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University of Warsaw, University of Management Press

2009

Online at <http://mpra.ub.uni-muenchen.de/23817/>  
MPRA Paper No. 23817, posted 11. July 2010 / 19:37

## Does Competition Matter? An Attempt of Analytical ‘Unbundling’ of Competition from Consumer Welfare: *A Response to Miąsik*

by

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### *Abstract*

This paper is an attempt to evaluate the conceptual relationship between two central elements of the theory of antitrust: competition and consumer welfare. These two notions are analysed in their mutual dependency. In terms of methodology, the paper proposes to structurally separate competition from consumer welfare. This technique is successfully applied in the domain of legal philosophy when the correlation between law and morality is debated. The main purpose of this paper is to show that both competition and consumer welfare are economic values of fundamental importance with no *ex ante* hierarchical dominance of consumer welfare over competition. In case of conflict, priority might be given to either of these values depending on the context of the assessment. This paper has a discursive character, it constitutes a response to Dawid Miąsik’s article entitled: ‘Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish

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Antitrust Law' which was published in the 'Yearbook of Antitrust and Regulatory Studies' 2008 vol. 1.

**Classifications and key words:** goals of competition law; deontological v. utilitarian antitrust; separability thesis; competition and liberal democracy; rule of form v. rule of reason.

## I. Introduction

In a thoughtful and persuasive paper on the role of consumer welfare in contemporary antitrust theory<sup>1</sup>, Miąsik provides an in-depth analysis of Polish legislative and adjudicative practices of defining the goal(s) of competition law and policy. Miąsik explores different approaches and methods presented in Polish antitrust doctrine, qualifying them in a clear and approachable manner. The conclusions of the paper suggests that “[P]olish [as well as all others – O A] competition law seems to be very consumer-oriented and generally follows the rule that ‘what is good for consumers, is good for competition’<sup>2</sup>. Miąsik also notes that competition “[i]s and should be protected because it is beneficial for consumers, the economy and therefore for the whole society”<sup>3</sup>.

These statements correctly reflect the reality of antitrust. Normatively however, both of these assertions are contestable. It will be shown here that conceptually competition should sometimes be protected notwithstanding the interests of consumers and, on occasion, even at their expense. The discrepancy in the perception of competition requires a broader theoretical discussion on the essence and the role of competition in liberal democracy. Thus, the purpose of this paper is to compare different approaches to the notion of *competition* and *consumer welfare*, to undertake a structural separation of these phenomena and, to provide some conceptual benchmarks for their comparison.

The central issue which needs to be properly articulated here is whether competition encompasses its own societal value<sup>4</sup> or, whether it is merely an

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<sup>1</sup> D. Miąsik, “Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law” (2008) 1(1) *YARS*.

<sup>2</sup> D. Miąsik, *ibid.*, p. 56.

<sup>3</sup> D. Miąsik, *ibid.*, p. 36.

<sup>4</sup> F. A. von Hayek, “Competition as a Discovery Procedure”, [in:] F. A. von Hayek, *New studies in philosophy, politics, economics, and the history of ideas*, Taylor & Francis, 1978: “[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”.

instrument of achieving other, more “tangible”, economic objectives<sup>5</sup>. In fact, the methodological task of this paper is to undertake a transposition, into the realm of antitrust, of the classical dilemma between *rules* and *interests* contained in political and legal theory<sup>6</sup>. Depending on the ideological approach adopted, economic interests can be seen in terms of consumer welfare, efficiency, total welfare, industrial growth, innovation or any other *tangible* economic results. All these benchmarks have one thing in common – they consider competition solely as a *means* to an end, rather than an end in its own right. The *end* of antitrust policy is found, instead, in its substantial economic outcomes.

Theories which consider competition to be merely an instrument of achieving external goals (more important/the only valuable societal goals) can be classified as *utilitarian*<sup>7</sup> antitrust theories. Concepts that consider competition to be more than merely a tool to increase productivity, generate welfare or maximise efficiency, are classified as *deontological* antitrust theorists<sup>8</sup>. The latter views perceive competition as a distinctive feature of liberal democracy that should be protected irrespective of the outcomes which it brings to society. This paper attempts to demonstrate that by emphasising the deontological elements of competition we make the entire discussion of the goals of competition law more coherent. The claim is not made here, however, that competition should be protected at any cost in all cases. The conflicts between different legitimate values are inevitable (competition and consumer welfare are only two of many such values) thus it is impossible for policymakers to fully avoid the necessity to make trade-offs. Nonetheless, the

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<sup>5</sup> Ph. Lowe, “The design of competition policy institutions for the 21st century – the experience of the European Commission and DG Competition” (2008) 3 *EC Competition Policy Newsletter*: “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”.

