

## REDISCOVERING THE SPIRIT OF COMPETITION: ON THE NORMATIVE VALUE OF THE COMPETITIVE PROCESS

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### A. INTRODUCTION

The argument of this paper is that competition should be perceived as a *sui generis* right. The paper develops this argument from three perspectives: substantive, methodological and comparative. On the *substantive* side it explains why competition should be conceptually treated as the central goal of antitrust policy and investigates potential situations where protection of competition conflicts with consumer welfare.

The paper makes a case for a *methodological* “unbundling” of those closely connected economic values. By exploring the essence of competition and its importance for the market, the paper explains how the idea of competition transforms from a means to an end, or rather how by being a legally defined means it procedurally becomes an end.<sup>1</sup> It develops its theoretical argument primarily in the European jurisdictional ambit, acknowledging that its conceptual implications can be relevant for other jurisdictions as well.

On the *comparative* side it makes an attempt at applying to the antitrust domain several techniques developed in legal theory and political philosophy. It demonstrates how these disciplines reconcile the inevitable conflicts between free speech on one hand and public morality and welfare on the other. Given that competition in its economic sense is a relatively new area, whereas the political aspects of freedom have a very long intellectual tradition, antitrust can only

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<sup>1</sup> EJ Mestmäcker, *A Legal Theory without Law: Posner v Hayek on Economic Analysis of Law* (Tübingen, Mohr Siebeck, 2007), 6, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1168422](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1168422) (accessed on 23 December 2009):

“In law, the relation of ends to means is more than a pragmatic methodological operation. One of the central themes of legal philosophy is unearthing law’s underlying rationale(s). Further, the purposes of constitutions, statutes or precedents inform their interpretation. Wealth maximisation is no substitute for the purpose of law in general.”

benefit from exploring the ways in which legal theory and political philosophy are debating the political and cultural aspects of competition. By drawing a parallel between the competition and freedom of speech, the paper shows why the same approach is necessary to solve the discrepancy between competition and consumer welfare. The consequences of defining competition as an independent economic value are not only academic. On a practical level they can lead to exempting some types of restrictive conduct from antitrust sanctions under a new standard.

It is beyond the limits of this paper to discuss the importance of such economic values as consumer welfare, industrial growth, market integration or innovation. The paper does not explore the role of competition in the process of achieving these economic goods either. It also leaves aside ideological tensions between the different types of welfare, perceiving both consumer welfare and total welfare as utilitarian values, which are opposed to an understanding of competition in its deontological sense. In contributing to the argument that competition deserves protection in its own right this paper does not diminish the importance of welfare-centric values. It treats their relation with competition as a *par-in-parem*. This enables the various interested parties to persuade the decision-maker of the importance of each particular value in each particular case via the adversarial adjudicative process.

The paper develops its core argument in 12 sections structured in three parts: I Positive analysis; II Normative proposal; and III Operationalisation. Section B illustrates the traditional justification for the utilitarian perception of competition and analyses its main weaknesses. Section C explores conceptual differences and underlines the fundamental similarities of the two major deontological antitrust schools (Austrian and Ordoliberal). Section D provides some conceptual argumentation for the treatment of competition as a constitutional value. Section E introduces the theoretical framework of value pluralism which reconciles the conflicts between constitutional values. The methodology of value pluralism is applied in order to balance the value of competition with the interests of welfare. Section F opens the second part of the paper. It explores competition as the essence of liberal democracy, claiming that the economic aspects of competition together with its political (elections) and cultural (free speech) elements constitute the core of democratic governance. Accordingly, these values should be protected as a matter of evolutionary choice of society without any utility-based verification. Section G conceptualises the ‘Oroboros dilemma’ of self-destructive freedom and democracy, which is described in the domain of competition by Robert Bork as the ‘antitrust paradox: a policy at war with itself’. Section H continues the comparative analysis of competition. It explores regulatory practices developed for the protection of free elections (political competition) and free speech (cultural competition) on one hand and economic competition on the other. It reveals the main methodological error of

antitrust, which prevents immunisation of some anticompetitive practices from sanctions on non-utilitarian grounds. This section concludes that, unlike its political and cultural counterparts, economic competition is gradually transforming into a purely instrumental consequentialist policy which corresponds neither to the semantics nor even to the syntax of the term 'competition'. The logic of such transformation is a direct consequence of the above-mentioned methodological inconsistency between economic competition on one hand and the political and cultural aspects of competition on the other. Section I develops the argument that in certain situations anticompetitive agreements are immunised from antitrust sanctions provided that they simultaneously promote competition more than they distort it. This possibility exists in the regulation of the political and cultural aspects of competition, but it is missing in the economic context. The current structure of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) does not envisage this option. Therefore in practice courts tend to develop indirect ways of granting immunity to undertakings which cannot conform to the rigid utilitarian requirements of Article 101(3) TFEU. While acceptable, this solution is far from optimal. For this reason the section proposes a conceptual amendment of Article 101 TFEU. This proposal is designed as a contribution to the academic debate on the role of the competitive process in antitrust rather than as a direct call for changes in primary European law. Section J clarifies that the proposed deontological benchmark for competition does not diminish the importance of utilitarian values since the proposal merely extends the current regulatory framework without substituting any of its existing parts. The application of the amended Article 101 (3) TFEU would still be based upon the discretion of the decision-maker. The will of the decision-maker (be it the Commission, national authorities or courts) constitutes the central part of this section. It analyses the balancing techniques, developed by the legal and constitutional theories and implements them into the area of antitrust. Section K continues the analysis of the balancing act, dealing specifically with the technique of separation of different values. It proposes a two-step methodology of balancing. The first one is purely value-centric. It artificially isolates each value from all others in order to undertake their independent analysis which helps to understand the internal essence of each value separately. The second consecutive step recontextualises previously isolated values into the main regulatory agenda. This section demonstrates that the present-day regulatory status of competition does not enable it to be in the *par-in-parem* relationships with other values, because all balancing acts are performed as a one-step analysis: each value is only balanced against the others at the external level, where the one with the higher importance always prevails. This section is designed to provide the operational justification for the normative proposal developed in Section I. The last section summarises the main findings of the paper.

## PART I

## B. THE UTILITARIAN UNDERSTANDING OF COMPETITION

There are two conceptual approaches to understanding competition: utilitarian and deontological.<sup>2</sup> According to the utilitarian vision, competition is not worth much; it is welfare that really matters in the economy.<sup>3</sup> Deontologists, on the contrary, submit that competition should be protected and fostered with no direct subordination to its eventual outcomes,<sup>4</sup> but as an important element of freedom.<sup>5</sup> The former view is encompassed into the Benthamite idea of social welfare; the latter into the Kantian categorical imperative. Therefore, both approaches are based on strong theoretical foundations.

In spite of the existence of different forms of utilitarianism (*inter alia*, rule-utilitarianism and act-utilitarianism), this paper assumes that all utilitarian justifications for competition are in some sense consequentialist (ends-justify-means type of reasoning) and subsequently it uses the terms ‘consequentialism’ and ‘utilitarianism’ interchangeably.<sup>6</sup> A similar taxonomy has been introduced to the area of antitrust by Black,<sup>7</sup> though he implies that the consequentialist view encourages ‘the survival of the economically fittest’ and the deontological

<sup>2</sup> On the doctrinal correlation between these two approaches, see the polemics between RM Dworkin and RA Posner: RM Dworkin, “Is Wealth a Value?” (1980) 9 *Journal of Legal Studies* 191; RA Posner, “The Value of Wealth: A Comment on Dworkin and Kronman” (1980) 9 *Journal of Legal Studies* 243.

<sup>3</sup> J Vickers, “Competition is for Consumers” (2002) A Speech to the Social Market Foundation, [www.ofg.gov.uk/shared\\_ofg/speeches/spe0102.pdf](http://www.ofg.gov.uk/shared_ofg/speeches/spe0102.pdf) (accessed on 4 August 2010) 1, 5: “Competition is increasingly being recognised as a core consumer issue . . . Competition is not an end in itself but a process that advances goals of economic well being, ultimately for consumers.”

<sup>4</sup> FA Hayek, “Competition as a Discovery Procedure” in FA Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (London, Taylor & Francis, 1978), 180:

“[C]ompetition is valuable *only* because, and so far as, its results are unpredictable and on the whole different from those which anyone has, or could have, deliberately aimed at . . . [T]he generally beneficial effects of competition must include disappointing or defeating some particular expectations or intentions.”

<sup>5</sup> DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Clarendon Press, 1998):

“The genesis of the idea of protecting competition was imbedded in the idea of protecting freedom, and thus it is important to review . . . the role and substance of the concept of freedom . . . The institutions and traditions of liberalism not only scripted thinking about economic competition, but also carried its political fortunes’.

<sup>6</sup> Since the term “utilitarian” is used in this paper in a broader sense, it also embraces the Posnerian notion of wealth maximisation, although Posner himself distinguishes his approach from classical (happiness maximising) utilitarianism (RA Posner, “Utilitarianism, Economics, and Legal Theory” (1979) 8 *The Journal of Legal Studies*). This paper treats them together since both kinds of utilitarianism are result-oriented, as opposed to deontological approaches, which are process-oriented.

<sup>7</sup> O Black, *Conceptual Foundations of Antitrust* (Cambridge University Press, 2005).

approach embodies ‘certain moral rights or political liberties’.<sup>8</sup> Accordingly, consumer welfare could be seen in Black’s model from the deontological perspective because it is not always achievable via a process of natural selection. The classification applied in this paper is fundamentally different. The criterion for separation between the deontological and consequentialist views is based upon their perception of competition itself rather than upon motives that are external to the phenomenon of competition. Thus such result-oriented views on the role of competition between consumer welfare or total welfare are always seen as utilitarian, whereas the perceptions of competition as an independent societal value are taken to be deontological.

The utilitarian vision of competition dominates both in theory and practice. Thus in the notes to their influential book *Fairness vs Welfare*,<sup>9</sup> Kaplow and Shavell explicitly claim that “social policies should be assessed entirely on the basis of how they affect individuals’ well-being. This claim implies that no independent weight should be granted to deontological principles.”<sup>10</sup> A similar vision is supported by all the main neoclassical antitrust schools. Accordingly, the representatives of the Chicago School, which introduced a “more-economic approach” to the area of antitrust, argue that the sole goal of competition law is promotion of total welfare. This position can be defined as “right-utilitarianism”. Although ideologically similar to *laissez-faire* non-interventionism, the Chicago School perceives competition in its instrumental sense, as a way to generate total welfare. The main narrative of the European Commission, developed *de facto* into the Neo-Brussels School, is that competition should serve the interests of consumers (ie “left-utilitarianism”). The ethos of “consumer welfare” with its powerful redistributive rhetoric has recently replaced the previous European benchmark of competition law—market integration (Old-Brussels School or utilitarian federalism), which claimed that European antitrust policy should be performed through the prism of market integration. Non-interventionists claim that competition is a useful tool to promote innovation (the Schumpeterian school or libertarian utilitarianism); industrialists submit that competition policy and law should be driven by the interests of national champions at the international level.

In spite of substantial ideological and methodological differences, all the above-mentioned perceptions of competition share one important character: none of them sees competition as an independent economic value. Competition is perceived here in its applied, instrumentalised form, as a way to achieve something which *ipso facto* has a higher value than competition itself. The importance of the utilitarian perception of competition is beyond dispute.

