THE COMPETITION-DEMOCRACY NEXUS UNPACKED – EUROPEAN COMPETITION LAW, REPUBLICAN LIBERTY, AND DEMOCRACY

Abstract

The proposition that competitive markets and competition law promote democracy constitutes a fundamental normative prior, if not a foundational myth, of European competition law. This article purports to unpack this notion of a competition-democracy nexus. It argues that the idea of a competition-democracy nexus can only be explained by the normative commitment to a specific understanding of liberty: namely, the republican concept of liberty as non-domination. On this basis, the article makes three contributions. First, on a conceptual level, it is the first to pin down a clear answer to the question of how competition and competition law further democracy. Second, on a historical level it traces how iterations of the ideal of republican liberty and the associated notion of a competition-democracy nexus shaped competition law in Europe and why both disappeared from our modern EU competition law landscape. The third contribution is practical. The article sheds light on how the ideal of republican liberty and the competition-democracy nexus can be operationalised through concrete competition law tools and how they could inform ongoing debates on the future of EU competition law in light of the current challenges posed by the rise of powerful digital platforms, rising levels of industry concentration and the climate crisis. A revival of the idea of a competition-democracy nexus, the article concludes, must not inevitably conflict with a consumer-oriented competition policy, but requires a radical rethink of the role of competition law.

I. Introduction

The idea that the protection of competitive markets and the control of corporate power through competition law play a crucial role for the preservation of a well-functioning democracy has again become fashionable.[1] This revival of the perception of a symbiotic relationship between competitive markets and democracy comes along with a growing awareness of the economic, societal, and political implications of rising levels of concentrated private economic power. Recent studies observing a steady increase in industry concentration and profit mark ups in the US and in Europe over the last three decades suggest that corporate power is on the rise.[2] This trend towards greater industry concentration and raising mark ups has been further accentuated by the emergence of a new species of successful digital 'super star' firms, such as Google, Facebook, Amazon or Apple, whose market shares and

[1] E. Deutscher and S. Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11(2) Competition Law Review 181; A. Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57(1) Journal of Common Market Studies 127.

[2] Council of Economic Advisers to the US President, 'Brief: Benefits of Competition and Indicators' (2016); M. Bajgar and others, 'Industry Concentration in Europe and North America' (2019). OECD Productivity Working Papers 18; OECD, 'Market Concentration - Issues paper by the Secretariat' (2018). DAF/COMP/WD(2018)46 <https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf> accessed 20 May 2019; T. Philippon, *The great reversal: How America gave up on free markets* (Harvard University Press 2019); J. de Loecker, J. Eeckhout and G. Unger, 'The Rise of Market Power and the Macroeconomic Implications*' (2020) 135(2) The Quarterly Journal of Economics 561.

capitalisation skyrocketed over the last years.[3] While the economic implications of growing industry concentration and profit levels are still controversially debated,[4] the unprecedented accumulation of wealth and corporate clout in the hands of a few giant tech companies has reopened fundamental questions about the economic but also political risks that unbridled private economic power poses to our liberal and democratic societies. Concerns over the economic power of big tech firms have gained even further momentum with events on Epiphany 2021, when a ransacking mob incited by misinformation and lies ventilated and amplified over social media platforms assaulted the US Capitol – one of the hallmarks of liberal democracy. The profoundly disturbing scenes unfolding on Capitol hill that day and the subsequent silencing of the outgoing 45th President of the United States by Facebook and Twitter have just been the latest reminder that a few potent technology behemoths control the key informational infrastructures of our societies, without being subject to any meaningful form of democratic control or oversight.

With the growing awareness of the fundamental challenges that concentrated corporate power poses to economic welfare but also to the integrity of our democratic societies and political systems, calls for a more proactive and heavy-handed enforcement of competition rules have grown louder on both sides of the Atlantic.[5] The for a long time prevailing view that the mission of competition law exclusively consists of making sure that markets offer consumers access to products and services at the lowest possible price (the so-called 'consumer welfare standard') finds itself increasingly challenged. At the same time, the view that competition law should attribute greater weight to societal and political considerations gains traction.[6] Prophets of a new 'anti-monopoly movement' increasingly see competition law as a suitable tool to reign in and impose democratic checks on private economic power.[7] Some commentators and policymakers go even as far as calling for the use of competition law to break up big tech companies in the name of democracy.[8]

While being again *en vogue* in some quarters, the thesis that the preservation of competitive markets through competition law is conducive to democracy is by far not new. All to the contrary. The idea of a positive relationship between democracy and competitive markets in which private economic power is split and dispersed amongst multiple players is a recurrent theme, if not a foundational myth, that is as old as US antitrust and EU competition law themselves.[9] It is, therefore, all the more puzzling that policy makers, practitioners and legal

[3] D. Autor and others, 'The Fall of the Labor Share and the Rise of Superstar Firms' (2020) 135(2) Q J Econ 645.

[4] Loecker, Eeckhout and Unger (n 2); Autor and others (n 3).

[5] L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710; L. Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) Journal for European Competition Law & Practice 131; T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018); Gerbrandy (n 1); Deutscher and Makris (n 1).

[6] H. First and S. Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81(5) Fordham Law Review; S. Weber Waller, 'Antitrust and Democracy' (2019) 46(4) Florida State University Law Review 806; E. M. Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) Legal Issues of Economic Integration 317.

[7] B. C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Wiley 2010); Z. Teachout and L. Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law & Public Policy 37; Wu (n 5); B. C. Lynn, *Liberty from all masters: The new American autocracy vs. the will of the people* (St. Martin's Press 2020); M. Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster 2019).

[8] E. Warren, 'Break Up Big Tech' (24 April 2020) <https://2020.elizabethwarren.com/toolkit/break-up-big-tech>.

[9] H. B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Johns Hopkins Press 1955).R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051; R. Hofstadter, 'What Happened to the Antitrust Movement' in D. A. Crane and H. Hovenkamp (eds), *The*

scholarship have as yet failed to explain this proposition. Paradoxically, the more the claim that competition is good for democracy gets repeated, the fewer efforts are being made to understand the conceptual fabric that underpins the relationship between competitive markets and democracy. At least to some, the proposition of a positive relationship between competition and democracy – what we shall call in the following the 'competition-democracy nexus'[10] – appears not to require any further explanation. It is instead treated as if it were a fundamental axiom or prior belief of competition policy that can be simply assumed to be true.

This limited understanding of the conceptual link between competition, competition law and democracy is not only unsatisfactory intellectually speaking. It becomes all the more problematic as calls for reigning in corporate power in the name of democracy gain political traction and inform recent proposals and ongoing debates on how to regulate big tech companies and address growing levels of industry concentration.[11] Without a proper grasp of the conceptual and historical foundations of the idea of a competition-democracy nexus, neither the virtues nor the costs of a competition policy that seeks to further democracy by curtailing the concentration of economic power can be fully assessed and tested. Understanding through which channels concentrated private economic power poses a threat to democracy and how, in turn, deconcentrated, competitive markets further democracy is also instrumental for reforming existing competition rules or designing new rules to operationalise the goal of a competition-democracy nexus.

This article purports to address this research gap by unpacking the conceptual and normative foundations of the idea of a competition-democracy nexus. It thus seeks to advance a clear-cut answer to the question of how competition and competition law can promote and protect democracy. The article thereby makes three contributions to the literature. First, on a conceptual level, the article is the first to shed light on the normative fabric of the idea of a competition-democracy nexus. After critically reviewing existing attempts to explain the idea of a competition-democracy nexus (Section II), it puts forth a systematic and theoretically sound explanation of why the preservation of competitive markets and the control of private economic power are often thought to be essential elements of a well-functioning democracy. The central – and admittedly somewhat surprising – claim of this article is that the idea of a competition-democracy nexus can only be explained by the republican concept of liberty as non-domination, which originated from republican thought in Ancient Rome. This republican concept of liberty markedly differs from our contemporary understanding of liberty. Today, we understand liberty predominantly in negative terms as the absence of actual or likely interference by somebody else with our choices. By contrast, republican liberty defines liberty as the absence of a master-slave relationship. It consequently considers the mere presence and defenceless subjugation to the arbitrary power and domination of another person as an obstacle to individual liberty, even

making of competition policy: Legal and economic sources (Oxford University Press 2013); E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936.

[10] This term has been first coined by Deutscher and Makris (n 1).

[11] Consolidation Prevention and Competition Promotion Act of 2017 14 September 2017. S. 1812 (115th Congress 1st Session); Merger Enforcement Improvement Act 14 September 2017. S. 1811 (115th Congress 1st session); H.R.3460 - State Antitrust Enforcement Venue Act of 2021 2021. 17th Congress (2021-2022); H.R.3816 - American Choice and Innovation Online Act 2021. 117th Congress (2021-2022); H.R.3825 - Ending Platform Monopolies Act 2021. 117th Congress (2021-2022); H.R.3826 - Platform Competition and Opportunity Act of 2021 2021; H.R.3826 - Platform Competition and Opportunity Act of 2021 (n 11); H.R.3849 - ACCESS Act of 2021 2021. 117th Congress (2021-2022); Executive Order on Promoting Competition in the American Economy 9 July 2021. S.228 - Merger Filing Fee Modernization Act of 2021. 117th Congress (2021-2022).Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). COM/2020/842 final; Competition and Markets Authority, 'A new pro -competition regime for digital markets - Advice of the Digital Markets Taskforce' . CMA135.

if this person is benevolent and does not interfere with our choices. It is the commitment to this very specific republican understanding of liberty, I shall argue, which constitutes the normative and conceptual bedrock of the claim that the preservation of competitive markets against excessive concentration of private economic power is a prerequisite of democracy. The idea of a competition-democracy nexus is thus also grounds in a normative commitment to a specific notion of 'republican democracy', that is a form of government that derives its legitimacy from promoting or maximising republican liberty as non-domination by guaranteeing electoral and non-electoral institutions that enable the contestability both of public and private power (Section III). [12]

The second contribution is historical in nature, as the article explores the historical role of this normative commitment to republican liberty in shaping the idea of a competition-democracy nexus in Europe. It revisits how the commitment to republican liberty and the idea of competition-democracy nexus influenced the German Ordoliberal School as the first law&economics movement in 20th century Europe (Section IV) and have found their way into early EU competition law (Section V). The article also identifies the reasons why the idea of a competition-democracy nexus has become largely irrelevant for modern EU competition law. It describes how the shift towards the so-called 'more economic approach' at the turn of the 21st century fundamentally challenged the republican tradition of EU competition law and supplanted the goals of republican liberty and of a competition-democracy nexus with a narrow concern about negative entrepreneurial liberty (Section VI).

Third, the article also makes a practical contribution. It identifies concrete legal mechanisms through which the idea of republican liberty and a competition-democracy nexus can be operationalised (Section V and VII). It further explores how the ideal of republican liberty provides a normative roadmap for the reform of EU competition law with a view to realigning EU competition law and the European Economic Constitution with the ideal of a republican democracy (Section VII).

II. Limitations of existing accounts of the competition-democracy nexus

The proposition that competition law – that is, legal rules prohibiting (i) anticompetitive agreements (Article 101 TFEU[13] in EU competition law), (ii) the abuse of monopoly power (Article 102 TFEU in EU competition law) and (iii) anticompetitive mergers (Regulation 139/2004 EC[14] in EU competition law) – promotes democracy is anything but obvious. Empirical studies have, for instance, failed to establish a clear-cut, significant correlation between democratic political regimes and the existence of competition law.[15] Moreover, nowadays the consensus view prevails amongst competition lawyers that the paramount objective of competition law is to ensure that competitive markets benefit consumers through lower prices, greater quality, choice and innovation.[16] And yet, competitive markets and their

[12] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) ix, 180-205; P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 22, 179-184, 302.
[13] Consolidated version of the Treaty on the Functioning of the European Union. OJ [2012] C 326/47.
[14] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ [2004] L 24/1.
[15] N. Petersen, 'Antitrust Law and the Promotion of Democracy and Economic Growth' (2013) 9(3) Journal of Competition Law & Economics 593; T.-C. Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity' (2016) 12(2) Journal of Competition Law & Economics 233.
[16] H. Hovenkamp, *The antitrust enterprise: Principle and execution* (Harvard University Press 2005) 1.

protection through competition law are frequently referred to as an important ingredient and safeguard of liberal democracy.[17]

The belief that the concentration of private economic power is incompatible with democracy and, that in turn, competition law in imposing checks on corporate power is instrumental in protecting democracy is arguably as old as competition law itself. It is oftentimes traced back to the famous words that US Senator Sherman uttered in the US Senate to garner support for his newly introduced federal antitrust bills in 1890. Senator Sherman contended that the concentration of economic power within the hands of a few powerful corporations creates a 'kingly prerogative, inconsistent with our form of government' and urged that '[i]f we will not endure a king as a political power we should not endure a king over production, transportation, and sale of any of the necessaries of life.'[18] With these words, the creed of a competition-democracy nexus was called into being and should soon fashion decades of US antitrust policy and jurisprudence.

The proposition that competition law in preventing excessive concentration and abuses of private economic power contributes to the integrity of democracy is however not confined to US antitrust law. It also had an important bearing on European competition law. As late as in the 1980s, the European Commission appeared to perceive a direct link between the preservation of competitive markets through competition policy and liberal democracy:

> *The Member States of the European Community share a common commitment to individual rights, to democratic values and to free institutions. It is those rights, values and institutions at the European and national levels that provide necessary checks and balances in our political systems. Effective competition provides a set of similar checks and balances in the market economy system. It preserves the freedom and right of initiative of the individual economic operator and it fosters the spirit of enterprise. […] Competition policy should ensure that abusive use of market power by a few does not undermine the rights of the many.*[19]

While the preservation of democracy has oftentimes been invoked as the ultimate normative justification of competition law, little efforts have been made so far to provide a convincing answer to the basic question underpinning the claim of a competition-democracy nexus: Why and how is it that competitive markets contribute to democracy? To answer this question, it is worthwhile to break down the idea of a competition-democracy nexus into the three basic claims that it is made up of. First, that the concentration of private economic power has adverse consequences for society (the 'concentration thesis'). Secondly, at least one of these adverse societal consequences is that the concentration of private power poses a threat to democracy (the 'democracy thesis'). And thirdly, that competition law is the right tool to address the nefarious implications that the excessive concentration of private economic power entails for democracy (the 'competition law thesis'). A convincing explanation of the competition-democracy nexus would have to explain the concentration, democracy and competition law theses by answering three questions. First, why is concentrated economic power a problem for society? Second, how does it harm democracy? And third, why is it the role of competition law to address this problem? This section critically reviews existing

[17] Fox (n 6); S. Weber Waller, 'Antitrust and Social Networking' (2012) 90 North Carolina Law Review 1771.
[18] 20 Cong Rec 2455 (1890) 2457.
[19] XVth Report on competition policy (1985) 11.

attempts to explain the competition democracy nexus by assessing how they perform in addressing these three questions.

A. The interest capture account

The 'interest capture account' constitutes the most recurrent and prominent explanation for the idea of a competition-democracy nexus. Various attempts have indeed been made by the contemporary proponents of the idea of a competition-democracy nexus to postulate an empirical and causal negative relationship between concentrated corporate power and democracy. The standard explanation for this negative relationship lies in what the economist Luigi Zingales tellingly calls the 'Medici vicious cycle'.[20] It assumes that large businesses can easily convert their economic power into political power through lobbying, campaign financing and interest capture. Accordingly, excessive concentration of economic power risks eroding or corrupting democratic processes and institutions and leads to rent-seeking, oligarchy, and crony capitalism. Recent studies showing that powerful corporations are more successful than smaller players and other social groups in lobbying government authorities and capturing regulatory processes also lend empirical support to this interest capture account.[21] On this basis, some antitrust scholars have recently called for a more heavy-handed competition law enforcement against big business with a view to disrupting this reinforcing spill-over effect[22] between economic and political power in order to preserve the integrity of our democratic system and institutions.[23]

Without a doubt, this concern about lobbying and interest capture as a transmission belt between private economic and political power has certainly had some bearing on the emergence of the idea of a competition-democracy nexus. As such, it is, however, insufficient to explain the relationship between competition, competition law and democracy. It is indeed far from clear why lobbying and interest capture is a problem that is particularly detrimental to democracy relative to other forms of government ('democracy thesis'). On the contrary, it is equally conceivable that interest capture by big business undermines the integrity or impartiality of political institutions in an autocratic regime or a monarchy. While it can rightly be said that the Medici vicious cycle is likely to corrupt and undermine the impartiality of political institutions, proponents of this account fail to explain how interest capture actually undermines the specific democratic nature of those institutions and, thus, is inimical to a democratic form of government. It also bears noting that pluralistic theories of democracy, coined by Madison's Federalist Paper No 10[24] and the work of Robert Dahl,[25] endorse to some extent lobbying, or in

[20] Zingales (n 19), 114.
[21] L. Zingales, 'Towards a Political Theory of the Firm' (2017) 31(3) Journal of Economic Perspectives 113 113; Wu (n 5) 55–58; J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 27, 30, 55.56; Lynn (n 7). For the discussion of empirical evidence of the lobbying hypothesis M. Gillens and B. I. Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12(3) Perspectives on Politics 564; J. E. Bessen, 'Accounting for Rising Corporate Profits: Intangibles or Regulatory Rents?' (2016). Boston Univ. School of Law, Law and Economics Research Paper No. 16-18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778641> accessed 20 March 2018; OECD (n 2); L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235 266–267; Teachout and Khan (n 7), 41–53; Philippon (n 2) 151–204.
[22] Zingales (n 19), 114.
[23] Wu (n 5) 58; Khan and Vaheesan (n 21), 265–268; Teachout and Khan (n 7), 70–72.
[24] A. Hamilton, J. Madison and John Jay, *The Federalist Papers: ed. Lawrence Goldman* (Oxford University Press 2008) Federalist No 10, p. 48.
[25] R. A. Dahl, *A Preface to Democratic Theory* (Chicago University Press 1956). R. A. Dahl, *Democracy and its Critics* (Yale University Press 1989).

other words, interest group representation as an important element and alternative channel of democratic participation.

Most importantly, the interest capture account also omits to explain why it should actually be the role of competition law to protect democratic institutions against the corrosive effect of lobbying and rent-seeking by big business ('competition law thesis'). Arguably, this problem could be addressed more effectively through the adoption of specific regulations and rules, such as stricter campaign financing and lobbying regulations, which shield democratic processes and institutions from undue corporate influence.[26]

Even if one were to agree that antitrust has a role to play in protecting democratic institutions against the corrosive influence of private corporate interests and excessive lobbying, the interest capture account fails to explain why this problem necessitates a more heavy-handed application of competition law against big business, which seeks to reduce instances of concentration of economic power. If interest capture and lobbying constituted the channels through which concentrated market power undermines democracy, it would arguably be more effective and less costly to apply competition rules directly against harmful rent-seeking or lobbying activities by which firms try to obtain anticompetitive legislation than seeking to reduce the overall level of industry concentration. Robert Bork, for instance, while being firmly opposed to any attempt to address the concentration of economic power directly through the application of antitrust laws, supported the application of competition law to anticompetitive lobbying. Such an approach would be better targeted than a sweeping tightening of antitrust laws against big business, for it would only screen out those attempts of lobbying, which actually harm or are likely to harm competitors or competition.[27] Yet, the US Supreme Court[28] and, to some extent, the EU Courts[29] have rejected the application of competition rules to lobbying out of fear that this would chill rather than protect democracy by curtailing the right to petition and inhibiting political participation. The argument that a more rigorous application of competition law against concentrated economic power is necessary to protect democracy from undue corporate influence ignores yet another solution to address interest capture, which was also advocated by several members of the Chicago School. Based on George Stigler's seminal theory of regulation, many Chicago Scholars argued that the easiest way to protect democracy and competition from undue interest capture and special-interest protectionism consists of cutting back regulation and reducing the scope of government intervention rather than expanding it through more competition law enforcement.[30]

Even if there was a positive correlation between economic and political power, the argument that competition law should become tougher on big business to protect democracy, rests on shaky grounds and does not convincingly explain the idea of a competition-democracy nexus. The interest capture account indeed fails to explain with the 'democracy' and 'competition law' theses two of the three core propositions underpinning the idea of a competition-democracy nexus: namely, that concentrated power is specifically harmful to democracy and that competition law is the right tool to deal with it.

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[26] Baker (n 21) 61.

[27] R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 347–364.

[28] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington* 381 U.S. 657 (1965).

[29] *Case T-432/05 EMC Development v Commission* ECLI:EU:T:2010:189.

[30] G. J. Stigler, 'The Theory of Economic Regulation' (1971) 2(1) The Bell Journal of Economics and Management Science 3; S. Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) The Journal of Law and Economics 211.

B. The liberty account

Alongside attempts to explain the idea of a competition democracy-nexus by pointing to a causal relationship or correlation between economic and political power, a number of scholars have suggested that the link between competition and democracy is grounded in the fact that competition promotes economic liberty.[31] This 'liberty account' echoes the assertion coined by libertarian thinkers, such as Friedrich August von Hayek and Milton Friedman, that competitive markets and capitalism are normatively superior to other economic systems because they enhance liberty.[32] This liberty-based explanation of the competition-democracy nexus, however, also leaves many questions unanswered.

1. What is liberty?

To understand the limitations of the liberty account in explaining the competition-democracy nexus, it is first necessary to clarify the notion of liberty[33] itself: What do we mean when we say that someone is free? The answer to this question is anything but obvious. Indeed, people often hold different and, at times, fairly contradictory views on what it takes to be free. The history of political thought abounds with these disagreements over the meaning of liberty. The most consequential attempt to rationalise and, in part, overcome these disagreements was made by the political and legal philosopher Gerald C. MacCallum. Diverging notions of liberty, MacCallum seminally argued, can always be expressed as a triadic relationship in the format: 'x is (is not) free from y to do (not do, become, not become) z'.[34] Accordingly, liberty always refers to the situation '*of* something (an agent or agents), *from* something, *to* do, not do, become or not become something'.[35] Liberty, consequently, is always describing a relationship between agents (x), preventing conditions, that is constraints, restrictions, interferences and barriers (y), which affect actions (z). From this vantage point, different notions of liberty represent nothing more (or less) than diverging views regarding the three key variables x, y, and z: namely,

(i) who qualifies as an agent (x);
(ii) what counts as a preventing condition (y);
(iii) and what should be included in the actions that agents might be reasonably be said to be free, or not free, to perform (z).[36]

The assertion coined by Hayek, Friedman and other mainstream liberal thinkers that competitive markets promote liberty is anchored in a negative notion of what liberty is. This negative understanding of liberty largely dovetails with how the concept is predominantly used in our contemporary discourses. When we nowadays talk about liberty, we usually tend to

[31] Pitofsky (n 9); E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140; E. M. Fox, 'The Battle for the Soul of Antitrust' (1987) 75(3) California Law Review 917; Fox and Sullivan (n 9); G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997); R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000); Fox (n 6).

[32] Hayek, Friedrich A. von, *The Road to Serfdom* (Routledge 2001); Hayek, Friedrich A. von, *The Constitution of Liberty [1960]* (University of Chicago Press 2011); M. Friedman, *Capitalism and Freedom* (University of Chicago Press 1962).

[33] While 'liberty' and 'freedom' may have occasionally slightly different meanings, I use both terms interchangeably in this articld. See for further discussion on the differences between 'freedom' and 'liberty' H. F. Pitkin, 'Are Freedom and Liberty Twins?' (1988) 16(4) Political Theory 523.

[34] G. C. MacCallum, 'Negative and Positive Freedom' (1967) 76(3) The Philosophical Review 312 314.

[35] ibid.

[36] MacCallum (n 34), 319 - 327, 333; I. Carter, 'Liberty' in R. Bellamy and A. Mason (eds), *Political Concepts* (Manchester University Press 2003) 11–14.

describe it primarily in negative terms, as freedom from something, namely from coercion or interference.[37] From the perspective of negative liberty, I am free because nobody else actually or likely interferes with my otherwise unconstrained choices or actions. [38] This negative understanding of liberty was first coined by Thomas Hobbes.[39] Subsequently endorsed by liberal thinkers such as Jeremy Bentham,[40] John Stuart Mill,[41] Benjamin Constant, [42] Isaiah Berlin,[43] Friedrich von Hayek,[44] and Milton Friedmann,[45] this negative concept of liberty has become over the course of the last two centuries, the predominant way of thinking about liberty.

This negative concept of liberty defines the notion of agents (x) narrowly. Only individuals but not collective human agents can be said to be free or unfree from interference by other agents. The preventing conditions that can be said to inhibit negative freedom are construed narrowly too. Proponents of negative liberty only consider external (actual or likely) interference by human agents as a threat to liberty. By contrast, constraints internal to the individual, or natural obstacles that restrict individual choices, such as lack of talent or resources, extreme weather events, or famines, do not qualify as obstacles to negative liberty.[46]

While agreeing that only external interference can count as obstruction of liberty, the negative camp disagreed on the type of actions (z) that can be legitimately said to be restricted so that an individual qualifies as unfree. On the one side, Hobbes asserted that an individual is free as long as she is not prevented from choosing her preferred course of action or option. Suppose an individual has the choice between option A and B and prefers A. [47] Hobbes would argue that the individual qualifies as free as long as she is not interfered with when choosing A, even if she were to be exposed to interference when choosing option B. Put differently, Hobbes conceived negative liberty as non-frustration or preference maximisation.[48] This content-*de*pendent Hobbesian version of negative liberty requires that the individual's preferences be only decisive (i.e., are respected) in the actual world where an individual chooses A, but not in the counterfactual world where she were to prefer B over A. This actualism becomes apparent if we consider an individual that has the choice to go through different doors and her preferred door opens. Hobbes tells us that she is to be considered free even in the event where every other (non-preferred) door was blocked.[49] All that is required to secure individual liberty as non-frustration is to minimise the probability of the individual being hindered from choosing her preferred option A, that is P (H if A) where P reads 'probability' and H reads 'hindrance'.[50]

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[37] I. Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty : incorporating Four essays on liberty/ Isaiah Berlin* (Oxford University Press 2002) 168–181.
[38] ibid 168–179.
[39] T. Hobbes, *Leviathan [1651]: or The Matter, Form & Power of a Common-Wealth Eclasticall and Civill* (Penguin Classics 1985) Part II, Chapter XXI, pp. 261-262.
[40] J. Bentham, 'Anarchical Fallacies' in J. Bowring (ed), *The Works of Jeremy Bentham* (William Tait 1843) 503; J. Bentham, *Theory of Legislation* (London 1873) 94.
[41] J. S. Mill, *On Liberty, Utilitarianism and Other Essays* (Oxford University Press 2015 [1859]).
[42] B. Constant, *Political Writings* (Cambridge University Press 1988) 307–328.
[43] Berlin (n 37).
[44] Hayek, Friedrich A. von (n 32); Hayek, Friedrich A. von (n 32).
[45] Friedman (n 32).
[46] Carter (n 36) 9–14.
[47] Hobbes (n 39) Part II, Chapter XXI, pp. 261-262.
[48] P. Pettit, 'The Instability of Freedom as Noninterference: The Case of Isaiah Berlin' (2011) 121(4) Ethics 693 695.
[49] V. C. Chappell (ed), *Hobbes and Bramhall: On liberty and necessity* (Cambridge University Press 1999) 81. P. Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson' (2008) 36(2) Philosophy & Public Affairs 206 211.
[50] I follow here the notation of Pettit (n 12) 34–35.