<sup>6</sup> M. Weber, “Objectivity and Understanding in Economics” [in:] M. Weber, *Methodology of the Social Sciences*, New York 1977: “All serious reflection about the ultimate elements of meaningful human conduct is oriented primarily in terms of the categories ‘end’ and ‘means’. We desire something concretely either ‘for its own sake’ or as a means of achieving something else which is more highly desired”.

<sup>7</sup> The terminological distinction between *utilitarianism*, *consequentialism*, *teleology* and *instrumentalism* is irrelevant for the purpose of this paper. It does not analyse the differences between *rule-utilitarianism* and *act-utilitarianism* neither.

<sup>8</sup> The deontological approach in legal theory is typical for the positivistic legal doctrines. In classical philosophy the deontological approach is related inter alia to the Kantian tradition. D. M. Hausman, M. S. McPherson, *Economic Analysis, Moral Philosophy and Public Policy*, Cambridge University Press 2008: “Moral systems like the Ten Commandments are called ‘deontological’... [D]eontological (non-consequentialist) ethical theories employ both agent-centered prerogatives (they sometimes permit agents to act in a way that does not maximise the good) and agent-centred constraints (they sometimes prohibit agents from acting so as to maximise the good)”.

compromises between different policies should have an *ad hoc* nature and depend on the particular circumstances of each case. They should not be based on an *ex ante* set hierarchy of values where the position of competition is lower than that of consumer welfare.

## II. Competition and liberal democracy

As can be understood from the very etymology of the term, *competition* is a notion which encompasses a process, more than a result<sup>9</sup>. The notion of consumer welfare, on the other hand, is result-oriented. If we are interested in the outcomes that can be generated by competition only, then the very process of rivalry between undertakings would be seen as unnecessary or, at least, not indispensable. If, however, we consider that competition (seen as a process) is important for the societal paradigm of economic development, then the outcomes generated by this process are not the only reason for the rivalry between undertakings to exist. Methodologically, the latter approach appears to be more consistent with the idea of liberal democracy<sup>10</sup>.

Miąsik shows that the majority of Polish case-law considers competition as a means to increase welfare, while deontological elements of antitrust are present in some decisions<sup>11</sup>. His examples demonstrate that the Polish antitrust

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<sup>9</sup> P. A. McNutt, "Taxonomy of Non-Market Economics for European Competition Policy – The Search for the True Competitive Price" (2003) 26(2) *World Competition*: "We argue that competition is a process, and as such can be described, rather than defined".

<sup>10</sup> D. J. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford 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>11</sup> D. Miąsik, *ibid.*, p. 34: "In some cases..., statement can be found that the purpose of competition law is 'to secure conditions for the development of competition' (Judgement of the Supreme Court of 24 May 2004, III SK 41/04 (2005)...)... This is followed by cases containing statements that the goal of competition law is to protect market competition seen as an "institutional phenomenon" which is the basis of free economy market (Decision of the President of UOKiK of 4 July 2008...). Other examples include declarations pursuant to which "[t]he good protected under the act is the existence of competition as the atmosphere in which economic activity is conducted" while the protection of consumers (as purchasers of goods and services offered under competition conditions) is executed "by the way" (Judgement of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, published in: UOKiK Official Journal 2006, No. 1, item 16). Statements can even be found that "the task of competition authorities and antitrust law is to lead to a total (unlimited) and effective competition on the relevant market (Decision of the President of the UOKiK of 10

doctrine is not exclusively dominated by the consumer welfare ethos. Miąsik's study reveals even more than "[t]hat the goals of Polish competition law have always been limited to enhancing efficiency and consumer welfare"<sup>12</sup>.

