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## Competition overdose: Exploring the limitations, searching for the treatment

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# Competition overdose: Exploring the limitations, searching for the treatment

## ABSTRACT

In this On-Topic we have invited prominent competition lawyers and economists – from academic, judicial, enforcement and practice sides of the profession – to discuss a book by two leading antitrust thinkers. The book “Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants” by Maurice E. Stucke and Ariel Ezrachi makes a sad – though not indeed fatal – diagnosis to some axiomatic values and practices dominating antitrust as well as the overall neoliberal agenda over the previous decades. The book has generated remarkable and diverse attention in the discipline and far beyond. All contributors were invited to reflect not only on the book but also on each other’s pieces. This makes the genre of the volume closer to a classical symposium.

## Introduction

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## The state and the market: Reflections on Competition Overdose

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## Competition, ideals and law: The transborder context

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## Competition as a tool

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## Consumer Overdose and why consumer protection is good for competition

**Amelia Fletcher**

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## On being competitive

**Jorge Padilla**

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*Dans le cadre de ce Dossier, plusieurs juristes et économistes reconnus dans le domaine de la concurrence ont été invités à échanger et à commenter le livre «Competition Overdose : How Free Market Mythology Transformed Us from Citizen Kings to Market Servants» écrit par Maurice E. Stucke et Ariel Ezrachi. Ce livre pose un diagnostic triste – sans être pour autant fataliste – sur certaines valeurs et pratiques axiomatiques qui ont dominé l’antitrust ainsi que l’agenda néolibéral global au cours des dernières décennies. L’ouvrage a suscité une attention considérable chez des spécialistes en concurrence et bien au-delà. Les contributeurs du Dossier ci-dessous sont des experts issus des milieux universitaires et judiciaires qui maîtrisent l’application des règles en pratique. Leurs réflexions portent non seulement sur le contenu du livre en tant que tel mais aussi sur les contributions des autres auteurs. Ainsi, le Dossier se rapproche à un symposium classique.*

## Regulation underdose?

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## A tirade against dogma

**Sir Philip Lowe**

Partner Oxera Consulting, Brussels

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Chair of the EUI Florence Competition Law and Policy Workshop

## Competition Overdose, “noble co-opetition”, and the climate change example

**Maurits Dolmans**

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## A new plurality of objectives in antitrust law?

**Daniel Zimmer**

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## Contribution to debate on Competition Overdose

**Juliane Kokott**

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**Hanna Schröder**

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## Afterword

**Ariel Ezrachi**

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# Introduction

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1. The scholarship of two prominent members of the antitrust community—Ariel Ezrachi and Maurice Stucke—was never limited only to the genre of classical academic publications, exploring various issues of economic competition within the established disciplinary boundaries and by traditional methodological apparatus. The authors expand the scope of their intellectual impact, publishing widely on the issues of competition from a broader societal account. As with their previous blockbuster *Virtual Competition*,<sup>1</sup> the new book *Competition Overdose*<sup>2</sup> has attracted remarkable attention, generating intense discussions in various competition circles and—most noticeably—far beyond.

2. *Competition Overdose* is in many respects a provocative and iconoclastic piece. It is a book written to expand the narrow, insulated, inward-oriented professional framework of competition law by embedding it into the broader socio-economic, political, philosophical and ethical contexts influencing our field.

3. It becomes clear from its very title and writing style that the book intends to trigger a new wave of discussions about the role of competition policy—which is rapidly changing, re-discovering itself—and even more fundamentally: about the very meaning and the real value of economic competition.

4. The book has interested me to the extent that I have written for *Legal Studies* a review article, articulating ten central features of the phenomenon of economic competition, which require an engaged discussion by the epistemic community of competition thinkers.<sup>3</sup> These issues concern several normative and methodological stereotypes and misunderstandings embedded deeply in most of the discussions on the goals and function of competition

law, economics and policy. The book addresses many of them. Among the main topics, which in my view would benefit from a reconceptualisation, and which are directly relevant to the normative and methodological focus of the *Competition Overdose*, are the following three:

- The first concerns a false dichotomy between the Invisible Hand of the market and the regulatory intervention. The situation is often being presented as if the idea of competition qua a spontaneous order, qua a spirit of entrepreneurship, qua a discovery procedure is categorically subsumed to and exhausted by the notion of libertarian laissez-faire. The Invisible Hand of the market is then juxtaposed to the Visible Hand of the regulator, reaching a bold conclusion that when regulators intervene into the spontaneous market process, the mystery/invisibility evaporates. This supposition, in my view, is only partially correct. It is correct in the sense that all libertarian, non-interventionist theories of competition are in one way or the other based on the notion of the Invisible Hand. However, it is incorrect to portray all pro-intervention theories of competition as those denying/destroying the principle of the Invisible Hand of the market. Some do indeed refute the notion of invisibility, seeing it either *rationality* as being economically redundant and suboptimal in terms of resource allocation or even *normatively* as a manifestation of an ethical vice. These essentially socialist ideologies however do not exhaust the spectrum of pro-regulation theories of the market, and it is wrong to polarise competition and intervention. The conclusion being, in other words, that it is both conceptually possible and normatively desirable to have a meaningful pro-regulation theory, which is fully based on or at least significantly appreciates the value of competition qua the Invisible Hand.
- This led me to the second central point: the notion of the Invisible Hand of the market concerns (primarily) not its incompatibility with State intervention, but (mainly) its incompatibility with mathematical measurability of neoclassical economics and absolute certainty of positivistic law. By definition, the *invisible* hand cannot become *visible*: it would

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1 A. Ezrachi, M. E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016).

2 M. E. Stucke, A. Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (Harper Business, USA, 2020).

3 O. Andriychuk, “Competition Overdose”: Curing Markets from Themselves? Ten Points for Discussion, *Legal Studies*, Vol. 41, No. 3, 2021, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3918775](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918775).

be an oxymoron, a *contradictio in terminis*. So, the invisibility of market's hand should be contrasted not with the regulatory intervention but rather with the mathematical scientification of antitrust. The holistic beliefs in the capacity of advanced mathematics and legal casuistic to discover the indiscoverable are in fact the real antagonists to the notion of competition as a spontaneous order (and incidentally, the indirect protagonists of central planning). Contrary to most laissez-faire theories, the argument goes that the mystery of the invisible hand of competition evaporates not at the regulatory intervention period, but at the period of its scientific visualisation.<sup>4</sup> The deterministic reliance on axiomatic formulas assigns economic attributes of natural science. In reality though economics is a social science, embedded deeply into the broader societal matrix. Clearly, my criticism concerns not the established legal and economic benchmarks as such, but only (and merely) a holistic belief in their absolute, deterministic universality and infallibility.

- Finally, synthesising the two previous points, the argument went to say that managing the competitive process as the only internal goal of competition law, economics and policy presupposes a harmonious coexistence of spontaneity and intervention as well as discipline's simultaneous openness and closure.<sup>5</sup> Each society—and in each context—defines concrete parameters of such coexistence. These parameters are to a large degree predetermined and constrained by institutional factors<sup>6</sup> as well as dominant economic and legal theories. In the era of polycentric antitrust<sup>7</sup> they are additionally being influenced by (but equally contribute to influencing) other legitimate societal values and challenges. Competition as a spontaneous order is akin in this sense to human libido—the vital energy, which drives our desires of self-fulfilment and self-satisfaction. Being the driving force of every human, it requires harmonious dialectics of nature and nurture. If left unregulated, it is likely to become a cause of various vices and distortions. This non-steered and unconstrained spontaneity would lead to self-distortion. If fully constrained, measured and regulated, it is equally likely to mutate into another perversion. The *ad-hoc* balance is somewhere in-between. Clearly, it is a non-utilitarian (or rather a utilitarian but in its non-welfarist fashion) normative claim about competition's real meaning and role. Elsewhere I argued that this is essentially the central characteristic of the competitive process as seen in its political (elections), cultural (free speech) and

economic (markets) aspects.<sup>8</sup> All three incarnations of the competitive process constitute the distinctive feature of liberal democracy.

5. Subsequently, Concurrences has honoured me with an invitation to guest-edit a special issue dedicated to the book—or rather to the foundational, quintessential issues, articulated by the book. This format and this venue offered an ideal opportunity to invite leading antitrust scholars and practitioners, representing very different disciplinary, normative, methodological and jurisdictional areas, but united in the excellence of their unique, authoritative and independent voice and opinion, as well as by their paradigmatic ability to shape and interpret ideas, steering the intellectual evolution of competition law, economics, policy, ideology and philosophy.

6. This collection offers an exciting set of essays on the development of antitrust theory, written by prominent antitrust thinkers through the prism of Ariel Ezrachi's and Maurice Stucke's *Competition Overdose*. This issue, however, is not a mere book symposium. The contributions go beyond the content of the book, engaging in a creative dialogue with the ideas articulated by the authors. *Competition Overdose* is thus the central reference point, keeping this volume together, but not constraining the intellectual autonomy of the contributors.

7. As with any collection of essays, written by authors with different disciplinary, jurisdictional, methodological and normative background, there was a risk of producing mechanistically a compendium of texts, each of which being interesting in its own right, but bringing little to the volume as a harmonious whole. To avoid this common epistemic trap, we have agreed to move the deadline for the submissions one month ahead, circulating all submitted drafts between all contributors, and inviting them to engage additionally with each other's texts where they think it is necessary. This allowed to produce a coherent volume, which offers contributions by leading antitrust experts, reflecting on the issues, raised by *Competition Overdose*—but also commenting on the ideas raised by each other. This approach is the golden standard in other areas, but it is seldom used in our domain.

8. The volume as it stands offers the readers an opportunity to engage with three layers of dialogue: (i) the dialogue with the book; (ii) the dialogue with the reflections on the book as perceived by the contributors; (iii) as well as the dialogue with the reflections of contributors on each other's pieces. Finally, the readers are offered a detailed feedback by Ariel Ezrachi and Maurice Stucke on the issues raised by the contributors to this collection.

4 O. Andriychuk, Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law, *Modern Law Review*, 2022, early view: <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12700>.

5 S. Makris, Openness and Integrity in Antitrust, *Journal of Competition Law & Economics*, Vol. 17, No. 1, 2021, pp. 1–62.

6 A. Ezrachi, Sponge, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2016, pp. 49–75.

7 I. Lianos, Polycentric Competition Law, *Current Legal Problems*, Vol. 71, No. 1, 2018, pp. 161–213.

8 O. Andriychuk, Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process, *European Competition Journal*, Vol. 6, No. 3, 2010, pp. 575–610, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1781512](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781512). O. Andriychuk, *The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust through the Lens of Legal Philosophy* (Edward Elgar, 2017), pp. 121–177.

9. Some contributions are written in a genre of polemic, using occasionally a vivid and even provocative rhetoric. This is inevitable as the book itself aims to generate such a discussion. Despite *Concurrences*' global reach and impact, the community of antitrust scholars is small and friendly. All authors have utmost respect to each other, and their occasional criticism and irony is part of the genre. The discussion should be seen through this prism—as a friendly intellectual ping-pong of ideas, as a coffee break, not as an outbreak.

10. The remainder of this introduction outlines briefly each contribution—clearly, there is no need to introduce the contributors.

11. The volume opens with a piece by Diane Coyle, offering a philosophical account of the phenomenon of economic competition and its role in shaping our society. The paper outlines various instances of “competition overdose,” looking in particular at enforcement standards, digital markets and the problem of choice. It offers some compelling intellectual remedies to the situation.

12. The next contribution is written by David Gerber. He offers an ethical perspective of the problems articulated by the book and broader literature on the goals, nature and function of competition, shaping a number of universal, cross-jurisdictional themes for discussion. In Gerber's judgement, *Competition Overdose* “foregrounds fundamental questions that antitrust orthodoxy has long obscured.” His paper aims to bring some light and clarity to the selected issues, relevant to the problem.

13. Pier Luigi Parcu provides a reassessment of the normative diagnosis of the book. While agreeing with most of the propositions of the authors, he focuses his contribution on the issue of the overdose from a different perspective. The attributes of overdose, the diagnosis, in Parcu's view are more suitable to the phenomenon of capitalism than to the phenomenon of competition. From this argument, he develops a number of appealing conclusions.

14. Amelia Fletcher begins her reflection on the book, by stating that it is indeed shocking that so many issues articulated by *Competition Overdose* yet required articulation. While the book is enjoyable, the nature of the issues it addresses is indeed depressing. She raises and discusses carefully a number of important examples of such a disappointing situation on the markets, focusing chiefly on the aspect of consumer protection.

15. In their co-authored piece Jorge Padilla and Salvatore Piccolo ask an ontological question of what it is for a firm to be competitive. Their normative stand is in many respects different to the one elaborated by the authors of

the book. Padilla and Piccolo aim to demonstrate that even in oligopolistic markets a firm may be (or rather “usually is”) competitive. They essentially develop an argument closer to the point of the inalienability of competitive dynamics from the markets, underpinning their normative position with the analysis of some relevant economic models.

16. The piece by Svend Albaek asks metaphorically whether instead of the alleged competition overdose we in reality have more of a regulation underdose. The paper is written in a genre of a friendly—and witty—polemic, engaging with many arguments of the book rather from a critical perspective, concluding rhetorically: “*I do not think that we live in the best of all possible worlds. However, I also do not think that things are quite as bad as Profs Stucke and Ezrachi would have us believe.*”

17. In his contribution to the volume, Sir Philip Lowe continues with the genre of academic pamphlets, calling his paper “A Tirade against Dogma,” enriching it with a number of personal observations and rather not well-known historical facts on the evolution of the EU competition policy, but also with insightful reflections on the theoretical foundations of economic competition as such.

18. The next piece is written by Maurits Dolmans. The author proposes a specific normative focus. He projects the main arguments of the book to the wide spectrum of problems related to competition law and sustainability, offering a great example of internalising the theoretical scholarship to the doctrinal as well as the broader societal context of climate change.

19. Daniel Zimmer discusses in his paper a seminal question of a new plurality of objectives in antitrust law, offering an exposition of several of the most prominent “Competition and...” movements. He finishes with an analysis of a new understanding of the concept of fairness in EU competition law, linking it convincingly with the central message of *Competition Overdose*.

20. At the end, the readers are offered a co-authored piece by Juliane Kokott and Hanna Schröder, in which the authors offer an astonishing synthesis of their personal academic opinions with the analysis of the book as well as a constructive discussion with most of the other contributions in this volume. The arguments are substantiated with reference to relevant cases.

21. In the Afterword to the volume Ariel Ezrachi and Maurice Stucke offer their comments, feedback and reflections on all contributions, allowing the readers to make an informed and comprehensive conclusion about the book itself as well as the cascade of astonishing questions it has triggered and will continue to trigger. ■



# The state and the market: Reflections on Competition Overdose

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1. The idea of “competition” is, as Maurice Stucke and Ariel Ezrachi observe toward the end of their book, open to several interpretations. It is a word whose use by economists tends to differ from the meaning intended in normal usage, or even legal usage. Competition in economics refers to the rivalry among businesses to attract customers, often by charging lower prices but also by offering higher quality, more choice or better service. Markets differ in their degree of competition, depending on how many firms share total sales and to what extent a few big firms dominate, and on how easy it is for new entrants to attract customers and make a reasonable profit. The degree of competition in this sense is positively correlated with good economic outcomes such as more innovation or higher aggregate productivity (CMA 2015).

2. Businesses also think of competition in terms of rivalry but rarely welcome it. Even dominant firms will complain about the intensity of the competition they face. As Andy Grove of Intel once put it in the title of his book, when the company was at the height of its dominance of the chip market, *Only the Paranoid Survive* (Grove 1996). Thus Google or Goldman Sachs, large companies in quite concentrated markets, assert that they face stiff competition. The economists’ concept of competition is not the same as this kind of oligopolistic rivalry. Rather, it is ultimately with ensuring a market structure that serves consumers with good and safe products and services, does not rip them off with prices far above costs, and encourages and enables innovation.

3. As *Competition Overdose* sets out in some detail, there are many markets in modern economies that do the opposite of this. There are forms of rivalry, often arms races, that degrade product quality and harm customers. Cutting headline prices may mean skimping on quality or service. Online marketplaces make use of hidden charges and dark patterns to overcharge consumers. The book also argues that there is too much choice, an overdose of choice being used with intent to confuse consumers,

imposing cognitive overload. This has some intuitive appeal; I remember being unable to buy toothpaste on my first trip to a US supermarket on arrival in the country in 1981, overwhelmed by the variety. I will return to the “too much choice” claim later. Still, it is hard for any open-minded economist to disagree with the claim that 21st century market economies are not serving us well, and that actually-existing forms of competition are dysfunctional, far from the economists’ ideal of “competition” serving society.

4. In this comment I will offer a different diagnosis of these symptoms of dysfunction, however. The fundamental issue, common to at least three of the “overdoses” identified in the book, is that economic analysis in competition policy has adopted a universally technocratic approach, looking at the rivalry between businesses in a framework of laws and regulations taken as given. Yet the “efficiency” that adequately competitive markets are meant to deliver is a normative concept. However, competition policy frameworks have ignored the unavoidable role of the state in setting the framework of normative aims within which economic markets operate, and hence the inherently political (with a small p), value-laden, character of competition. Structural trends are making it increasingly impossible to ignore the political and moral character of competition, however, from the dominance of big tech in online markets to the growing role of Chinese state-owned enterprises in western markets through trade or direct investments (Dahmen 2022 forthcoming).

5. So I reach a somewhat similar conclusion to Ezrachi and Stucke, but with different implications for policy choices. It is the ideology of the separation of state and market, and valorizing of “market” outcomes over public interventions, that has created dysfunction and consumer harm. Markets and state are both terms for collective economic organisation and need to operate together for the common good (Coyle 2020, Tirole 2019). “Too much competition” is not the problem.

# I. Dimensions of competition

6. Rankings have become ubiquitous as an information device supposed to empower consumer choice. Chapter One of *Competition Overdose* highlights the egregiously counterproductive effects of US college rankings, which do anything but enable would-be students to select the higher education offer best suited to them. There are many other examples; the next section of this comment considers the effect of price comparison websites.

7. An important origin of rankings was the introduction of the ideology of individual choice in a market context by the Thatcher and Reagan revolutions in public policy. These drew inspiration from intellectual trends in economics and political science, specifically public choice theory (Munger 2015) and the literature on New Public Management (NPM) (Hood 1991). The notion was that sufficiently well-informed consumers or citizens would not need the nanny state to make decisions for them, and that more information would make for better choices. Rankings would be able to fill information gaps, particularly in contexts such as public services where there is no direct market price, or in markets where prices can be observed but there are quality dimensions essential to making an informed choice, such as higher education. Since the 1980s there has been a proliferation of rankings, including in education, hospitals, and insurance for example—all services where there are substantial asymmetries of information. The problem is that rankings change the behaviour of those being ranked; information is not exogenous to the world it describes.

8. The empirical evidence on the benefits and costs of rankings, their impact on both service quality and choice is mixed (Lapiente 2020). For instance, some research on hospital rankings in the English NHS suggests that these improved patient outcomes (Propper 2018). But as the US college rankings example in the book shows, the existence of the league tables distorts provider behaviour. There is ample evidence of similar distortions caused by NPM league tables in UK public services (for example, Gruber et al. 2018).

9. Interestingly, the problem of choice distortions caused by information structures is paralleled in the growing use of machine learning (ML) systems to make decisions. One core challenge in using ML algorithms is specification of the reward function. An algorithm used in criminal justice to decide who gets parole cannot optimise for an objective function stating: “*See that justice is done.*” It will need specific indicators that measure “justice” outcomes, and any indicators will be narrow measures of the underlying aim—just as in public services waiting list times are a narrow measure of “*treat patients quickly to ensure the best possible health outcome, while triaging effectively when demand is high.*” Depending on the metrics selected, the outcomes of the algorithmic choice may be far from the true human intention (Coyle & Weller 2020, Russell 2019).

In the field of AI, as in the literature on NPM, this alignment problem is much discussed; the impact of other rankings less so.

10. It is a fair conclusion that rankings will distort market choices by causing a race, if not to the bottom, then crowded along just one lane. The outcomes we want to see from market choices have more dimensions than can be captured in a specified list of indicators, which will trigger damaging feedback loops. Unfortunately, this leaves us without a good solution to the challenge of how law and regulation can structure markets where there are substantial inherent information asymmetries. Both market and regulatory approaches have to grapple with that fundamental problem. On the face of it, filling the information gap with league tables was a reasonable way to think about empowering people. How to resolve the resulting dysfunction will vary greatly depending on context, but “less competition” is not an easy fix.

## II. Enforcement of standards

11. The second issue raised in *Competition Overdose* is another race to the bottom, the intensity of cost pressures leading rival businesses—most of the examples are food retailers and the food supply chain—to cut prices by cutting quality. Consumer attention focuses on prices, as does competition policy attention especially in the US. Prices are easy to observe while quality is not. As someone based in the UK, food retailing is not a sector I would consider to be competitive. Supermarkets were the subject of a major Competition and Markets Authority Market Investigation (CMA 2010), are subject to ongoing controls as a result because of their monopoly power as buyers, and have recently been subject to regulatory action because of their breaches of the requirement that they do not stop rivals opening nearby stores (CMA 2020).

12. Nevertheless, it is the case that both economists and normal people tend to focus on price at the expense of other aspects of a product or service. It is much easier to observe the price than it is the quality of a service once paid for. This has led—spurred by the immediacy of online comparison—to practices such as add-on costs that only become apparent as people click through toward a checkout (discussed in Chapter 3 of the book, and below), or to price comparison tables that distort product offers as providers cross-subsidise new customers with low prices that keep them at the top of these rankings by overcharging loyal customers. The “loyalty penalty” has been the subject of investigation by the CMA (CMA 2018) following a super-complaint from Citizens Advice.

13. In these contexts, the degree of competition does not seem to be the root cause. There are some fundamental challenges concerning what metrics are good indicators of “true” quality, as discussed above, and also concerning

the cognitive load that consumers can be expected to bear in making choices in a complex information environment (BIT 2018). The policy challenge, though, is entirely different. While the book calls for “regulatory awareness” of the costs as well as the benefit of competition, the solution to the food chain problems seems altogether more straightforward: it is enforcing existing standards regulation. There are ample protections in law against adulterating food, or using slave labour, but they are inadequately enforced. In the UK, in the food quality context, the Food Standards Agency has faced massive budget cuts and had to shed a quarter of its workforce between 2009 and 2019. Yet if they had confidence that minimum quality standards were enforced, consumers could rely on price comparisons. Likewise they should be able to rely on the protection of suppliers to the supermarket chains not being exploited by monopsonists. There have been similarly failures to enforce labour law in markets where some companies have monopsony power, particularly so-called “gig” platforms (Adams-Prassl et al. 2021).

14. For competition in a market to operate for the common good, the rules by which the market operates are profoundly important. Laws governing minimum standards have long been fundamental; so is their enforcement. One consequence of the philosophy of the minimal state, and the idea of state and markets as opposites, has been the hollowing out of enforcement and even the neglect of the need for the government to set key standards. Taxpayer funding for food safety is not a regulatory cost, but rather an investment in enabling the market to operate efficiently. The policy solution to this “overdose” is adequate enforcement of the standards setting the market framework, a function of effective government for centuries.

### III. Digital challenges

15. As noted above, online markets appear to manifest some troubling developments in the way competition takes place to the detriment of consumers, including the focus on headline prices rather than the total cost after all the add-ons. Chapter 3 in *Competition Overdose* focuses on the way online providers, in particular (although far from exclusively, as *Mad Men* so enjoyably testified), exploit human psychology. This surely helps explain the growing interest of competition authorities in behavioural economics and the psychology of consumer choice. The price tag “free” seems to have particularly irresistible power, as do special offers and perks, although people will often be at least somewhat aware that there is an associated catch.

16. In credit card markets, for instance, the FCA (FCA 2016) found that consumers do shop around for cards according to the introductory perks and the rewards on offer. Although there is competition among issuers about whose brand appears on the card, particularly when store cards are included, Visa and Mastercard dominate credit card networks. In the US there was a high-profile anti-trust class action suit brought by

retailers against the two networks (still ongoing), and a new suit on behalf of consumer has been given the go-ahead in the UK ([2021] CAT 28), so again I find the credit card market an odd one for the book to describe as experiencing “too much” competition.

17. Still, there are clearly many markets where consumer choice does not operate effectively, perhaps because of the cognitive burden or the relative gains from comparing different complicated offers not being worth the time and effort. Many of these markets have been investigated by competition authorities and courts, including energy markets, banking, accommodation websites, and the many price comparison sites discussed earlier. Remedies proposed have sometimes focused on encouraging consumer switching: the UK’s Open Banking regime is one example, where common data standards and mandated APIs are intended to make switching between providers of financial products easier and less fraught with the risk of going wrong. Other remedies focus on safeguarding vulnerable customers who are least likely to switch by mandating certain types of products or price caps (as in UK energy markets); or on providing information in a way that will be more likely to trigger switching (as in the UK’s recently introduced requirement for annual notifications of insurance premiums to include the previous year’s price so that consumers notice price increases that might prompt them to shop around, rather than allowing inertia to rule).

18. There are without doubt more useful insights to come from behavioural economics concerning consumer choice, and the effectiveness of the dark patterns or pricing algorithms deployed by online providers to maximise their profits at the expense of consumers. Competition authorities are aware that they need to be able to better monitor these developments (e.g., CMA (2018) on online pricing) and also that they need to build their own internal expertise. As in any regulated industry—which digital markets are now becoming at least in the EU and UK—there is an asymmetry of funding and expertise between the regulators and the powerful companies they regulate. But in this context too the policy challenge is establishing a framework of market regulations and norms that enable markets to operate well. When it comes to the online world, there are some very large firms with extraordinary power in concentrated (not competitive) markets. Competition authorities have been slow to keep up but this is now changing following a number of landmark reports (for example, I was involved in Furman et al. 2019).

### IV. The “overdose” that isn’t: Choice and value

19. The fourth “overdose” identified by Ezrachi and Stucke is a non-problem: the idea of there being too much choice. To some extent choice reflects product differentiation in monopolistically competitive (or oligopolistic) sectors. “Too much” choice is argued to



impose cognitive costs, according to some experimental results (Iyengar and Lepper 2000). On the other hand, there is a large empirical literature recording the increases in consumer surplus due to increased variety, from cereal flavours (Hausman 1996) to music and movies (Waldfogel 2017). Counter-arguments that there is “too much” choice seem unable to identify the optimal degree of choice, while acknowledging that too little—as in planned economies—is detrimental to social welfare.

**20.** The problem is not the existence of variety but rather the manipulation of choice discussed in the previous section. Google has increasingly allocated its most valuable (\$ per pixel) onscreen real estate to either paid-for links or its own products. Similarly, searching on Amazon is increasingly likely to lead to prominent links to its promoted products. The quality of the results is getting degraded in these cases. This is not a problem of too much choice and the exploitation of limited attentional bandwidth, however, but rather the lack of competition in big tech markets. “Self-preferencing” by big online companies is a target of recent policy proposals such as the EU’s DMA (European Commission 2020). If another search engine with a better product were able to enter the market, it could dethrone Google, just as Google dethroned Yahoo by higher quality. But there is too high an entry barrier, in large part due to lack of data interoperability and access, and therefore too little competition—not too much. The policy concern is not that there are too many book titles or t-shirts listed on Amazon, it is that there is too little competition at scale in online retail.

## V. Conclusions: Market and state

**21.** Modern capitalism is not working well, but an overdose of competition (as economists mean it) is not the problem. There is a proliferation of variety so consumer demands can be better met, and greater convenience from online options. At the same time, competition authorities and regulators have been scrutinising many significant markets such as financial services, energy, and food retail because they appear to be overcharging on price or under-providing on quality. Modern markets and products are often complex, and the cognitive load of choosing among insurance policies or energy deals is far higher than in earlier and simpler times. Most consumers quite rightly do not want to spend much time and cognitive energy on comparisons and switching. They expect a policy framework that will protect them by ensuring the downside risk to their

choices is low. Reasonably, they expect to be able to buy safe food with honestly listed ingredients whenever they go to the supermarket—and also reasonably expect that the supermarket will pay a fair price to farmers for milk and will not buy chocolate from suppliers using slave labour, or exploit zero hours workers in their own warehouses. They also reasonably get annoyed when what looks like a great deal online incurs hidden costs, or when with hindsight they could have bought this year’s insurance policy for 10% less.