Other proponents of negative liberty, most prominently Isaiah Berlin, embraced however a more demanding notion of negative liberty with respect to the type of actions (z) that an individual must be able to carry out without being interfered with to count as free. Unlike Hobbes, Berlin did not think that it suffices for an individual to be unrestrained in choosing her preferred option to enjoy liberty. He argued, instead, that the liberty of an individual depends on the number of alternative doors through which she can pass without being interfered with, irrespective of which of the doors is currently the preferred one.[51] When choosing between option A and B, an individual can thus only be said to be free if she is unrestricted in both her preferred option A, but also the alternative option B. Berlin thus advocated a content-*in*dependent version of liberty. To be free, an individual's preferences must be decisive, regardless of which option is preferred.[52] The content-independent, Berlian version of negative liberty thus requires not only the minimisation of the probability of hindrance of the preferred option (that is P (H if A)) but the minimisation of the sum of P (H if A) + P (H if B).[53] Accordingly, an individual is only free if her preferences are not only decisive in the actual but also in a nearby likely counterfactual world. The Berlinian version of negative liberty thus favoured probabilism over the purely actualist conception of liberty coined by Hobbes.[54]

2. The shortcomings of the liberty account

Attempts to explain the competition-democracy nexus with the propensity of markets to promote liberty, the previous discussion suggests, usually rely on a negative notion of liberty, understood as the absence of state and private interference with the sphere of autonomy and choices of (other) market agents. This liberty account is however also fraught with a number of limitations, irrespective of whether it is grounded in an actualist Hobbesian or probabilistic Berlinian notion of negative liberty.

The principal problem with attempts to explain the competition-democracy nexus by the fact that competition enhances economic liberty is that negative liberty is by no means inextricably linked with democracy. On the contrary, Berlin and Hayek have pointed out that negative liberty can be guaranteed irrespective of the specific form of the political regime in which we live, so long as there are some basic guarantees of liberty, such as constitutional rights and the rule of law, in place.[55] Not least Hayek's and Friedman's support for the free-market reforms of the authoritarian Pinochet regime in Chile provides empirical evidence showing that there is no immediate and inevitable relationship between negative economic liberty, competitive markets, and democracy.[56] The liberty-account of the competition-democracy nexus thus suffers from the major shortcoming that the notion of negative liberty cannot support any positive relationship between liberty and democracy ('democracy thesis').

A second major shortcoming of the liberty account is that it does not explain why it is precisely competition law that will promote greater (negative) liberty. Mainstream liberals view

[51] Berlin (n 37) xlviii.
[52] P. Pettit, 'Symposium on Amartya Sen's philosophy: 1 Capability and freedom: a defence of Sen' (2001) 17(1) Economics and Philosophy 1 5; Pettit (n 48), 696–705; Pettit (n 48), 698.
[53] Pettit (n 12) 34–35.
[54] P. Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson' (2008) 36(2) Philosophy & Public Affairs 206 217 <http://www.jstor.org/stable/40212819>.
[55] Berlin (n 37) 178; Hayek, Friedrich A. von (n 32) 72–74.
[56] J. Meadowcroft and Ruger William, 'Hayek, Friedman, and Buchanan: On Public Life, Chile, and the Relationship between Liberty and Democracy' (2014) 26(3) Review of Political Economy 358; B. Caldwell, Montes and Leonidas, 'Friedrich Hayek and His Visits to Chile' (2015) 28(3) The Review of Austrian Economics 261.

any form of state interference through legal rules as coercion and, hence, a reduction of liberty.[57] The proposition that competition law, which interferes with the contractual and entrepreneurial liberty of businesses, promotes liberty must therefore sound utterly counterintuitive to them. It is indeed only in carefully circumscribed and exceptional circumstances where there is 'definite damage, or definite risk of damage' to others[58] that proponents of negative liberty countenance state intervention. State intervention is hence only legitimate if the reduction of liberty (as-non-interference) resulting from state coercion is outweighed by the harm it prevents.[59] Without any additional qualification, calls for tougher competition law intervention to tackle concentrated economic power cannot be grounded in a normative commitment to negative liberty. All things being equal, more competition law enforcement will not result in more but rather less (negative) liberty. The liberty account thus also fails because it does not lend sufficient support to the claim that competition law furthers negative liberty ('competition law thesis').

Most notably, the concept of negative economic liberty cannot explain why Senator Sherman and others perceived the mere presence of concentrated economic power as a danger for democracy ('concentration thesis'). We have seen that the negative liberty of an individual is only impaired if another person or authority is actually interfering (Hobbesian version) or likely to interfere (Berlinian version) with her in such a way that she cannot carry out a course of action she would otherwise embark on in the absence of actual or the threat of likely interference. Put simply, for the concentration of economic power, say in the hand of a giant firm, to count as obstruction of negative liberty, this power must be exercised in a way that the giant firm interferes or is likely to interfere with the sphere of autonomy of other market participants. Absent actual or likely interference, the mere presence of concentrated economic power does neither qualify as a preventing condition (y), nor does it hinder an agent from performing an action (z) in such a way that it must be considered unfree. Accounts which attribute the link between competition and democracy to the conduciveness of competitive markets to further negative economic liberty are deficient because they fall short of explaining why proponents of a competition-democracy nexus perceive the very existence and not only the exercise of concentrated economic power as being at odds with liberty and democracy. Attempts to ground the idea of a competition-democracy nexus in the role of competitive markets in enhancing economic liberty in its common negative sense are hence unconvincing both on a conceptual and empirical level.

III. The nexus unpacked - Republican liberty as the connecting piece between competition and democracy

The previous section shows how both the 'interest capture' and '(negative) liberty account' fail to put forth a convincing explanation as to why the mere existence of concentrated economic power constitutes a threat to democracy that should be addressed through competition law and, conversely, why the promotion of competitive markets through competition law bolsters democracy. More precisely, both accounts omit to offer a convincing story for the concentration, democracy and competition law theses that underpin the idea of a competition-democracy nexus. What else, the reader might ask, is then the missing piece that entwines competition and democracy? The response that this article proposes in this section is that the

[57] Hobbes (n 39) Part II, Chapter XXI, pp. 262-268; Bentham (n 40) 503; Bentham (n 40) 94; P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 596; Pettit (n 12) 37–40.
[58] Mill (n 41) 80, 93.
[59] Pettit (n 12) 35; Pettit (n 57), 596. P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 145.

idea of a competition-democracy nexus is anchored in, and can only be explained by, a very specific conception of liberty: namely, republican liberty as non-domination.

A. A distinct, third notion of liberty

The idea of republican liberty, while being historically much older than the concept of negative liberty, has only recently been rediscovered by the political theorists Quentin Skinner and Philipp Pettit.[60] The origins of this republican concept of liberty, however, trace back to the laws and political thought of the ancient Roman republic.[61] Roman law and thinkers, such as Marcus Tullius Cicero and Titus Livius, defined liberty primarily in opposition to serfdom or slavery.[62] Accordingly, a person enjoys freedom if it is, unlike a slave, not subjugated to, or dependent on the arbitrary will or domination of a master. Being free in the Roman republic was hence synonymous with enjoying the status of a free and independent citizen who is not subordinated to a master-slave relationship.[63] This republican or neo-Roman version of liberty was carried across from antiquity in the Italian city-republics[64] and remained influential in the Anglo-Saxon common law tradition and political thought until the late 18th century.[65] Most notably, republican liberty fundamentally fashioned the ideal of a democratic republic envisaged by the founding fathers of the US Constitution,[66] notably Thomas Paine,[67] Thomas Jefferson[68] and James Madison.[69] The ideal of republican liberty, thus, lay at the origin of the first republican democracy and has been the predominant way of how liberty was conceived until the late 18th century. Only during the late 18th and 19th century, this republican version of liberty as non-domination has been crowded out and superseded by the negative concept of liberty as non-interference.[70]

What is peculiar about this republican concept of liberty as non-domination is that it forms an inherently distinct concept of liberty that importantly differs from negative liberty.[71]

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[60] See for instance, Pettit (n 57); Pettit (n 12); Pettit (n 12); Q. Skinner, *Liberty before Liberalism* (Cambridge University Press 1998); Q. Skinner, 'A Third Concept of Liberty: Isaiah Berlin Lecture' in The British Academy (ed), *Proceedings of the British Academy: 2001 Lectures.* Volume 117 (Oxford University Press; British Academy 2002).

[61] Pettit (n 12) 5, 19-20. Skinner (n 60) 38–46.

[62] 'Certainly, the great divide in the law of persons is this: all men are either free men or slaves.' A. Watson (ed), *The Digest of Justinian: Volume I* (University of Pennsylvania Press 1985) I, 5 (3); Skinner (n 60) 38–39. M. T. Cicero, *On the Commonwealth and On the Laws* (Cambridge University Press 1999) I, 47–49; II, 42-48; III, 37 b; Titus Livius (Livy), *The History of Rome: Translated from the Original with Notes and Illustrations by George Baker, A.M.* (Peter A. Mesier et al. 1823) I, xxiii; III, xxxvii-xxxviii.

[63] Pettit (n 12) 21–28, 31-32. Pettit (n 57), 576; Pettit (n 59), 134; Skinner (n 60) 248–255.

[64] N. Machiavelli, *Discourses on Livy* (University of Chicago Press 1998).

[65] Skinner (n 60) 248; Pettit (n 12) 5, 10, 19-20; J. G. A. Pocock and R. Whatmore, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition [1975]* (Princeton University Press 2016).

[66] A. Kalyvas and I. Katznelson, *Liberal beginnings: Making a Republic for the Moderns* (Cambridge University Press 2008) Chapter 4.

[67] T. Paine, *Political Writings* (Cambridge University Press 2000).

[68] T. Jefferson, *Political Writings* (Cambridge University Press 2004).

[69] Hamilton, Madison and John Jay (n 24) see most notably Federalist N° 10 and 51.

[70] Pettit (n 12) 37–49.

[71] P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 3, 8. Pettit (n 57), 578. Skinner disagrees on this point, as he perceives republican liberty as genuinely negative concept of freedom Skinner (n 60) 255, fn. 99, 262.

Republican liberty indeed follows a distinct logic and is characterised by its own imaginary, grammar, language[72] and themes[73] that fashion its distinctive geometry.

1. Domination not interference – a broad notion of preventing conditions (y)

The first difference between republican and negative republican liberty pertains to the specific types of acts, constraints and restrictions – that is, the preventing conditions (y) to follow MacCallum– which can legitimately be considered an abrogation of liberty. Unlike advocates of negative liberty, the republican tradition does not only perceive actual interference or the threat of likely interference as a source of unfreedom. On the contrary, the republican concept of freedom as non-domination considers 'dependence on the goodwill of others'[74] or 'subjugation' understood as 'defenseless susceptibility to interference, rather than actual interference'[75] as an impairment of freedom. It is hence rather concerned about an individual's exposure to the capacity of a powerful agent to arbitrarily interfere with her at its whim without accounting for her interest.

2. A robust, non-probabilistically weighted concept of liberty – a broad notion of restricted actions (z)

Negative and republican liberty not only differ in the type of preventing conditions (y) but also in the type of actions (z) that can be legitimately said to be restricted so that an individual counts as unfree. We have seen in the previous section that negative liberty is frustrated if there is actual interference with an individual's preferred choice (Hobbesian version) or likely interference with alternative options that the individual may choose in a likely counterfactual world (Berlinian version). It follows that negative liberty requires the presence of actual interference or at least some plausible degree of likelihood of interference for an agent to be unfree. Accordingly, negative liberty is maximised if the probability of interference is minimised in the actual world (P (H if A)) or in a nearby neighbouring world (P (H if A)+P (H if B)).[76]

By contrast, republican liberty is obstructed even in the absence of any likelihood or probability of interference, as long as one party possesses the power and capacity to interfere with the choices of another party.[77] Republican liberty hence fundamentally differs from the probabilistic logic[78] of negative liberty. It instead guarantees a more robust and resilient form of liberty. Ensuring a high probability of non-interference is therefore not a sufficient basis for republican liberty to flourish. Rather, non-domination can only be achieved so long as the capacity to interfere with someone else on an arbitrary basis is, to the largest extent possible, inaccessible to other parties.[79] Republican liberty thus presupposes not only the absence of, but

[72] On the distinctive language of republicanism Pettit (n 12) 130–135.
[73] Pettit (n 70) 31.
[74] Skinner (n 60) 247.
[75] Pettit (n 57), 577.
[76] C. List, 'The Impossibility of a Paretian Republican?: Some Comments on Pettit and Sen' (2004) 20(1) Economics and Philosophy 65 70–71.Pettit (n 57), 600.
[77] Pettit (n 12) 22.
[78] Pettit (n 12) 64; Pettit (n 12) 33–35; Pettit (n 59), 135-137, 145.
[79] Skinner (n 60) 255, 262; Pettit (n 12) 123.

immunity or security from interference.[80] Unlike negative liberty, it demands a 'probabilistically unweighted'[81] or modal[82] protection against arbitrary interference not only in the actual but across a range of all (relevant) possible worlds.[83]

Republican liberty thus goes above and beyond the more demanding Berlinian version of content-independent negative liberty that presupposes the minimisation of the sum of P (H if A)+P (H if B), where P is probability and H is hindrance.[84] Republican liberals object that even when individuals are not exposed to actual or likely interference, they are unfree if powerful agents can interfere at will with their choices should they adopt an unfriendly disposition towards them. They therefore postulate that individuals only qualify as free if they benefit both from a content- and context-independent form of liberty: to be free, an individual's preferences must be decisive, not only regardless of their content, but also irrespective of the context in which she finds herself when making her choices.[85] This context-independent dimension of republican liberty thus calls for the minimisation of the probability of hindrance both in the range of worlds where powerful agents are friendly 'F' and unfriendly 'U'. For republican liberty to be guaranteed we therefore have to minimise the sum of P (H if A & U) + P (H if A & F) + P (H if B & U) + P (H if B & F).[86]

To illustrate this fundamental difference between the probabilistic negative and modal republican accounts of liberty, consider, for instance, the relationship between a benevolent, non-interfering master and a slave. From the perspective of negative freedom, the slave is free, as long as the master does not actually or likely interfere with her choices. [87] Liberty as non-interference hence only presupposes the absence of coercion in the actual world and nearby probable worlds. In contrast, the republican concept of liberty accounts for the fact that it can nonetheless happen by accident or owing to a change in mood of the non-interfering master that the slave will become very easily subject to interference. Aiming to achieve freedom in a context-independent manner, liberty as non-domination strives for a more resilient and robust protection of liberty than its negative counterpart.[88] Republican freedom is hence less sensitive to contingencies, such as the caprices of the powerful. It provides a higher degree of security than negative liberty. For it ensures that individuals can enjoy their liberty without having to worry about a sudden change of mind and attitude of currently non-interfering, benevolent, but more powerful parties.

This higher degree of security or resilience of republican liberty also has an important psychological dimension. Even if she is subordinate to the dominion of a benevolent, non-interfering master, a slave will try to adopt any kind of cunning or ingratiating behaviour in order to please and placate her master and, thus, avoid any future interference. By contrast, republican freedom allows agents to act independently without having to worry about the

[80] Pettit (n 12) 69.
[81] Pettit (n 59), 138.
[82] List (n 75), 83–86; C. List, 'Republican freedom and the rule of law' (2006) 5(2) politics, philosophy & economics 201.
[83] List (n 75), 72–73; Pettit (n 54), 218–219.
[84] Pettit (n 12) 34–35.
[85] Pettit (n 52), 6–8; Pettit (n 48), 704–714; List (n 75), 72–73.
[86] I follow here the notation of Pettit (n 12) 67–69.
[87] Pettit (n 12) 54, 62; Pettit (n 57), 585. See for instance R. A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103 134.
[88] Pettit (n 12) 24–25; Pettit (n 12) 67.

consequences of their conduct on the mood of the powerful.[89] Republican liberty thus recognises that the mere awareness of being subject to the arbitrary will of someone else often has the potential to constrain someone's liberty.[90]

3. The egalitarian dimension of republican liberty – a broad notion of agents (x)

The example of the master-slave relationship also points to the strong egalitarian impetus of republican liberty as its third distinctive feature.[91] To republicans, liberty always means 'equal liberty'.[92] They thus adhere to a broad notion of the category of agents (x) who can be said to be free or unfree. This egalitarian dimension of liberty in the republican sense also becomes manifest in the fact that it turns upon the idea of 'self-mastery' or 'self-ownership' in the sense of 'being your own man' or woman.[93] Defining freedom as non-mastery,[94] a primary concern of republican liberty is to preserve the independent status or standing of the individual as a citizen of the republic.[95] Subjugation to hierarchical relationships of dependence is hence deemed incompatible with the standing of a citizen as a free-(wo)man having their independent will and self-ownership.[96]

Whereas mainstream liberals do not object to hierarchies or imbalances of power,[97] the republican tradition displayed a fervent hostility against power asymmetries. Republican liberals firmly oppose social hierarchies as being at odds with the ideal of a society and polity of free and equals. As it aims to maximise the non-domination of all members of the society, the republican notion of liberty thus has an inbuilt commitment towards 'structural egalitarianism'.[98] It seeks to promote 'equally intense non-domination'.[99] Assuming that the intensity of non-domination that an individual enjoys depends on the relative power of the individual in the society as a whole, republican liberals assert that the liberty of an individual depends on her own power relative to the power of others. To guard the equal liberty of all citizens, republican freedom is, therefore, committed to promoting an equal structure and distribution of power amongst citizens by levelling power imbalances and hierarchies.[100]

4. An in-built democracy and rule of law commitment

A fourth feature in which negative and republican liberty diverge is their attitude towards the form of government and legal rules. Republican liberty not only differs from negative liberty in so far as it assumes that freedom can be restricted even in the absence of actual or likely interference, for instance, when an individual is subjugated to a non-interfering master. Contrary to negative liberty as non-interference, liberty as non-domination does not classify every form of interference with the choices of an agent as an illegitimate restriction of

[89] Pettit (n 12) 24–25.
[90] Q. Skinner, 'Rethinking Political Liberty' [2006] History Workshop Journal 156, 256.
[91] Pettit (n 12) 110–111.
[92] Cicero (n 62) I, 47; Pettit (n 12) 5.
[93] Skinner (n 89), 164.
[94] Pettit (n 12) 22.
[95] ibid 32–33.
[96] Skinner (n 89), 160–164. Skinner (n 60) 251-252, 263.
[97] Pettit (n 12) 11.
[98] Pettit (n 12) 113.
[99] Pettit (n 12) 116; Pettit (n 57), 595.
[100] Pettit (n 57), 598. For the proponents of negative liberty, by contrast, power imbalances are not objectionable. Pettit (n 12) 11.

her freedom. Rather, republican liberals accept the possibility of non-mastering or non-arbitrary interference.[101] Such non-arbitrary interference occurs in instances where the interferer is obliged to take into account the interests or ideas of the interfered agent.[102] For republican liberals, state interference, therefore, does not inevitably lead to a decrease or loss of someone's liberty, so long as institutional safeguards, such as constitutional bounds of power or the rule of law, prevent the interfering authority from exercising arbitrary power and compel it to track the interests of the agents it interferes with.[103] Republican freedom thus is not only opposed to an agent being subject to the arbitrary will of a non-interfering master but it also recognises the legitimacy of a non-mastering interferer.[104]

The importance of this difference between non-arbitrary and arbitrary interference plays out in opposing attitudes that mainstream and republican liberals exhibit towards the form of government and legal rules. The republican tradition argues that citizens could only be said to be free, independent, and not subject to some state of enslavement if they do not live under the authority of somebody else. Enjoying republican liberty, thus, presupposes that one lives under a free form of government, which ensures that the citizens can decide upon their own laws.[105] Republican liberals indeed assert that liberty can only be secured under a specific form of government or polity which provided for specific public, institutional safeguards against arbitrary power and interference.[106] Republican liberty is hence closely associated with a specific form of republican polity in which the end of all government is to guarantee civil liberty as non-domination. Unlike negative liberty, republican liberty, therefore, cannot exist under any form of government, but can only thrive under a specific, republican form of government: in short, a republican democracy.[107]

Relatedly, the distinction between arbitrary and non-arbitrary interference also shapes fundamentally different attitudes towards government intervention through law. For mainstream liberals any kind of state intervention and law, which interferes with private choices, reduces liberty. By contrast, if freedom is no longer perceived as non-interference but non-domination, not every form of state interference with private autonomy through legislation also automatically obstructs individual freedom. [108] Laws and regulations adopted in a democratic republic through processes which ensure their non-arbitrary character by tracking citizens' interests and complying with the rule of law and constitutional safeguards do not inevitably reduce the citizens' freedom because they do not subjugate them to arbitrary interference or domination.[109] Republican liberals, hence, assert that 'non-arbitrary' state

[101] Pettit (n 57), 595–597.
[102] Pettit (n 12) 22-23, 65-66.
[103] ibid 23, 26, 35.
[104] ibid 22–23.
[105] See for instance Skinner (n 60) 23–28. While positive and republican liberty overlap in this point, unlike proponents of positive liberty, republican thinkers generally advocated representative rather than direct democracy.
[106] Pettit (n 12) 27.
[107] See however for the tensions between republicanism and (popular) democracy Mc Cormick, John P. 'Republicanism and Democracy' in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2014) 89.
[108] Pettit (n 12) 23–24, 36-40. Pettit (n 59), 147.
[109] Pettit (n 57), 586–587.

interference, unlike private interference,[110] does not necessarily undermine liberty, even if it restricts individuals' sphere of autonomy.[111]

The republican belief that non-arbitrary interference does not inevitably reduce liberty reshapes the calculus of the balancing of rights to decide when state intervention is justified to prevent or remedy an undue restriction of liberty. In the eyes of mainstream liberals, any state interference entails a reduction in liberty for the party with which the state interferes. This is even if state intervention is aimed at preventing the party from unduly interfering with the choices of another individual. Mainstream liberals, therefore, posit that legitimate state interference must be subject to a delicate balancing exercise.[112] The state may only intervene when the entailing loss in freedom of the individual with whose choices it interferes is compensated by an at least commensurate increase in freedom for other individuals, for instance, as the result of reduced danger.[113] State intervention thus requires some form of balancing of freedoms or a cost-benefit analysis which shows that state interference maximises the overall level of liberty in society. Such is the case if the gains in liberty achieved by preventing an agent from unduly interfering with the choices of others compensate for the reduction of liberty caused by the state intervention to prevent this interference.[114] Conversely, this means that the state may only intervene to prevent one private party from interfering with the liberty of another party if the private interference is unreasonable; that is, if the loss in liberty for the other party is so disproportionately high that it outweighs the cost in terms of loss of liberty on the part of the interfering party as a consequence of state intervention.

By contrast, republican liberals assume that, as long as it complies with processes and safeguards ensuring its non-arbitrary character, state interference does not necessarily compromise freedom and hence creates much less or no cost (in terms of reduction of freedom) at all. At the same time, in the eyes of proponents of republican liberty, state intervention in the form of legal rules or laws may also generate higher benefits than those recognised by mainstream liberals. Republican liberals are acutely aware of the fact that legal rules are constitutive[115] of a resilient form of liberty. This is because legal rules do not only prevent isolated occurrences of arbitrary interference at a given point in time. Instead, by making certain forms of arbitrary interference inaccessible, or at least prohibitively costly, to private parties, laws may also reduce the capacity and ability of powerful agents to indulge in interference in the future. They are, hence, capable of decreasing the 'level of domination overall' in a society.[116] The republican tradition thus conceives rules as authoritative propositions that prescribe how the world should work and thereby define classes of permissible worlds.[117] Legal rules, from this point of view, constitute moral desiderata that have a modal character because they propose facts that are true across all permissible worlds.[118] Owing to their modal character, legal rules can thus define rights sets of individuals that are guaranteed across all relevant possible worlds. Legal rules hence form a crucial tool to ensure the modal, context-independent

[110] Pettit (n 59), 146.
[111] Pettit (n 57), 586, 597; Pettit (n 12); Pettit (n 59), 135. E. Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?' (2017) 9(2) European Journal of Legal Studies 103 105–109.
[112] Pettit (n 59), 145.
[113] Pettit (n 12) 35; Pettit (n 57), 596. Pettit (n 59), 145.
[114] Pettit (n 12) 35; Pettit (n 57), 596.
[115] Pettit (n 70) 35.
[116] Pettit (n 59), 146.
[117] List (n 81), 205–206.
[118] ibid 206–207.

and non-probabilistic form of liberty as non-domination.[119] Republican liberty, therefore, has 'a built-in rule of law requirement'[120] which secures its non-probabilistic and robust nature. Both the belief that non-arbitrary state interference may be legitimate and the recognition that legal rules play a primordial role in guaranteeing republican liberty explain why it is much easier for republicans than for mainstream liberals to justify state interference.

5. The role of institutions

A fifth related distinctive feature of republican liberty is the importance it attributes to legal and political institutions in ensuring a resilient protection of individuals against domination. The republican tradition acknowledged that liberty in its robust and modal form as non-domination could not be simply brought about through spontaneous balances of power achieved through individual self-help and self-defence. Since the Roman republic, the proponents of republican freedom instead devised protective institutions to preserve liberty as non-domination by creating and sustaining institutional balances of reciprocal power.[121] The republican tradition, thus, thus grounds in the belief that liberty as non-domination presupposes a specific political and institutional regime that counter-balances power-structures.[122]

Republican liberals, therefore, highlight the importance of what Philip Pettit calls institutions of 'antipower'[123] which actively contribute to the reduction or elimination of domination without however creating new forms of domination.[124] These institutions of antipower aim at strengthening the status or standing of the individual as a self-determinant person by counter-balancing existing patterns of power and domination. Instead of merely shielding individuals from any form of actual or potential coercion, institutions of antipower also enhance individual empowerment by actively equalising power relationships.[125] Institutions of antipower seek to redistribute power and, thereby, to promote the equalisation of and emancipation from patterns of hierarchical dependence and domination within and outside the political sphere.[126]

Let us pause here to pull the key differences (summarised in Table 2) between republican and negative liberty together. First, republican liberty views a greater number of preventing conditions as obstructions to freedom than its negative counterpart. Second, it is not only wary of interference with actual or likely preferred courses of action of an individual but seeks to protect individuals' choice sets across a whole range of relevant possible worlds. Republican liberty hence also recognises a broader range of actions whose restriction can be said to frustrate individual liberty. The broader scope of the republican concept of liberty with respect to variables y and z suggests that republican liberty as non-domination offers a 'thicker' and more resilient concept of liberty than the more recent negative version of liberty as non-interference does.[127] The thickness of republican liberty also manifests itself in its profoundly

[119] ibid 210–211.
[120] ibid 211.
[121] For a discussion of the republican institutions in ancient Rome and their influence on the Italian republics Mc Cormick, John P. 'Machiavellian Democracy: Controlling Elites with Ferocious Populism' (2001) 95(2) American Political Science Review 297.
[122] Pettit (n 57), 601.
[123] ibid 588.
[124] ibid.
[125] ibid 591, 595.
[126] ibid 602.
[127] Pettit (n 12) Chapter I, 26-77.

egalitarian dimension. The thickness of republican liberty, however, also entails that it presupposes more demanding institutional safeguards than its negative counterpart. While negative liberty is compatible even with an authoritarian system of government as long as interference is kept to a minimum, republican liberty can only emerge and flourish in a republican democracy and presupposes the existence of republican laws and institutions of antipower that ensure the contestability of power in the political and non-political sphere.