<sup>8</sup> *Ibid.*, 33–61.

<sup>9</sup> L Kaplow and S Shavell, *Fairness versus Welfare* (Cambridge, MA, Harvard University Press, 2002).

<sup>10</sup> L Kaplow and S Shavell, “Notes on Welfarist versus Deontological Principles” (2004) The Harvard John M Olin Discussion Paper Series No 460, 2.

However, the question remains “the importance” for “what”? An instrumentalised competition policy can indeed be beneficial for welfare, innovation, industrial growth and market integration. But should it constitute the core of antitrust analysis? Does it fill in the whole value spectrum of competition? Does not competition itself constitute an important societal interest which could be seen independently from its welfare-maximising effects? Isn't it for consumer policy to deal with the interests of consumers? Should industrial, innovation and market integration policies not deal with their respective goals by themselves?

The utilitarian vision of competition is therefore contestable.<sup>11</sup> If utilitarian goals, such as consumer welfare or efficiency, are considered to be the only reason for antitrust policy to exist, then antitrust policy becomes consequentialist (ends-justify-means type of reasoning). In this case the very principle of a free market with undistorted competition is under threat. Whenever a greater efficiency can be achieved through dirigistic regulatory practices (understood in this context as the practices that go against the free market), competition standards would be considered as an obstacle for generating efficiency, thereby loosing any economic justification, legitimacy and, eventually, legality.<sup>12</sup> Indeed, some authors claim that any attempt to raise the importance of consumer welfare at the constitutional level by instrumentalising the existing competition rules is *contra legem et contra constitutionem*.<sup>13</sup>

<sup>11</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Polity Press, 2004), 258: “[I]f in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses.”

<sup>12</sup> J Wolff, “The Ethics of Competition” in G Parry, H Steiner and A Qureshi (eds), *The Legal and Moral Aspects of International Trade: Freedom and Trade*, vol 3 (London, Routledge, 1998), 84, 89:

“It would be a mistake to conclude that acting competitively is wrong; perhaps there are stronger counter-arguments. Yet we have enough to motivate the thought that competition in general, and economic competition in particular, is morally problematic . . . Perhaps we have become so used to the idea that these private vices generate greatly outweighing public virtues that we take the moral argument against competition to have been answered long ago. This, then, is to see the case for competition to be made out in consequentialist terms, and the argument is surely impressive: competition keeps prices down, quality up, and facilitates efficient employment of resources.”

After subordinating competition to the outcomes which it is capable of generating, it becomes an easy task for the author to destroy the societal value of competition, concluding that it is a consequence of “a vastly misleading romanticism of the economic world”.

<sup>13</sup> R Zäch and A Künzler, “Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law” in R Zäch, A Heinemann and A Kellerhals (eds), *The Development of Competition Law—Global Perspective* (London, Edward Elgar, 2010), 76:

“The ultimate consequence of the ‘more economic approach’ would be that competitors, by engaging in competition, would no longer be serving their own freely chosen purposes but, instead, a collective economic purpose, consumer welfare. At this point, the constitutionally guaranteed freedom of competition would be instrumentalised. Instances of the instrumentalisation of fundamental basic rights tend to be found in societies organised on socialist principles and/or in centrally planned economies where governmental agencies have

### C. THE DEONTOLOGICAL UNDERSTANDING OF COMPETITION

Concerns with the instrumentalisation of competition by utilitarian antitrust theories have been raised by deontological competition scholars. They claimed that an applied vision of competition inevitably diminishes its societal importance. Most of the defendants of the deontological view on competition develop their ideas within the tradition of the Austrian and the Ordoliberal schools.

These two schools are substantially divided in their perception of the role of competition in economic life and even more explicitly on the mechanisms applied by states in order to establish, maintain, protect and promote competition. Leaving aside the historical and cultural contexts within which the two schools have developed their main theses, the main discrepancies between them can be reduced to three major conceptual disagreements. Acknowledging the independent status of competition in the economic life of liberal democracy, they disagree (1) on the role of the state in this process; (2) on the ontological aspects of competition as an *individual* right; and (3) on the ontological aspects of competition as a *collective* right.

(1) The ideas developed by the Austrian school are based upon the deep ideological roots of *laissez-faire* individualism. They conceive of competition in terms of the Freudian libido, natural instinct of economic life, Hayekian “competition as a discovery process”, or Darwinian “competition as a nature’s God”. Unlike mainstream neoclassical schools, Austrians see competition as a process of spontaneous interaction, inspired by the entrepreneurial endeavours of individuals.<sup>14</sup> The dynamism and unpredictability of this conception of competition distinguish it from most of the other antitrust schools. According to Hayek, “Freedom granted only when it is known beforehand that its effects will be beneficial is not freedom.”<sup>15</sup> The Austrians are known to be strong advocates of the minimalist state, claiming that the invisibility of the market’s hand cannot be replaced or even improved by the rational actions of policy-makers.<sup>16</sup>

to decide which economic behaviour will in the future have positive results for society (result-oriented approach).”

<sup>14</sup> IM Kirzner, *How Markets Work: Disequilibrium, Entrepreneurship and Discovery* (London, Institute of Economic Affairs, 1997), 39:

“Mainstream theory left entrepreneurship out of its picture because entrepreneurship seems chaotic and unpredictable. . . . In order to perceive regularities amidst the apparently chaotic vagaries of real-world market volatility, it may seem methodologically sound to imagine a world with no scope for entrepreneurship. Yet, paradoxically, exactly the opposite is the case. It is only when entrepreneurship is introduced that we begin to appreciate how and why markets work.”

<sup>15</sup> FA Hayek, *The Constitution of Liberty* (London, Routledge & Kegan Paul, 1960), 31.

<sup>16</sup> Kirzner criticises the mainstream neoclassical antitrust theories and blames them for attempting to rationalise something which is by definition non-rational: “In the neoclassical world, decision

The Ordoliberal thought, predetermined by the tragic experience of the Second World War, is much more sceptical in its assessment of the capacity of the unregulated economy to be self-sufficient or even sustainable. The German political *laissez-faire* system with free elections had demonstrated in 1933 how easily it can be misused by populists. The same danger was anticipated by the Ordoliberals in the economic context. According to them, competition cannot exist without strong regulatory interventions by the state, which should prevent any abuse of this delicate model. However, reliance on interventionist methods should not be seen as an attempt to diminish the role of competition but rather as a form of recognition of its fragility and vulnerability.

(2) The second difference between the two deontological schools is closely tied to the former. While both agree that competition should be seen as an individual right, they perceive the essence of this right differently. According to the Ordoliberals, every economic actor possesses a relative claim to enter the market in order to exercise her right to compete. The right to participate in the competitive process must not be jeopardised either by the state or by more successful individuals or undertakings. Therefore, the importance of the market's structure plays a pivotal role in their thought.<sup>17</sup> For the same reasons the Ordoliberal antitrust policy is very suspicious of cartels and monopolies. Contrastingly, the Austrians claim that the right to compete should be primarily interpreted as the right to benefit from commercial success, achieved by an entrepreneur by using her individual skills and endeavour. As a result, states should be more tolerant towards monopolies and cartels, because both constitute natural outcomes of successful economic activities. The Ordoliberals are thus interested in protecting the individual rights of weaker agents (left-deontology), while the Austrians are striving to promote the individual rights of stronger market players (right-deontology).

(3) Finally, the views of the Austrians and Ordoliberals differ at the level of their perception of competition as a *collective* right. The Austrian school claims that the principles of economic individualism and spontaneous order are, in the long run, capable of delivering benefits to the whole society. Rich and successful undertakings are intuitively interested in sharing their wealth with others in order to maintain economic and social stability. Furthermore, open markets always enable the free entrance of innovative ideas. This would promote economic progress and impel successful companies not only to benefit from their

makers know what they are ignorant about. One is never surprised" (IM Kirzner, "Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach" (1997) 35 *Journal of Economic Literature* 64).

<sup>17</sup> W Eucken, "The Competitive Order and its Implementation" (trans C Ahlborn and C Grave) (2005) 2 *Competition Policy International* 224: "In contrast to the policy of the *laissez-faire*, the central task of the [Ordoliberal] economic policy is the creation of conditions within an industrialised economy which allow the development of functioning and humane economic orders."



current status but also to constantly improve their commercial strategies. From the Ordoliberal perspective, which in its generic sense was adopted as the German post-war social-market economic model,<sup>18</sup> free competition as a collective right should be predetermined by strong redistributive elements. This balance between the market ethos and social concerns requires some active regulatory control and proper institutional design.<sup>19</sup>

In spite of all these differences between the Austrian and Ordoliberal schools, their conceptual similarities are more important for this paper. Methodologically, both perceive the phenomenon of competition separately from the outcomes which competition can eventually generate. Both submit that in some cases competition should be protected as an independent economic value. This implies the conceptual recognition of situations where competition can be protected even though it does not generate any measurable economic benefits and sometimes even if such benefits are diminished or sacrificed. Competition is therefore protected as a matter of evolutionary choice and an important societal value. No value and no right would pass the test of efficiency each and every time. Otherwise, there would be no necessity to protect them, they would be self-executable.<sup>20</sup> If competition is seen in its deontological dimension, then there is no need to prove its economic efficiency at each and every moment. After being granted the status of societal value, competition begins to be recognised per se. Public values are not protected because they are always efficient, and they should not stop being protected just because sometimes they are inefficient. Therefore, as soon as competition manages to pass through the crucible of time and transform itself into a societal value, it no longer needs to be subordinated to a permanent efficiency check.

#### D. THE CONSTITUTIONAL IMPORTANCE OF COMPETITION

The decisive question to address is whether competition should be considered as a public value or merely as a tool to increase “more important” utilitarian economic values (eg total welfare, consumer welfare, industrial growth, market

<sup>18</sup> On the nuances and the historical background of the term “social-market economy”, see VJ Vanberg, “The Freiburg School: Walter Eucken and Ordoliberalism” (2004) Freiburg Discussion Papers on Constitutional Economics No 04/11.

<sup>19</sup> JP Bladel, “Against Polanyi-Centrism: Hayek and the Re-emergence of ‘Spontaneous Order’” (2005) 8 *Quarterly Journal of Austrian Economics* 22: “Hayek respected Eucken greatly, but Eucken and the Ordo-liberals were too inclined towards rationalist constructivism to embrace spontaneous order.”

<sup>20</sup> R Dworkin, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1978), 333:

“There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient.”

integration, innovations). The dominant view supports the latter approach.<sup>21</sup> According to Bork, ‘if the achievement and maintenance of competitive processes . . . means preserving rivalry for its own sake, there seems to be no point in it’.<sup>22</sup> To prove the opposite, it is necessary to show that competition as a process can be seen as an important (constitutional) value of liberal democracy.

