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Can We Protect Competition Without Protecting Consumers?

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Competition belongs to one of the most important values of the European Union. However, competition is not an exclusive path to create welfare and generate efficiency. In this respect competition can be seen as a 'luxury product' of market-oriented societies, which is not indispensable for achieving such values as industrial growth, market integration, social coherency, consumer welfare or innovations. Why then should competition be perceived as a separate economic value? What features does it contain which are so important for liberal democracy? How should competition be correlated with consumer welfare? These questions are central to this paper, which argues for conceptual separation of competition and consumer welfare and offers a methodology for the 'unbundled' analysis of these societal values.

COMPETITION-AS-A-MEANS VS COMPETITION-AS-AN-END

It is usually taken for granted that competition-as-a-process in not the most important value of antitrust policy, and that 'the ultimate objective of […] intervention in the area of antitrust and merger control should be the promotion of consumer welfare'.[1] The very term 'consumer welfare' is defined differently by different authors. The representatives of the Chicago School, for instance, consider it as a logical outcome of allocative and productive efficiency. Those, who advocate more interventionist approach to competition policy, measure it rather in terms of low prices and/or variety of choices. The common denominator for both (and some other) theories is the idea that (i) consumer welfare is seen in the utilitarian terms of the *outcomes* which are more important than the *process of competition* and (ii) consumer welfare is the final objective of antitrust policy. This paper proceeds from and concentrates on these two generic features of consumer welfare which are common for different schools of antitrust. In this sense the terms 'consumer welfare', 'consumer interests' and 'efficiency' are used as synonyms. They all are consequentialistic and they all constitute the core of the utilitarian perception of competition as opposed to competition in deontological sense.

Although the mantra of consumer welfare is mainly evident in political rather than judicial outputs in European antitrust,[2] the idea that consumer welfare constitutes the

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1 Philip Lowe, 'The design of competition policy institutions for the 21st century – the experience of the European Commission and DG Competition', Competition Policy Newsletter, Number 3, 2008.

2 Pinar Akman, "Consumer Welfare' and Article 82EC: Practice and Rhetoric' (2009) 32(1) World Competition 71 at p 71: 'as far as this author is able to detect, the term 'consumer welfare' has been used in merely two competition cases by the Court of First Instance … and has never been referred to by the European Court of Justice'.

ultima ratio for competition policy is increasingly accepted. As Hovenkamp eloquently points out:

> '[j]udges have spoken of antitrust law as a "consumer welfare prescription" for so long that the phrase seldom produces anything but yawns… The rhetoric of "consumer welfare" is very powerful. A statute declaring protection of consumers to be the goal of antitrust would probably pass Congress by a unanimous vote'.[3]

Those who consider that competition should serve only as a means to generate consumer welfare can be seen as advocates of 'utilitarian antitrust', which 'instrumentalises' competition, claiming that competition without efficiency does not deserve protection. According to Kroes, '[f]ree competition is not an end in itself – it is a means to an end'.[4] On the contrary, from the perspective of 'deontological antitrust', competition is perceived as a process. In its report on the mergers in contemplation *Safeway plc and Asda Group Ltd* the UK Competition Commission observed that '[w]hen working effectively, competition involves a process of rivalry between firms'.[5] This process constitutes a societal value in itself, even in the cases when this process does not lead to welfare gains, because '[v]igorous competition between firms is the lifeblood of strong and effective markets'.[6]

These two approaches to competition perceive differently the correlation between competition and consumer welfare. Indeed, the doctrinal relationship between the notions of 'competition' and 'consumer welfare' is ambivalent. On one hand they are analysed in their causal interconnection, where competition is seen as a way to generate welfare (from the utilitarian perspective). On the other hand, competition itself deserves its protection even in circumstances when it does not lead to efficiency gains (from the deontological perspective). As Schaub indicates, '[a]doption of a competition law is a political act. Thus, debate on objectives cannot be limited to economic arguments'.[7] Competition and welfare are considered in the mainstream discourse of antitrust analysis as mutually correlated. Such beneficial interdependence often implies their convergence, which causes several conceptual inconsistencies.

The 'merger' between competition and consumer welfare despite its practical usefulness leads to several analytical problems. One of them is terminological. Anticompetitory[8]

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3 Herbert Hovenkamp, *The Antitrust Enterprise. Principle and Execution*, Harvard University Press, 2005.