Table 1- Key differences between republican and negative liberty

	Negative liberty	Republican liberty
Type of actors (z)	No in-built commitment towards egalitarianism	In-built commitment towards egalitarianism
Type of preventing condition (y)	Interference	Domination (arbitrary interference)
Range of restricted actions (z)	Preference decisiveness in the actual world (minimisation of P (H if A)) or nearby likely world (minimisation of P (H if A) + P (H if B))	Preference decisiveness across all (relevant) possible friendly (F) and unfriendly (U) worlds (minimisation of P (H if A & U) + P (H if A & F) + P (H if B & U) + P (H if B & F)
State interference	Reduction of liberty	No reduction of liberty if non-arbitrary
Form of Polity	Any form of government with constitutional safeguards and rule of law	Republican democracy
Institutions	Constitutional rights; rule of law	Constitutional rights; rule of law; political and non-political institutions of antipower

B. Republican liberty as the explanatory variable of the competition-democracy nexus

All five distinctive marks of republican liberty explored in the previous section explain why republican liberty outperforms the 'interest capture' and '(negative) liberty' accounts in unpacking the idea of a competition-democracy nexus.

First, republican liberty and its broad understanding of what counts as preventing conditions (y) and range of actions (z) provide a better conceptual explanation of the 'concentration thesis' – i.e., the proposition that concentration of power as such has adverse societal consequences – often implied by the idea of a competition-democracy nexus. Unlike negative liberty that underpins the conventional 'liberty account', the republican concept of liberty as non-domination allows us to explain why proponents of a competition-democracy nexus perceived the existence of concentrated power in *itself*, and not only its exercise, as 'kingly prerogative' incompatible with 'our form of government'.[128] From the perspective of negative liberty, concentrated economic power can only represent a source of unfreedom when it gives rise to actual or likely interference. By contrast, the republican tradition is not only alert to the actual or likely interference resulting from the *exercise* of power. It rather already perceives the potential of arbitrary interference deriving from the mere *existence* of power as a source of unfreedom. From this vantage point, it is the mere existence of concentrated power and the concomitant subjugation of market participants to powerful firms capable to arbitrarily interfere with them whenever they see fit, which constitutes a source of unfreedom. Whereas negative liberty is indifferent towards asymmetries of economic power, the context-independent and egalitarian dimension of republican liberty elucidates why the concentration of economic power is often perceived as being at odds with a society of free and equals. From a republican perspective, living in the presence of private concentrated economic power is like living under the domination of a benevolent, non-interfering master.

Second, the fact that republican liberty is closely associated with and constituted by republican democracy also helps us understand the 'democracy thesis', that is the proposition that concentrated economic power poses a distinctive threat to democracy as opposed to other forms of government. The crucial difference between negative and republican liberty is that the latter is inextricably linked with a specific form of republican, democratic government, whereas the former can – at least theoretically – thrive under any form of government. It is this crucial link between the perception of concentrated power as obstruction of republican liberty and the close kinship between republican liberty and republican democracy, which underpin and allow us to make sense of the idea of a competition-democracy nexus. Obstruction of republican liberty as non-domination hence becomes tantamount to an obstruction of a republican form of democratic government that derives its legitimacy from promoting or maximising republican liberty as non-domination by guaranteeing electoral and non-electoral institutions that enable the contestability both of public and private power. [129]

Third, republican liberty also outperforms the 'liberty account' and 'interest capture' account in making the 'competition law thesis' intelligible. The fact that republican liberty is compatible with non-arbitrary interference and the in-built rule of law requirement of republican liberty can indeed resolve the apparent paradox that besets the conventional 'liberty account'. It elucidates why the proponents of a competition-democracy nexus unlike mainstream liberals do not automatically perceive competition law intervention as state coercion that is antonymous to economic liberty. As long as republican institutions and processes secure their non-arbitrary nature, the competition rules and their enforcement are not automatically considered as an obstruction but rather as constitutive of a republican form of

[128] Senator Sherman 20 Cong Rec 2455 (1890) (n 18) 2458.

[129] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) ix, 180-205; P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 22, 179-184, 302.

economic liberty. For republican liberals, there is hence no immediate tension between calls for greater competition law enforcement against concentrated economic power and economic liberty.

The important role of institutions and legal rules in safeguarding republican liberty also illuminate why proponents of the competition-democracy nexus assert that it is for competition law to promote democracy, even though there is, at first sight, no straightforward link between competition in the economic and democracy in the political sphere. Republican liberals posit that liberty can only be preserved through institutions of antipower that operate as an antidote to domination. The operation of these institutions of antipower is not confined to the political sphere. Instead, their role is to guarantee the status of citizens as free and equals not only in the vertical relation between private individuals and the state, but also in the horizontal relationship between the private individuals to one another.[130] This notion of institutions of antipower thus also offers a more convincing account of the 'competition law thesis' than the 'interest capture account' that claims that competition law ought to protect democracy from lobbying or interest capture. Under the republican account, the primary channel through which concentrated economic power harms democracy is by creating instances of economic domination and frustrating the republican liberty as non-domination of market participants. The concept of republican liberty thus explains why proponents of the idea of a competition-democracy nexus affirm that the answer to the danger that concentrated economic power poses to democracy lies primarily in competition laws, and not in, say, stricter rules on lobbying or campaign financing.

In sum, this discussion shows that the connecting piece between competition and democracy lies in the concept of republican liberty and hinges on the institutional proposition that republican liberty can only be protected through institutions of antipower. From this perspective, competition (and competition law protecting it) enhances republican liberty and indirectly republican democracy, by operating as an institution of antipower. [131] Competition as rivalrous, polycentric[132] market structure and its preservation through legal rules as modal normative desiderata can thus be understood as an institution that guarantees a robust form of economic liberty as non-domination, which in turn is a prerequisite for a republican society and democracy. Polycentric competition prevents the concentration and abuse of economic power by dispersing it amongst many players who, through their rivalrous interaction, keep one another in check and constantly contest existing instances of power. By ensuring the capacity of competitive markets to operate as institutions of antipower that secure the continuous dispersal and contestation of economic power, competition law maximises republican liberty and guarantees a society of domination-free, heterarchical interaction: in short a republican society of free and equals.

After having explored and pinned down republican liberty as the conceptual fabric and foundation of the idea of a competition-democracy nexus, we canvass in the next sections how this notion has historically influenced the emergence of competition law in Europe and had considerable bearing on the making of EU competition law.

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[130] Pettit (n 12) 136, 181.
[131] Pettit (n 57), 577, 588.
[132] M. Polanyi, *The Logic of Liberty* (Routledge 1951) Chapters 2 - 6. Hayek, Friedrich A. von (n 32) 230; V. Ostrom, 'Polycentricity: The Structural Basis of Self-Governing Systems' in F. Sabetti and P. Dragos Aligica (eds), *Choice, Rules and Collective Action: The Ostroms on the Study of Institutions and Governance* (ECPR Press 2014).

IV. Republican liberty and the Ordoliberal origins of European competition law

On the morning of February 20, 1933 less than a month ahead of the last democratic elections of the Weimar Republic about twenty of the most important German business leaders were invited to a meeting in the residence of the then President of the German Reichstag, Hermann Göring. During the meeting, the industrialists pledged to inject new funds into the Nazi party's depleted campaign budget.[133] In return, Adolf Hitler promised to put an end to the instability that beset the parliamentary democracy of the Weimar republic, protect private property, and crush the left-wing parties and trade unions.[134] This meeting was the hour of birth of a Faustian bargain that should closely tie German conglomerates and cartels with the Nazi regime throughout the Third Reich. In the transition towards a centrally-planned war economy that followed, large industrial conglomerates played an essential role in propping up the destructive forces of the German military apparatus that was soon unleashed to wreak havoc over the European continent. Under the totalitarian reign of the Nazi regime, the German *Konzerne* took an active part in and greatly benefitted from the industrial exploitation and extermination of millions of slave labourers, Jews and other minorities.[135]

In the same year of the fateful 1933 reunion between the stewards of the German conglomerates and the grandees of the Nazi party, the economist Walter Eucken and the lawyers Franz Böhm and Hans Großmann-Doerth started to convene regularly at the University of Freiburg, a mid-sized city located in the South-West of Germany. The central theme of their discussion was the growing concern over the economic, social and political challenges posed by the surge in industry concentration and cartelisation that held a tight grip on the German economy since the late 19th century.[136] These interdisciplinary gatherings gave birth to the influential intellectual paradigm of the so-called 'Ordoliberal' or 'Freiburg School'. The Freiburg School should soon play a pioneering role in coining and promoting the idea of a link between competition and democracy in Europe.

A. Republican liberty at the heart of the Ordoliberal idea of a competition-democracy nexus

The starting point of these reflections of the Ordoliberal School on the problem of economic concentration was that there is a fundamental interdependence between the economic, social and political order. [137] Ordoliberals assumed that the specific form of the economic order has a direct impact on the shape of the social and political system. On this premise, the Ordoliberals postulated that the concentration of economic power in the hands of the state and

[133] A. Tooze, *The Wages of Destruction: The Making & Breaking of the Nazi Economy* (Penguin 2007) 99–100.
[134] ibid.
[135] See for a detailed analysis Tooze (n 131) Chapter 4; A. Tooze, 'The German National Economy in an Era of Crisis and War, 1917-1945' in H. W. Smith (ed), *The Oxford Handbook of Modern German History* (Oxford University Press 2011) 411, 417; J. Diarmuid, *Hell's Cartel* (Bloomsbury 2008) 233–284.
[136] F. Böhm, W. Eucken and H. Großmann-Doerth, 'Unsere Aufgabe (The Ordoliberal Manifesto) - 1936' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008); M. Spoerer and J. Steg, *Neue Deutsche Wirtschaftsgeschiche* (2013) 56–61.
[137] W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 16, 304-308; F. Maier-Rigaud, 'On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012) 137.

private corporations alike poses a serious threat to a democratic polity and society. The Ordoliberals therefore viewed competitive markets as the only form of economic order which is compatible with democracy.[138] Based on this core assumption, the Ordoliberal school of thought, which was soon also joined by the economists Leonhard Miksch, Alexander Rüstow, Wilhelm Röpke, and later the lawyer Ernst-Joachim Mestmäcker, developed a highly integrated intellectual programme that should influentially shape the design of the German and European economic governance and competition law during the second half of the 20th century.[139]

At the heart of the Ordoliberal opposition against the concentration of economic power lay the concern about economic liberty. The goal of economic liberty was indeed at the centre of the Ordoliberal thinking[140] and understanding of competition law.[141] Ordoliberals conceived competition in the first place as an 'order of freedom' (*Freiheitsordnung*).[142] The existing competition law literature has recognised this pivotal role of economic liberty for the Ordoliberal understanding of competition. Yet, most of the existing scholarly literature portrays the Ordoliberal understanding of economic liberty in the negative sense as the absence of interference.[143] The mainstream account thereby ignores that the Ordoliberals opposition to the concentration of economic power in the hand of monopolies and cartelists went far beyond the fear of undue interference, but was in fact rooted in a republican notion of liberty as non-domination. A closer look at the Ordoliberal idea of a competition-democracy nexus indeed reveals the very variables and features (identified in the previous section) that make up the distinctive geometry of republican liberty.

1. Economic concentration as an obstacle to a 'domination-free' private law society

The first way in which this republican understanding of economic liberty manifests itself in Ordoliberal thought is how members of the Freiburg School perceived economic concentration. Instances of concentrated private power constituted for Ordoliberals an anathema to their ideal of a free society governed by private law (*Privatrechtsgesellschaft*)[144] which embodied the Ordoliberal idea of a 'domination-free social order' (*herrschaftsfreie*

[138] Prefrace by Ernst Joachim Mestmäcker in F. Böhm (ed), *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden [1933]* (Nomos 2010) 5; F. Böhm, 'Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013).

[139] D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press; Oxford University Press 1998) 232–391.

[140] For a detailed discussion of the Ordoliberal understanding of economic freedom see also Maier-Rigaud (n 135); H. Schweitzer, 'Efficiency, Political freedom and the Freedom to Compete: Comment on Maier-Rigaud' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012).

[141] See for instance Mestmäcker identifying the 'freedom to compete' (Wettbewerbsfreiheit) as normative goal of competition law in his preface to Böhm (ed) (n 136) 12. ibid 273, 326-327.

[142] F. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (Nomos 1980) 18, 232.

[143] See for instance, W. Möschel, 'Competition Policy from an Ordo Point of View' in A. T. Peacock, H. Willgerodt and D. Johnson (eds), *German neo-liberals and the social market economy* (Macmillan for the Trade Policy Research Centre 1989) 142; G. Monti, 'Article 81 EC and Public Policy' (2002) 39(5) Common Market Law Review 1057 1059–1061; J. S. Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) Fordham International Law Journal 1157 1163–1164.

[144] For an account of the concept of "private law society" in English see F. Böhm, 'Rule of Law in a Market Economy [1966]' in A. T. Peacock and H. Willgerodt (eds), *Germany's social market economy: Origins and evolution* (Macmillan for the Trade Policy Research Centre, London 1989); S. Grundmann, 'The Concept of the Private Law Society: After 50 Years of European and European Business Law' (2008) 16(4) European Review of Private Law 553.

Sozialordnung).[145] The Ordoliberal argument that concentrated economic power is detrimental to a free society not only originated from the fear that mighty firms may exercise their power in a way that unduly interferes with the choices of other market participants. The Ordoliberal critique of concentrated economic power was more fundamental: Ordoliberals argued that the mere existence of concentrated economic power and not only its exercise constitutes an obstruction of liberty because it subjects market participants into relationships of dependency and subordination to the arbitrary will of more powerful economic players.[146] In keeping with the republican understanding of liberty, Ordoliberals thus did not only perceive interference but subordination and dependence on someone's arbitrary will as a preventing condition (y) of liberty.

Ordoliberals also adhered to the egalitarian understanding of liberty that typifies the republican heritage. Consonant with republican tradition, the Ordoliberals perceived liberty always as 'equal liberty' and equality of opportunity that ought to be secured for every market participant regardless of its degree of efficiency.[147] The Freiburg School thus also endorsed a broad notion of who actually counts as an agent (z) that should be vested with economic liberty. This egalitarian impetus of the Ordoliberal understanding of economic liberty also reverberates in their fierce criticism of imbalances of economic power and socio-economic hierarchies. Ordoliberals, indeed, warned that the excessive concentration of market power would entail a 're-feudalisation' (*Refeudalisierung*) of economic and social relationships,[148] that renders the liberty of other market participants precarious. In the shadow of concentrated economic power, the extent to which market participants can enjoy economic liberty on equal terms becomes wholly contingent upon the goodwill of powerful firms. Weaker market participants thus become increasingly dependent 'vassals' (*Hintersassen*) of the mastery corporations.[149] The very existence of concentrated economic power was therefore in the eyes of Ordoliberal thinkers deeply antithetical to their ideal of a private law society of free and equals.[150]

The Ordoliberal critique of concentrated economic power also shares the non-probabilistically weighted understanding of what counts as actions that agents might be reasonably be said to be free, or not free, to perform (z). Ordoliberals were not merely concerned about likely interference by powerful players that may frustrate economic liberty in the actual world, but they also considered possible-but-improbable arbitrary interference with individual actions in a range of possible worlds as obstructions of liberty. In consonance with the republican tradition, the Ordoliberals argued that by vesting powerful firms with the continuous capacity to arbitrarily interfere with other market participants, the concentration of economic power generates forms of psychological domination ('*psychologisch begründete Verfügungsgewalt'*).[151] As powerful firms can use their economic power to discipline other competitors whenever they see fit, the concentration of economic power thus creates a situation of continuous (legal) uncertainty pushing market participants towards a submissive

[145] Mestmäcker's introduction to Böhm (ed) (n 136) 8–9. Böhm (ed) (n 136) 206, 300, 303, 305; W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 52.
[146] Böhm (ed) (n 136) 237, 275-276. Eucken (n 135) 51-52, 174, 176–177, 246, 279, 293, 334. Eucken (n 135) 137; L. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (Verlag Helmut Küpper 1947) 15, 17, 27, 54, 103, 117, 119; Böhm (n 140) 36, 225.
[147] Böhm (n 142) 53–54; Böhm (n 140) 12; W. Röpke, *Jenseits von Angebot und Nachfrage: [ein Klassiker der sozialen Marktwirtschaft]* (Verl.-Anst. Handwerk 2009 [1958]) 17–19.
[148] Böhm (n 136) 273–279. Böhm (n 140) 221, 258–259; Eucken (n 135) 22,40.
[149] Böhm (n 140) 221.
[150] ibid 225.
[151] Böhm (ed) (n 136) 275.

behaviour.[152] Even if powerful firms are unlikely to interfere with weaker market participants, the latter are unfree as they feel compelled to act in a way that placates the mighty players.

2. Competition as an institution of antipower

The republican rooting of the Ordoliberal understanding of economic liberty also becomes apparent in the reasons for which they valued competition. For Ordoliberals, competitive markets were not only a welfare maximisation tool. Rather, they regarded competitive markets as a prerequisite and safeguard of a 'domination-free economic' order ('*herrschaftsfreie Wirtschaftsordnung*')[153] which is characterised by the mutual and decentralised self-adaptation of the autonomous plans of independent market participants. Competition thus constituted for Ordoliberals the organising principle of an impersonal, 'domination-free' process of economic coordination that operates without any subordination to hierarchical decision-making.[154]

Ordoliberals valued competition first and foremost as an institution of antipower that disperses economic power equally among a multitude of players and, thereby, contributes to a society of free and equals. In their eyes, competition constitutes the 'most remarkable and ingenious instrument for reducing power known in history'.[155] By tearing down hierarchies, competition enhances a resilient and egalitarian dimension of liberty that fosters the equal freedom of all market participants to pursue their economic activities without being dependent upon the orders or subject to the domination of other players.[156] Competition safeguards equality of status amongst economic agents by reducing the possibilities of economic domination and eliminating monopolistic privileges.[157] Competitive markets thus play a pivotal role in the realisation of the Ordoliberal ideal of a private law society in which legal rules, not humans, govern.[158]

3. The interdependence between economic, social, and political order

The republican pedigree of the Ordoliberal notion of economic liberty also explains the Ordoliberal idea of the interdependence between the economic, social, and political order that underpins their claim that competition promotes democracy.[159] The Ordoliberals pointed out that the re-feudalisation of the economy as a consequence of the excessive concentration of economic power will have negative spill-over effects across the economic, social and political sphere and eventually undermine democracy.[160] The members of the Freiburg School warned that the degeneration of a private law society into a neo-feudal order would give rise to 'group anarchy' (*Gruppenanarchie*) where different factions will try to use every means to impose their arbitrary private monopoly or group interests upon all other market participants.[161] Powerful private players will increasingly take on powers which are normally the prerogative

[152] ibid 275–276.
[153] ibid 303.
[154] ibid 301. ibid 64, 301, 305, 314. Böhm (n 140) 36–37; Eucken (n 135) 22, 246.
[155] Böhm (n 136) 279. See also Eucken (n 135) 50, 237.
[156] Böhm (n 140) 106–109.
[157] Eucken (n 135) 336.
[158] Böhm (n 140) 226.
[159] Eucken (n 135) 16, 304-308; Maier-Rigaud (n 135) 137.
[160] Eucken (n 135) 146, 329; Böhm (n 136) 273–279.
[161] Böhm (ed) (n 136) 234 237,, 239-240.Eucken (n 135) 79, 144-148, 171-172, 244.

of the democratically elected legislator or government,[162] yet without being subject to constitutional boundaries.[163]

To Ordoliberals, the concentration of private power thus raises the spectre of private government both in the economic and socio-political sphere. On the one hand, it undermines liberty as non-domination in the economic sphere, as it allows powerful businesses to indulge in arbitrary interference and private rule-making. On the other hand, political institutions will eventually be taken hostage by the powerful private players and lose their capacity of curbing private power and regulate the economy and society in a non-arbitrary way.[164] The failure of the state to reign in the cartelisation and monopolisation will thus not only destroy the societal trust in the legitimacy of economic processes[165] but eventually also erode the legitimacy of the democratic institutions themselves.

Competition, by preventing the excessive concentration of economic power and thereby, guaranteeing liberty as non-domination in the economic and social sphere, thus constitutes in the eyes of the Ordoliberals an economic and social prerequisite of a republican or democratic society of free and equals.[166] Ordoliberals indeed contended that economic liberty constitutes a precondition and corollary of other fundamental and political rights and freedoms within a democratic society and polity.[167] In their view, individual citizens could only fully enjoy their equal status and basic political rights as long as they are not subject to domination by other citizens or the state in the economic sphere.[168] Ordoliberals even went as far as likening consumer choice in a competitive market economy to citizens' right to vote in a democracy.[169] Apprehending competition itself as some form of universal suffrage or plebiscite,[170] Ordoliberals argued that competition could be described as 'from a technical point of view the most ideal existing manifestation of democracy'.[171] Competitive markets, however, only benefit from this quasi-democratic legitimacy and contribute to a democratic society and polity as long as the liberty of consumers and competitors is not tainted by domination by private and public power.[172]

4. Law as a constitutive source of liberty

The fact that Ordoliberals adhered to a republican rather than a negative understanding of economic liberty also becomes apparent in their understanding of legal rules as a safeguard

[162] ibid 328.
[163] Eucken (n 135) 328; Böhm (ed) (n 136) 334.
[164] Eucken (n 135) 53, 175, 177, 292.
[165] Eucken (n 135) 172; Miksch (n 144) 13.
[166] Böhm (n 140) 220.
[167] E.-J. Mestmäcker, 'Wirtschaftsordnung und Staatsverfassung' in F. Böhm, E.-J. Mestmäcker and H. Sauermann (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift f. Franz Böhm z. 80. Geburtstag* (Mohr Siebeck 1975) 385; F. Böhm, 'Freiheit und Ordnung in der Marktwirtschaft [1971]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 256–257; Böhm (ed) (n 136) 298, 327; F. Böhm, 'Die Bedeutung der Wirtschaftsordnung für die politische Verfassung: Kritische Betrachtungen zu dem Aufsatz von Ministerialrat Dr. Adolf ARNDT über das »Problem der Wirtschaftsdemokratie in den Verfassungsentwürfen«' (1946) 1(6) Süddeutsche Juristen-Zeitung 141 141; Miksch (n 144) 215–216; Eucken (n 135) 48, 53, 126, 130, 176.
[168] Böhm (n 165), 141.
[169] See Mestmäcker's introduction to Böhm (ed) (n 136) 8. ibid 209, 262, 270, 306–307. Eucken (n 135) 30. Miksch (n 144) 12, 215. Böhm (n 136) 268.
[170] Miksch (n 144) 215. ibid.
[171] Böhm (n 140) 89.
[172] Eucken (n 135) 177.

of liberty. The Ordoliberal paradigm in fact emerged in response to the failure of *laissez-faire* liberalism of the late 19th and early 20th century to reign in the soaring levels of industry concentration and cartelisation that engulfed the German economy.[173] The Ordoliberals criticised laissez-faire liberals for cultivating a negative understanding of liberty that condoned anticompetitive contracts or cartels as a legitimate exercise of the parties' contractual or commercial freedom that should be insulated from state interference. [174] Instead of perceiving like their laissez-faire opponents any form of legal rules and state interference as undue coercion, the Ordoliberals endorsed the republican view that legal rules play a constitutive role for liberty. The major insight of Ordoliberals was that competitive markets and economic liberty could not be sustained by the unrestricted interaction of private actors or market forces themselves, but must be ensured by the state through non-arbitrary rules and economic policy.[175] Accordingly, competition can only operate as a self-governing polycentric order and institution of antipower within the framework of certain state-created legal rules and conditions that address the problem of private economic power.[176] Unlike laissez-faire liberals, the Ordoliberals thus not only perceived public but also private economic power as a threat to economic liberty that has to be kept in check through legal rules.

The Ordoliberals were thus amongst the first[177] in Europe to politicise or 'constitutionalise' the issue of private economic power. This becomes apparent in the Ordoliberal idea of the 'economic constitution' (*Wirtschaftsverfassung*) which assumes the specific form of an economic order (Wirtschaftordnung) to be the result of a fundamental economic policy decision (*ordnungspolitische Gesamtentscheidung*) on the specific design and form that an economic system should take. In treating this fundamental choice as 'constitutional', the Ordoliberals stressed that the design of market rules should not be left to the arbitrary discretion and interests of private economic players but should fall within the exclusive remit of the democratic legislator taking into account the general interest.[178]

In politicising and constitutionalising the issue of private economic power, the Ordoliberals put competition rules at the heart of their concept of economic constitution. Competition law, in their view, should preserve competition as institutions of antipower by ensuring 'open markets'[179] and securing equal opportunity for all market participants to pursue

[173] Böhm (ed) (n 136) 41 – 44, in particular fn 11, 297; Eucken (n 135) 172.
[174] Böhm (ed) (n 136) 267, 268; F. Böhm, E.-J. Mestmäcker and H. Sauermann (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift f. Franz Böhm z. 80. Geburtstag* (Mohr Siebeck 1975) 214, 233, 268.
[175] Eucken (n 135) 53; L. Miksch, 'Versuch eines liberalen Programms [1949]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 164–167; Miksch (n 144) 28.
[176] M. Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978-1979* (Gallimard; Seuil 2004) 135. The Ordoliberals underline that A. Smith's work reflects an awareness of the importance of the State and the legal order for the functioning of the market. Yet, they are more reserved than Smith about the harmonious tendency of the market. See for instance Miksch (n 144) 11. Mestmäcker also stresses the similarity between the Ordoliberals' emphasis on the role of legal rules in ensuring a self-governing economic order and Hayek's distinction between ‚Rechtsordnung' and ‚Handelsordnung'. E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Nomos 2003) 35–36.
[177] The term 'economic constitution' is not an Ordoliberal invention, but has been first coined by Hugo Sinzheimer G. Teubner, 'Transnationale Wirtschaftsverfassung: Franz Böhm und Hugo Sinzheimer jenseits des Nationalstaates' (2014) 74 Zeitschrift für ausländisches öffentliches Recht un Völkerrecht 733. See also H.-W. Micklitz, 'The Transformative Politics of European Private Law' in P. F. Kjaer (ed), *The Law of Political Economy* (Cambridge University Press 2020).
[178] Eucken (n 143) 55, 245. Mestmäcker (n 165). ibid 383.
[179] Eucken (n 135) 42, 264-269; Miksch (n 144) 38.

an economic activity.[180] To Ordoliberals, the central mandate of competition law consists of promoting and protecting performance-based competition (*Leistungswettbewerb*) – a term which can be best translated into English as 'competition on the merits'.[181] This concept understands competition as a domination-free process in which all market participants enter into a rivalrous rule-based[182] contest for consumer demand.[183]Accordingly, market participants may only try to obtain customer goodwill by means of their own performance, without trying to win the race by using their power to hinder other rivals' ability to compete.[184] At the same time, competition law should prevent firms from engaging in 'hindrance competition' (*Behinderungswettbewerb*), that is attempts to win the competitive race by deteriorating or preventing rivals' ability to compete.[185]

B. Different Ordoliberal approaches to the operationalisation of republican liberty through competition law

Though all Ordoliberals agreed that the mere existence of concentrated economic power imperils economic liberty as the economic basis of a republican society of free and equals because it enables firms to engage in dominating 'hindrance competition', they advanced divergent views on how competition law should be designed to preserve competition as an institution of antipower. Contemporary accounts which treat Ordoliberals as a monolithic School of thought, tend to ignore that the Freiburg School was a broad church, comprising various views on how competition law should tackle the issue of private economic power and preserve a republican form of economic liberty.[186]

Some Ordoliberals, namely Eucken and Miksch, proposed to design competition law around 'situational' or 'market circumstances' tests. [187] Both opined that competition policy should actively promote what they called a state of 'complete competition' under which markets are fragmented, sellers and buyers are of insignificant size and, hence, do not possess market power.[188] While assuming that for relatively atomistic markets the prohibition of anticompetitive collusion through 'general competition law' (*Allgemeines Wettbewerbsrecht*) would suffice to secure complete competition,[189] Eucken and Miksch suggested that firms in oligopolistic or monopolistic markets should be subject to more intrusive regulation. The purpose of this regulation would be to make sure that oligopolistic and monopolistic firms conduct their business 'as-if' they were subject to the constraints of complete competition ('as-if competition' standard).[190] Should the 'as-if competition' standard prove ineffective in restoring complete competition and eroding positions of economic power in the medium term,

[180] Böhm (ed) (n 136) 272. Böhm (n 165) 306; D. J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42(25) American Journal of Comparative Law 25 38.
[181] Böhm (ed) (n 136) 206. Eucken (n 143) 42, 247–249. Miksch (n 144) 15, 54.P. Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (Discussion Paper N°7/15, 2015) 8, 11-12.
[182] Böhm (ed) (n 136) 206–207.
[183] ibid 207–209, 240, 257. Eucken (n 143) 244–249.
[184] Böhm (ed) (n 136) 208; Eucken (n 143) 42, 237, 249.
[185] Böhm (ed) (n 136) 208-209, 219. ibid 38, 240-249, 257-265, 275-276. Eucken (n 143) 43, 247-249, 267, 296, 329.
[186] M. Marquis, 'Introduction, Summary, Remarks' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008).
[187] I use here the distinction between situational and conduct test in C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) 59.
[188] Miksch (n 144) 33, 38, 66-67, 80; Eucken (n 143) 248–249.
[189] Miksch (n 144) 16, 55-56.
[190] Miksch (n 144) 16, 62-63, 123-129, 137, 144; Eucken (n 135) 293, 295-296.