**22.** The dysfunctions of modern markets may sometimes be related to the prevailing dimensions of competition. In particular, it is easier to monitor price than any indicator of quality. Yet in general there has been a reduction in competition in many markets over time, even as these dysfunctions have become more apparent. For example, the OECD has reported increased concentration ratios in both manufacturing and services in many of its member countries (OECD 2018), Philippon 2019, Autor et al. (2020). Some of the problem markets identified in *Competition Overdose* are exactly the ones that have attracted significant anti-trust enforcement action.

**23.** This is where the language problem matters. From an economist’s perspective, there has been too little competition, not too much. But there is a systemic problem about lack of effective regulation and enforcement in a complex digital economy characterised by substantial information asymmetries. Markets need strong government if they are to work well. The prevailing political philosophy since 1980 has—wrongly—treated market and state as substitutes rather than complements, and has underfunded regulatory bodies and (until recently) tilted competition policy away from active enforcement.

**24.** The fundamental issue is the need for competition in and for the market to be accompanied by an effective state-shaped and enforced framework within which competition operates. Indeed, in dynamic markets including all online markets, where there are large economies of scale and network effects, the state—including competition authorities—play a decisive role in shaping the evolving structure of the market. Any decision taken in a merger or dominance cases will shape future markets, no matter which way the decision goes. The dynamics of increasing returns, network effects, technological lock-in and consumer behaviour lead to tipping points and path dependence. This calls for a more muscular, less technocratic, competition policy, and one far more comfortable than has been the case in recent decades with competition authorities making unavoidably normative choices about the kind of market economy we will have. ■

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# Competition, ideals and law: The transborder context

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## I. Introduction

1. *Competition Overdose* foregrounds fundamental questions long obscured by antitrust orthodoxy. It shows how the ideology of free competition has often led to increased concentration of economic power, and it identifies many of the harms that have accompanied this concentration. These include, for example, unfair markets, higher prices, reduced consumer benefits, and reduced economic freedom. Their analysis yields many valuable insights into a central concern of any society: the role of markets. The authors urge a response centered on ethical values. Specifically, they suggest that a set of values encapsulated by the ideal of “noble competition” can lead the way to more responsible and equitable forms of competition. In this Essay I explore the reach and force of their suggested response, and I glimpse potential for expanding both. I make no claims regarding the extent, if any, to which their proposal should be followed by specific decision makers.

2. The book presents the noble competition ideal as a universal model. As an abstract ideal, it has no borders. In this role, it can frame comparisons, identify goals and shine light on the harms that deviating from the ideal can cause. These are potentially important roles, and the ideal can play them in any society or community. Political and economic decision makers in any society may also consider these values sufficiently attractive on their own and without further support to take them into account in making their decisions. As we shall see, however, further motivation will often be necessary.

3. I here explore factors that are likely to shape the potential influence of ethics-based appeals such as those proposed in *Competition Overdose* on political and economic decisions in multi-unit contexts. The many references to “we” in *Competition Overdose* assume a single-unit context. In a single unit such as a nation-state, the conduct, the harm, the values, and the tools of response are all part of that unit. Often, however, decision makers face a transborder context with quite

different features and dynamics. In a multi-unit context, the harmful conduct and its harms are dispersed, values differ and potential responses are sharply constricted by political borders. This alters the potential force of ethics appeals in important and often underappreciated ways. Their capacity to influence the conduct of a decision maker depends on factors such as her incentives, the economic and political dynamics influencing her, and the density of public support for the claims. These factors have very different valences in a multi-unit context as compared to a domestic context.

4. This Essay identifies differences in the two decision-making contexts, focusing on the impact of political borders on the reach and force of the ethics appeals. The investigation shows why and how borders tend to reduce the capacity of the ethics appeal to influence conduct, and it notes some potential paths toward reducing those limitations. We look first at some of the changes that result from widening the lens to include transborder contexts and then explore some of their consequences.

5. Two preliminary caveats regarding the scope of the Essay are necessary. First, a “unit” for these purposes may have overlapping and cross-cutting dimensions. For purposes of clarifying the analysis, we here assume that a unit is defined by national political borders, but it may also be defined by regional and local political borders and sometimes even cultural boundaries. Sometimes these dimensions map onto each other, but often they do not. Second, even in a single-unit context the potential force of ethics claims is filtered and shaped by institutions. Ethics claims appeal to the motivations of individuals, but in markets other than local markets individuals typically act through institutions. Some individuals in some institutions may be inclined to give weight to the noble competition ideal, but the institutions within which they make their decisions may inhibit or deform their efforts.

## II. Widening the lens: From one unit to multiple units

6. *Competition Overdose* often refers to “we”—implying a single unit context. It does not specify who or what is included in “we,” but it presents its claims as universal truths, presumably applicable in any society.<sup>11</sup> As noted above, this single-unit perspective internalizes competition harms, ethical claims and legal responses. It locates harms, values, and legal support within the same decisional and conceptual space. This tends to advance the ethics claims and their legal support, because it relates those who are harmed to those who cause the harm—typically, on many levels. These relationships provide a basis for claims that those who cause the harm have some form of obligation to take the interests of those they harm into consideration. Moreover, the “victims” often also have means of pressing their claims—whether it be through voting or other forms of influence within the unit.

7. When we expand our view to include multiple units, the decision-making context changes in important ways. Harm is scattered across boundaries, and ethical claims are not necessarily imbedded in or associated with any other relationships between the harms and those causing the harms. In addition, political boundaries divide, limit and disperse potential legal responses. The abstract claims no longer have the same impact. In the following sections, I note a few of the changes.

## III. Widening the lens: Harm

8. Borders refract and scatter the toxicity of economic power. The capacity of a firm to cause harm is based on the interplay of power and conduct. It requires that the firm have power and that it also engage in conduct that takes advantage of that power. In a single-unit context both power and conduct exist and operate in the same unit, and their harms are felt within that unit. In a multi-unit context, in contrast, the power that enables a firm to cause the harm may be anchored in one unit, the conduct that is based on the power may be located in other units, and the consequences may be felt in many units. The result is that those who are harmed may not be part of the same political unit as those who create the harm and may, therefore, have no capacity or opportunity to seek redress of the harms.

9. For example, Apple may have sufficient power to raise the price of mobile phones across the entire world market for mobile phones, causing anti-competitive harm in many political units. Its power to raise price depends on factors in the US as well as other countries, and many of its main decisions are taken in the US and subject to US laws. Yet the price effects may cause harm to consumers in many different units, and those harmed seldom have any means of influencing Apple’s decisions. Both power and conduct are often distant from the locus of harm.

## IV. Widening the lens: The appeal to ethics

10. Borders also fundamentally change the potential force of an appeal to ethics. Ethics claims refer to obligations toward others. Typically, a sense of shared interests or identity or both provides the basis for such obligations. They create a form of “community.” The book’s references to “we” assume such relationships. The community may be large and loosely defined or small and ethnic, but it is based in a sense of shared interests and/or identity. This we-frame for decisions places the harms—for example, the potential harms associated with highly concentrated economic power—in direct relation to those harmed. In so doing, it supports the force of an ethics appeal.

11. Inserting borders into this picture moves decisions from the “we” frame to a “we/they” frame. Here those who cause harm and those they harm may not be part of the same unit; the borders may separate one from the other. As a result, an ethics appeal may ask a decision maker to respect the interests of others with whom s/he may share neither interests nor identity. S/he may not even know whose interests s/he is being asked to respect. From her perspective, individuals, institutions and interests on the other side of the border are “other” and outside the frame of mutual obligations to which she belongs or with which she identifies. Moreover, those on the other side of the border are often seen not only as “other,” but also as potential opponents or even enemies. In this context “we” references are likely to lose some or all of their force.

12. The move to a we/they frame may be particularly salient in the context of the noble competition ideal. It often asks a business firm to forego some form of economic gain or advantage for the benefit of others. As such it is, in effect, a transfer of resources. The references to “we” are likely to have limited attraction for a decision maker in a country where producers and consumers view themselves as powerless victims of actions taken by others elsewhere. For example, it may be quite difficult to convince an economic or political decision maker in Africa to forego economic gains in order to satisfy an

<sup>11</sup> The book’s references and examples suggest that the authors had high-income Western countries in mind in thinking about the role of the noble competition ideal.



abstract obligation that would benefit consumers and/or producers in the US. S/he may be more likely to see businesses from the US as a threat to her interests or the interests of those within her community rather than as entities for whom they should make sacrifices.

**13.** We-they contexts highlight the need to identify incentives that can motivate ethics-based decisions across borders. The abstract values of ethics claims are often insufficient to motivate such decisions. Four main factors are likely to condition the impact of such claims on transborder decision makers: Awareness of the ethical claims, the perceived relevance of the abstract claims to decision maker, the extent of their attractiveness to her, and her expectations of the feasibility of pursuing them.

- Awareness: Ethics appeals can influence decisions only where decision makers are aware of them—i.e., actually know of their existence. They may be available somewhere on the web, but the decision maker may have no reason to take note of them. In a single unit, awareness tends to be widely shared. Inhabitants of a country typically pay substantial attention to measures that affect them. As a result, they are likely to be aware of claims, including ethics ideals, made by others within the community, including political, business and other public figures. In a multi-unit context, in contrast, a decision maker may not even be aware of appeals by others in other units that have no apparent relationship to her or her interests. Similarly, where community ties are at least partly based on religious or cultural ties, ethical claims made in one community may be unknown outside that community.
- Relevance: Awareness does not necessarily mean that a decision-maker will see an ethics appeal as relevant to her. Such claims are likely to impact her decisions only to the extent that she recognizes their potential relevance for her, either because they affect her own interests or those that she represents or because they are associated with other values with which she identifies. Where, for example, a decision-maker in Africa assumes that an ethics appeal is applicable only to high-income Western countries, she may pay little attention to it. Similarly, ethics claims associated with Western cultural traditions may seem irrelevant to Islamic or Buddhist decision-makers.
- Attractiveness: In a transborder context, the influence of ethical norms on decisions also depends on whether the norms “translate” across language and cultural borders and whether the decision maker perceives them as useful or otherwise attractive. Translating ethical claims is notoriously difficult, and this is likely to be particularly true where they relate to a concept such as competition, which is itself abstract and which is often poorly understood and little appreciated. Assuming that the decision-maker is confident that she understands the claim, she is likely to pay attention to it only to the extent that she identifies value in it for herself or those she represents or she associates it with values with which she identifies. Liberal values that tend to make competition

attractive in high-income Western country contexts are often viewed with caution and suspicion elsewhere. Experience with markets varies enormously, leading to wide divergences in attitudes toward competition. Many have experienced it as a mechanism of control by outside forces and actors rather than as a font of economic freedom or a driver of economic growth. As a consequence, they are often uncertain of its value and wary of its effects.

- Feasibility: Finally, a decision-maker is unlikely to act on ethics appeals unless she sees them as potentially successful. An individual decision maker may be inclined to take ethics appeals into account, but if she believes that her efforts are unlikely to have significant effect and may even engender disapproval from others, she may be more likely to abandon the effort.

**14.** These examples illustrate some of the factors that may shape the transborder influence of an ethics appeal.

## V. Widening the lens: Law’s support roles

**15.** A transborder context also alters the capacity of law to support ethics appeals. Borders diffuse and scatter potential legal responses. The contrast with a single-unit context is again instructive. In that context, a defined set of legal institutions evaluates claims in light of consequences within its territory and on the basis of its own objectives and capacities, and it is authorized to take measures to enforce its claims within its borders.<sup>22</sup> As a result, harms, ethical claims and the capacity to enforce are all interrelated within a single political unit. The contrast with a transborder decisional context is striking. With few exceptions,<sup>33</sup> no single set of institutions has authority to adjudicate and enforce transborder legal claims relating to competition. International law and customary state practice disperse legal authority. As a result, the authority of legal institutions remains basically territorial, each state having authority within its own territory to prescribe and enforce conduct norms. For example, where conduct in Country A causes harm in other jurisdictions, those harmed will often have no or limited means of coercing or pressuring the harm-causing agent to compensate the victims or cease its harmful activities. As a result, law’s capacity to support ethics claims must depend primarily on institutions and decisions in each individual unit.

**16.** In individual political units, however, there may be few incentives to provide legal support for ethics claims that would benefit entities outside the unit at the expense of those within it. A transborder context moves ethics appeals from the private decision-making sphere of “should I?” to the public domain of “should we require?”

<sup>22</sup> I explore the legal aspects of these relationships in detail in D. J. Gerber, *Global Competition: Law, Markets and Globalization* (Oxford University Press, 2010).

<sup>33</sup> The primary examples are the European Union and related institutions.

Rather than ask an individual to consider effects on others in making personal decisions it asks public officials to use their authority to promulgate and/or enforce conduct norms that may affect the entire unit. In the competition context an appeal to ethics may require domestic business firms to forego economic advantage for the benefit of those elsewhere. Political decision makers are typically reluctant—to put it mildly—to use state power to require such other-benefiting conduct of those on whom they may rely for support.

**17.** Competition law (also known as “antitrust,” esp. in the US) is the domain of law that is specifically tasked with protecting competition. Its capacity to support ethics claims is generally limited by the factors discussed above, but two factors endow it with additional significance in the Noble Competition context. One is its potential value as a field of experimentation. Given that it is a defined area of law, it can facilitate comparisons among competition laws, institutions and rules that may both increase awareness of ethics claims and reveal factors that have supported such claims. The other is its role as a field of interaction. Competition law has spawned relatively well-defined transnational networks of practitioners, officials and scholars. Many discuss competition law issues in private discussions or at meetings and conferences as well as in the context of specific cases. These interactions can increase dissemination of ethics appeals and discussion of their potential value.

## VI. Extending the reach of ethics claims?

**18.** This section takes a preliminary look at the potential for extending the impact of ethics appeals in transborder contexts. As we have seen, moving from a single-unit to a multi-unit perspective tends to vitiate the force of ethics claims. Our examination also suggests, however, some strategies for tempering the effects of borders and thereby extending the reach of ethics-based appeals.

### 1. Starting points

**19.** In a transborder context, ethics appeals have no “natural” or indigenous substrate to which they can attach. The borders obliterate the “we” perspective of a domestic context. As a result, ethics appeals can no longer build on the ties associated with domestic communities. Neither membership in a community nor customs and values that are automatically absorbed by members of a community can give them influence, at least not directly.

**20.** One strategy for extending the influence of ethics appeals is, therefore, to develop perceptions of relationship and obligation that resemble those that are based in traditionally conceived communities and that

therefore may be capable of supporting ethics obligations. In short, the objective would be to create “community-like” relationships. The strategy rests on malleability of perception.<sup>44</sup> Perceptions of relationship and obligation are the basis for ethics-based decisions, and customarily they are tied to communities defined by territory, religion or ethnicity. They remain perceptions, however, and perceptions can be influenced and altered. Accordingly, perceptions of relationship and obligation can be expanded to include those who are outside these traditional communities and thereby justify restricting one’s competitive conduct in ways that would benefit all within this wider community. This suggests the potential value of an “extension strategy” that extends the concept of community to include those outside traditional communities.

**21.** Recognizing the differences between single-unit and multi-unit contexts is a necessary foundation for an extension strategy. Value claims are often assumed to have the same traction in a multi-unit context that they have in single unit. As we have seen, however, the two decision contexts often differ fundamentally, and recognizing this opens the door for influencing decisions in a multi-unit context. This Essay’s focus on decisions and the factors that influence them can foster recognition of this difference.

## 2. Community-like relationships

**22.** Numerous factors contribute to shaping a sense of relationship that can induce and support the perception of obligation. They include common traditions, shared territory, shared interests, and perceived enemies. An example relating to competition may be useful.

**23.** Recent discussions of the harm caused by large technology companies such as Facebook and Google highlight the extent to which concerns about privacy and the manipulation and sale of personal data cross borders. These companies engage in conduct that has similar effects wherever individuals and corporations use their services. This widely shared perception of threat establishes a relationship among those harmed that is similar to those that shape traditional community relationships. Where the perception of harm crosses borders and forms the basis of obligations among those harmed, it can also support the perception that those causing the harm (e.g., big-tech corporations) should be subject to community-like obligations toward those affected everywhere. Recognizing these relationships creates a substrate to which ethical values can attach. This perception of obligation can also provide the basis for transborder legal responses. For example, it can lead to transborder cooperation to develop and enforce laws to protect users from harmful data manipulation.

<sup>44</sup> Numerous discussions of global relations assume a role for perception in evaluating transborder relationships, but systematic study of its centrality could provide additional insights. See, for example, A. Iriye, *Global Community* (Univ. of Cal. Press, 2002). I hope to contribute to that project.

### 3. Constructing community-like obligations

**24.** In part IV above we noted the main factors that influence the degree to which ideals and values are likely to influence conduct. We here explore ways in which those factors might inform a strategy for extending the reach of Noble Competition's values. First, a decision maker must be aware of the ethics claims in order for them to influence her decisions. Many will not be aware that they have any obligation to consider "foreign" interests in making their decisions, but an extension strategy can take steps to increase awareness of such community-based claims. It can, for example, appeal to governments, political leaders, newspapers, social media and other opinion shapers to talk and write about the obligations. It can also use social networks to spread awareness. Expanding awareness of ethics claims requires that the ideals be disseminated in ways that call attention to them. Persistent and effective marketing through public as well as social media channels make this possible.

**25.** A second factor is relevance. The ethics message can only penetrate decision making where the decision maker recognizes it as potentially relevant to her own decisions. Why should the obligation apply to her? What factors link her to those whose welfare she is being asked to consider in her decisions. In the competition context, as noted above, this means acknowledging the value of sharing resources with those outside her domestic sphere. Scholars, journalists, writers and policy analysts will need, therefore, to identify, explain and develop these ties and their relevance in particular contexts.

**26.** Third, the decision maker is not likely to see the claims as an attractive basis for her decisions unless she sees their potential value to her or to interests or those with which she identifies. She may, for example, see personal and political advantage in successful transborder efforts to induce Big Tech companies to provide greater privacy protection. Another potentially powerful basis for attraction to ethics values is their connection to other values with which she identifies or that are prominent in her political or cultural unit. Ideologies and religions are typically promising in this context. For example, a decision maker who cherishes economic freedom is likely to be receptive to ethical appeals that she sees as associated with that value. Similarly, if she values greater income equality, she may be attracted to ethics values that she believes would support that concern. In both contexts, however, the factors that generate attraction are not self-evident. They must be developed and disseminated. This may be particularly true with regard to Noble Competition values that often rest on limited and questionable experiences with competition itself and uncertainty about the assumptions and values on which the Noble Competition values rest.

**27.** Finally, the feasibility of taking ethics claims into consideration is likely to be a factor in her decisions. If she believes that her decision may have at least some support from others, she is more likely to act on the ethical values it represents. This highlights the role of social and other media in disseminating support for ethics values. They can demonstrate to any individual the extent to which others have expressed support or sympathy for such values or, perhaps more importantly, taken decisions which reflect the same or related values.

### 4. Cooperation and coordination

**28.** Transborder cooperation and coordination relating to competition and broader elements of economic policy can be important sources of influence. They are points of contact among decision-makers and opinion shapers that channel information and reveal preferences and values. In these contexts, decision makers—government officials, business leaders, lawyers, accountants and others—must consider alternatives, take positions on competition-related issues and respond to others. This process often generates awareness of unrecognized interplays of interest. The interplays are sometimes conflictual, but they also often increase the bases for mutual support. For example, where a company in the United States, Europe, or Japan outsources production to a low-income country such as Bangladesh, company officials often work with representatives of other companies in the supply chain; government officials from participating countries often discuss the harms and benefits involved in the arrangements; and lawyers representing the various interests interact with each other. The discussions and decisions can reveal interests and aspects of the relationships. Should supply chain recipient companies consider the interests of the foreign workers and apply more extensive controls over the manufacturing units than is required by law or custom, possibly at the cost of their own profitability? Should a government require that they impose such controls? Discussions of these issues across borders often highlight important community-like ties.

### 5. Global adaptive systems analysis: Identifying the fibers of community

**29.** Adaptive systems analysis can be a very valuable tool for recognizing and evaluating efforts to extend the reach of ethics-based appeals, in general, and Noble Competition appeals, in particular. It can reveal relationships and identify patterns of influence that are critical to thinking about such an effort. This method of analysis has been developed in the natural and

social sciences in recent decades,<sup>55</sup> and I have modified it for use in analyzing transborder legal and economic contexts. I have discussed the use and potential value of this type of analysis in more detail in other contexts,<sup>66</sup> but the basic idea is that a set of relationships among agents (or decision units) can be analyzed as an interactive and adaptive system. The analysis consists of has three basic elements. First, the relationships are mapped as networks. Second, degrees and forms of influence and power within the network are identified and assessed. This registers the dynamics of interactions among the participants. And third, the effects of external impacts on the agents, their relationships and their environments are tracked. This analysis can reveal shared interests and shared bases for cooperation that might otherwise have gone unnoticed or remained underappreciated.

## VII. Concluding comments

**30.** *Competition Overdose* is a valuable book! Its analysis of competition law's "orthodoxy" fosters serious re-examination of assumptions about competition and its role in society as well as about the use of law to "protect" it. The book also sketches an ethics-based ideal that can be used to inform responses to the problems it identifies. The concept of "noble competition" presents a vision of how competition could be restructured to increase its benefits across a wider spectrum of humanity and reduce the harms that current forms of competition often create. Articulating this ideal and its potential advantages is valuable in itself, and its appeal may have sufficient force on its own to influence decisions.

**31.** This Essay looks more closely at the potential impact of the ethics appeal, focusing on decisions in crossborder contexts. It focuses on differences between these contexts and single-unit contexts and on the role of these differences in thinking about the role and potential impact of Noble Competition's appeals. It does not explore the many and difficult issues that arise in deciding whether the values embedded in that ideal should be implemented in specific decisional situations—a broader discussion in which that ideal must compete with other decision factors. Our review identifies obstacles to the appeals presented in *Competition Overdose*, but it also notes the potential for expanding their reach and force. ■

<sup>55</sup> For foundational discussions of this form of analysis, see, e.g., J. H. Miller and Scott E. Page, *Complex Adaptive Systems: An Introduction to Computational Models of Social Life* (Princeton University Press, 2009) and A. Yang, *Intelligent Complex Adaptive Systems* (IGI Publishing, 2008).

<sup>66</sup> See, e.g., D. J. Gerber, *Competition Law and Antitrust: A Global Guide* (Oxford University Press, 2021).



# Competition as a tool

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1. *Competition Overdose* by Maurice Stucke and Ariel Ezrachi is an important book and I probably agree with 90% of these leading scholars' line of reasoning. Their search for a better and more just society, and their call for the State, the industry, workers, consumers and citizens, to do their part in trying to change the path of inequality and exclusion is explained in a masterly fashion and is sincerely convincing. However, because I agree on so many of the concepts expressed in the book, I feel it is valuable to concentrate this comment on a single, but very topical, element of disagreement.

2. Reading *Competition Overdose*, an old memory came to my mind. In *Palombella Rossa*, a 1989 movie, the iconic Italian film-maker and actor Nanni Moretti, maddened by the list of clichés used by a women journalist who is trying to interview him, starts shouting at her: “*Words Are Important!*” While I assure you that I don’t intend to shout, I feel that this memory reveals the important problem of terminology that lies at the core of my discomfort with the book.

3. In fact, I think that if Stucke and Ezrachi had entitled their work “Capitalism Overdose” or “Greed Overdose” I would have simply cheered at its moral clarity and intellectual bravery. Alas, at the end of *Competition Overdose*, I remain somewhat troubled by what I believe is a misleading title and, consequently, an incorrect emphasis on the presumed defects that are attributed by the authors to what they intend to be “competition.”

4. Reading *Competition Overdose* stretched my thinking about the very notion of competition. I guess it is exactly in the distance I feel with the authors in the understanding of this concept and its scope that the origin of my doubts lies. With some bluntness, I will conclude that *Competition Overdose* should not be considered to be a book about competition, if not minimally, and will try to explain why this creates a serious misunderstanding and, partially, is a lost occasion.

## I. On the meaning of competition

5. Clearly, there are different ways in which one can interpret the word competition, but it seems to me that, at least for law and economics scholars, the primary meaning of the term should be linked to the functioning of the markets in an economy. If we start by relating competition to markets, it appears that a competitive market is just one of the possible forms of their functioning. Moreover, if we believe in classical welfare economics, we also have compelling mathematical proofs that a competitive market is one that brings to its participants the maximum amount possible of total welfare.<sup>1</sup> In any case, competition, for me, is essentially a form of market organization and, in principle, the most desirable one. Put in simpler terms, competition is a tool.

6. Let’s examine some of the examples of “competition overdoses” that are proposed by the authors against this background. Are adopting a deceiving marketing strategy in pricing hotel rooms in Las Vegas, or blending horse meat into the beef of our hamburgers, really failures of competition? Or sending University letters to invite a promising dog to early enrolment? I leave the private jails example for later, because it is particularly interesting and to the point. The previous examples, and others in the book, in my opinion, list cases of frauds, unfair commercial practices, maybe outright stupidity, all caused by excessive and unchecked greed. I don’t think competition as a tool can be charged with any of these kinds of blunders.

7. Consider professional football (or soccer). They are very competitive sports, you play hard to win, but there are rules, and if you violate the rules, and are caught, you normally pay and lose. For markets (and many other areas of life), essentially, it works in the same way. Competition is only one of the possible tools that are used to organize markets, and normally a decently good one, as far as I can see.

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1 G. Debreu, *Theory of Value* (John Wiley & Sons, 1959).

8. If you put horse meat in the hamburger, and this is forbidden, you are violating the rules of the game. You will pay the fine, your business will be closed, or you will suffer whatever the penalty is. But what if there is no law or regulation to protect the consumer or the citizen? Well, that would be a problem and a mistake, but it is a fault of the state, or of the society, not a defect in the competition tool.

9. Competition is simply one of the ways to play the market game, but this game exists within a vast set of rules that are fully embedded in a precise and given legal and social context. As the authors know very well, antitrust law is there to ensure that certain specific rules are respected, no cartels to fix prices, no abuses of market dominance, and a few others. In addition to antitrust law, there are several other specific rules that regulate the markets' functioning, more in certain sectors, less in others. But by far the largest part of the context in which economic activity, or any human activity, is played, is defined by an infinitely larger set of norms and customs. If some of these other norms are lacking, or are violated without serious consequences for the perpetrators, normally, this should not be blamed on a weakness in the way markets are regulated, and even less so on a malfunctioning of the competition tool. As the authors themselves recall, citing one of the top economists that they have met "*Economists have outlined numerous instances when markets – despite being competitive – might not deliver a positive social outcome. Promoting competition, for the sake of competition, does not guarantee the optimal or fair outcome. It is for the State to balance between efficiency, competition, and other social values*" (Chapter 5, p. 124).

10. Now, let's go back to someone putting horse meat in my hamburger, is it allowed? I imagine that probably it isn't. Let's then assume that it is forbidden, are there sufficient controls in place? Is the level of deterrence adequate to contrast the possible gains of the untrustful supplier of meat? More to the point, what might be the alternative to competition in selling hamburgers: cooperation? Would the consumers be better off if the suppliers of meat could cooperate and form a great co-operative cartel that produced hamburgers? I strongly doubt it. Not only would I expect, with a high degree of certainty, to pay a higher price for my hamburger, but I would also probably expect to see more horse meat on the table.

11. The point is very simple: greed for profit is always there, and in many (all?) cases needs to be reined in by rules. Capitalism is about earning as much profit as possible, and the issue, therefore, is to understand what kind of profitmaking behaviours are allowed by the laws and customs and are tolerated by the society. To complicate the assessment, one has to recognize this as a moving target. Our shifting perception of what is allowed or acceptable in the pursuit of profit, as consolidated in the laws and as tolerated by the social community, unavoidably changes with time. The increasingly negative reaction to long working hours for laborers, the exploitation of children, environmental externalities, and many other important, or even dramatic themes, can be considered a historic metre for

measuring social progress. I doubt that many regrettable situations from the past could be reasonably attributed to ancient forms of "competition overdose."

