, eg, predatory behaviour towards competitors...”.²⁴⁰

Relying on these statements, SISTIC contended that the key objective of Singapore's Competition Regime was that of the enhancement of economic welfare and efficiency.²⁴¹ As such, the appropriate benchmark to evaluate an alleged instance of anti-competitive conduct in Singapore would be that of a “total welfare” standard, as opposed to a “consumer welfare” standard. Secondly, SISTIC relied on the EC's *Guideline on Enforcement Priorities* (the “EC Guidelines”) in support of its proposed approach. SISTIC argued that the EC Guidelines drew a distinction between “mere foreclosure” and “anti-competitive foreclosure”—while the former would impede competitors *simpliciter*, the latter required conduct which, while impeding competitors, *also* resulted in negative effects on consumer welfare.²⁴² Thus, SISTIC submitted that the CCCS had not established “anti-competitive foreclosure” in the relevant market based on a total welfare standard, and therefore did not discharge its burden of proof.²⁴³

In contrast, CCCS argued that the appropriate touchstone of liability was whether “the conduct was intended to restrict or foreclose competition or was capable of doing so”. Once an effect, or a likely effect, on the competitive process was established by the competent authority, the burden would fall on the dominant undertaking to put forward an objective justification that their practice was not anti-competitive.²⁴⁴ Under this approach, the counterfactual assessment would not be a legal requirement in abuse of dominance proceedings.²⁴⁵

²³⁶ *Ibid.*

²³⁷ *Ibid* at para 262.

²³⁸ *Ibid* at para 261.

²³⁹ *Supra* note 123.

²⁴⁰ Only a portion of his statements are reproduced here.

²⁴¹ *SISTIC CAB*, *supra* note 233 at para 257.

²⁴² *Ibid* at para 258.

²⁴³ *Ibid* at paras 259-260.

²⁴⁴ *Ibid* at para 275.

²⁴⁵ *Ibid* at para 278.

The CCCS argued that existing EU and UK Competition Law advocated the legal test that it had proposed.²⁴⁶ It also relied on evidence of its expert witness, Mr Coomb, who argued that it was standard practice for competition authorities to assess the impact or the likely impact of a firm's conduct on the competitive process, but not the impact of its conduct on prices, output and economic welfare. According to Mr Coomb, such an approach was based on conventional economic theory and certain assumptions, ultimately leading to the conclusion that conduct which adversely affects the competitive process is expected to reduce economic welfare. Where these assumptions do not hold, however, it would be for the dominant entity to raise "efficiency defences" in the form of objective justifications.²⁴⁷

Ultimately, the CAB agreed with the CCCS' arguments on the basis that they paid closer fidelity to the precedents of the UK and EU. The CAB noted that section 47 of the Competition Act was *in pari materia* with its EU counterpart, Article 102 TFEU:

"The Board respectfully agrees with the CCCS that the decisions of the EU/UK Courts on competition law are highly persuasive on the legal test for abuse of dominance cases under section 47 of the Act. *The said section 47 is modelled on section 18 of the UK Competition Act 1998 which in turn was modelled on Article 102 of the Treaty on the Functioning of European Union...* Having regard to the decisions of the EU/UK courts cited by the CCCS, the Board respectfully adopts the test laid down by these courts, which was summarised by the EU General Court... in the case of *British Airways Plc v Commission of European Communities*, Case T-219/99, in which British Airways not only rewarded the loyalty of some of its travel agents but also discriminated between travel agents... The [General Court] stated as follows: ... 'for the purpose of establishing an infringement of Article [102], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect... [thereafter endorsing the ECJ appeal of *British Airways Plc v Commission* with approval]'".²⁴⁸

The formalism here is obvious—as long as the abusive conduct of the undertaking in a dominant position tends to or is capable of restricting competition, it will be liable for the said conduct regardless of whether the conduct had a concrete effect on the market.²⁴⁹ As we will explain in the following paragraphs, we would submit that this is a form of *overt* formalism that is inherently problematic.

The optimal starting point of any analysis concerning an alleged abuse of dominance would begin with whether the type of conduct would, *in the usual instance*, be injurious to economic welfare. As mentioned above,²⁵⁰ such an approach would necessitate a reference to economic theory, and would also require an analysis of the factual matrix at hand. To this end, instances of exclusive contracting as alleged

²⁴⁶ *Ibid* at para 275. See also *National Grid v Electricity Markets Authority* [2010] EWCA Civ 114.

²⁴⁷ *SISTIC CAB, ibid* at para 276.

²⁴⁸ *Ibid* at para 287.

²⁴⁹ In other words, there is a very real likelihood that liability may nevertheless be imposed on a group of undertakings that have not effected any anti-competitive harm on the relevant market.