Miksch and Eucken, suggested that large monopolistic or oligopolistic corporations should be broken up, even in the absence of anticompetitive conduct.[191] For markets characterised by the presence of natural monopolies in which the break-up of firms would prove unpractical, Miksch even went as far as advocating state ownership and direction (*Lenkung*) as a remedy of last resort.[192] The 'complete competition' strand of the Freiburg School embodied by Eucken and Miksch thus relied on a situational approach which assumes that regulatory state intervention could be triggered by the mere existence of concentrated markets. This situational approach addresses the problem of economic power by directly regulating and breaking up instances of concentrated economic power, even absent concrete anticompetitive behaviour.

Other Ordoliberals, such as Böhm and Mestmäcker, envisaged another conduct-based[193] approach to address the problem of economic power. Like fellow Ordoliberals, they were equally concerned about the very existence and not only the abuse of concentrated economic power. Böhm and Mestmäcker, however, resisted the idea that competition law should achieve the ideal state of complete competition by relying on a situational approach that would as *ultima ratio* break up or even nationalise monopolistic firms. Such intrusive and heavy-handed competition policy, they feared, would concentrate too much power in the hands of the state and would create the risk of excessive and arbitrary state intervention. Instead of tackling the problem of concentrated economic power through continuous regulation that seeks to ensure the alignment of markets with an abstract, idealised model of 'complete competition', Böhm and Miksch asserted that competition law should pursue a more realistic, 'effective competition' approach. Accordingly, competition law should ensure that existing instances of concentrated market power remain contestable and are, in the medium-term, eroded by residual competition.[194] Rather than relying on a situational approach that would compel state intervention on the mere basis of the presence of concentrated economic power, Böhm and Mestmäcker translated the concern about the dominating effects of concentrated economic power into a form-based conduct standard. This conduct standard seeks to reduce domination by restricting the range of means through which firms could collectively or unilaterally exert domination.[195] This approach prohibits *ex ante* certain forms or categories of coordinated or unilateral business behaviour as 'hindrance-based competition' based on the presumption that they jeopardise the functioning of competition as a non-dominating process and institution of antipower.

Böhm and Mestmäcker identified two categories of conduct that amount to hindrance competition. The first category of hindrance competition comprises specific forms of conduct, which are presumed by their very nature to be in breach with the principle of performance-based competition on the merits and, thus, *prima facie* unlawful. This *per se* category covers business conduct that experience has shown to harm competition.[196] Those practices do not only have as their clear effect the restriction of competition, but they also exhibit an overt anticompetitive objective.[197] Along with the prohibition of horizontal cartels,[198] the *per se*

[191] Miksch (n 144) 119; Eucken (n 143) 290–294.
[192] Miksch (n 144) 17, 34, 98-103. Eucken, however, objected to Miksch's view that state ownership or direction may constitute an appropriate tool to restore complete competition. Eucken (n 135) 293. 298.
[193] Kaysen and Turner (n 185) 59.
[194] Böhm (n 1) 279.
[195] Böhm (ed) (n 136) 254.
[196] ibid 268.
[197] ibid.
[198] Böhm (n 140) 234–235, 261, 268.

category also covers specific types of unilateral conduct of dominant firms, such as exclusivity contracts, fidelity rebates, refusals to deal,[199] margin squeeze,[200] and (secondary-line) price discrimination that distorts competition on down- or upstream markets.[201] The second category of hindrance competition encompasses practices whose anti-competitive effect can only be identified on the basis of a more searching economic analysis. This category, for instance, includes predatory pricing.[202] Böhm and Mestmäcker thus complemented the *per se* category with a second analytical category, which accounts for the difficulties to draw a clear line between performance- and hindrance-based competition.[203]

While sharing the same concern over the dominating effect of concentrated economic power, the Ordoliberal School explored different strategies through which competition law can address the problem of concentrated economic power to preserve economic liberty as non-domination and ultimately to contribute to a republican society and polity of free and equals: either competition law reduces the level of domination directly by promoting a deconcentrated market structure through the imposition of regulation and beak up of instances of concentrated economic power; or competition law indirectly reduces domination flowing from private economic power by making certain dominating conduct unavailable and keeping markets open so that residual competition can constrain and erode concentrated economic power. Both the assumption that competition law by tackling the problem of concentrated economic power and protecting economic liberty promotes democracy and the different design choices explored by the Ordoliberal law should have a lasting imprint on EU competition law.

V. The Competition-Democracy Nexus and EU competition law

Revisiting the intellectual history of Ordoliberalism, the previous section shows that the idea of a competition-democracy nexus is deeply enrooted in the European law and economics tradition. The study of Ordoliberalism also lends further support to the central claim of this article that the ideal of republican liberty as non-domination constitutes the main explanatory variable that helps us make sense of the idea that competition, and its preservation through competition law, are essential prerequisites of (republican) democracy. The major achievement of the members of the Freiburg School was to explore various ways in which legal rules, most notably in the form competition law, can be used to operationalise the ideal of a competition-democracy nexus by maximising republican liberty of market participants. They thus lay the foundations of what can be called a European brand of 'republican antitrust'. In this section, we explore how iterations of this 'republican antitrust tradition' and the related idea of a competition-democracy nexus percolated EU competition law.

The argument advanced here is *not* that it is only or primarily because of the influence of the Ordoliberal School that the idea of a competition-democracy-nexus and related concern about republican liberty left a deep imprint on the formative era of EU competition law. The degree of influence Ordoliberalism had on EU competition law is indeed contested, as some

[199] ibid 64–65, 259, 265, 268, 293.
[200] Böhm (ed) (n 136) 259.
[201] ibid 259, 265.
[202] ibid 221, 267, 275, 284.
[203] ibid 289.

authors have challenged the widely held view[204] that Ordoliberalism had an important bearing on the development of EU competition law.[205] Instead of trying to establish a historical causality between Ordoliberalism and the shape EU competition law took during its formative era, the enterprise of this section is of conceptual nature. It seeks to demonstrate that EU competition law until the early 2000s displayed important features that suggest that it was grounded in a commitment to republican liberty and the idea of a competition-democracy nexus first envisaged by Ordoliberals in Europe. If we scratch under the surface of the history and jurisprudence of EU competition law, the very same geometry of republican liberty that shaped the Ordoliberal origins of the idea of a competition-democracy nexus in Europe starts to shine through. In excavating traces of the republican heritage in EU competition law, the section also brings to the light certain indices that cast doubt on the claim that the impact of Ordoliberalism on EU competition law was nominal – a claim whose historical validity has already been fundamentally challenged elsewhere.[206]

A. The concern about concentrated economic power at the origin of the European project

A first indication of the anchorage of EU competition law in the republican antitrust tradition can be traced to the very early hours of the European project. The European integration process itself can, arguably at least in part, be considered as the offspring of the republican fear about concentrated economic power. The act of creation of the European Coal and Steel Community in the aftermath of the Second World War constitutes an immediate response to the catastrophic impact of the Faustian pact between German conglomerates and the Nazi regime. The Schuman Declaration[207] and Treaty of Paris establishing the European Coal and Steel Community (ECSC),[208] which lay the foundations of the European project, embodied a radical proposition. Out of fear that the German coal and steel producers yet again cartelise, concentrate their private corporate power and become the driving forces of a new arms race between France and Germany, the pioneers of the European integration project made the revolutionary move to create a common competitive market for two of the at that time strategically most important industrial sectors of the war-torn continent. A key feature of the newly created ESCS was the unprecedented idea to tame private corporate power controlling some of the most important industrial sectors in Europe through supernational competition rules and the control of a supranational competition authority. In introducing competition rules regulating anticompetitive agreements (Art. 65), mergers and concentrations (Art. 66) as well as unfair business conduct (Arts. 60, 63) and abuses of dominant position (Art. 66 (7)), the

[204] Gerber (n 178); Gerber (n 137); H. Schweitzer, 'Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' . EUI Law Working Paper 32/2007 <http://cadmus.eui.eu/handle/1814/7626> accessed 30 September 2018; E.-J. Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' in L. F. Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011).

[205] P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, 2007).A. Wigger, 'Debunking the Myth of the Ordoliberal Influence on Post-war European Integration' in C. Joerges and J. Hien (eds), *Ordoliberalism: Law and the rule of economics* (Hart Publishing 2018) 171–176.

[206] K. K. Patel and H. Schweitzer, 'Introduction' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* ; Schweitzer (n 202).

[207] R. Schuman, 'The Schuman Declaration – 9 May 1950' <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en> accessed 25 June 2021.

[208] Treaty Establishing the European Coal and Steel Community.

ECSC Treaty 'constitutionalised' the problem of concentrated economic power by subordinating private corporations to supranational legal rules.

The competition rules in the ECSC treaty thereby superseded prior instruments[209] that the Allies had introduced after the Second World War to control agreements, trade practices and ownership structures in the Ruhr with a view to preventing the 'excessive concentration of economic power'.[210] Making sure that the competition rules in the ECSC treaty and the High Authority of the ECSC would guarantee that the deconcentration and decentralisation efforts of the German *Konzerne* are not reversed through new anticompetitive practices and mergers was a major concern during its negotiation and ratification process. Historical sources[211] clearly show that the goal of preventing an excessive concentration of private economic and political power in the hand of large corporations was a central reason for the inclusion of competition provisions in the ECSC treaty. At the same time, by making national corporations subject to the control of an independent supranational authority, the ECSC also severed the unwholly alliance between national private and public power that had turned out to be disastrous in the first half of the 20th century. Not only was the creation of a common and competitive market for coal and steel aimed at enhancing welfare, growth and economic stability, but it primarily served the goal of stimulating competitive interdependence between French and German industries and economies with a view to eliminating the possibility of a new war.[212] The creation of the ECSC thus followed the republican belief that competitive interaction tends to eliminate domination as it ensures a rivalrous process amongst many players who keep each other in check and, thereby, channel their resources towards mutually beneficial rather than dominating or even openly hostile behaviour. Even though there are no historical sources suggesting a direct

[209] Gesetz 75 der amerikanischen und britischen Militärregierungen zur Umgestaltung des Deutschen Kohlenbergbaues und der Deutschen Eisen- und Stahlindustrie sowie Durchführungsbestimmungen. Bundesarchiv, BArch B 109/619. Gesetz N°27 hinsichtlich der Umgestaltung des deutschen Kohlenbergbaues und der deutschen Stahl- und Eisenindustrie (16. Mai 1950); 'Agreement for an International Authority for the Ruhr (London, 28 April 1949)' <https://www.cvce.eu/content/publication/1997/10/13/39099742-20be-484c-b7b2-95a7c03c972f/publishable_en.pdf> accessed 25 June 2021.

[210] 'Agreement for an International Authority for the Ruhr (London, 28 April 1949)' (n 207) Art. 18; 'Note on the relationship between the International Authority for the Ruhr and the European Coal and Steel Community (7 November 1950): Anonymous French note on the coexistence of the International Authority for the Ruhr and the High Authority of the European Coal and Steel Community (ECSC).' <https://www.cvce.eu/obj/note_on_the_relationship_between_the_international_authority_for_the_ruhr_and_the_european_coal_and_steel_community_7_november_1950-en-dd751731-2c0e-45e8-af7c-6eba8034b110.html> accessed 25 June 2021; 'Accord relatif à la cessation des fonctions de l'Autorité Internationale de la Ruhr (27 mai 1952)' (25 June 2021) <https://www.cvce.eu/obj/accord_relatif_a_la_cessation_des_fonctions_de_l_autorite_internationale_de_la_ruhr_27_mai_1952-fr-c9d0ffff-fcf4-4016-b7c8-a2be4db48a50.html>.

[211] P. Leroy-Beaulieu, 'Note de Paul Leroy-Beaulieu sur le transfert du pouvoir de déconcentration de l'Autorité internationale de la Ruhr à la Haute Autorité (11 novembre 1950)' <https://www.cvce.eu/obj/note_de_paul_leroy_beaulieu_sur_le_transfert_du_pouvoir_de_deconcentration_de_l_autorite_internationale_de_la_ruhr_a_la_haute_autorite_11_novembre_1950-fr-89f62809-69a5-438c-93de-9c1ae4a16da5.html> accessed 25 June 2021; J. Monnet, 'Lettre de Jean Monnet à Robert Schuman (Paris, 1er juillet 1952)' <https://www.cvce.eu/obj/lettre_de_jean_monnet_a_robert_schuman_paris_1er_juillet_1952-fr-997fe68f-dbc7-43e9-8dad-0836fdf5bc30.html> accessed 25 June 2021; J. Monnet, 'Lettre de Jean Monnet à Robert Schuman (Paris, 22 janvier 1951)' <https://www.cvce.eu/obj/lettre_de_jean_monnet_a_robert_schuman_paris_22_janvier_1951-fr-18322de9-9556-4d78-98ff-31e93f4d398a.html> accessed 25 June 2021; A. Bureau, 'Rapport d'Albert Bureau sur la déconcentration de la sidérurgie allemande (28 juin 1951)' <https://www.cvce.eu/obj/rapport_d_albert_bureau_sur_la_deconcentration_de_la_siderurgie_allemande_28_juin_1951-fr-be4d654a-ef52-48bf-beb7-7bbe177749f4.html> accessed 25 June 2021.

[212] Schuman, 'The Schuman Declaration – 9 May 1950' (n 205).

influence of the Ordoliberal School on the negotiation process of the ECSC, the first European competition rules seemed to draw similar lessons from the traumatic experience of the Second World War as the Ordoliberal School did. The ECSC competition rules thereby followed the playbook of the republican antitrust tradition as it was first envisaged by the Ordoliberal School in Europe.

B. Republican liberty and the case law of the formative era

Not only the circumstances of the coming into being of the European integration project and competition rules bear testimony to the republican concern about concentrated economic power that lies at the core of the idea of a competition-democracy nexus. Even more importantly, the republican goal of ensuring competitive markets as a system of antipower and safeguard of economic liberty as non-domination clearly manifests itself in the formative case law of the European Commission and Court of Justice. This early case law gave shape to the concern about republican liberty and the idea of a competition democracy nexus through four channels.

1. A structural understanding of competition

A first channel the early case law of the EU judicature and Commission used to operationalise the republican ideal of liberty as non-domination was the endorsement of a structural interpretation of the notion of competition and the mission of competition law. From the early days onwards, the Court of Justice made it clear that EU competition law 'is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.'[213] The Court thus rejected a consequentialist interpretation of competition and competition law, advocated by some seminal scholars,[214] that merely focuses on the instrumental value of competition in bringing about greater (consumer) welfare.[215] Holding that EU competition law protects the competitive market structure as an 'institution' which has an intrinsic value,[216] the Court instead endorsed a constitutive,[217] if not deontological, understanding of competition as a decentralised market structure. Accordingly, competition is valued over and apart from it being instrumental in generating consumer welfare, but because it is a precondition and, hence, constitutive of republican liberty.

This notion of competition as decentralised market structure and institution chimes with the Ordoliberal understanding of competition as institution of antipower that is constitutive of individual liberty by dispersing market power polycentrically amongst many players whose

[213] *Case C-8/08 T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 para. 38. To this effect *Case C-501/06 P GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610 para. 63. *Case 6/72 Europemballage Corporation and Continental Can Company v Commission* ECLI:EU:C:1973:22 para. 26.
[214] R. Joliet, *Monopolization and abuse of dominant position : a comparative study of the American and European approaches to the control of economic power* (1970).
[215] *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) paras. 36-37. *Opinion of Advocate General Kokott in Case C-8/08 T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:110 para. 56.
[216] ibid para. 58. See for a similar argument *Opinion of Advocate General Kokott in Case C-293/13 P Fresh Del Monte Produce* ECLI:EU:C:2014:2439 para. 215; *Opinion of Advocate General Kokott in Case C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2014:2437 para. 113.
[217] For the notion of 'constitutive value' and its difference with instrumental and deontological thinking: I. Carter, *A measure of freedom* (Oxford University Press 1999) 54-60.

rivalrous interaction keeps on another in check.[218] The notion that EU competition protects competition as an institution can, indeed, be traced back to the second-generation Ordoliberal Ernst-Joachim Mestmäcker. He advanced the view that EU competition law fulfils the two-fold mission of protecting individual rights and freedoms of consumers and competitors (*Individualschutz*) and competition as an institution (*Institutionenschutz*).[219]

Tough EU competition law never went as far as its US counterpart in coming close to outlawing the possession of market power as such,[220] the structural understanding of competition underpinning the formative case law of the Court of Justice until the 2000s clearly reveals that EU competition law sought to address the potential domination that instances of concentrated economic power may create.[221] Accordingly, EU competition law was not only concerned about the unfair exercise of market power in a way that interferes with the choices of other market participants, but the very existence of concentrated economic power. This becomes, for instance, apparent in *Continental Can* where the Court did not associate the concept of abuse of dominance with any specific conduct by which the dominant firm interferes with the liberty of other market participants. Echoing the republican imaginary of unfreedom as dependence or master-slave relationship, the Court instead observed that

> *[a]buse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.*[222]

The formative case law thus expresses a clear concern about the very existence of concentrated economic power. The Court, however, did not opt for a situational approach along the lines envisaged by Eucken and Miksch, who had called for the break-up of monopolies and the regulation of dominant and oligopolistic firms based on the principle of 'as-if' competition.[223] The Court of Justice, instead, endorsed in *Hoffman-La Roche* and subsequent cases the more moderate conduct-based approach favoured by Böhm and Mestmäcker, who assumed that protecting residual competition of smaller competitors and keeping markets contestable constitutes the most effective remedy against instances of concentrated economic power.[224] Endorsing this conduct approach, the Court held that Art. 102 TFEU primarily outlaws dominant firm behaviour that strengthens the power of dominant firms by foreclosing residual competition.[225] Seeking to protect residual competition in the market and hence a competitive market structure, the structural conduct approach of the formative case law accounts for the fact that remaining competitors, irrespective of their efficiency, may impose an important constraint on the power of dominant firms and prevent them from exerting

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[218] Böhm (n 136) 279.
[219] E. J. Mestmäcker, 'Die Beurteilung von Unternehmenszusammenschlüssen nach Article 86 des Vertages über die Europäische Witschaftsgemeinschaft: [1965]' 608.
[220] *United States v. Alcoa* 148 F.2d 416 (2d Cir. 1945); *American Tobacco Co. v. U.S.* 328 U.S. 781 (1946). Joliet (n 212) 127–128; *Case 322/81 Michelin v Commission* ECLI:EU:C:1983:313 para. 57.
[221] Mestmäcker (n 217) 606, 608.
[222] *Case 6/72 Europemballage Corporation and Continental Can Company v Commission* (n 211) para. 26.
[223] Mestmäcker (n 217) 607–608.
[224] ibid. This strand of Ordoliberalism is often ignored by existing scholarship which explores the influence of Ordoliberalism on Art. 102 TFEU. Most commentators, erroneously associate Ordoliberalism with direct intervention against monopoly power advocated by Eucken and Miksch. Akman (n 203) 20, 24.
[225] *Case 85/76 Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 para. 91; *Case C-62/86 AKZO v Commission* ECLI:EU:C:1991:286 paras. 69-70.

domination.[226] Residual competitors might, moreover, erode the economic power of the dominant firm[227] and over time reduce the overall level of domination by restoring a more deconcentrated market structure.

The concern about preserving competition as an institution of antipower that disperses economic power polycentrically also transpires from the classical case law on Art. 101 TFEU. The Court consistently held that Article 101 (1) TFEU prohibits agreements that are not in line

> *with the concept inherent in the [EU] Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article [101 (1) TFEU] is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.* [228]

Instead of being only fixated on the adverse effects of collusion on prices or output, the Court, thus, identified the preservation of polycentric, independent interaction between market players as the central goal of Art. 101 TFEU. It consistently emphasized that Article 101 (1) TFEU creates a 'requirement of independence'[229] for market participants that obliges them to act as independent decision-makers. This requirement of independence was grounded in the concern that market operators might otherwise all too easily exercise domination by jointly eliminating the constraints that their independent, polycentric interaction would otherwise impose on each other and impose their idiosyncratic interests on the rest of society.[230]

European merger control, too, displayed throughout its formative era a concern over the excessive concentration of economic power. Although the Treaty of Rome establishing the European Economic Community (EEC Treaty)[231] did not roll over the merger control system introduced by the ECSC treaty,[232] the European Commission started as early as 1966 to call for the introduction of a European merger regime. Tough it recognised that mergers might contribute to the creation of an internal market and foster the international competitiveness of the European industry,[233] the Commission certainly did not – as it has been recently argued – endorse a 'big is beautiful' attitude,[234] which championed industry concentration. On the

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[226] *Case C-395/96 P Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:2000:132 para. 117. See for the economic argument J. F. Brodley and G. A. Hay, 'Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards' (1980-1981) 66 Cornell Law Review 738 745.

[227] Case No IV/34.621 Irish Sugar plc. OJ [1997] L 258/1 para. 134; *Case C-395/96 P Compagnie Maritime Belge Transports and Others v Commission* (n 224) paras. 113-114, 119.

[228] *Case C-209/07 Beef Industry Development and Barry Brothers (BIDS)* ECLI:EU:C:2008:643 para. 34. *Case 40/73 Suiker Unie and Others v Commission* ECLI:EU:C:1975:174 para.173.

[229] *Case 40/73 Suiker Unie and Others v Commission* (n 226) para. 174; *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) para. 33.

[230] *Case C-209/07 Beef Industry Development and Barry Brothers (BIDS)* (n 226) para. 40. See for a similar holding *Case 136/86 BNIC v Aubert* para. 17.

[231] Treaty establishing the European Economic Community.

[232] Treaty Establishing the European Coal and Steel Community (n 206).

[233] European Commission, 'Le problème de la concentration dans le marché commun: The problem of concentration in the Common Market.' (1966). Information Memo P-1/66 5,7,8 <http://aei.pitt.edu/40303/> accessed 28 September 2019.

[234] See for instance N. Petit, 'Competition Cases Involving Platforms - Lessons from Europe: Comment on Federal Trade Commission ("FTC")Hearing #3 on Competition and Consumer Protection in the 21st Century' (2018) 3 <https://www.ftc.gov/system/files/documents/public_comments/2018/10/ftc-2018-0088-d-0011-156146.pdf> accessed 22 December 2019.

contrary, the 1966 Memorandum on the Concentration of Enterprises in the Common Market underscored the need to control the growing trend towards industry concentration through mergers and acquisitions[235] in order to preserve effective competition in the internal market.[236] During the 1970s, the Commission also repeatedly warned that the growing tendency towards concentration undermined the maintenance of a decentralised market structure and led to a substantial increase of economic power in the hands of a few firms.[237]

The first EC Merger Regulation (EEC) 4064/89[238] clearly stood in the direct continuity of this structural approach. Instead of endorsing a consumer welfare standard, it laid down as the overarching purpose of EU merger policy to assess mergers with respect to their 'effect on the structure of competition'.[239] The Regulation was hence directed against mergers, which bring about 'significant structural changes'[240] in the market resulting in the creation or strengthening of a collective dominant position.[241] Consistent with this structural approach, until the early 2000s the Commission did not shy away from inferring the potential of a merger to result in anticompetitive effects from the 'sheer size'[242] of the merged entity.

The case law of the Commission and the Court of Justice thus followed the basic precept of the republican antitrust tradition, first spearheaded by the Ordoliberals in Europe, that competition by preserving competitive markets as institutions of antipower maximises liberty as non-domination and, thereby, secures the precondition of a republican society and democracy of free and equals. EU competition law operationalised the concern about liberty as non-domination through a structural approach that seeks to preserve a polycentric market structure and to keep markets contestable. The formative case law thus aimed to protect consumers and competitors not only against actual or likely interference by dominant firms or combinations of firms, for instance in the form of price increases, reduction of choice or foreclosure. Rather, by protecting a polycentric market structure, EU competition sought to minimise the mere capacity of firms to exert arbitrary power by keeping instances of amalgamated economic power to a minimum. In keeping with the republican notion of liberty, the formative case law thus adhered to a broad understanding of what constitutes a preventing condition (y) of liberty which does not only encompass actual or likely interference, but also the dependence on and exposure to powerful actors with the capacity to interfere at will.

This structural approach also gave effect to the egalitarian dimension which typifies the republican understanding of economic liberty. The formative case law was indeed grounded in a broad notion of who qualifies as an agent (z) whose liberty should be guarded against domination. This egalitarian notion of economic liberty became particularly manifest in the area of Article 102 TFEU. Until the early 2000s, the Commission and the EU courts did not shy

[235] European Commission (n 231) 9–11.
[236] Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings 1973. COM (73) 1210 final 1,4,5 and rec. 2.
[237] European Commission (n 231) 9, 11; Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings (n 234) 6, 8.Vth Report on competition policy (1975) 13–14; VIIth Report on competition policy (1977) 10, 17; IXth Report on competition policy (1979) 10; A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 95.
[238] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ [1989] L 395.
[239] ibid rec. 7.
[240] ibid rec. 9.
[241] ibid Art. 2 (3).
[242] Case No COMP/M.1741 MCI WorldCom/Sprint. OJ [2003] L 300/1 para. 145. Annulled on procedural grounds in *Case T-310/00 MCI, Inc. v Commission* ECLI:EU:T:2004:275.

away from applying Art. 102 TFEU to protect the economic liberty and opportunities of competitors that are not necessarily as efficient as the dominant firm. The Commission and EU judiciary, for instance, held that above-cost price-cutting by dominant firms may amount to a violation of Art. 102 TFEU without having regard to the efficiency of the foreclosed firm.[243] In some abuse of dominance cases, the Court of Justice made this concern about the equality of opportunity of smaller rivals even more explicit. It repeatedly stressed 'that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators'.[244] The republican understanding of liberty as equal freedom of market participants is thus deeply engraved in the normative fabric of Art. 102 TFEU in particular and EU competition law more generally.