Competition is not only an important value in economics, it is also very much appreciated in the sphere of politics and culture. Inasmuch as the distinctive elements of competition are identical in its political, cultural and economic sense, we can draw a parallel between the economic side of competition and its political (elections) and cultural (freedom of speech) dimensions. In all of its three aspects, competition constitutes the essence of a liberal society<sup>13</sup>. The political aspect of competition is traditionally known as *democracy* (whereby elections are a competitory<sup>14</sup> process, where political parties compete for the preference of the electorate). The cultural dimension of competition is commonly associated with *pluralism* (with the freedom of speech considered to be a competitory process, where different opinion-makers compete for the preference of citizens). The economic side of competition is reflected in the notion of *markets* (with the economic exchange of goods and services as a competitory process, where undertakings compete for the preference of consumers).

In other words, electoral democracy is a competition of political programs; pluralism – a competition of cultural ideas; and the market – a competition of goods and services. We apprise free elections and free speech not because of their *a priori* effectiveness, but because the freedom to elect and to speak constitute the political and cultural essence of democracy. The same applies to its economic aspect as encompassed in the notion of free competition.

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October 2005, DOK-127/2005)". All these decisions advocate deontological value of competition as an independent process.

<sup>12</sup> D. Miąsik, *ibid.*, p. 33.

<sup>13</sup> J. Baquero Cruz, *Between Competition and Free Movement*, Oxford 2002: "[There is a tendency among competition specialists to treat their topic in a highly technical way, 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>14</sup> In my view it is more precise to use the term "competitor" rather than "competitive". The scope of the latter term is much broader and apart from its antitrust sense (i.e. "involving rivalry") it also encompasses the rather industrial meaning of "competitiveness" as "being of good enough value to be successful against other competitors". The notion of "competitiveness" indicates the ability to compete. This ability can be achieved either by applying competition, protectionism or dirigisme. As we know, competition is not the exclusive way to achieve efficiency and industrial growth. The term "competitor" is oriented to the very process of competition. It is not interested in the final results of this process. For instance, the term "competitive market" can be interpreted as (i) a market which is strong enough to compete externally with other markets or as (ii) a market with strong internal competition.

If this presumption is correct, then competition deserves protection as a matter of principle and public choice, even in cases where it does not necessarily bring the best economic results. Competition in this constellation plays a pivotal role for the political, cultural and economic life of societies. It constitutes an important social value and represents a clear-cut public choice. In this sense, competition is not an indispensable way to generate welfare. It is rather a *luxury* product similar to most other rights and values. Often, from the utilitarian perspective, it might be seen as a redundant unnecessary practice with no, or minimal, positive effects. However, competition is protected not because it is the most efficient model for economic relations, but because this model is most compatible with freedom.

### III. Constitutionality of antitrust goals

The first question addressed by Miąsik is the discrepancy between the goals of competition law and the legislative acts which contain them. The author correctly observes that most antitrust rules are designed in a very ambivalent form, which makes it possible to interpret them differently depending on the context<sup>15</sup>. This approach is confirmed by other distinguished authors<sup>16</sup>. In my view, the statutory ambiguity belongs to universal attributes of law<sup>17</sup> and legal interpretation<sup>18</sup> as well as, more specifically, to constitutional legal

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<sup>15</sup> D. Miąsik, *ibid.*, p. 34: “Without a doubt, competition law statutes around the world have one thing in common – their substantive rules are drafted in a language so general and imprecise that they resemble far more the provisions of constitutional law (Pointed out by the US Supreme Court as early as the judgment delivered in *Appalachian Coals, Inc v. United States*, 288 U.S. 344, 359–60 (1933)), that those of any other coherent body of law. Leaving any interpreter with one of the widest possible margins of discretion, this generality allows substantive provisions of antitrust law to remain unchanged for hundreds (US), a few dozen (EC) or several years (Poland) seeing as its rules may easily be adapted to changing economic, political and social circumstances and, of course, legal or economic concepts”.

<sup>16</sup> C. D. Ehlermann, “Introduction” [in:] C. D. Ehlermann, L. L. Laudati (eds.), *The Objectives of Competition Policy, European Competition Law Annual 1997*, Oxford 1998: “Objectives are rarely defined expressly in competition statutes... They have to be inferred from legislative provisions which are broadly worded”.