12. The authors propose another example of competition overdose in the chapter dedicated to digital dominant platforms. They examine a list of the consequences of the behaviours of the largest digital companies, which they call Gamemakers, negatively affecting consumers, business partners and democracy.<sup>2</sup> Clearly, this is a theme that is causing a heated debate and I see, at least at present, a strong consensus, on both sides of the Atlantic, on the risks and the dangers of GAFAM unchecked market power, but it seems to me that complaints and requests for intervention to limit the market dominance that is enjoyed by the Big Techs are essentially questions relating to a lack of competition. More competition in these markets is primarily sought as a possible solution, although it may be insufficient, and is never viewed as the problem.

13. For instance, the new EU legislation on the topic, the Digital Market Act (DMA), seeks to restore contestability (and fairness) in digital markets.<sup>3</sup> In the US, the new cases that have been brought up by the FTC, the DoJ, and many States, against Google, Facebook and other Big Techs, clearly constitute a reaction against what is perceived to be an illicit attempt to monopolize markets. In the case of digital markets, it is difficult to understand why competition should be presented as the villain? In fact, competition appears to be one of the main victims. These are almost certainly cases of competition underdose, rather than the reverse.

14. However, in my view, the least convincing example of competition overdose proposed by the authors is what they call the overdose (or overload) of choices. Sure, there can be too many wines, jams or cheeses for a confused Borat on the shelves of an American supermarket, but to define this as a competition overdose sounds strange. Who should establish when the level of choice is so vast as to constitute an overdose, Borat? How can anyone be in charge in order to establish the right dose of product differentiation? Is there a right number of wines or of kinds of beers? These are examples of markets that are open to many producers, some of whom are even very small, and these producers differentiate their products in the search for customers. An authoritarian organization of the production, arbitrarily limiting the choice "overdose," appears to be contrary to our idea of a free society, and I am quite sure that this would certainly not be in the interest of the consumers.

2 By the way, I agree with many of the worries expressed in the chapter, especially on the third count, see P. L. Parcu, New Digital Threats to Media Pluralism in the Information Age, *Competition and Regulation in Network Industries*, Vol. 21, Issue 2, 2020, pp. 91-109.

3 P. Larouche and A. de Stree, The European Digital Markets Act: A Revolution Grounded on Traditions, *Journal of European Competition Law & Practice*, Vol. 12, Issue 7, 2021, pp. 542-560.

**15.** A derived theme and example that refers to the existence of unfaithful recommendation systems that exploit the choice overdose to drive the confused consumer far from their best choice, is also not particularly convincing. If there is choice, one will eventually change to more satisfactory recommendation systems and abandon the treacherous ones. In the absence of competition, market regulation of recommendation systems may become an important regulatory issue, in fact, this is exactly one of the targets of the DMA. Again, it is the lack of choice, the market power of the gatekeepers, and the insufficient protection of the consumers, which appear to exacerbate the problem, not the competition overdose.<sup>4</sup>

## II. Competition is a strong ideology?

**16.** Now, let me come to a different reading of “competition.” Particularly in the second part of the book, Stucke and Ezrachi take issue with a concept that I would define as competition as an ideology. They primarily attack lobbyists who want to limit regulations and who often get an attentive political hearing in their efforts, ones which lead to “toxic competition.” I don’t have any specific problem with this line of reasoning and, in principle, I share the authors’ concerns. Nonetheless, this referring to competition as an “ideology” that is especially dangerous for our societies doesn’t strike me as a major practical issue. This, however, may depend on the side of the Atlantic on which one operates.

**17.** In most of continental Europe, and certainly in Italy, where I live, the competition ideology almost always has a negative implication. The word “competition” is rarely found alone. In fact, in political discussions, it is almost unavoidably accompanied by negative sounding adjectives, like savage, unfair, ruthless, toxic. Many kinds of economic privileges and rents are usually defended by challenging and refusing the adoption of any pro-competitive solution. From taxi licenses and notary franchises, to inefficient in-house companies that are owned by municipalities, there are a host of rents, losses and inefficiencies that are preserved and justified by condemning the spread of a nefarious competition ideology.

**18.** In this context, an intense use of competition as an effective ideology that is used to remove necessary regulations, the topic that is really addressed by the authors, seems to me a theme that, at least in Europe, is too uncommon to constitute a serious threat. On the contrary, I often feel that, in Europe, and especially in Italy, we may need a little more competition ideology. Nonetheless, the many interesting US examples that are presented by Stucke and Ezrachi in their book seem to

<sup>4</sup> In fact, the combined use of insights from behavioral economics and big data analytics may allow companies to exploit consumer irrationality and biases, but the question is whether this is a question for competition, regulation or consumer protection.

confirm that, at least to a certain extent, the geographical location of the observer is important in generating their different perception of the problem.

## III. Competition, market regulation and the state

**19.** Trying a more constructive approach, I think that competition, in the meaning that is more relevant to the authors, should essentially be defined as a characteristic of markets. This very elementary definition suggests that when markets are not the most appropriate instrument to provide certain goods or services, competition should neither be invoked or involved.

**20.** Only when using markets is efficient and effective, competition emerges as a framework generally preferable to monopoly, to oligopoly, and to other forms of market organization, in the interest of consumers, competitors and society at large. Nevertheless, there are markets in which—due to extreme externalities, large economies of scale, etc.—competition is quite difficult to achieve or to maintain, and there are others where, for the presence of non-market values, due to fundamental rights and societal externalities, there is a need for special protections. In these cases, it is necessary to regulate markets more strictly.

**21.** In principle, authorities should do what they can to preserve, or to re-establish, competitive markets. In fact, this is one of the declared purposes of the DMA, to reinstate contestability in certain digital markets in the EU; or of the new German antitrust law, which aims to prevent market tipping and dominance in that country. In certain instances, however, the context is such that competition is bound to, in any case, remain insufficient. In these situations, it is unavoidable that more penetrating forms of market regulation have to be adopted and enforced. This was very clear for the old monopolies in the utilities, and the same lesson is probably valid for some of their new forms.

**22.** In synthesis, in my view, competition and (market) regulation are complements, and not substitutes. In most real circumstances, one needs both to be present to obtain a well-functioning economy, and the right mix will always depend on the specific characteristics of the goods and services involved.

**23.** For this reason, a theme on which I fully side with the authors is their strong critique of certain deregulations that, especially in financial markets, have incautiously dismantled necessary legal protections. The rash liberalization of financial markets, just before the financial crisis of 2008 in the US, is a convincing example of how easily disasters can follow from adopting the wrong mix of aggressive competition and lax regulation.

Greenspan's naïve surprise, cited by the authors, when faced with the "irrational" behaviour of banks and other financial institutions taking risks they couldn't bear, is revealing. Maybe, at that time, in the US Federal Reserve, there was some competition ideology overdose after all.

## IV. Conclusion

**24.** In conclusion, from the discussions above, I don't want to suggest the wrong impression: that competition is the best tool in any circumstance. Let's return to the private jails example, which is well illustrated in Stucke and Ezrachi's book. I wouldn't even dream of entertaining the idea of competition as a good way to run a system of private jails, and the authors are very convincing in pointing to a long list of the serious pitfalls of this very American undertaking.

**25.** In theory, one might maybe invent a better design of the competition tool for private jails in which there is a clear reward for some virtuous outcome, like prizing good conduct, the reintegration of inmates into society, et similia. However, there is a very high probability of disaster, and I would certainly side with the authors in believing that competition among private jails is simply a horrible idea. However, in my opinion, the bad idea comes long before arriving at competition; the mistake is to authorize private jails in the first place. It is practically impossible to run them well, and, anyway, the risk they pose for fundamental human rights is simply unacceptably high.

**26.** Speaking more generally, I fondly concede that there are vast areas of social life where competition is a tool that should be used with extreme caution, or which should be altogether avoided. The latter statement would call for a long and articulated discussion. In extreme synthesis, I observe that basic research, police and military defence, health, and some other important areas, are the domain

of public and merit goods and services. When these types of goods are involved, extreme attention is necessary to choose the right tools with which to organize production and consumption.<sup>5</sup> The role of the State in these economic areas is fundamental, and nowadays, during a pandemic, it is even, and rightly, expanding. In all these areas, the space for markets is limited, and so it is necessarily the space for competition.

**27.** Moreover, it is important to note that the action of the State is normally better organized with the tool of command and control, and can only very marginally be improved by using the tool of competition (albeit that is sometimes possible). Anyway, I am sure that, on these themes, I would find a vast amount of agreement with the authors of *Competition Overdose*.

**28.** The point, in conclusion, is that we first need to search for the right equilibrium between competition and regulation in the organization of the markets. Even this may be too narrow a view for the key questions that are posed in Stucke and Ezrachi's book. Markets, and their organizational forms, including competition, are part of society, embedded in a much larger and stronger fabric that preserves and defines its organization and functioning. The choice among the reach of the markets, that of other forms of not-for-profit social organizations, and the role of the State, come well before the competition/regulation dichotomy.

**29.** The quality, and the final result, of our economic and social life depends primarily on how we solve these deeper institutional dilemmas. Stucke and Ezrachi's important reflections point in a new direction, and they call for the correction of the route, in respect for the recent past. However, as Apicella (Moretti's character) would probably have loudly observed, for their message to be more clear and more effective, they should be talking of capitalism and greed, not of competition. Words are important. ■

<sup>5</sup> R. Musgrave, *The Theory of Public Finance* (McGraw-Hill, New York, 1959).



# Consumer Overdose and why consumer protection is good for competition

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1. In *Competition Overdose*, authors Ariel Ezrachi and Maurice Stucke identify some important and compelling situations in which the free market is not delivering good outcomes, and how this might be addressed. It is a book that is both enjoyable and depressing to read.

2. Nonetheless, it is shocking that *Competition Overdose* had to be written. After all, there is nothing in it that we shouldn't already know. Every economist is taught, at an early stage in their economics education, that markets do not necessarily deliver good outcomes, and indeed are unlikely to do so, if there are market failures present. And while market power—as addressed by competition law—is one source of market failure, it is far from being the only one. Others include externalities (positive and negative), asymmetric information, and cognitive limitations.

3. The book describes some excellent examples of precisely these market failures. The “competition overdose” it describes amongst elite universities results from two-way asymmetric information about the quality of both universities and students. The ignoble competition in the food industry depicted in the book reflects both asymmetric information and serious negative externalities. The final two examples of competition failures that it highlights—which both involve online platforms—reflect a combination of asymmetric information and cognitive limitations.

4. In terms of policy responses, the book emphasises that competition can deliver huge benefits, as well as harms. It cautions, quite rightly, against approaches which dispense with competition altogether. Indeed, it is not obvious that the examples in the book are even a result of “too much” competition. Some of the markets described (hotel booking, online marketplaces) are arguably characterised by too little competition.

5. In fact, the real competition overdose described in the book is not an excess of competition, even though this can sometimes occur. Rather it is that we have developed

excessive expectations of what competition can achieve. It is over-relied upon to solve market failures—a task for which is not well designed—and there is insufficient recognition that it can even exacerbate such market failures.

6. Again, this conclusion should not be surprising. We already have a wide array of regulations to address these wider market failures, from consumer protection to environmental standards, from food safety and animal welfare regulation to labour law. Perhaps the biggest takeaway from the book is that all of this wider legislation really matters. Competition will only deliver the huge benefits that it tantalisingly promises if it is pursued within a robust regulatory framework that ensures that competition works for, not against, the interests of consumers, workers, the environment.

7. In this short article, I focus on one particular aspect of this wider regulatory environment, consumer protection. *Competition Overdose* spotlights the importance of consumer protection for ensuring that competition delivers good outcomes, and I discuss and confirm this. However, I also make an additional and important point, not covered in the book: consumer protection is good for competition itself.

## I. Consumer protection as an enabler of “noble” competition

8. The importance of consumer protection in market-based economies is well established and has been increasingly formalised through legislation. President John F. Kennedy first introduced the US Consumer Bill of Rights in 1962, and the United Nations first adopted

Guidelines for Consumer Protection in 1985. Across many jurisdictions, consumers are now protected by law from unsafe products, fraud, deceptive advertising and a variety of other unfair business practices.

9. Yet consumer protection regulation is often seen as weaker, and of lower priority, than competition law. Outside of financial services, the enforcement of consumer protection regulation frequently receives fewer resources than competition law enforcement, and the sanctions for breach are weaker.

10. Some justify this imbalance on the basis of a serious misconception; that if we can ensure effective competition, then this will itself protect consumers. This is simply not true, as is shown clearly in *Competition Overdose*. While competition can sometimes help protect consumers, it certainly cannot be relied upon to do so.

11. This crucial finding is supported by a whole host of academic research. There is simply too great an imbalance of bargaining power and too great an asymmetry of information between firms and consumers, for naked competition to be expected to deliver good outcomes. The position is exacerbated by consumers' cognitive limitations, and the potential for firms to manipulate consumer decision-making through the way in which they present choices (known as "choice architecture").

12. A serious re-evaluation of the importance of consumer protection is therefore overdue. In particular, it deserves far greater recognition for its critical role in enabling effective competition that actually delivers good consumer outcomes.

## 1. Consumer protection and competitive markets: A brief introduction

13. At one level, whenever firms know substantially more about their products than do consumers, it is entirely obvious that consumer protection may be required to ensure good market outcomes. If firms are able to engage in naked fraud—selling stakes in investments that don't exist, or selling "snake oil" as a health cure—then many will eagerly do so. If enough consumers are conned, it will be a profitable strategy.

14. Of course, some consumers might be smart and realise that these products are worthless. However, unless they can clearly identify which sellers are honest and which are fraudsters, their best response will simply be to stay out of the market and avoid purchasing. The incentives of traders to remain honest in such a market will be weak, and there is a serious risk that only the fraudsters will survive. None of this is good.

15. It is well understood that consumer protection can solve this problem and restore more "noble" competitive incentives, by requiring that sellers provide what they promise. This ensures a level playing field on which firms cannot gain market advantage by offering consumers a bad deal.

16. However, consumer protection also has a more subtle and sophisticated role to play, even in the absence of all-out fraud. Markets deliver good consumer outcomes most effectively if the "demand side" of the market works well. This involves consumers, to the greatest extent possible, making well-informed active choices to buy the products that best suit their needs. This in turn requires them to attend to (or engage with) the market in question in the first place, access relevant information about the available products, assess that information, and finally act on that information. These four "As" underpin effective consumer decision-making and are critical for competition delivering good outcomes.<sup>1</sup>

17. In practice, however, real consumers struggle with all of these elements. They have limited information and a limited ability to process information. They face search and switching costs. They have cognitive limitations and exhibit behavioural biases. They make decisions on the basis of imperfect information. Their ranking of options may not be either coherent or consistent. They may fail to select their preferred option, either by mistake or due to misdirection by the seller. In addition, evidence on consumer inertia suggests that consumers procrastinate, whether due to time-inconsistent preferences, overoptimism regarding future action, or underestimation of future switching costs. They may simply lack self-control or forget to complete the process of finding better suppliers.

18. Importantly, it can also be both rational and efficient for consumers to choose not to fully engage or inform themselves. If a consumer were always to scrutinize all the terms and conditions of the services they signed up for, they would have little time to do anything else; they instead tend to "click to accept," without giving this "small print" any serious scrutiny.<sup>2</sup>

19. However, these various factors, which limit the effectiveness with which consumers attend to, access, assess, and act on relevant information have a variety of important implications for competition.

## 2. Consumer protection as a limit on distorted competition

20. First, even if firms are not acting strategically to confuse or deceive consumers, their competitive incentives will naturally be influenced by how consumers respond to their offerings. Even "competitive" and "non-deceptive" markets can generate poor consumer outcomes if consumers do not move towards the market options that provide lower prices, higher quality, or less exploitation, not least because firms will not then be incentivised to offer these better options.

1 A. Fletcher, Disclosure as a tool for enhancing consumer engagement and competition, 5(2) *Behavioural Pub. Policy* 252 (2021).

2 See Y. Bakos et al., Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts, 43(1) *J. Legal Stud.* 1 (2014).

**21.** Critically, competition can also occur on the “wrong” dimensions. If consumers ignore an aspect of the product or its price, competitive firms will be incentivised to compete aggressively on the salient elements, which consumers focus on, and to exploit consumers on any neglected dimension.<sup>3</sup> So if consumers focus overly on food prices, and give insufficient attention to food standards, competition will lead suppliers to cut corners on the latter. Similarly, if consumers mis-predict their own future actions—such as being overoptimistic regarding their ability to pay off loans—firms will compete hard on the element that consumers are focused on (easy access to loans, low upfront fees), and exploit the elements where they benefit from consumers’ mispredictions of their own behaviour (interest rates, late payment charges).<sup>4</sup>

**22.** Unregulated profit-maximizing firms in such settings—knowingly or unknowingly—exploit naïve consumer misperceptions and this can lead to undesirable consequences.<sup>5</sup>

**23.** Consumer protection regulation can usefully protect against such unsafe or unfair outcomes. A consumer who purchases food in a supermarket should not be expected to carefully check whether the available food is toxic; they should be able to trust in food safety regulations to protect them from the worst eventualities. When consumers are protected in this way from “hidden nasties,” they can more safely focus their scarce attention on the salient aspects of the product, and this is likely to result in better choices and more desirable market outcomes.

### 3. Consumer protection as a facilitator of “noble” competition

**24.** Alongside the need for a protective regulatory framework, *Competition Overdose* also argues that competition will deliver better outcomes if market actors take a more ethical approach to the firm’s activities. The book focuses on consumers, but this could equally involve a firm’s workers or its investors.

**25.** Clearly this is happening to some extent. The actors in markets are individuals and do behave according to their own ethical frameworks. Increasingly workers, investors and consumers are all having some impact on the ethical behaviour of firms, from moves towards ethical sourcing in response to consumer pressure, to investors forcing firms to take ESG (environmental, social and

governance) issues more seriously, to Google apparently terminating plans for a controversial censored search engine in China following employee pressure.<sup>6</sup>

**26.** These ethical forces can be powerful. However, this approach may itself require facilitative consumer protection regulation. For example, consumers and investors can only be confident in choosing green companies if they can be assured that their claimed green credentials are valid. Hence, there are strong moves in both financial services and general consumer markets towards addressing “greenwashing” concerns.

## 4. Consumer protection as a tool for enhancing competition

**27.** Third, if consumers are not making effective choices across products, competition itself can be harmed. This can occur for a variety of reasons.

### 4.1 Enhanced incumbency advantage and reduced innovation

**28.** If consumers feel that they are unable to trust the market, then they may well lack the confidence to try new products or suppliers. They will be more inclined to buy from established incumbent sellers who may be no better than entrants, but who have earned consumer trust by selling in previous periods. This can clearly increase the incumbency advantage—and consequently the market power—of such suppliers, while creating a barrier to entry and expansion for smaller rivals. Likewise, consumers in this situation may be uninclined to try innovative new products, which will in turn reduce incentives for firms to invest in innovation.

**29.** Competition and innovation can both be improved by consumer protection law that allows consumers to choose safely between products, including from less well-established sellers, secure in the knowledge that a mistaken choice will not have significant adverse consequences.<sup>7</sup>

### 4.2 Strategic dampening of competition

**30.** Given the critical importance of the demand side for competitive outcomes, it is perhaps unsurprising that firms may have a strategic incentive to impede informed consumer decision making with a view to dampening competition. Rather than seeking to gain customers through offering good value for money, firms may instead choose to shroud their poor value for money by acting strategically to make product comparison hard and generate consumer confusion.

<sup>3</sup> For example, X. Gabaix & D. Laibson, Shrouded Attributes, Consumer Myopi, and Information Suppression in Competitive Markets, 121(2) *Econ. J.Q.* 505 (2006).

<sup>4</sup> For example, S. Alan et al., Unshrouding: Evidence from Bank Overdrafts in Turkey, 73(2) *J. Fin.* 481 (2018); S. DellaVigna & U. Malmendier, Paying Not to Go to the Gym, 96(3) *Am. Econ. Rev.* 694 (2006)

<sup>5</sup> See M. Armstrong & J. Vickers, Consumer Protection and Contingent Charges, 50(2) *J. Econ. Lit.* 477 (2012); P. Heidhues & B. Kösegi, *Handbook of Behavior Economics – Behavioral Industrial Organization* 517 (2018); P. Heidhues et al., Inferior Products and Profitable Deception, 84 *Rev. Econ. Stud.* 323 (2017); P. Heidhues & B. Kösegi, Naïveté-Based Discrimination, 132(2) *Econ. J.Q.* 1019 (2016).

<sup>6</sup> See R. Gallagher, Google’s Secret China Project “Effectively Ended” After Internal Confrontation, *The Intercept*, 17 December 2018, <https://theintercept.com/2018/12/17/google-china-censored-search-engine-2>.

<sup>7</sup> P. Heidhues et al., Browsing versus Studying: A Pro-market Case for Regulation, 88(2) *Rev. Econ. Stud.* 708 (2021).

**31.** The inability of consumers to compare products can be a source of profits and oligopoly power, even when there are several suppliers.<sup>8</sup> Moreover, when markets become more competitive, firms can have increased incentives (unilateral or shared) to make product comparisons more difficult, or otherwise obfuscate, in order to avoid the resulting downward pressure on profit margins.<sup>9</sup> Likewise, if an established firm is able to deter its consumers from shopping around—for example through obfuscation or measures to decrease consumer engagement and increase inertia—it will achieve increased market power and incumbency advantage; it becomes less likely to lose its customers to rivals even if the latter offer a theoretically more attractive deal.

**32.** In this situation, consumer protection regulation that makes it harder to obfuscate or inhibit engagement can directly reduce market power and enhance competition, to the benefit of consumers.

### 4.3 Strategic leverage

**33.** Where a firm has an existing customer relationship, it has a natural advantage in selling additional products to that customer. However, it may also be able to unfairly exploit its advantageous position through selling additional products on a misleading basis.

**34.** For example, consumers can exhibit strong “default bias,” especially where they trust the source of the default option.<sup>10</sup> If an additional product or service is offered as a default choice, for example through a pre-ticked box online, this can nudge consumers towards making purchases without shopping around for the best deal (or even making purchases that are entirely unsuitable or unnecessary). This in turn limits the ability of alternative providers of these products to gain customers, even if they offer far better value for money or are more suitable. For this reason, in the EU, online sellers are now prohibited from selling additional products or services through pre-ticked boxes.

**35.** Similarly, the UK Advertising Standards Authority (ASA) recently upheld a complaint against Amazon in relation to its advertising of its Amazon Prime service, which is complementary to its core online shopping service.<sup>11</sup> The complaint concerned a particular choice screen which included two buttons appeared to present different options as regards Amazon Prime. In fact, both buttons led to customers agreeing to sign up. The only route to not signing up was to click on a link that was far

less salient than the two buttons. The ASA considered that this framing was likely to mislead consumers into taking Prime. In doing so, Amazon was effectively leveraging its core market position into this additional service.

**36.** Consumer protection, by limiting the ability of sellers to market exploitatively to their existing customers, can clearly play a valuable role in limiting such unfair strategic leverage, and so fostering more effective competition.

### 4.4. Strategic enhancement of “bottleneck” market power

**37.** Finally, in the context of multi-sided platforms, consumer protection regulation can have an unexpected additional benefit for competition. Such platforms can exhibit “bottleneck” market power in relation to one side of the market – typically third-party sellers or advertisers – if they provide a critical route to consumers on the other side of the market. This in turn is most likely to occur when consumers “single home” or do not shop around.

**38.** This, of course, provides an additional incentive for platforms to act strategically to limit consumers’ ability to “multi-home” or shop around. While consumers may not suffer directly from such action, the additional market power that platforms gain in their dealings with third-party sellers will in the end harm consumers through driving up the costs faced by these sellers. Consumer protection regulation, which is inherently intended to foster consumers’ ability to shop around, can be invaluable in ameliorating this problem.

**39.** In addition, platforms may be able to enhance their “bottleneck” position further by obfuscating on their own platform. For example, the UK Competition and Markets Authority has taken action against hotel online booking sites for failing to make clear that the hotel rankings they provide, ostensibly to reflect the consumers’ best interests, are in fact influenced by commercial factors, such that hotels are effectively able to buy higher rankings. This blurring of the boundary between organic search rankings and paid for advertising not only left consumers at risk of making poor choices but also conferred greater “bottleneck” power on the platforms—they could charge hotels a lot to improve their position in these misleading rankings. Again, consumer protection regulation, by ensuring that consumers are not misled in this way, should help to reduce market power and enhance fair competition.

## II. Conclusion

**40.** Effective consumer protection can therefore be seen as a key component of effective competition policy. This does not, of course, mean that consumer protection law is always beneficial. Mandating disclosure of relevant information will not improve consumer choice if consumers simply ignore it, and it could even harm

<sup>8</sup> See T. Scitovsky, Ignorance as a source of monopoly power, 40(2) *Am. Econ. Rev.* 48 (1950); P. Diamond, A model of price adjustment, 3(2) *J. Econ. Theory* 156 (1971).

<sup>9</sup> See R. Spiegler, Competition over agents with boundedly rational expectations, 1(2) *Theoretical Econ.* 207 (2006); B. Carlin, Strategic price complexity in retail financial markets, 91(3) *J. Fin. Econ.* 278 (2009); I. Chioveanu & J. Zhou, Price competition with consumer confusion, 59(11) *Mgmt. Sci.* 2450 (2013).

<sup>10</sup> See J. Jachimowicz et al., When and why defaults influence decisions: A meta-analysis of default effects, 3(2) *Behavioural Pub. Policy* 159 (2019).

<sup>11</sup> See Advertising Standards Authority Oct. 30, 2019 G19-1021643, ASA Ruling on Amazon Europe Core Sarl (UK), <https://www.asa.org.uk/rulings/amazon-europe-core-sarl-G19-1021643.html>.



consumer decision making if consumers feel overloaded. Likewise, simplified disclosure can be distortionary if the simplification is ill-suited to the choice being made. For example, the use of APRs can lead to worse choices regarding short-term credit options (Bertrand and Morse (2011)).<sup>12</sup> Consumer protection law can also create detriment if, in protecting the naïve, it inhibits firms from offering products which more sophisticated consumers would both understand and value.

**41.** However, the fact that certain protections can have some negative consequences does not undermine the general need for, and benefits of, consumer protection law. Rather, the observation simply demonstrates that regulation of this sort often involves trade-offs, and potential negative consequences should clearly be considered carefully in regulatory design.

**42.** As *Competition Overdose* so forcefully argues, competition has huge benefits, but also downsides. Consumer protection has a critical role to play both in limiting these downsides and in enhancing competition itself.

**43.** A final note. Some of the examples provided above relate to the digital sphere, and there is an urgent need to revisit and bolster consumer protection legislation in the context of digital platforms.<sup>13</sup> Consumer protection concerns are elevated in this arena by several key factors.

The high levels of concentration in many digital platform markets, combined with the potential for “bottleneck” market power, mean that the competition considerations set out above are likely to be especially critical. Digital platforms also provide important routes to market for third party trader and receive revenues for playing this intermediary role. They thus have a critical role to play in ensuring that these traders act within the law and treat consumers fairly. Not only are they uniquely well positioned to police such conduct, but they also have a responsibility to do so given that they gain from the earnings of these traders.

**44.** In addition, digital platforms frequently have huge quantities of individual consumer data, complete control over the user interface and thus the choice architecture facing consumers, and the ability to run extensive “A/B testing” to assess how consumers react to changes in this architecture, potentially on a personalised basis. All of this can potentially be utilised strategically by digital platforms to influence consumer decision-making in a way that is beneficial to the platform but not necessarily the consumer.

**45.** All of this means that consumer protection needs to be more firmly brought within the sights of policy makers and enforcers, including those tasked with ensuring competition is healthy and delivers good outcomes. ■

<sup>12</sup> For example, M. Bertrand & A. Morse, Information Disclosure, Cognitive Biases and Payday Borrowing, 66(6) *J. Fin.* 1865 (2011); F. Duarte & J. Hastings, Fettered Consumers and Sophisticated Firms: Evidence from Mexico's Privatized Social Security Market, *Nat'l Bureau of Econ. Rsch., Working Paper* No. 18582 (2012).

<sup>13</sup> A. Fletcher et al., Consumer Protection for Online Markets and Large Digital Platforms, *Policy Discussion Paper* No. 1, Tobin Center for Economic Policy at Yale: Digital Regulation Project (2021).