4 Neelie Kroes, "Free competition' is not an end in itself...', Concurrences, N° 3-2007.

5 'Safeway plc and Asda Group Ltd. A report on the mergers in contemplation', September 2003, UK Competition Commission. Cited in Mark Furse, *Competition Law of the EC and UK*, 6th Edition, Oxford, 2008.

6 White Paper 'Productivity and Enterprise' (Cm. 5233, July 2001), UK Government. Cited in Mark Furse, 'Competition Law of the EC and UK', 6th Edition, Oxford, 2008.

7 Alexander Schaub, Working Paper, Claus Dieter Ehlermann, Laraine L. Laudati (Eds), *The Objectives of Competition Policy - European Competition Law Annual 1997*, Hart Publishing, Oxford, 1998.

8 It is more precise to use the category 'competitory' instead of 'competitive'. The meaning of the latter term is much broader and apart from its antitrust sense (i.e. 'involving rivalry') it also encompasses the rather industrial meaning of 'competitiveness' as 'being of good enough value to be successful against other competitors'. See Oles Andriychuk, 'How the Theory of Dialectical Antitrust Perceives the Role of

agreement which benefits consumers often receives its immunity from antitrust sanctions and is usually called procompetitory, even despite the fact that its impact on competition remains negative. And other way around, some agreements which are harmful for consumers are called anticompetitory even despite the fact that they are either procompetitory or competition-neutral. Thus, landmark decision of the U.S. Supreme Court in *Leegin* case recapitulates this formula as well: 'The rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest',[9] explicitly equalising anticompetitory effects with the harm to the consumer.

The problem can be explained by the fact that the antitrust theory does not recognise that some market behaviour can be simultaneously pro and anti-competitive and, as Crane observes, that '[s]ome competitive practices that cause harm cannot be controlled without doing damage to similar competitive practices that do good'.[10]

An interpretation of competition solely as a means to increase consumer welfare eliminates substantial characteristics from competition as a process, depriving competition from its original meaning. According to McNutt, 'competition is a process, and as such can be described, rather than defined'.[11] Therefore it is necessary to elaborate methodological instruments for dialectical analysis of these interdependent phenomena without their logical juxtaposition.

It is misleading to define competition by evaluating its external role on the economy. This role is important only from the perspective of performance. From the ontological view however it is irrelevant. Some forms of competition are *good* or *beneficial* others are considered as *harmful* or *undesirable*, but in both cases we talk about different features of the same phenomenon. The idea that 'competition has to bring positive outcomes for economy, otherwise it is not competition' is logically incorrect. It is impossible to qualify the essence of object only by exploring its external effects.

Methodologically, the *effect* of competition on the consumer welfare has to be taken out of the factual context; or the other way around – competition initially has to be explored separately from consumer welfare. If competition indeed is as an independent societal value, then it should not be subordinated to the efficiency gains. The *outcomes* which it brings for the economy (those are usually measured in terms of welfare or efficiency) should be correlated with *competition-as-a-process* only at the external cognitive level. The former cannot just substitute the latter. The mechanism for correlation of different conflicting societal values is encompassed in the idea of balancing. Each

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Competition Authorities', The ICC Global Antitrust Review, Issue 2, 2009. http://www.icc.qmul.ac.uk/GAR/GAR2009/GAR%20On-line%20Oles%20Andrychuk%205.pdf

9 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

10 Daniel A Crane, 'Chicago, Post-Chicago, and Neo-Chicago', Reviewing Robert Pitofski (ed.), *How the Chicago School Overshot the Mark*, Oxford University Press, USA, 2008, in Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies April 2009, Working Paper No. 259.

11 E.g. Patrick A McNutt, 'Taxonomy of Non-Market Economics for European Competition Policy – The Search for the True Competitive Price' (2003) 26(2) World Competition 303.

regulator faces the necessity to compromise some values for the benefits of the others. By separating competition from consumer welfare, we can envisage the situations where welfare is prioritised over competition – but also other way around: in other cases competition could potentially receive its priority over welfare-related gains. Both situations are conceptually plausible. None would undermine the ontological essence of the value which has become de-prioritised, because the decisions of regulators are based on the unique constellation of the political preconditions which are impossible to predict ex ante with the scientifically relevant probability.