<sup>17</sup> In the Dworkinian sense, law itself is seen as a gapless interpretative process.

<sup>18</sup> Unless perceived in terms of Barak’s “purposive interpretation” (see A. Barak, *Purposive Interpretation in Law*, Princeton and Oxford 2005: “Purposive interpretation is holistic. It views each text being interpreted as part of the legal system as a whole. Whoever interprets one text, interprets all texts. Each individual text is connected to the totality of texts in the legal system”), or Radbruch hermeneutic: G. Radbruch, “Legal Philosophy” [in:] *The Legal Philosophies of Lask Radbruch and Dabin*, Harvard University Press 1950: “The interpreter may understand

provisions. Following his presumption, Miąsik asks: “[h]ow is it possible that the same provision, the same semantic structure, is understood and applied in a substantially different way? How can it be that the same conduct was first perceived as anti-competitive, then as pro-competitive and it is now, in turn, viewed with caution?”<sup>19</sup>. He explains this situation by distinguishing between the goals of competition law and the statutory provisions that authorise or prohibit some legally significant actions. Miąsik states that the goals of competition law are not often defined and contained in its statutory acts but rather, that they are considered to be doctrinal, conceptual premises of the regulatory and judiciary authorities.

According to Miąsik, the theories concerning the role and place of the goals of competition law are defined most precisely, extensively and authoritatively in the case law of the relevant courts: “[c]ase law determines which conduct restricts and which does not restrict competition as well as what circumstances are to be taken into account in a competition-related analysis”<sup>20</sup>. Indeed, Miąsik’s explanation appears to be satisfactory in respect to the importance of the judicial interpretation of legal provisions. However, in the continental legal tradition the judicial interpretation plays an important role only on the practical level. Conceptually, it is still overshadowed by the statutory provisions.. Indeed, judicial activism and judicial ‘lawmaking’ are becoming common and convenient practices also in many continental countries; however, their interpretation of statutory provisions still has an *ad hoc* nature and it does not change its ontological status.

According to positivistic theories<sup>21</sup>, if a societal value has been explicitly embedded in a constitutional act, this value should be protected even in cases where judicial opinion deviates from the norm or states otherwise<sup>22</sup>.

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the law better than its creators understood it; the law may be wiser than its authors – indeed, it must be wiser than its authors”.

<sup>19</sup> D. Miąsik, *ibid.*, p. 34.

<sup>20</sup> D. Miąsik, *ibid.*, p. 35.

<sup>21</sup> M. H. Kramer, *In Defence of Legal Positivism*, Oxford University Press 1999: “Though legality and morality are of course combinable, they are likewise disjoinable... What exactly is meant by the claim that law and morality are always separable? One thing clearly not meant is that law and morality are always separate. Separability does not entail separateness... [T]here can exist any number of contingent connections between legal requirements and moral requirements. A refusal to acknowledge the possibility of such connections would be at least as foolish and misguided as an insistence that they must actually obtain in all circumstances... [What this view] contends is not that legal requirements and moral requirements must diverge, but that legal requirements and moral requirements can diverge... Anyone seeking to gain a clear understanding of the relationships between law, justice and morality must attend to numerous distinctions within each of those phenomena”.

<sup>22</sup> J. Raz, “Legal Principles and the Limits of Law” (1972) 81(5) *The Yale Law Journal*: “The literal interpretation of judicial rhetoric is made possible only if one is prepared to join



The continental culture of legal interpretation does not unequivocally require complete coherency of judicial decisions either with one another, or even with statutory provisions. Each judicial decision that comes into effect is presumed to be legal – there is no requirement to cross-check newer decisions with their predecessors. Thus, constitutional norms can be interpreted and applied differently by different actors. This attribute of continental legal systems prevents situations where previous precedents play the role of *lex specialis*, because case law is undoubtedly placed below the hierarchical superiority of constitutional provisions. As a result, even under the presumption that case law contains some features of statutory provisions, it constitutes merely a “*lex inferiori*”<sup>23</sup> to constitutional norms. Thus the generic constitutional provision that “competition should be protected” is neither specified nor concretised by judicial practice. It should only be applied by courts.