The notion of constitutionality is taken in this paper in its broader sense.<sup>23</sup> This *inter alia* implies that the essence of rights and the scope of their recognition cannot be diminished simply by making changes in positive law. In order to protect certain societal priorities of a polity, constitutionality does not necessarily have to be embedded into a written constitution.<sup>24</sup> This hermeneutical nature of constitutionality is tied to the metaphysical rationale of a given political community. It pays much less attention to the historical method of interpretation and the “real” intentions of its “founding fathers”. Thus in the European context the recent transfer of public commitments to protect competition from Article 3(g) EC to the Protocol (No 27) on the Internal Market and Competition should not be seen as a change which substantially affects the post-Lisbon status of competition.<sup>25</sup>

<sup>21</sup> A Jones and B Sufirin, *EC Competition Law: Texts, Cases and Materials* (Oxford University Press, 3rd edn, 2008), 1–2:

“States which adopt a market economy do so because, on the basis of neoliberal economic theory, they consider it to be the form of economic organisation which brings the greatest benefits to society. The basis of a free market is competition between firms because such competition is believed . . . to deliver efficiency, low prices, and innovation.”

<sup>22</sup> RH Bork, “The Goals of Antitrust Policy” (1967) 57 *American Economic Review* 252.

<sup>23</sup> JB Cruz, *Between Competition and Free Movement* (Oxford, Hart Publishing, 2002), 1:

“[There is a] tendency among competition specialists to treat their topic . . . as distinct from the economic constitutional law of the Community. As the law now stands, however, the competition rules contained in the Treaty have a constitutional status and may be interpreted as shaping a law of economic liberty from restraints of competition and abuses of private economic power, not only a law of economic efficiency. Thus, an efficiency-oriented approach to the Community competition rules may not be in tune with the current normative structure.”

<sup>24</sup> J Gardner, “Can There Be a Written Constitution?” (2009) University of Oxford Legal Research Paper Series No 17, 1: “Does the United Kingdom have a constitution? Some people doubt it. But there is no room for doubt. A constitution is a conceptual necessity of every legal system.”

<sup>25</sup> This paper does not explore the further political outcomes of shifting competition from the main body of the Treaty to one of its Protocols, but considers this modification as a logistic technicality or a mere symbolic gesture with no meaningful legal consequences. For the analysis of the post-Lisbon status of competition, see J Drexler, “Competition Law as Part of the European Constitution” in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2nd edn, 2010):

“The existence of this new provision can be explained through comparison with the existing regulation on the objectives in the EC Treaty. Article 3(3) TEU-Lis functionally corresponds to Article 2 EC and not to Article 3 EC. In Article 2 EC, the Treaty refers to the establishment of the ‘common market’ without mentioning the protection of competition as one of the Community’s objectives. Article 3(3) TEU-Lis follows this approach but replaces the outmoded term of the ‘common market’ with the term ‘internal market’. Since it had been decided that Article 3 EC in its present form should not reappear in the new Treaty, the reference to the

Above all, the ideals of liberal democracy, of which—as will be argued—competition is a central component, are recognised in the Preamble of the Treaty on the European Union. The references to the “humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”<sup>26</sup> and the “attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms”<sup>27</sup> can serve as examples of the “constitutional” significance of competition in the European context. In addition, the structure of Article 101(1), which prohibits not only the creation of negative consequences from the perspective of competition but even the very intent thereof, shows the importance of the competitive process for the European Union. This view has been partly supported by the case law of the European Courts from *Grundig*<sup>28</sup> to *GlaxoSmithKline*.<sup>29</sup>

Acknowledging that the economic, political and cultural aspects of competition constitute the essence of liberal democracy and freedom, the “constitutional” status of competition can be found in Article 2 of the Treaty on European Union (TEU): “The Union is founded on the values of respect for . . . freedom [and] democracy.”

The references to democratic humanistic values are included in the Charter of Fundamental Rights of the European Union, which acknowledges the Union’s awareness of “its spiritual and moral heritage“ founded “on the indivisible, universal values of . . . freedom [and] democracy” and “places the individual at the heart of its activities”.<sup>30</sup> These references can be read along the lines of the Ordoliberal and Austrian traditions which show that competition constitutes the core of individual economic freedom.

In addition, the values of liberal democracy are inherently encompassed in the constitutional tradition as well as in the legislation of all Member States. This can mitigate their jurisdictional claims on competence. By recognising the deontological value of competition, the European Treaties accept that freedom and welfare are two incommensurable domains<sup>31</sup> with no direct subordination of the former to the latter.

protection of competition had initially been deleted from the Treaty text accidentally and without further consideration. It seems as if the French resistance towards the reintroduction of ‘undistorted competition’ in Article 3(3) TEU-Lis only developed after realising this ‘accident’.”

<sup>26</sup> Consolidated Version of the Treaty on European Union [2010] OJ C 83/01.

<sup>27</sup> *Ibid.*

<sup>28</sup> Joint cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, para 7.

<sup>29</sup> Case C-501/06 *P GlaxoSmithKline Services v Commission* [2009] OJ C282, 21 November, 2, para 63.

<sup>30</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/02.

<sup>31</sup> On the dialectical nature of commensurability debates in legal theory, see JL Schroeder, “Apples and Oranges: The Commensurability Debate in Legal Scholarship” (2002) 48 *Cardozo Law School Research Paper Series*.

Finally, in a purely legal sense, the principle of an open<sup>32</sup> market economy with free competition is still contained in Article 119(1) TFEU<sup>33</sup> as a tool to achieve the purposes of the European integration project. By being articulated so explicitly in the TFEU, free competition could already be perceived as an independent value. In other words, the goals of the EU cannot be reached by means which deviate from (let alone are incompatible with) the principle of an open market economy with free competition.

For these deontological reasons, the phenomenon of competition can legitimately be separated from the outcomes which it generates, since it does not receive its validity from its eventual utilitarian effectiveness, but primarily as a matter of principle. Therefore, competition is protected as an evolutionary choice of society. It is neither the *best* nor the *optimal* way to create wealth—be it consumer or total welfare, industrial growth or innovation. From a utilitarian perspective, competition is not indispensable. Arguably, there are other ways to generate welfare. The reason to protect the ethos of competition lies in a different dimension. It belongs to one of the fundamental rights, developed by the philosophical, moral and constitutional traditions of liberal democracies.

### E. COMPETITION AND VALUE PLURALISM

The recognition of the “constitutional” status of competition by no means implies its hierarchical superiority to other societal values such as consumer welfare. Constitutionality does not guarantee absolute protection. This paper recognises that each societal value has been accepted in one way or another at the constitutional and institutional level.<sup>34</sup> Moreover, the advocates of these

<sup>32</sup> The premise of this paper is that the notion of “open market” is a synonym for “free market”. It leaves aside the restrictive interpretation of the “openness” of the market as being only relevant for the purpose of designing an internal market as a federalist integration project.

<sup>33</sup> Art 119(1) TFEU provides that “For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.”

<sup>34</sup> AS Sweet and J Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 *Columbia Journal of Transnational Law* 89:

“A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.”

values can also find both legal and conceptual justification for their values to be protected at the “constitutional” level. This acceptance, however, merely reflects public recognition of that value. Democratic societies tend to acknowledge the futility of a clear-cut homogeneous hierarchy of values. Any attempt to develop such a constant subordination of societal priorities paves the way to authoritarianism. The scope of the recognised “constitutional” values is much broader than the regulatory capacity to fully protect every aspect of them.

Each socially significant fact is composed of a unique constellation of different conflicting values; therefore its complete regulatory scheduling is hardly possible to foresee. The hierarchical relationship between the different deontological and utilitarian values is one of mutual subordination. This situation creates a “rock–paper–scissors” game-theoretical effect: depending on the context, which is per se unpredictable and inductive, each value can outweigh another, while being simultaneously outweighed by a third one, which in turn outweighs the second one. This interaction composes a closed spiral circle.

In addition, each situation is predetermined by a dice-game effect where the decision of the regulator depends on the amount of “regulatory units” which every value has managed to claim on the universal value scale. The kaleidoscopic reality is then unpredictable *ex ante*. These characteristics of the regulatory reality are accepted as inevitable by liberal democracies. They constitute a well-known philosophical problem, depicted in the notion of “tragic choice”. As Galston submits, objective goods cannot be fully ranked or ordered:

“[T]here is no common measure of value for all goods, which are qualitatively heterogeneous. . . . There are no ‘lexical orderings’ among types of goods. And there is no ‘first virtue of social institutions,’ but, rather, a range of public values the relative importance of which will depend on particular circumstances.”<sup>35</sup>

One of the central claims of legal pluralists is that values constantly collide. Furthermore, as Maduro argues, “constitutional pluralism should not be seen simply as a solution, be it pragmatic or normative, to the problem of conflicting constitutional claims. Rather it should be conceived as something which is inherent in the theory of constitutionalism itself.”<sup>36</sup> General legal theory acknowledges this clash in the notion of “hard cases”.<sup>37</sup> Dworkin’s famous metaphor of the ideal Judge Hercules, who can eventually uncover “the right answer” to any legal case,<sup>38</sup> represents a monistic perception of the adjudicative process. From a pluralistic perspective, even if he were to devote all his powers to

<sup>35</sup> W Galston, *The Practice of Liberal Pluralism* (Cambridge University Press, 2005), 11–22.

<sup>36</sup> MP Maduro, “What Is Constitutional Pluralism?” in M Avbelj and J Komárek (eds), “Four Visions of Constitutional Pluralism” (2008) European University Institute Working Paper, Law No 21, 5.

<sup>37</sup> HLA Hart, *The Concept of Law* (Oxford University Press, 1997).

finding “the right answer”, Judge Hercules would become a victim of his own strength, simultaneously discovering all powerful counterarguments, hence transforming himself from Hercules into Sisyphus. Therefore, in order to reconcile conflicting values, each decision-maker inevitably has to undertake difficult choices. This implies that some values will be de-prioritised despite their significance. It is in the very nature of the adversarial process that it enables the promoters of each value to persuade the decision-maker of the societal or institutional importance of each value in each particular case.

The incommensurability of values in liberal democracies has been explored at the philosophical level by value pluralists.<sup>39</sup> The task of each decision-maker is predetermined by John Rawls’s “veil of ignorance” or HLA Hart’s “penumbra” which prevents the possibility of making ultimate judgements. Value pluralism conceptualises the relativity of each act of the decision-making, even though this relativity does not amount to relativism. Values still hold their internal essence which predetermined the choice of the decision-maker. Unlike relativism, which is a negative, deconstructive theory which ultimately justifies a complete arbitrariness of choice, value pluralism develops the idea of a “bounded” or “limited” arbitrariness of the decision-maker, which is predetermined and subordinated by such traditional control mechanisms of liberal democracies as elections, the separation of powers, free speech and adversarial processes, as well as the strong implicit influence of the legal culture shared between the actors or “reflective equilibrium”.<sup>40</sup> In one way or another, all these elements contain strong competitive components. This also shows the pivotal societal role of competition as an “immune system” of liberal democracy.

The dilemmatic nature of the decision-maker problem is rejected by authoritarian regimes, which base their decision-making process upon quasi-religious commands with homogeneous structures and mutually reconcilable elements. Authoritarian views therefore support the existence of clarity and predictability (right v wrong situation). Conversely, liberal democracy recognises the inevitability of making choices between equally important options (right v right situation). This is the reason why the former model inclines towards inquisitorial jurisprudence, while the latter is based upon adversarial judicial (and, in a broader sense, decision-making) processes.

