Dialectical antitrust: An alternative insight into the methodology of the EC competition law analysis in a period of economic downturn

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On the nature of dialectical antitrust

Dialectics is a method of legal reasoning, in which the controversies between the norms are considered as inevitable and productive. In the area of antitrust, dialectics states that different economic values (such as consumer welfare, economic efficiency, industrial growth, protection of competitory process, etc.) cannot be entirely consistent with one another and such inconsistency is considered as the "fuel" for "an engine of freedom".

Dialectical antitrust has at least five dimensions:

- competition in/for the markets;
- competition between public values;
- competition between the "visible" and "invisible" hands of the market;
- competition between preventive and proactive antitrust (i.e. should competition be merely "protected" or does it also deserve "promotion"?); and
- competition between antitrust theories (the actors are scientists; the object is competition between different doctrines of antitrust).

On the *first dimension* the purpose of dialectical antitrust is to explain the necessity of the competitory process,[1] which constitutes the essence of liberal democracy (in all its political, cultural and economic dimensions). Dialectical antitrust has to demonstrate why competition is a distinctive feature of liberalism and why it deserves its protection even in the cases where the outcomes it proposes are neither optimal nor the most desirable. Indeed, competition is a multidimensional phenomenon which by its nature cannot be properly articulated. In this sense competition is an essence, while competition policy and law is a form; competition is a spirit, while competition policy and law is a letter. A structure of analysis of the correlation between essence and form has been developed already in ancient philosophy. Those two attributes of the object cannot be entirely coherent; the tensions between the essence and the form have a dialectical nature. For this reason each antitrust enforcer should be provided with substantial room for discretion. He has to be empowered to set up the most effective format of competition, which should not be predetermined by other public values. Competition is a thing in itself, an independent public virtue, which deserves its protection and promotion. In this sense competition is a societal libido. As in the case with human beings, libido is never sufficient to establish the individuality, yet without libido no individuality can be established.

Thus, by recognising the importance of competition as an independent economic value, regulators should correlate it with other public values, which also deserve their protection and promotion. It is the *second dimension* of dialectical antitrust. Here competition as an economic value "competes" with other legitimate societal values (like consumer welfare, economic efficiency, innovations, etc.). The task of the enforcers is to "fine-tune" the regulatory system in a way that reflects the basic expectations and priorities of society. This research will demonstrate why the consequentialist approach to antitrust contradicts the basic ideas of liberal democracy, and explain why competition should be treated on a *par-in-parem* principle in respect to other economic values.

Methodologically a conflict of interests can be solved by policymakers by applying a parentheses theory, which proposes to undertake an analytical inclusion of different public goals in separate "boxes". While being within parentheses it is irrelevant whether any

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1 I try to avoid using the term "competitive process" and substitute it by the more accurate notion of "competitory process", inasmuch as the idea of "competitiveness/competitive" indicates the external *ability* to compete. Some societies/or firms can be competitive without applying competition on the *internal* level. In other words, competition is only one of many ways to achieve competitiveness, another one being for example planned economy (thus Chinese companies are competitive externally but they reach their competitiveness without a competitory process inside the country; another example would be an "anti-competitive" state aid to selected Olympic teams (those which are most likely to win the medals) which leads to an increase of their competitiveness at the stage of Olympic games, but this is done for the costs of reduction of competition between different sports *for* the state subsidies).

particular format of competition is beneficial or harmful for society. It has to be explored as a thing in itself. After performing such internal analysis, which helps to understand the things in their entirety, they ought to be extracted from the parentheses and contextualised into the policymaking process. On this external level these different public goals do compete with one another in the process of being prioritised by policymakers.

This external competition between different economic values leads to the *third dimension* of dialectical antitrust theory, namely to the competition between the "two hands" of the markets. Each economic relationship within the market can be potentially either regulated by enforcer or left for taking their evolutionary course. Both options have their pros and cons, and essentially both could be justified from the holistic perspective.

When the enforcer considers that the intervention into the markets is necessary, he or she has to decide whether to conduct it for the purposes of *protection* of competition or its *promotions*. This balancing act is explored in the *fourth dimension* of dialectical antitrust, which compares the relationship between *preventive* and *proactive* antitrust policy. This new criterion for classification of competition law has not yet been articulated in present-day antitrust doctrine. It goes beyond "ex ante/ex post" taxonomy, inasmuch as it does not say "when" to intervene, but rather, is concerned about the purpose of such intervention. In other words, competition can be "protected" by both ex ante and ex post instruments, but it can be also promoted by using the same ex ante/ex post tools.

The *fifth dimension* of dialectical antitrust reveals and explores competitory tensions between different schools, and doctrines "compete" for acceptance of their own algorithm for solving the tensions between different economic goods. Thus, for instance, the Ordoliberal School would put a pattern on the constitutional dimension (an economic freedom to compete), whereas the Chicago School would adhere to a prioritisation of consumer welfare, and federalists would advocate an instrumentalisation of competition law to achieve the goal of EC market integration, while conservatives would defend the freedom of monopolists to profit from their investments. The task of dialectical antitrust here is to reassess each of these theories and to test their applicability to different economic contexts.

Hence, on the *first* level dialectical antitrust explores the essence of competition. It explains why competition should be considered as an independent economic virtue. On the *second* level it analyses how competition must be correlated with other economic virtues (different public values should compete with one another to be prioritised by regulators in each particular case). On the *third* level, after competition as a public value has been already correlated with other legitimate societal values, dialectical antitrust investigates the tensions between regulatory intervention and evolutionary self-development of the markets. On the *fourth* level it explores the relationship between preventive and proactive competition laws. On the *fifth* level it investigates dialectical tensions between different schools and approaches to antitrust policy and law.