# On being competitive

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## I. Introduction

1. When is a firm competitive? In economic theory, at least in what is commonly known as neoclassical price theory,<sup>1</sup> what characterises a competitive firm is that it is small relative to the size of the market and overall supply (i.e., it is “atomistic”) and, therefore, is unable to affect the market price through its choice of output.<sup>2</sup> A competitive firm is therefore a “price taker.” Instead, oligopolistic firms and, in the extreme, monopolists can affect the market price by reducing their output. Oligopolists are few and each of them typically represents a significant share of overall supply and, of course, a monopolist controls all supply. Both oligopolists and monopolists are “price makers”: by limiting their output choices relative to the competitive benchmark they push the market price and, hence, their margins and profits upwards.

2. The economic theory definition of what constitutes a competitive firm does not seem to correspond to what businesspeople and management gurus seem to consider to be a competitive firm. As explained by Michael E. Porter in his classical book, *Competitive Strategy*,<sup>3</sup> competitive firms seek to secure and retain an advantage over their rivals to escape competition and obtain positive rents. A competitive firm has a “franchise” (i.e., its products are not commoditized) which affords pricing power. It is anything but atomistic or a price taker.

3. The economic theory interpretation of “competitive” does not seem in line with common parlance either. On our side of the pond, “competitive” is defined to mean “as good as or better than others” or “trying hard to be better than others” by the *Oxford Advanced Learner’s Dictionary* 9th Edition (2015). *The Essential Dictionary of the Spanish Language of the Royal Academy of Spain*

(2006) defines “competitive” as “capable of competing” and “inclined to compete.”<sup>4</sup> *Le Petit Robert Micro* (2013), a commonly used French dictionary, states that competitive is “who can compete in the market”<sup>5</sup> and, finally, *i garzantini* (2007), our preferred Italian dictionary, considers that competitive is “which allows you to compete with the rivals.”<sup>6</sup>

4. Interestingly, none of these European dictionaries links “success” with being “competitive,” as the management literature does. This is different in the US. According to the *Merriam-Webster’s Advanced Learner’s English Dictionary* (2017), one of the most widely used and respected English dictionaries in the US, “competitive” refers to “a situation in which people or groups are trying to win a contest or be more successful than others”; indicates “having a strong desire to win or be the best at something”; or the ability to be “as good as others of the same kind, able to compete successfully with others.” Note the emphasis on the notion of “success” in each of the three definitions of competitive in this US dictionary.

5. Yet, as noted by David George (2008), when “competitive” is interpreted as “successful,”<sup>7</sup> a price maker, even a monopolist, can be considered to be competitive. “Paradoxically enough, the firm that manages to become the only seller (an economist’s ‘monopolist’) or the firm that manages to be one of just a few sellers (an economist’s ‘oligopolist’) now qualifies for the title of ‘very competitive firm’ since it’s the only one (or one of a few) that managed to survive the competitive struggle. Amazingly, the firm that is least able to be described as ‘competitive’ by the old definition (a single firm in a sea of many firms) now is most able to be described as ‘competitive’ by the new definition (a ‘victorious’ or ‘most able’ firm). This is a coup d’état writ large.”

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1 See G. Debreu (1959), *Theory of Value*, Yale University Press. See also S. Jaffe, R. Minton, C. B. Mulligan and K. M. Murphy (2019), *Chicago Price Theory*, Princeton University Press.

2 See H. Hovenkamp (2021), *Principles of Antitrust*, 2<sup>nd</sup> Edition, Chapter 1.

3 See M. E. Porter (1980), *Competitive Strategy*, Free Press.

4 “Competitivo: 1. Perteneciente o relativo a la competición; 2. Capaz de competir; 3. Inclinado a competir.” *Diccionario esencial de la lengua española* (Real Academia Española, Espasa, 2006).

5 “Compétitif : Qui peut supporter la concurrence du marché.” *Le Petit Robert Micro* (Le Robert, 2003).

6 “Competitivo: Che permette di competere con la concorrenza.” *Dizionario i garzantini Italiano* (Garzanti Linguistica, 2007).

7 D. George (2008), On being “competitive”: the evolution of a Word, *Real-World Economics Review*, 48, 319–334.

6. The positive attitude towards success may explain why, in the US, firms, irrespective of size or market position, can set prices unconstrained, even if that means setting very high prices. As stated by Justice Scalia in *Trinko*,<sup>8</sup> “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”

7. Instead, in Europe, whether in the EU or the UK, a company that is so successful that can influence, let alone set, market prices—i.e., a firm that is able to behave independently of its competitors, customers and, ultimately, its consumers—is not regarded as “competitive.” Rather it is considered to hold a “dominant position” or “significant market power” and its prices are subject to scrutiny *ex post*—competition law—and, sometimes, also *ex ante*—regulation.<sup>9</sup> Dominant firms are supposed to behave “as if” they were price takers; that is their so-called special responsibility. While dominance is not a problem per se, European competition agencies regard markets where a dominant position exists as markets where competition is necessarily distorted. That is why any unilateral conduct by a dominant firm that places rivalry at risk is condemned even if it may generate efficiencies and improve consumer welfare. This is also why any merger or agreement that strengthens, albeit minimally, a dominant position is bound to be prohibited and, as the General Court stated in Case T-399/16 *CK Telecoms v. European Commission*, paragraph 90, the merger regulation in the EU “must be interpreted as allowing the Commission to prohibit, in certain circumstances, on oligopolistic markets concentrations which, although not giving rise to the creation or strengthening of an individual or collective dominant position, are liable to affect the competitive conditions on the market to an extent equivalent to that attributable to such positions, by conferring on the merged entity the power to enable it to determine, by itself, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker.”

8. In this paper we discuss whether it is correct to restrict the qualification of competitive to those firms that act as price takers. That is, whether it is right as a matter of economics to conclude that only firms that, while able to compete with others offering goods that are no less desirable at costs that are not too high, are unable to affect the market price should be considered competitive. We conclude that this narrow interpretation of what a competitive firm is, which is the one adopted by many competition laws around the world, is incorrect. Price

takers compete aggressively but they are not the only one to do so. We show that firms run by empire building managers can be very aggressive even when they possess market power, and that the same is true for firms where managers are paid if their firms are the most profitable. That is, we find that firms can be competitive even in concentrated markets where their output decisions determine prices, provided their managers are not just trying to compete but do strive to be the best.

9. What is key is to ensure that markets deliver outcomes that benefit consumers – i.e., efficient or competitive outcomes – is that firms are compelled to compete on the merits, promoting their sales but refraining from undertaking actions that undermine their rivals’ sales. Aggressive managers, as well as managers incentivised to act aggressively in the marketplace, deliver competitive outcomes to the ultimate benefit of consumers but only when they are restricted to compete by enhancing the value and appeal of their offers or by expanding their franchises. Managers that seek to prevail by undermining their rivals, e.g., raising their costs and/or blockading their sales, should be shown a red card. Those managers may be regarded as competitive in common parlance, but their competition is nefarious. Competition among such managers, ready to wage an all-out war against their rivals by all means possible, including by infringing on their property rights, may cause the market to collapse, in which case we could say that the market died of a “competition overdose”.

## II. The Canonical Cournot Model

10. The Cournot model has been extensively used in competition economics and, in particular, in merger control. In its simplest formulation it specifies a market for a homogeneous good, where (a) demand  $D$  is inversely related to price according to the following linear relationship:  $D = a - P$ , where  $P$  is the market price; and (b) there are  $N$  firms competing for such demand with common marginal costs equal to  $c$ , with  $a > c$ . Each firm  $i$  sets its own quantity,  $q_i$ , so that overall supply,  $Q = \sum_{i=1}^N q_i$ , equals demand at the market price.

11. When the number of firms is finite, then each firm chooses a quantity so that the marginal cost of producing an extra unit,  $c$ , equals its marginal return, which is equal to the margin made by selling an extra unit,  $P$ , minus the reduction in revenue caused by negative impact of the sale of an extra unit on the market price. So, in this model, when there is a finite number of firms, each of them acts as a price maker, i.e., each takes into account the effect on the market price of its output decision. This model predicts that each firm will produce a quantity equal to  $(a - c)/(N + 1)$  and the market price will equal  $(a + Nc)/(N + 1)$  which is greater than  $C$ .

<sup>8</sup> Opinion, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (02-682) 540 U.S. 398 (2004), 305 F.3d 89, reversed and remanded, p. 7.

<sup>9</sup> R. Whish and D. Bailey (2021), *Competition Law*, 10th Edition, Oxford University Press, Chapter 5.

**12.** Firms only act as price takers when is sufficiently (to be precise, infinitely) large. When the number of firms is so large, each of them contributes a negligible fraction of total supply and, hence, no longer cares about the price impact of expanding its output. Yet, the sum of their contributions is so large that the market price converges to , i.e., all supra-competitive rents disappear. Thus, the Cournot model predicts that firms behave competitively when the market is sufficiently fragmented. The more concentrated the market is, the less competitive firms behave and the more profits they make.

### III. The Cournot Model with Empire Building Managers

**13.** Consider the Cournot model of the previous section with a finite number of firms , so that each of them has market power and, therefore, cannot be regarded as perfectly competitive. Suppose now that each firm is run by a manager who maximises a linear combination of the firm's profits and its output:  $v_i = \alpha(\pi_i + \gamma q_i)$  where  $\pi_i = (P - c)q_i$ . The manager's objective function  $v_i$  may be the result of (a) an explicit compensation scheme laid out by the firm's shareholders to encourage her to win market share, or (b) her own empire building aspirations – the will to run the largest firm in the market.

**14.** The manager of firm chooses a level of output equal to  $(a - c + \gamma)/(N + 1)$  and the market price equals  $(a + Nc - N\gamma)/(N + 1)$ . Provided  $\gamma > 0$  the output chosen by firm  $i$ 's manager is greater than the one the shareholders chose under the canonical Cournot model. As  $\gamma$  grows, each firm sells more, and the market price goes down. When  $\gamma = \gamma^* = (a - c)/N$  then the market price equals  $c$ , and therefore all supra-competitive rents are competed away. (Note that  $\gamma^*$  is decreasing in  $N$ .)

**15.** This modification of the standard Cournot model has several interesting implications. Firstly, whether a market is competitive depends not only on its market structure but also on the incentives of the managers running the various firms. A market populated by empire builders will be very competitive even if it only features a small number of firms. Secondly, while none of the managers in this model are price takers, they would behave as if they were, provided they cared enough about selling more (e.g., being the market leader, employing lots of people, etc.) Thirdly, the competitive benchmark may obtain even with non-atomistic firms and even if the market is concentrated. In short, firms may behave competitively when their managers are competitive in the sense of “having a strong desire to win or be the best at something”. That is, when they are not just trying to compete but to do so successfully.

**16.** Will shareholders hire empire-building managers if, in the end, they end up reducing profits? The answer is yes.<sup>10</sup> Shareholders face a prisoner's dilemma. Collectively, they would be better off if none of them hired an empire builder to run their firms. But, assuming none of the firms did, it is in the incentive of each of them to deviate and hire one. The firm with the sole empire builder would steal market share at the expense of the others without a major impact on price. The deviant firm would be highly profitable. Given this, its rivals would respond by hiring empire builders too.

### IV. Yardstick Competition

**17.** Consider now a Cournot *duopoly* where demand and costs are as in the previous sections. Unlike in the sections above, however, we now assume that each firm  $i (= 1, 2)$  is run by a manager maximising the following utility function:  $u_i = \alpha(\pi_i - \gamma\pi_j)$ , where  $\pi_i = (P - c)q_i$ . The manager's objective function  $u_i$  may be the result of (a) an explicit compensation scheme chosen by the firm's shareholders, linking her compensation to the relative performance of firm  $i$  or (b) her own desire to run the most profitable firm in the market.

**18.** The manager of firm  $i$  chooses a level of output equal to  $(a - c)/(3 - \gamma)$  and the market price equals  $(a(1 - \gamma) + 2c)/(3 - \gamma)$ . Provided  $\gamma > 0$ , the output chosen by firm  $i$ 's manager is greater than the one obtained in the canonical Cournot model. As  $\gamma$  grows, each firm sells more, and the market price goes down. When  $\gamma = 1$  the market price equals  $c$ , and therefore all supra-competitive rents are competed away.

**19.** So, in markets where managers care about the relative performance (profits) of their firms – i.e., in markets characterised by yardstick competition – competition can be very intense even if the market is highly concentrated (a duopoly) and, hence, firms are large. As in the previous section, therefore, whether a market is competitive crucially depends on the incentives of the managers running the various firms and not necessarily on the degree of concentration of the market. That is, firms are more likely to behave competitively when their managers are not just trying to compete or capable of competing but when they try to be the best.

10 J. Vickers (1985), Delegation and the Theory of the Firm, *Economic Journal*, 95, 138–147.



## V. From Competition to Conflict

**20.** Thus far we have assumed that all managers can do to advance their objectives is to expand or contract output. In this section we enrich the strategy space by allowing managers to engage in activities that undermine the competitive position of their rivals. Specifically, we consider that they can undertake actions that limit their rivals' output. A competitive manager will be one that is willing to engage in actions that undermine its rivals' competitive position.

**21.** To fix ideas, consider a Cournot duopoly with the same demand function as before. The manager of firm  $i$  ( $i = 1, 2$ ) is incentivised to maximise profits. Thus, unlike the models of the last two sections, managers' compensation is perfectly aligned with firm value. So, her choice of output  $q_i$  trades off more volume with a lower margin. Yet, the output of firm that finally makes it to the market, i.e., firm  $i$ 's volume of sales, is not  $q_i$  but  $q_i - d_j$ , where  $d_j$  is chosen by firm  $j$ 's manager.

**22.** Producing higher output is costly: the cost of producing  $q_i$  is  $\alpha q_i^2/2$ . Engaging in destructive activities is also costly, with the costs given by  $\beta d_i^2/2$  (Both  $\alpha$  and  $\beta$  are non-negative but not too large). Thus, the manager of firm  $i$  maximises

$$\pi_i = (P - c)(q_i - d_j) - \frac{\alpha q_i^2}{2} - \frac{\beta d_i^2}{2}$$

where  $P = a - (q_i - d_j) - (q_j - d_i)$ . It is easy to show that firm  $i$  will set  $q_i$  and  $d_i$  so that  $(1 + \alpha)q_i = d_j + (P - c)$  and  $(q_i - d_j) = \beta d_i$ .

**23.** That is, for given fundamentals, firm  $i$  will produce more but will invest less in destructive activities, the greater the destructive activities of its rivals. So, the output of a company and destructive activity of the other are strategic complements, whereas the output of a company and the output of its rival are strategic substitutes, and the destructive activities of the rivals are also strategic substitutes.

**24.** In the unique symmetric equilibrium:

$$d^* = (a - c) / \Psi(\alpha, \beta)$$

$$q^* = (1 + \beta) d^* \text{ and}$$

$$P^* = a - 2\beta d^*,$$

$$\text{where } \Psi(\alpha, \beta) = \alpha(1 + \beta) + 3\beta$$

**25.** It follows that the volume of sales for each firm,  $q^* - d^*$ , is decreasing, and the market price,  $P^*$ , is increasing, as  $\beta$  goes down so that, for given  $d_i$ , the marginal cost of the destructive activity goes down. When that cost approaches zero (i.e.,  $\beta \rightarrow 0$ ),  $q^* - d^*$  is close to zero and the market price equals  $a$ . That is, the market collapses and both consumers and firms are worse off.

**26.** Furthermore, these outcomes can be compared to those that correspond to an otherwise identical oligopoly model where managers cannot adopt destructive activities. In that alternative scenario,  $d = 0$ ,  $\hat{q} = (a - c)/(3 + \beta)$  and  $\hat{P} = (a(1 + \alpha) + 2c)/(3 + \alpha)$

Then, we have that, for all  $\beta$ , firm's sales are lower and market prices are higher when managers engage in destructive activities: i.e.,  $q^* - d^* < \hat{q}$ , and  $\hat{P} < P^*$ .

**27.** The implications of this analysis are quite stark. Unlike in the managerial models of the previous two sections, the presence of aggressive managers (those for whom the marginal cost of destructive activities is low) leads to high prices and low output and, in the extreme, may cause the collapse of the market. So, when assessing the competitiveness of a market we need to go beyond market structure and managerial incentives and consider the ways in which competition materialises. Aggressive managers are good for consumers and, hence, for allocative efficiency, when they compete by expanding their output. When in addition they engage in value destruction activities with the only purpose of undermining their rivals' sales, their contribution to social welfare is negative. Hence, aggressive managers should be restricted to compete on the merits and punished heavily when restricting rivals' output, e.g., by raising their rivals' costs or making it difficult for them to reach out to their customers.

## VI. Concluding Remarks

**28.** In this brief essay we have considered the circumstances under which a firm can be regarded as competitive. In particular, we have investigated whether it would be correct to conclude that only companies operating in fragmented markets and acting as price takers can be regarded as such. We conclude that, while firms are indeed likely to behave competitively in fragmented markets, they will also do so in concentrated markets, even in highly concentrated ones, provided they are run by aggressive managers; i.e., managers geared to build market share at the expense of their rivals, or managers that are paid handsome returns only if their firms are at the top of the billboard.

**29.** We have seen, however, that not all aggressive managers are good for competition and welfare. Society should encourage firms to hire aggressive managers and to incentivise them to behave competitively but should restrict the ways in which they can compete so that they are compelled to compete on the merits. Competition among managers ready to wage an all-out war against their rivals, e.g., infringing on their property rights, may

cause the market to collapse as a result of a “competition overdose”. Thus, this paper emphasises conduct over structure, incentives over size, and in so doing contradicts those who place the focus on market concentration and *ex-ante* structural intervention and invites readers to reconsider the importance of regulating firm’s behaviour *ex-post*. ■

# Regulation underdose?

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## I. Introduction

1. As a competition economist working in the European Commission, I opened *Competition Overdose* with a certain amount of trepidation. Would this be (yet) another attack on the use of economics in competition policy? Or would it be (yet) another attack on the competition policy of the European Commission? It did not take long, however, before I realised that I could relax and enjoy the reading. The book is not an attack on competition economics, nor on European competition policy.

2. What is it then about? *Competition Overdose* is mainly a well-written and entertaining cry for more or better regulation in various parts of the economy. To quote from the preface: it is “time to wake up and notice that, beginning in the 1970s, competition has been overprescribed, the many regulations to protect us from overdosing have been stripped away, and the warning labels suggested by economists have been removed.”<sup>1</sup>

3. But the book does much more than present technical arguments for more regulation. Towards the end, the authors present their views on many topics that go beyond the examples given previously in the book. For instance, the authors encourage us to “[t]hink of the hardworking UPS and FedEx drivers who are likely to be displaced by automation. Don’t they warrant any kind of protection from our government?”<sup>2</sup> They continue by stating that “[t]he government’s role can’t be restricted to simply championing competition or prosecuting illegal antitrust violations. If we encourage people to compete, we can’t let them descend into bankruptcy—and worse—if they fail. It is the responsibility of every society and its government to provide for and protect those who have become collateral damage in the competitive rat race. Until recently, this was a foundational view of government, shared by many countries around the world and reflected in their policies.”<sup>3</sup>

4. The authors also encourage us to be more aware about our food and think about where we buy it. “Most of us have forgotten what food can actually taste like. We have become so acclimated to hard peaches and green pears picked before they ripen, apples treated chemically so they can be stored for months, and strawberries bred to be big and red and gorgeous but lacking any smell or taste, that we no longer think to demand anything else. If you want a tastier tomato or humanely raised (and also better-tasting) grass-fed beef, then you should demand it. One way to do so is to put a face back on your food. A good place to start is your local farmers market, which can offer this combination of price, quality, and service.”<sup>4</sup>

5. I quote these examples to give a potential reader an idea of the wide range of issues that the book deals with in its almost 300 pages. But also to explain that I found it a bit of a challenge to figure out how to tackle the book from a competition policy angle, since, in my view, most of the book actually does not really deal with competition policy, although that is the home turf of the two authors.

6. In fact, I have decided that I find the title a bit misleading. Maybe “Regulation Underdose” would have been better than “Competition Overdose,” at least as regards several chapters of the book.<sup>5</sup> There are, in my view, not that many examples of “too much competition” in the sense that the situation would have been better if there were less firms competing in the market(s).<sup>6, 7</sup> Which

\* The views expressed in this article are solely those of the author and do not necessarily reflect those of the European Commission.

1 Page viii.

2 Page 270.

3 Pages 270–271.

4 Page 288.

5 In his contribution to this special volume, Pier Luigi Parcu suggests “Capitalism Overdose” or “Greed Overdose.”

6 Both Diane Coyle and Amelia Fletcher make similar points in their contributions.

7 As far as I can see, the book does—somewhat curiously—not at all mention the way one in my view can convincingly argue that perhaps we have seen “too much competition” over the last couple of decades. I am thinking of the effects of globalization where governments arguably have not managed to compensate the losers from globalization in a satisfactory way, although the gains from globalization should have provided room for such compensation. By “compensation,” I do not only mean financial compensation, but also retraining for and help with finding new jobs. This is probably one of the reasons—and maybe even a main one—for widespread dissatisfaction in certain geographical areas and social groups with the current economic model. To the extent that governments have not been able to handle this problem, globalisation probably has led to “too much competition.”

is the way I normally would think of “too much” competition. The book is more about firms competing “the wrong way”: cheating on the scales, exploiting weaknesses of their customers, etc. And I am not convinced that firms would do much less cheating and exploiting if there was less competition in the sense of fewer firms competing. I am, for instance, not sure, that monopolists generally are “nicer” to their customers than are firms involved in fierce competition.<sup>8</sup>

7. What I will do in the remainder of this small article is to discuss, first, what the book has to say about competition policy in the “narrow” sense. I will then move on to what the book says about regulation in a wider sense. Finally, I will have an “other” category, that is, issues dealt with in the book that, as far as I can see, cannot be characterized as competition policy nor as regulation.

## II. Competition policy

8. Since *Concurrences* is, after all, a journal devoted to competition policy, I thought I would spend some time checking what *Competition Overdose* actually says about competition policy—or rather, given its US orientation, about “antitrust.” Perhaps a bit surprisingly, since the authors both are distinguished antitrust professors, the word antitrust actually does not show up that often in a book of almost 300 pages. There are some not-so-kind general words about antitrust practitioners—for instance that “[j]udges, antitrust enforcers, and policy makers might privately recognize that competition isn’t always what it’s cracked up to be. But in their day-to-day work they typically enforce the competition ideology.”<sup>9</sup> However, as far as I can see, there are only few examples of concrete criticism of current antitrust doctrine.

9. The example that seems closest to the authors’ hearts concerns college sports. The book describes how American universities are involved in an “arms race” to invest in expensive facilities in order to attract the best football and basketball players.<sup>10</sup> Furthermore, some coaches are paid very high salaries. Many athletics programmes apparently are losing money. However, agreeing among the universities to restrict the number of coaches and their salaries would probably be considered anticompetitive under the antitrust laws. The authors seem to think that such restrictions should be allowed, since otherwise there is a risk that the “main business” of the universities, education, suffers from having to subsidise athletics.

<sup>8</sup> I am here assuming that all firms—including the monopolist—are private. It would be an entirely different discussion if we were to compare public monopolies with markets with competition. Such a discussion—including whether the privatizations that have taken place in the last decades have been successful—would go beyond what I can deal with in this short contribution.

<sup>9</sup> Page 126.

<sup>10</sup> Pages. 132–145.

10. It is slightly unclear to me why exactly the universities find it necessary to participate in this arms race.<sup>11</sup> The book explains that one university tried to pull out by shutting down its football team, but that “*the decision prompted hate mail, threats, a vote of ‘no confidence’ by the faculty for the college president—and ultimately a reversal.*”<sup>12</sup> So apparently the academic faculty, whom the decision to shut down the football team ought to benefit, protested against the decision. As you can understand from my puzzlement, I am not an expert on American college sports. However, I cannot help stating that, from my outsider’s perspective as a sports-interested European, I have always thought that top college athletes are short-changed by the American system. In Europe, younger top athletes in big-money sports often will get some kind of compensation—and in football maybe even a more-than-decent salary—while they are trying to break through into the big leagues. In the US, younger athletes in certain sports are—or at least were until the recent Supreme Court judgment in *NCAA v. Alston*<sup>13</sup>—supposed to be “amateurs” whose compensation from universities are limited by rules of the National Collegiate Athletic Association. The comparison with Europe is even odder when taking into account that college football and basketball are enormously popular spectator sports in the US.<sup>14</sup>

11. The Supreme Court in *NCAA v. Alston* upheld a district court judgment that found that certain NCAA rules were unlawful. In a concurring opinion, Justice Kavanaugh went further and hinted strongly that in his view the remaining NCAA rules also could be unlawful: “*The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.*”<sup>15</sup> As you may have understood, I have some sympathy for this view. Maybe somebody would argue that at least one could allow a wage limit for coaches’ salaries, as some of them run into millions of dollars. But where to stop? If the argument is that too high salaries to coaches risk taking funds away from education, could one not also argue that too high

<sup>11</sup> Tatos and Singer show that the most important college athletics programmes make significant amounts of money. Furthermore, they argue that “*it bears noting that limiting the analysis to athletic department revenues understates the contribution success in these sports can make to the university and its brand.*” (T. Tatos and H. Singer, Antitrust Anachronism: The Interracial Wealth Transfer in Collegiate Athletics Under the Consumer Welfare Standard, *The Antitrust Bulletin*, Vol. 66(3), 2021, 396–430.

<sup>12</sup> Page 141.

<sup>13</sup> *National Collegiate Athletic Association v. Alston et al.*, decided June 21, 2021.

<sup>14</sup> According to the website Topend Sports, eight of the world’s ten largest sport stadiums in May 2021 were American college football stadiums (<https://www.topendsports.com/world/lists/stadiums-largest.html>).

<sup>15</sup> The article by Tatos and Singer cited above tries to estimate this transfer of wealth from student athletes to other beneficiaries.



salaries for law professors risk taking funds away from education? After all, maybe universities could provide more education, if they were allowed to limit the salaries of top law professors—or for that matter other university staff. To me it seems a treacherous path for antitrust to start making such calls. I am therefore not convinced about the book's using college sports as an example of where antitrust fails as a result of relying too much on the benefits of competition. I am not sure that it is the job of antitrust to make judgment calls on whether competition is good or bad in such a situation, since it would invariably mean picking sides in a distributional argument.

12. In their concluding chapter, where the authors provide ideas about how to improve things, they write that “*policy makers could draft antitrust exemptions that would allow competitors to agree to certain restrictions on their competition, without risking millions of dollars in antitrust fine or even prison sentences, in order to prevent the race to the bottom.*”<sup>16</sup> It is, of course, difficult to disagree with this statement as such. Everything depends on what one wants to exempt from the antitrust laws. As I have explained above, I am, for instance, not convinced that a blanket exemption that would allow universities to restrict compensation for college athletes—or even their coaches—is a good idea. On the other hand, I would be perfectly happy with finding a way to allow Uber and Lyft drivers to unionize—or more generally to bargain collectively—without conflicting with antitrust laws.<sup>17</sup>

### III. Regulation

13. The book spends more ammunition on arguing for more—or better—regulation than it does on criticising antitrust. Examples go from “drip pricing,” where consumers fail to anticipate additional fees or high prices of add-ons, over the European horsemeat scandal, and airlines flying with dangerously little fuel, to the failure of regulators to prevent the 2008 financial crisis.

14. Maybe it is because I am a Danish economist, trained to have a twin belief in the power of markets and the need for the state to intervene when markets do not deliver, that I could not find much to disagree with. Well, perhaps I could quibble about the way some of the examples are presented, but this book is not an article submitted to a top economic journal. It needs a good and fast-moving narrative to reach the broader audience that I think it targets, and I understand that this may mean that some details and caveats are left out.

15. And I do agree with the basic narrative that in many markets some form of regulation is needed.<sup>18</sup> Economists

are taught about market failures and aware that regulation may be needed, for instance because of imperfect information. The book itself quotes<sup>19</sup> the famous “market for lemons” article of Nobel prize winner, George Akerlof.<sup>20</sup> The hard part is, of course, to figure out how to regulate in an intelligent way.