The distinction between utilitarian and deontological competition is implicitly recognised by some regulators, yet has not been sufficiently articulated. Thus, the UK Office of Fair Trading distinguishes competition from consumer welfare:

> 'the OFT views competition as a process of rivalry between firms seeking to win customers' business. This process of rivalry, where it is effective, impels firms to deliver benefits in terms of prices, quality and choice. When levels of rivalry are reduced (e.g. because customers have fewer firms among which to choose or because of coordinated behaviour between firms), the effectiveness of this process may diminish to the likely detriment of customers.'[12]

Thus, OFT recognises the possibility of competition which is not efficient for consumers, but this mere fact does not make this process anticompetitory.

Competition should not be seen as a zero sum game. Even in sports where the parties are fighting for the trophy, which by definition presupposes only one winner and the rest losers, there are other ancillary benefits (positive externalities) aside from the trophy. While most of these effects are neither expected nor directly strived for by the competitors, they bring added value to the market. Within this constellation, the very idea of competition is all about such externalities. The moment of unexpectedness is very important, since it shows the inherent elements of competition, which are of a similar nature to the invisible hand of the market. They are not sufficient for the existence of the contest, but their elimination makes the very concept of competition meaningless.

THE VALUE OF WEALTH

Today consumer welfare is a benchmark for competition. The idea of consumer welfare was imported into the antitrust context by representatives of the Chicago School.[13] They perceived consumer welfare as a standard of appropriateness for antitrust sanctions, though, as Crane notes, 'Chicago's non-interventionism is greatly

[12] Office of Fair Trading, UK, Mergers: Substantive Assessment Guidance, 2003 http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516.pdf .

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

overstated'.[14] The initial presumption was that such presumably anticompetitory practices as distributional restraints or some unilateral conducts are not illegal per se. Consequently, those practices can be cross-checked by the simultaneous benefits for the consumers and, as a result, being declared procompetitory. Thus the Chicago School had advocated 'soft antitrust', by applying a consumer welfare standard: allegedly anticompetitory conduct can be allowed if it brings benefits for consumers. As Fox indicates:

> '[t]he 1980s victory of the Chicago School was more a victory of economic libertarianism and political conservatism than of maximisation of a microeconomic welfare function. 'Consumer welfare' was the label given for the raison d'être of the new regime, but it obscured the fact that the real first principle was non-intervention'.[15]

She follows on by explaining how exactly the term 'consumer welfare' has been operationalised by policy-makers with its subsequent transformation into a benchmark of antitrust enforcement.

Nowadays the yardstick of consumer welfare serves also the opposite purpose. It requires the application of competition remedies in every situation where consumer welfare is likely to be violated. Some authors[16] explicitly equalise harm to competition with harm to consumer. Others go further, claiming that competition law should serve 'as a true means of consumer well-being maximisation'.[17]

Thus the Chicago School paved the intellectual way for its ideological opponents. By deconstructing the legal formalism of per se rules for the benefits of *laissez-faire* policy, the Chicagoans have elaborated conceptual techniques of legal realism. These techniques are widely used by the interventionalists, who apply the same *outcome-oriented* way of reasoning (i.e. consumer welfare standard) for the regulatory purposes which are diametrically opposite to the Chicagoan *laissez-faire* ideals.

The situation was somewhat different in earlier stages of competition policy in Europe, when the Ordoliberal School put on the agenda the necessity to defend the right to compete, considering this a fundamental part of the economic constitution. This being said, while ordoliberals were much closer to perceiving competition as an independent value, even the ordoliberal vision of antitrust did not encompass the notion of

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[14] Daniel A. Crane, 'Chicago, Post-Chicago, and Neo-Chicago', reviewing Robert Pitofski (ed.), *How the Chicago School Overshot the Mark,* Oxford University Press, USA, 2008, in Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies April 2009, Working Paper No. 259.

[15] Eleanor M Fox, 'We Protect Competition, You Protect Competitors', (2003) 26(2) World Competition 149.

[16] John Temple Lang, Robert O'Donoghue, 'The Concept of an Exclusionary Abuse under Article 82 EC', Global Competition Law Centre Research Papers on Article 82 EC July 2005: 'It could be argued, with some force, that […] there is no harm to the "structure of competition" that, ultimately, does not also lead to direct consumer harm. […] Put differently, there can be no case for intervention under competition law where there is harm to the competitive process, but none to consumers'.