From the continental, positivistic perspective, the consistency of legal interpretation with previous case law is merely *strongly desirable*, rather than *absolutely indispensable*. What is strictly required is the consistency with the hierarchy of statutory provisions. This would not be the case in common law jurisdictions, including to a large extent the EU case law culture. Therefore, I can only partly share Miąsik’s methodology of distinguishing between the goals of competition law and statutory provisions. I also have my reservation about the validity of Miąsik’s view that “[i]t is the goals of competition law rather than its statutory provisions that determine which conduct is prohibited, which practice is allowed and how and when can a conduct find approval”<sup>24</sup>. Miąsik’s remedy, which shifts the attention from the “useless” provisions of

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the courts in endorsing two really harmful myths. One is the myth that there is a considerable body of specific moral values shared by the population of a large and modern country. The myth of the common morality has made much of the oppression of minorities possible. It also allows judges to support a partisan point of view while masquerading as the servant of a general consensus. The second myth is that the most general values provide sufficient ground for practical conclusions. This myth holds that, since we all have a general desire for prosperity, progress, culture, justice, and so on, we all want precisely the same things and support exactly the same ideals; and that all the differences between us result from disagreements of fact about the most efficient policies to secure the common goals. In fact, much disagreement about more specific goals and about less general values is genuine moral disagreement, which cannot be resolved by appeal to the most general value-formulations which we all endorse, for these bear different interpretations for different people”.

<sup>23</sup> This would not be the case from a legal pluralism perspective, which tolerates wide discrepancies between the form and the idea of law. See e.g. V. Champeil-Desplats, “Legal Reasoning and Plurality of Values: Axio-Teleological Conflict of Norms” [in:] A. Soeteman (ed.), *Pluralism and Law. Proceedings of the 20<sup>th</sup> IVR World Congress*, Volume 4: Legal Reasoning, Amsterdam 2001: “The legal systems built on a percept of coherence badly adapt to the coexistence of norms prescribing contradictory conducts”.

<sup>24</sup> D. Miąsik, *ibid.*, p. 34.

statutory norm to the more 'fruitful' and detailed provisions developed by case law, is logically consistent with the model in which case law is on the top of the legal hierarchy. This paper, however, advocates the opposite view. It assumes that statutory provisions are more than 'abstract generality' which *ipso facto* requires additional interpretation. Statutory provisions are *rules* and not *guidelines*.

Statutory provisions should be correlated with the goals of competition law in *form-essence* or *substance-idea* categories. In other words, each statute contains more than is expected by a restrictive interpreter. Ontologically, each statutory provision is presented in its positive structure (form) and simultaneously contains its ideal dimension ("ideal" in its *philosophical* rather than *poetic* sense of the word)<sup>25</sup>. The relationship between antitrust goals and legislature are strongly correlated; they are mutually dependent and cannot be separated from each other. Thus, it is not the differences in goals which are responsible for "[d]ivergent applications of identical, or highly similar, rules contained in various legal systems"<sup>26</sup>, but the very nature of law which inevitably encompasses the productive tensions between the form and the essence of legal provisions. Taking a closer look at the correlation between the form and the essence of the law is thus necessary. In the domain of antitrust theory, this relation is particularly obvious in the conflict between *per se rules* and the *rule of reason*, which will be explored in the next section.

#### IV. Rule of form v. rule of reason

By applying a dialectical analysis<sup>27</sup>, we can observe that agreements which violate Article 81(1) EC, can be immunised from antitrust sanctions for two reasons: (i) because the agreement can have positive effects on competition

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<sup>25</sup> F. Atria, *On Law and Legal Reasoning*, Oxford 2001: "D.1.3.29 (Paul, libri singulari ad legem Cinciam). Contra legem facit, qui id facit quod lex prohibet, in fraudem uero, qui saluis uerbis legis sententiam eius circumuenit (it is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense). In other words, it is not possible to know whether by following a rule we are following the law unless we can ascertain theratio (sensus) legis".

<sup>26</sup> R. Whish, *Competition Law*, Oxford 2001, p. 16 (cited by Miąsik, *ibid.*, p. 34).