16. I find that the book here shows that it seems to be mainly targeting a US audience. Most of the examples are from the US, and it was often difficult for me to imagine who the mostly anonymous “policy makers,” that the book criticises, could be in a European context. For instance, which European policy makers with real influence (perhaps besides certain UK Tories) could reasonably be described as believing the competition is a “magical cure-all”?<sup>21</sup> Or when the authors write: “*If there is any doubt that competition is the ideology that rules our lives, ask yourself: Do you remember any policy maker within your lifetime issuing a warning about competition's potential for toxicity? Almost certainly not.*”<sup>22</sup> Well, in a European context, the answer is certainly yes.<sup>23</sup> With a bit of effort, I think anybody can come up with many quotes from centrally placed European politicians giving such warnings.

17. It is, of course, not a problem in itself that the book mostly targets a US audience, and that most of the examples are from the US. But it did at times make it difficult for me to see the relevance of the examples for a European audience. From a European perspective, it sometimes feels as if the authors are pushing at an open door.

### IV. Other considerations

18. The authors describe many of their examples as “toxic” competition. I am not sure that the book actually says this directly, but I was left with the impression that the authors think that the world has got worse—that there is more toxic competition now than in the past. This made me scratch my head a bit: do I actually know whether there is a reason to believe this? In the end, I decided that I do not know. Maybe I should try to find out, but right now, I simply do not know.

19. It is, of course, easy to find examples in the past of unscrupulous behaviour similar to the examples given in the book. The snake oil sellers I know from the many Western movies that I watched in my childhood were

16 Page 287.

17 Page 232. See also the European Commission's initiative to clarify the scope of the application of EU competition rules to collective bargaining agreements for self-employed.

18 See here Amelia Fletcher's contribution on the importance of having an effective consumer protection policy.

19 Page 63.

20 G. A. Akerlof, “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism,” *Quarterly Journal of Economics* 84, No. 3 (August 1970): 488–500.

21 Page 39.

22 Page 130.

23 Both Philip Lowe and Pier Luigi Parcu make similar points in the contributions. See, in particular, Philip Lowe's anecdotes about Nicolas Sarkozy.

not just artistic inventions. If one looks up “wine fraud” on Wikipedia, the first example given is Pliny the Elder complaining about widespread fraud in the Roman wine market. Fraud is therefore certainly not a recent invention. Neither are attempts to exploit human weaknesses in order to increase sales. How many parents have not dreaded standing in line in a supermarket with a child facing meters of tempting sweets? And I was personally taken for a ride in more than one sense by a used car dealer in Los Angeles more than thirty years ago. Fraud and other types of unscrupulous behaviour have always existed.

**20.** But has it got worse? I guess that there could be two ways in which it has got worse. One way would be that increasing competition in many markets means that more firms would be forced into such types of behaviour than was the case before. As I said above, I simply do not know whether that is true. The other way would be that the firms that engage in such behaviour are getting better at it. And here I do think that maybe matters indeed have got worse. I am thinking of what the book deals with in the chapter called “The Gamemakers.” This chapter describes the ways in which we can be manipulated online, and how these Gamemakers can extract and use our personal data to target and influence us in various ways, whether through advertising, personalised offers and pricing—or ways we are not even aware of. So yes, here I do think that matters have got worse. But, luckily, it also seems to be something that the book’s anonymous and often maligned “policy makers” are aware of and grappling with finding answers to. Again, that is easier said than done, but I do not doubt that the book’s Gamemakers are going to find themselves much more regulated in the future than they are today.

**21.** The last chapter of the book is called “Competition: From Toxic to Noble.” It follows a chapter arguing that the “oversimplified version of the competition ideology that is being sold to us today, with its assumption that unfettered competition is always and in every circumstance superior to any other path, has not delivered as promised.”<sup>24</sup> According to the authors, one of the “key take-aways” from that chapter is that “if we want to navigate toward an inclusive economy that serves us, the citizens, we must distinguish between the zero-sum and positive-sum forms of competition.”<sup>25</sup> The ideal solution to this is “noble competition,” which is “the ideal form of competition (...) which while not completely attainable, points to the way to what we, as a society, should aspire.” “Noble competition is helping your rivals reach their full potential. Players compete fiercely, but do so with deep societal and moral awareness. Each player, while seeking to prevail, is aware of her wider community and recognizes how her competitiveness can help her rivals be their best selves.”<sup>26</sup>

**22.** At this point, I was beginning to become a bit sceptical. Is it really true, that “[b]eginning in the late

1970s, [regulatory] protections were gradually stripped away as the competition ideology (...) took over and smothered everything in its path—including the social, moral, and ethical values that might have mitigated its pernicious effects”?<sup>27</sup> Is it really true, that “companies have lost any sense of purpose beyond maximizing profits and, where applicable, shareholder value. Neither their executives nor their employees can identify any other kind of purpose—and many are not interested in doing so”?<sup>28</sup>

**23.** To me it seems instead that many companies are taking a wider view of their responsibilities than just looking at their bottom line. Think, for instance, of the many companies striving to find more sustainable production methods. Maybe this is an example of what the authors refer to when they write that “[e]mpirical observations suggest that having an ethical, social purpose that informs strategic decision-making helps companies unlock opportunities and increase profits. A win-win situation.”<sup>29</sup> So perhaps these companies are taking a more sophisticated view of their bottom line than just next year’s profit. I am not saying that everything is perfect, and I am sure many would want companies to move even quicker than they do. But I also think it would be a caricature to say that all—or even most—companies have “lost any sense of purpose beyond maximizing profits.”

## V. Conclusion

**24.** After finishing reading *Competition Overdose*, I found myself in a slightly unusual position. At work, I increasingly find myself in the role of the grumpy old man complaining about how the world is changing for the worse. While here, I asked myself: “is it really as bad as they claim?” As you may have gathered by now, I do not think it is.

**25.** Admittedly, I see things from a European perspective, and I do not know enough about the US to comment on the situation there. But here in Europe, I do not see a lack of willingness to use regulation to correct market failures, protect workers, etc. Of course, there will always be a political battle to determine exactly what kind of regulation to implement. But I do not think it would be fair to say that in Europe “our policies and legislation are shaped by this distorted competition ideology: If competition is strong enough, we can get rid of regulations; and the self-correcting markets will promote prosperity and consumers’ welfare. Key governmental policies blindly rely on market forces to fix it all, willingly remove any state regulation (as the market will offer a better alternative), and set aside any consideration of other societal values.”<sup>30</sup> To be fair, the quote is in all likelihood about the US, as there is a reference to George H. W. Bush immediately

<sup>24</sup> Page 228.

<sup>25</sup> Page 251.

<sup>26</sup> Page 256.

<sup>27</sup> Page 229.

<sup>28</sup> Page 274.

<sup>29</sup> Page 276.

<sup>30</sup> Page 127.

after. My point is that I think most people would disagree with such a blanket statement about Europe (or at least about Continental Europe)—although one obviously could find some who would agree.

**26.** I also do not think that competition is quite as toxic as the authors would have us think. Yes, there are examples of toxic competition, and I am personally quite worried about many issues in the online world. However, I hope and believe that regulation will catch up with those issues and find appropriate ways to protect our data and privacy, and prevent us from being (too) manipulated.

At least, I see a political willingness to engage with these issues, even though they are not easy problems to solve. As I wrote above, I also think that many companies do take a wider view of their role than just maximizing profits. They may not all be engaging in noble competition, but everything is not toxic either.

**27.** I hope that I do not sound like Voltaire's Dr. Pangloss; I do not think that we live in the best of all possible worlds.<sup>31</sup> However, I also do not think that things are quite as bad as Profs Stucke and Ezrachi would have us believe. ■

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<sup>31</sup> Readers interested in recent critiques of present-day capitalism by a number of prominent economists may consult the special issue of *Oxford Review of Economic Policy* called "Capitalism" (Vol. 37, Issue 4, Winter 2021).

# A tirade against dogma

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1. This article is certainly not going to earn me any prize for academic distinction. There are no references and no footnotes. I also do not have to thank anyone for having helped me to research the topic or prepare the article itself. It is very personal. It is a tract, in fact a tirade against dogma, the dogma around competition law and policy.

2. In 2007, when Nicola Sarkozy was looking to find a compromise under French Presidency on the text of the EU's draft Lisbon Treaty, he highlighted two of the draft fundamental aims of the European Union which were unacceptable to France: monetary stability and competition. He reportedly then sought a Franco-German compromise by asking Angela Merkel which of these two aims Germany was prepared to live without, while France would live with the inclusion of the other. Not unexpectedly, the German Chancellor insisted on monetary stability and competition was relegated to a lower level of political aspiration, at least as far as the draft treaty was concerned.

3. This result was the culmination of a long campaign during which the French President continually put the question, along the lines of Monty Python's question about the Romans, "what has competition policy ever done for us?"

## I. What has competition policy ever done for us?

4. The general reaction in the competition law community was one of amusement but also shock that someone as important as the French president could actually ask the question, even discounting for traditional French scepticism about markets. After two decades of efforts to open up markets and liberalise public utilities throughout Europe, it seemed like heresy to call into question the benefits of competition.

5. But gradually it dawned on everyone that there was a genuine problem, at least of communication, if not of convincing arguments for competition. If politicians had not been convinced, the chances were that the public at large had not fully grasped why competition was important. At a formal dinner at the time, I was seated next to a very elegant and distinguished lady of the Belgian nobility who spent most of her time helping the homeless. We talked for over an hour about the homeless after which she asked me what I did in life and I replied that I was director general for Competition in the European Commission. She looked a bit confused and then said "what is competition actually?" As we were then leaving the table, I had just enough time to say that it's about protecting everyone from getting ripped off.

## II. Perfect competition and "*Wettbewerb in sich*"

6. I blame this general incomprehension about what competition is on the arrogance of the founding fathers of competition analysis. On the one hand, Ricardo and other economists vaunted the idea of competition as a system in which firms which actively competed to provide consumers with the best available results, at least in terms of price. And the concept of "perfect competition" held out the prospect of an ideal equilibrium where all competitors ended up offering the same ideal price to everyone. It seemed that in promoting competition we could attain this ideal state, just as after having led a virtuous life, we could get to heaven and spend our time in choirs of the faithful, endlessly singing the same hymns in unison.

7. On the other hand, professors of the ordoliberal legal tradition placed competition on a pinnacle as an end in itself (*Wettbewerb in sich*). If there was a competitive structure in a sector, for example several firms competing to provide the same goods and services, there was the hope of free and fair trade for every competitor and benefits for society as a whole.



### III. Analysing the benefits of competition

8. In both these visions, the benefits of competition have therefore largely been taken for granted. Similarly, in countless press releases of competition authorities, their decisions aim to create more competition and are declared to be beneficial for consumers, for business and for citizens, whether or not there is any firm evidence for this.

9. By the way, the issue here is nothing to do with the decades-old doctrinal debate about per se rules or an effects-based approach. After all we should presume that any legislator who proposes per se rules has some empirical evidence to justify them.

10. No. We are talking here about a basic assumption that competition is good in itself. Today in 2021, nothing of this would get past the scrutiny of any impact assessment board anywhere.

11. Admittedly over the last two centuries, there has been some attempt to explain more clearly why competition can have a positive impact on things that matter. It leads to a more efficient allocation of resources within an economy. It subjects firms to the “discipline of the market” and ensures fair play among them, and it promotes (or should promote) consumer welfare. Schumpeter’s model of competition as a source for creative destruction has also helped to explain why aggressive competition on the market or for the market, keeps firms on the alert and fit, and also allows the benefits of innovation to flow to consumers.

12. Is it useful though to talk about the benefits of competition without looking more closely at how specific markets actually work (or don’t work)? You have to be pretty courageous if not foolish to claim that more competition, in all circumstances, will be beneficial. And, of course, commentators use different measures as proxies for “more competition.”

### IV. Is there more competition if there are more competitors?

13. One measure is, of course, the number of players on the market and the degree of concentration (as measured by HHI). Yet you can have situations where there are two major competitors, such as Boeing and Airbus who

are fiercely competitive and produce good results for consumers and society, whereas there are other markets where there are more than six competitors but they don’t really compete. As in the UK energy market, the competitors in an oligopoly twist in their mediocrity, not because they are necessarily colluding but because the barriers to entry are relatively high and there is no incentive to be different from each other.

### V. Is monopoly always bad?

14. Another frequently held view is that monopoly, whether under public control or not, is the worst form of market organisation and is by definition bad. There is some empirical evidence for this view. Monopoly shuts out competitors and frustrates innovation. However we have to be on our guard on this.

15. Initiatives to liberalise public utilities such as telecoms, energy, post and railways have been attractive to governments because they pass the burden of financing costly major infrastructure investment from the public to the private sector. However they have also been justified by the desire to open the market for supplying the services concerned to new competitors (“more competition”). Are the results convincing? I think the jury is still out on this.

### VI. Has the liberalisation of utilities produced the benefits which were promised?

16. Thanks in part to technology and innovation, the telecommunications sector seems to have benefitted most from more competition and more benefits to consumers in terms of price, quality, choice and innovation. But the conclusions in other sectors are not so obvious. As far as postal services are concerned, we have now come full circle. In the first instance, everyone said rightly that due to the internet, letters are dead and that the delivery of other parcels and packets should be “opened up to competition.” After thirty years of liberalisation, we now have the ironic situation that competing online providers such as Amazon and a various service providers such as FEDEX/UPS and DHL, are very pleased to delegate deliveries to the home to the original ex-monopoly incumbents. The latter have always looked after universal service of letters and they are, after all is said and done, well-placed to handle parcels and packets as well.

17. As to railways, “more competition” has allowed the occasional new entrant to come in. But the major impact has been to put out services to competitive tender on the basis that providers who ask for the least subsidy will get the concession. The impact is similar with water. Is “more competition” here for the benefit of consumers? Unlikely. But it’s probably for the benefit of public finances and taxpayers.

18. In the energy sector, the results of liberalisation and more competition are even more problematic in terms of consumer benefit. The networks are now unbundled from suppliers and retail providers, but despite the arrival of new entrants, consumers have frequently not bothered to switch to cheaper suppliers. Loyalty to suppliers has also been “rewarded” by higher tariffs than those offered to new customers.

19. At the same time, the demand for more freedom from long-term contracts for example for gas, has led to more dependence on relatively volatile international markets and exposure to price hikes at the wholesale and retail level. Why do people continue to believe that long-term contracts distort markets? They are a logical market-based response to short-term price volatility. A market which is entirely based on long-term contracts, which customers are tied in to, is problematic but a mix between short-term transactions and long-term contracting is often the best solution we can hope for.

20. Broadly, the conclusion I would draw from the now multiple experiences with liberalisation across the world is that for some utilities, the arguments in favour of a tightly regulated monopoly, as opposed to an equally tightly regulated and restricted set of private operators, are finely balanced. There is no doubt where many French people stand on that issue. When I went to the French National Assembly some years ago to plead for more competition in the energy and water sectors, one deputy from the Auvergne called me to order: “Mr. Director general, you have not really understood. In France, we like our public monopolies. They protect us. Private competitors don’t. They look after themselves.” This kind of attitude is extreme. It also often is a cover to protect other interests such as those of powerful trade unions. But we can’t just presume that competition always provides better outcomes. It has to be proved.

## VII. The parameters of “good” competition

21. I want to come back now to the parameters on which we can base our analysis of the benefits of competition. In any sector, we should certainly look at the impact of competition on price, on choice, on quality, and on innovation. But there are other important impacts, in particular redistributive effects. Competition based on the merits of a superior product service will drive out less performing alternatives. That is a classic “survival of the fittest” situation which, on the whole, our societies accept.

22. On the other hand, competition at one level of a supply chain can simply produce a transfer of rents to another level. Take the example of large supermarket chains which have repeatedly put pressure on the price of milk and other dairy products. Farmers’ margins have narrowed, milk is cheaper for consumers but how much of the margin which has been created actually goes to the supermarkets and how much to consumers?

23. Look too at the impact of promoting more competition in financial services and in the protection of shareholder interests. Admittedly, those who provide capital to any enterprise are entitled to a reasonable return on their investment. But their demand for a larger share of any corporate cake in the short term could well be at the expense of employees and consumers in the longer term.

## VIII. Markets and market failures

24. Contrary to what you may be thinking at this point, I am not arguing against competition. I am basically saying that the term “competition” is too generic to make any judgement on its impacts and benefits. You need to drill down into the specific parameters of markets in order to judge what market organisation is best.

25. This is in part why I will always hesitate when I hear any proposal to “let the market work.” It sounds liberating as a battle cry, but it could be exactly the wrong solution in specific cases. I have mentioned already the current hikes in energy prices but this is not the only example where market outcomes do not match either public expectations or the public interest.

26. The reality is that, lurking behind many markets, there is usually some form of market failure to be addressed. They range from plain vanilla issues where the market fails to take account of social costs (externalities), to natural monopolies such as energy networks, to lack of sharing of information between producers and consumers and to problems created by cartels, or the conduct of dominant firms.

27. So it’s not by accident that there are now so many competition authorities and sectoral regulators throughout the world. Competition and markets are frequently far from perfect. And we shouldn’t be surprised that even legislators sometimes have to intervene in order to place some limits on the outcomes that markets can produce. This is particularly true when prices to consumers seem excessive but where competition law doesn’t provide an appropriate or timely answer to the problem. Take two celebrated examples within the EU: the limits placed on roaming charges on mobile phones and on card interchange fees.

## IX. Making markets work better

**28.** Finally, I don't want this tirade against dogma to detract from what I think is the noble cause of competition authorities and regulators, and that is to make markets work for the benefit of consumers, business and society as a whole.

**29.** The blanket prescription that we should simply “let the market work” is frankly ludicrous. We know that it frequently produces outcomes that we don't like. The call for “more competition” begs the question as to what kind of competition is the best in a particular circumstance. Yes, it broadly moves us in a direction where there can be a check on prices, more choice and more innovation. But we shouldn't take this for granted. ■

# Competition Overdose, “noble co-opetition”, and the climate change example

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1. When I started my career, in the early 1980s, publications like the *Antitrust Paradox* by Robert Bork inspired the notion that antitrust policy should leave as much room as possible to free markets, since market forces were thought to be the best way to maximize consumer welfare and an efficient allocation of resources. Welfare was defined as increased output and increased consumption of material goods and services.<sup>1</sup> There was no thought given to other policy goals or to notions such as fairness.

2. The pendulum is swinging again, and Ariel Ezrachi and Maurice Stucke are amongst those who push it.<sup>2</sup> They present a fascinating and at times controversial example of critical thinking on the foundations of competition policy. These intellectual challenges are needed from time to time, to keep policy-makers, regulators and practitioners on their toes. Not an attack on antitrust regulators, just part of the dialectic process.

3. They argue, in essence, that promoting competition as a process has resulted in an “overdose” of competition that can be “toxic” for consumers. They recognize that “[a]t times, competition can lift people out of poverty, increase well-being, and promote autonomy.” But at the same time, “when overprescribed with no safeguards, it does the opposite.”

4. They identify a number of “competition overdoses.” For instance, they worry that competition can lead to a race to the bottom where individual and public interests diverge. They identify two basic circumstances in which that happens:

*“FIRST, when the competitors’ individual interests are not aligned with their collective interests, or with society’s collective interests.*

*SECOND, when either the competitors or the intended beneficiaries of competition—or both—are harmed by this race to the bottom, but no one can independently de-escalate it.”*

5. This resonated with me. Ezrachi and Stucke don’t mention the environment or the climate crisis in this connection, except in passing (on pp. 124 and 242). They focus quite a bit on online markets. Yet nowhere does their concern appear more clearly, I think, than in the area of climate change, the environment, and biodiversity.

6. The key problem, simply put, is that the costs that production and consumption impose on society—including climate change, large-scale pollution, and loss of biodiversity—are not included in the market price consumers pay. This leads to excessive output and overproduction (and an inefficient allocation of resources). This in turn gives rise to a “tragedy of the commons,” or the degrading of our environment due to overuse, and a climate crisis due to excessive greenhouse gas emissions. A prime example of a situation where, in the authors’ words, “*the competitors’ individual interests are not aligned with their collective interests, or with society’s collective interests.*”

7. The second circumstance the authors describe is present, too. What the authors call “de-escalation”—interrupting the downward spiral—is discouraged by market failures like the first mover disadvantage, or by strict application of competition law (which may treat coordinated de-escalation as “collusion”). Sir Nicholas Stern called climate change “*a result of the greatest market failure the world has seen.*”<sup>3</sup>

\* This paper is submitted in my own name, and does not bind the firm or its clients. It reflects and further develops earlier papers, including The “polluter Pays” Principle as a Basis for Sustainable Competition Policy, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte and M. Snoep, eds. (Concurrences, 2021), and more ephemerally, Sustainability agreements and antitrust – three criteria to distinguish beneficial cooperation from greenwashing, *Chillin’ Competition*, 9 September 2021, as well as submissions to the European Commission and the UK Competition and Markets Authority CMA in consultations on competition policy and the EU’s and UK’s net zero goals.

1 See historical overview and insightful critique by J. Newman in *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, *Iowa Law Review*, Vol. 107, No. 2, 2022 Forthcoming.

2 M. E. Stucke, A. Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (1st edition, Harper Collins, 2020).

3 Nicholas Stern: *Climate Change, Ethics and the Economics of the Global Deal, Economist’s View*, 29 November 2007.



8. To solve this, Ezrachi and Stucke posit that we need to promote a kind of “ethical competition,” defined as “*positive-sum, ethical competition, (...) a way of expanding the pie, so that most, if not everyone, benefit.*” Even beyond that, they advocate a concept of “noble competition,” where rivals mutually strive for excellence. “*Noble competition is helping your rivals reach their full potential.*” A race to the top instead of a race to the bottom. They recognize that this “*while not completely attainable, points the way to what we, as a society, should aspire.*”

9. As part of ethical and noble competition, Ezrachi and Stucke advise companies to follow a principle that sounds very much like Kant’s categorical imperative: “*So when you are seeking an edge over a rival, consider what will happen if others follow your lead and take similar measures. If everyone ends up worse off, with no advantage going to anyone, you’re in a race to the bottom that benefits neither you nor society.*” They even argue that “*values such as friendship, honesty, fairness, and responsibility should shape the way they compete.*”

10. These are admirable, and morally sound words. If everyone followed them independently, pollution and the climate crisis would be mitigated. The problem is, of course, that even if a number of firms in a market are enlightened enough to think of such a rule and might want to apply it unilaterally to their own behavior, others are not. There are always one or more unscrupulous or unthinking players who start the race to the bottom. In markets where consumers are not willing to pay (or pay enough) for clean and green products, rivals then have little choice but to follow.

11. Regulation, carbon taxation, and systems of emissions trading rights are a solution to slow down a race to the bottom, or get us to the top again. The UK CMA, for instance, takes the position that “*regulation and government policy are the primary means to achieve the UK’s Net Zero and sustainability goals.*”<sup>4</sup> But regulation is slow, and often ineffective, and carbon taxes especially are deeply unpopular. Carbon trading rights in the EU and UK have gone up to just above £60 at the time of writing, but carbon trading rights don’t cover all activities and all greenhouse gases, including several that are much more potent than CO<sub>2</sub>. Worldwide, the price is lower, and taxation and regulation cover only 21.5% of emissions.<sup>5</sup> The revenues are not dedicated to solving the climate crisis, either.

12. We are faced with what can only be called a “regulatory deficit” or more accurately, a “regulatory failure.” This concern is even greater when reviewed from a worldwide perspective, given that a number of key greenhouse gas emitting countries refuse to subscribe to adequate and timely net zero goals, and many of those who say they do, do not actually pursue them with effective regulation. Ezrachi and Stucke explain part of

the background of this regulatory deficit, in particular the resistance to regulation, and some of the forces that also hamper effective environmental and climate regulation. They could have mentioned others also, for instance, competition between countries to attract investment, leading to a race to the bottom in regulation and taxation, too.

13. When smart regulation is in practice too little, too late,<sup>6</sup> should we allow private cooperation as complementary means to address the climate crisis—a type of “noble co-opetition” (competition tempered by cooperation where needed)?<sup>7</sup> The answer is that we should not ban sustainability agreements under competition law on the ground that, in theory, taxation, ETS, or regulation are better tools to correct market failures.

14. Ezrachi and Stucke see private cooperation as part of the solution, too. “*While we place special responsibility on the public leaders charged with protecting our markets and economy, corporate executives also have a key role to play. The role of the state in sustaining and promoting healthy competition can be supplemented by industry-wide efforts to keep it fair and honest—through self-regulation, and through lobbying for rules that will bring everyone into compliance with those efforts.*” They give an interesting example from Ethiopia, comparing different forest management policies, some allowing free and unregulated use of the commons, and others agreeing on cooperation to avoid overexploitation. These are “conditional cooperators,” in that they agreed to mitigate their own exploitation of the forest on conditions that others mitigated as well. It reads like a parable of climate change. Not surprisingly, “*forest user groups with larger shares of conditional cooperators did far better, on average, than the groups dominated by greedy members.*” In economic terms, the forest maintenance leads to a “long-term spill-over benefit”: each member of the group benefits in the long term if everyone else refrains from (or is prevented from) taking what they can to maximize their short-term profit.

15. The authors call on competition authorities to recognize this. “[I]n our *First Overdose*, where the competitors’ collective and individual interests diverge, policy makers could draft antitrust exemptions that would allow competitors to agree to certain restrictions on their competition, without risking millions of dollars in antitrust fines or even prison sentences, in order to prevent the race to the bottom.”

16. This happens to be a hotly debated issue. Some argue that there is no market demand for sustainability agreements—few firms have contacted the Commission

4 CMA, Environmental sustainability advice to government: Call for Inputs, 29 September 2021 (CFI), para 8.

5 World Bank, Carbon Pricing Dashboard. See also OECD, Effective Carbon Rates 2021.

6 Climate Crisis Advisory group, Net zero by 2050 is “too little too late”: world-leading scientists urge global leaders to focus on net negative strategies, 26 August 2021.

7 For the concept of “co-opetition” (a contraction of “cooperation” and “competition”), see A. Brandenburger and B. Nalebuff, *The Rules of Co-opetition*, *Harvard Business Review*, January 2021. It is, in essence, cooperation between competitors designed to help both companies achieve a common goal, for instance, in joint R&D, or production of complementary or related products. Cooperation should be allowed only if the common goal is consistent with consumer welfare and the common good.

with examples of sustainability agreements—and that we should therefore not allow them. Existing decisions, legal practice, and discussion documents, however, reveal more than fifteen different categories of sustainability agreements, ranging from the clearly permissible via a grey zone to the clearly impermissible. So, from personal observation, there is demand. Of course, if it were true that there is no current demand for this policy, there is no harm in creating a framework to allow them. But I'd say, "Build it, and they will come."<sup>8</sup>

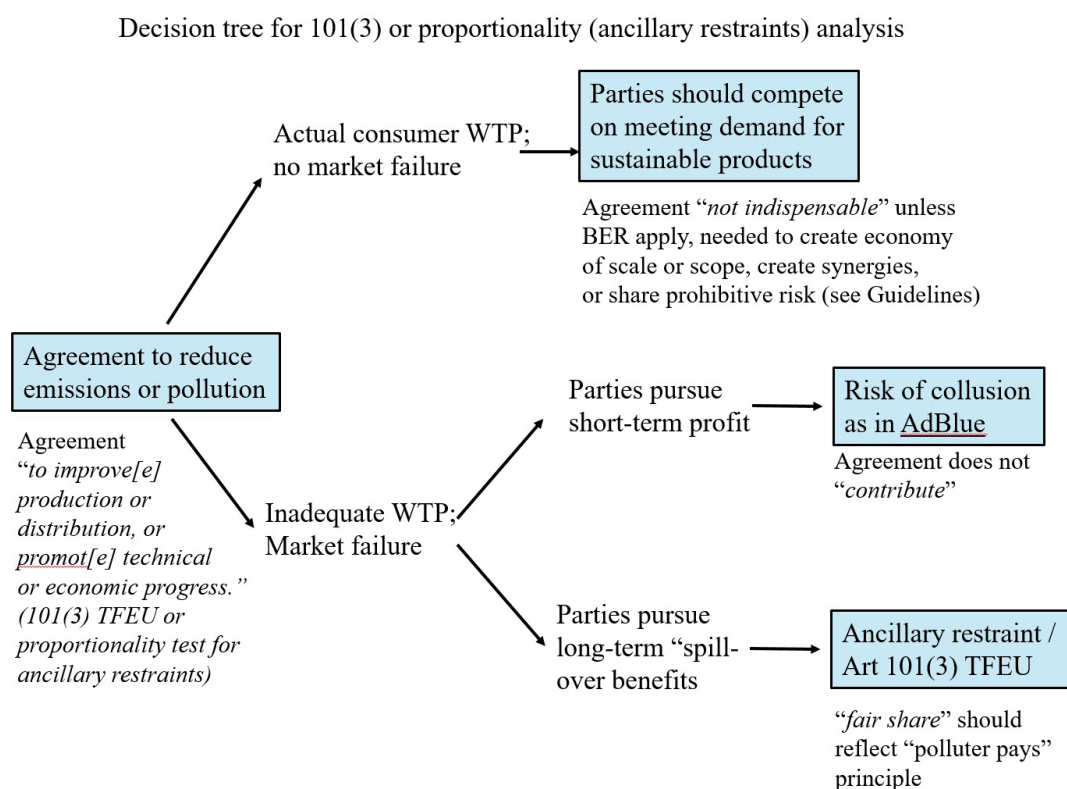
17. Others argue that this kind of cooperation is inconsistent with existing competition law. But is it? Do we need to resort to concepts like "noble competition" that sound like a departure from the law as it stands, or is this already possible under current law? The CMA at least recognizes that "public bodies and businesses can play an important role through a wide range of initiatives (including cooperation agreements and unilateral initiatives), translating into more sustainable supply chains and more environmentally-friendly products and services for consumers."<sup>9</sup> At the time of writing, the EC is still weighing what policy to adopt,<sup>10</sup> but I think that

Article 101(3) TFEU and Section 9(1) CA98 already enable this kind of competition. Moreover, the conditions of those provisions allow for a thoughtful analysis to separate the good (sustainability agreements benefiting everyone) from the bad (collusion like the AdBlue cartel).