2. Presumptions of anti-competitiveness

A second channel through which EU competition law operationalised the republican concern about liberty as non-domination and the ideal of a competition-democracy nexus is its reliance on legal presumptions[245] of anti-competitiveness of certain types of business conduct or levels of concentration. The most prominent form of such a legal presumption in EU competition law is the distinction between by-object and by-effect restrictions of competition under Art. 101 (1) TFEU. From the very early case law onwards, the Court of Justice held that certain forms of agreements, which have a sufficiently deleterious'[246] or 'injurious'[247] impact on competition, can be presumed to restrict by their very nature competition and therefore to run afoul of Art. 101 (1) TFEU without there being a need to assess their actual or likely effects on competition, consumers or competitors. [248] Only if the form of an agreement, considered within its broader legal and economic context, [249] does not trigger the by-object presumption, its anticompetitive nature has to be ascertained by means of a more searching analysis of its actual or likely effects.[250] Until the 2000s, the Court of Justice had the tendency to interpret the presumption of anti-competitiveness underpinning the by-object category broadly[251] and to apply it to price fixing,[252] output restricting[253] and market sharing agreements,[254] information

[243] *Case C-395/96 P Compagnie Maritime Belge Transports and Others v Commission* (n 224) paras. 113-120.
[244] *Case C-202/88 - France v Commission* ECLI:EU:C:1991:120 para. 51. *Case C-18/88 RTT v GB-Inno-BM* ECLI:EU:C:1991:474 para. 25; *Case C-49/07 MOTOE* ECLI:EU:C:2008:376 para. 51.*Case C-462/99 Connect Austria* ECLI:EU:C:2003:297 para. 83; *Case C-327/03 ISIS Multimedia and Firma 02* ECLI:EU:C:2005:622 para. 39; *Case C-280/08 P Deutsche Telekom v Commission* ECLI:EU:C:2010:603 para. 233; *Case C-553/12 P Commission v DEI* ECLI:EU:C:2014:2083 paras. 43-44.
[245] D. Bailey, 'Presumptions in EU Competition Law' (2010) 31(9) European Competition Law Review 362; C. Ritter, 'Presumptions in EU competition law' (2018) 6(2) Journal of Antitrust Enforcement 189. The notion of presumptions employed in this article markedly differs from A. Kalintiri, 'Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions' [2020] Journal of Competition Law & Economics 392.
[246] *Case 56/65 Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38 p. 249.
[247] *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) para. 29. *Case C-67/13 P Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 para. 50.
[248] *Case 56/65 Société Technique Minière v Maschinenbau Ulm* (n 244) p. 249.
[249] ibid.
[250] ibid p. 250.
[251] For emblematic examples of this broad interpretation of the by-object category *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211); *Case C-209/07 Beef Industry Development and Barry Brothers (BIDS)* (n 226); *Case C-32/11 Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160.
[252] *Case 123/83 BNIC v Clair* ECLI:EU:C:1985:33 para. 22.
[253] *Case 136/86 BNIC v Aubert* (n 228) para. 17.
[254] *Case 41/69 Chemiefarma v Commission* ECLI:EU:C:1970:71 paras. 116, 128.

exchange agreements,[255] as well as resale price maintenance[256] and territorial restrictions[257] bringing about absolute territorial protection.

A similar presumption based on an implicit distinction between by-object and by-effect restrictions of competition was also operative under Art. 102 TFEU. [258] The Court repeatedly held that Art. 102 TFEU prohibits certain unilateral forms of conduct by dominant firms that are not in line with normal competition on the merits. The Court and the Commission also established that certain types of unilateral conduct can automatically be presumed to be incompatible with normal competition without there being the need to ascertain their actual or likely effects. [259] Akin to the by-object restriction under Art. 101 TFEU, this presumption was applied broadly to exclusive dealing agreements, [260] tying,[261] below-average variable cost pricing, [262] as well as loyalty[263] and loyalty-enhancing rebates. [264] Other types of unilateral conduct, such as refusals to deal, by contrast, were only prohibited if they entailed actual or likely foreclosure effects.[265]

EU merger control, too, was structured around structural presumptions. Until 2004, the European Commission inferred the anticompetitive nature of mergers from their impact on market structure and the ensuing concentration of economic power. Though the dominance test of the ECMR was framed as a two-limbed test that requires the showing that a merger gives rise to a dominant position and thereby causes effective competition to be significantly impeded, the Commission and EU adjudicature inferred the anticompetitive nature of mergers from the fact that they led to the creation or strengthening of a dominant position, without looking at their actual or likely effects on prices or consumer welfare.[266]

The important role presumptions of anti-competitiveness played throughout the formative era of EU competition law bears testimony to the continuous influence of Ordoliberalism on the early cases law. These presumptions indeed replicated the Ordoliberal distinction between performance-based and hindrance competition.[267] Instead of constituting

[255] *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) paras. 35-36.
[256] *Case 243/83 Binon v AMP* ECLI:EU:C:1985:284.
[257] *Case 56/64 Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41; *Case C-501/06 P GlaxoSmithKline Services and Others v Commission and Others* (n 211).
[258] For a similar argument about the role that the object/effect divide plays under Art. 101 and 102 TFEU P. I. Colomo and Lamadrid de Pablo, A. 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in D. Gerard, M. Merola and B. Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017) 346; *Case T-203/01 Michelin v Commission (Michelin II)* ECLI:EU:T:2003:250 para. 241.
[259] *Case 85/76 Hoffmann-La Roche v Commission* (n 223) para. 90.
[260] *Case 40/73 Suiker Unie and Others v Commission* (n 226) paras. 502-505; *Case 85/76 Hoffmann-La Roche v Commission* (n 223) paras. 89-90.
[261] *Case T-30/89 Hilti v Commission* ECLI:EU:T:1991:70 paras. 64-78, 89-94.
[262] *Case C-62/86 AKZO v Commission* (n 223) para. 71.
[263] *Case 40/73 Suiker Unie and Others v Commission* (n 226) 502. *Case 85/76 Hoffmann-La Roche v Commission* (n 223) paras. 89-91.
[264] *Case 322/81 Michelin v Commission* (n 218) paras. 71-86; *Case T-203/01 Michelin v Commission (Michelin II)* (n 256) para. 59.
[265] *Opinion of Advocate General Jacobs in Case C-7/97 Oscar Bronner* ECLI:EU:C:1998:264 paras. 37-47.
[266] *Case T-2/93 Air France v Commission* ECLI:EU:T:1994:55 paras. 79-80; *Case T-290/94 Kaysersberg v Commission* ECLI:EU:T:1997:186 paras. 179, 185.
[267] See for instance Böhm (ed) (n 136) 242, 275-276; Eucken (n 135) 247; Böhm (n 140) 64. The influence of the Ordoliberal divide between performance-based and hindrance competition on the interpretation of Art. 102 TFEU has been also lucidly pointed out by J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive

an inference of anticompetitive effects of specific conduct, the presumptions under Art. 101, 102 and merger control rather encode a prior belief about the complementarity of specific forms of conduct or market structures with the idea of performance-based competition as a non-dominating process that requires and enables independent decision-making and equal opportunities of all competitors. Accordingly, these presumptions could only be rebutted by the showing that the impugned conduct was, in reality, in line with performance-based competition, because it could be explained by an objective justification or a pro-competitive objective.

Through the reliance on broad presumptions about the compatibility of certain conduct with performance-competition, EU competition law did not only outlaw conduct that entailed actual or likely interference with the economic liberty of competitors or consumers. Rather, the broad interpretation of presumptions under Art. 101, 102 and merger control made certain forms of dominating conduct unavailable, or at least prohibitively costly, to market players irrespective of whether they entailed a concrete risk of actual or likely anticompetitive interference. EU competition law thus maximised liberty as non-domination by simply making certain conduct that has dominating potential inaccessible. [268]

The reliance of the formative case law on rule-based presumptions thus replicated the modal, context-independent feature of republican liberty[269] which harnesses legal rules to secure unrestrained actions (z) across all relevant possible worlds. In enhancing legal certainty that specific dominating conduct is outlawed in all permissible worlds, these presumptions not only ensure that the probability of interference is minimised in the actual world (P (H if A)) or in a nearby neighbouring world (P (H if A)+P (H if B))[270], but across all relevant possible worlds irrespective of the friendly (F) or unfriendly (U) disposition of powerful market participants P (H if A & U) + P (H if A & F) + P (H if B & U) + P (H if B & F).[271] These broadly construed presumptions thus guarantee a resilient protection of the republican liberty of other weaker market players as they vest them with legally enforceable guarantees that their liberty is protected irrespective of the actual contingencies of the situation they find themselves in. At the same time, they also empower market participants against power imbalances by providing them legal defence mechanisms to contest potentially dominating conduct by dominant firms.[272] By delineating some concrete market freedoms that shield market participants from dominating conduct, such as anticompetitive cartels, tying or loyalty rebates, legal presumptions thus carved out spheres of autonomy or rights sets for consumers and competitors within which they are able to act as their own masters because their preferences remain content- and context-independently decisive.[273]

The robustness of the modal and resilient protection of the right sets guaranteed by these presumptions was further compounded by the fact that they carried considerable weight, as defendants had only limited possibilities to rebut them. In fact, defendants only had two channels through which they could challenge these form-based presumptions: either they advanced undermining evidence showing that the form-based inference of the anticompetitive

Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263 268–272.

[268] Pettit (n 70) 93.

[269] List (n 81), 203–211.

[270] List (n 75), 70–71.Pettit (n 57), 600.

[271] Pettit (n 12) 67–69.

[272] Pettit (n 70) 95.

[273] List (n 75), 73. List (n 81), 211.

nature of the impugned conduct did not hold true in the case at hand; or they proffered offsetting evidence demonstrating that the anticompetitive harm caused by the impugned conduct was outweighed by economic benefits or efficiencies.[274] The type of admissible undermining evidence was however extremely restricted because defendants could not simply rely on the fact that the impugned conduct did not bring about the hoped-for anticompetitive effects to overturn a form-based presumption.[275] The sole type of undermining evidence whereby defendants could show that the presumption of anticompetitivness did not hold true in the case at hand was to demonstrate that the impugned conduct was not arbitrary but ancillary to the pursuit of a legitimate objective.[276] Defendants also faced an uphill battle in their attempts to rebut presumptions by proffering offsetting evidence under Art. 101 (3) TFEU, the objective justification or under the EUMR. To successfully raise such offsetting evidence, defendants had to meet an exacting standard of proof showing that the impugned conduct was indeed necessary to achieve economic benefits, which outweighed the harm suffered by consumers.[277]

3. A Non-probabilistic standard of proof

A third vector through which EU competition law during the formative operationalised the ideal of republican liberty that lies at the core of the idea of the competition-democracy nexus is the standard of proof to which a restriction of competition had to be demonstrated. The standard of proof sets a minimum quality standard that evidence has to meet in order for an infringement of competition law to be deemed proven. The peculiarity of the standard of proof in EU competition law during the formative era is that it was probabilistically unweighted. In those early days, the Court and the Commission did not insist on the showing that the impugned conduct would cause likely harm consistent with a negative understanding of liberty that is only concerned about actual or likely interference. Rather, the EU Courts held that it would be sufficient for a plaintiff to show that a specific conduct would lead to potential harm to support the finding of an infringement of competition rules.

This probabilistically unweighted standard of proof governed, for instance, the Art. 101 case law. The Court of Justice repeatedly held that for an agreement to qualify as a by object restriction, it is sufficient that it 'has the potential to have a negative impact on competition' or 'in other words [is] capable in an individual case […] of resulting' in a restriction of

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[274] For the distinction between undermining and offsetting evidence, see S. C. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (2017) <https://scholarship.law.georgetown.edu/facpub/2007/>.

[275] *Case C-235/92 P Montecatini v Commission* ECLI:EU:C:1999:362 paras. 121-128. *Case C-189/02 P Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408 paras 144-145; *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) paras, 29-31; *Case C-238/99 P Limburgse Vinyl Maatschappij and Others v Commission* ECLI:EU:C:2002:582 paras. 508-510; *Opinion of Advocate General Kokott in Case C-8/08 T-Mobile Netherlands BV and Others* (n 213) para. 45; Kalintiri (n 243), 407. *Case T-219/99 British Airways plc v Commission* ECLI:EU:T:2003:343 para. 297.

[276] *Case 42/84 Remia v Commission* ECLI:EU:C:1985:327 para. 20; *Case C-103/08 Gottwald* ECLI:EU:C:2009:597 para. 46; *Case C-399/93 Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie Coberco* ECLI:EU:C:1995:434 para. 14. For Art. 102 *Case C-40/70 Sirena v Eda* ECLI:EU:C:1971:18 paras. 16-17; *Case 27/76 United Brands v Commission* ECLI:EU:C:1978:22 para. 184; *Case T-30/89 Hilti v Commission* (n 259) paras. 102-119.

[277] *Case 56/64 Consten and Grundig v Commission of the EEC* (n 255) pp. 348-350. A. Llorens Albors, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44(6) Common Market Law Review 1727 1729-1735, 1746. Case No IV/M.053 Aerospatiale-Alenia/de Havilland. OJ [1991] L 334/42 paras. 66, 69.

competition.[278] This 'capability standard'[279] of proof establishes a relatively low threshold for an agreement to be caught as a by object restriction: No analysis of the likely effects of the agreement, for instance, on consumers, [280] was necessary to demonstrate its *prima facie* unlawfulness under Art. 101 TFEU.

Along similar lines, under Art. 102 TFEU, the Court consistently resisted calls to adopt a standard of proof, which would follow the probabilistic logic of negative liberty by requiring the showing of actual or likely anticompetitive effects. Instead, the Court condemned certain forms of dominant firm conduct because of their mere capacity to bring about dominating interference. This relatively unexacting standard may warrant competition intervention before the dominant firm conduct reaches the stage where it constitutes an actual or a concrete threat of likely interference with the actions and choices of competitors and consumers.[281] Under this 'minimalist'[282] standard of proof, competition law intervention is warranted against potentially exclusionary conduct, such as loyalty rebate schemes, if they have the tendency ('tends to')[283] or capacity ('is capable of')[284] to foreclose competitors.

The Court's interpretation of the standard of proof thus strongly differed from what one would expect from an approach grounded in negative liberty. It indeed did not require the showing that the anticompetitive conduct at issue is on a balance of probabilities more likely to give rise to anticompetitive effects than not. Rather, it justified the prohibition of certain types of conduct on the basis of their potentially substantial harm to competition, without there being the need to inquire into the likelihood of this harm to eventuate. This probabilistically-unweighted 'balance-of-harm' standard thus attributed more weight to the magnitude of possible harm that specific types of conduct might cause than to the actual probability of that harm to materialise in the actual case. It thus also enabled the application of competition law in cases where anticompetitive harm can be considered a low-probability, but high-impact event. Just like the extensive reliance on form-based presumptions, this standard of proof was essential for republican antitrust to ensure a 'probabilistically unweighted form of protection' of market participants against arbitrary interference, in keeping with the thick, resilient understanding of republican liberty.[285] The probabilistically-unweighted standard thus also contributed to a modal and robust protection of a broad range of an individual market agent's actions (z) not only in the actual, or nearby likely but across all relevant possible worlds.

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[278] *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) para. 31; *Case C-32/11 Allianz Hungária Biztosító and Others* (n 249) para. 38.
[279] Colomo and Lamadrid de Pablo, A. (n 256) 361–363.
[280] *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) para. 29-30, 38.
[281] See for this standard of proof requiring potential harm in tying cases Case No IV/31043 Tetra Pak II. OJ [1992] L 72/1 para. 105, 117, 120. *Case T-201/04 Microsoft Corp v Commission* ECLI:EU:T:2007:289 paras. 857, 868. For a similar standard of proof in exclusive dealing cases *Case 85/76 Hoffmann-La Roche v Commission* (n 223) paras. 90, 127. For a similar standard of proof in predatory pricing cases see *Case C-62/86 AKZO v Commission* (n 223) para. 72.
[282] Kallaugher and Sher (n 265), 263.
[283] *Case 85/76 Hoffmann-La Roche v Commission* (n 223) para. 90. *Case 322/81 Michelin v Commission* (n 218) paras. 73, 81. *Case C-95/04P British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 para. 67. *Opinion of Advocate General Kokott in Case C-95/04P British Airways* ECLI:EU:C:2006:133 76 fn. 81; *Case T-203/01 Michelin v Commission (Michelin II)* (n 256) paras. 239-240.
[284] *Case 85/76 Hoffmann-La Roche v Commission* (n 223) para. 127. *Case C-62/86 AKZO v Commission* (n 223) para. 72; *Opinion of Advocate General Kokott in Case C-95/04P British Airways* (n 281) paras. 41 and 46. *Case C-95/04P British Airways plc v Commission of the European Communities* (n 281) paras. 68, 77..
[285] Pettit (n 59), 137.

4. An intervention-friendly error-cost framework

A fourth lever through which EU competition law gave effect to the republican notion of liberty is the way in which it weighed the costs and benefits of competition law enforcement. By virtue of its structural notion of competition, its reliance on broadly construed rule-like presumptions and its relatively unexacting standard of proof, the form-based approach of the formative era relied on an error cost framework that set a relatively low standard for competition law intervention. The form-based approach thus embodied the assumption that the benefits of broadly prohibiting certain forms of agreements, unilateral conduct or mergers outweigh the costs caused by the application of inherently over-inclusive legal presumptions that might give rise to false positives by catching innocuous conduct. In other words, the form-based approach hinges on the implicit value judgment that the benefits of categorically outlawing certain forms of conduct exceed the costs of potential over-enforcement (type I errors). This also implies that the benefits of broadly construed presumptions are superior to the benefits of a more searching, effects-based analysis, which would reduce those type I errors by screening out and insulating pro-competitive conduct from antitrust liability on a case-by-case basis. The form-based approach thus rested on the belief that the costs of under-enforcement of competition law under a more effects-based approach exceeded the benefits of filtering out pro-competitive conduct and sheltering it from the application of competition rules.

The preference of this error-cost framework for type I errors was, on the one hand, informed by the Ordoliberal insight that the ability of markets to self-regulate themselves is limited. [286] On the other hand, it was also shaped by the distinction between arbitrary and non-arbitrary interference that typifies the republican notion of liberty. From a republican vantage point, interference does not reduce liberty as long as democratic processes and legal safeguards guarantee its non-arbitrary nature by accounting for the interests of all affected individuals and securing their right to contest the interference. Whereas from the perspective of negative liberty state intervention is only justified so long as the costs of state intervention in terms of a reduction of liberty of one player are outweighed by the benefit of the preserved or restored liberty of another player, republican liberty tolerates a broader scope of state intervention without requiring such a balancing of rights.[287] In short, in following the republican tradition, the form-based approach of EU competition law assumed that the costs and liberty-reducing impact of state intervention are much lower than they would appear from the vantage point of negative liberty.

At the same time, the benefits of state intervention from a republican perspective oftentimes exceed the gains recognised by mainstream liberals. Republican liberals highlight that state intervention not only enhances the liberty of a single individual by addressing an isolated incidence of interference, but it also promotes liberty by preventing potential arbitrary interference with other individuals and thereby reduces the general level of domination by making such arbitrary interference unavailable. [288] These ‘accuracy benefits’ of antitrust intervention are further amplified because the positive effects of guarding economic liberty against domination are not limited to the economic sphere. Given the importance the republican antitrust tradition coined by the Ordoliberals attributed to the protection of economic liberty for

[286] P. Larouche and M. P. Schinkel, ‘Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act’ (TILEC Discussion Paper No. 2013-02, Tilburg 2013)).
[287] Pettit (n 57), 586, 597; Pettit (n 59), 135. Gill-Pedro (n 110), 105–109.
[288] See in this respect Pettit (n 59), 145.

a republican and democratic society and polity, competition law intervention generates positive externalities for the broader society and polity. In recognising, these broader 'accuracy benefits' of competition law intervention, the form-based approach thus implicitly endorsed the Ordoliberal view that '[i] f we want freedom we have no option but to sacrifice some advantage which we could obtain only by employing concentrated power.'[289] Accordingly, the form-based approach followed an error-cost framework that in the case of conflict between society's immediate preference satisfaction and competitors' liberty was slanted towards the protection of the latter.

The formative era of EU competition law until the 2000s thus reveals clear signs of a strong normative commitment to the republican notion of economic liberty as non-domination that underpinned the Ordoliberal idea of a competition-democracy nexus. The formative case law indeed appears to revolve around three distinctive markers that characterise the geometry of republican notion of liberty: a broad notion of preventing conditions (y) that perceives not only interference, but domination as an obstacle to liberty; an egalitarian understanding of liberty comprising a broad range of agents (x); a modal understanding of restricted actions (z) that covers not only the actual or nearby likely, but all relevant possible worlds. The case law of the Court also stood in continuity to the efforts initiated by the Ordoliberal School to operationalise republican liberty and, thereby, the competition-democracy nexus through a specific design of competition law. Four channels can be identified in the case law that played a particular role in giving effect to this republican antitrust approach: namely, a structural notion of competition as a polycentric institution of antipower; a form-based approach relying on rule-like rebuttable presumptions ensuring a modal, resilient form of economic liberty; a non-probabilistically weighted standard of proof and an error-cost framework that in the case of doubt erred on the side of false positives.

VI. The shift towards a laissez-faire approach

Over the last two decades, this republican approach to EU competition and with it the idea of a competition-democracy nexus have experienced a steady decline. This fall of republican antitrust was primarily triggered by the shift of EU competition law towards the so-called 'more economic approach' in the late 1990s and early 2000s. The main objective of this reform was to align the enforcement of EU competition law with the new economic teachings of the Chicago and post-Chicago School in the US.[290] The Chicago School had emerged in the 1960s and 1970s in opposition to a politicised interpretation of US antitrust law that, in a similar vein as the Ordoliberal School and EU competition law during its formative era, adhered to the republican assumption that antitrust law, by guaranteeing economic liberty as non-domination and equal status, contributed to a democratic society. From the 1970s onwards, the Chicago and neo-Chicago antitrust paradigms started to disparage concerns about economic concentration and its adverse impact on liberty and democracy as 'antitrust populism'.[291] A rational antitrust policy, the Chicago scholars argued, must be purged from what they perceived as unduly political or ideological considerations. Instead, they coined the idea that antitrust policy should

[289] Böhm (n 1) 271.
[290] Witt (n 235).
[291] R. A. Posner, *Antitrust Law* (University of Chicago Press 2001) 23–28.

exclusively pursue the allegedly value-neutral and scientific objective of wealth maximisation.[292]

A. The rise of the consumer welfare standard

In the early 2000s, the Chicagoan idea that competition law should only outlaw business conduct that reduces consumer welfare also gained a foothold in Europe.[293] Influential voices in EU competition circles grew increasingly frustrated over the formative case law. Its form-based approach became emblematic of what was seen as an economically illiterate and overly intrusive competition policy that ignored the actual welfare effects of business conduct and ended up in protecting less efficient competitors rather than competition to the detriment of consumer interests. [294]

1. The consumer welfare approach as a response to the 'republican paradox'

Mounting calls on the Commission and EU courts to emulate Chicago School teachings in Europe constituted a direct response to the analytical limitations of the republican approach. Proponents of the more economic approach argued that concerns about economic liberty and market structure that underpinned the republican approach of the formative case law obfuscated the very notion of 'restriction of competition'. As any agreement, unilateral conduct or merger restricts the economic freedom of some market participants and affects market structure, equating the notion of 'restriction of competition' with that of a reduction in economic liberty or rivalry would result in a situation where, at least theoretically, any business conduct may run afoul of competition law.[295] Critics thus put the finger on the failure of the republican approach to put forth a logically consistent and sound yardstick to decide when competition law intervention is warranted.

This failure of the republican approach to pin down a limiting principle for competition law enforcement is the immediate result of the thick concept of republican liberty. In a world where not only actual or likely interference, but the mere exposure to or dependence on a powerful agent capable of interfering with someone's actions qualify as preventing conditions (y) of liberty, any theoretically possible interference, be it ever so remote, can be viewed as an impairment of freedom requiring remedial state action. Virtually every social relationship may

[292] Bork (n 27) 5, 8, 91, 116-129.a

[293] A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 2–3; R. O'Donoghue and A. J. Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006) 4. Economic Advisory Group on Competition Policy (EAGCP), 'An economic approach to Article 82' (2005) accessed 4 April 2015; N. Kroes, 'European Competition Policy – Delivering Better Markets and Better Choice' (SPEECH/05/512 15 September 2005) <http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm> accessed 23 March 2016.

[294] V. Korah, 'EEC Competition Policy—Legal Form or Economic Efficiency' (1986) 39(1) Current Legal Problems 85.I. Forrester and C. Norall, 'The Laicization of Community Law; Self-Help and the Rule of Reason;: How Competition Law is and could be Applied' (1984) 21(1) Common Market Law Review 11. Kallaugher and Sher (n 265), 263, 280-281; Economic Advisory Group on Competition Policy (EAGCP) (n 291) 5–7; J. Temple Lang and R. O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82' (2002) 26 Fordham Int'l L.J. 83 110.

[295] See for instance B. E. Hawk, 'System failure: Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973 977–978; Economic Advisory Group on Competition Policy (EAGCP) (n 291) 2, 9.

then suddenly appear to be tainted by domination. And liberty becomes impossible.[296] The broad definition of preventing conditions (y) together with the modal character of republican liberty that is concerned about interference with individual actions (z) not only in the actual or nearby likely but across all (relevant) possible worlds are the principal reasons why republican antitrust increasingly run into difficulties. As the republican version of liberty requires that individuals' preferences are decisive and prevail across a potentially unrestricted number of possible domains, there may simply not exist any aggregate social choice function that could simultaneously satisfy the weak Pareto principle[297] and the demanding minimum requirements of the robust republican version of liberty.[298]

In concrete terms, this 'republican paradox' implies that the robust version of republican liberty leads to numerous frictions and conflicts between individual spheres of liberty. The EU version of republican antitrust often brushed over this tension by assuming that most of the time the preferences and interests of competitors and consumers are largely aligned. It thereby failed to acknowledge that there might be important conflicts between the interests of competitors and consumers in the event that consumer and competitor preference orderings are misaligned. All too often, republican antitrust failed to acknowledge that liberty in its robust republican sense can only be protected by relaxing the weak Pareto principle: in other words, republican liberty can only be protected if we accept Pareto-inefficient outcomes.[299] This tension between protecting economic liberty or a polycentric market structure and consumer welfare found little, if any, mention in the formative case law. As a consequence of its broad and demanding understanding of liberty, the republican approach failed to provide a clear standard to determine when (i) firm conduct unduly interferes with the economic freedom of other market participants (boundary issue 1) and (ii) when such interference was sufficiently serious to warrant state intervention (boundary issue 2). The consumer welfare standard thus put forth a versatile framework to decide how tensions between different spheres of liberties and rights should be resolved and balanced.

The endorsement of the basic tenets of the Chicago School antitrust paradigm and the shift from a form-based to a more economic approach in EU competition law thus constituted in the first place an attempt to address the frailties of republican antitrust. Though the alignment of EU competition law with Chicago School teachings remained less complete than that of US antitrust law,[300] the Chicago precepts on the consumer welfare standard[301] and the Chicagoan error-cost framework[302] found growing support among the competition community in Europe.

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[296] I. Carter and R. Shnayderman, 'The Impossibility of "Freedom as Independence"' (2019) 17(2) Political Studies Review 136.

[297] The weak Pareto principle requires that unanimous individual preference rankings are reflected in social decisions, i.e. that if all indviduals prefer alternative A to B, then society also prefers A to B A. Sen, 'Liberty and Social Choice' (1983) 80(1) The Journal of Philosophy 5 5, 7.

[298] A. Sen, 'The Impossibility of a Paretian Liberal' (1970) 78(1) Journal of Political Economy 152 153–154; List (n 75), 74–75; Sen (n 295).

[299] C. List, 'Social Choice Theory' <https://plato.stanford.edu/entries/social-choice/> accessed 10 September 2021.

[300] See for the endorsement of the consumer welfare standard *Reiter v. Sonotone Corp.* 442 U.S. 330 (1979) 343. See for the endorsement of the Chicagoan error-cost framework *Verizon Communications Inc v Law Offices of Curtis Trinko* 540 US 398 (2004) 407.