<sup>27</sup> Dialectics is a tool of analytical thinking, which accepts controversies within the norms, considering them as inevitable and productive forces of evolutionary development. In the area of antitrust dialectics *inter alia* means that different economic values (such as consumer welfare, economic efficiency, industrial growth, protection of competitory process, etc.) cannot be entirely consistent with one another, the trade-offs between them are then inevitable. Such inconsistencies are considered as the "fuel" for "an engine of freedom".

itself and, (ii) because the agreement can have positive effects on other important societal values, such as consumer welfare, innovation or industrial growth. It is therefore necessary to undertake an analytical separation of competition from consumer welfare. Competition and consumer welfare are two important societal values. Both of them are equally necessary for society. They, however, should not be seen as the synonyms.

Present day evaluation of the positive effects of anti-competitive agreements is based on the presumption that the agreement can be either pro- or anti-competitive. However, this is not always the case. In some situations the same agreement can be simultaneously anti-competitive, pro-competitive as well as beneficial to consumers. In other cases, a given agreement can be simultaneously anti-competitive and pro-competitive but detrimental to consumers. Since competition constitutes an important societal value of liberal democracy, pro-competitive effects of anti-competitive agreements can sometimes outweigh the negative effects it has either on consumer welfare or competition. In other circumstances, the latter can be more important than the former. In both scenarios, this new additional test is necessary. This test can be performed by applying dialectics, which (i) separates competition from consumer welfare and, (ii) internalises pro-competitive elements of anti-competitive agreements.

Analytically, the conflict between rule of form and rule of reason is inevitable and generally productive. The relationship between those two notions has the same structure as the ancient philosophical dilemmas between form and essence, letter and spirit, norm and effect. Nowadays, it is encompassed in the terms of legal formalism and legal realism<sup>28</sup>. Antitrust doctrine strives to *solve* this conflict yet from the perspective of dialectical analysis, the conflict is irresolvable. The existence of the conflict has to be *accepted*. The tensions between the *per se* rule and the rule of reason should be seen in their dialectical

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<sup>28</sup> B. Tamanaha, “The Bogus Tale About the Legal Formalists”, St. John’s University, Legal Studies Research Working Paper Series, Paper No. 08-0130, April 2008: “Contemporary perspectives on judging are dominated by the story about the formalists and the realists. This chronicle has been repeated innumerable times. From the 1870s through the 1920s – the heyday of legal formalism-lawyers and judges saw law as autonomous, comprehensive, gapless, logically consistent, and determinate, and believed that judges engaged in pure mechanical deduction from this body of law to produce single correct outcomes. In the 1920s and 1930s, building upon the pioneering work of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo, the legal realists exploded legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for most every legal rule or principle, and that legal principles can produce more than one outcome. The realists argued that judges decide outcomes in accordance with their personal views then construct legal decisions to rationalise or justify the desired outcome”.

interplay. They are an engine for the evolutionary development of antitrust scholarship.

For example, according to the landmark *Leegin*<sup>29</sup> decision: “The rule [of reason] distinguishes between restraints with anti-competitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer’s best interest”<sup>30</sup>. In this respect, the doctrine equalises anti-competitive effects with harm to consumers. Respectively, pro-competitive effects are measured in terms of consumer benefit. The Court shows a clear example of holistic (i.e. either-yes-or-no approach) antitrust reasoning whereby an agreement can be either pro- or anti-competitive: “Vertical retail-price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed”<sup>31</sup>.

Although the *per se* rule is rejected mostly due to its administrative opportunism, the rule of reason also tends to base itself on the same methodological postulates – sacrificing analytical consistency for the sake of practical certainty. Following an alternative methodology of antitrust analysis, which is encompassed in the idea of dialectics, some agreements can be *simultaneously* pro- and anti-competitive. Thus, the balancing of the different effects of an agreement should not be seen in “either or” terms, as is currently the case<sup>32</sup>. Similarly, the fact that pro-competitive elements can outweigh an agreement’s anti-competitive ones should not be seen as the absorption of one by the others. The rule of reason concerns merely the immunisation from antitrust sanctions of otherwise anti-competitive conduct.

