The boundaries of antitrust in the European Union

4

The Boundaries of Antitrust in the European Union

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I. Introduction

At the time Giuliano Amato's *Antitrust and the Bounds of Power* was published, there were very few works about European competition law which discussed it in its wider context, and few comparative works in that vein.[2] Most of the scholarship was doctrinal and much was produced by practitioners. While practical analysis matters, technical antitrust doctrines, Amato showed, 'find their roots in the great political and philosophical options with which antitrust law still remains bound up'.[3] Matching doctrinal development with the story of ideas about markets is the major achievement of his book.[4] Of the many reflections found in it, the one which is the focus of this chapter is Amato's claim that the transformation of EU antitrust law from a system that focused on economic freedom to one that focused on economic efficiency meant that there should be 'a liberation of antitrust law from the multiple purposes it has served in the past enabling it to be … antitrust law pure and simple'.[5]

In this chapter I discuss whether antitrust has been liberated and if such liberation is desirable. It is structured in the following way. In section II, I trace the normative perspective which Amato used to reach this recommendation and its implications. Then, I take each implication in turn and discuss it in light of the evolution of EU antitrust in the last 25 years. In section III, I argue that

[1] Professor Amato and I both taught at the European University Institute (EUI). During my stint there, I learned a considerable amount from my 31 PhD students, and I have used some of their contributions to antitrust scholarship to develop this chapter.

[2] An exception was AD Neale and DJ Goyder, *The Antitrust Laws of the United States of America: A Study of Competition Enforced by Law*, 3rd edn (CUP, 1981). A year later DJ Gerber, *Law and Competition in Twentieth Century Europe* (OUP, 1998) brought even more insights.

[3] G Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart, 1997) 2.

[4] I have tried to emulate this in my work, see G Monti, *EC Competition Law* (2007).

[5] Amato, *Antitrust and the Bounds of Power* 116.

the transformation of antitrust which had just begun in 1997 now threatens the ability of antitrust to contain all manifestations of market power. Here, liberation has gone too far. At the same time, those calling for a re-strengthening of antitrust to prohibit more forms of conduct are advancing claims that push the boundaries of antitrust outwards again: are they going outside antitrust boundaries? In section IV, I argue that the liberation of antitrust from multiple purposes has occurred by reference to the Commission's enforcement track record, but competition law suffers repeated challenges to open itself up to exempting practices for strategic or other policy reasons which it appears to both accept and resist.[6] Here, liberation is under pressure: how do we decide when antitrust should resist and when it should yield?

The purpose of this discussion is to try and answer the two questions above by articulating a set of principles to help us understand when a change in antitrust perspective is legitimate, thereby establishing criteria to spell out the boundaries of antitrust.[7] Section V brings the discussion to a close by defending a vision of antitrust that is, from Amato's perspective, impure, but by showing that lack of purity is in the very nature of the antitrust enterprise. Space precludes detailed consideration of every development of antitrust during the past 25 years, but hopefully this impressionistic sketch covers key developments that justify the claims made here.

II. Antitrust Pure and Simple

While antitrust has always been a law to control economic power, Amato claimed that the scope of its application has changed. First, in its original incarnation, antitrust was capable of controlling big firms for their impact on the economy as well as on national politics. However, with the opening of markets to trade, the capacity of antitrust to control the political manifestations of private power waned.[8] 'A big firm that does not have economic power over a market that has expanded beyond national limits may nonetheless have in the domestic political process that abusive power it was the antitrust objective to contain'.[9] Thus, it became more tricky to check political power absent market power. Second, developments in economics led to a narrowing of the scope of antitrust by observing the economic efficiencies of forms of conduct that were once forbidden, a phenomenon that is particularly clear when considering vertical integration and vertical restraints. This does not mean that enforcement ends, but that it focuses on instances where

[6] On this, see also S Makris, 'EU Competition Law as Responsive Law' (2021) 23 *Cambridge Yearbook of European Legal Studies* 228.

[7] This tries to build on the important contributions of Ioannis Lianos. See in particular, I Lianos 'Polycentric Competition Law' (2018) 71 *Current Legal Problems* 161.