Dialectical antitrust versus holistic antitrust

Dialectical antitrust is a method of understanding the conflicts inside competition policy by considering them as a productive tool for its development. It *divides* things in order to *govern* them. Such "*divide-et-impera*" is a methodology which distinguishes dialectical antitrust from holistic antitrust. The latter seeks to build up a harmonious homogeneous hierarchy of competition objectives by *solving* the conflicts between antitrust's controversies. Its methodological credo would be rather "*reconcilia-et-impera*". Dialectical antirust does not deal with political choices, considering that their ad hoc nature leaves a considerable room for regulators and actors to manoeuvre on a case-by-case basis.[2] Dialectical antitrust tries to *understand* and to *explain* competition. It does not provide *prescriptions*.

Competition is the essence of a liberal society.[3]The political aspect of competition is traditionally known as a *democracy*[4]; competition in a cultural dimension is commonly conceived of as *pluralism*[5]; the economic sense of competition is reflected in the notion of *market*.[6] Those different dimensions of competition have been widely explored from the perspective of dialectic. The common denominator for all three is a notion of competition: democracy is a competition of the political programs, pluralism—competition of cultural ideas, market—competition of goods and services. It might even be said that all sorts of interactions between autonomic entities have elements of competition. Such "Schumpeterian" understanding of competition as a permanent multilevel interactive process of *creative*

2 Due to its *dialectical* and *competition* nature, dialectical antitrust is much more analytical theory than political guidelines.

3 David J. 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."

4 The elections in a democracy play the role of an "engine", which stimulates competition between the different political programs and ideologies. The constituencies in politics can be seen as the consumers in economics.

5 An example with pluralism shows why in competition the "journey is more important than [the] destination". Co-existence and interplay between different cultures and ideas mean more than the cumulative value of each of them.

6 Because of semantic reasons, these terms are not used interchangeably, but their essence is mutatis mutandis very similar if not identical.

destruction[7] constitutes the essence and the driving force of liberal evolutionary development. We talk here about "butterfly-effect competition", where everything depends on everything else.

However, competition in such a broad sense becomes non-regulatable, because all its actors can use conflicting arguments excessively broadly and interchangeably. Depending on the purpose of the interpreter and because of the dialectical nature of the "butterfly-effect competition", each economic conduct may be considered as simultaneously harmful and beneficial for competition. Therefore, the rational interest of regulators is to limit the scope of competition by reducing its meaning to easily identifiable categories. Yet this intention inevitably leads to a decrease of the very notion of competition, since it cuts off its less visible elements in order to maintain the stability and predictability of the entire regulatory system.

Each society elaborates its own unique algorithm of priorities and balances.[8] Not all economic objectives can be achieved and not all constitutional values can be protected in their entirety, inasmuch as the very notion of "prioritisation of everything" is a *contradictio in terminis*. The whole variety of goals and interests—and competition is one of them—are too broad to be coherent. Most of them are "merely" incoherent, some fairly conflicting, whereas others are mutually exclusive. It is up to policymakers to design the multilevel system of checks and balances of priorities and tradeoffs. The place of each value in the "doctrinal guidelines for policymakers" depends on the importance with which the society associates it.[9]

The reliance on competition as a driving force of economic development is not self-evident. There are different approaches to the role of competition rules within the regulatory model of a given society. Leaving aside developing and authoritarian regimes, industrialised economies themselves also generate many controversies with regard to competition.[10] Competition is not the exclusive way to achieve efficiency and industrial growth. Therefore the utilitarian approach to competition, which considers its necessity only to the extent to which competition provides efficient economic results, may harm the very notion of competition.

Two-handed market: Manus Manum Lavat

The language of antitrust is quite euphemistic: it is accustomed to calling some things efficient and others abusive, while assuming that these semantically subjective categories are universal concepts. By applying this metaphoric language to the ideal market equilibrium, one might conclude that states use their dominant market position and intervene into economic processes in order to achieve different societal objectives. At least in the categories of laissez faire, each antitrust regulation constitutes ipso facto an intervention.[11] There are many reasons why public regulators exercise their power to fine-tune the markets.[12] One of the reasons for such an intervention might be the *establishment*, *protection* and *development* of competition within some specific economic sector; another, the efficient allocation of resources or increase of consumer welfare.[13] These aims of state intervention are on the same hierarchical level. Sometimes competition is prioritised over consumer welfare; sometimes consumer welfare has to be seen as a value, which is more important than competition. However, there should not be any strict causational links of subordination between these policies—at least on the level of methodology.

The notion of an open market is inseparably linked to the Smithian idea of the invisible hand.[14] The superficial

7 Joseph A. Schumpeter, *Capitalism, Socialism and Democracy?* (London: George Allen & Unwin, 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']."

8 As an artist can inlay different compositions from the same small elements, the set of similar public values can also be laid out in different constellations.

9 EC competition case law provides many examples, when non-competition objectives are taken into account. Often they prevail over competition goals. For a detailed analysis of the correlation between competition law and other public values, see Giorgio Monti, "Article 81 EC and Public Policy" (2002) C.M.L. Rev. 39.

10 Wyatt Wells, *Antitrust & The Formation of The Postwar World* (New York: Columbia University Press, 2002):

> "[At the beginning of the twentieth century 't]he enthusiasm for cartels reflected more than the desire of business to protect itself from hard times. . . Many in academia and government believed that cartels were a 'higher' form of economic organisation that replaced the brutal ethos of competition with a system of cooperation."