[301] R. O'Donoghue and A. J. Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006) 4. l European Commission, 'Report by the Economic Advisory Group on Competition Policy (EAGCP) - "An economic approach to Article 82"' (2005) 3 <http://ec.europa.eu/competition/antitrust/art82/> accessed 21 November 2015.

[302] A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed*

While the European Commission and Court stopped short of unconditionally endorsing the consumer welfare standard, they increasingly disavowed the structural approach of the formative era and considered the adverse welfare effects of business conduct on consumers as the central normative benchmark to assess its legality under EU competition law.[303] A prominent example of the growing sway of the consumer welfare standard on EU competition law is the EU judicature's endorsement of the as-efficient competitor principle as the predilect tool to decide when dominant firm conduct unduly forecloses competitors and therefore runs afoul Art. 102 TFEU.[304]

This growing role of the consumer welfare standard in the interpretation of EU competition rules by the Commission and EU courts is a first indication of the decline of the republican approach in EU competition law. Indeed, the consumer welfare standard coined by the Chicago and post-Chicago School has the appeal of addressing the failure of the republican approach to provide a principled framework that allows competition authorities, courts and businesses to distinguish between situations when the reduction of economic liberty of a market participant must be regarded as the result of legitimate competition and when it must be sanctioned as an undue exercise of single or collective market power by perpetrator firms.[305] It thus puts forward a clear limiting principle that defines when the intervention of competition law is necessary and legitimate to preserve the economic liberty of other market participants.

What is often ignored by antitrust scholars is that the consumer welfare approach does not simply replace the republican commitment to liberty as non-domination and equal status with the allegedly depoliticised, purely economic and value-neutral concept of welfare.[306] On the contrary, the consumer welfare standard itself encodes a specific, narrowly defined notion of negative liberty. The rise of the consumer welfare standard in EU competition law thus led to the displacement of the thick republican conception of economic liberty as non-domination by a thin, negative understanding of economic liberty as non-interference.

2. Boundary Issue 1: Is there a clash between spheres of negative economic liberty?

Indeed, the consumer welfare standard clearly and narrowly delineates those – from the vantage point of the proponents of a more economic approach – rare instances in which the businesses' unbridled exercise of negative economic liberty unduly interferes with the economic freedom of other market participants so that antitrust intervention may be

Approach to Article 82 EC (Hart 2008) 25 ff. See with respect to predatory pricing and above-cost price cuts Economic Advisory Group on Competition Policy (EAGCP) (n 291) 7, 53. *Opinion of Advocate General Wahl in Case C-177/16 Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome (AKKA)* ECLI:EU:C:2017:286 para- 117.

[303] See for instance Guidelines on the application of Article 81(3) of the Treaty, Guidelines on the application of Article 81(3). OJ [2004] C 101/97 para. 13. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Guidance Paper. OJ [2009] C 45/7 para. 23; *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 245) para. 51.

[304] *Case C-52/09 TeliaSonera Sverige* ECLI:EU:C:2011:83 para. 32; *Case C-209/10 Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172 paras. 21-25; *Case T-851/14 Slovak Telekom v Commission* ECLI:EU:T:2018:929 para. 108; *Case C-413/14 P Intel v Commission* ECLI:EU:C:2017:632 paras 133-136.

[305] A. Director and E. H. Levi, 'Law and the Future: Trade Regulation' (1956) 51 Nw. U. L. Rev. 281.

[306] J. D. Wright, 'Statement of Joshua D. Wright University Professor Antonin Scalia Law School at George Mason University before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Protection: Hearing on 'The Consumer Welfare Standard in Antitrust Law: Outdated or Harbor in a Sea of Doubt?' Washington D.C December 13, 2017' (2017) <https://www.judiciary.senate.gov/download/12-13-17-wright-testimony> accessed 29 September 2019.

indicated.[307] The consumer welfare standard suggests that such an undue obstruction of negative economic liberty only occurs if business conduct interferes with the economic choices or opportunities of another market participant in a way that reduces consumer surplus. In other words, economic liberty of consumers and competitors is only unduly reduced if business conduct interferes with them in such a way that consumers can no longer satisfy their actual or nearby likely preferences.

If applied to unilateral conduct, for instance, the consumer welfare standard delineates precisely when powerful businesses unduly interfere with the negative liberty of competitors and consumers. The consumer welfare standard would only identify a liberty-decreasing interference if the resulting foreclosure of competitors prevents the competitor from entering mutually beneficial economic transactions with consumers, and these transactions are either not offered by the dominant firm at all or on less advantageous terms. Such would be the case if the foreclosed competitor, absent the exclusionary conduct, could have produced and sold its product or services at least as efficiently as the dominant firm. In short, business conduct by a dominant firm only amounts to undue interference if it is likely to foreclose an equally or more efficient competitor.[308]

By endorsing the consumer welfare approach, the more economic approach thus addressed the shortcomings of the broad definition of preventing conditions (y) by the republican concept of liberty. The consumer welfare standard simply narrows the type of acts (hindrances) that qualify as obstruction of liberty to welfare-reducing interference. Domination resulting from the mere capacity of powerful firms to arbitrarily interfere with other competitors or consumers, by contrast, no longer qualifies as an encroachment on liberty.

Not only did the consumer welfare standard shrink the breadth of preventing conditions (y) against which competition law could protect economic liberty, but it also restricted the range of actions (z) that can be considered to be unduly restricted to preference-satisfying actions in the actual or nearby likely world. The rise of the consumer welfare standard thus brought about the rescoping of the 'relevant domain' of worlds[309] across which economic liberty ought to be protected. In its extreme form, the consumer welfare standard reduces the type of economic liberty protected under EU competition to the non-frustration of actual preferences. It thereby endorses the extremely narrow, Hobbesian understanding of negative liberty that only views interference with the currently preferred option in the actual world as a source of unfreedom. This narrow, actualist approach towards economic liberty is only concerned about interference that closes the preferred door. But it does not perceive - in keeping with the more demanding, Berlinian version of negative liberty – the blocking of alternative doors as obstruction of liberty (Berlinian version of negative liberty). Nor is it wary of the presence of powerful gatekeepers who may, whenever they see fit, close the currently preferred or alternative doors in a relevant range of possible other worlds (republican liberty).

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[307] See for a similar argument R. J. Peritz, 'A Counter-History of Antitrust Law' (1990) 39(2) Duke Law Journal 263 299–311; E. M. Fox, 'Consumer Beware Chicago' (1986) 84(8) Michigan Law Review 1714 1715; E. M. Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window' (1986) 61 N.Y.U. L. Rev. 554 558; Fox (n 31), 1156–1157.

[308] Posner (n 289) 194–197; R. A. Posner, 'Exclusionary Practices and the Antitrust Laws' (1974) 41(3) The University of Chicago Law Review 506. This has also been endorsed by late Harvard Scholars P. Areeda and D. F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88(4) Harvard Law Review 697; W. J. Baumol, 'Predation and the Logic of the Average Variable Cost Test' (1996) 39 J.L. & Econ. 49; H. Hovenkamp, 'The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal' (2015) 46 Review of Industrial Organization 209.

[309] List calls this the 'neighbourhood function' N. List (n 75), 70.

In conditioning the protection of competitors on their performance in satisfying consumer preferences, the consumer welfare standard also *de facto* shrinks the type of agents (x) whose liberty ought to be guaranteed by EU competition law. The republican approach broadly assumed that the preferences of competitors and consumers were largely aligned. As a result, the range of actors (x) whose equal liberty the republican approach assumed to protect encompassed consumers and competitors alike. By contrast, the consumer welfare standard only protects the decisiveness of competitors' preferences so long as they are really aligned with consumer preferences. It thus limits the economic liberty afforded by competition law to consumers and as-efficient competitors: that is those competitors whose products consumers prefer, or are at least indifferent to, relative to the products offered by the dominant firm. With the endorsement of the consumer welfare approach, most prominently in the form of the as-efficient competitor test, EU competition law also gave up its commitment to an egalitarian understanding of economic liberty and the preservation of broad-based economic opportunity amongst multiple market agents.

3. Boundary Issue 2: How to manage clashes between spheres of negative liberty?

Not only provides the consumer welfare standard a conceptually clear answer to the question of when allegedly anticompetitive business conduct amounts to an undue restriction of the negative liberty of other market participants, but it also offers a workable framework for balancing the rights and liberties of the relevant stakeholders (e.g., consumers, competitors, perpetrator firm(s)) to decide when such a *prima facie* liberty-reducing interference actually warrants state intervention. It thus provides a clear framework offering guidance on how clashes of spheres of liberty should be resolved (boundary issue 2). Consistent with the traditional conception of negative (economic) liberty,[310] the consumer welfare approach perceives any state intervention as coercion. It thus encapsulates the proposition that state interference is only legitimate if the reduction of negative liberty of perpetrating firms as a consequence of remedial state coercion is more than compensated by the gains in liberty of other market players by reason of the fact that anticompetitive harm is averted or remedied.

The consumer welfare standard provides with the wealth maximisation principle a handy device to carry out such a balancing of rights by comparing and weighing off otherwise incommensurable liberties or rights of all relevant stakeholders. The wealth maximisation principle, indeed, offers a common cardinal unit[311] to measure the offsetting effects of state interference with the liberty of a perpetrator firm, and the interference of the perpetrator firm with the liberties and interests of other consumers and competitors. Under the premise that wealth maximisation is the ultimate goal of antitrust policy, state intervention is only legitimate so long as the gains of consumer surplus resulting from the increase in liberty of consumers and/or competitors protected by antitrust law intervention outweigh any potential reduction in wealth resulting from the state interference with the liberty of the perpetrator firm. In other words, state intervention against a perpetrator firm to remedy the latter's interference with the liberty of other market participants is only warranted if it maximises consumer welfare more than does the unrestrained exercise of negative liberty by the perpetrator firm.[312] Put simply,

[310] Pettit (n 57), 596, 598-599, 601. Pettit (n 70) 37-38, 42-44, 46.
[311] For the need of such a common cardinal unit to carry out meaningful balancing see H. Hovenkamp, 'Antitrust Balancing' (2016) 12 N.Y.U. J.L. & Bus. 369 373.
[312] Posner (n 86), 130.

the wealth maximisation principle indicates that antitrust intervention is only legitimate if it maximises the net expected liberty – measured in net expected welfare – in the society.[313]

By seeking to align EU competition law with the consumer welfare standard, proponents of the more economic approach proposed to overcome the 'republican paradox' by reverting to Pareto-efficiency as a decision rule to balance and solve clashes between conflicting liberties of market participants. The balance of rights under the consumer welfare standard solves competing liberty claims in favour of the party that will contribute most to the maximisation of preference satisfaction and thereby compensates parties whose liberty has been reduced. Only if the unrestricted exercise of negative entrepreneurial liberty fails to bring about such Pareto-efficient outcomes, EU competition law may legitimately step in.

The increasing, albeit not unreserved, endorsement of the consumer welfare standard by the EU Commission and more recently also the EU judiciary thus triggered a decline in the importance of republican liberty for EU competition to the benefit of a thin, welfarist notion of negative liberty. Instead of domination and possible arbitrary interference, modernised EU competition law seems to perceive only actual or likely welfare decreasing interference with the economic liberty of other market participants as a source of concern. In short, the endorsement of the consumer welfare principle moved EU competition law from the republican towards a laissez-faire approach that aims to protect a very narrow definition of negative economic liberty.

B. A laissez-faire error cost framework

A second channel through which the reconfiguration of EU competition law from a republican to a laissez-faire approach took place is the growing endorsement of a systematically biased understanding of the costs and benefits of competition law enforcement. Proponents of the more economic approach uncritically subscribed to the Chicago School notion that the costs of erroneous over-enforcement (false positives aka. type 1 errors) always tend to exceed the costs resulting from mistaken under-enforcement (false negatives aka. type 2 errors) of antitrust law.[314] The perception that the expansive and overly interventionist interpretation of EU competition rules resulted in far too many false positives and, thereby, deprived consumers from welfare-enhancing conduct was a central line of attack against the form-based approach republican approach. [315] Even though the EU Courts never went as far as their US counterparts in endorsing the Chicagoan error-cost framework, [316] concerns over mistaken inferences of anticompetitive conduct carry growing weight in the judicial interpretation of EU competition rules over the last two decades.[317]

Albeit being couched in the scientific terminology of decision-theory, the Chicagoan error-cost framework, just like the consumer welfare standard, operationalises an ideological

[313] See for a similar formulation Pettit (n 59), 145.
[314] F. H. Easterbrook, 'The limits of Antitrust' (1984) 63(1) Tex. L. Rev. 1 3, 15-16.
[315] Economic Advisory Group on Competition Policy (EAGCP) (n 291) 2, 4, 7, 14-15.Padilla and Ahlborn (n 300) 25 ff. Venit (n 141), 1177–1178.
[316] *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 298) 414; *FTC v. Qualcomm Inc.* 969 F. 3d 974 (2020) 990.
[317] *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 245). *Opinion of Advocate General Wahl in Case C-177/16 Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome (AKKA)* (n 300) para. 117; *Case C-413/14 P Intel v Commission* (n 302); *Case T-399/16 CK Telecoms UK Investments v Commission* ECLI:EU:T:2020:217.

choice. The assumption that state intervention tends in most of the cases to be more expensive than 'doing nothing'[318] and that type 2 errors are, therefore, preferable to type 1 errors, provides the proponents of a more economic approach with a powerful economic argument in support of shielding the negative entrepreneurial liberty of alleged perpetrator firms against antitrust intervention. This error-cost framework, indeed, puts some economic gloss on the assumption that in most cases the loss in commercial liberty suffered by powerful businesses as a consequence of antitrust intervention is not outweighed by any gains in the liberty and welfare of other market participants that would justify such state interference in the first place.[319] This unequal weighing of errors-costs skews the balancing of rights of market participants in competition cases in favour of negative entrepreneurial liberty of alleged perpetrator firms. The consumer welfare and error-cost framework thus encode a balance of rights, which is clearly geared towards preserving the negative liberty of businesses against state intervention. By endorsing the consumer welfare standard and the Chicagoan error-cost framework, the protagonists of the more economic approach aligned EU competition law with the blueprint for a 'laissez-faire' antitrust approach that revolves around the basic premise that '[t] he firm is better left alone'.[320]

C. The undoing of presumptions of illegality

The growing sway concerns about the costs of type I errors had on the thinking of the European Commission and the EU judiciary manifests itself in the constant shrinking of the scope and weight of presumptions of anticompetitiveness which constitutes a third vector of the transformation of EU competition law from a republican towards a laissez-faire approach. The proponents of the more economic approach increasingly viewed the broad scope and considerable weight of the form-based presumptions which typified the formative case law as a major driver of false positives and welfare losses. Arguing that the existing presumptions entailed an overly inclusive prohibition of potentially welfare-enhancing conduct, advocates of the more economic approach called for their narrowing and replacement with effects-based standards that would require a case-by-case analysis of the competitive and welfare effects of the impugned conduct.[321] Moreover, they also called for the creation of presumptions of legality that automatically shielded innocuous business conduct from the scope of competition law.[322]

With the move towards a more economic approach, presumptions of anticompetitiveness in EU competition law underwent four developments. First, the Commission and the Court reacted to the critique of the form-based approach by providing a new welfarist and decision-theoretic rationalisation of presumptions of anticompetitiveness that algins their rationale with a narrow, probabilistic notion of negative economic liberty as non-interference. Under the republican form-based approach, the basis of presumptions under Art. 101 (1), Art. 102 and the ECMR was primarily the magnitude of their potential harm. In more recent years, however, the Commission and the Court started to couch these presumptions in

[318] R. H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law&Economics 1 18.
[319] Bork (n 27) 134-135, 143-144, 157, 196.
[320] ibid 196.
[321] R. Wesseling, *The modernisation of EC antitrust law* (Hart 2000) 81–101; *Opinion of Advocate General Wahl in Case C-67/13 P Groupement Cartes Bancaires v Commission* ECLI:EU:C:2014:1958 paras. 36-46; *Opinion of Advocate General Wahl in Case C-413/14 P Intel v Commission* ECLI:EU:C:2016:788 paras. 73-108; D. Geradin, 'Loyalty Rebates after Intel: Time for the European Court of Justice to overrule Hoffman-La Roche' (2015) 11(3) Journal of Competition Law & Economics 579.
[322] *Opinion of Advocate General Wahl in Case C-413/14 P Intel v Commission* (n 319) para. 80-81.

the probabilistic language of modern decision theory. Recent cases and policy documents suggest that presumptions of anti-competitiveness are no longer grounded in concerns about the magnitude of potential harm that a specific business practice, say a by-object restriction of competition, may bring about. Rather, the by-object presumption only operates if experience indicates that the impugned conduct is likely to result in an overwhelming number of cases in a significant reduction of (consumer) welfare. [323] Recent case law thus narrowed the presumption of anti-competitiveness attached to the by-object category to those types of agreements that are not only capable of entailing a large magnitude of harm, but for which experience also suggests that the expected harm is likely to materialise in all or almost all cases. By reclothing presumptions of anti-competitiveness as mere probability estimates of anticompetitive effects, the Court and Commission aligned them with the probabilistically weighted understanding of negative liberty that only considers actual or likely interference as a source of unfreedom.

Second, this probabilistic reinterpretation of the underpinning rationale of presumptions of illegality in EU competition law went in tandem with a shrinking of their scope. In *Cartes Bancaires*, the Court prominently established the principle that the presumption of anti-competitiveness attached to the by-object category must be interpreted narrowly.[324] This narrow interpretation has been reaffirmed ever since.[325] Broad presumptions under Art. 102 TFEU were also increasingly disavowed. Unlike in its formative case law, the Commission and Courts no longer rely on broad presumptions of illegality against tying [326] and exclusive dealing[327] arrangements. Most prominently, the Court in *Intel* recently narrowed the presumption of anti-competitiveness to loyalty rebates that are capable of foreclosing equally efficient competitors.[328] Under merger control, too, the Commission and the EU judiciary have explicitly rejected any form of presumptions against mergers entailing a substantial increase in concentration. [329]

Third, not only did the EU Courts curtail the scope of existing presumptions under Art. 101 and 102 TFEU, but they also alleviated the weight of remaining presumptions by recognising new channels through which they can be rebutted. *Cartes Bancaires* and subsequent cases increased the options for defendants to rebut the finding of by-object

[323] *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 245) para. 51. The Court here followed the Commission's approach in Guidelines on the application of Article 81(3) of the Treaty (n 301) paras. 21-24; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. OJ [2011] C 11/01 paras. 27-28; Commission Staff Working Paper - Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice. SWD(2014) 198 final p. 3.

[324] *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 245) para. 58.

[325] *Case C-345/14 Maxima Latvija* ECLI:EU:C:2015:784 para. 18; *Case C-469/15 P FSL and Others v Commission* ECLI:EU:C:2017:308 para. 103; *Opinion of Advocate General Wathelet in Case C-373/14 P Toshiba Corporation v Commission* ECLI:EU:C:2015:427 para. 26; *Opinion of Advocate General Bobek in Case C-228/18 Budapest Bank and Others* ECLI:EU:C:2019:678 para. 40.

[326] *Case 85/76 Hoffmann-La Roche v Commission* (n 223) para. 89; *Case C-413/14 P Intel v Commission* (n 302) para. 137.

[327] Case No COMP/37.792 Microsoft. C (2004)900 final para. 841.*Case T-201/04 Microsoft Corp v Commission* (n 279) paras. 857, 868. See also Case No COMP/39.530 Microsoft (tying). OJ [2010] C 36/7 para. 34; Case No COMP/AT.40099 Google Android. C(2018) 4761 final para. 749.

[328] *Case C-413/14 P Intel v Commission* (n 302) paras. 133-144.

[329] Commission Guidelines on the assessment of horizontal mergers 2004. O.J [2004] C 31/5 para. 14; *Case C-413/06 P Bertelsmann and Sony Corporation of America v Impala* ECLI:EU:C:2008:392 para. 48; *Case T-79/12 Cisco v Commission* ECLI:EU:T:2013:635 para. 48; *Case T-399/16 CK Telecoms UK Investments v Commission* (n 315) paras. 174, 249.

restrictions by broadening the criteria enforcers and courts have to account for at the characterisation stage before they can classify an agreement as a restriction of competition by object or effect.[330] Parties, as a consequence, are no longer limited to rebutting the by-object presumption by proffering offsetting evidence under Art. 101 (3) TFEU or undermining evidence under the ancillary restraints doctrine. Rather, the Court recently recognised that parties can overturn the presumption of anticompetiveness against agreements that *qua* their form would qualify as a by-object restriction by advancing undermining evidence at the characterisation stage showing that, in the case at hand, they do not result in the inferred anticompetitive effects.[331] The Court also expanded the channels through which parties could advance offsetting evidence at the characterisation stage, showing that a *prima facie* by-object restriction would generate efficiencies capable of attenuating or muting its anticompetitive effect.[332] It thus departed from previous case law[333] that required parties to demonstrate that their agreement met the demanding four-pronged test under Art. 101 (3) to successfully rebut the by-object presumption on efficiency grounds. This dilution of the weight of remaining presumptions also occurred under Art. 102 TFEU. The Court recognised in *Intel* that defendants could rebut the presumption of illegality against loyalty rebates by advancing undermining evidence showing that, in the case at hand, they are not capable of foreclosing an as-efficient competitor.[334]

The combined effect of the probabilistic reinterpretation, the curtailing of the scope and the alleviation of the weight of presumptions of anti-competitiveness was two-fold. On the one hand, it raised the evidentiary burden for enforcers and private antitrust plaintiffs to activate presumptions of illegality by introducing a number of 'reality check[s]'[335] that have to be met before a presumption can be relied on. On the other, it increasingly collapsed the previous categories of by-object and by-effect restrictions into a sliding-scale rule of reason analysis that requires competition enforcers and courts to consider a considerable amount of case-specific evidence before they could legitimately characterise the impugned conduct as a by-object restriction of competition. [336] As a consequence, the rise of the more economic approach dethroned form-based presumptions and supplanted them by a more searching effects-based analysis as the default mode of EU competition law analysis.[337]

This decline of presumptions of anti-competitiveness has moved EU competition law further afield from a republican approach that guarantees a non-contingent protection of economic liberty by making certain types of conduct which enable private players to engage in potential domination unavailable, or at least prohibitively costly. By reinterpreting presumptions in probabilistic terms as estimates of the likelihood of anticompetitive effects, the

[330] *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 245) para. 53; *Opinion of Advocate General Bobek in Case C-228/18 Budapest Bank and Others* (n 323) para. 51; *Case C-307/18 Generics (UK) and Others* ECLI:EU:C:2020:52 paras. 67-68.
[331] *Opinion of Advocate General Wahl in Case C-67/13 P Groupement Cartes Bancaires v Commission* (n 319) paras. 43-44.*Case C-228/18 Budapest Bank and Others* ECLI:EU:C:2020:265 paras. 81-83.
[332] *Case C-307/18 Generics (UK) and Others* (n 328) paras. 103-108; *Opinion of Advocate General Kokott in Case C-307/18 Generics (UK) and Others* ECLI:EU:C:2020:28 paras. 147-180.
[333] *Case C-209/07 Beef Industry Development and Barry Brothers (BIDS)* (n 226) para. 21.
[334] *Case C-413/14 P Intel v Commission* (n 302) paras. 137-139.
[335] *Opinion of Advocate General Bobek in Case C-228/18 Budapest Bank and Others* (n 323) paras. 43,45.
[336] *Case C-469/15 P FSL and Others v Commission* (n 323) para. 107; *C-373/14 P Toshiba Corporation v Commission* ECLI:EU:C:2016:26 para. 29; *Opinion of Advocate General Bobek in Case C-228/18 Budapest Bank and Others* (n 323) para. 47.
[337] *Case C-228/18 Budapest Bank and Others* (n 329) para. 54.

Commission and the Court aligned them with the narrow notion of negative liberty that considers only welfare-reducing actual or likely interference as a source of unfreedom. The protection of economic liberty afforded by remaining presumptions not only covers a narrower set of rights or liberties, but its protection has become also less robust as it is deprived of its modal character and becomes more contingent upon changing circumstances. Instead of securing liberty by non-probabilistic, modal presumptions that carry weight across all relevant possible worlds, the sliding scale approach operates through a blend of probabilistic presumptions and the analysis of case-specific evidence. This sliding-scale approach is only concerned about the impact of impugned business conduct on market participants' range of action (z) within the actual or a highly probable alternative world.

The move of EU competition law towards a laissez-faire approach has been further compounded by the fact that the EU Commission and Courts curtailed not only existing presumptions of anti-competitiveness, but also crafted new presumptions of *pro*-competitiveness of certain business conduct. In recent years, the European Commission and the EU judiciary firmly established the principle that Art. 102 TFEU only prohibits dominant firms from cutting prices below their incremental costs and thereby foreclosing as-efficient competitors. [338] The growing importance of the as-efficient competitor test as benchmark to determine when dominant firms engage in abusive behaviour implicitly carved out a presumption of pro-competitiveness that insulates dominant firms' above-cost price cutting from antitrust scrutiny.

A similar presumption of pro-competitiveness was also recently introduced by the General Court in *CK Telecoms* in relation to mergers. In this case, the General Court extended the possibility for merging parties to overturn the finding of a significant impediment to effective competition by recognising a new category of 'standard efficiencies'.[339] Unlike the merger-specific efficiencies that merging parties can plead under the EUMR and Horizontal Merger Guidelines, these efficiencies do not have to be substantiated and do not have to meet the strict evidentiary requirements for offsetting efficiencies under the EU Merger Guidelines.[340] Instead, the General Court grounded this new and elusive category of presumptive 'standard efficiencies' in the bold belief that 'any concentration will lead to efficiencies'.[341] In case the merging parties advance during the merger proceedings standard efficiency claims, it is upon the Commission to rebut them by showing that the merger would cause anticompetitive effects that are sufficiently significant to outweigh the claimed standard efficiencies. The General Court thus brought into being a *de facto* presumption of legality of mergers whose anticompetitive effects do not exceed a safe harbour threshold of assumed (standard) efficiencies.[342] By shielding certain pricing conduct and mergers from the scope of competition law intervention, these newly crafted presumptions of pro-competitiveness align EU competition even further with the Chicagoan error-cost framework that errs in the case of doubt on the side of type II errors, non-intervention and, hence, negative entrepreneurial liberty.

[338] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (n 301) paras. 20, 23–27, 41-44. *Case C-209/10 Post Danmark A/S v Konkurrencerådet* (n 302) paras. 25-38.*Case C-23/14 Post Danmark II* ECLI:EU:C:2015:651 para. 58; *Case C-413/14 P Intel v Commission* (n 302) paras. 133-134, 139-140; *Case C-280/08 P Deutsche Telekom v Commission* (n 242) paras. 198-203; *Case C-52/09 TeliaSonera Sverige* (n 302) paras. 33, 40-46.
[339] *Case T-399/16 CK Telecoms UK Investments v Commission* (n 315) para. 279.
[340] ibid paras. 277-279.
[341] ibid para. 277.
[342] ibid para. 275, 279.