The Court states that “[t]he rule of reason is designed and used to eliminate anti-competitive transactions from the market”<sup>33</sup>. The origins and essence of the rule of reason are not in the elimination of anti-competitive transactions from the market. On the contrary, the origins lie in the immunisation of anti-competitive transactions from antitrust sanctions, because the benefits of such transactions outweigh their negative impact on competition. It might be misleading to assume that the rule of reason impels pro-competitive agreements seeing as its purpose is to authorise anti-competitive agreements. The reason for such authorisation can be twofold. The conduct can be immunised because it brings better outcomes for consumers, industrial growth or innovation.

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<sup>29</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>30</sup> *Leegin*, *ibid.*

<sup>31</sup> *Leegin*, *ibid.*

<sup>32</sup> *Leegin*, *ibid.*: “The rule of reason is designed and used to ascertain whether transactions are anticompetitive or precompetitive”; *Leegin*, *ibid.*: “While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases”.

<sup>33</sup> *Leegin*, *ibid.*

Similarly, though *prima facie* paradoxically, it can be immunised because its pro-competitive elements outweigh the anti-competitive ones, but not because the agreement “loses” its anti-competitive nature.

The latter situation is possible after a conceptual separation of competition, as an independent economic value, from consumer welfare, another independent economic value. The two are equally important yet different realms. Acknowledging that each market action impacts the economy in many direct and indirect ways, we can see a so-called “butterfly-effect competition” where everything depends on everything else<sup>34</sup>. If so, then some market practices can be harmful to some relevant markets while beneficial to others. Hence, properly shown positive effects for competition on some markets, can justify the application of the rule of reason to agreements that have anti-competitive effects on other markets. This justification is neither a blanket authorisation of restrictive conduct, nor a statement that this conduct is in fact pro-competitive, as it is currently the case.

## V. Methodology of separation

The political management of competition (its instrumentalisation in order to achieve ancillary economic benefits) is inevitable and desirable. It does not constitute however competition policy *sensu stricto*. Instead, it is set in the ambit of either consumer welfare policy, industrial policy or innovation policy. Competition, as an inevitable element of the market, has to be “unbundled” from other legitimate economic goals. The specificity of competition requires a separate analysis, which does not have to be subordinated solely to the utilitarian framework of consumer welfare, economic efficiency and other economic, political and societal goals<sup>35</sup>. Competition also has an inherent value

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<sup>34</sup> J. A. Schumpeter, *Capitalism, Socialism and Democracy?*, London 1976: “The opening up of new markets, foreign or domestic, and the organisational development from the craft shop and factory ... illustrate[s] the same process of individual mutation ... that incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism [O.A. – i.e. “about market”]”.

<sup>35</sup> J. M. Buchanan, V. J. Vanberg, “The Market as a Creative Process” [in:] D. M. Hausman, *The Philosophy of Economics, An Anthology*, Third Edition, Cambridge University Press 2008: “The market economy ... neither maximises nor minimises anything. It simply allows participants to pursue that which they value, subject to the preferences and endowments of the others, and within the constraints of general “rules of the game” that allow, and provide incentives for individuals to try out new ways of doing things”.

as *par in parem*<sup>36</sup>. Such a description of the relationships between different goals and values facilitates the decision-making process seeing as it requires the regulator to prove the necessity to prioritise one goal over the others<sup>37</sup> without going into their rhetorical subordination. In other words, the regulator does not have to invent a sophisticated theory of “what serves what” each time that its actions may diminish the interests of one policy or another. There simply is no “external”, independently defined objective against which the results of market processes can be evaluated. Each public regulatory authority shows an inherent tendency towards “economic optimisation”<sup>38</sup>. This temptation of policymakers often leads to over-regulation.

In fact, neither competition nor any other societal value can be prioritised in all cases. However, the deontological (or value-oriented) approach to competition does not seek to explain this lack of legal protection by diminishing the internal importance of competition. Quite the contrary, the fact that some societal values have been somewhat restricted, due to the priority given to other values, does not necessarily mean that the former are reduced in their ontological essence.

Certain conduct of an undertaking can go against competition but in favour of consumer welfare. The opposite can also be true: a market practice beneficial to competition can be harmful to consumers. A practice does not necessarily need to be anti-competitive in order to be declared incompatible with other economic goals. The holistic (either-yes-or-no; either-good-or-bad) perception of policies with no mutual intersection and contradiction does not reflect reality. The negotiability of rights, and in particular the right to compete, relativises the notion of their absolute protection. No right can exist without its external correlation to another right. These rights are often in conflict with

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<sup>36</sup> Compare this approach with the position of Richard Posner: R. A. Posner, *Antitrust Law*, The University of Chicago Press 2001: “Efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further”.