The relevant methodology or balancing act is analysed in the subsequent parts of this paper. Before this, however, it is necessary to show why economic competition is so important for liberal democracies. This argument is developed

<sup>38</sup> RM Dworkin, *Law's Empire* (Oxford, Hart Publishing, 1998).

<sup>39</sup> I Berlin, “On Value Pluralism” (1998) XLV(8) *New York Review of Books*: “We are doomed to choose, and every choice may entail an irreparable loss. The world we encounter in ordinary experience is one in which we are faced with choices between ends equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. . . . The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.”

from a comparative perspective. The economic aspects of competition have been historically so deeply influenced by the utilitarian cost–benefit approach that any reference to the deontological foundations of competition is seen as irrelevant. This is not the case for the regulation of the political and cultural aspects of competition. Both are still predetermined by strong deontological boundaries. In order to demonstrate that the same could be applied in the area of antitrust, it is necessary to reveal the conceptual similarities between the political, cultural and economic aspects of competition.

## PART II

### F. THREE DIMENSIONS OF COMPETITION IN LIBERAL DEMOCRACY

Aside from its economic dimension, competition is present in the political and cultural contexts.<sup>41</sup> In fact, competition is an indispensable attribute of democracy,<sup>42</sup> although not an indispensable attribute of governance. Arguably, many societies can *efficiently* develop their economic, cultural and political activities on the basis of authoritarian principles of administration with no or only some minimal competition. The present-day economic performances of countries with planned economies and rapid development of the notion of “authoritarian capitalism” against the background of the financial crisis can serve as recent examples thereof. In this sense, competition should be seen as a “luxury product” which is accepted as a distinctive attribute of liberal democracy. It is not being abandoned every time the markets fail. Competition is recognised as a matter of principle rather than necessity.

All three aspects of competition are inherently protected in all democratic polities.<sup>43</sup> Thus in politics the competitive process is reflected in the elections, where political parties “compete” by offering ideologies and programmes for their constituencies. In a cultural sense competition is encompassed in the notion of “free speech”, by which individuals and groups freely express their views and opinions. For a long time free speech has been seen as a “marketplace of ideas”,<sup>44</sup> which holds that the solution to many problems arises out of the

<sup>40</sup> J Rawls, *A Theory of Justice* (Cambridge, MA, Harvard University Press, 2005).

<sup>41</sup> H Demsetz, “Economic, Legal and Political Dimensions of Competition” (1981) University of California, Los Angeles Discussion Paper No 209.

<sup>42</sup> G Amato, *Antitrust and the Bounds of Power: Dilemma of Liberal Democracy in the History of the Market* (Oxford, Hart Publishing, 1997).

<sup>43</sup> PJ McNulty, “Economic Theory and the Meaning of Competition” (1968) 82 *Quarterly Journal of Economics* 639: “[C]ompetition is, in our system, a political and social *desideratum* no less than an economic one.”

<sup>44</sup> The concept of the “marketplace of ideas” was originally borrowed by the legal discourse from two decisions of the US Supreme Court in *Abrams v United States*, 250 US 616 (1919) and *Keyishian v Board of Regents*, 385 US 589, 605–06 (1967).

tensions that exist between different views. Society as a whole benefits from the circulation of thoughts that can be seen as a “competition” of ideas.<sup>45</sup> Finally, in its economic sense, competition is present in the idea of free markets. Thereby the notions of elections, free speech and markets can be seen as the political, cultural and economic aspects of competition, respectively.

The political, cultural and economic dimensions of competition are equally important for a healthy democracy. None of them should be justified by efficiency benchmarks.<sup>46</sup> In politics we do not simply appoint “the best” or “the most effective” party to govern the country as in enlightened absolutism. We do not select only “the best” or “the most useful” ideas to be freely circulated inside the community. The very notion of competition and freedom automatically implies certain redundancies and inefficiencies. However, their existence does not provide a sufficient ground for changing the system.

Authoritarianism is a concept starkly opposed to competition. Unlike competition, it is concerned with final results. The procedure by which they are obtained is often neglected. The famous credo of authoritarianism is “the end justifies the means”, whereas for competition the “journey” is more important than the “destination”. The regulation of economic affairs in an authoritarian fashion can be *successful*, whereas reliance on the invisible hand may lead to failures. This does not mean, however, that the ethos of competition should be replaced by command control or planned economy. Indeed, economic freedom usually leads to success. Then again, its success sometimes becomes its biggest enemy. Economic prosperity can find supporters more rapidly than the notion of economic freedom. Therefore the latter is often perceived as an instrument to achieve the former. The maximisation of welfare is neither an unconditional nor a quintessential feature of freedom. Freedom cannot be seen as a purely rational, predictable and calculable activity, but rather as a driving force of the entrepreneurial discovery.

<sup>45</sup> Stucke and Grunes highlight the similarities between competition and free speech, though the centre of gravity of their research (ME Stucke and AP Grunes, “Antitrust and the Marketplace of Ideas”, (2001) 69 *Antitrust Law Journal*) is based on the regulation of free speech by antitrust law rather than on the analysis of the economic aspects of competition in comparison with the political regulation of free speech.

<sup>46</sup> RM Dworkin, “Introduction” in I Hare and J Weinstein (eds), *Extreme Speech and Democracy*, (Oxford University Press, 2009):

“If freedom of speech is a basic right, this must be so not in virtue of instrumental arguments, like Mill’s [‘Mill said that we should tolerate even the speech we hate because truth is most likely to emerge in a free intellectual combat from which no idea has been excluded’], which suppose that liberty is important because of its consequences. It must be so for reasons of basic principle.”



### G. THE SELF-DESTRUCTIVE NATURE OF FREE COMPETITION

The deontological aspects of competition constitute its main attractiveness for liberal democracies.<sup>47</sup> At the same time, it constitutes also its biggest vulnerability, because the competitive process in its pure form cannot conceptually resist any radical views, since it allows them also “to compete” for being prioritised by constituencies, individuals and consumers. Liberal democracy itself contains strong self-destructive elements. Radical views in politics and restrictive conduct in economics constitute an inherent (though undesirable) part of the competitive process, even if endowed with all the positive features peculiar to competition. In this respect, any radical political ideology, as well as any intolerant expression and any anticompetitive conduct, can claim protection as a matter of freedom. These practices can be prohibited only after counterbalancing the elements of freedom which they contain with other important societal values.

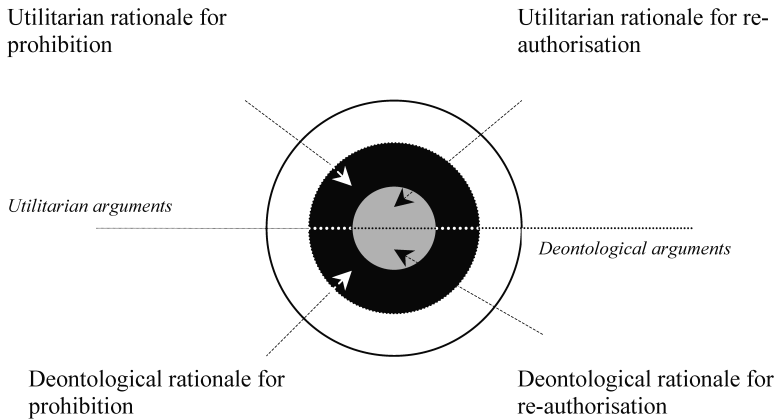
For this reason certain “benchmarks of appropriateness” have been drawn with respect to all three aspects of competition. For instance, political parties which promote racism or other perverse ideologies are not authorised to participate in elections. Extreme speech is not allowed as a form of argumentation. No company is permitted to embark on restrictive conduct. These preventative political, cultural and economic safeguards are called for to avoid any harm to both democracy and competition. Yet, paradoxically, in an ontological sense they conflict with the fundamental principles and the very essence of democracy and competition. This dilemma is permanently faced in the political, cultural and economic spheres. In antitrust scholarship it has been captured by Robert Bork in his famous phrase “the antitrust paradox: a policy at war with itself”.<sup>48</sup>

In contrast to economic thought—in which the concept is relatively new<sup>49</sup>—the self-contradictory essence of competition has been the object of continuous investigations in the political and cultural contexts for a long time. Thereby it became an inherent part of the intellectual tradition dating back to antiquity (eg the Socratic method of philosophical inquiry; moral dilemmas;

<sup>47</sup> *United States v Topco*, 405 US 596, 610 (1972): “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.”

<sup>48</sup> RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, The Free Press, 1978).

<sup>49</sup> Despite this relative novelty, legal and political philosophers use the “language” of economics to explain the idea of pluralism. See eg B Baez, *Affirmative Action, Hate Speech, and Tenure—Narratives About Race and Law in the Academy* (London, Routledge Taylor & Francis Group, 2001), 50: “Ironically, the marketplace metaphor, which is rooted in laissez-faire economics, is more effective for representing speech than for representing the free market system itself.”



*Fig 1* Regulation of Self-destructive Competition

tragic choices; enlightened absolutism). Understandably, antitrust can benefit from the more elaborate solutions offered by legal and political theory.<sup>50</sup>

The above-mentioned self-destructive elements of competition have their conceptual solution designed in the form of a three-circled process (Fig 1). The big (white) circle implies that any conduct in liberal democracy is authorised by default. The middle (black) circle shows that some of those practices authorised by default can be prohibited because they significantly encroach upon the (i) utilitarian or (ii) deontological interests of the polity. The small (grey) circle demonstrates that those prohibited by the black circle agreements can be reauthorised (i) on deontological grounds or (ii) on utilitarian grounds after performing a balancing act.

Along the lines of Fig 1, the reference to liberty and democracy in the Preamble of the TEU would constitute the big (white) circle (authorisation by default); the rationale of Article 101(1) TFEU is expressed by the lower (deontological) part of the middle (black) circle; whereas the rationale of Article 101(3) TFEU is encompassed in the upper (utilitarian) part of the small (grey) circle. In other words, (1) at the outset, every economic activity is authorised by default; (2) unless it significantly restricts other important societal values. The structure of Article 101(1) TFEU enables prohibition of only those agreements which violate the deontological value of competition; other rules prohibit violations of other values. The conceptual attempt to expand the scope of

<sup>50</sup> LA Sullivan, "Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?" (1977) 125 *University of Pennsylvania Law Review* 1214: "[A]ntitrust scholarship could usefully explore the styles of analysis and some of the material from the humanistic disciplines of history and philosophy, and . . . it might be useful to draw upon social sciences other than economics, particularly on sociology and political science."

Article 101(1) TFEU into the utilitarian part of the middle circle has been supported by the Court of First Instance,<sup>51</sup> but then fundamentally rejected by the European Court of Justice.<sup>52</sup> Therefore, Article 101(1) TFEU does not deal with such values as consumer welfare. There exist other mechanisms for the protection of utilitarian values, which go beyond the scope of antitrust. (3) On the other hand, the current structure of Article 101(3) TFEU covers only utilitarian rationales for the reauthorisation of otherwise prohibited agreements. This paper attempts to demonstrate that this feature constitutes the main discrepancy between the regulation of the economic aspects of competition and the regulation of its political and cultural elements. A conceptual amendment of Article 101 TFEU will be proposed and explained in the following sections, which would enable the reauthorisation of some anticompetitive practices not only on utilitarian grounds (as it is the case in Article 101(3) TFEU now), but also from the deontological perspective currently missing in antitrust, though present in the regulation of the political and cultural aspects of competition.