11 Compare Joël Monéger in Hanns Ullrich (ed.), *Competition, Regulation and System Coherence—The Evolution of European Competition Law. Whose Regulation, Which Competition?* (Cheltenham, United Kingdom: Edward Elgar, 2006):

> "Today there are no completely unregulated or completely regulated industries. Everything is a question of degree and depends on the health of the economy and on the ideology favoured by citizens in the different countries throughout the world."

12 William J. Baumol and Robert D. Willig, *Contestability: Developments Since the Book* (Oxford Economic Papers, Oxford University Press, 1986):

> "Contestability theory does not, and was not intended to, lend support to those who believe. . . that unrestrained market automatically solves all economic problems and that virtually all regulation and antitrust activity constitutes a pointless and costly source of economic inefficiency."

13 On the affect of the legal tradition on national antitrust doctrines and the general attitude of regulators and actors to competition see A.E. Rodriguez, "Does Legal Tradition Affect Competition Policy Performance?" (Winter 2007) 21(4) *The International Trade Journal*.

14 However Smith himself acknowledged the necessity for the limitation of certain economic behaviours: Adam Smith, *An Inquiry into the Nature And Causes of the Wealth of Nations* (Prometheus Books, 1991): "People of the same trade seldom meet together, even for merriment and diversion, but the

interpretation of the concept of an invisible hand gives an impression that markets can be organised with no external interference and that they are capable of synergetic self-maintenance.[15] According to this uncritical approach/belief, every regulatory intervention into the markets is believed to be a violation of the principle of a free market economy. However, it is utopian to antithesise free market to state regulation.[16] "Unregulated market" is *contradictio in terminus*,[17] since the very notion of "market" inherently implies the rules which regulate its functioning. The reference to a free market as an entirely unregulated cowboy-style arena is misleading, inasmuch as even anarchy is subordinated to the rules by which it is defined.[18] This presumption does not make the market's hand more visible, but rather claims that the very idea of markets is meaningless without their regulation.

Since regulation is indispensable for the existence of the markets, its presence does not make them automatically non-free. Only some regulation restricts the freedom of markets. The same is true with regard to the correlation between regulation and competition. Since the traditional mindset of antitrust lawyers considers competition only in the framework of arts 101–106 TFEU,[19] the idea of the *promotion*, *development* and *improvement* of competition meets severe opposition in our circles. It can only be contra-balanced by the very opaque and non-critical notion of market failure within the framework of liberalisation policies.[20]

Indeed, the invisible hand is an indispensable—albeit insufficient—component of a free market.[21] The notion of the invisible hand constitutes the distinctive feature of the market. Without it no market can exist, and its *invisibility* must not be confused with *non-regulatability*.[22] No regulator can either fully understand or substitute the invisible hand. At the same time an invisible hand on its own can never suffice. It is *just* a spirit, a soul of the market, which also requires its body, its regulatory form.[23] The relation between the two can be seen only in their dialectical interdependence. The idea of the invisible hand deals with internal incentives and challenges, but it does not prioritise it over an external influence on the markets by their regulators. The invisible hand of internal incentive, challenge and desire is inevitably predetermined and co-ordinated by the visible hand of external regulation and rational choice for the mutual benefit of both.[24] Such external regulation is possible within the framework of free market and should not be seen as a trade-off between economic freedom and political necessity. A compromise between the two is unavoidable, but it occurs on a higher level, as an act of political balancing, as the next step of proactive regulation, conducted by policymakers, who are ex officio forced to operate within the scarcity of resources, choices and priorities. It means that not every act of proactive regulatory intervention has to be conceived as a reconciliation of market choice with social interests. Not all kinds of regulations are directed to *repair* market "failures", some are conducted *to enhance* the proper functioning of the markets, others—to substitute them.

The same applies mutatis mutandis to the process of competition within the markets. Competition can be

conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

15 For an analysis of the Ordoliberal approach to European integration and the notion of social market economy see, i.e. Christian Joerges and Florian Rödl, "'Social Market Economy' as Europe's Social Model?" (2004) 8 *EUI Working Papers, Law*.

16 This idea has well-founded ordoliberal roots. It is explained, inter alia, in Röpke's notion of "liberal interventionism", Wilhelm Röpke, *Wirrnis und Wahrheit. Ausgewählte Aufsätze, Erlenbach* (Zurich, Stuttgart: Rentsch, 1962). Some elements of coexistence between strong regulation and free market had been also explored by Carl Schmidt in his notion of "authoritarian liberalism".

17 The doctrinal critique of this point has been elaborated inter alia by two Italian thinkers and politicians, Luca Einaudi and Giuliano Amato. Luca Einaudi conditioned the markets to their regulators, ("carabineers who protect existing order")—in Luca Einaudi, Riccardo Faucci and Roberto Marchionatti (eds), *Selected Economic Essays* (Palgrave Macmillan, 2006). This notion has been contextualised to the regulation of competition by Giuliano Amato, i.e. in *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing, 1997).

18 For an analysis of different approaches to economic liberalism see inter alia Viktor J. Vanberg, *On the Complementarity of Liberalism and Democracy* (Walter Eucken Institut, Freiburg, Institut für Allgemeine Wirtschaftsforschung; Abteilung für Wirtschaftspolitik; Albert-Ludwigs-Universität Freiburg), June 2009.