<sup>37</sup> Ch. Kirchner, “Goals of Antitrust and Competition Law Revisited” [in:] D. Schmidtchen, M. Albert, S. Voigt (eds.), *The More Economic Approach to European Competition Law*, Tübingen, 2007: “[C]ompetition policy is competing with other policies which may pursue conflicting ends, e.g. agricultural policy, industrial policy, environmental policy...”.

<sup>38</sup> The rationale behind this is quite simple. Imagine that on the South, on the North, on the West and on the East of country X four manufacturers produce orange juice. All ingredients of this product are equal, and the companies compete at the level of marketing rather than at the level of quality. The intuition of a dirigist regulator would be to “save” costs for the economy (i.e. transportation, aggressive advertisement, overproduction etc.) and to limit distribution of four identical products to the regions where they are produced. For the regulator this approach has many chimerical “advantages” and the idea of a free market with undistorted competition is therefore jeopardised by this regulatory temptation every time it fails to provide better outcomes.

each other. A vivid example of the negotiability rights is a leniency program, which is essentially an agreement between a regulator and an infringer not to prosecute otherwise illegal behaviour if the infringer provides the regulator with important information. The idea of the non-negotiable nature of certain rights, such as human dignity, can exist only in an environment where all other rights are totally subordinate to it. The existence of two different absolute rights requires a compromise between them.

From the structural perspective, the conditions contained in Article 81(3) EC are not competition law *sensu stricto*. Rather, they constitute transitory guidelines on how to balance competition with innovation, economic efficiency and consumer welfare. They are a bridge between different policies, an algorithm for fine-tuning and balancing different interests and priorities within the EC; a compromise between competition and other legitimate goals, but not a competition policy as such. There are many elements of consumer welfare and economic efficiency in both rights, but the balance between them does not have to be based on the level of efficiency or other political goals. The alleged lack of mobility and economic productivity of the structure-based approach is related to industrial goals rather than to competition policy. If competition law was to be perceived through the perspective of efficiency, that would mean that competition does not have an intrinsic value in and of itself but is seen only as a mean of increasing consumer welfare. If, however, competition law is understood as an independent societal value, like industrial policy is understood as another independent societal value, than it would indeed be necessary to establish a formula for their balancing. In such case, one can reasonably accept the deviation from competition rules in order to achieve industrial goals, but the rules as such will remain the same. In other words, the task of the public regulator is not to substitute the *raison d'être* of one policy by another, but to conduct a permanent balancing act where trade-offs are made between them. This being said, a compromise between principles does not mean that one is replaced by another.

## VI. Conclusion

Miąsik's paper provides a very fruitful and methodologically harmonious analysis of the goals of competition law. The author not only expresses very original ideas related to the theory of antitrust, but also substantiates them by numerous relevant judicial decisions. While not fully agreeing with Miąsik's theoretical positions and disagreeing with him on some technical questions, this paper widely supports Miąsik's findings with perhaps the exception of

a few slight discrepancies which are likely to derive from the difference on the doctrinal backgrounds of the two papers.

The notion of competition is inherently present in the economies of all liberal democracies. Indeed, there are many parallels between the economic concept of antitrust and the political notion of democracy. As soon as social values are being considered, it is no longer possible to perform a simple efficiency test. Human rights – the right to compete being one of them – have an absolute nature and cannot be compromised by mere efficiency criteria. The scope of rights is broader than the societal ability to protect them. Some rights are in conflict with each other and thus, there is often a need of reconciliation. Yet, at the conceptual level all rights remain absolute in their essence. The biggest political skill and the highest academic endeavour lies in the ability to find (or at least to articulate and define) the most appropriate solution in this perpetual practice of multi-compromises between different societal values and interests. Each society is characterised by a number of factors that distinguish it from their counterparts. Both are relying on competition as an invisible managerial hand which not only helps to articulate the most efficient political ideas and economic practices, but also prevents a monopolisation of economic and political power.

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