²⁵⁰ See Part IV(B)(1) of this Article.

abuse would almost always require a full-blown “effects-based” analysis, as it is well established in industrial economics that exclusive contracting has numerous pro-competitive effects.²⁵¹ Indeed, it was common ground between the CCCS and SISTIC that an “effects-based” analysis was the appropriate approach to adopt.²⁵² Furthermore, the infringement decision issued by CCCS involved substantial discussion of the economic effects following SISTIC’s conduct.²⁵³ Nevertheless, we do not opine that the legal *requirement* of proof,²⁵⁴ that the conduct “tends to or is capable of restricting competition” is consistent with a robust methodology to determine the economic effects of abusive conduct.

A careful scrutiny of the legal test adopted by the CAB and the CCCS reveals that specific variants of it are overtly broad. Three different variants of the legal test may be discerned from the CAB’s decision: (1) whether the conduct is *intended to restrict or foreclose* competition,²⁵⁵ (2) whether the conduct is *capable* of restricting or foreclosing competition;²⁵⁶ and (3) whether the conduct has a *likely or actual* [negative] *effect* on the competitive process.²⁵⁷ As Tan notes, the phrase “capable of” connotes mere possibility, whereas the phrase “likely” connotes a degree of probability, of which the former is a lower standard²⁵⁸ However, both of these formulations raise the same objections that were raised earlier against the “potential to have a negative effect on competition” test in *Allianz Hungaria*²⁵⁹—numerous forms of conduct that have an ambiguous effect on total welfare will be “capable of” or “likely to” adversely impact the competitive process. The practice of exclusive contracting, for example, has numerous pro and anti-competitive effects, but, in any case, will be “capable of” having a negative impact on competition. Furthermore, the three formulations of the test posited above are arguably not interchangeable insofar as they have different meanings. Tan has argued that an intent based rule does not require any consideration of the conduct at hand, and so may be an independent basis of liability²⁶⁰ separate from the other two variants of the test. Importantly, the CAB’s conflation between the three formulations leads to unnecessary confusion in any application of the adopted test, thereby removing the advantage of legal certainty following bright line rules under a formalistic approach.²⁶¹

²⁵¹ Massimo Motta, *Competition Policy: Theory and Practice* (New York: Cambridge University Press, 2004).

²⁵² *SISTIC CAB*, *supra* note 233 at para 260.

²⁵³ *SISTIC Infringement Decision*, *supra* note 137. See Chapters 6 and 7.

²⁵⁴ *Eg.*, in *Re Singapore Medical Association—Guidelines on Fees* [2010] SGCCS 6 at para 81, the CCCS claimed that as it had concluded that certain guidelines on fees by an association of medical professionals had the object of restriction competition, it was not necessary as a matter of *legal necessity* to consider if the guidelines had the effect of doing so. Similarly, the question arises here as to whether the CCCS is *mandated* by law to evaluate the pro and anti-competitive effects of an alleged instance of abusive conduct.

²⁵⁵ *SISTIC CAB*, *supra* note 233 at para 283.

²⁵⁶ *Ibid* at para 283.

²⁵⁷ *Ibid* at para 290.

²⁵⁸ Nicholas Tan, “A Big Ticket Issue for Singapore’s Biggest Ticketing Issuer” (2011) 23 *Sing Ac LJ* 538 at paras 69-82.

²⁵⁹ *Allianz Hungaria*, *supra* note 186.

²⁶⁰ Absent any objective justification. See Nicholas Tan, *supra* note 258.

²⁶¹ In other words, the costs of applying a legal test increases with uncertainty over its interpretation. See Rubinfeld, *supra* note 153.

It has been suggested that the defence of “objective justification” is always available to the dominant firm as a means of rebutting any presumption of anti-competitive behaviour.²⁶² However, if firms find it difficult to discharge the burden of proof in an overtly formalistic regime, there will not be a substantial amelioration of Type I error costs.²⁶³ Indeed, we would note that this reflects existing practice in EU Competition Law—there has yet to be any Article 102 case in which conduct has been saved from infringing Article 102 because of economic efficiencies.²⁶⁴ For the “efficiencies exception” to apply, four cumulative conditions must be fulfilled: the efficiencies must relate to the conduct at issue; the conduct must be indispensable to their realisation; the efficiencies must outweigh the negative effects on competition [and consumer welfare];²⁶⁵ and the conduct must not eliminate effective competition²⁶⁶—a formulation similar to the Net Economic Exception in the Singapore Competition Act. The last condition that requires the conduct to “not eliminate effective competition” is particularly onerous. As the market is already in a low competitive state given the presence of a dominant undertaking, any type of foreclosure by the undertaking²⁶⁷ is likely to eliminate effective competition in the relevant market, thereby precluding availability of the defence in most cases.