#### **H. “FREE SPEECH V HATE SPEECH” = “FREE COMPETITION V ANTICOMPETITIVE CONDUCT”**

The relationship between free speech and hate speech—ie speech designed to promote hatred on the basis of race, religion, ethnicity or national origin<sup>53</sup>—is ruled by a dialectical interplay. On one hand, hate speech is prohibited, because it causes harm both from (i) a utilitarian and (ii) a deontological perspective: (i) hate speech is detrimental for such societal goods as public morals and equality and (ii) it threatens freedom of speech, because it can lead to the establishment of authoritarianism (“Oroboros” scenario) if it is not curbed.<sup>54</sup> On the other hand, hate speech itself is a component of free speech.<sup>55</sup> Thus, while fundamentally belonging to the big regulatory circle, hate speech also falls in the middle circle of prohibition. The same can be said on the correlation between free competition and anticompetitive conduct. On one hand, anticompetitive conduct is prohibited since it harms (i) some economically significant utilitarian

<sup>51</sup> T-168/01 *GlaxoSmithKline Services v Commission* [2006] OJ C294, 2 December, 118ff.

<sup>52</sup> C-501/06 *P GlaxoSmithKline Services v Commission* [2009] OJ C282, 21 November, 63.

<sup>53</sup> M Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis” (2003) 24 *Cardozo Law Review* 1523.

<sup>54</sup> JT Nockleby, “Two Theories of Competition in the Early 19th Century Labour Cases” (1994) 38 *American Journal of Legal History* 452: “Many scholars have recognised the dual, paradoxical nature of competition as both destructive and beneficial. . . . ‘Competition’ plays an operative role in what Adam Smith called the ‘invisible hand’ that guides the productive engines of the economy.”

<sup>55</sup> The same rationale can be developed in respect to the limitation of the political aspects of competition, by which some parties with eccentric ideologies are not allowed to participate in elections because they can be detrimental (i) for democracy itself or (ii) for other important societal values.

values (the doctrinal mainstream interpretation of Article 101(1) TFEU); as well as (ii) the deontological essence of competition itself (the literal interpretation of Article 101(1) TFEU). At the same time, anticompetitive conduct is also a part of free competition. Indeed, however harmful, it remains an expression of free economic will and it can thus claim its protection at least to some extent. As a result, anticompetitive conduct simultaneously belongs to the big circle of by default authorisation, the middle circle of strict prohibition and the small circle of reauthorisation.

This being said, there still are significant distinctions between antitrust and free speech and this is the focal point of this paper. Namely, at the level of the small circle (reauthorisation) legal theory considers both types of harms (“utilitarian” or welfare-centric, and “deontological” or value-centric), whereas antitrust deals only with utilitarian forms of harm. In other words, to decide whether or not a particular expression of hate should be allowed, legal and political theories consider its positive effects for freedom of speech as well as other public values. Furthermore, they put a particular emphasis on the positive effects predominantly related to the deontological aspects of free speech.<sup>56</sup> Thus hate speech is seen as an integral part of free speech and can be reauthorised, in spite of its negative effects on public morals, due to the intrinsic importance of freedom.<sup>57</sup> In contrast, antitrust analysis confines itself mostly to the eventual positive effects of anticompetitive practices for such economic values as consumer welfare, industrial growth and innovation; all values that are external to competition. It refuses to explore any procompetitive outcomes of anticompetitive conducts, considering this *prima facie* paradoxical scenario as impossible. The reason for this self-limitation is apparently to be found in the “quantitative”, “equilibrium-based” rationale of the neoclassical economic approach to antitrust;<sup>58</sup> which, unlike legal theory, cannot internalise any qualitative values and, instead, simply considers them as “*known unknowns*”. Hence, the structure of Article 101(3) TFEU takes the form shown in Fig 2 in which deontological reasons for re-authorisation are missing.

<sup>56</sup> The US doctrine (due to historical reasons) went in this respect as far as distinguishing between “the right to advocate violence” v “the duty to refrain from incitement to violence” (see *Yates v United States*, 354 US 298 (1957)).

<sup>57</sup> The most explicit examples with no justification of free speech other than deontological can be seen in two cases of the US Supreme Court. The US Supreme Court decision in *National Socialist Party of America v Village of Skokie*, 432 US 43 (1977) recognised the right of the National Socialist Party of America to march in a town inhabited by Holocaust survivors; the US Supreme Court decision in *Brandenburg v Ohio*, 395 US 444 (1969) recognised the right to promote the Ku Klux Klan’s ideas.

<sup>58</sup> RJ Peritz, “A Counter-history of Antitrust Law” (1990) 2 *Duke Law Journal* 265:

“[B]ecause the economic logic of price theory has persuaded many of us to accept its claims of unrivalled precision and logical structure, we presume (or fear) that arguments founded in social values but not reflected in the current antitrust discourse of economic . . . simply cannot be adjudicated in a structured way.”

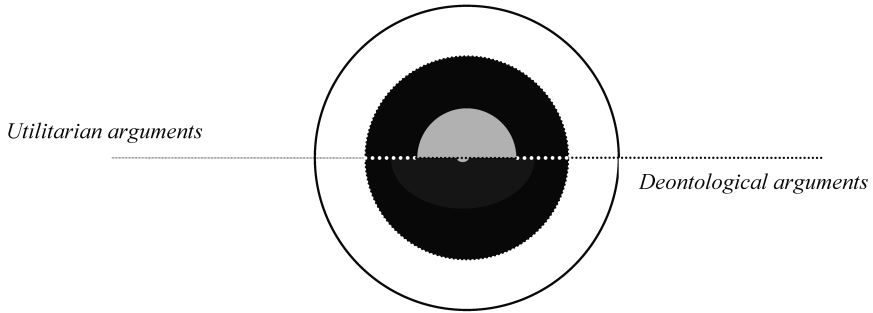


Fig 2 Article 101(3) TFEU

For instance, the Commission's Guidelines on Vertical Restraints which envisage the balancing of inter-brand with intra-brand competition stipulate that

“vertical restraints which reduce inter-brand competition are generally more harmful than vertical restraints that reduce intra-brand competition . . . [since they] may significantly restrict the choices available to consumers . . . [and/or] can reduce innovation in distribution and deny consumers the particular service.”<sup>59</sup>

By offering a valuable analysis of different empirical techniques which can be used for balancing of the conflicting societal interests in general, the Guidelines neither measure nor counterbalance the *intensity* of these competitive practices. They do not set up any standard for prioritisation of one kind of competition which would be based on other criteria than efficiency or consumer welfare.<sup>60</sup> In other words, the Guidelines do not ask how much competition has been limited by a restrictive conduct on a given market versus how much competition has been simultaneously generated by this conduct on another market. The balancing which is offered in the Guidelines concentrates on the measurement of the impact which the reduction of inter/intra-brand competition would have on consumers/innovations/industrial growth or market integration (ie the values which are external to competition itself), not on their impact on the competitive process.

The structure of Article 101 TFEU conceptually excludes the possibility that under some circumstances an anticompetitive conduct is capable of bringing about some positive effects for competition in other relevant markets, thereby becoming simultaneously anti- and procompetitive. These agreements are either reauthorised on the utilitarian grounds listed in Article 101(3) TFEU or simply not considered within the framework of Article 101 TFEU, which goes against

<sup>59</sup> Guidelines on Vertical Restraints COM(2000) C291/01.

<sup>60</sup> Guidelines on Vertical Restraints, SEC(2010): “[I]f inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers.”

the letter of the law, since Article 101(1) TFEU prohibits *all* anticompetitive agreements. Prima facie the deontological option for the reauthorisation is partly acknowledged in European legislation<sup>61</sup> and soft law.<sup>62</sup> However, the conceptual pattern there also deviates from the assessment and balancing of the *essence* of different kinds of competitions to the benefit of the evaluation of their economic *effects* on welfare, innovations or industrial growth (considerations that are external to competition as an independent societal value).

This crucial difference between free speech and economic competition is due to the fact that the contemporary antitrust doctrine equates harm to consumers with harm to competition and (the other way around) considers positive effects for consumers as inherently procompetitive. The ensuing discrepancy is caused by a regulatory lacuna which the proposed amendment of Article 101 TFEU will try to fill in.

### I. PROCOMPETITIVE ELEMENTS OF ANTICOMPETITIVE AGREEMENTS

The traditional approach to the assessment of the positive outcomes of an anticompetitive conduct is designed according to the intuitively monistic belief that the conduct can only be either pro- or anticompetitive.<sup>63</sup> This is the only way for the decision-makers to operate without recognising the existence of an independent deontological rationale for reauthorisation. Thus according to the decision adopted in *Leegin*,<sup>64</sup> “Vertical retail-price agreements have *either* pro-competitive *or* anticompetitive effects, depending on the circumstances in which they were formed” (emphasis added).<sup>65</sup> In this respect the doctrine explicitly equalises anticompetitive effects with harm to the consumers: “The rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with pro-competitive effect that are in the consumer’s best interest.”<sup>66</sup> However, this presumption is logically

<sup>61</sup> Eg Commission Regulation No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336; Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102, 23 April, P 0001–0007.

<sup>62</sup> Eg Guidelines on Vertical Restraints, *supra* n 59; Guidelines on Vertical Restraints, *supra* n 60.

<sup>63</sup> Communication from the Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/08, 11:

“The assessment under Article 81 thus consists of two parts . . . The second step, which only becomes relevant when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects.”

<sup>64</sup> *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877 (2007).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

contestable.<sup>67</sup> The same “either–or” neoclassical logic has been criticised by Monti.<sup>68</sup> Theoretically, the conduct can be both anticompetitive and pro-competitive at the same time. In some cases this conduct can be proconsumer, in others consumer-neutral or anticonsumer. Antitrust scholarship tries to *solve* this internal conflict by redefining it as an ontological “inconsistency”. However, this conflict is *irresolvable*. It has to be *incorporated* into the theory and considered as an engine for the evolutionary development of antitrust.

In this context the present paper does not accept the rationale that “[t]he rule of reason is designed and used to eliminate anticompetitive transactions from the market”.<sup>69</sup> The essence of the rule of reason and the nature of Article 101(3) TFEU do not entail the elimination of anticompetitive transactions from the market but, on the contrary, the immunisation of anticompetitive transactions from the antitrust sanctions, because the benefits of such transactions outweigh their negative impact on competition. An agreement which is covered by Article 101(3) TFEU remains anticompetitive on the second (black) level of the model of three regulatory circles. The purpose of the rule of reason is to reauthorise otherwise anticompetitive agreements, and *inter alia* those agreements which promote competition more than they simultaneously distort it.