[8] On this theme see also A Daly, *Private Power, Online Information Flows and EU Law – Mind the Gap* (Hart, 2016) observing the private power of digital firms.

[9] Amato (n 3) 104.

market power causes inefficiency. Amato recognised that there remain debates about what efficiency means, suggesting at least two concepts; one focuses solely as 'non-restriction of output', which is the position taken by those who propose light touch antitrust intervention; and the other sees efficiency as 'the maximum possible opening of markets', which is probably close to a contemporary Ordoliberal understanding of competition law enforcement.[10]

In the context of this refocusing of antitrust only towards the economic effects of market power, EU and US antitrust retain fundamental differences, notably the EU's emphasis on the single market imperative and the special responsibility held by dominant undertakings. In Amato's view these aspects of EU competition law will 'remain in the antitrust picture'.[11] However, what Amato felt the Europeans could jettison is 'interference in the antitrust area from policies of other types that have so far influenced it'.[12] The justification offered for this view is that the Maastricht Treaty signed in 1992, in particular the new Article 130 EC (now Article 173 TFEU), required that the European Community (now Union) and the Member States develop a set of policies in coordination with each other to 'ensure that the conditions necessary for the competitiveness of the Community's industry exist'. What mattered for antitrust law is that this industrial policy shall be carried out 'in accordance with a system of open and competitive markets' and that the legislator specified that this provision 'shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition'.[13] Thus, an anticompetitive agreement cannot be justified because it creates an EU champion. Generalising from this, according to Amato, 'The EC Treaty imposes the avoidance of any confusion and requires antitrust to be antitrust alone'.[14]

These changes would yield three consequences. First the regulatory stance of EU competition law would wane because one would no longer balance competition and non-competition considerations. Second, there would be greater emphasis in applying competition law by reference to economic yardsticks, which would in particular affect the interpretation of Article 101(1) TFEU. Third, this would call into question the role of the Commission as an antitrust enforcer. If the rules are antitrust pure and simple, then an EU competition authority would be better placed to make such technocratic choices, and the Commission might be limited to absolving restrictive agreements in the name of a public interest.[15] Having sketched Amato's argument for a transformation, we now take stock of developments since 1997 and discuss how far this transformation has occurred and what reactions there have been to it.

[10] ibid 115. E Deutscher and S Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11 *Competition Law Review* 181.

[11] Amato (n 3) 116.

[12] ibid.

[13] Article 130(3) EC.

[14] Amato (n 3) 119.

[15] ibid 122. The text is sketchy on the role of the Commission and on the grounds that might be invoked to authorise agreements.

III. The More Economic Approach to Antitrust

A. The Evolution of the More Economic Approach

Just a year after the publication of Amato's book, the Commission published a follow-up report on its review of vertical restraints. This is a remarkable document because it is one of the few times the Commission has openly admitted 'shortcomings in current policy'.[16] Its self-assessment reflected criticisms in the literature: straight-jacketing effects of block exemption regulations, under-enforcement as firms with market power could benefit from block exemptions, over-enforcement resulting from a lack of coverage of the block exemptions. The conclusion was that 'a more economics-based approach is required'.[17] Here began a major transformation of EU competition law.[18] The consequence of this approach, according to the Commission would be that fewer agreements would be covered by Article 101(1) TFEU.[19] The result of this Green Paper are well known: the Commission produced a new-look Block Exemption Regulation, which exempted agreements only of undertakings below a given market share threshold and allowed these undertakings to enter into whatever contract they wished, provided that a small set of blacklisted contractual arrangements were not present.[20] This led to a much more liberal system, allowing undertakings without market power to design distribution agreements in the way they wished without fear of regulatory intervention. At the time of writing, this new-look Block Exemption Regulation is undergoing its second revision and its fundamental structure remains intact. The main focus of the reform is to secure acceptable rules in a market where online sales are of increasing importance.[21] This more economic approach clashes with the Commission's enforcement against vertical restraints that segment the internal market, but as Amato had recognised, this European idiosyncracy is well-embedded in the EU system.[22]

Having said that, there is a risk of the more economics-based approach going too far and reducing the capacity to enforce the law. This has occurred in the context of Article 102 TFEU, although the developments in this field

[16] Communication from the Commission on the application of the Community competition rules to vertical restraints – Follow-up to the Green Paper on vertical restraints [1998] OJ C365/3, S 1.