D. A probabilistically-weighted standard of proof

A fourth policy lever that has been essential to the move of EU competition law away from a republican towards a laissez-faire approach is the reconfiguration of the standard of proof. During the republican era of the formative case law, EU competition law relied primarily on a probabilistically unweighted capability standard of proof that required plaintiffs to merely show that the impugned conduct had the potential or was capable to cause anticompetitive harm in a range of relevant possible worlds for it to be found in breach of competition rules. [343] This 'capability standard'[344] became a central target of the critique of the proponents of the more economic approach. They contended that it was at odds with a serious assessment of the concrete welfare effects of business conduct and, therefore, entailed too many false positives.[345] The Commission reacted to this criticism by reformulating in its various Guidelines the standard of proof to which it would have to demonstrate anticompetitive effects as a balance of probabilities standard that would require it to show that the conduct at issue was likely (that is, more likely than not) to result in anticompetitive effects. [346] Under Article 101 TFEU, the Court at least in part endorsed this probabilistic standard of proof holding that by-object restrictions must be likely to cause anticompetitive effects. [347] Under Art. 102 TFEU, the EU judiciary also embraced a balance of probabilities standard for some forms of unilateral conduct, such as specific pricing conduct[348] and loyalty-enhancing rebates.[349] In other instances, the Commission and the Court, however, reaffirmed the capability standard.[350] In merger cases, the EU judiciary also firmly established a balance of probabilities standard.[351] In the recent *CK Telecoms* judgment, the General Court went even one step further in holding that merger control is, at least in certain cases, governed by a standard of proof which is stricter than the balance of probabilities standard.[352] While stopping short of requiring the Commission to show that a merger will lead to anticompetitive effects beyond reasonable doubt, the General Court held

[343] *Case C-8/08 T-Mobile Netherlands BV and Others* (n 211) para. 31; *Case C-32/11 Allianz Hungária Biztosító and Others* (n 249) para. 38. *Case 85/76 Hoffmann-La Roche v Commission* (n 223) paras. 90, 127; *Case C-62/86 AKZO v Commission* (n 223) para. 72; *Case T-201/04 Microsoft Corp v Commission* (n 279) paras. 857, 868.
[344] Colomo and Lamadrid de Pablo, A. (n 256) 361–363.
[345] Kallaugher and Sher (n 265), 263. Temple Lang and O'Donoghue (n 292), 110.
[346] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ [2001] C3/2 para. 18. Guidelines on the application of Article 81(3) of the Treaty (n 301) paras. 17-18, 22-24. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 321) par. 26; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (n 301) paras. 19-20.
[347] *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 245) para. 51. (emphasis added)
[348] *Case C-209/10 Post Danmark A/S v Konkurrencerådet* (n 302) para. 44. (emphasis added) See also for a reference to likely foreclosure effects *Case C-52/09 TeliaSonera Sverige* ECLI:EU:C:2011:83 para. 67.
[349] *Opinion of Advocate General Kokott in Case C-23/14 Post Danmark II* ECLI:EU:C:2015:343 para. 82; *Case C-23/14 Post Danmark II* (n 336) para. 72.
[350] Case No COMP/AT.39740 Google Search (Shopping). C(2017) 4444 final paras. 336, 339; Case No COMP/AT.40099 Google Android (n 325) para. 733; *Case C-413/14 P Intel v Commission* (n 302) paras- 138, 140.
[351] *Case C-413/06 P Bertelsmann and Sony Corporation of America v Impala* (n 327) para. 47; *Case C-12/03 P - Commission v Tetra Laval* ECLI:EU:C:2005:87 para. 43; *Case C-265/17 P Commission v United Parcel Service* ECLI:EU:C:2019:23 para. 32; *Case T-79/12 Cisco v Commission* (n 327) para. 47; *Case T-399/16 CK Telecoms UK Investments v Commission* (n 315) para. 108; *Opinion of Advocate General Kokott in Case C-413/06 P Bertelsmann und Sony Corporation of America/ Impala* ECLI:EU:C:2007:790 paras. 208-211.
[352] *Case T-399/16 CK Telecoms UK Investments v Commission* (n 315) para. 118.

that the Commission is required to demonstrate that the merger will with a 'strong probability' result in a SIEC.[353]

This tightening of the standard of proof is testament to the objective of the more economic approach to reduce false positives to a minimum. At the root of this concern over type 1 errors is the concern to shelter the negative entrepreneurial liberty of businesses to the largest extent possible from state interference. This more exacting standard of proof builds an implicit safe harbour threshold or marginal presumption of pro-competitiveness into the evidentiary requirements that, in the case of doubt, tilts the balance in favour of the defendant and, hence, negative entrepreneurial liberty.[354]

The curtailing of the scope and weight of presumptions, the alteration of their underpinning rationale and the 'probabilisation' of the standard of proof had the combined effect of reducing both the scope and robustness of economic liberty protected by EU competition rules.[355] The shrinking of the breath of presumptions of anti-competitiveness considerably reduced the rights sets of economic agents and notably competitors afforded by competition law by narrowing the range of dominating conduct that is made unavailable or, at least, prohibitively costly. The probabilistic reinterpretation of presumptions and the standard of proof also reduced the degree to which market participants' remaining, albeit curtailed, rights sets remain stable across different relevant possible worlds.[356] EU competition law now longer seeks to minimise the probability of dominating interference with market agents across possible friendly (F) and unfriendly (U) worlds (P (H if A & U) + P (H if A & F) + P (H if B & U) + P (H if B & F))[357] in the way the broad presumptions and standard of harm of the republican approach did. Instead, the laissez-faire approach remodelled presumptions of anti-competitiveness and the standard of proof in such a way[358] that competition law only minimises the probability of interference with the market participants' actual preferred option (P (H if A)) or, at least in some cases, likely alternative options (P (H if A) + P (H if B)).

E. The fading away of the 'competition-democracy nexus'

With the rise of the more economic approach, the concern about republican liberty and the concomitant idea of a competition-democracy nexus in EU competition law have faded away. The republican approach gave way to a narrow understanding of negative liberty that only regards welfare-decreasing interference as a source of unfreedom. This reconfiguration of EU competition law took effect via four channels: (i) the transformation of the notion of competition from a polycentric market structure operating as an institution of antipower to a welfarist understanding of competition grounded in the consumer welfare standard; (ii) the endorsement of a laissez-faire error-cost framework; (iii) the probabilistic reinterpretation, shrinking of the scope and dilution of the weight of presumptions of anticompetitiveness; (iv) and the alignment of the standard of proof with the probabilistic logic of negative liberty. The recalibration of EU competition law along these four policy levers brought into being a laissez-

[353] ibid.
[354] Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 272) 7.
[355] List (n 81), 217.
[356] ibid 216–217.
[357] Pettit (n 12) 67–69.
[358] List (n 81), 216.

faire antitrust approach that under the guise of welfarism seeks to protect above all the entrepreneurial liberty of powerful businesses.

The modernisers of EU competition law thus proposed to overcome the 'republican paradox'[359] through radically re-scoping the economic liberty guaranteed by EU competition law. Until the 2000s, EU competition law (i) protected a thick and robust notion of republican economic liberty that was guaranteed to a broad range of agents (z); (ii) tackled a wide range of preventing conditions (y) which included not only actual or likely interference but focused on domination, that is the ability of firms to engage in dominating interference; and (iii) secured economic agents a modal set of actions (z) across all (relevant) possible worlds. The rise of the laissez-faire approach has thinned out the form of economic liberty guaranteed by EU competition law along these three variables (see Table 2). First, in endorsing the consumer welfare standard, laissez-faire antitrust excluded 'less efficient' competitors from the range of actors (z) whose economic liberty is deemed worthy of protection. It thereby considerably reduced the degree to which EU competition law protects broad-based economic opportunities and the inclusiveness of markets. Second, it excluded domination resulting from the mere capacity of powerful single or collective players to arbitrarily interfere with other market participants from what counts as preventing conditions of economic liberty (y). Under the laissez-faire approach, EU competition law no longer shields market participants against domination, but only against actual or likely welfare-reducing interference. Third, the transition towards a laissez-faire approach also reduced the robustness of economic liberty ensured by EU competition law. Laissez-faire antitrust no longer secures market participants' actions (z) content- and context-independently across all (relevant) possible worlds, but only guarantees the non-frustration of preferred options in the actual or nearby likely worlds. In short, the response of the modernisers of EU competition law to the republican paradox was to reduce the inclusiveness (agents (x)), scope (preventing conditions (y)) and robustness (restricted actions (z) of economic liberty and to align it with the purely negative understanding of economic liberty.

Table 2 - The shift from a republican to a laissez-faire approach in EU competition law

	Republican approach	Laissez-faire approach
Range of agents (x)	Consumers, competitors irrespective of their efficiency	Consumers, as-efficient competitors
Range of preventing conditions (y)	Domination, i.e., capability to interfere arbitrarily	Welfare-decreasing actual or likely interference
Range of actions (z)	Preference decisiveness across all (relevant) possible friendly (F) and unfriendly (U) worlds (minimisation of P (H if A & U) + P (H if A &	Preference decisiveness in the actual world (minimisation of P (H if A)) or nearby likely world

[359] As a reminder, that is the impossibility of securing a social aggregation function that is capable to ensure the content and context-independent decisiveness of the preference of at least two individuals and satisfies the weak Pareto principleList (n 75), 75.

	F) + P (H if B & U) + P (H if B & F)	(minimisation of P (H if A) + P (H if B))

The abandoning of republican liberty as central normative commitment of EU competition law has not only made the protection of economic liberty more precarious and less robust, but it has also severed the relationship between economic liberty and a republican society and democracy. It is indeed this very shift from republican to laissez-faire antitrust that explains why the idea of competition-democracy nexus has become largely irrelevant in EU competition law. As the notion of negative liberty guaranteed by modernised EU competition law can thrive under any type of government that follows a minimum degree of rule of law and constitutional principles, the idea of the interdependence between the economic, social and political order that lay at the heart of the Ordoliberal blend of European antitrust republicanism has become obsolete. By giving up its commitment to the preservation a republican form of economic liberty as non-domination to the benefit of a thinned-out version of negative liberty, EU competition no longer ensures the economic preconditions of a republican society and democracy of free and equals.

VII. A republican antitrust approach 4.0?

This account of the hallowing out of the republican approach and the decline of the competition-democracy nexus raises the question of whether the transition of EU competition law towards a laissez-faire approach is reversible and, if so, whether a recalibration towards a more republican approach is desirable. This question has gained new momentum with the growing concerns over the unprecedented concentration of economic power in the hands of a few powerful online platforms, growing levels of industry concentration and increasing calls for a redesign of competition rules to facilitate the transition towards a green economy. All three developments have prompted commentators to cast doubt on the shift towards a more economic approach and the suitability of a consumer welfare approach as a guiding principle for competition law in a digital and green economy.[360]

The rise to power of digital platforms has indeed slowed down, if not brought to a halt, the incremental transition of EU competition law to a laissez-faire approach as envisaged by the proponents of the more economic approach. Over the last years, the Commission has handed down bold decisions against digital platforms[361] and has intensified its enforcement action in digital markets. Currently, competition authorities across Europe rush towards new enforcement instruments to tackle the economic power of online platforms and preserve

[360] Khan (n 5); Wu (n 5); T. Wu, 'After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice' 2018 Competition Policy International; M. Steinbaum and Stucke, Maurice E. 'The Effective Competition Standard' (2018) accessed 29 September 2019.

[361] Case No COMP/AT.39740 Google Search (Shopping) (n 348); Case No COMP/AT.40099 Google Android (n 325); Case No COMP/AT.40411 Google Search (AdSense); European Commssion, *Press release IP/21/2061 - Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers* (2021); European Commission, *Press release IP/20/2077 - Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices* (2020).

competition in digital markets.[362] At the same time, the European Commission, as well as national competition authorities, are currently exploring how concerns over environmental sustainability can be better accommodated in EU competition law.[363] The challenges of the digital and green revolution have brought EU competition law but also other competition regimes across the world at a crossroads. Competition policy makers face a stark choice: either completing competition law's alignment with the laissez-faire approach grounded in the consumer welfare standard or recalibrating the enforcement of competition rules so that they can rise to the new challenges posed by the digital and green industrial revolutions. As the shift towards the more economic approach appears to have reached its inflection point, this section asks whether EU competition law could revert to or incorporate, at least, some elements of the republican tradition with a view to addressing these novel challenges and revitalise the competition-democracy nexus. It sketches some avenues towards a renewed version of republican antitrust – call it 'republican antitrust 4.0' – while also highlighting challenges and obstacles.

A. Consonance between a structuralist republican approach and consumer welfare

A move towards a more republican approach and the reinvigoration of the competition-democracy nexus would require EU competition law to take concentrated economic power again seriously. Competition law should no longer merely rely on a purely outcome-oriented approach that seeks to protect a competitive market structure so long as it maximises consumer welfare. A renaissance of the republican tradition and the idea of a competition-democracy nexus would involve the reversal towards a more structuralist approach that seeks to tackle economic concentration with a view to maximising non-domination. In basic terms, this would mean that competition law should no longer only protect market participants' liberty to open the door that they actually or likely prefer. But it would have to ensure that they could open other doors without hindrance in a number of (relevant) possible counterfactual worlds. To secure republican liberty as non-domination, competition law would thus have to address the position of power of potent economic agents who are in the position of 'gatekeepers' able to close these doors whenever they see fit both in the actual or relevant possible worlds. Reorienting competition law towards a more structural approach that seeks to preserve a polycentric market structure and to secure the ability of residual competitors effectively to constrain and, in the long run, to erode instances of concentrated economic power may foster republican liberty and revive the ideal of a competition-democracy nexus. Recent proposals by the EU Commission,[364] the UK Government[365] and national legislators[366] aimed at curtailing the 'gatekeeper power' of vertically integrated digital platforms and securing the contestability of digital markets clearly go in this direction.

[362] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (n 11); Competition and Markets Authority (n 11); Zehntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (die „10. GWB-Novelle).

[363] See for instance European Commission, 'Competition Policy in Support of Europe's Green Ambition' (2021). Competition Policy Brief 01. Dutch Cometition Authority (ACM), 'Draft Guidelines - Sustainability Agreements' (07/2020).

[364] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (n 11) Arts. 1 (1), 1 (2), 2(1) and 3 (1) recitals 3-6, 10.

[365] Competition and Markets Authority (n 11) notably, part 4 and Annex B-D.

[366] Zehntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (die „10. GWB-Novelle) (n 360) most notably § 18, 19. 19 a and 20.

As the laissez-faire approach finds itself increasingly embattled, proponents of the consumer welfare standard never grow tired to argue that such a shift towards a more structuralist approach would inescapably result in welfare losses and harm consumers.[367] This however does not have to be always the case. There are at least three arguments that can be made to suggest that a competition policy which protects a competitive and contestable market structure may also further consumer welfare.

1. The option value of polycentric markets

First, economic and social choice theory have shown that consumers and society often derive important benefits from keeping their options open. The 'option value' literature coined by Weisbrod,[368] Fisher-Arrow[369] and others[370] suggests that it may indeed be welfare maximising and rational for economic agents not only to choose the currently preferred option, but also to maintain their ability to choose alternative options in the future although they are not preferred at the time of the decision-making. This is notably the case if (i) the commitment to a specific option A is irreversible because the alternative option B will no longer be available within a reasonable time frame or because switching to option B will be too costly and (ii) if there is uncertainty or insufficient information about future preferences, future supply conditions or the future consequences of choosing option A (or not choosing B). In such a situation, economic agents and/or society gain an additional benefit from keeping their options open by postponing their commitment for a specific option until they have gained more information about the implications of choosing option A or B.[371] To give a concrete example for this 'preference for flexibility' or option value, suppose that you have today a strong preference for burger relative to other dishes. Despite this preference, you may however value the fact that the canteen of your university or company offers several different dishes on its weekly menu instead of offering only burger. This is because you might be uncertain about your future tastes, the future availability or quality of meat or potential consequences of excessive fast-food consumption on your wellbeing.[372] Some of you might also resent if your canteen had the power to arbitrarily and irreversibly decide only to offer burger without tracing the interests of students, university staff or employees whenever it sees fit. This 'option value' that consumers or society as a whole may derive from maintaining a broader choice set is not fully captured by the static concept of consumer welfare/surplus as it is understood by the proponents of a consumer welfare standard.[373]

The 'option value' literature thus suggests that polycentric market structures that maintain a broader option set and cater to our preference for flexibility operate like an insurance policy and thereby produce a distinct benefit that is not fully captured by the consumer welfare

[367] To cite just one example: A. D. Melamed and N. Petit, 'The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets' (2019) 54(4) Rev Ind Organ 741.
[368] B. A. Weisbrod, 'Collective-Consumption Services of Individual-Consumption Goods' (1964) 78(3) Q J Econ 471.
[369] K. J. Arrow and A. C. Fisher, 'Environmental Preservation, Uncertainty, and Irreversibility' (1974) 88(2) The Quarterly Journal of Economics 312.
[370] C. J. Cicchetti and A. M. F. III, 'Option Demand and Consumer Surplus: Further Comment' (1971) 85(3) Q J Econ 528; C. Henry, 'Option Values in the Economics of Irreplaceable Assets' (1974) 41 The Review of Economic Studies 89.
[371] Arrow and Fisher (n 367), 314–318.
[372] I draw here on the example used by D. M. Kreps, 'A Representation Theorem for "Preference for Flexibility"' (1979) 47(3) Econometrica 565 565–566.
[373] See for instance, Arrow and Fisher (n 367), 313; Cicchetti and III (n 368), 529.

standard as it is commonly understood.[374] This ties in nicely with literature that underscores the virtue of polycentric processes and markets in minimising the risk of simultaneous failure and in ensuring a higher problem-solving and adaptation capacity.[375] The insight of the option value literature that society may gain from not (irreversibly) committing to a single option until market processes generate more detailed information about the consequences and values of alternative options also tallies with Hayek's account of competition as a 'discovery procedure' that allows society to gain information about otherwise unknown facts.[376] In other words, option value theory suggests that in the presence of irreversibility, uncertainty or increasing value of future information, it may be in the interest of consumers and society to preserve a polycentric market structure where there are different competing alternatives available, even if one of the alternatives is currently the preferred one.[377] This is in particular so because polycentric markets themselves play a crucial role in generating this relevant information endogenously.[378]

Economic literature on option value theory and the virtues of polycentric systems thus offers valid and well-established arguments in support of preserving a diversity of options in the market place.[379] Preserving option value militates for an antitrust policy that guarantees a thicker protection of economic liberty going beyond a content-dependent, Hobbesian form of negative liberty according to which individuals are free as long as they are not hindered in choosing their preferred option. The fact that individuals confronted with uncertainty may have a rational preference for future flexibility[380] offers a strong economic justification for a commitment to a content-independent protection of liberty that keeps not only the preferred but all doors open.[381] Accordingly, it may be a rational antitrust policy not only to minimise the probability of hindrance of option A, that is P (H if A), when A is the preferred option between A and B, but minimise the sum of P (H if A)+P (H if B), where P is probability and H is hindrance.[382] This preference for future flexibility also makes a strong economic case to go beyond the protection of thick negative economic liberty and to endorse a competition policy grounded in republican liberty that protects content- and content-independent liberty. In fact, liberty to choose between the option A and B in the future becomes illusionary if powerful gatekeepers have the capacity to easily interfere with these choices whenever they see fit. This would be the case if, for instance, powerful digital platforms 'turn rogue' and harness network

[374] Some authors indeed refer to the option value as some form of 'risk aversion premium' Cicchetti and III (n 368), 536. See in this sense also W. Kerber, 'Competition, Innovation and Maintaining Diversity Through Competition Law' (2009) 15.

[375] Polanyi (n 130) 117-122, 171-175.E. Ostrom, 'Why Do We Need to Protect Institutional Diversity?' (2012) 11(1) Eur Polit Sci 128 129; K. Carlisle and R. L. Gruby, 'Polycentric Systems of Governance: A Theoretical Model for the Commons' (2017) 47(4) Policy Stud J 927.

[376] Hayek, Friedrich A. von, 'Competition as discovery procedure - Translated by Marcellus S. Snow' (2002) 5(3) The Quaretly Journal of Austrian Economics 9.

[377] For the relationship between option value and the value of future information Henry (n 368), 90; B. S. Bernanke, 'Irreversibility, Uncertainty, and Cyclical Investment' (1983) 98(1) Q J Econ 85 86; W.M. Hanemann, 'Information and the concept of option value' (1989) 16(1) Journal of Environmental Economics and Management 23 29. 35-36.

[378] The option value is indeed high when information can only be obtained endogenously by observing a specific environment for a period of time. Hanemann (n 375), 35–36.

[379] Kerber (n 372); J. Farrell, 'Complexity, Diversity, and Antitrust' (2006) 51(1) The Antitrust Bulletin 165.

[380] T. C. Koopmans, 'On Flexibility of Future Preference' (1962). Cowles Foundation Discussion Paper 150; Kreps (n 370).

[381] A. Sen, 'Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms' (1993) 45(4) Oxford Economic Papers 519 523, 530; P. K. PATTANAIK and Y. XU, 'On Ranking Opportunity Sets in Terms of Freedom of Choice' (1990) 56(3/4) Recherches Économiques de Louvain/ Louvain Economic Review 383.

[382] Pettit (n 12) 34–35.

effects to 'tip'[383] markets in their favour and thereby lock-in the choice of A irreversibly, while making option B unavailable. A robust and resilient protection of technological option value thus calls for a republican antitrust approach that secures a modal protection of the availability of options A and B across a range of worlds where circumstances are 'friendly' F and unfriendly 'U' by minimising P (H if A & U) + P (H if A & F) + P (H if B & U) + P (H if B & F).[384]

The option value of maintaining the stable availability of different options across different possible worlds is particularly high in digital and other new technology markets where the future consequences of a specific technology on consumers, public health, environmental sustainability or – as the events on Capitol hill of Epiphany 2021 have shown in the case of digital platforms – democracy remain often unknown. Not only does the modal preservation of option value and technological flexibility[385] permit consumers to easily switch to alternative technological solutions if the currently preferred one turns out to have unsustainable effects, but it also reduces the costs for democratically elected legislators to regulate or, indeed, outlaw certain technological solutions, as technological alternatives are readily available.

2. Innovation diversity and polycentric markets

This option value argument also already implicitly alludes to a second way in which the protection of a polycentric market structure and, thereby, the preservation of republican economic liberty may go hand in hand with greater consumer welfare. The option value literature not only underscores the costs of an irreversible reduction of alternative choices but also highlights the role of markets in generating valuable information. Economic thinkers, such as Hayek,[386] Polanyi,[387] the Ostroms,[388] or Nelson,[389] identified polycentric markets in which multiple, independent decision-making centres engage in parallel experimentation as a central force of economic innovation and progress. Along similar lines, the work of Acemoglu and Robinson documents the historical importance that inclusive economic institutions characterised by broad-based economic opportunities had for economic progress and innovation across global economic history.[390] Different strands in economic research thus show that the preservation of a polycentric market structure in which equal competitive opportunities are spread amongst many players embarking on a diversity of innovation paths may be an important driver of innovation and economic progress. This literature suggests that there is an added value in having – at least for a certain period of time – multiple firms in the market which engage in parallel experimentation.[391] Even if only the technological solution of one firm eventually turned out to be the most efficient one, there is an added value in protecting the

[383] For the origin of the concept of tipping markets M. L. Katz and C. Shapiro, 'Systems Competition and Network Effects' (1994) 8(2) Journal of Economic Perspectives 93 105–106.
[384] Pettit (n 12) 67–69.
[385] Kerber (n 372) 9–10.
[386] Hayek, Friedrich A. von (n 374); Hayek, Friedrich A. von, 'The Use of Knowledge in Society' (1945) 35(3) American Economic Review 519.
[387] Polanyi (n 130).
[388] Ostrom (n 130).
[389] R. R. Nelson, 'Uncertainty, Learning, and the Economics of Parallel Research and Development Efforts' (1961) 43(4) The Review of Economics and Statistics 351.
[390] D. Acemoglu and J. A. Robinson, *Why nations fail: The origins of power, prosperity, and poverty* (Profile Books 2013) 76-77, 208, 319-334.
[391] W. M. Cohen and S. Klepper, 'The tradeoff between firm size and diversity in the pursuit of technological progress' (1992) 4(1) Small Bus Econ 1. For an excellent summary Kerber (n 372).

'paths not taken'.[392] For without multiple players experimenting in parallel, society would not have gained the necessary knowledge and information to decide which technological solution is the most effective one.

Most importantly, the work of Acemoglu and Robinson suggests that it is not sufficient to protect the economic opportunities of market participants against actual or likely interference to ensure that they have the incentive to experiment independently. Instead, they suggest that the mere presence of a powerful agent – be it a despotic state or dominant private player – may stymie the incentives of other market players to engage in parallel experimentation. This is because the ability of the powerful agent to appropriate the investments in and gains of innovation by smaller market participants may deter the latter from investing in innovation in the first place.[393] The work by Acemoglu and Robinson thus adds an interesting economic dimension to the insight of the republican paradigm that the very presence of domination may have a psychological effect on weaker parties that pushes them towards ingratiating behaviour.[394] It also shows that the mere presence of concentrated economic power and its psychological impact on the incentives of other market participants may have an economic cost that is not captured by the static consumer welfare standard. By protecting a more deconcentrated market structure and securing a robust and resilient protection of economic liberty against arbitrary interference not only in the present but across a range of relevant possible worlds, a more republican approach to competition law may importantly enhance incentives of smaller competitors to innovate and further long-term consumer welfare. Of course, this dynamic efficiency argument in support of a more republican approach markedly differs from the predominant Schumpeterian[395] take on the relationship between market structure and innovation which regularly celebrates monopoly power as a driver of economic progress.[396] Instead of focusing on the incentives of large incumbents to innovate, this republican dynamic efficiency argument turns our attention to the incentives of smaller competitors to invest in innovation. Unlike the Schumpeterian paradigm, the republican account offers a more inclusive vision of innovation in which not only the opportunity to innovate but also the gains of innovation are shared more evenly amongst multiple players instead of being concentrated amongst a handful of large firms.