Since some *anticompetitive* practices can have not only *pro-industrial*, *pro-innovation* or *proconsumer*, but also *procompetitive* effects, these practices should be seen as simultaneously *anti-* and *procompetitive*. For instance, an agreement of undertakings on the improvement of standards of goods and services objectively restricts the rights of some to compete, but at the same time one of its consequences can improve or intensify the process of competition between the

<sup>67</sup> PJ Hammer, “Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs” (2000) 98 *Michigan Law Review* 923: “Under contemporary doctrine, restraints of trade can be justified if the restraints are ‘pro-competitive’, but what does it mean to be ‘pro-competitive’? . . . The answers that the Court often gives mark a departure from structural understandings of competition. Conduct is pro-competitive if it increases output, reduces price, or enables the parties to provide a product or service that would not otherwise be available . . . It is easier to reconcile these criteria with a total welfare standard than with a competition-based standard . . . Within this framework, evidence of an increase in output, a reduction in price, or the introduction of a new product most often indicates an increase in social welfare, regardless of the impact of the conduct on competition.”

<sup>68</sup> G Monti, “Article 81 EC and Public Policy” (2002) 39 *Common Market Law Review* 1060: “From a neoclassical perspective, the inclusion of Article 81(3) EC makes no economic sense: if an agreement’s anticompetitive harms are outweighed by its pro-competitive benefits, then the agreement does not restrict competition at all. Conversely, if an agreement’s pro-competitive effects (for example in terms of productive efficiency) outweighed by the risks generated by too much market power (which would reduce consumer welfare) then the agreement as a whole is anticompetitive. Therefore, Article 81(3) is futile—an agreement either promotes competition (and is thereby lawful) or suppresses competition (and is thereby unlawful)—the weighing of the pro and anti competitive aspects of an agreement can be carried out under the first paragraph of Article 81.”

<sup>69</sup> *Leegin*, *supra* n 64.

remaining undertakings.<sup>70</sup> Along these lines, Article 101(3) TFEU can be amended as follows:

“The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement . . . decision . . . concerned practice . . . which contributes to improving the production or distribution of goods [ie pro-industrial elements] or to promoting technical or economic progress [ie pro-innovation elements], while allowing consumers a fair share of the resulting benefit [ie pro-consumer elements] . . . and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives [ie individual minimal harm test]; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question [ie collective minimal harm test<sup>71</sup>] or *protects, strengthens or improves competition within the internal market.*”

In this context the proposed condition should be applied separately from the previous ones as an alternative to them.

Alternatively a new “Article 101(4) TFEU” can be proposed:

“The provisions of paragraph 1 may be also declared inapplicable in the case of any agreement, decision, concerned practice which while preventing, restricting or distorting some aspects of competition within the internal market, simultaneously protects, strengthens or improves others aspects of competition within the same or different part of the internal market.”<sup>72</sup>

The structure of “Article 101(4) TFEU” would take the form shown in Fig 3 in which only the deontological reasons for reauthorisation are explicitly provided.

Since the proposed changes only supplement and do not erase the current scope of Article 101(3), the whole structure of Article 101 after the amendment

<sup>70</sup> In its purest form the elements of this model are seen in the North American regulation of sport. Professional leagues form a *de facto* cartel with fixed prices, high barriers to entry and strong individual dependency. These leagues compose a closed association, where no other club is allowed to enter. However, the intensity of competition between the remaining clubs increases proportionally to the level of their closed (anticompetitive) co-operation, since the very essence of sport is contest and rivalry.

<sup>71</sup> Art 101(3) TFEU in this context mentions “the same” elimination of competition as Art 101(1) TFEU does, implying that an agreement can be immunised from antitrust sanctions only if the elimination of competition which has been established during the Art 101(1) TFEU test was not substantial. Conversely, the new amendment permits taking into account different components of competition which were not articulated by means of the Art 101(1) TFEU test and which can outweigh the negative impact on competition (by the Art 101(1) TFEU test) regardless of whether the latter has been eliminated substantially or not.

<sup>72</sup> The same rationale can be potentially applied to Art 102 TFEU, although the structure of this article would not require any changes, since its wording is more flexible than that of Art 101 TFEU. If an undertaking abuses its dominant position, an objective justification can be potentially based on deontological grounds. Instead of referring to technological development or the benefits for consumers, it can in some cases argue that the practice is beneficial for competition as such. There are different potential strategies for developing this argument. The specificity of the concept of abuse still requires a separate theoretical analysis, which goes beyond the limits of this paper.



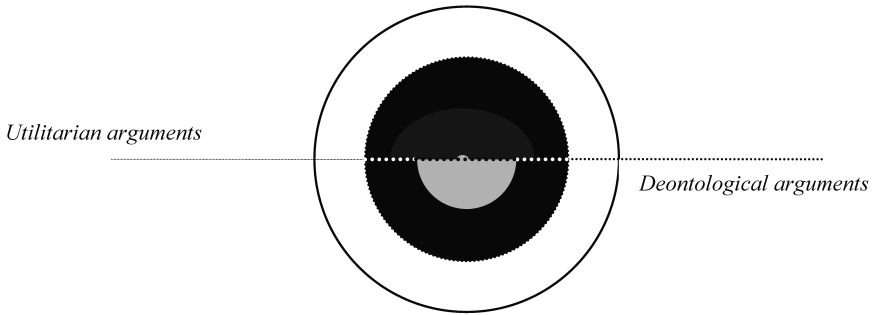


Fig 3 "Article 101(4) TFEU"

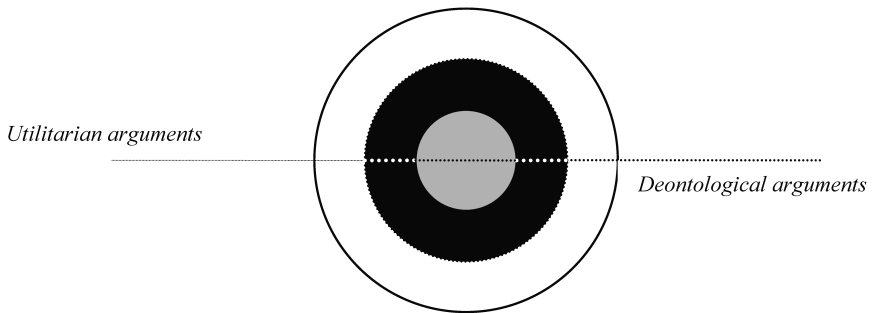


Fig 4 Article 101(3) and "(4)" TFEU

would take the form shown in Fig 4, where both utilitarian and deontological grounds for reauthorisation will be potentially available.

In the ideological<sup>73</sup> sense, competition in its political, cultural and economic dimensions is recognised as an important European value, grounded in well-established conceptions of liberal democracy. In fact, the political (elections), cultural (free speech) and economic (markets) aspects of competition constitute the keystone of liberal democracy. Freedom is a non-utilitarian category. We do not accept competition because it brings us the best of outcomes by default. Restricting freedom is often more *efficient* than freedom itself, but that does not mean that freedom should be compromised every time that it fails to be efficient. Yet, it does not mean either that freedom can never be compromised for the sake of efficiency.

<sup>73</sup> The term "ideology" is used in its narrow sense (ie a common denominator of the basic values of a particular group/society agreed upon by a "social contract").

In the systemic sense, if something is being balanced against something else, the latter consideration can also include some elements of the former. The regulator always does it on a higher systemic level. Thus, we protect equality-based rights by limiting free speech, but at the same time some of these prohibited free speech practices also receive immunisation from prohibition, because they bring more to free speech than they take away from equality rights. Similarly, we protect consumer welfare by limiting free competition, but at the same time some of these prohibited restrictive practices are to be protected from prohibition, if they bring more to free competition than they take away from consumer welfare (or from competition in different markets).<sup>74</sup> Economic competition contains the same systemic features as political competition (free elections) and cultural competition (free speech). Unlike economic competition, both political and cultural aspects of competition already envisage this option.

In the legal sense, the requirements of the amended Article 101 TFEU would merely concretise the objectives of the EU, which explicitly encompass the idea that the EU is based upon the values of liberty and democracy. Therefore, in situations where balancing and compromising of different European values are inevitable, competition should be seen as a legitimate economic value in its own right. In addition this option will enable the proper application of Article 101(1) TFEU, since the balancing test will be conducted according to the wording of the Treaty and not “merely” as a matter of common sense or as a rule of reason.

Arguably this conceptual proposal can be seen as politically ill timed. Indeed, it would also require a substantial reassessment of the present antitrust legislation. The conceptual justification of this approach can still be grounded at three levels: legal; systemic and political.

## PART III

### J. THE BALANCING ACT

The idea that competition is an independent value does not mean that it should be achieved at all costs. It is not a normative but rather a methodological statement. This paper does not claim that competition should be always prioritised over consumer welfare. However, it does effectively question the utilitarian approach to competition for not even allowing the possibility of such a

<sup>74</sup> P Nicolaides, “An Essay on Economics and Competition Law of the European Community” (2000) 27 *Legal Issues of Economic Integration* 15: “[F]irms compete on many different dimensions. Constraining one or more dimension does not necessarily result in the weakening of overall competition” (but can be sufficient for Article 101(1) TFEU to be applied).

prioritisation.<sup>75</sup> The lack of legal protection in all cases does not diminish the ontological essence of free competition. Instead, it submits it to the rational choices of policy-makers. The fact that some values have undergone a certain limitation due to the priority of other values, a state of necessity or even sheer public ignorance does not mean that they are reduced in their essence.<sup>76</sup> This prioritisation has an *ad hoc* rather than a systematic nature, which means that under another set of circumstances another value might be prioritised.<sup>77</sup>

The set of recognised public goals and interests—competition being one of them—is too broad to be coherent. Most of them are “merely” incoherent, some fairly conflicting, whereas others are mutually exclusive. Some regulators are aware of the dilemmatic nature of such reconciliation; others keep trying to bring together the whole spectrum of interests and values by casting them into a uniform and homogeneous system. Each regulator develops its own algorithm of hierarchical priorities and balances. Traditionally, competition—in its economic, political and cultural senses—has been highly appreciated in some parts of the world and, conversely, underestimated and/or oppressed in others.<sup>78</sup> It is not the purpose of this paper to give an opinion on which approach to competition is the most appropriate for Europe, since the answer appears to be self-evident. However, this “self-evidence” would be jeopardised were the role of competition to be totally circumscribed by its effectiveness, as is becoming increasingly the case nowadays.<sup>79</sup>

<sup>75</sup> Eg Christopher Townley in his comprehensive and persuasive study on Art 101 TFEU (C Townley, *Article 81 EC and Public Policy* (Oxford, Hart Publishing, 2009) acknowledges that “competition policy cannot do everything”, and this explains the inevitability of balancing. However, his observations concentrate the balancing analysis on the conflict between consumer welfare and economic efficiency (which are considered as the primary goals of antitrust) on one hand and non-economic, sociopolitical goals (which are sporadically recognised by competition law too) on the other. This implies that deontological “competition-centric” antitrust is only worth mentioning from the historical perspective, merely as an evolutionary period in the history of antitrust, which was de-legitimised by the eloquent phrase of the former EU Commissioner for competition Karel van Miert that “competition is not an end in itself”. This rationale does not include the competition-centric aspects of antitrust into the balancing act at all.

<sup>76</sup> At least, there is no direct proportionality between the level of regulatory ignorance of a given value and its internal axiological importance (even for the same regulator).

<sup>77</sup> In some cases (eg a “super-injunction” imposed on *The Guardian* newspaper to report on the controversial Trafifigura case) security concerns prevailed over free-speech interests. In others (eg the participation of the British National Party in public discussions on the BBC’s *Question Time* programme) the interests of free-speech prevail over the interests of tolerance.