19 More in-depth analysis of this issue is provided in the section related to proactive and preventive antitrust.

20 Those who believe that markets can exist without any external regulation, once faced with the necessity to regulate, strive to show *why* in the very specific circumstances free market does not work. Yet the market never fails, and it does not require an ascertaining of its failure in order to approve the external regulatory intervention.

21 Ernst Ulrich Petersmann, "Constitutionalism and the Regulation of International Markets: How to Define the 'Development Objectives' of the World Trading System?" (2007) 23 *EUI Working Papers, Law*:

> "Efficient market competition is no gift of nature but depends on rules and government interventions constituting open markets, defining rights and obligations of market actors, correcting market failures and supplying public goods."

22 The discussion between economic liberals and protectionists has a perpetual nature and rather productive consequences, the results of which can be harmful only when some party would definitely win them. For the history of the discussion between advocates of "invisible" and "visible" hands in the UK context see Frank Trentmann, *Free Trade Nation* (Oxford: Oxford University Press, 2008).

23 This is rather economic dimension of perpetual mankind thinking on correlation between form-and-essence, letter-and-spirit, yin-and-yang, which has to be seen in their dialectical, indissoluble interdependence.

24 Sometimes the choices may be not mutually beneficial—sometimes even tragic—but sometimes they are in conformity with the interests of all parts of the society.

regulated in order to shape its own proper functioning.[25] In this case, it would be an internal regulation, the purpose of which would be to protect and promote competition. However, it can also be regulated for external purposes, such as consumer welfare.[26] The next section of this article explains why the achievement of consumer welfare belongs to the second, external, kind of market failures correction. The regulator is required to intervene and the judge is "advised" to interpret positive law in the most consumer-friendly way, by using the rhetoric of "market failure". However, this is an external intervention into competition, because such regulatory intervention is not supposed to correct failures for the benefits of a free market, but rather, to escape the outcomes which the free market produces.

Consequently, an internal regulation of competition is called either *to protect* or *to promote* competitory process, whereas an external regulation of competition strives to reconcile the most optimal competitory process with other legitimate economic values. From the perspective of dialectical antitrust, consumer welfare and economic efficiency belong to the second group; they are external with respect to competitory process. Hence what is good for competition is not necessarily good for consumer welfare and vice versa.

Consumer welfare "fallacy"

Can competition be harmful to consumers? Or is it the case that, as soon as it begins to harm them, it is no longer "competition" and does not deserve protection? To put it in "apples-and-oranges language": are acid apples "less-apples" than sweet ones? If the purpose of environmental policy is the protection of the environment, if industrial policy strives to enhance industrial growth, and agricultural policy is called upon to develop agriculture, why should the purpose of competition policy be something other than the protection and promotion of competition? Is it so only because competition is difficult (impossible) to define, or because competition is a multidimensional phenomenon—or just because competition is not an economic value in itself?

The hypothesis of this paper assumes that on the analytical level the purpose of antitrust policy is the protection and promotion of competition. Hence, consumer welfare cannot be seen as the objective of competition policy. Otherwise, the very essence of "competition" and "consumer welfare" would be barely distinguishable. "Sweetness" can be an indicator of "sweet apples" or even of "good apples", but when sweetness substitutes "appleness", "apples" transform into "sugar". This gives reason for a methodological "unbundling" of competition from consumer welfare, and analytical "liberalisation" of competition from other public values. This is not to advocate "anti-consumer competition law" or "consumer-neutral competition law", but merely to protect the notions of *competition* and *consumer welfare* from their unequivocal non-critical "merging".

Consumer welfare and economic efficiency (as well as industrial policy, manufacturing growth, social stability, promotion of innovations, fostering investments, sustainable development, market integration, military strength, public health, environmental cohesion, intelligence security and many other legitimate societal goals) are core public values of democratic societies. Yet competition is also one of them. None of the abovementioned interests is perused by policymakers without its cross-checking with others, yet such balancing of values does not deprive them from being seen as independent realms. Since their respective scopes often overlap, this paper proposes a dialectical "parenthesis theory", which analyses each societal value separately as a thing-in-itself and reconciles the conflicts between them. As Hovenkamp eloquently points out:

> "Judges have spoken of antitrust law as a 'consumer welfare prescription' for so long that the phrase seldom produces anything but yawns. . . The rhetoric of 'consumer welfare' is very powerful. A statute declaring protection of consumers to be the goal of antitrust would probably pass Congress by a unanimous vote."[27]

Thus, instead of being a shield, it is becoming a sword.[28]

The problem with consumer welfare is that this concept is considered as the final aim of antitrust.[29] It leads to excessive expansion of its scope, which

25 Regrettably, the term "regulatory competition" is already "occupied" by comparatists in respect to the analysis of the different regimes regulating the attraction of international investments. In the case of competition law this term would mean "regulation of competition", whereas in corporate law its synonym would be rather "competition of regulators".

26 Rosita B. Bouterse, *Competition and Integration—What Goals Count?* (Kluwer Law Publishers, 1994):

> "[I]n contrast to 'competition law', 'competition policy' has a strong political dimension. It indicates that antitrust prohibitions amount to measures of economic policy—at least when a particular decision is taken with a view on the proper functioning of the given economy."

27 Herbert Hovenkamp, *The Antitrust Enterprise. Principle and Execution* (Harvard University Press, 2005).

28 This perhaps constitutes a part of "Bork's paradox" (Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* (New York: The Free Press, 1993) and paves the way for "Ullrich's conundrum of competition of competition rules" (Hanns Ullrich, "Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?" (February 2005) *EUI Law Working Paper* 2005/01).