One final point may be made. The CAB’s reasoning that EU jurisprudence was adhered to because of the *in pari materia* nature of the statutory provision is unconvincing. The UK and EU jurisprudence that was proffered before the CAB amounted to merely “highly persuasive” authority—the CAB was certainly free to depart from the principles expounded in those cases in considering the autochthonous circumstances of Singapore’s competition regime. More importantly, the CAB did not consider the long line of academic commentary criticising the *British Airways* series of litigation as overtly formalistic,²⁶⁸ nor did it consider the definitional spiel of Advocate General Kokott in her Opinion accompanying the ECJ decision in *British Airways*:

“[Article 102] forms part of a system designed to protect competition within the internal market from distortions. Accordingly, [Article 102], like the other competition rules of the Treaty, *is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such* (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where

²⁶² *SISTIC CAB*, *supra* note 233 at para 276.

²⁶³ The argument is similar to arguments made with respect to the “Net Economic Benefit” exception in Art 101 TFEU. See Jones, *supra* note 203.

²⁶⁴ Jones & Sufrin, *supra* note 29.

²⁶⁵ Although this remains an open issue in the context of Singapore’s Competition Law, we do not believe that the firm would be required to establish that efficiencies arising from its conduct outweigh the negative effects on consumer welfare, as opposed to total welfare.

²⁶⁶ EC, *Guidance on Commission’s Enforcement Priorities in Applying Art 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, [2009] OJ, C 45/2 at para 30.

²⁶⁷ Including “mere foreclosure” as defined by the EC Guidelines.

²⁶⁸ Eg, Denis Waelbroeck, “Michelin II: A Per Se Rule Against Rebates by Dominant Companies?” (2005) 1(1) *Journal of Competition Law and Economics* 1 149.

competition as such is damaged, disadvantages for consumers are also to be feared".²⁶⁹

This passage has epitomised what many scholars consider the "ordoliberal" bent of EU Competition Law in protecting the structure of competition as an end in and of itself.²⁷⁰ As we have expounded in our earlier discussion, the influence of ordoliberalistic principles on the formulation of formalistic rules in EU Competition Law should not be disregarded.

V. CONCLUSION

In the CAB Decision of *Pang's Motor Trading*,²⁷¹ the appellant argued that it was inappropriate for the CCCS to rely on cases from the UK, EU and the US as those cases were decided in countries with different legal, political and socioeconomic climates. In rejecting this argument, the CAB noted its earlier decision in *SISTIC CAB* justifying why the decisions from the EU and UK were highly persuasive. Interestingly, it went further in suggesting that:

"... The Board further considers that decisions from other jurisdictions like the US or Australia might still provide useful guidance despite the material differences in the wording of their competition laws, insofar as their laws target similar types of anti-competitive conduct as ours (see *eg* s 1 of the US Sherman Act and s. 4D of the Australian Competition and Consumer Act 2010, which are the equivalents of section 34 of our Act)... *It goes without saying that foreign decisions should not be uncritically applied in the local context without due appreciation for local conditions and the facts of a particular case.*"²⁷²

Nevertheless, we have set out how the uncritical adoption of EU Law thus far in Singapore's competition regime has resulted in overtly formalistic rules that may be inefficient, thereby subverting the welfarist objective of economic efficiency. Henceforth, we suggest that antitrust authorities in Singapore should exercise considerable caution in endorsing the application of EU law in individual cases.

The antitrust authorities in Singapore do not operate in a silo. In a recent interview with MLex, a CCCS representative declared that CCCS was "not the antitrust policeman for the world".²⁷³ The statements revealed an implicit recognition of the importance of global developments in antitrust policy on Singapore. This Article is an attempt to suggest a more critical application of foreign decisions in the local context. The development of competition rules along more critical, nuanced principles will serve Singapore well for many years to come.

²⁶⁹ *Supra* note 10, Opinion of Advocate General Kokott at para 68.

²⁷⁰ L Gormsen, "The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC" (2007) 3(2) *Eur Competition J* 329.

²⁷¹ *Pang's Motor Trading v Competition Commission of Singapore* [2014] SGCAB 1.

²⁷² *Ibid* at paras 33-34.

²⁷³ See MLex, *Singapore Antitrust Regulator to Focus on Cartels, Bid Rigging and SMEs, Chief Executive Says* (19 April 2016), online: <<http://www.ccs.gov.sg/~media/custom/ccs/files/media%20and%20publications/publications/journal/mlcx%20interview%20with%20ce.ashx>>.