18. Ezrachi and Stucke don't go into this level of detail. They recognize that it is necessary to separate the wheat from the chaff, but stick to the high level. "It's true, of course, that competitors might abuse these exemptions and use them to try to eliminate healthy competition (or their rivals). Long before ADM, rivals sought to justify their price-fixing schemes as a way to escape 'ruinous' competition. Rather than giving competitors a blanket exemption from competition, policy makers need to be able to define those select areas where an agreement to avoid competition would be warranted, and other areas where it wouldn't."

19. It is worthwhile discussing how this can be done. The discussion below broadly reflects the following decision tree:

Figure 1.



<sup>8</sup> See very recently, Bundeskartellamt, press release, 18 January 2022, "Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives," discussing its approach to two sustainability agreements.

<sup>9</sup> CFI, para. 8

<sup>10</sup> Vice President Vestager, Competition Policy in Support of the Green Deal, 10 September 2021, and Competition Policy in Support of Europe's Green Ambition, Competition Policy Brief 2021-01 September 2021.

20. A sustainability agreement that restricts the parties competitive freedom to achieve sustainability goals can qualify for exemption if it meets four criteria, each of which I briefly discuss below.

# I. “Economic progress” and the importance of longer-term goals and supply-side “spill-over benefits”

**21. “Economic progress.”** First, the agreement must “contribute to improving production or distribution, or promoting technical or economic progress.” The *Policy Brief* recently published by the European Commission recognizes that environmental benefits qualify for exemption, if they improve quality, reduce costs, and even if they lead to other sustainability benefits like reduced pollution, lower climate risks, or sustainable production. Indeed, the notion of “economic progress” covers agreements that help resolving market failures, reducing or internalizing negative externalities, reducing greenhouse gas emissions, or increasing availability of clean and green products and services (as well as non-market goods).<sup>11</sup> Production and distribution methods are “improved” if their social costs are reduced by using cleaner manufacturing processes or lowering direct or indirect emissions. Similarly, technological solutions to reduce pollution and emissions are “technical progress.”

**22.** Whether an agreement can be genuinely said to “contribute,” on balance, to economic progress requires an analysis of the goals and effects of the agreement and causality. This involves both a subjective review (what do the parties say are their goals?), and an objective analysis (what are the parties’ incentives, are the stated goals credible, and is the agreement capable of leading to the stated goals?). If this analysis shows private sustainability coordination seeks and is capable of leading to socially beneficial effects or increasing consumer welfare, the agreement should be found to “contribute to (...) economic progress.”

**23. Longer-term goals and “spill-over benefits.”** Critics of integrating sustainability in competition policy argue that the incentives are not right, and that sustainability agreements lead to less sustainability than conditions of competition.<sup>12</sup> They imply that these agreements therefore do not “contribute” to economic progress or consumer welfare. But these critics focus on abstract models, which consider solely short-term profit incentives. Reality is

diverse, and does not necessarily follow abstract models bounded by the limitations of assumptions—such as that all firms always seek short-term profit maximization. Economic consultants Oxera analysed this in a paper, agreeing that firms who focus solely on short-term profits may have an incentive to avoid competition on sustainability, or hold back on such measures, as the AdBlue cartel did.<sup>13</sup> Importantly, however, economic analysis shows that “where positive spill-overs exist between firms, efforts by one firm also benefit other firms. In this case, the level of sustainability efforts by other firms would actually have a positive effect on a firm achieving its own objectives. Allowing firms to coordinate their sustainability efforts will then lead to higher overall effort levels.”

**24.** Accordingly, antitrust authorities should look at the following when analysing sustainability agreements:

- whether firms benefit in the long run if their rivals eliminate greenhouse gas emissions or achieve other sustainability objectives (“spill-over benefits”);
- whether these private benefits align with public benefits; and
- whether the parties to the agreement actually pursued these spill-over benefits.

An agreement seeking spill-over benefits appears to be a good example of what Ezrachi and Stucke refer to as “de-escalation” of the “race to the bottom.”

**25.** Absent spill-over benefits, or absent an indication that these benefits are effectively pursued, there may be a suspicion that companies are agreeing to limit sustainability efforts or hold back—in which case there is on balance no adequate contribution to “economic progress.” But if firms have a genuine incentive to pursue efficient sustainability goals, and effectively do so, antitrust authorities should not assume that they are just out to rip off consumers or limit climate action, and should not stand in the way of achieving the spill-over benefits.

**26.** Ezrachi and Stucke propose that entrepreneurs should be asking “What is your company’s why? What is its social purpose? What values does your company promote?” These are good questions. But entrepreneurs don’t have to be altruistic to realize the value of spill-over benefits. They should ask themselves also “what are our longer-term benefits and how do we get there?” (or “how do we survive as a business?”). Companies benefit in various ways if their rivals eliminate pollution and greenhouse gas emissions.

- Surely long-term survival is the first one, keeping in mind the recent IPCC Report and its dire warnings of climate “tipping points.” It’s true that managers often pursue short-run profits at the cost of future risks. But more and more firms realize that short-term profits are not the sole

<sup>11</sup> The *Policy Brief* states “there may be instances where companies need to get together in order to override a first mover disadvantage and nudge consumers towards using more expensive sustainable products, instead of cheaper but polluting ones.” The Commission adds: “[I]t would be helpful to address the question of when and how market failures would prevent the free market from generating benefits.”

<sup>12</sup> M. P. Schinkel and L. Treuren, Green Antitrust: (More) Friendly Fire in the Fight against Climate Change, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte and M. Snoep, eds. (Concurrences, 2021).

<sup>13</sup> Oxera, When to give the green light to green agreements, Agenda, 13 September 2021.

measure of success, and that it is worthwhile to pursue longer-term survival of our environment and, therefore, themselves, our economy, and society as a whole. Major oil companies require nothing short of self-reinvention to survive—a fact acknowledged by some market leaders, which have already unveiled transition plans.<sup>14</sup> Yet they may be discouraged from investing enough in clean and green alternatives, for fear that their rivals free ride and steal their customers. Their rivals, in turn, may fear the same from them. Cooperation can be an appropriate way to solve such a collection action problem.

- Other positive spill-over benefits include reduction of physical climate risks to the business, faster development of clean solutions (sharing risks, creating economies of scale and scope), or levelling the playing field by avoiding the litigation risk of asymmetric liability—as Shell experiences, following its climate liability case.<sup>15</sup>

27. The Oxera paper contains an interesting list of examples of “spill-over” benefits, and explains that when economic models are adjusted to take these into account, firms have proper incentives to improve sustainability outcomes compared to conditions of competition.

28. Evidence that parties really sought legitimate climate objectives could be found in internal corporate statements, an objective assessment of the nature of the agreement, and economic analysis (in particular the presence of market failures and regulatory deficiencies). Parties who publish their agreements, open them up to public scrutiny, and discuss them with stakeholders, can be presumed to really seek legitimate benefits and not just to line their own pockets or limit climate action.

## II. “Indispensability” and the importance of “willingness to pay”

29. Second, the agreement must “*not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.*” In other words, cooperation must be “necessary,” in that there is no realistic, less restrictive, and equally effective alternative.

30. Agreements may not be indispensable if in prevailing market conditions, firms have the incentive to compete individually on being greener and cleaner. This is the case if:

- enough consumers are sufficiently “willingness to pay” (WTP) to fully eliminate or compensate for these emissions, and to clear up the damage of the past. (This refers to the actual, current WTP derived from actual revealed preferences, and not the “extracted” WTP discussed below); and
- producers and consumers can actually discern (and calculate) these costs and integrate them into their production and consumption decisions.

In such circumstances, market forces should be adequate to achieve the sustainability goals.

31. WTP is usually assessed based on stated preferences (surveys), or revealed preference studies.<sup>16</sup> These may reflect demand-side market failures. For instance, consumers often underestimate the future cost of climate change, or the effects that deflecting costs on others or on society may have for themselves in the long run. Other deficiencies include inadequate information, confirmation bias, endowment bias, hyperbolic discounting, and free rider concerns.

32. Because of these demand-side market failures, the actual current WTP will in many cases be inadequate to internalize environmental and climate change externalities. Unless there is effective regulation, taxation, or emission trading, private cooperation may then be necessary to eliminate or mitigate climate change and environmental risks to resolve supply-side market failures such as first mover disadvantages, free rider concerns, and collective action problems, and other market failures arise.

33. The burden of proof would rest on the parties to the agreement. Market failures and absence of adequate regulation are, however, the normally prevailing situation in environmental economics. It is appropriate, therefore, not to demand quantitative evidence of collection action problems in connection with agreements genuinely pursuing spill-over benefits in situations where the parties provide a credible qualitative explanation of the existence of market failures and regulatory deficiency.

## III. “Fair share to consumers”—individualistic or collective consumer welfare?

34. Article 101(3) TFEU and Section 9(1) CA98 require that consumers receive “*a fair share of the resulting benefit.*” They do not impose limitations as to the nature

14 See Cleary Gottlieb Steen & Hamilton, How will Climate Change Affect Emerging Markets, *Emerging Markets Restructuring Journal*, Winter 2021.

15 M. Dolmans et al., Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company, *Pratt's Energy Law Report*, Vol. 21, No. 8, September 2021. It should be permissible for Shell and other oil and gas majors to agree that they will all make plans to comply with the same standard that the Dutch court imposed on Shell – a kind of “agreement to comply with law”.

16 See B. Kriström & P.-O. Johansson, Economic Valuation Methods for Non-market Goods or Services, 2019, and R. Baker & B. Ruting, Environmental Policy Analysis: A Guide to Non-Market Valuation, Productivity Commission Staff Working Paper, January 2014.



of the benefit, or the relevant market to which the benefit should belong. The benefit need not be a monetary gain, but can include quality increases or improvements of living conditions or circumstances of consumption.

35. Consumers can benefit from effective sustainability agreements, because of reduced climate risk or improved environment, even if output decreases as a result of the agreement. In an article on the “*output-welfare fallacy*,” Prof. John Newman explains that “*alleviating a negative externality can reduce output of a relevant product yet increase consumer welfare*” (his emphasis).<sup>17</sup> Commenting on a car makers’ agreement with the State of California to produce lower-emission vehicles, he added, “*in this market less output might be good, not only for society as a whole but even for consumers of vehicles. There’s a variety of markets in which negative externalities can drive output higher, yet even the consumers of the products can be worse off due to a prisoners’ dilemma.*”

36. A cost increase (even if it leads to an increase of the price for the good or service) should not be a barrier to exemption, so long as the overall consumer surplus with the agreement is higher than in the counterfactual (without the agreement). Consumer surplus can be calculated as follows:

$$\begin{aligned} &\text{Overall Consumer Surplus} \\ &= (\text{actual WTP} - \text{Market Price} - \text{SCC}) \\ &\quad \times \text{Quantity Consumed} \end{aligned}$$

(where WTP is “willingness to pay” and SCC is “social cost of carbon”). The benefits of reducing the social cost of carbon can be quantified, as Sir Nicholas Stern and Prof. Joe Stiglitz explain.<sup>18</sup> If as a result of the agreement the SCC decreases more than the market price increases, consumers still benefit overall. The market price increase may moreover be transitory, as new technology becomes widely accepted, and economies of scale and scope are achieved.

37. “Fair share” does not require “in-market” “full compensation.” By their terms, neither Section 9(1) CA98 nor Article 101(3) TFEU require that the benefits to consumer “fully compensate” them for the costs, nor do they impose limitations as to the nature of the benefit, or the relevant market to which the benefit should belong. Nonetheless, there is debate especially on this.<sup>19</sup>

38. Consumers may be “fully” compensated, where even a small reduction of a risk with potentially enormous and devastating consequences of extreme weather events and tipping points could significantly improve—indeed

preserve—the life and home of the customer, their offspring, and the society and economy in which they live. Read Mark Lynas’ *Our Final Warning: Six Degrees of Climate Emergency*, and the benefits of avoiding even 2 or 3 degrees warming become frighteningly clear. Such an advantage (even if a future one) surely outweighs the economic cost of any price increase. Even if discounted, and even for individual consumers, the value of avoiding a climate cataclysm is significant.<sup>20</sup>

39. Until 2004, the European Commission followed a thoughtful approach towards environmental agreements. It found in *CECED* that “*On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines.*” “*Such environmental results for society would adequately allow consumers a fair share of the benefits even if no [in-market] benefits accrued to individual purchasers (...)*”<sup>21</sup>

40. The Austrians just adopted this pre-2004 principle in Austrian Competition law.<sup>22</sup> The Dutch and Greek authorities wish to do so as well.<sup>23</sup>

41. In 2004, however, the European Commission changed course. It took the position that consumers must receive “full compensation” within the same market as that in which the effects of the restriction of competition were felt.<sup>24</sup> Out-of-market benefits and benefits in terms of non-market goods (access to clean air, water, land, biodiversity, manageable climate) are not counted.

42. The Commission invokes the case law of the European Court of Justice, but as the ACM explains, those cases do not say what the Commission says.<sup>25</sup> The real background for the policy change was policy cautious conservatism. When modernizing competition law, the Commission divested itself of its exemption monopoly, and required companies to “self assess” whether the conditions for exemption were met. But it apparently did not trust companies to get it right, so it took away with the left hand much of what it had given with the right.

20 “*The possibility exists that even a smaller warming of the earth and a lower [increase of] the concentration of hothouse gases causes a dangerous climate change, for instance because a tipping point is reached, or because the ice melts more quickly (...)* The precautionary principle means that more rather than fewer far-reaching measures have to be adopted to reduce the emission of hothouse gases.” Dutch Supreme Court, *The Netherlands v. Urgenda*, 20 December 2019, ECLI:NL:HR:2019:2006, para. 7.2.10.

21 Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/E/36.718. CECED), para. 56.

22 Artikel 1, Änderung des Kartellgesetzes 2005.

23 ACM, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, 26 January 2021; Hellenic Competition Commission, Staff Discussion Paper On Sustainability Issues and Competition Law, 2021. See also R. Inderst, E. Sartzetakis & A. Xepapadeas, Technical Report on Sustainability and Competition, A report jointly commissioned by the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC), 2021.

24 See 2004 Guidelines on the application of Article 101(3) TFEU (para. 43).

25 ACM Legal Memo, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?, 27 September 2021. See also The “polluter Pays” Principle as a Basis for Sustainable Competition Policy, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelshulte and M. Snoep, eds. (Concurrences, 2021).

17 J. Newman, The Output-Welfare Fallacy: A Modern Antitrust Paradox, *Iowa Law Review*, Vol. 107, No. 2, 2022 Forthcoming.

18 N. Stern & J. E. Stiglitz, The Social Cost of Carbon, Risk, Distribution, Market Failures: An Alternative Approach, *NBER Working Paper* 28472, February 2021; J. S. Kikstra et al., The social cost of carbon dioxide under climate-economy feedbacks and temperature variability, *Environmental Research Letters*, Vol. 16, No. 9. See also Sir P. Dasgupta (2021), The Economics of Biodiversity: The Dasgupta Review (London: HM Treasury).

19 The European Commission is still reluctant. “*Benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same.*” Competition Policy in Support of Europe’s Green Ambition, *Competition Policy Brief* 2021-01 September 2021. Yet there is nothing in Article 101(3) TFEU or Section 9 CA98 that requires that benefits be “in-market.”

The Commission is now rethinking this, stating in the *Policy Brief* (perhaps ambiguously) on the one hand that “the assessment of the anticompetitive effects and benefits of a practice are made within the confines of each relevant market. Benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same.”

43. And concluding, on the other hand, that “if an agreement leads to a reduction in pollution to the benefit of society, and assuming the benefits are significant, a fair share of them can be apportioned to the harmed consumers—the latter being part of society—and fully compensate them for the harm.”<sup>26</sup>

44. There has been discussion on whether we would be on a slippery slope by recognizing climate-related out-of-market and non-market benefits in exemption and exception assessment. Would we then have to do the same for all 17 UN Sustainable Development Goals? Would competition policy become impossible to implement? In the extraordinary circumstance of a climate crisis, with “devastating impact” as confirmed by the European and British Parliament,<sup>27</sup> where the EU Treaties<sup>28</sup> and human right conventions<sup>29</sup> require climate action, and where the impact can be quantified, enforcement convenience is no longer a justification for ignoring out-of-market and non-market benefits.<sup>30</sup> Climate change, large-scale pollu-

tion, and biodiversity disasters are existential problems, unique in nature and quality. Ignoring them would be illegal.<sup>31</sup> We should not refuse to do anything because we can’t do everything.

45. A “fair share” must reflect the “consumer pays” principle. The definition of “fairness” should reflect the “consumer pays” principle. This principle finds solid support in economics and ethics,<sup>32</sup> as well as the European treaties and English law. It’s enshrined in Article 191(2) TFEU, and UK Supreme Court Justice David Neuberger observed that “there is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as ‘the polluter must pay’.”<sup>33</sup>

46. In accordance with this principle, a consumer receives a “fair share” of the environmental benefits if the price increase or incremental cost they bear is less than the sum of (i) the benefit they derive from the sustainability agreement, plus (ii) the reduction of the social costs of greenhouse gas emissions (or other externalities). The latter is a way, also, to count the demand-side spill-over benefits (the benefits a consumer obtains when other consumers switch to goods that are more sustainable or reduce consumption of high-carbon-emission products), and the “contingent value” and “non-use value” resulting from the preservation of the environment, from climate stability, and from avoiding widespread societal disruption. In other words:

Price increase (or value decrease)  
< benefit + externality reduction.

47. Restoring the balance by first eliminating the costs on others is “fair” in accordance with the general principle that “the polluter should pay.” A “fair share” means the polluter pays, not that the polluter should be compensated.

26 Competition Policy in Support of Europe’s Green Ambition, *Competition Policy Brief* 2021-01 September 2021.

27 House of Commons, Climate and the Environment, May 1, 2019 and Press Release, The European Parliament declares climate emergency, 29 November 2019 (“an environment and climate emergency following the finding of the Inter-governmental Panel on Climate Change that to avoid a more than 1.5°C rise in global warming, global emissions would need to fall by around 45 per cent from 2010 levels by 2030, reaching net zero by around 2050.”) The United Kingdom has ratified the Paris Agreement. It enshrined its commitment in the Climate Change Act, and adopted a Net Zero Strategy. It is now the obligation of all arms of Government to do what is possible to achieve the goals of that agreement. The CMA rightly lists “Supporting the transition to a low carbon economy” as the fourth of its four business priorities for 2021/22.

28 Articles 3(3) (the Union shall work for “the sustainable development of Europe based on (...) a high level of protection and improvement of the quality of the environment”), 3(5) (the EU “shall contribute to (...) the sustainable development of the Earth”), and 11 TEU (“environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”). Article 191(2) TFEU (“Union policy on the environment shall aim at a high level of protection (...) It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”)

29 Article 37 of the EU Charter of Fundamental Rights (“a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”).

30 And after Brexit (as much as I regret it), there is no obligation for the CMA to follow the same line either, as pre-Brexit case law is no longer determinative. This applies in particular to the UK Supreme Court judgment in *Sainsbury’s against Visa and Mastercard* ([2020] UKSC 24) where the UK Supreme Court relied on the Opinion of Advocate General Mengozzi in *Mastercard*, suggesting that “full compensation” is appropriate. The judgment concerns Article 101(3) TFEU, rather than Section 9 CA98, and a two-sided market where there was no overlap whatsoever between the customers benefiting from the agreement and those paying for it (whereas a sustainability agreement may benefit everyone, including the consumers who feel the effect of the agreement). Also, European Court of Justice in *Mastercard* did not exactly follow the Advocate General but left open the possibility of the consumers receiving “appreciable objective advantages” (para. 234), which may be less than “full compensation” (see ACM Legal Memo, 27 September 2021, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?, 2021). More importantly, the CMA and UK Courts are no longer bound by Articles 3 and 16 of Regulation 1/2003, which prohibited UK courts from exempting agreements that were prohibited by the Commission or the European Court.

31 Article 7 (“the Union shall ensure consistency between its policies and activities, taking all of its objectives into account”).

32 Oxford mathematician, economist, and game theorist Prof. Ken Binmore discusses the Golden Rule as a norm that all religions and philosophies share. Pursuant to this rule, a consumer should treat others (who bear the burden of externalities of her consumption) the same way she would have others treat her (when others by their consumption impose externalities on her). K. Binmore, *Fairness*, 4 *Criterion J. on Innovation* 533 (2019). Harvard philosopher Prof. John Rawls in his “Theory of Justice” describes a system as “fair” if it is acceptable to all participants in that discussion under a “veil of ignorance,” i.e., before they know where in that system they will be placed. A consumer therefore receive a “fair share” of the benefits of a sustainability agreement if that share is acceptable to them before they know whether they are consumer or a neighbour bearing the burden of an externality. Economist Hal Varian proposes that a distribution is fair from an economic perspective when a group of agents divide a bundle of goods and “no agent wishes to hold any other agent’s final bundle.” H. R. Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness, Philosophy & Public Affairs*, Vol. 4, No. 3, Wiley, 1975, pp. 223–247. This might be a situation where everyone gets the same bundle (“even division allocation”), or when—perhaps after trading—each finishes with a bundle which best matches her preferences. This can be called an “envy test.” Where producers, consumers, and third parties vie for a “fair share” of benefits of a sustainability agreement, this test can be met only after externalities are eliminated in accordance with the “consumer pays” principle. In fairness, the costs (externalities) must be paid before the benefits can be shared.

33 Re *Mineral Resources* [1999] BCC 422, at 431, cited with approval in *Scottish Environment Protection Agency & Ors v. Joint Liquidators of the Scottish Coal Company Ltd* [2013] CSIH 108 at [144] (Scottish Environment Protection Agency). See also The Environmental Damage (Prevention and Remediation) Regulations 2009—as amended by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015.

48. Inderst and Thomas in this connection distinguish between “individualistic” and “collective consumer welfare.”<sup>34</sup> In an individualistic welfare analysis, the consumer is asked to express “willingness-to-pay in relation to her own appreciation of the relevant good (in a given choice context).” This is not just a question of asking what the consumer prefers today, or studying revealed preferences from purchase decisions. They explain that “without compromising the consumer welfare criterion, the authority may incorporate ecological sustainability and thereby externalities into its decision – to the extent that these are represented in an extracted consumer willingness-to-pay.” This willingness to pay is “extracted” by giving the consumer more time and more information to think about the implications of a choice, including—importantly—about the externalities, including for their children, and by then asking the consumer to decide what she is willing to pay. They call it “triggering other-regarding preferences by pointing out the externalities.”

49. They add that this should be a dynamic analysis, because social norms change, and this change can be predicted. Indeed, the very existence of a sustainability agreement may contribute to such a change in norms and behavior, leading to reduced climate risk: “if an agreement between firms leads, however, to a wider adoption of the more sustainable fuel, she may want to reconsider her choice [for the less sustainable product], as it would now lie outside the changed social norm.” Cooperation may unlock not just the supply-side spill-over benefits discussed above, but also demand-side spillover benefits.

50. This “extracted individualistic consumer welfare” may be the approach the Commission has in mind when it states in the *Policy Brief* that “As long as the users of the product concerned appreciate the sustainability benefits related to the way the products are produced or distributed, and are ready to pay a higher price for this reason alone, such benefits can be taken into account in the assessment.” But can we go further and “launder preferences”? Can welfare analysis be built on choices that consumers are supposed to make “if they had complete information, unlimited cognitive abilities and no lack of self-control”? Inderst and Thomas suggest that this is justified only if the choice “threatens a consumer’s own health.”

51. Although they don’t say so, this will be the case if the full force of the climate crisis is unleashed. But ignoring that for a moment, why is it fair for a consumer to make a decision that threatens a neighbour’s health and endangers collective consumer welfare? Inderst and Thomas object to taking this into account. They argue that it goes too far to consider the “collective welfare” effect of a sustainability agreement—or even to ask what a consumer would be willing to pay if all other consumers paid to eliminate the externality as well. They consider

it is unreasonable to ask a consumer to “pay the bill” for avoiding a climate crisis, because the consumer “would thus be forced to pay a higher price for something they do not want only because other consumers care not only about their own choices but have a say about all consumers’ choices.” It would impinge on “consumer sovereignty.” First, this ignores that currently, the consumer buying the dirty product is imposing a cost on all others, without those others having any say about that. That is even less fair. The others’ sovereignty is impinged upon when the externalities (like pollution or climate change) are imposed on them, too. Worse, this is done without compensation. In addition, this reasoning appears to maintain one of the greatest demand-side market failures of all—free rider concerns (“why should I buy clean fuel when my neighbor continues to buy the polluting kind?”)

52. Second, the argument ignores the “polluter pays” principle – which the European Commission is required to follow by Article 191 TFEU. Inderst and Thomas argue that using “extracted” individualistic welfare as a yardstick for antitrust analysis is justified by “the way the legal order has embraced sustainability as a societal goal of great importance, as, e.g., in Article 11 TFEU. Such legal endorsement serves as a justification for choosing the willingness-to-pay value that attributes the greatest weight to sustainability.” But the same applies to “collective consumer welfare.” The legislature has embraced the “polluter pays” principle explicitly, and declared a climate emergency. Competition policy should integrate that.

53. All of that said, Inderst and Thomas have advanced the debate by explaining how the scope for internalization of externalities may be larger than what is evident at first sight, by looking at “extracted” (and even “laundered”) individualistic willingness to pay, and by recognizing that sustainability agreements, by their very existence, may change the willingness to pay and thus contribute to sustainability goals. But consumers also obtain “spill-over benefits” from all other consumers changing their consumption choices, and that deserves to be taken into account, too.

## IV. Residual competition

54. Finally, the agreement must not “afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.” This should not be a barrier to sustainability agreements where residual competition on price, quality, functionality, and innovation continue to be possible.

<sup>34</sup> R. Inderst & S. Thomas, *The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach*, July 2021.