29 Traditionally, the difference between "economic efficiency" and "consumer welfare" is recognised. When these notions are in conflict, some authors adhere to economic efficiency (e.g. Bork, *The Antitrust Paradox: A Policy At War With Itself*, 1993), but most of them give priority to consumer welfare. See for instance John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency* (2008), available at *http://ssrn.com/abstract=1113927* [Accessed December 15, 2009].

in turn deprives this concept of its original meaning. Originally, this idea had libertarian foundations.[30] Indeed, the notion of consumer welfare was initially introduced—and, in the course of time, conceptualised—by representatives of the Chicago School.[31] They proposed consumer welfare as a benchmark and an external test for whether antitrust remedies have to be applied or not. The initial idea of consumer welfare is based upon the proposition that not every antitrust sanction is efficient for the economy, and that violation of competition can be counterbalanced by consequential direct cross-benefits for the consumers. However, this original meaning is significantly altered nowadays.

The Chicago School was inspired by a libertarian vision of the economy, which in its pure form considers any limitation of free trade as a violation of competition.[32] Conceptually this approach goes against antitrust precisely because of the presumption that an invisible hand would design the markets in a more effective way than the visible hand of the regulators. However, bearing in mind the existence of strong per se rules, developed by the Ordoliberal[33] and Harvard Schools, which prohibit allegedly anti-competitory behaviour without even taking into account their real effect on the economy, Chicagoans began to advocate "lightweight antitrust" by elaborating a consumer welfare benchmark: a conduct, which formally fulfils the requirements of violation of competition must be excluded from the sanctions, if it provides sufficient benefits for the consumers.

Apparently, they overplayed. In the course of time the successful reference to consumer welfare as a benchmark for exclusion from antitrust sanctions has been substantially modified.[34] The regulators have instrumentalised the concept of consumer welfare, as a test for the non-application of antitrust remedies. This has backfired more and more often: instead of helping to exempt conduct from the regulatory remedies, it has now become a universal test for applying antitrust in every situation where consumer welfare is "infringed" or even "can be increased".[35] The consumer welfare test is still applied by regulators for the original Chicagoan purposes (to exempt from antitrust), but also contrary to the purposes of the Chicago School (as an undisputable reason for regulators to intervene). In other words, this notion is still applicable nowadays in cases of immunisation from antitrust remedies, but is also used as a tool to subordinate a whole range of economic policies to a common denominator[36] (which goes against the doctrinal premises of the Chicago School). Thus, instead of performing its original task to keep the regulatory system more market-friendly, the notion of consumer welfare helps making the economy regulated and purpose-oriented.

Because the consumer welfare test is essentially an amorphous concept, which can be easily adopted to justify any reasonable behaviour, this notion can be applied not only for immunisation from antitrust, but also for the application of antitrust as well as other regulatory tools to certain companies and industries. The consumer welfare benchmark was originally proposed as a legal instrument to defend economic freedom, yet it evolved into a universally applicable tool of proactive industrial policy.

From the traditional neoclassical perspective, the main sign that competition is working properly is the situation in the markets where the barriers to entry are low and the choices for consumers are wide. Monopolisation is seen as a situation when a dominant undertaking may "free ride" on a consumer demand allowing itself not to concentrate on the decrease of marginal costs but rather to benefit from the lack of competition. Two factors are decisive to show that competition is limited: (i) high barriers to entry; and (ii) a limited amount of competitors.

Yet those criteria have to be contested, inasmuch as they are designed only to show the consumer dimension of competition. Competition in such a construct is seen merely as the ability of the consumers to choose

30 Although the very idea of consumer welfare is central to neoclassical economics, it has been implemented in antitrust thinking mostly by representatives of the Chicago School.

31 Daniel A. Crane, "Technocracy and Antitrust" (Forthcoming) 86 Tex. L. Rev.:

> "[Since the Chicago School revolution] antitrust enforcement has become considerably less democratic and more technocratic. It has become increasingly separated from popular politics, insulated from direct democratic pressures, delegated to industrial policy specialists, and compartmentalised as a regulatory discipline."

32 For an overview of the influence of the Chicago School on modern antitrust see inter alia William E. Kovacic, "The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy" (1990) 36 *Wayne Law Journal* 1413.

33 For a study of Ordoliberalism see inter alia Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism, Freiburg Discussion papers on Constitutional Economics* (Walter Eucken Institut, Institut für Allgemeine Wirtschaftsforschung; Abteilung für Wirtschaftspolitik; Albert-Ludwigs-Universität Freiburg, 2004), 04/11.

34 Essentially, distorted.

35 Eleanor M. Fox, "We Protect Competition, You Protect Competitors" (2003) 26(2) *World Competition* 149:

> "Consumer welfare operationalised as aggregate consumer surplus provided a benchmark that was a check against antitrust enforcement. It stood for the admonition that antitrust law would not be invoked unless a particular challenged practice decreased aggregate consumer surplus. Given the presumption of market and business efficiency, it seldom did."