<sup>78</sup> DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Clarendon Press, 1998), vii:

“Competition is popular—or so it seems. At least politicians and pundits in most places in the world tend to sing its praises and/or acknowledge its necessity. But what kind of competition and what is and should be the relationship between the process of ‘competition’ and other components of societal life? Despite their importance, these questions have been relatively little explored. Economic interests and ideologies of left and right have often blocked inquiry into the issues and obscured answers to the questions.”

<sup>79</sup> This conceptual conflict has been explored *inter alia* by Richard Posner (RA Posner, *Antitrust Law* (The University of Chicago Press, 2001):

The deontological perception of competition does not imply that it has to be protected in all cases and at any costs. The main claim of this paper is that competition should not be predetermined exclusively by an external utilitarian rationale. The scope of the protected rights and values is too broad and their absolute protection would paralyse the functioning of society.<sup>80</sup> Therefore tradeoffs are unavoidable.<sup>81</sup> Yet, the fact that some right has not been protected in its entirety does not cancel its validity or its importance for society. Competition and consumer welfare are two fundamentally important economic values. Utilitarian thinkers give a bigger priority to welfare, whereas deontologists place more importance on competition. Not all objectives can be achieved in their entirety and not all values can be fully protected. Likewise, the very notion of “prioritisation of everything” is a *contradictio in terminis*.

### K. *DIVIDE ET IMPERA*

The methodology of separation of different values which is applied in this paper is conceptually rooted in the theoretical discussion between legal positivists and natural law theorists. The central problem for this discussion in legal theory is the relationship between law and morality. Positivists argue in favour of their conceptual separation; naturalists oppose this claim. This paper attempts to internalise the approach developed by legal positivists and apply it to the area of antitrust law. It accepts Kramer’s argument that “[t]hough legality and morality are of course combinable, they are likewise disjoinable”, that “separability does not entail separateness”, and that the main contend of the argument about

“If we assume that antitrust policy is to be shaped by economic analysis of the monopoly problem, what is the proper treatment of practices that, while monopolistic rather than competitive, may be more efficient than the competitive alternative? The social costs resulting from monopoly pricing will sometimes be lower than the cost savings generated by such pricing. Imagine a market that is so small in relation to the efficient scale of production that a single firm will have much lower costs than more than one firm—so much lower, indeed, that the profit-maximising monopoly price is actually below the price that would be charged by competing firms . . . Social welfare would be greater if the monopoly were permitted than if it were forbidden, and since, in an economic analysis, we value competition because it promotes efficiency—that is, as a means rather than as an end—it would seem that whenever monopoly would increase efficiency it would be tolerated, indeed encouraged.”

<sup>80</sup> T Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press, 2005) 1: “We live in a world of markets and rights. . . . One of the most fundamental problems facing modern law is how to attempt to reconcile the values of markets, rights, and social solidarity and how to deal with the tensions between them.”

<sup>81</sup> J Raz, “Legal Principles and the Limits of Law” (1972) 81 *Yale Law Journal* 829–30:

“We know not only that principles like ‘maximise total happiness’ and ‘strive to increase equality’ may conflict when applied to particular cases, but also that rules may sometimes conflict as well . . . and that they impose obligations which may be overridden in particular cases by contrary considerations.”

separability is not that “legal requirements and moral requirements must diverge, but that legal requirements and moral requirements can diverge”.<sup>82</sup> The same methodology is applied in order to separate the deontological meaning of competition from its eventual utilitarian outcomes: they can indeed coincide, they are mutually influenced, but this does not mean that they cannot diverge and therefore be treated as conceptually different phenomena.

There are two ways of reconciling conflicting values (in our case it is a conflict between competition and welfare). The first is monistic, the second is pluralistic. According to the monistic approach, all values should be systematised in a complex hierarchical form. Legal monists claim that values obtain their coherency by being transformed into legal rules. In this way conflicts between them disappear, since legal rules are applied with no reservation. This approach is the most attractive for policy-makers because it eliminates all problems related to the balancing of conflicting values.<sup>83</sup> Legal pluralists claim that this reconciliation is rather illusionary. Both in practice and in theory there will always be room for conflicts between different rules, because the more complex a legal system becomes, the bigger is the potential for divergent interpretations. Even very primitive or very mobile systems of norms cannot avoid discrepancies between their different parts. These discrepancies are present in all legal systems; they are natural for law as reflected in HLA Hart’s comments on the “open texture” of rules.

As argued above, according to legal pluralists, the tensions between various legal rules are seen as inevitable and, in general, productive. This approach does not even try to eliminate them. Pluralistic interpretation internalises the conflicts of values and offers an alternative way of reconciling them. Instead of an unrealistic attempt to establish a homogeneous hierarchical system, it divides different values for the sake of their independent analysis. The homogeneity of the legal system is always taken here as a never-reaching *aim* and not as a *fact*. Following this separation, the values are explored on their own merits. This operation helps to discover the relevant features of each value. After an internal analysis, the values are proposed to policy-makers, who should reintegrate them by deciding which value is to be prioritised over the others, and to what extent. The decision of policy-makers is inductive in the sense that there is a strong probability that some different value would be prioritised under different circumstances. Unlike the monistic approach, which is a one-step technique, the pluralistic method is a two-step approach, in which decontextualisation is followed by recontextualisation.<sup>84</sup> These stages are synthetically separated for the

<sup>82</sup> MH Kramer, *In Defence of Legal Positivism* (Oxford University Press, 1999).

<sup>83</sup> According to Habermas (J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Polity Press, 1996) constitutional rights cannot be balanced. Otherwise they will lose their normative nature.

<sup>84</sup> A decision-making process of the Commission is an example of this dialectical reconciliation. Thus, each directorate is responsible for its own policy. Internally each is concentrated on the

sake of analytical investigation. In real life their interdependency often prevents them from being seen separately.

At the first (internal) stage values are explored separately. They constitute close autopoietic self-sufficient systems.<sup>85</sup> Each value internally develops its own “language” and “currency” and tries to persuade the decision-maker of its importance (as shown in Fig 5).

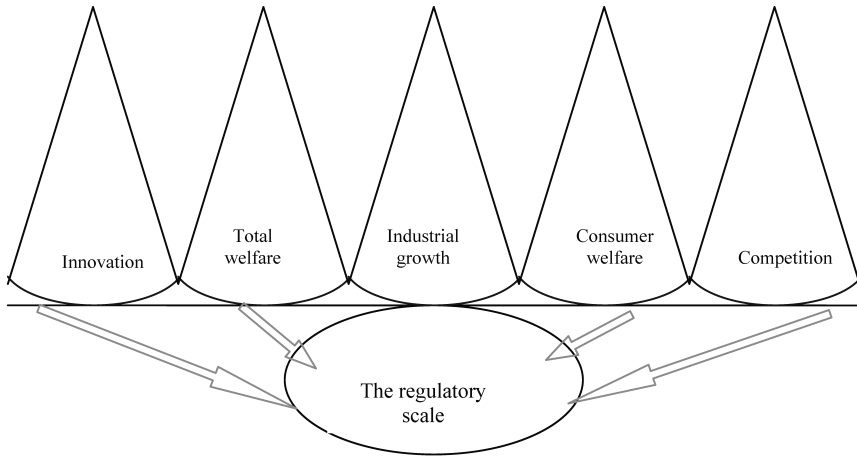


Fig 5 Internal Communication

The *dialogue* between the values and the decision-maker takes the form of a one-way communication: the innovation box claims that any act of the regulator should protect and promote new innovative ideas; the welfare box constantly reminds the regulator of the necessity to increase welfare; the federalist box insists that all policies should include elements of European integration, etc. Internally all policies are explored in each box separately, they evaluate these policies according to their own internal merits. This type of out-of-context internal analysis constitutes the essence of scientific thinking, encompassed into

specificity of its policy. This enables them to undertake a thorough in-depth analysis of all issues related to EU competence. In a second round these values are put on the agenda of the Commission which, as a collective body, decides which societal interest should prevail over the others in each particular case. Each directorate is interested in prioritising the policy that it is responsible for. Indeed, at the external level, each value is traded off against all others. No societal interest is regulated without taking into consideration the resources and capacities of the regulator as well as the cross-interests of other policies. The list of societal objectives is too broad to be consistent.

<sup>85</sup> N Luhmann, *Law as Social System* (Oxford University Press, 2004).

the notion of specialisation, which unlike its practical counterpart is preoccupied with *understanding* the problems rather than *solving* them.

At the second (external) stage each value abandons its natural limits and its specific “language” and tries to use all available “languages” in order to be prioritised by the decision-maker (as shown in Fig 6).

If economic competition is not perceived as a value in its own right—as put forward by the utilitarian vision of antitrust—then competition cannot claim its societal importance at the internal stage (Fig 7).

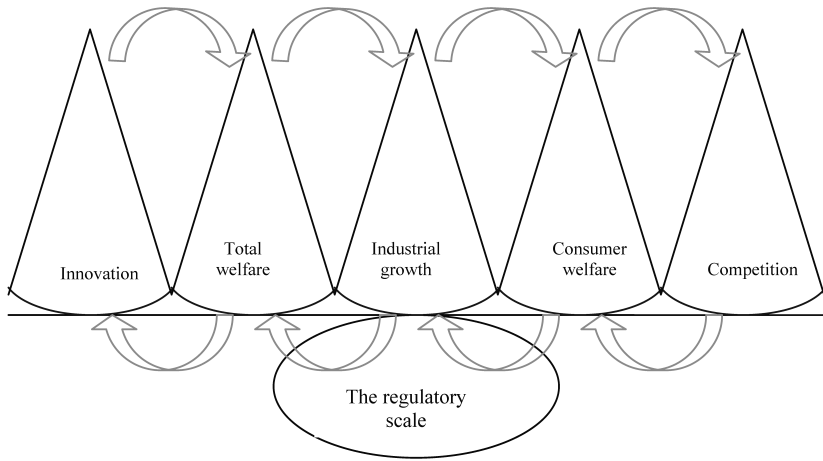


Fig 6 External Communication

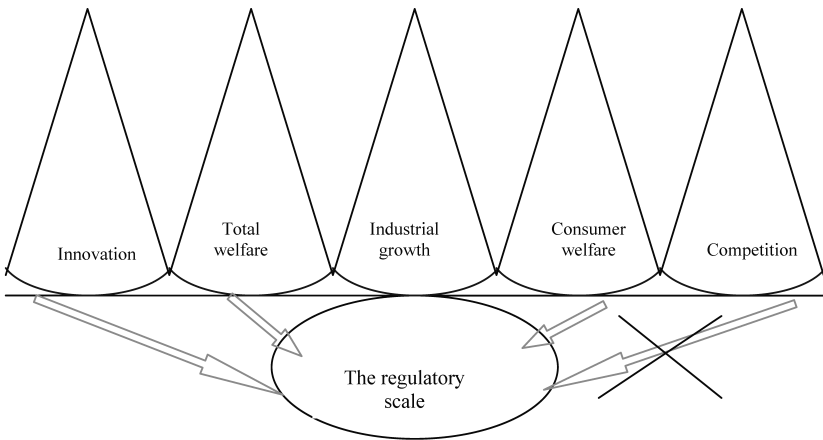


Fig 7 The Status of Competition in the Internal Communication

It encourages the regulator to create a universal “language” and “single currency” or at least to establish a stable “rate” between the different internal “currencies”. However, at the same time, the internal “language” of each value which reflects its specificity and uniqueness also appears in its discourse. Hence, the external “language”, “the regulatory Esperanto”, is not a substitution for the internal “languages”. They dialectically coexist in both dimensions, constantly “translating” each other.