[17] Eugene Buttigieg, 'Consumer Interests Under the EC's Competition Rules on Collusive Practice' (2005) 16(3) European Business Law Review 643.

competition as a fundamental ideological choice. It limited antitrust concerns mostly to the rights of competitors, their ability to compete combined with the regulatory idea of 'liberal interventionism'.[18] Thus, although the ordoliberal approach is the closest to solving the antitrust paradox, at the end it treats it as 'the Gordian knot' and offers a more prescriptive than analytical remedy.

Discussion about the relationship between deontological and utilitarian elements of public values is not unique to antitrust. Debate concerning the relationship between deontological rights and utilitarian interests are going on in the domain of legal theory and political philosophy. The spectrum of arguments of both parties is wide and persuasive. Competition law discourse, on the contrary appears to be rather ignorant of this dilemma, which is still implicitly presented in many antitrust considerations. One of the most fruitful polemics in the field occurred between Ronald Dworkin[19] and Richard Posner.[20] Dworkin argued that wealth maximisation should not be seen as a per se legitimate benchmark of the political and judicial interpretation of law. He justified his argument, questioning 'why social wealth is a worthy goal. Who would think that a society that has more wealth, as defined, is either better or better off than a society that has less'?[21]

'Wealth', as utilitarian category, can be seen in the context of antitrust as 'consumer welfare'. Dworkin claimed that if the only standard of appropriateness is wealth maximisation, then every time wealth can be maximized at the expenses of violation of law, it would be done so, because obedience to legal rules is not always the most efficient way to increase welfare. Posner, on the contrary, stated that wealth maximisation will inevitably lead to the development of such deontological values as respect of human rights and individual freedoms and other personal virtues. Furthermore, Posner believed that wealth should not be perceived as utility. He illustrated his claim by showing that '[t]he difference between wealth and utility is that wanting something very much, but not being able to pay more for it than its owner or competing demanders, does not establish a claim to a good in a system of wealth maximization, although it might do so in a system of utility maximization'.[22] Thus, he essentially shifts the debates from a 'rule vs reason' dimension to a 'left vs right' ideological battle. Even under the latter constellation, however, such values as negative economic freedom and wealth maximisation can be in a direct conflict with positive rules and/or moral imperatives.

In the context of antitrust, the utilitarian vision of competition would support only 'the most effective' forms of a competitory process (i.e. those forms of competition, which

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[18] Christian Joerges, Florian Rödl, 'Social Market Economy as Europe's Social Model?', European University Institute Working Paper, Law, No. 8, 2004.,

[19] Ronald M Dworkin, 'Is Wealth a Value?', (1980) 9(2) Journal of Legal Studies 191.

[20] Richard A Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman' (1980) 9(2) Journal of Legal Studies 243.

[21] Ronald M Dworkin, 'Is Wealth a Value?', op cit, n 19.

[22] Richard A Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman', op cit, n 20.

bring the benefits for consumers). Those who advocate competition as an independent value claim that the genuine criterion for competition has to be the very intention to access the market. The greater the desire to enter, the greater is competition. The level of competition does not depend on the conditions of accessing the market. Competition can exist in both formats: opened for external competitors and closed for them. In terms of behavioural economics, the main criterion for measuring competition is the willingness of potential competitors to enter this market (not, as it is traditionally suggested, a lack of barriers to entry) and vice versa unwillingness of existing competitors to leave the market (not, as it appears to be with closed markets, the reluctance to block the entrance for the newcomers). It is not to say that a closed model is more desirable for society than an open one, but rather to point out their 'relative irrelevance' for competition. It is not the *structure* of the markets, which is detrimental for measuring competition-as-a-process, but rather their *attractiveness*. Competition in this behavioural context appears similar to the Freudian libido, 'Ordo instinct of economic life', Hayekian 'competition as a discovery process' or to Darwinian notion of 'competition as nature's God'.

PARENTHESES THEORY

$(2 \times 2) + 2 \neq 2 \times (2 + 2)$

Methodologically the conflict between competition-as-a-process and other legitimate societal values (such as welfare-oriented values) can be explored by application of the parentheses theory. The idea behind this method has ancient roots. Essentially, it is borrowed from the language of mathematics. Its formula is: $(2 \times 2) + 2 \neq 2 \times (2 + 2)$, which means that the identical arguments provide different results, depending on their proportion and correlation with one another or depending on the scope of the parentheses. The presence of the parentheses, as well as their place in the equation, changes (sometimes dramatically) the outcome.