36 For the proactive approach to consumer welfare see Eugene Buttigieg, "Consumer Interests Under the EC's Competition Rules on Collusive Practice" (2005) *European Business Law Review*:

> "Unfortunately, in the past, US and EC antitrust law only indirectly promoted and safeguarded consumer interests while occasionally their application might even have led to a result that was at variance with consumer expectations as the economic efficiency goal now pursued by both systems is not coterminous with a fully fledged consumer well-being objective that takes into account wealth transfer. . . while the myriad of goals simultaneously informing EC competition law prevent it from serving as a true means of consumer well-being maximisation."

between different sellers.[37] Competition *in* the market is considered as more desirable for political reasons, since it provides tangible results for the consumer welfare. Furthermore, it is quite predictable and achievable in a short term. On the contrary, competition *for* the markets is traditionally considered to be a bad option for consumers, since instead of improving their goods and services, companies concentrate their efforts rather on business-to-business and business-to-government relationships.[38] Thus, from the utilitarian perspective of political economy priorities, competition *in* the markets has more proactive effects than competition *for* the markets.

However, the idea of competition is not exhausted by utilitarian considerations about the benefits it produces for consumers. On the analytical level, regardless of its practical usefulness, both kinds of competition still remain *competition* in the proper sense of the word and even if a fierce competition *for* the markets does not bring about direct short-term benefits for the consumers, it does not become "not-competition" or (even) "less-competition". Regardless of their practicability as a political choice, all sorts of competition have to be analysed, since their political usefulness is not a distinctive feature, which is sufficient to separate desirable kinds of competition from other forms of competition.[39] This is why the consumer welfare criterion does not serve properly when we need to see *what* is decisive for competition as a theoretical phenomenon.[40] Consumer-friendly competition merely points out what is decisive for *desirable* competition. The reference to the consumer as an *ultimo ratio* of competition moves the debates from the level of theory to the level of policies. However, this shift remains to be conceptually un-captured: we still keep calling it competition as a whole, while in fact it covers only a fraction of the entire phenomenon of competition (i.e. only a *desirable, consumer-friendly competition*).

Antitrust taxonomy

After conducting an analysis of the nature of antitrust and of its goals,[41] it is necessary to explore the legal forms in which competition law and policy exist. Traditional antitrust scholarship distinguishes competition policies predominantly on the criterion of their *object* of regulation (i.e. cartel law, antimonopoly law, merger law) or *time* of regulatory intervention (i.e. ex ante and ex post). In addition to this classification, dialectical antitrust introduces an additional criterion, which differentiates competition law depending on the *purpose* of its functioning: proactive and preventive antitrust.[42]

As has been already persuasively demonstrated by some authors,[43] those parts of sector-specific regulation (SSR), which are related to liberalisation, at the same time belong to competition law. The reality that those instruments substantially differ from traditional antitrust does not negate the fact that this law still regulates competition and there is no reason to exclude this legal tool from competition doctrine. SSR still has to be distinguished from traditional competition law, and their differentiation can be presented in classical for European integration terms *proactive* and *preventive*, which refer to methods of regulation. Due to the specific legal nature of SSR, and its distinctive impact on competition, this paper presupposes that the biggest part of SSR as well as merger regulation belong to *proactive* competition law, whereas traditional antitrust in terms of arts 101–106 TFEU is *preventive* competition law.[44] As has been pointed above, the provisions of art.101(3) TFEU cannot be considered

37 Ludvig von Mises in Bettina Bien Greaves (ed.), *Human Action, A Treatise on Economics* (Indianapolis: Liberty Fund, 2007):

> "The classical economists favoured the abolition of all trade barriers preventing people from competing on the market. Such restrictive laws, they explained, result in shifting production from those places in which natural conditions of production are more favourable to places in which they are less favourable. They protect the less efficient man against his more efficient rival. . . In short they curtail production and thus lower the standard of living."

38 Michael L. Katz and Howard A. Shelanski, "'Schumpeterian' Competition and Antitrust Policy in High-Tech Markets" (2005) 14 *Competition* 47:

> "Many empirical studies fail to account for the fact that market structure itself might be affected by the perceived possibilities for innovation and that market structure might therefore be a result, rather than a cause, of innovation incentives."

39 The "neutrality" of competition on its ontological level has been recognised by many authors. For an analysis of the different formats of competition from the perspective of public policy see Thomas Eilmansberger, "How to Distinguish Good From Bad Competition Under Article 82: In Search of Clearer and more Coherent Standards For Anticompetitive Abuses" (2005) C.M.L. Rev. 42.

40 For scientific purposes, a non-cancerous growth and a malignant growth are both tumours. It would be an absurd obscurantism to refuse to analyse the latter due to its badness for the organism.

41 Bork, *The Antitrust Paradox* (New York: The Free Press, 1993): "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give."

42 The idea of proactive and preventive competition law can be also applicable in other jurisdictions, which do not pursue implicit goal of their political and economic integration, yet in regard to the EU this approach appears to be even more appropriate.

43 See, e.g. Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (Oxford: Hart Publishing, 2000); Giorgio Monti, "Article 81 EC and Public Policy" (2002) C.M.L. Rev. 39; Heike Schweitzer, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81", EUI Working Papers, Law 2007/30, Florence, 2007.

44 Joël Monéger, "Competition, Regulation and System Coherence" in Hanns Ullrich (ed.), *The Evolution of European Competition Law. Whose Regulation, Which Competition?* (Cheltenham: Edward Elgar, 2006), talks about this feature of antitrust, but he sees it rather as a trend than a rule:

as competition law *sensu stricto*, but rather as an intermediary between competition and other European policies, since those provisions stipulate the conditions under which competition law *is not applicable* due to priorities, which are given to other legitimate interests in society.