The ensuing *multilogue* between the values and the decision-maker takes the following form: “innovation is good because *inter alia* it increases total welfare and industrial growth → total welfare is good because *inter alia* it enhances industrial growth and innovation → industrial growth is good because *inter alia* it increases consumer welfare and social cohesion, etc, ad infinitum”.

Therefore at the external stage, under the current regulatory framework, competition can only claim its societal importance by presenting itself as a tool to increase such utilitarian values as innovation, industrial growth, consumer welfare etc (Fig 8). Other values do not have to refer to or even take into account competition as an independent realm in their attempts to increase their own regulatory significance (since competition is seen only as an external utilitarian means to arguably more important ends).

Therefore, the task of this paper is to raise some awareness about the importance of such internal recognition for competition. It does not claim any exclusivity for the deontological approach, but merely its coexistence on an equal footing with the utilitarian approach. In the area of antitrust this can be achieved only if some space on the regulatory scale is reserved for competition as

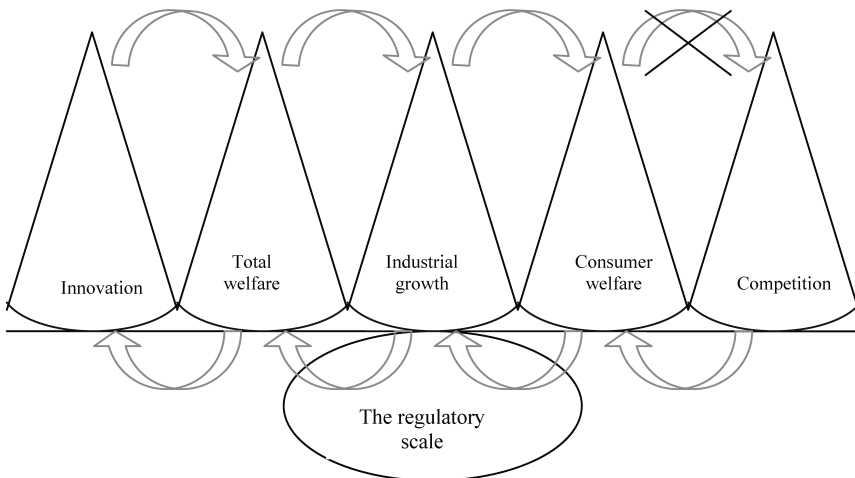


Fig 8 The Status of Competition in the External Communication



a process, as the proposed amendment to Article 101 TFEU stipulates. As already explained, this proposal does not replace the utilitarian conditions of Article 101(3) TFEU and does not deprive the decision-maker of its competence to make choices in the “bounded arbitrariness” framework, since “the provisions of paragraph 1 *may* be declared inapplicable” but they do not have to.

In these circumstances competition cannot expect parity with other regulatory values which hold their internal recognition from the decision-maker. In other words, under the current approach procompetitive aspects of anticompetitive conduct can only be protected when they contribute to the enhancement of other values by using their own “language” (ie “competition is good *only* because it is beneficial for consumers, innovation, growth or integration). Other values do not have to use the “language” of competition in order to reaffirm their legitimacy, because the “language” of competition is not recognised as an autopoietic internal value. For instance, the claim that industrial growth is good because it increases competition can only be made sporadically.

This situation is not unique to competition. Some other deontological values encounter similar problems in their own domains. For example, from the law and economics approach, intellectual property faces the challenge of its utilitarian legitimisation. Accordingly, it is not enough to hold the right to some intangible assets. On top of this, an additional justification is required for property rights on such utilitarian grounds as the protection of incentives to invest, better distribution of goods, creativity or enhancement of innovation. From an utilitarian perspective the possession of the right as such does not suffice.

Fig 8 shows the reason why only the external justification of competition represents the central part of present-day antitrust analysis, and why the “more economic approach” dominates current antitrust discourse. Since competition is refused any claim to internal legitimacy, it cannot expect other values to take into consideration its significance. As a result, the only way for competition to be present on the regulatory agenda is to demonstrate its instrumental relevance for the development of other values and policies. This is more easily achieved by means of economic than legal analysis, because economics relies on well-developed quantitative techniques aiming at reducing all incommensurable values to a single universally understandable “currency”.

## L. CONCLUSION

The main *substantive* claim of this paper is that, apart from its utilitarian, applied, dimension, competition also deserves to be perceived as an important deontological economic value. On the *methodological* side this paper argues that each value (including competition) has its own internal merits. The reconciliation of

competition with other values constitutes a central regulatory task. But this task should not be seen as either the sole or the primary role for the antitrust scholarship. The reconciliation of values is a political rather than an academic exercise. The predetermination of the antitrust doctrine merely by politically sensitive welfare-centric goals diminishes the importance of competition as an independent value. The task of the “competition box” should be more modest. It should refocus its attention on the semantics of the term “competition” in order to provide for this phenomenon sufficient internal scrutiny. All attempts to justify “consumer-centric”, “integration-centric” or “environment-centric” antitrust interpretations should be designed and promoted by these respective policies rather than by competition policies.

This paper calls for a higher level of specification in antitrust. It argues that antitrust law should primarily address the questions of the protection and promotion of competition and only explore in an ancillary role the impact of competition on consumer welfare and other economic or political values. By applying the methodology developed by legal theory and political philosophy for the regulation of freedom of speech, it shows on the *comparative* side that economic competition can also be seen as an independent value. The utilitarian assumption that competition is only useful as a means to generate welfare is contestable and can be dangerous. Its literal interpretation would reveal that we appreciate welfare more than competition and, if this is the case, competition will be compromised as soon as we find better ways to generate welfare. This would undermine the very concept of freedom, paving the way for antitrust “philistinism”. The one-sided perception of the deontological vision of competition is not acceptable either. Both utilitarian and deontological arguments should coexist and interact within the framework of Article 101 TFEU, as the proposed amendment envisages.

The claim for competition-centric antitrust should not be understood as a proposal to diminish the importance of other values, influenced by competition law. Indeed, sectoral norms do not exist in legal vacuum, but constitute a part of a broader legal corpus. One might have to accept the possibility that all the relevant legal disciplines purportedly increase their importance by reinterpreting the legal meaning of the neighbouring areas. For instance, a norm establishing criminal responsibility for illegal file-sharing belongs both to criminal law and to intellectual property law. The “legal identity” of this norm would become even more multifaceted if, for instance, the file-sharing act has been committed by an underage, mentally challenged refugee. In this case no less than five areas of law could claim doctrinal priority, trying to provide their own internal rationale and discursive narrative concerning the perspective from which the case should be dealt. The very fact that different societal values try to expand their influence by using antitrust rules is thus fairly rational. Such a diffusion of legal meanings is acceptable from the perspective of legal pluralism. However, the problem of

modern antitrust lies in the fact that the core, competition-centric, meaning of Articles 101–109 TFEU is becoming barely visible, making way for other societal values, which apart from their external presence in antitrust also hold some place in their own internal value-centric “boxes”.

Antitrust has been asked to look “outside the boxes” so often and so persistently that it is about to forfeit its own “box”—competition then becoming as vulnerable as a snail without its shell. What distinguishes competition policy from other European policies is that it appears to lose its own merits by becoming fully subordinated to such external values as consumer welfare.<sup>86</sup> The recalibration of the goals of antitrust policy and the limitation of its ambit to purely competition-related problems can contribute to filling the current gap between the conceptual consistency and practical effectiveness of competition policy.

This paper left aside some important methodological questions of antitrust analysis—eg the “legal certainty v economic efficiency” dimension of antitrust methodology which is being intensively discussed in antitrust scholarship but is not of primary importance for the argument of this paper. It presumes that both legal and economic techniques can be applied in the separate internal analysis of the competitive process. Therefore, the deontological vision of competition should not be seen as an attempt to criticise the “more economic approach”. Its task is rather to enhance the “more competition approach”. The economic analysis of law is potentially applicable to the development of the deontological aspects of competition as well, although traditional legal instruments are still considered to be more relevant in this respect. It is not the objective of this paper to claim that competition should prevail over welfare. On the contrary, it only aims at defending the theoretical possibility of this option. Likewise, it does not try to develop the notion of competition as such, and it acknowledges that the idea of competition is no less multifaceted and context dependent than its consumer welfare counterpart and requires a separate theoretical investigation.

Finally, the re-establishment of the deontological elements of competition could have significant practical implications. For example, defendants could rely on an additional criterion for reauthorisation of otherwise prohibited practices. This would also impel undertakings—and in particular those with significant market power—to design their commercial activities in a way that could bring some benefits for the competitive process in other relevant markets. In doing so, public regulators will *de facto* share some parts of their duty to protect and promote competition with private industries without sharing their competence to intervene. The logic of “Article 101(4) TFEU” does not change the existing

<sup>86</sup> P Lowe, “The Design of Competition Policy Institutions for the 21st Century—The Experience of the European Commission and DG Competition” (2008) 3 *Competition Policy Newsletter* 6: “In the Commission’s view, the ultimate objective of its intervention in the area of antitrust and merger control should be the promotion of consumer welfare.”

format of antitrust regulation, since it neither replaces Article 101(3) TFEU nor deprives the enforcers of their power to reauthorise agreements and practices when the arguments of the parties and the objective findings of the cases provide sufficient grounds to this effect. In this respect, the priority of Article 101(1) TFEU remains undisputed. More importantly, antitrust regulators would benefit from an additional leverage to promote the significance of competition policy on the broader regulatory scale. Antitrust would no longer be perceived only as a tool which contributes to general public goals, but also as a policy in its own right, which protects and promotes an independent economic value—the competitive process. The absence of definitive standards by which practices can be reauthorised and the apparent complication of the reauthorisation procedure itself can be seen as shortcomings of this proposal. Yet, both can be easily mitigated and fine-tuned by the adversarial adjudicative process and the ability of the parties to put forward persuasive arguments. This proposal is also in conformity with the broader trend in European antitrust policy to enhance the private enforcement of competition law, enabling private parties actively to promote the competitive process in their everyday economic activities.

The deontological acknowledgement of competition as an additional standard for immunisation from antitrust sanctions should not be seen in its absolute form. Indeed, none of the existing conditions of Article 101(3) TFEU (ie benefits for innovations, industrial growth and consumers) are seen in their absolute form either. The recognition that competition should be seen as an independent economic value, separated from consumer welfare, does not imply that utility-based values are less important than deontological ones. The relation of competition with other important societal interests should take the form of a *par in parem* relationship. This “equal among equals” means that European rule-makers and policy-makers will still have sufficient room for interpretation and balancing of the conflicting values, in order to decide which should be prioritised over the others in each particular set of circumstances, and will not be required to protect or promote exclusively competition at the expense of more utility-based values. This mitigates suggested changes and makes the conceptual proposal explored in this paper less controversial and more realistic.