Epistemologically, the parentheses relate to the ability to separate a phenomenon for its following independent analysis. In verbal language, the items, taken within the parentheses would mean the consideration of a certain notion as a 'thing-in-itself', outside of the context. A thing-in-itself has to be distinguished from the phonetically similar notion of an 'end-in-itself'. While the former explores the matter without any external context and influence of other things, the latter strives to subordinate everything to it. An end-in-itself has the tendency to internalise and all neighbouring items, whereas a thing-in-itself, on the contrary, tends to exclude alien elements in order preserve the integrity of the cognitive analysis. The former makes a case for domination, the latter – for separation.

Regardless of the practical usefulness, on the abstract level, the things have to be explored with no linkage to other objects, however close and inseparable the connection with other phenomena might appear to be in real life. In the domain of antitrust, competition as a process should be explored without any direct connection to ancillary objects. The rationale behind this claim is valid, if we perceive – as this paper

does – competition in its deontological sense. Its 'structural separation' from welfare-oriented values is politically legitimate and logically substantiated, because competition in its economic, cultural and a political senses constitutes the fundament of liberal democracy.

There are direct parallels between the political dimension of competition (encompassed in the idea of the elections, where political parties *compete* for being prioritised by the electorate), its cultural dimension (where intellectual and artistic ideas are freely circulated among the people) and its economic dimension (where firms compete in the markets). All three dimensions of competition are inevitable for liberal democracy. If the hypothesis of this paper is correct, then the economic aspects of competition-as-a-process should be protected regardless of its eventual outcomes. We do not protect only *good* political parties and we do not support only *good* cultural ideas, believing that the competitory framework itself deserves its protection too. The same is the case for the economic competition: it should be protected not (only) because it generates the best outcomes, but as a matter of principle and as a matter public choice. If the former is true, then competition should be methodologically separated from other legitimate societal values for its independent theoretical examination. There is enough room for the following re-focusing and re-investigation of the influence of competition on consumer welfare, but these two analyses should be conducted separately.

On the ontological level, the purposes of different policies are balkanised and controversial: the closer to borders with another policy, the more explicit such controversies become. As Schweitzer indicates, 'competition law norms cannot incorporate an open balancing of all goals set out in Art. 2 and 3 of the EC Treaty without losing their meaning and effectiveness'.[23] Policymakers perform a balancing of different policies and objectives in accordance with their rational political choices and ideological persuasions. Inasmuch as one can prove that competition constitutes a genuine thing-in-itself, which initially has to be internally evaluated and only later undergone the external balancing test, it will be possible then to elaborate a hierarchical constellation of different societal objectives and formulas of their correlation. According to Kirchner, 'competition policy is competing with other policies which may pursue conflicting ends, e.g. agricultural policy, industrial policy, environmental policy'.[24]

This paper tries to prove that competition-as-a-process not only deserves to be explored as a separate phenomenon, but also that due to its internal characteristics it has to be considered among the highest priorities in the taxonomy of values and objectives of the European social-market economy in conformity with Articles 3(1)(g) and 4(1) EC. Competition, therefore, should be seen a *luxury product*, a matter of a deliberate public choice rather than an *indispensable element* of governance. The

[23] Heike Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81', EUI Working Papers, Law 2007/30, Florence, 2007. .

[24] Christian Kirchner, 'Goals of Antitrust and Competition Law Revisited' in Dieter Schmidtchen, Max Albert, Stefan Voigt (eds), *The More Economic Approach to European Competition Law*, Mohr Siebeck, Tubingen, 2007.

protection of competition-as-a-principle safeguards it from the necessity of being permanently correlated with the 'efficiency benchmark'. Thus after being raised up to the level of the constitutional value, competition sometimes can be *inefficient*. Its inefficiency does not necessarily cancel its legitimacy.