The present criterion for classification of different regulatory policies in competition as "ex ante–ex post" remains very relevant in most of the cases, and the criterion of "proactive–preventive regulation" does not substitute and merely complement the former. Yet, they remain as different criteria, since "ex post–ex ante" classification refers to the time of the regulation, while the "proactive–preventive" dimension talks about the tool of regulation. The former taxonomy does not provide us with an answer to *what-* and *when-policy*, but rather tells us *how-policy*. In other words, the same purposes can be achieved by applying ex post as well as ex ante tools interchangeably in order to *protect* competition (i.e. *preventive* antitrust), as well as to *improve* it (*proactive* antitrust).

The differentiation of proactive from preventive antitrust provides a clear-cut separation between two distinctive legal instruments, which regulate the same object—competition. While *preventive* competition law strives to *protect* the existing level of competition within the market, its *proactive* counterpart seeks to *establish, develop* or *improve* competition. The essential difference between those instruments is only one of methodology, and not one of substance. Inasmuch as no market can exist without regulation, the same is implied with regard to competition: traditional antitrust limits competition in order to ensure its protection, whereas SSR limits it in order to ensure its development.[45]

> "[W]ith regulation the approach is a proactive one, whilst with competition it is preventive. . . Regulation is mostly ex ante mechanism, while competition assessments are traditionally made ex post. But this is not true in all cases. . . From the outset, competition rules were only some of the tools of the regulatory system in force. At least, it seems that this was the case in the USA. So one of the questions to answer is whether or not the same is true of the EU legal system. In other words, is competition part of regulation or not and vice versa, or should they be considered as separate areas within the legal system?"

There are, however much more opponents than supporters of this idea: Hovenkamp, *The Antitrust Enterprise. Principle and Execution* (2005):

> "[A]ntitrust is not a proactive administrative enterprise such as the regulation of retail electricity, where a government agency sets rates, decides when plants need to be built or modernised, and determines how much should be invested in developing new technologies. Opting to have antitrust at all entails a belief that in most cases the market will produce the correct amount of competition and innovation. All antitrust must do is see to it that the market functions reasonably well. This requires the creation of a few second-order incentives to develop the proper market structures and to discourage anticompetitive practices. By 'second order' I mean that antitrust is largely reactive—for example, it never decides when firms should merge or create internal distribution systems; but it may pass judgment on the legality of such decisions once private firms have made them on their own."

45 This is, perhaps, the reason why states are usually not responsible for the violation of antitrust rules themselves. Application of art.10 EC (repealed at Lisbon) (which requires from Member States, "to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks") in conjunction with arts 101–106 TFEU is actually an exception, which has to be interpreted with an emphasis on *obligations arising out of this Treaty* rather than on Member States as antitrust enforcers. These provisions establish a hierarchical subordination between regulators. The same rationale applies to state aid rules.

The doctrine of European integration and studies on federalism demonstrate that the distinction between proactive and preventive regulatory policies (i.e. positive integration and negative integration) are always more technical than structural, they are much more important in the domain of law than in those of political sciences and economics. In fact, the borderline between both is very washed out, because, often the best way to *protect* something is its *promotion* and vice versa. This interaction between proactive and preventive competition law represents another dimension of productive destruction, which is so inevitable for dialectical antitrust, since it gives a fuel to the whole functioning of this regulatory machinery. It is very likely, that this notion would be contested by the mainstream antitrust scholarship, which traditionally contradistinguishes SSR to competition law, and the conflict between them exists indeed, yet it has a procedural nature.[46] The methodology of preventive antitrust has its well-developed judicial and doctrinal jurisprudence, it went through a long evolutionary process; preventive antitrust is legally predictable it covers a wide variety of contexts. The legal nature of SSR by definition is much more purpose-oriented and it is characterised by its ad hoc essence: it is supposed to regulate "market failures", and ideally it shall disappear after the correction.

Proactive competition law does not necessarily regulate markets in a much stricter manner than preventive antitrust. Technically, the instruments of proactive competition can be applied to soften the existing system of preventive antitrust. Proactive and preventive competition law are different legal instruments, however their differences are often not precisely articulated. Neither economists nor political scientists shall consider the purposes of both instruments as distinctive from one another—they diverge only from the legal perspective. Both traditional antitrust and SSR restrict "free" competition in order to liberate it. SSR provides such liberation via the *introduction* of competition into originally closed markets, whereas preventive antitrust performs the same task by *protecting*

46 Damien Geradin, Robert O'Donoghue, "The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector", The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/05 (latter version in (2005) 1(2) *Journal of Competition Law and Economics*) provide a comprehensive analysis of the main potentialities of procedural conflicts between competition law and SSR.

competition if it already exists in a given market. Usually, however, the relations between those tools are seen in a ''regulation versus competition'' paradigm, which is misleading, since both are a form of regulation and both are dealing with competition.

Conclusions: productive deconstruction of dialectical antitrust

The main idea behind this article was to perform a theoretical analysis of the purposes and tools of antitrust policy and law. An ancient dialectical method has been applied to separate different components of competition policy with the following deconstruction of the conflicting essence of those elements without inevitable evening-out the distinctions between them. Dialectical antitrust demonstrates why competition deserves to be explored independently from other legitimate economic goals and that the primary purpose of competition law logically is protection (via preventive antitrust, i.e. arts 101–106 TFEU) and promotion (via proactive antitrust, i.e. sector-specific regulation) of competition.