## V. Conclusion

**55.** The climate crisis is a good example of the effects of “competition overdose.” While Ezrachi and Stucke say little about the environment and the climate crisis, their thinking is entirely consistent with the notion that competitors should be allowed to cooperate to eliminate pollution and emissions of greenhouse gases. To reach that conclusion, it is not necessary to follow Ezrachi and Stucke all the way to require “ethical competition” or “noble competition.” It is in firms’ self-interest to pursue reduction of climate risks—a spill-over benefit that is consistent with society’s and consumers’ interests. The law as it stands allows it—so long as the conditions of

Articles 101(3) and Section 9(1) CA98 are met—and in view of the “polluter pays” principle, EU and UK law arguably require it. And it can be done without sacrificing the consumer welfare criterion, so long as competition authorities recognize demand-side spill-over benefits (the benefits a consumer obtains when other consumers switch to goods that are more sustainable or reduce consumption of high-carbon-emission products). But Ezrachi and Stucke’s thinking provides a thoughtful framework for higher-level analysis. If companies seek “noble co-opetition” for their own and the common good, we should allow that. We have the tools to distinguish between the colluders and the enlightened. ■



# A new plurality of objectives in antitrust law?

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## I. A fresh perspective: *Competition Overdose*

1. How do you write a bestseller? For example, like this: (1.) You start with a statement that—as explained at the beginning—is shared by the whole world. (2.) Then you show with many examples that the initial statement is wrong, i.e., that all those who shared it are wrong.

2. The book *Competition Overdose* by Ariel Ezrachi and Maurice Stucke begins (1.) with the statement: “*There is one subject on which just everybody seems in agreement. Have you ever heard any American politician question the benefits of competition?*” No reason is given why the authors—one of whom teaches in the U.S., the other in Great Britain—limit their consideration to American politicians. Had they included the European discussion, they could not have ignored the debate that preceded the Lisbon Treaty. At the instigation of the French government, the treaty objective of establishing a “*system of undistorted competition*” was removed from the target provisions of the European treaties at the time—in 2007. Some European governments saw—compared to competition—an active state industrial policy as a more suitable approach for achieving desired economic policy results. After heated debate, a political compromise was reached: the principle of competition was deleted from the treaty objectives, but it was declared to remain binding in a protocol declaration to the Lisbon Treaty.<sup>1</sup> Even if the exact rank of the competition principle may appear doubtful<sup>2</sup> after this, the discussion and the banishment of the principle from the official treaty

objectives make it clear that competition on this side of the Atlantic is by no means as uncontroversial as observed by the authors in the USA.

3. With regard to the second ingredient of the above-described recipe for writing a bestseller, there may also be doubts about the book by Ezrachi and Stucke: The authors would like to prove (2.) that the often praised competition is responsible for quite unfavorable results in numerous cases. They often identify “toxic” competition, which—unlike the “noble” variant they favor—works to the disadvantage of consumers and other market participants. They use as evidence, for example, seemingly arbitrary procedures in the admission of students to American universities, the presence of horse and pork ingredients in European “beef” shipments, and a variety of disadvantages suffered by consumers in need of protection when entering into contracts.

4. The authors arrive at these statements—that competition often leads to bad outcomes—by the artifice of using “competition” as a synonym for “markets” or even “capitalism.” If this equation of competition, markets and capitalism is taken into account, the authors’ statements no longer appear spectacular. It is common knowledge that markets often do not function in a desirable way. Recent textbooks on economics are full of examples of market failure. Many of these examples—namely, those in which behavioral economists have identified systematically irrational consumer behavior as the cause of market failure—appear in the book. However, there may be doubts about Ezrachi and Stucke’s thesis that it is competition that is responsible for what they often call “toxic” outcomes.

5. If competition is not equated with the concept of the market, but is analytically distinguished from it, a more differentiated statement can be made: in many of the markets considered by the authors, competition cannot fulfill its task. This is not because competition is an unsuitable instrument in principle, but because there is a

1 Protocol (No. 27) on the internal market and competition, Consolidated version of the Treaty on European Union—PROTOCOLS—OJ C 115, 9.5.2008, p. 309.

2 Cf. I. Lianos, Competition law in the European Union after the Treaty of Lisbon, in *The European Union after the Treaty of Lisbon*, D. Ashtagbor, N. Countouris and I. Lianos, eds. (Cambridge University Press, 2012), p. 252 *et seq.*; B. van Rompuy, The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts, *CPI Antitrust Chronicle*, December 2011.

lack of preconditions for competition to fulfill its beneficial effects: For example, if price information is presented in an unclear manner (the book impressively describes the practice of drip pricing, which is widespread in the U.S. hotel industry), many consumers make decisions that are to their disadvantage. It is commendable that the authors describe the successful lobbying efforts that have prevented consumer-protective regulation in this area in the United States. But: there is no “overdose” of competition in this example. In fact, it can be argued that the opposite is the case: because consumers are unable to make a decision that is advantageous to them due to the confusing presentation of prices, the competition that is certainly possible only comes into play imperfectly. The result is therefore an underdose of competition.

6. Admittedly, the book also contains examples in which the metaphor of an overdose may seem appropriate: When the aircraft manufacturer Boeing under the acute competitive pressure exerted by its rival Airbus produces an airplane that is not airworthy (737 Max), one can speak of a “toxic” effect of competition. Of course, the book makes it clear that it is not competition that is responsible for the fatal crashes of two Boeing aircraft: The actions of irresponsible managers and—as the authors emphasise—the failure of government regulation are to blame for the crashes. Here, as in many other chapters in the book, it becomes clear that regulation is often a necessary precondition for functioning competition: Regulation in areas such as consumer protection, safety, and health must set a framework so that competition can have welfare-enhancing effects.

7. This also applies to the digital economy, to which Ezrachi and Stucke devote many pages. The authors meticulously describe how companies such as Google and Facebook use their position as market gatekeepers to maximize revenues, especially from advertising contracts. Here, too, a thorough analysis would have to come to the conclusion that there is no “overdose” of competition. On the contrary, the opposite must be assumed: As the Australian Competition Authority has noted, “*Google and Facebook are critical and, in many cases, unavoidable business partners.*”<sup>3</sup> That’s why these companies can reap monopoly returns. Again, therefore, the analysis is that there is no “overdose” but, as with many classic competition problems, an “underdose” of competition.

8. Contrary to its title, the book does not deal solely with cases of an “overdose” of competition, and it is precisely here—in its broad approach—that its strength lies. Overall, the authors provide nothing less than a broad analysis and critique of the existing system of competition law and its application. It is therefore a welcome contribution to a discussion that has long been underway. At this point, some remarks on the objectives of competition law from a European perspective will be contributed.

3 Australian Competition & Consumer Commission (ACCC), Digital Platforms Inquiry: Preliminary Report (December 2018), <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report>, at p. 2.

## II. A new plurality of objectives in antitrust Law?

9. In the last two decades we have seen a narrowing of official competition policy to essentially one objective: The enhancement of consumer welfare. From the point of view of some colleagues from the discipline of economics, this concentration on one objective function may have had the charm that they could come to—seemingly—unambiguous statements: If consumer prices rise, this speaks for a ban, if they fall, this speaks for permitting a behavior. However, at the latest since the triumph of the large multi-sided platforms, it has become clear that the simplistic focus on consumer prices does not do justice to what is happening in the markets: The trick with the platforms is that consumers are often served free of charge, and at best pay the bill indirectly: for example, via the diversion of higher pricing on the other side of the market (the business users), which then pass the disadvantage on to consumers unnoticed via higher product prices.

10. In recent times, competition law has been confronted with demands to take into account objectives that have played only a minor role in the discussions during the past decades, namely (1.) a consideration of sustainability goals, (2.) proposals to use antitrust law specifically against new forms of monopoly capitalism (“GAFA”: Google, Amazon, Facebook, Apple), and (3.) a new understanding of fairness in competition law.

### 1. Consideration of sustainability goals?

11. It has recently been argued that antitrust law and its application should also promote or at least take into account sustainability, environmental and climate protection goals.

12. In the *Bayer/Monsanto* merger case, for example, numerous concerned citizens as well as a number of non-governmental organizations from the fields of environmental and health protection pointed out that the companies involved manufactured products that posed risks to nature, the environment, health and the climate. The European Commission, however, saw no possibility to take these concerns into account in the pending merger control proceedings and cleared the merger subject to conditions and obligations which only took into account competition concerns.<sup>4</sup>

4 European Commission Decision of 21 March 2018, Case M. 8084 – Bayer / Monsanto, Article 8(2) Regulation (EC) 139/2004.

**13.** In the context of Article 101 TFEU, however, the Dutch competition authority ACM has put up for discussion drafts of new guidelines with which it would like to make possible a more far-reaching authorisation for sustainability initiatives.<sup>5</sup> It wants to achieve this by changing the understanding of consumer benefit: According to a traditional understanding of Article 101(3) TFEU, an exemption can only be considered if the advantages of a restrictive agreement benefit consumers on the same market which is affected by the adverse effects of the restriction of competition—for example, rising prices. This would often exclude sustainability initiatives, as their benefits do not specifically accrue to the disadvantaged consumers. In the future, the ACM intends to take into account sustainability benefits in a more generous way: If an agreement concerns the reduction of negative externalities, and, as a result thereof, a more efficient usage of natural resources, the ACM wants to take into account benefits for others than merely those of the users. The authority argues that in such situations, it can be fair not to compensate users fully for the harm that the agreement causes because “*their demand for the products in question essentially creates the problem for which society needs to find solutions.*” Instead of requiring a benefit that accrues (precisely) to the users, it shall be sufficient if the agreement in question contributes efficiently (i) to the compliance with an international or national standard (to which undertakings are not bound) or (ii) to a concrete policy objective. The ACM mentions as an example of a concrete policy objective the Dutch government’s policy aimed at reducing CO2 emissions on Dutch soil.

**14.** On a closer look, the draft guidelines contain an important deviation from the traditional consumer welfare approach which has been dominating the application of competition law for decades: Competition policy is no longer to be geared solely to the preferences of the consumers affected by an agreement. Behind this new approach is a more realistic conception of the consumer: The consumer can appear to be the real problem, if she sets environmentally or climate-damaging production in motion with her demand behavior.

## 2. Proposals to use antitrust law specifically against new forms of monopoly capitalism (“GAFA”: Google, Amazon, Facebook, Apple, etc.)

**15.** A second new objective may be the demand to use antitrust law specifically against new forms of monopoly capitalism—keyword Google, Amazon, Facebook, Apple, which are also referred to as GAFA companies—and to further develop them for this purpose. Much has been written in this respect. Influential in the US discussion was the essay Amazon’s Antitrust Paradox, published by antitrust lawyer Lina Khan in the *Yale Law Journal* in 2017.<sup>6</sup> She argued against the one-sided fixation of the prevailing application of antitrust law on the goal of low consumer prices and pointed out that Amazon has been monopolising markets for many years precisely with the instrument of low consumer prices, thus making life difficult for other suppliers. With this essay, Lina Khan stands for a new school of thought in antitrust law, which no longer focuses on short-term consumer welfare, but on long-term market structure consequences.<sup>7</sup>

**16.** How seriously this new trend should be taken is not only shown by the fact that it is denigrated by orthodox competition economists as populist—namely as “antitrust populism.”<sup>8</sup> The growing influence of the critics of the platform monopolists is also reflected in President Biden’s appointment in June 2021 of Lina Khan as a new member and outright chair of the Federal Trade Commission, which plays a central role in the application of US Antitrust law.

**17.** In the meantime, the US administration is active on many fronts against tech giants. It initially failed in court with its attempt to reverse Facebook’s acquisition of Instagram and WhatsApp, which was initiated under the previous administration, and is now making a second attempt to achieve this goal. The U.S. Department of Justice is proceeding against Google, arguing that the company is illegally protecting its dominant position in Internet search and the associated advertising, i.a. through contracts with hardware manufacturers and other companies. In addition, there are a number of legislative proposals at the federal and state levels aimed at, among other things, reducing the dependence of app developers on the major ecosystem operators Google and Apple.

<sup>5</sup> Authority for Consumers and Markets, Guidelines Sustainability agreements – Opportunities within competition law, second draft version of January 2021, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>, chapter 4.

<sup>6</sup> L. Khan, Amazon’s Antitrust Paradox, 126 *Yale Law Journal* (2016), p. 710 *et seq.*

<sup>7</sup> On the more recent discussion of the consumer welfare standard also, for example, H. Hovenkamp, Is Antitrust’s Consumer Welfare Principle Imperiled?, 45 *The Journal of Corporation Law* (2019), p. 101 *et seq.*, and B. Orbach, The Consumer Welfare Controversy, *CPI Antitrust Chronicle*, November 2019, p. 22 *et seq.*

<sup>8</sup> J. Wright and A. Portuese, Antitrust Populism: Towards a Taxonomy, 25 *Stanford Journal of Law, Business & Finance* (2020), p. 131 *et seq.*

18. In Europe, there are also legislative projects at two levels to counter the development of a new monopoly capitalism in some digital sector markets. At the European Union level, the draft Digital Markets Act (DMA) presented in December 2020 appears to be the most important project. It appears remarkable that the DMA largely breaks away from conventional categories of competition law: It does not link to the existence of a dominant market position, but creates a new type of norm addressee with the figure of the gatekeeper. Correspondingly, no analysis of the effect of the behavior of gatekeepers on competition is required in individual cases. Instead, the DMA contains a catalog of conduct that is prohibited from the outset for gatekeepers providing certain types of core platform services.<sup>9</sup>

19. Parallel to this, legislative proposals on the digital sector are under discussion (e.g., in France<sup>10</sup>) or already in force (in Germany<sup>11</sup>) at the level of the EU Member States.

20. This short contribution is not the place to go into this discussion and the new proposals *in extenso*. It may suffice here to point out: The old way of applying competition law—the one-sided fixation on a single variable, consumer welfare—has proven to be no longer viable, at the latest since the emergence of the large market-dominating platforms: For many services in the digital sphere—especially free services such as search engines and social networks—invoking short-term consumer detriment has proven unsuccessful. Often, at first glance, consumers actually benefit from the practices of incumbents. The disadvantages come through the back door: the other side of the market, e.g., manufacturers or retailers, often pay excessive contract and advertising fees, which can then be passed on to consumers—usually not verifiable in individual cases—via higher product prices. In addition, the buyout of small promising companies at an early stage of their existence by incumbents can nip dynamic competition and the resulting benefits for innovation and development in the bud. In the area of the digital economy, competition policy, which has largely stood idly by and watched the development of concentration in this sector in the past, has an important task.

9 See on the draft DMA L. Cabral et al., The EU Digital Markets Act, A Report from a Panel of Economic Experts, 2021; A. de Stree et al., The European Proposal for a Digital Markets Act, 2021; G. Monti, The Digital Markets Act – Institutional Design and Suggestions for Improvement, 2021; R. Podszun et al., The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers, *Journal of European Consumer and Market Law* 2021, p. 60 *et seq.* See also the contributions by P. Ibáñez Colomo, F. Chirico, M. Botta, J.-U. Franck and M. Peitz, N. Petit, P. Larouche and A. de Stree, A. Lamadrid de Pablo and N. Bayón Fernández in *JECLAP* 2021, Vol. 12, No. 7.

10 See for France the discussion by the Autorité de la concurrence, Contribution au débat sur la politique de concurrence et les enjeux numériques, [https://www.autoritedelaconcurrence.fr/sites/default/files/2020-02/2020.02.28\\_contribution\\_adlc\\_enjeux\\_num.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/2020-02/2020.02.28_contribution_adlc_enjeux_num.pdf).

11 § 19a of the Act against Restraints of Competition, introduced by the Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions of 18 January 2021 (“GWBG-Digitalisierungsgesetz”).

### 3. A new understanding of fairness in competition law?

21. The concept of fairness has not been foreign to competition law in the past: The prohibition of abuse in Article 101(1) TFEU refers to the prevention of “*unfair purchase or selling prices*.” And the exemption provision of Article 101(3) TFEU requires that consumers should receive a “fair share” of the resulting efficiency gains. So: the word “fair” also appears in traditional antitrust law. The passages just mentioned in which the English version of Article 101 TFEU uses the term “fair” or “unfair” seem to refer to distributive justice: unfair buying or selling prices, a fair share of efficiency gains.

22. However, there is a second sense in which “fairness” could be understood: This second meaning does not occur in the context of distribution, but with respect to behavior: People or undertakings may behave in an unfair manner, and the law might have the function to prevent such unfair comportment. This concept of fairness is familiar to the law—and even to competition law—, as well: The law against unfair competition is directed against behavior that is deemed by the legislator to be unfair. The EU Unfair Trade Practices Directive (UTP Directive) provides a number of provisions directed against such unfair behavior.<sup>12</sup> In this sense, a buyer must not carry out acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation (Art. 3(h) UTP Directive). Likewise, a buyer is not allowed to refuse to confirm in writing the terms of a supply agreement for which the supplier has asked for written confirmation (Art. 3(f) UTP Directive).

23. Behavioral (and not just distributive) fairness is also required by the EU regulation on promoting fairness and transparency for business users of online intermediation services (so-called P2B regulation).<sup>13</sup> According to this regulation, providers of online intermediation services, namely online search engines, are obliged to disclose the main parameters that are most important for determining a ranking (Art. 5(1) and (2) P2B-regulation). Providers of online intermediation services and of online search engines are also obliged to explain any differential treatment of goods and services of different business users displayed or offered through their facilities (Art. 7(1) and (2) P2B Regulation).

24. The draft DMA already mentioned also pursues—among other things—the goal of ensuring fairness. In its introductory explanatory notes, the DMA states: “*The objective of the proposal is (...) to allow platforms to unlock*

12 Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111, 25.4.2019, p. 59 *et seq.*

13 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57 *et seq.*



*their full potential by addressing at EU level the most salient incidences of unfair practices and weak contestability so as to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment.”*

25. The first of these elements—the DMA is to ensure the contestability of markets—appears to be quite consistent with traditional competition policy: the traditional abuse control of dominant companies is also directed, among other things, against dominant market participants making it difficult for competitors to enter the markets they dominate, for example, by means of abusive contractual clauses, and thus securing their own position of power. So: even if this has not been justified in every single case with the term contestability, securing free access to markets appears to be part of established competition policy.<sup>14</sup>

26. By contrast, the second aim of the DMA—to safeguard a fair environment—seems to go beyond old-fashioned requirements of antitrust law.<sup>15</sup> Many of the prohibitions laid down in the Articles 5 and 6 DMA serve to protect the business users against unfair treatment by a platform: Article 5(b) DMA amounts to a prohibition of the use of most-favoured-nation clauses and best price clauses by the platform, preventing its business users from setting different prices when using other ways of distribution of their goods or services. According to Article 5(c) DMA gatekeepers must not make it difficult for business users to effectively use a distribution channel outside the platform. Article 6(a) DMA requires gatekeepers to refrain from using, in competition with business users, data which is generated through activities by those business users. When ranking services and products a gatekeeper has to refrain from treating services and products offered by himself more favourably compared to those of third parties (Art. 6(d) DMA).

27. All in all, the draft seems to pursue more than an antitrust goal here: it conveys a certain image of fair behavior that large providers of central platform services must display.<sup>16</sup> These behavioural requirements benefit not only—unilaterally—end consumers, but often also other traders and namely business users, i.e., often the—compared to end consumers—“other market side” of a

two-sided market. Precisely this—the protection not only of end consumers but also of commercial users—is expressed in a large number of provisions and recitals of the DMA.

28. After the enactment of the DMA the narrative in European competition policy could be: We do not only protect consumers against an abuse of market power, but also business firms such as online retailers and app developers from unfair treatment by the large digital corporations. One could also say: on platform markets both market sides are in similar ways in need of protection against unfair treatment by the platform—as both are dependent on the use of the platform service. So it is not only the end users (consumers) but also the business users who deserve protection. With such an understanding, too, the conventional one-sided consumer-welfare thinking could be overcome—as has already been shown in connection with the consideration of sustainability goals.

### III. Conclusion

29. The orthodox economic approach according to which competition law has to serve consumer welfare—and nothing else—has come under pressure. In recent times, some researchers have called for a renaissance of a process-oriented competition policy.<sup>17</sup> According to this approach, competition law serves to protect certain prerequisites of a competitive process. These conditions relate in part to the behaviour of market participants and in part to the market structure.<sup>18</sup> If safeguarding the competitive process by protecting its prerequisites can be seen as a goal of competition law, this does not necessarily exclude the pursuit of other goals by competition law. It has often been said that competition law protects the competitive process because of a presumption that competition will bring about favourable results.<sup>19</sup>

30. The book by Ezrachi and Stucke rightly points out that it often falls short of the mark to seek salvation only in low consumer prices. There are good reasons for broadening the perspective and taking into account more values. This article attempts to justify this on the basis of further considerations: Sometimes the consumer with her demand, for example, for goods or services that are harmful to the climate or the environment is the problem. So a maximization of her welfare does not necessarily appear advisable when societal goals such as environmental and climate protection are taken into account. Also on platform markets, the pursuit of the goal of short-term consumer welfare may appear questionable: Here the provision of free services to end users can lead to the emergence of monopolies. The price for this is paid

14 Similarly, P. Larouche and A. de Streel, *The European Digital Markets Act: A Revolution Grounded on Traditions*, *JECLAP* 2021, p. 542, at 544.

15 See for an ongoing discussion on the nature of the fairness-requirement in the DMA: R. Podszun et al., *The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers*, *Journal of European Consumer and Market Law* 2021, p. 60, at 62; H. Schweitzer: *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*, 29 *Zeitschrift für Europäisches Privatrecht* (2021) p. 503, 508 et seq.

16 P. Ibáñez Colomo, *JECLAP* 2021, p. 561, at 568–569 emphasizes this behavioral nature of the fairness requirement in the DMA: “Fairness—as understood in the Draft DMA—seeks to neutralise the competitive advantages enjoyed by gatekeepers. Accordingly, a market is deemed fair where all firms are placed on a level playing field. For instance, gatekeepers would not be entitled to benefit from the data generated by the activity of its business users.” By contrast, P. Larouche and A. de Streel advocate a distribution-related interpretation of fairness in the DMA: *JECLAP* 2021, p. 545 et seq. See also, for a more differentiating view, H. Schweitzer: *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*, 29 *Zeitschrift für Europäisches Privatrecht* (2021) p. 503, 508 et seq.

17 In this sense, H. Schweitzer, 29 *Zeitschrift für Europäisches Privatrecht* (2021) p. 503, 508 et seq. In more depth, D. Zimmer, *The basic goal of competition law: to protect the opposite side of the market*, in *The Goals of Competition Law*, D. Zimmer, ed. (Edward Elgar Publishing, 2012), p. 486 et seq.

18 D. Zimmer, in *The Goals of Competition Law* (2012), p. 488 et seq.

19 Ibid., p. 490.

by the other side of the market—mostly business users—who will try to pass on the costs to their customers. And finally, the considerations made here have shown that there are good reasons for taking a closer look at fairness in markets again. The draft DMA presented by the European Commission can be seen as an attempt to steer the relationships between platforms, business users and end users in the direction of greater fairness. ■

# Contribution to debate on *Competition Overdose*

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1. While criticizing the undesirable outcomes of insufficiently regulated competition on particular markets, the authors of *Competition Overdose* do not seem to reject the principle of competition as such, or all forms of competition in an economy. Rather, they appear to argue, on the one hand, that competition, at times, is not the right tool in order to satisfy certain needs, and, on the other hand, that competition without appropriate and thoroughly enforced regulation leads to problematic results and harm.

2. We share both of these positions. Like Svend Albrecht, we agree not only with the “belief in the power of markets” but also with the “need for the state to intervene when markets do not deliver,” as well as with the “basic narrative that in many markets some form of regulation is needed.”<sup>1</sup>

3. As regards the first of these points, that is the need for the state to intervene when markets do not deliver, Philip Lowe convincingly demonstrates, with the example of the liberalization of utilities, how such liberalization can, at times, turn out beneficial, like in the telecommunication sector, whereas, in other settings, its benefits can be far less obvious and even questionable, like in the postal, railway or water sectors.<sup>2</sup> These examples indeed underline that opening up a certain sector to unfettered competition and the mechanisms of the pure market economy might not always be the right tool to meet the needs of the sector concerned. However, this does not mean that competition, as such, is bad, but rather that competition follows rules of play and leads to outcomes that might not be appropriate for all types of goods and services that a society needs. If it is just not profitable to deliver letters to a remote mountain village, to provide reliable public transportation at reasonable prices including in the countryside or to conduct

pharmaceutical research in order to heal rare diseases, leaving the accomplishment of these tasks to the mechanisms of the market economy will simply not work. As the authors of *Competition Overdose* state, without incentives, private firms will not invest in infrastructure or the more general needs of society.<sup>3</sup>

4. To cope with such problems, however, there is no need to reject the market economy or the principle of competition as such. As Pier Luigi Parcu vividly exposes, one just has to be aware of the fact that “capitalism is about earning as much profit as possible.”<sup>4</sup> Thus, it should not come as a surprise that private firms, even if they nowadays take into account—partly because of a corresponding consumer demand—some social or environmental concerns, do not operate for the common good, but for private profit. This is nothing reprehensible, but just inherent to the capitalistic form of market economy based on private initiatives, private property and private ownership of means of production.

5. This leads us to the second of the two above-mentioned points, that is the need for regulation of competition. Without necessarily being reprehensible, the just outlined private-profit-oriented motivation inherent in any private undertaking entails a need for appropriate and thoroughly enforced regulation of the competitive process. As nearly all of our fellow commentators point out, competition without regulation—in the sense of consumer protection, production standards, labour law, interdiction and sanction of cartels and market dominance abuse, etc.—will not be beneficial for the common good and society as a whole.

6. Yet, the utilization of competition as a tool to serve society and to make people’s lives better seems exactly to be what the authors of *Competition Overdose* call for. Indeed, what these authors really criticize are not the

\*The views expressed in this chapter are attributable to the authors in a personal capacity only.

1 S. Albrecht, Regulation underdose?, pts. 14 and 15.

2 P. Lowe, A tirade against dogma, pt. 16 et seq.

3 M. E. Stucke and A. Ezrachi, *Competition Overdose*, p. 229. See on this point also P. L. Parcu, Competition as a tool, pts. 20, 21 and 26.

4 P. L. Parcu, Competition as a tool, pt. 11.

harmful effects of competition as such, but the harmful effects of competition associated with excessive deregulation.<sup>5</sup> More than a “competition overdose,” they blame a “deregulation overdose” or, as Svend Albaek puts it, a “regulation underdose,” expressing an emphatic “cry for more or better regulation in various parts of the economy.”<sup>6</sup>

7. The fact that the authors of *Competition Overdose* do not call into question the principle of competition or the market economy as such, but rather some of its current excrescences caused by the absence of appropriate and sufficiently enforced regulation, also appears when questioning what alternatives to the criticized forms of competition they suggest. As Oles Andriychuk states in his Ten Points for Discussion, they do not really seem to favor a model of a centrally planned, state dirigisme-driven non-competition economy.<sup>7</sup> Nor could they reasonably prefer collusion between firms as an alternative to competition. Indeed, as Pier Luigi Parcu rhetorically asks, “which could be the alternative to competition in selling hamburgers: cooperation?”<sup>8</sup> Of course not. As Parcu and other commentators correctly point out, what the authors of *Competition Overdose* blame is in reality not competition, but rather unfettered capitalism or greed.

8. If competition is not called into question as such, what Diane Coyle announces explicitly and what underlies most of the comments, however, is the remarkable consensus that competition needs regulation to function in a beneficial way. All authors and commentators equally agree on this. As Coyle puts it, “markets and state (...) need to operate together for the common good,” because “markets need strong government if they are to work well.”<sup>9</sup> Philip Lowe argues in the same vein when he underlines that it is precisely the “noble cause of competition authorities and regulators (...) to make markets work for the benefit of consumers, business and society as a whole.”<sup>10</sup>

9. As several of the commentators point out, however, at least in continental Europe, the consensus about such a need for regulation of the markets and the rejection of unfettered competition seems to be quite commonly shared by most politicians and most probably all regulators.<sup>11</sup> Thus, the vision of competition ideology as depicted by the authors of *Competition Overdose* certainly needs to be nuanced concerning Europe. Indeed, it does not seem that in Europe, an “oversimplified version of the competition ideology (...)”

with its assumption that unfettered competition is always and in every circumstance superior to any other path” is being sold to the public, as claimed by the authors of *Competition Overdose* as regards the US context.<sup>12</sup> According to the German concept of ordo-liberalism, completely liberalized markets tend to dissolve themselves. The yardstick for such a degenerated situation is neither the number of actors on the market, nor the homogeneity of the goods, nor is it consumer welfare in the sense of low consumer prices. What is decisive is whether the market actors are powerless against price formation. This is the contrary of complete competition or market equilibrium. In contrast to oligopoly or monopoly, here no one is in a position to economically steer another market player. Similarly, and as set forth by Daniel Zimmer, Lina Khan now also stands for such a “new” (Zimmer) approach in US antitrust law.<sup>13</sup> Thus, the focus is no longer on short-term consumer welfare, but on long-term market structure consequences. Such a more comprehensive understanding of the market has become even more important in the globalized digitalized economy. This modern economy inherently favors bigger multinational enterprises to the detriment of SMEs which easily get under pressure to be driven out of the market by cheaper, but not necessarily better or more sustainable products of their bigger competitors.<sup>14</sup>

10. As one of us already outlined elsewhere, in the EU, it is indeed commonly accepted that competition legislation aims at ensuring that all undertakings active on the internal market of the EU must abide by the rules of fair play, and that there must be sanctions for foul play. This is because we are convinced that our society in general, and consumers in particular, would be worse off if we did not make sure that all market players respect the rules of free and effective competition. At the same time, the very existence of common competition rules is a token of fair treatment for all undertakings active on the EU’s internal market, since those rules create a “level playing field”, that is to say, a framework which must be observed by everyone and which, at the same time, guarantees equal treatment and equal opportunities for all.<sup>15</sup>

11. Thus, the conviction that beneficial competition needs effectively and efficiently enforced regulation certainly underlies European Union competition law and, more particularly, Articles 101 and 102 TFEU and their interpretation by the European Court of Justice (ECJ). Of course, the Court is not a policy-maker nor has it a political agenda, but its approach on competition law follows some basic principles that endorse the need for regulation of competition.