The external balancing of different legitimate societal goals has to be performed on a *par in parem* principle, whereas none of these policies has to serve as a final aim for another. This theoretical discussion is indispensable in antitrust theory. One of its dimensions is a correlation between the passive right to compete and the proactive right to benefit from successful competition. Usually the successful competitor is protected by property rights, which reaffirms the existing state of affairs and in static terms protects his 'right to be successful'. Originating in liberal economics and 'modernised' by the Chicago School it intuitively strives to protect such successful competitors, but in a quite unexpected methodological way. Instead of referring to the natural right to economic success or natural right of property, which are in the same hierarchical system with the right to compete, it relies on an argument of consumer welfare; instead of saying 'PR = RC it says PR → CW'; instead of saying in deontological terms 'the Right to Compete is as natural as a Property Right' (and therefore the tradeoffs between them are possible on a level of political choices), it says in utilitarian language 'the Right to Compete leads to Consumer Welfare' (and therefore it has to be protected).

The right of successful competitors to benefit from their commercial power is the most appropriate counterbalance to the right of the real and potential competitors to enter into a competition. The main problem with this equation is that it does not leave room for legal and economic certainty: each reasonable economic act has some benefits for some consumers; hence, it immunises the actor from the responsibility of a violation of the right to compete. If one would still mention this logical inconsistency, s/he will be advised to try to look outside the boxes. However, there is no such thing as thinking outside the framework of the premises. The logical reasoning *ipso facto* presupposes a system within which to operate. Logical thinking is possible only inside boxes. Each abstraction requires structural certainty.

The main practicality of the parentheses theory is that it provides an effective tool for the separation of means from ends; it offers a method of re-establishing the causal linkage whenever it has been lost incidentally or changed intentionally. For instance, depending on the context, one would prefer listening to music to reading a poetry, or even would consider this as a zero-sum game (i.e. the more s/he listens to music the less time remains for reading a poetry), yet this ad hoc rational choice of the individual by no means reflects the essence of both – *reading* and *listening*. It is so even regardless of the fact that from a subjective utilitarian perspective these practices will be in direct conflict with each other.

The separate and independent existence of competition law is not a necessity, if it does not pursue *sui generis* tasks. If its task is limited to total welfare maximisation, it is a total welfare maximisation law, if it is limited to the maximisation of consumer welfare – it is

a consumer welfare law etc. Competition policy may be pro-consumer, consumer-neutral or anti-consumer, because the primary purpose of competition policy sensu stricto is *protection* of competition-as-a-process (Art 81-82 EC and major part of merger regulation) and the secondary purpose of competition policy sensu stricto is *promotion* of competition-as-a-process (sector-specific regulation, liberalisation policy and some elements of merger regulation). The internal incentives of competition policy should never be neither competition-neutral nor anticompetitory. Antitrust policy has to be concerned only with competition-as-a-process. If competition happens to be anti-consumer, government has to decide to what extent it has to apply it. Such a trade-off is inherent to every regulatory action.

As Lowe shows:

> 'competition authority should ideally intervene at the right time […] In the real world, however, external constraints – resulting from limited resources and the institutional context – often disrupt this ideal. No competition authority has the resources to do all possible cases. Some form of prioritisation is necessary'.[25]

Each political decision is the consequence of many compromises between different policies. Such compromises, however, do not reflect the nature of these policies. The utilitarian reduction of competition to its positive influence on consumers is only practical from the political point of view, since it allows conducting a more effective governing. However, scientifically this approach is reductive and purpose-oriented and therefore doubtful.

CONCLUSIONS

Why is it necessary to distinguish competition as a deontological value and welfare-oriented utilitarian values as two epistemologically different policies? Beside theoretical clarity, taking them in separate parentheses helps to find proper causal links between them. It is not the same to say the 'European economy is efficient because it ensures the freedom to compete' and 'the freedom to compete exists because it ensures the efficiency of the European economy'. In these days of fast economic growth of planned-oriented economics with the command-based approach to the regulation of the markets and against the current background of recession in many liberal economies, one could rhetorically dispute the efficiency of the latter, and give priority to allegedly more efficient models of economic regulation.

Presuming that this is the case, then should we sacrifice the freedom to compete to alleged economic efficiencies that arise from the restriction of this freedom? The freedom to compete is a thing-is-itself, which is inevitable for the liberal spirit of European democracy. The limits of this freedom are possible only in its external application, inasmuch as it has to be counterbalanced with other interests in the society. Economic efficiency and consumer welfare are valuable and legitimate goals of

[25] Philip Lowe, 'The design of competition policy institutions for the 21st century – the experience of the European Commission and DG Competition', Competition Policy Newsletter, Number 3, 2008.

European economic policy as well, but they are not goals of antitrust itself, they are the goals of economic-efficiency policy and consumer-welfare policy respectively.