Dialectical antitrust does not deny that consumer welfare[47] constitutes a meta-goal of modern competition policy. Indeed in the hierarchy of economic values consumer welfare remains decisive, but methodologically it is neither exhausted nor entirely embraced by competition law, which exists in order to regulate competition. Sometimes competition and consumer welfare overlap and go hand in hand, whereas at other times they may not be entirely consistent, or even conflict. In this case, it is up to the regulator to decide which value has to be given priority at the expense of the other.[48] It is a fiction to suggest that consumer welfare choice would always prevail. No theory is prescriptive enough to provide a sufficient empirical guideline for policymakers.

It is difficult to contest that what is not beneficial for consumers is bad for society, but the idea of competition cannot be reduced only to its proactive elements. Otherwise, such utilitarian antitrust can exist even if the idea of competition is completely withheld from its regulatory purposes. Semantically, the existence of bad or undesirable competition does not make this competition anti-competitive. Competition can be good and bad, and bad competition is still competition,[49] just as well as acid apples remain apples to the same extent as their sweet congeners.[50] Indeed, theoretically, competition is not always the best option to increase consumer welfare; otherwise, the notions of ''competition'' and ''consumer welfare'' would be identical. It is true that from the perspective of the regulator, not every form of competition deserves to be protected or promoted. In fact, regulation of competition is not a zero-sum game,[51] and the regulator is responsible for designing the most appropriate balance between different values and goals for the society. The position of regulator has to be active even in the system, which is governed by the principles of an open market economy with free competition, since the notion of free market inherently includes its external regulation, inasmuch as the idea of an invisible hand is a crucial, decisive and inevitable—but not sufficient—regulatory tool of liberal economy.

The political art of reconsolidation of different, often conflicting, values and rights is another important phenomenon, which also has to be explored separately. Depending on the societal and regulatory priorities, various economic values and different models of competition can get priority over other values and models, but their prioritisation over regulation is not supposed to have an impact on the internal nature of the values and models themselves. Epistemic parentheses perform the cognitive role of separator, which enables the creation of an internal space for each distinctive notion.

Antitrust theory has striven for a long time to reconcile the apparent dilemma between the aspiration to protect the freedom of undertakings to benefit from their successful competition on one hand, and the freedom of their less successful counterparts to participate in this competition on the other; to provide for firms liberal environment on the one hand and to fine-tune their behaviour in order to establish legal predictability and economic efficiency on the other; to protect competition on the one hand and maximise common benefits for society on the other.[52] Essentially, those three crucial

47 To the extent to which—in one way or another—consumer welfare constitutes a meta-aim of all areas of law and policies.

48 Ideologically, competition does not have to prevail over consumer welfare too often. The nineteenth century's scientific Darwinian beliefs in competition as an exclusive tool for progress have to be counterbalanced by more moderate methods of efficient economic development of the twenty-first century.

49 David J. Gerber, *Law and Competition in Twentieth Century Europe*, 1998: ''Competition has been both God and devil in Western civilization. It has promised and provided wealth, undermined communities and challenged moral codes.''

50 The other side of the equation is, ''not everything that is good for consumer welfare is competition''.

51 Compare with partially different approach: Oliver Black, *Conceptual Foundations of Antitrust* (Cambridge University Press, 2005):

> ''There is a difference between 'competition' and 'rivalry'. The latter is a zero sum game, by which the gains of one directly correspond to losses of another, whereas competition envisages possibility of mutual benefits.''

52 In the regulatory environment, this dilemma has been traditionally known as an ''antitrust swinging pendulum''. See William E. Kovacic, ''The Modern Evolution of U.S. Competition Policy Enforcement Norms'' (2003) 73 *Antitrust Law Journal*:

> ''One common narrative of U.S. antitrust history depicts federal enforcement policy since 1960 as a swinging pendulum. In this narrative, federal antitrust enforcement swings through three phases:

dimensions of the competition dilemma can be solved within the framework of dialectical antitrust, which on the level of methodology proposes to utilitise those conflicts by placing their different components into separate parentheses. On a substantial level, the idea of regulated freedom, which is advocated in this paper, has been conceptually elaborated by the Ordoliberal School of antitrust.[53] Yet the article proposes a shift in antitrust taxonomy of economic constitution, from the emphasis on the rights of competitors (as a possibility to compete freely) to the right of competition as such. This constitutional status of competition would allow it to be protected and promoted by regulators regardless of its external efficiency and useful impact on other societal goals, like consumer welfare. In such a constellation, this approach to antitrust would allow to consider competition without its conceptual bundling with consumer welfare, which is perceived as a phenomenon, outside of the genuine concern of competition policy and law.

The importance of dialectical antitrust is not only theoretical. It provides regulators and practitioners with the possibility to perform an additional compliancy test in order to check the impact of the conduct at issue on competition and consumer welfare separately. Because of its value-neutrality, it can be applied in both directions: to justify stronger regulatory intervention of policymakers, if regulatory measure can protect or develop competition, or to defend allegedly anticompetitive behaviour, if an undertaking would manage to show that potential harm for consumer welfare is counterbalanced with proactive effects for competition.

too active in the 1960s and 1970s, too passive in the 1980s, and properly moderate in the 1990s."

53 See inter alia David J. Gerber, "Constitutionalising the Economy: German Neo-Liberalism, Competition Law and The 'New' Europe" (1994) 42(1) *The American Journal of Comparative Law*:

"Despite its enormous importance, ordoliberal thought—and German neo-liberal thought generally—has received little attention in the English-speaking world, and it remains all but unknown in the United States. Moreover, except in Germany, awareness of these ideas has been confined almost exclusively to economists, while lawyers and political scientists have seldom been exposed to them. Finally, there has been little modern study of the impact of these ideas on the development of European thought."