[17] ibid S 2.

[18] AC Witt, *The More Economic Approach to EU Antitrust Law* (Hart, 2016) for critical assessment.

[19] Amato (n 3) 50–54, where he observes that the ECJ had already been moving in this direction in its case law and regretting the regulatory approach of the block exemptions of the time.

[20] Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

[21] MJ Schmidt-Kessen 'Selective Distribution Systems in EU competition and EU trademark law: resolving the tension' (2018) 9 *Journal of European Competition Law and Practice* 304.

[22] G Monti, 'Keeping Geo-Blocking Practices in Check: Competition Law and Regulation' (19 February 2021), available at ssrn.com/abstract=3789176. Economists have recommended a less interventionist stance, see EAGCP (Economic Advisory Group on Competition Policy), 'Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic view' (September 2009).

remain patchy.[23] Much as with vertical restraints, commentators considered the Commission's approach to Article 102 TFEU to be form-based and overly aggressive.[24] As with vertical restraints, the Commission consulted economic experts and stakeholders to assess whether to recalibrate its policy.[25] Unlike verticals, the Commission's official documents did not acknowledge errors in its previous policy, but the resulting soft law document took a narrower view on the application of Article 102 TFEU.[26] Of particular importance for the purposes of this discussion is that the Commission rethought its approach to dominant firms. In particular, the Commission took the view that an abuse would only be found if the conduct causes anticompetitive foreclosure:

> '[A] situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.[27]

This is a much narrower view than that explained by the Court in its earlier case law, where the emphasis was on the extent to which dominant firms harmed the competitive process more generally. For example, in assessing discounts offered by a dominant firm to its customers, the Court took the view that there could be four reasons for condemning rebates offered by a dominant undertaking to its customers. They could: (i) remove or restrict the buyers' freedom to choose their sources of supply; (ii) bar competitors from access to the market; (iii) apply dissimilar conditions to equivalent transactions with other trading partners; or (iv) strengthen the dominant position by distorting competition.[28] The new approach that focuses on anticompetitive foreclosure does not require proof of direct consumer harm, however. It merely asks the Commission to establish that the conduct in question is capable of causing anticompetitive foreclosure. Nevertheless, establishing this capability requires a greater investment of resources on the part of the Commission, as can be seen in the *Intel* decision.[29]

Having narrowed down the interests protected under Article 102 TFEU, the Commission also indicated that anticompetitive foreclosure is a concern when the rival is as efficient as the dominant undertaking. Thus, excluding inefficient rivals, appears authorised under the new approach.[30] The problem with this emphasis

[23] G Monti, 'Abuse of a dominant position: A post-intel calm?' (2019) 3 *CPI Antitrust Chronicle*.

[24] DA Crane and G Mirailles Murciego, 'Toward a Unified Theory of Exclusionary Vertical Restraints' (2011) 84 *Southern California Law Review* 605.

[25] Report by the EAGCP, 'An economic approach to Article 82' (July 2005).

[26] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

[27] ibid para 19.

[28] Case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission* EU:C:1983:313 [73]. See also, to the same effect, *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, EU:C:1979:36 [90].

[29] Case COMP/C-3/37.990 – Intel (decision of 13 May 2009), which is still subject to judicial proceedings.

[30] Case C-209/10, *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172 [22].

on efficient rivals is that it is often unknown what a new rival might bring to the market but for the exclusionary conduct of the dominant undertaking. From this perspective, the scope of application of Article 102 TFEU is further reduced. It is not yet entirely clear whether the as efficient competitor standard, which has been applied in the context of price-based exclusionary conduct such as discounts and predatory pricing, applies to other forms of unilateral conduct.