5 See explicitly M. E. Stucke and A. Ezrachi, *Competition Overdose*, p. 228 et seq.

6 See S. Albaek, Regulation underdose?, pt. 2.

7 O. Andriychuk, ‘Competition Overdose’: Curing Markets from Themselves? Ten Points for Discussion, *Legal Studies* (2021), Vol. 41, No. 3, p. 519 (520).

8 P. L. Parcu, Competition as a tool, pt. 10.

9 D. Coyle, The state and the market: Reflections on *Competition Overdose*, pts. 5, 23.

10 P. Lowe, A tirade against dogma, pt. 28.

11 See for instance S. Albaek, Regulation underdose?, pts. 16, 17 and 25; P. L. Parcu, Competition as a tool, pt. 16 et seq.; D. Zimmer, A new plurality of objectives in antitrust law?, pt. 2.

12 M. E. Stucke and A. Ezrachi, *Competition Overdose*, p. 228.

13 D. Zimmer, A new plurality of objectives in antitrust law?, pt. 15.

14 On obstacles to ethic competition in the transborder context, see D. Gerber, Competition, ideals and law: The transborder context.

15 See J. Kokott and D. Dittert, Fairness in Competition Law and Policy, in D. Gerard, A. Komminos and D. Waelbroeck, eds. (Bruylant, 2020), p. 22 et seq.



Thus, in the field of competition law, the Court has always endeavoured to strike a balance between guaranteeing the rights of undertakings and taking account of economic realities on the one hand, and effectively sanctioning anti-competitive behaviour on the other.

**12.** When reading the considerations of the authors of *Competition Overdose* as well as the comments of Oles Andriychuk and our co-commentators in this special edition, a very recent example in the Court's case law came to our minds as an illustration of the need for competition law regulation and enforcement depicted therein: The jurisprudence on so-called "reverse payment" patent settlement agreements in the pharmaceutical sector, i.e., the so-called *Generics* and *Lundbeck* cases.<sup>16</sup>

**13.** It does not come as a surprise that the pharmaceutical sector provides a particularly striking illustration of the need for regulation of the competitive process and its outcomes. Indeed, not only the need for regulation and surveillance as for product safety, underlined by Diane Coyle,<sup>17</sup> but also the need for regulation and state intervention in order to make up for the failure of market mechanisms to meet patients' needs are particularly salient here.

**14.** Thus, on the one hand, it is common ground that market mechanisms alone are not sufficient to meet the needs of patients. This is the reason, for example, for the existence of public subsidies for research, particular incentives for the development and marketing of drugs against rare diseases (so-called orphan medicinal products)<sup>18</sup> and the like.

**15.** On the other hand, in our current economic system, the basic principle nevertheless is that the provision of drugs and pharmaceutical products is entrusted to the private sector and the mechanisms of the market economy, even if they are very strictly regulated and somehow canalised by the state.

**16.** If pharmaceutical research is entrusted to the private sector, originator companies, that develop new medicinal products, need to have enough incentives to conduct such research. This is why they benefit, after the launch of a new product, from a period of marketing exclusivity thanks to data exclusivity and patent protection. On the other hand, upon expiry of this period of exclusivity, generics of the originator product can enter the market. This does not only help to avoid excessive testing on humans and animals, because the initial trials do not have to be repeated. It also introduces competition with regard to the concerned medicinal product, which leads to a fall in prices that eases the financial burden on the public health systems

and patients. The rules of EU law on the marketing of medicinal products thus try to establish a balance between various conflicting interests.<sup>19</sup>

**17.** Consequently, as already written in the opinion in the *Lundbeck* case before the Court, in the pharmaceutical sector like in other sectors where intellectual property rights are concerned, a certain degree of tension between competition and such intellectual property rights is inevitable, as these rights grant certain exclusive privileges to inventors, that stay the competitive process for some time.<sup>20</sup> However, the granting of a patent only creates a presumption of validity of that patent. As the Court has stated, the subject matter of a patent thus cannot be interpreted as affording protection against actions brought in order to challenge such a patent's validity, especially in view of the fact that it is in the public interest to eliminate obstacles to economic activity which may arise where a patent was granted in error.<sup>21</sup> It follows that the existence of patents protecting a certain medicinal product does not amount to a legal barrier excluding all competition such as the exclusive rights recognised as constituting such barriers in earlier cases before the Court.<sup>22</sup>

**18.** In view of the abovementioned specific public interest in the market entry of generic medicinal products, the competitive process of challenging existing patents is particularly important in the pharmaceutical sector. This is especially true in situations in which the active ingredient of an originator medicinal product is already in the public domain because patent protection for that active ingredient has expired, but where the manufacturer of the concerned medicinal product still holds manufacturing process patents for the active ingredient at issue. Such manufacturing process patents are sometimes called "secondary" patents because they are often granted much later than the original patents for the active substance itself and the original manufacturing process. In such situations in particular, the presumption of validity of the concerned process patents cannot be equated with a presumption of illegality of generic products validly placed on the market which the patent holder considers to be infringing those patents.<sup>23</sup> The reason for that is not only the existence of the possibility that the process patents are found invalid in patent litigation. Furthermore, in such a situation, there also exist other ways of manufacturing the active substance at issue than those protected by the

<sup>16</sup> CJEU, 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52), and 25 March 2021, *Lundbeck v. Commission* (C-591/16 P, EU:C:2021:243).

<sup>17</sup> D. Coyle, *The state and the market: Reflections on Competition Overdose*, pt. 14.

<sup>18</sup> See for the EU Regulation (EC) No. 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products, OJ L 18, 22.1.2000, p. 1.

<sup>19</sup> Especially Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67) and Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ L 136, 30.4.2004, p. 1), as amended. See on this regulation opinion of AG Kokott in case C-423/17, *Warner-Lambert Company* (EU:C:2018:822, pt. 1 *et seq.*).

<sup>20</sup> See opinion of AG Kokott in case C-591/16 P, *Lundbeck v. Commission* (EU:C:2020:428, pt. 1 *et seq.*).

<sup>21</sup> CJEC, 25 February 1986, *Windsurfing International v. Commission* (193/83, EU:C:1986:75, paras. 89 and 92), GCEU, 8 September 2016, *Lundbeck v. Commission* (T-472/13, EU:T:2016:449, para. 119).

<sup>22</sup> See opinion of AG Kokott in case C-307/18, *Generics (UK) and Others* (EU:C:2020:28, pt. 69).

<sup>23</sup> *Ibid.*, pt. 113.

secondary process patents, namely the original manufacturing process for which, in general, patent protection has expired at the same time as patent protection for the active ingredient itself. Consequently, the question of whether a generic medicinal product has been manufactured by way of using a still patent-protected manufacturing process or by way of using a manufacturing process that is already in the public domain is often in dispute in patent litigation.

19. However, in the agreements concerned in the *Generics* and *Lundbeck* cases, the manufacturers of generic products decided to abandon patent disputes and efforts for the launch of their products against payments from the holders of the patents for the originator medicinal products. As these payments flowed from the patent holders to their generic challengers and not, as with normal licensing agreements, from a licensee to the patent holder, such agreements are sometimes called “reverse payment” settlement agreements.

20. As explained in the opinion in the *Lundbeck* case, patent dispute settlements are, of course, not unlawful as such and may even be in the public interest as a means of conserving resources and encouraging economic development. However, patent dispute settlements become problematic when they clash with the rules of competition law because their true aim is not to resolve a patent dispute, but to forestall or delay the market entry of potential competitors.<sup>24</sup>

21. In its judgements in the *Generics* and *Lundbeck* cases, the Court established the criteria for distinguishing such harmful “pay-for-delay” deals from genuine patent settlement agreements. Thus, according to the Court, a patent settlement agreement between a manufacturer of originator medicines and a manufacturer of generic medicines must be qualified as an anticompetitive agreement prohibited by article 101 TFEU where the transfers of value provided for cannot have any explanation other than the commercial interest of the parties not to engage in competition on the merits and, accordingly, act as an incentive to the manufacturers of generic medicines to refrain from entering the market concerned.<sup>25</sup> In other words, if it is found that the sole consideration for the value transfer from the manufacturer of originator medicines to the manufacturer of generic medicines is that the latter refrains from entering the market with its product and from continuing to challenge the patent during the agreed period, the agreement providing for such a value transfer must be considered anticompetitive.<sup>26</sup> Furthermore, in such a case, the agreement must be considered anticompetitive by its very object, which means that it is not necessary to prove its anticompetitive effects to conclude that it falls under the prohibition established by article 101 TFEU.<sup>27</sup>

22. This is nothing but coherent. Indeed, in concluding such an agreement, the manufacturer of the originator medicinal product and its generic challenger decide, rather than to play the rules of the competitive process, to refrain from competing and to share the monopoly rent generated in favour of the originator by the very absence of market entry of its generic rival, at the expense of the general interest. The consequences of such an anticompetitive behaviour and distortion of the competitive process are dramatic, not only for the expenses of public health insurance, but also for research and innovation, as originator companies are less incentivised to do research for new and innovative medicines if they can rest on the benefits of monopolies that have been founded on research that has been rentabilized long ago. This is why US lawmakers are currently considering a bill that, in order to preserve access to affordable generics and biosimilars, would establish that pay-for-delay agreements between generic and brand name manufacturers are presumptively illegal under antitrust laws.<sup>28</sup>

23. The discussion of whether the mechanisms of competition in a market economy are the right tool to meet the needs of patients and to provide the pharmaceutical sector with innovative and affordable medicinal products is, of course, far from closed. Thus, there are regularly voices from NGOs calling for a de-linkage of profitability and sales of medicinal products because otherwise the incentives for firms do not function in a way to fulfill the needs of innovation and fair-priced medicines.<sup>29</sup> In the same vein, the current debate on the need for a waiver for Covid-19 vaccine patents shows that the answer to the question of whether the patent protection system is the right regulation for the needs of the pharmaceutical sector is far from being obvious.

24. Without taking sides in this debate, however, it is possible to affirm that, in any case, the pay-for-delay cases show how harmful the absence of effective competition and competition law enforcement can be in a sector where the regulation of the competitive process is designed in order to orient the behaviour of private market actors in a way that also serves the common good, that is, in the case at hand, the need to encourage as well innovation by originator companies as competition by their generic challengers. If, in such a case, the competitive process is undermined by collusion, the effects are disastrous for the common good. Consequently, it is to be hoped that the call for a more thorough regulation and competition law enforcement, issued by the authors of *Competition Overdose* and shared by all commentators of this special volume, will not remain unheard and lead to a more consequent use of competition for the benefit of the common good and society as a whole. ■

<sup>24</sup> See opinion of AG Kokott in case C-591/16 P, *Lundbeck v. Commission* (EU:C:2020:428, pt. 4).

<sup>25</sup> CJEU, 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, para. 87), and 25 March 2021, *Lundbeck v. Commission* (C-591/16 P, EU:C:2021:243, para. 114).

<sup>26</sup> See opinion of AG Kokott in case C-307/18, *Generics (UK) and Others* (EU:C:2020:28, pt. 141).

<sup>27</sup> The outcome of some other cases in similar matters is still pending, see cases C-176/19 P, *Commission v. Servier*, and C-201/19 P, *Servier and Others v. Commission*.

<sup>28</sup> See H.R. 2891, the Preserve Access to Affordable Generics and Biosimilars Act, <https://www.congress.gov/bills/117th-congress/house-bill/2891>.

<sup>29</sup> See for example the claims of Médecins sans frontières, <https://msfaccess.org/about-us>.

# Afterword

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1. Our book *Competition Overdose* addresses a curious paradox. On the one hand, the belief in competition to resolve many societal ailments has increased. Yet, on the other hand, the competition ideology does not always deliver on its promise. At times, due to peculiar market conditions, the ensuing competition is toxic. At other times, competition, even in its nobler forms, fails to provide what is needed. And yet, despite this paradox, few, if any, in market-based economies question the limits of competition. Instead, the solution invariably is to foster more competition. This broad-brush approach elevates the competition ideal while disregarding its limitations.

2. In asking whether competition is always good, we initially heard some common refrains. The problem was never competition per se, but something else. For some, it was too many regulations, which like kudzu, strangle competition. For others, it was ineffective (or no) regulations. At times, the argument was that it was something broader, like capitalism. But never competition itself, which remained amorphous but undeniably good.

3. In writing *Competition Overdose*, we set to embark on a journey to explore the limitations of competition itself. We aimed to address several fundamental questions: Can competition be toxic? If so, why? Who is pushing this toxic competition? Can policymakers, businesses, and individuals reorient toxic competition to something nobler? If so, how? And are there some things that even competition, in its noblest form, cannot provide?

4. In reaching out to competition officials, business executives, economists, policymakers, and legal and business scholars, we anticipated a lively, and at times, heated debate. After all, we were questioning the core principles on which many people rely. But we were surprised as to how many shared our concerns, even if they did not articulate them the way we did. Indeed the competition ideal has often been misused. Some warily observed how powerful companies ironically champion competition to justify limited state intervention in

markets that are heavily concentrated. Others pointed to instances in which the competition dynamic itself simply backfired.

5. But perhaps the people who shared their thoughts throughout the research and writing process did not represent the greater population. What would be the general response after our book was published—particularly outside antitrust circles? And how relevant would our book be, when countries were grappling with the pandemic?

6. With the spread of Covid-19, our journey took a different turn. Rather than a traditional launch, we had the opportunity, via Zoom, to discuss these issues around the globe. The shift to virtual presentations, while regrettable in many ways, enabled us to reach a wider audience. We found ourselves presenting and discussing the book with different groups, in different jurisdictions and cultures across every continent. There were some surprises along the way, and we'll touch on several of the common themes. Thus, we were delighted when Nicolas Charbit, came up with the idea of this project to further explore the themes discussed in our book. Oles Andriychuk skillfully led this project and assembled contributors with varying viewpoints who could enrich the debate. We are grateful to him and the contributors for engaging with the themes discussed in *Competition Overdose*.

7. So, what did we learn from this journey, during the pandemic, about *Competition Overdose*? Let us highlight a few themes.

## I. The many types of competitive dynamics

8. Competition is more like a mutating organism than a Standard Schnauzer. We can safely distinguish a goldfish from a dog; even in the American Kennel Club's working group category of dogs, we can distinguish Great Danes

from Giant Schnauzers. When is a breed a breed and not just a kind of dog? As the AKC notes, we can instantly recognize the dog as belonging to a particular breed, based on that breed's ideal physical traits, movement, and temperament. But there is no analogous standard for competition. Defining what is competition proves to be far more elusive (even though governments around the world devote billions (if not trillions) of dollars in advocating the concept of competition).

**9.** One key message in our book is that competition exists in many different forms, some toxic, while others are positive-sum or even noble. Most people agreed with this view; no one argued that competition is inherently and invariably good. No one argued for the model of "perfect competition." Nor did anyone offer a single, all-encompassing definition of competition.

**10.** But we did miss one thing. In one conference, we were slated to debate one of the chief proponents of injecting market competition in India. The organizers predicted fireworks. In one corner, the country's chief advocate for more competition. In the other corner, two academics warning about the dangers of toxic competition and at times privatization. After the bell rang came the surprise.

**11.** The thoughtful official argued that our taxonomy of toxic competition was far broader than our four categories. So his attack wasn't that competition cannot be toxic, but the forms of toxicity are more varied than what we proposed. Indeed he argued that his government should identify all the forms of toxic competition in his country. He was right. What we learned in speaking with him and other people around the globe is that the forms of toxic competition are far more varied than what we originally considered. No economy is immune from toxic competition. Overall, we were surprised to realize that in writing the book, we overestimated the likely pushback on toxic competition; the pushback instead was other categories of toxic competition that we missed!

**12.** Likewise, when we introduced our concept of Noble Competition, we were delighted to see that many found it intuitively appealing. There was a universal acceptance that competition indeed need not be toxic or even at times zero-sum. Everyone was well aware of the limitations of rivalry. While competition can often deliver on its promise, it may also backfire.

## II. Blame X rather than Y

**13.** Some people, however, did push back in arguing that the problem we identified was not with competition, but with capitalism or the lack of effective regulation.

**14.** It is easy to correct someone when they mistake your Giant Schnauzer for a Great Dane. But arguing against a claim that the problem is with capitalism (or lack of effective regulations) rather than competition is a lot harder.

**15.** To see why, let's start with capitalism, which *Merriam-Webster* defines as "an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision, and by prices, production, and the distribution of goods that are determined mainly by competition in a free market." Naturally, there are many parallels between our book's discussion on competition and a discussion of capitalism. However, even if one focuses on capitalism, then, as Pier Luigi Parcu noted, competition is the critical instrument. Thus, here is exactly where our analysis strikes. We discard the notion that the competitive dynamic necessarily forms a neutral beneficial instrument. The idea of competition as a neutral instrument assumes purity and impartiality and herein lies the problem. Competition is not necessarily pure, good, and unblemished. After all, if one assumes purity, competition becomes even more elusive, and leads to a simplified dichotomy: If the tool delivers and increases well-being, we'll call it competition. But if it fails to deliver, we'll call that tool something else (e.g., arms race, race to the bottom) and blame the economic system rather than the instrument. So to us, the notion that competition is pure, while capitalism can be toxic, makes little sense.

**16.** Moreover, competition can be toxic regardless of the economic system at play. Competition, while ubiquitous, can take different forms. Market participants compete to secure greater monetary profits. Sycophants in authoritarian regimes compete to curry favor with superiors. Toxic competition exists in socialist economies, capitalist economies, and authoritarian regimes. So competition, outside a capitalistic environment, can be toxic. Indeed, what we learned from discussions around the world is more about the toxic forms of competition that exist in their countries.

**17.** A few others asked us whether the problem was with competition or the lack of effective regulation. This presents a chicken-egg problem. Whenever one sees toxic competition, one can blame the shortcomings of the regulatory state. Another duality emerges: competition is a neutral (or good) force, the culprit is the regulatory state.

**18.** Competition, of course, is defined in part by the legal, social, and moral norms. So competition and regulation are inextricably linked. But we focused on competition for at least two reasons.

**19.** First, few people, if any, when advocating for more competition are also advocating for more effective regulations. Think about it. Have you ever heard any policymaker, when advocating for more competition, also note the fine print of the need to beef up the regulations to ensure that the competition delivers? Often the argument is that market competition will reduce the need for regulation. Again this is not a "U.S. thing." Rarely, if ever, is a policymaker (when highlighting the virtues of competition) also pointing to the regulatory state needed to ensure that the competition is healthy. As put eloquently by Amelia Fletcher, "*we have developed excessive expectations of what competition can achieve.*" Too



quickly, many governments were willing to remove regulatory protections that protected their citizens from overdosing. Too often they took the easy path of outsourcing challenges to the free market and then blamed it when it fails to deliver.

**20.** Blaming the regulatory state misfires for another reason. At times, competition itself is the culprit. Take the following example, which we heard early on from one policymaker: In most markets, one assumes that if a merger reduces choice in a way that damages consumers' welfare, that creates an opportunity for a choice-restoring entrant. However, at times, the degree of choice does not evolve in a market but is imposed. Suppose there are two types of grocery chains: high quality/high price gourmet supermarkets and everyday-low-price/low-service supermarkets. Suppose a town has two supermarkets: A (gourmet) and B (discounter). Suppose C (a chain of discount supermarkets) buys Chain A, and finds it more profitable to change A's product offering to C's private label in all the Chain A supermarkets. Now the town has two deep-discount supermarkets: Chains B and C. In some countries, like the UK, the available space (under the land planning system) for supermarkets is limited. Entry will not correct the local worsening of the choice available to consumers and a reduction in aggregate consumers' well-being. A competition agency, however, would unlikely challenge the supermarket merger, as competition will likely increase, not decrease, post-merger. Indeed, instead of the weak competition between the highly differentiated high-end Supermarket A and low-end offerings of Supermarket B, the town now enjoys head-to-head competition in the same discount segment. But there is a loss of choice. Some consumers preferred A's high-end offering. Many—probably most—will have shopped at both stores, for different items. All of those people have lost some welfare. So, competition increases, and well-being decreases for those interested in the high-end offering. It is hard to blame the regulatory state.

**21.** One theme we highlight in the book (and repeatedly heard in our discussions) is that competition, even in its good forms, may lead to an efficient outcome, but not necessarily the fair, just, or wise outcome. When the government elevates competition above other values, the citizens end up with markets that do not necessarily serve them. We had hoped that our book not only raises the prospect of toxic competition but the limitation of the competitive process itself at times—i.e., not all problems can be effectively outsourced to the free market to resolve. Governments should recognize, as President Franklin D. Roosevelt articulated nearly eighty years ago, the important role they have to play in providing what competition cannot—such as promoting the freedom from want with a basic safety net.

**22.** Ultimately, effective regulations can help prevent some forms of toxic competition. Regulations can also promote nobler forms of competition. As David Gerber explores, the set of values “*included in the noble competition ideal presents a vision of how competition could be*

*restructured to increase its benefits across a wider spectrum of humanity and reduce the harms that current forms of competition often create.*”

**23.** But even these nobler forms of competition may fail to deliver. Firms will compete to maximize revenues; in doing so, parts of the population will be left out. Consequently, countries cannot solely rely on competition for every essential service. Blaming the lack of effective regulations will not change this when competition itself is an inappropriate tool.

**24.** Indeed, if there were any doubt about this, it dissipated with the pandemic.

### III. The COVID-19 pandemic

**25.** Much has been said about the pandemic, but one interesting aspect of the early days of the pandemic, was it offering us a unique opportunity to witness all types of competition—from toxic to noble—and remind ourselves of the limitations of rivalry as a mechanism to promote overall welfare.

**26.** In the pandemic's early days, many were startled by the fierce competition among nations or states for ventilators and basic supplies like masks and nose swabs. The race to the bottom in which nations grabbed what they could, regardless of immediate need, likely caused more, rather than fewer, deaths. Take, for example, the toxic competition in the U.S. among the states as they outbid each other to acquire ventilators and protective equipment. As then-New York's governor noted, with so many states competing to buy the same commodity, “*It's like being on eBay with 50 other states bidding for ventilators (...) it's the wild West.*” Such auctions may make sense for antiques and artworks, but not when doctors are left deciding who gets to breathe and who doesn't. Absent a coordinated federal policy, this free-for-all enriched a few at the expense of many. New York was paying nearly fifteen times the normal price for masks as it bid against other stricken states and nations. Here the federal government should have intervened and secured the ventilators and protective gear on behalf of the states, and deployed them accordingly.

**27.** The crisis also exposed what we termed “cream skimming,” which creates the mirage that whatever the government can do, competition and private markets can do even better. Take, for example, health care in the UK. For years, the government gently pushed to increase competition and alternative services. The private sector appears to deliver better health services at lower costs, which in itself is welcomed, but can be used to justify reducing investments in the UK National Health Service (NHS). Is the NHS less efficient? Not necessarily. In many areas, it was cream skimming that distorted the image. The private sector takes on the “high margin” profitable services while saddling the state with unprofitable or

costly functions. The NHS, for example, incurs the costs in training doctors, maintaining emergency services, having enough hospital beds for peak months, and caring for the “low-profit” and unprofitable patients. So, in skimming the “high-value” patients and services, the private health sector appears remarkably efficient, partly because they can offshore the costlier unprofitable functions and patients to the NHS (and taxpayers).

**28.** At a fundamental level, the coronavirus tested the assumption that competitive market forces will always yield the right mix and quantity of products at the right price. While often true, market forces do not always deliver. Competition works well in making supply chains efficient, by driving down costs. This looks good during ordinary times, until a major shock to the economy, like the current pandemic, exposes the system’s fragility. For example, competition, in squeezing out costs, discourages (rather than promotes) hospitals from having enough ventilators and protective masks for a pandemic. Consequently, some forms of inefficiency (or redundancy) are needed, such as more ventilators, more beds, and more doctors. Sometimes the government must require some inefficiencies (like having more regional banks than a few national banks, more supermarkets, bookstores, and retailers than relying on Amazon and a few club stores, and more regional seed providers than the Big Four that currently dominate private-sector research on both seeds and herbicides) to safeguard society in case one important player is taken out. The lesson is clear, albeit not always apparent—when our leaders blindly outsource too many of their responsibilities to the competition elixir, they undermine the government’s ability to ensure that markets will deliver at times of crisis. No one else is tasked with this responsibility.

**29.** But, of course, there is also hope, as the pandemic reveals the triumph of humanity. The pandemic, while unleashing toxic competition, has also prompted noble competition, one infused with a social purpose other than maximizing shareholder value or personal gain. The race to find a vaccine, for example, led to an unparalleled level of cooperation, in a mutual striving for excellence. Scientists at the University of Pittsburgh, after discovering that *“a ferret exposed to Covid-19 particles had developed a high fever—a potential advance toward animal vaccine testing,”* did not opt the usual route for academics—publication in a prestigious journal.<sup>1</sup> Rather they shared their findings with other scientists on a World Health Organization conference call. As Paul Duprex, a virologist leading the university’s vaccine research said, *“It is pretty cool, right? You cut the crap, for lack of a better word, and you get to be part of a global enterprise.”*

<sup>1</sup> <https://www.nytimes.com/2020/04/01/world/europe/coronavirus-science-research-cooperation.html>.

**30.** We see other altruistic acts around us, where self-interest is not only irrational but self-defeating. To save others (and possibly ourselves), we must look beyond our self-interest. That came to the fore with the vaccines. It is in each country’s self-interest to ensure that its citizens get the vaccines. But if wealthier countries disregard the countries that cannot afford the vaccines, it harms all. New (and deadlier) mutations of the virus will emerge (just consider the new variant detected in South Africa), which soon will spread to wealthy countries. Likewise, as long as people forego vaccines and masks, the disease will spread. So, rather than countries competing for vaccines, we need more cooperation for vaccination allocations.

## IV. Final reflections

**31.** We have enjoyed the many occasions in which the book opened the door to a lively intellectual debate on the dynamics of competition. The debate often was not on the terrain we predicted (and fortified). Indeed, we did not foresee all the ways competition can be toxic. But we hope our book did achieve its primary aim: to inject a pause whenever one hears that some policy measure is pro-competitive. Rather than assume that it must be good for society, the listener may pause and inquire about its potential toxicity. And we hope that one inquires who is promoting the competition ideal (and their incentives in doing so). One might sense how the competition ideology has increasingly been used in the wrong context, to enable powerful companies to retain their power.

**32.** Finally, rather than reflexively assume that more competition will solve most, if not all, problems, we wanted to highlight the limits of competition, and encourage policymakers to read the warning label. True, competition will often benefit society and individuals, but not always. Once you move from textbooks to the real world, competition can fail, more frequently than we originally thought. And in the wrong dosage, the competitive dynamic can be lethal.

**33.** Many thanks again to Nicolas, Oles, and all the contributors who have helped further the debate over competition and its limits. We look forward to the tributaries of research and policies that will follow, and hope for nobler forms of competition that serve us (rather than our serving it) and bring out our best (rather than worst). ■

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