3. Contestability of market power and polycentric markets

But putting dynamic considerations aside, there are also static welfare arguments to be made for a republican approach that seeks to preserve a competitive market structure. There are indeed instances where competition law may preserve consumer welfare by protecting a competitive market structure and residual competitors even though these competitors are less efficient than the dominant incumbent. Economic analysis suggests that in the presence of high entry barriers, even the foreclosure of less efficient competitors may lead to higher prices if it

[392] I. Letina, 'The road not taken: Competition and the R&D portfolio' (2016) 47(2) The RAND Journal of Economics 433.
[393] D. Acemoglu and J. A. Robinson, *The Narrow Corridor* (Viking-Penguin 2019) 113-114, 125, 132, 142-144. For a model exploring how a monopolistic incumbent can pre-empt of innovation efforts of potential entrants R. J. Gilbert and David M. G. Newbery, 'Preemptive Patenting and the Persistence of Monopoly' (1982) 72(3) The American Economic Review 514 515-520, 524.
[394] Pettit (n 12) 24–25.
[395] J. A. Schumpeter, *Capitalism, Socialism and Democracy [1942]* (Harper & Row 1962) 82-88 and entire Chapter 7.
[396] *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 298) 414; *FTC v. Qualcomm Inc.* (n 314) 990.

allows a dominant incumbent to restore or entrench its monopoly position. The foreclosure of a less efficient competitor may thus result in a loss in consumer welfare that exceeds the savings flowing from the lower production costs of the monopolist.[397] Preserving a competitive market structure composed by even less efficient players thus does not necessarily harm but may actually protect consumer welfare because their mere presence may impose important constraints upon the dominant firm's ability to raise prices.[398]

In sum, contrary to what proponents of the consumer welfare approach conventionally claim, a structuralist, republican approach to competition law must not necessarily run counter to the goal of (consumer) welfare maximisation. While this insight may persuade some sceptics, it also carries a discomforting message. It implies that competition policy by emulating static or revealed consumer preferences may not necessarily maximise consumer welfare. One can indeed conceive a situation where consumers genuinely prefer a relatively deconcentrated market structure – for instance because it ensures option value or reduces domination and thereby protects a democratic society and polity – but behave in a way that actually contributes to greater concentration. Herbert Hovenkamp pointedly observed that there is considerable evidence that consumers often actually value the preservation of small businesses and have an aversion against the concentration of economic power. The crux is, however, that consumers do not necessarily act consistently with this preference for a deconcentrated economy when they engage in market transactions. On the contrary, consumers tend to 'free ride' by buying the cheaper product from large producers in the hope that others do buy from a smaller, less efficient producer.[399]

A more republican antirust approach seeking to preserve a relatively deconcentrated market structure would operate in a way that is diametrically opposed to the way in which competition law is perceived today. The more economic approach assumes that market forces, if unrestrained, lead to efficient outcomes and sees the core mission of competition law in replicating these efficient market outcomes. By contrast, the republican approach acknowledges that the unrestricted interplay of market forces may lead to unsustainable levels of excessive concentration that generates domination and reduces consumers' and society's option value. From this perspective, the problem of economic concentration results from the mismatch between optimal private and optimal social behaviour. Republican competition law 4.0 would thus approach the preservation of a relatively deconcentrated and polycentric market structure as a positive externality or public good, which is actually valued by consumers but is not internalised in the market price they (are willing to) pay because its benefits, for instance in the form of greater option value, are difficult to appropriate.[400] Competition law would thus follow a similar logic as environmental protection legislation: just as environmental regulation seeks to prevent an excessive level of pollution, competition law would seek to keep the level of

[397] Brodley and Hay (n 224), 745. B. S. Yamey, 'Predatory Price Cutting: Notes and Comments' (1972) 15(1) The Journal of Law and Economics 129 134–135; Brodley and Hay (n 224), 744–746; G. A. Hay, 'A Confused Lawyer's Guide to the Predatory Pricing Literature' (1987) 17(2) Journal of Reprints for Antitrust Law and Economics 155 161–164.D

[398] For the proposition that less-efficient competitors may impose important constraints on the market power of monopolistic firms and thus benefit consumers S. C. Salop, 'The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test' (2017) 81(2) Antitrust Law Journal 371 414–415. S. C. Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard' (2006) 73 Antitrust Law Journal 311 328–329. This has been recognised by the Court of Justice in *Case C-23/14 Post Danmark II* (n 336) paras. 59-60.

[399] H. Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84(2) Michigan Law Review 213 242–244. The Chicago scholars have clearly excluded these values from their definition of wealth maximisation, by defining wealth narrowly as everything to which consumers attach value backed by dollars. Posner (n 86), 120.

[400] Free riding is one reason why markets often fail to generate the option value which explains its public-good character Weisbrod (n 366), 473–476; Cicchetti and III (n 368), 537–538.

economic concentration at a sustainable level.[401] The term 'competition law' or 'antitrust law' from this perspective becomes a bit of a misnomer, as it would rather function as an 'anti-concentration law'.

B. Managing the republican paradox

Protecting a polycentric market structure and consumer welfare, the previous section shows, do not have to be at loggerheads. This however does not mean that their relationship is without tension. To the contrary, a major failure of republican antitrust was to simply obfuscate this tension and ignore the 'republican paradox', that is that republican liberty cannot be maximised across all areas without sacrificing (Pareto) efficiency.[402] That we as a society sacrifice some efficiency in order to safeguard liberties is not unusual and a problem as such. On the contrary, any society or political paradigm valuing freedom will have in certain circumstances to preserve liberty at the expense of welfare.[403] The problem is instead that the republican antitrust approach has never fully addressed this trade-off head-on by explicitly devising strategies and mechanisms to manage, if not to escape, the 'republican paradox'.

One avenue to proactively manage the trade-off between protecting republican liberty and efficiency losses is through the design and choice of a specific set of competition law interventions. The synopsis of the various strands within the Ordoliberal School but also the discussion of the various policy levers of the republican approach of EU competition law shows that there is not one, but various different strategies to operationalise the ideal of republican liberty. These strategies may differ in the degree to which they proactively seek to promote republican liberty by positive action and, hence, their degree of intrusiveness and welfare costs.

Arguably, the least intrusive way to give greater weight to at least some dimension of republican liberty is the recalibration of the predominant Chicagoan error-cost framework that is slanted towards non-intervention. Such a recalibration would give greater weight to the costs or foregone accuracy benefits of type 2 errors. Readjusting the error-cost framework is arguably also the least radical and controversial proposal. A number of prominent antitrust economists have recently criticised the misconceptions underpinning the distorted Chicagoan error cost framework that counsels that competition authorities and courts in the case of doubt should err on the side of non-intervention.[404] Not least option value theory provides a number of valid arguments why it is rationale to err in certain circumstances on the side of type I errors. This is notably the case in markets characterised by considerable uncertainty about the future value of different alternative options and the risk that some of these options are eliminated irreversibly. The irreversibility of type I errors that might arise, for instance, if a dominant firm engages in conduct that may tip the market in its favour on a lasting basis, simply reduces the weight of potential benefits of its conduct.[405] In the face of uncertainty and irreversibility, what has been

[401] The assumption being that concentrated of economic power or its consequences are, like environmental pollution, costly to reverse Arrow and Fisher (n 367), 319. For a similar argument describing excessive levels of concentration as market failure Böhm (n 140) 215–216.
[402] List (n 75), 73–75.
[403] ibid 78.
[404] J. B. Baker, 'Taking the Error out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' (2015) 80(1) Antiturst Law Journal 1. First and Weber Waller (n 6), 2570–2572.
[405] Arrow and Fisher (n 367), 319.

derided as 'precautionary antitrust'[406] by some may actually constitute an economically sensible policy. Because even for risk-neutral decision makers it may be perfectly reasonable to account for the cost of irreversible losses of different options and to err in the case of doubt on the side of 'diversity'.[407]

A second, slightly bolder avenue to incorporate elements of the republican approach into contemporary EU competition law would consist of reconsidering the transition towards a purely probabilistic standard of proof. This proposal may also turn out to be less controversial than it at first sight appears. Decision-theoretic literature indeed shows that in order to minimise decision-errors competition authorities and courts should not only consider the likelihood but also the magnitude of harm of impugned conduct. This implies that in certain circumstances the balance of probabilities standard, which requires that the anticompetitive harm be more likely than not, may prove inappropriate. When, for instance, certain unilateral conduct or mergers have the potential to result in harm of a sizeable order of magnitude, it may be economically reasonable to prohibit them, even if the harm is unlikely to materialise. In the presence of high-impact, but low-probability events, decision theory suggests that antitrust law should rely on a 'balance of harm' standard of proof that is less demanding than the balance of probabilities standard and intervene even though the probability of the harm lies below 50%.[408] Such a balance of harm standard does not presuppose any risk aversion on the part of the decision-makers. However, it would carry even greater weight in situations where harm is irreversible[409] or where (non-measurable) uncertainty does not allow the assignment of specific probabilities to alternative events.[410]

Replacing the balance of probabilities with a balance of harms standard would dissociate competition law from the probabilistic logic that typifies the negative concept of liberty and realign it with the non-probabilistically weighted notion of republican liberty. A bounded probabilistic[411] standard of proof that is concerned about interference not only in an actual or likely, but relevant possible alternative worlds would bolster the modal character and robustness of liberty guaranteed by competition law. Essential to the question of which world qualifies as relevant possible world is the presence of concentrated power and power imbalances that create a realistic prospect of arbitrary interference capable to entail harm of significant magnitude. The bounded probabilism of the republican tradition thus would not justify antitrust intervention on purely hypothetical grounds. It would still require the showing of concrete instances of power imbalances; yet it would not only seek to prevent likely interference by powerful agents, but also to reduce their capacity to do so.

Our discussion of the Ordoliberal School also shows that the implementation of the ideal of republican liberty does not necessarily presuppose the deconcentration of industries or break

[406] A. Portuese, 'Precautionary Antitrust: A Precautionary Tale in European Competition Policy' (Law and Economics of Regulation, Springer International Publishing 2021)
[407] Farrell (n 377), 170.
[408] C. F. Beckner, III and S. C. Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust L.J. 41 61–62; L. Kaplow, 'Efficiencies in Merger Analysis' (2021). Harvard M. Olin Center for Law, Economics and Business Policy Discussion Paper 3/2021 46–47.
[409] Arrow and Fisher (n 367), 319.
[410] Frank Knight famously drew a strict distinction between risk as 'measurable uncertainty' that can be captured by assigning probabilities to specific events or outcomes and (non-measurable) uncertainty, in the strict sense, to which no probability can be attributed F. Knight, *Risk, Uncertainty and Profit* (The Riverside Press Cambridge 1921) 20.
[411] Pettit (n 49), 218–219; List (n 81), 216.

up of large-scale firms. While such a situational approach has been favoured by Eucken and Miksch, other scholars, most notably Böhm and Mestmäcker, have coined the basis of the EU Courts' and Commission's form-based approach. This form-based approach devises a number of rule-like presumptions of anti-competitiveness against specific types of conduct that are considered to have the potential to result in significant harm. What is characteristic of these presumptions is the non-probabilistic, modal character. They operate even if in the specific actual or closely neighbouring world the conduct is unlikely to lead to interference and harm. Instead, they secure non-interference across a range of relevant possible worlds. Because they make certain means of dominating interference unavailable or very costly, rule-like presumptions maximise republican liberty by reducing the level of domination. In securing a modal protection of liberty as non-domination rule-like presumptions have important 'accuracy-benefits'[412] that are only rarely recognised by the conventional antitrust literature.

Reinforcing the role of modal rule-like presumptions thus constitutes a third avenue through which EU competition law could be realigned with a more republican approach. This would require a partial reversal of the shift towards a more casuistic analysis favoured by the acolytes of a more economic approach. Giving greater weight to and expanding the scope of presumptions however must not necessarily result in the revival of old-school formalism. Economic literature and the Commission's own experience, for instance in the area of vertical restraints,[413] suggest that rule-like presumptions can be finetuned and updated in light of new economic insights to reduce excessive welfare losses.[414] Embracing optimally differentiated presumptions as a way to revive the republican European antitrust tradition does not preclude the use of more heavy-handed regulatory or structural deconcentration interventions. The various strands of the Ordoliberal school suggest that these different approaches can be blended into a multi-layered competition policy, where antitrust intervention is escalated as a function of the degree of domination or entrenched concentration prevailing in a market.

EU competition law, this discussion shows, has at its hands a number of levers that it could adjust to reinvigorate the republican tradition and thereby promote a republican form of economic liberty that is compatible with a republican ideal of a society and polity of free and equals. The different levers play a complementary role and can be blended with one another as need be. The more of the variables set out above are recalibrated, the more radical will be the departure from the predominant laissez-faire antitrust paradigm and the more significant will also be the shift toward the republican approach. The specific choice and combination of the above instruments also determine how much welfare and efficiency are sacrificed in the pursuit of a more resilient form of economic liberty.

The discussion of various avenues to reunite EU competition law with the republican tradition also illustrates that the trade-off between efficiency and republican liberty will operate along two dimensions: the scope and the robustness of liberty protected.[415] One way to escape the republican paradox consists of compromising on the 'robustness' of the protection of republican liberty. Instead of endorsing a genuinely probabilistically-unweighted protection of

[412] First and Weber Waller (n 6), 2571; A. Christiansen and W. Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of per se Rules vs. Rule of Reason' (2006) 2(2) Journal of Competition Law and Economics 215 219–220.
[413] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. OJ [1999] L 336/21.
[414] Christiansen and Kerber (n 410), 220–229.
[415] List (n 81), 217–218.

liberty across a range of relevant possible worlds, republicans could at least in part accept a more probabilistic and hence less robust protection of liberty. This would involve a narrowing of the relevant alternative possible worlds across which competition law was to maximise non-interference. A second way to escape the republican paradox is to restrict the domain or more generally speaking the range of preference/right sets for which a robust, modal protection of liberty ought to be guaranteed.[416] Robust protection of liberty thus may only be possible for a restricted domain of preference/right-sets or agents. A shift towards a more republican approach with a view to reinvigorating the competition-democracy nexus would thus require EU competition law to strike a balance between the robustness and scope of (republican) liberty to be protected.

C. Republican antitrust 4.0, sustainability and the democratic legitimacy of the European Economic Constitution

The renaissance of the republican tradition however does not necessarily always imply a more restrictive competition policy. To the contrary, the fact that the republican tradition recognises that non-arbitrary interference does not inevitably frustrate liberty may also help resolve some inherent tensions and fundamental challenges that EU competition currently faces in light of the green industrial revolution. Most notably, a shift towards a republican approach has the potential to open up new avenues to accommodate specific forms of cooperation between businesses that are deemed necessary to achieve greater environmental (or also social) sustainability.

For the last twenty years, the debate about whether EU competition rules should be relaxed to facilitate collective efforts of firms to reduce environmental pollution, or enhance other legitimate environmental or societal concerns has divided EU competition circles into two camps. On the one hand, there are the 'apologists' who claim that environmental protection and sustainability is so important that it should – at least in some circumstances – trump the goal of preserving competition and, hence, be a valid excuse for otherwise anticompetitive agreements.[417] On the other, the 'sceptics' forcefully object to the idea that sustainability grounds should serve as a valid ground on which anticompetitive arrangements should be exempted from competition rules. They warn that a more welcoming approach towards sustainability agreements would all too easily serve firms as a fig-leave to 'greenwash' agreements that harm competition and consumers.[418] Moreover, they make the institutionalist assertion that the power to decide when market mechanisms ought to be suspended to pursue public interest goals should exclusively lie with the democratically elected legislator rather than private players who are guided by their idiosyncratic private interests and the goal of profit-maximisation.[419] The current debate on the role of sustainability considerations for competition

[416] List (n 75), 75–77; Sen (n 296), 153.

[417] C. Townley, *Article 81 EC and public policy* (Hart 2009); S. Kingston, *Greening EU competition law and policy* (Cambridge University Press 2012); G. Monti, 'Four Options for a Greener Competition Law' (2020) 11(3-4) Journal of European Competition Law & Practice 124; S. Holmes, D. Midelschulte and M. Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences Review 2021).

[418] M. P. Schinkel and Y. Spiegel, 'Can collusion promote sustainable consumption and production?' [2016] International Journal of Industrial Organization 1.

[419] H. Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81' (EUI Working Papers 2007/30, Florence 2007) 10 ff; H. Schweitzer, 'Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Lichte der Querschnittsklauseln' in

policy has thus reached a *cul-de-sac*. The sceptics have little to say in response to the argument that public regulation is often too little, too late to address the existential threat of climate change. The apologetics, in turn, have either never seriously engaged with or have not yet come up with satisfactory response to the concern that a lenient approach to sustainable collusion would confer on private parties the *de facto* power to exert 'private government'[420] without being mandated with democratic legitimacy or subject to any accountability safeguards.

The reversal to a more republican approach would allow EU competition law to constructively overcome this impasse. The republican approach may, on the one hand, throw a lifeline to the apologetic camp because it recognises that interference with market agents' decision-making does not necessarily frustrate their liberty, as long as it is non-arbitrary. Accordingly, as long as cooperation between firms genuinely pursues the public interest goal of greater sustainability and does not serve as a cloak for the exercise of arbitrary private power, sustainability agreements do not have to be at odds with (republican) liberty. On the other hand, the republican concept of non-arbitrary interference also credits the concern of the institutionalist argument advanced by the sceptics. For it highlights that interference can only qualify as non-arbitrary as long as there are safeguards or mechanisms in place that structure power and force the interfering agent to trace and be responsive to the interests of other agents. Accordingly, sustainability agreements can only qualify as a non-dominating form of interference and do not amount to undue 'private government', as long as there are robust mechanisms in place which ensure that the firms entering these agreements have properly traced the interests of affected consumers and competitors, and are subject to procedures that guarantee the legitimacy and contestability of their decisions.

Prior to the modernisation of EU competition law by Regulation 1/2003 those safeguards were built into the design of the enforcement of Art. 101 (3) TFEU. Agreements pursuing legitimate objectives could only be exempted once they were notified to the Commission and the latter, upon thorough review, ensured their non-arbitrary character.[421] Following the shift towards the self-assessment regime,[422] whereby it became the task of private firms to ascertain that their agreements comply with the conditions of Art. 101 (3) TFEU, EU competition law in its present stage is devoid of such institutional safeguards that would ensure the non-arbitrariness of sustainability agreements. To secure the non-arbitrariness of collective sustainability initiatives, EU competition law would thus have to devise new rules and mechanisms with a view to replicating the public character and procedural safeguards which were built into the Art. 101 (3) notification system in the private sphere.

Such mechanisms would not have to be developed from scratch but already exist in related areas of EU competition law. For instance, the Court of Justice developed under the so-called *van Eycke* doctrine various procedural safeguards that ensure that the public, impartial character of otherwise anticompetitive market interventions is preserved when state authorities

Monopolkommission (ed), *Symposium: 40 Jahre Monopolkommission* (2015) 21-22, 24,26,38; O. Odudu, *The boundaries of EC competition law : the scope of Article 81* (Oxford University Press 2006) 47-51, 165.

[420] E. Anderson, 'Liberty, Equality and Private Government' in M. Matheson (ed), *The Tanner Lectures on Human Values* (vol 35. Cambridge University Press 2016).

[421] EEC Council Regulation 17/62 implementing Articles 85 and 86 of the Treaty. OJ [1962] L 13/204 Art. 4.

[422] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ [2003] L 1/1 Art. 1 (2).

delegate regulatory functions to private entities.[423] Similar procedural safeguards have also been devised by the European Commission to decide when standardisation processes comply with Art. 101 (1) TFEU. To fall outside the prohibitive scope of Art. 101 (1), standardisation agreements must be voluntary, open, transparent and non-discriminatory.[424] Both the *van Eycke* case law and the existing rules on standardisation offer a starting point for the design of procedural safeguards that would ensure that restrictions of competition ensuing from sustainability agreements are non-arbitrary, as they trace the interests of competitors, consumers and the wider public. Such safeguards would secure that even when adopted by private players, restrictions of competition keep a public character.

Republican liberty and the related concept of non-arbitrary interference thus lay out a pathway that would enable EU competition to reconcile and surmount the entrenched disagreements over the role of sustainability considerations. A more republican approach would open up more policy space to accommodate genuine and legitimate collective arrangements between competitors that are necessary to ensure greater sustainability, while guaranteeing at the same time that they do not amount to arbitrary private government and domination. Unlike a purely laissez-faire reading of the European Economic Constitution that condemns any form of public interest regulation as an assault on negative economic liberty,[425] a more republican approach could guarantee greater policy space for public regulators but also private or civil initiatives to pursue cooperatively sustainability initiatives.

A revival of the republican approach would thus enhance the competition-democracy nexus in EU competition law along two dimensions. On the one hand, it would enable EU competition law to afford a more robust protection of economic liberty in light of growing levels of industry concentration and the rise to power of digital gatekeepers. By guaranteeing the functionning of competition as an institution of antipower, a republican approach to competition law would thus guarantee the economic and societal preconditions of a republican society and democracy of free and equals. On the other hand, in creating new pathways towards a competition policy that is capable of accommodating legitimate societal and public policy concerns a republican approach would also strengthen the social and democratic legitimacy of the European Economic Constitution.

VIII. Conclusion

This article unpacks a fundamental normative prior, if not a foundational myth of European competition law. It is the first academic study to offer a systematic, conceptually sound, theory-based explanation for the proposition that competitive markets and competition law promote democracy. The article purports to show that the idea of a competition-democracy nexus can only be explained by the normative commitment to a specific understanding of

[423] *Case 267/86 - Van Eycke v ASPA* ECLI:EU:C:1988:427 para. 16; *Opinion of Advocate General Reischl in Case 13/77 INNO v ATAB* ECLI:EU:C:1977:134 paras. 29-35; *Case 13/77 - INNO v ATAB* ECLI:EU:C:1977:185 paras. 29-35; *Opinion of Advocate General Darmon in Case C-185/91 Bundesanstalt für den Güterfernverkehr v Reiff* ECLI:EU:C:1993:309 paras- 16-22; *Case C-35/99 - Arduino* ECLI:EU:C:2002:97 paras. 37-41; *Case C-184/13 API and Others* ECLI:EU:C:2014:2147 paras. 39-41; H. Schepel, 'Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test' (2002) 39(1) Common Market Law Review 31.

[424] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements para. 163.

[425] M. E. Streit and W. Mussler, 'The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'' (1995) 1(1) European Law Journal 5.

liberty: namely, the republican concept of liberty as non-domination. Having its origin in ancient Roman thought, liberty in its republican sense differs from our predominantly negative understanding of liberty in so far as it perceives not only actual or likely interference but domination – that is, the subjugation to a master-slave like relationship – as a source of unfreedom. Republican liberty, the article shows, is the only explanatory variable that can offer a satisfactory explanation of why proponents of the idea of a competition-democracy nexus perceive the mere concentration of private economic power as a threat to democracy and why they assume that it is the role of competition law to tackle this threat.

The article, then, 'models' the notion of republican liberty, focusing on three distinctive features. First, republican liberty has a strong egalitarian dimension, as it understands liberty always as 'equal freedom' or 'equal status'. It thus recognises a broad category of agents (z) that can legitimately be said to be free or unfree. Secondly, in perceiving not only actual or likely interference but domination as an obstacle to liberty, republican liberty also relies on a broader notion of preventing conditions (y) that frustrate liberty and require remedial state action than does negative liberty. Thirdly, in seeking to ensure a robust and modal protection of individuals against arbitrary interference not only in the actual or likely but across all relevant possible worlds, republican liberty also encompasses a broader range of actions (z) that an individual can be said to be free or unfree to perform than does its negative counterpart.

This model of republican liberty is used to trace the influence of the ideal of republican liberty and the competition-democracy nexus in the history of European competition law. It shows that the concern about the adverse effect of excessive concentration of private economic power on republican liberty and democracy was central to the Ordoliberal School of thought which pioneered the 'republican antitrust' tradition in Europe. This republican approach and the associated idea of a competition-democracy nexus also had an important bearing on the formative era of EU competition law until the early 2000s. The article shows that EU competition law operationalised the protection of republican liberty through four channels: namely, the protection of competition understood as a polycentric market structure and institution of antipower; the reliance on broadly construed form-based presumptions of anti-competitiveness; a probabilistically-unweighted standard of proof and an intervention-friendly error-cost framework.

The article also explains why, in recent years, the republican approach and the idea of a competition-democracy nexus have become largely obsolete in EU competition law. This decline of the republican approach is the immediate result of the more economic approach that has moved EU competition law away from a commitment to republican liberty and aligned it instead with a laissez-faire approach that adheres to a narrow negative understanding of economic liberty as the absence of welfare-reducing interference. This shift from the republican to a laissez-faire approach also operated along four policy levers: namely, the replacement of a structuralist understanding of competition by the consumer welfare standard; a narrowing and probabilistic reinterpretation of presumptions of anti-competitiveness; the progressive transition towards a probabilistic standard of proof and the endorsement of an error-cost framework that seeks in the first place to protect negative entrepreneurial liberty against state interference. This move from a republican towards a laissez-faire approach has thinned out the type of economic liberty that is protected by EU competition along three dimensions: it has narrowed the inclusiveness of economic liberty by reducing the range of actors (z) whose economic liberty is protected under EU competition law; it has curtailed the scope of economic liberty by shrinking the range of preventing conditions (y) that EU competition law seeks to

address; and it has lowered the robustness of economic liberty by limiting the range of actions (z) that are protected by competition law against interference.

The last part of the article discusses whether and how the republican approach could inform the reform of EU competition law and strengthen the competition-democracy nexus in light of the challenges that the rise to power of digital platforms, growing levels of industry concentration, and the climate crisis pose to our societies and polities. The article discusses different policy proposals as to how EU competition law could be realigned with a more republican approach by reverting to a more structural understanding of competition and recalibrating the role of presumptions, the standard of proof and the error-cost framework. It also asserts that such a shift towards a republican and more structuralist approach does not have to be at odds with the goal of protecting consumer welfare. To the contrary, a structural approach can protect consumers in the short-term by securing important constraints on the power of entrenched incumbents and in the long-term by maintaining broad-based innovation incentives, innovation diversity and option value. The article thus not only deciphers one of the most important but often unexplained normative predispositions underpinning EU competition law but it also sheds light on its practical relevance for the current debate on the reform of EU competition law.

The contribution of the article is hence threefold. The first is of conceptual nature, as it is the first to pin down a clear conceptual answer to the question of how competition and competition law promote democracy. The second contribution is historical in tracing how iterations of the ideal of republican liberty and the competition-democracy nexus shaped competition law in Europe and how the republican approach disappeared. The third contribution is practical. The article sheds light on how the ideal of republican liberty and the associated notion of a competition-democracy nexus can be operationalised through concrete competition law tools and how they could inform competition law reforms in light of the current challenges posed by the rise of powerful digital platforms, rising levels of industry concentration and the climate crisis be. In so doing, it also affirms that the republican approach can be reconciled with a welfare-oriented competition policy.

In making these three contributions, the article also challenges current attempts of the defenders of the *status quo* to ridicule the idea that competition and competition law enhance democracy as 'antitrust romanticism'.[426] These attempts are not only disingenuous but also misleading. On the one hand, the 'romanticism' charge is historically misleading because the idea of a competition-democracy has very little to do with the sentimental and anti-rational movement of 19th-century romanticism. All to the contrary, the idea of a competition-democracy, the article suggests, is firmly anchored in republican thought that has been carried over by Renaissance and enlightenment thinkers from ancient Rome to our modern times and has – notably through the American and French revolutions – left an important imprint on our modern democracies on both sides of the Atlantic. On the other hand, the 'romanticism' label is also misleading in so far as it insinuates that the republican approach, which seeks to preserve a deconcentrated, polycentric market structure, is necessarily at odds with the goal of consumer

[426] T. Schrepel, 'Antitrust without Romance' (2019) 13 N.Y.U. J.L. & Liberty 326. Melamed and Petit (n 365), 741. Labelling political approaches to antitrust as 'romance' or 'romantism' is not very original either, as this mimics a very old tune in the antitrust debate D. Dewey, 'Romance and Realism in Antitrust Policy' (1955) 63(2) Journal of Political Economy 93.

welfare and, therefore, irrational. Such a claim simply ignores well-established[427] economic literature, which suggests that maintaining polycentric markets and keeping options open can be a rational, welfare-enhancing policy.

That said, important challenges and tensions remain. To mention just two of them: First, a reversal towards a republican approach and the idea of a competition-democracy nexus would require a fundamental rethink of how we understand EU competition law today. The mission of competition law would no longer be to merely emulate and restore efficient markets. Rather, it would have to operate along similar lines as environmental regulation and intervene even in otherwise efficient markets to maintain a socially and politically sustainable level of economic concentration. Such a reinterpretation of the role of competition law as 'anti-concentration law' would demand a general agreement about the fact that even otherwise efficient markets fail to 'price in' all the economic, societal and political costs of excessively concentrated markets. Second, even though a republican approach does not have to automatically clash with consumer welfare and efficiency, republican liberty in its demanding and robust form is subject to the 'republican paradox': It is impossible to secure republican liberty across an unlimited domain of relevant worlds without sacrificing Pareto efficiency. The fact that the protection of republican liberty involves the sacrifice of some efficiencies is not a problem a such – in our liberal democracies, we accept such sacrifices every day. The challenge is rather the question of how exactly this trade-off between liberty and efficiency should be struck. This, of course, is an inherently political question from which most competition scholars and policymakers for all too long preferred to stay clear.

[427] With Kenneth Arrow (1972), Ludwig August van Hayek (1974), Tjalling C. Koopmans (1975) Amartya Sen (1994) and Elinor Ostrom (2009) in total five economists who shed light on the 'option value', 'preference for flexibility' and virtues of polycentric markets have won the 'Nobel prize' in economics.