The effect of these two moves is to raise the agency's costs in applying competition law. Even economists who support an aggressive antitrust stance against dominant undertakings require fairly sophisticated methods before conduct is condemned. Of particular interest in this context is the approach to rebates. In the Guidance Paper the Commission suggested a fairly complex test for identifying rebates likely to exclude as-efficient rivals, but even this degree of sophistication did not satisfy economists who support the application of antitrust against rebates, who maintained that the Commission 'could have done a better job in formulating the theory of harm in a more coherent way'.[31]

Even if critics think that the Commission has not yet fully digested modern industrial economics in its Article 102 TFEU case law, the concern remains that the Commission has swallowed more economics than is necessary, because Article 102 TFEU

> is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect *the structure of the market* and thus *competition as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market.[32]

This foundational stone of the application of abuse of dominance is being speedily eroded.

B. Widening the Concerns of Antitrust again

An even more radical critique of the economic approach is that it leads to significant under-enforcement by its adoption of a consumer welfare standard which leads to unnecessarily lenient treatment of business conduct. This critique originates in US scholarship where the past 25 years have seen an even more significant retreat in the public enforcement of antitrust law by US agencies than that which was noted by Amato.[33] It is not clear whether the retrenchment in the US is the result of the consumer welfare standard or of courts raising the standard of proof

[31] C Fumagalli, M Motta and C Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (CUP, 2018) 217.

[32] Case C-95/04P, *British Airways plc v Commission* EU:C:2006:133, Opinion of AG Kokott [68] (emphasis in the original).

[33] R Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP, 2008).

for plaintiffs, but the current debate in the US has not led to a convincing alternative antitrust standard.[34] This so-called Neo-Brandeisian critique of antitrust has much less traction in the EU where public antitrust enforcement by the Commission and some national competition authorities has remained vigorous and serves as a benchmark for some US reformers.[35]

In the EU, the most radical challenge to the economics-based approach in the case law is found in the *Bayer/Monsanto* decision.[36] The Commission was faced with arguments for a more aggressive antitrust stance when considering the effect of a merger in the markets for seeds and pesticides. A number of organisations were concerned that the Commission's analytical framework was too narrow. In addition to assessing the effects of the merger on prices, innovation incentives and the reduction in product variety, they claimed that one should look at the merger 'also in terms of loss of biodiversity as a harm to the environment'. Moreover, when considering innovation, one should not just focus on whether the merger would reduce incentives to innovate, but also whether the right kind of innovation would occur post-merger. They claimed that one should assess the risk of misuse of innovation. On the facts, it was claimed that 'the merged entity would have very little, if any incentive, to innovate towards the use of less chemical products or towards healthier farming products'.[37]

The Commission's response was that while the TFEU requires the Commission to have regard to multiple objectives, including the protection of human health and environmental protection requirements, these objectives formed no part of its assessment under the Merger Regulation because the legislator did not confer upon it the competence to address these effects. However, this reading is simplistic, for two reasons. The first is that the Commission labels the arguments of the opponents of the merger as non-competition concerns. This assumes a particular vision of what competitive markets should be like and thus requires a deeper justification as to why it is that the likely reduction in innovation is relevant for competition law, but the risk of less innovation in more sustainable products is not a competition parameter. A normative choice has been made to include within 'competition' a set of considerations and exclude others, but the justification is not apparent.[38] This is not least because there is evidence, in this specific merger, that innovation

[34] AD Melamed and N Petit, 'The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets'(2019) 54 *Review of Industrial Organization* 741, G Monti, 'The American antitrust counter-revolutionaries: A European perspective' in N Charbit and S Gachot (eds) *Eleanor M. Fox: Antitrust ambassador to the world – Liber Amicorum* (Concurrences, 2021).

[35] see eg LM Khan and S Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 *Harvard Law & Policy Review* 235, 283, noting that US 'antitrust agencies and courts should look to European Union abuse of dominance law for a model to emulate'.

[36] Case M.8084, *Bayer/Monsanto* (20 December 2018).

[37] ibid [3007].

[38] In the healthcare field, it has been argued that the focus on choice as a parameter of competition can be at the expense of considering the quality of healthcare. T Stavroulaki, 'Connecting the Dots: Antitrust, Quality and Medicine' (2019) 31 *Loyola Consumer Law Review* 175.

by the larger players is skewed to maximising revenue.[39] The second is that if we say that the considerations above are not competition-related, then Recital 23 of the Merger Regulation requires that the competition appraisal is carried out 'within the general framework of the achievement of the fundamental objectives' expressed in the Treaties.[40] The Commission fails to explain how merger analysis can be carried out with respect to this requirement. It is not enough to state that there are other EU policies that regulate agricultural markets and that therefore there are other means of addressing non-competition market failures. Recital 23 requires an integrated approach, for example by asking in detail how far existing regulations addresses concerns raised by opponents to the merger, say biodiversity. Where there is existing legislation, the non-competition concerns can be set aside because there is a regulatory safeguard. However, where there is no legislation protecting society from a particular negative effect such as a reduction in biodiversity, it is arguable that the Commission can step in and block the merger on that ground if it is shown that the market power of the merged entity leads to a reduction in biodiversity. Obviously, this recommendation requires an even more complex merger analysis than what is being carried out.

This discussion raises a key question about the boundaries of antitrust. Supporters of the consumer welfare standard suggest that antitrust applies only when conduct harms economic welfare.[41] Even under this optic (and so without accepting calls for a wider reading of the scope of antitrust law) the risk of innovation being poorly directed can count as a parameter of economic welfare. If consumers demand research in more sustainable farming methods but the merged entity has enough market power to refuse to respond to such demand and continue only less sustainable lines of innovation, then this is an economic harm to which merger law should respond. The Commission's characterisation of the complaint as a non-competition concern looks insufficiently robust and a better conceptual framework is required to distinguish between harms that are protected by competition law and those harms that are not within its purview. Four principles are suggested here. These apply in particular to the EU and US systems because in both the legislative text is open-textured and scant legislative guidance is provided to determine its scope.

The first is that the boundaries of antitrust are drawn with reference to the interest the law is designed to protect. Amato, along with most commentators, considers that economics helps interpret the laws, hence a standard based on economic welfare is established. The history of EU antitrust suggests a further

[39] ME Stucke and AP Grunes, 'An Updated Antitrust Review of the Bayer-Monsanto Merger', The Konkurrenz Group (6 March 2018) 14–15.

[40] Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L/24/1, recital 23. Now these are found in Art 3 TEU.

[41] The discussion between total and consumer welfare is not relevant for the purposes of this chapter. See R Pittman, 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' EAG 07-9 June 2007.

interest – keeping markets open. The pursuit of these two interests normally converge, but the latter is more aggressive when it comes to dominant firm conduct. Applying these two approaches allows the development of an innovation theory of harm upon proof that the merger reduces incentives to innovate. But neither would allow intervention if the merger does not reduce incentives to innovate as a whole but there is evidence that the 'wrong' kind of innovation is carried out. As we said above, the economic welfare standard could prohibit a merger leading to the wrong kind of innovation only upon proof that that kind of innovation is desired by consumers. The open market approach to antitrust would be agnostic about the direction of innovation. Both approaches would condemn innovation efforts designed to exclude rivals, but here the reason for condemning bad innovation in this context is because it harms consumer welfare or the competitive process.[42]

The second principle is that the conduct has to fulfil the other requirements of the statute. Thus, unilateral conduct by a non-dominant firm which causes pollution is excluded from the scope of antitrust because there is no dominance for Article 102 TFEU to apply nor an agreement to build up a case under Article 101 TFEU. Each antitrust case is composed of conduct falling within the statute plus the undesired effect that the law is designed to protect.

The third, which follows from the above, is that the application of competition law should always achieve the objective of safeguarding the interests the law protects. For example, every time Article 101 TFEU is applied to cartels one is preventing a practice that harms consumer welfare or the competitive process.[43] If we apply this principle to a dominant undertaking polluting the environment, we can see that there might be the odd case that a competition authority will take that achieves this, but that this is not a harm that is generally addressed by applying antitrust. In fact, it might well be that by opening markets to competition there is more pollution. For example, consider the opening up of the market for postal services: the incumbent attempts to foreclose market access to competing firms who would deliver mail. By facilitating entry, we duplicate the number of vans delivering post, increasing emissions. This approach helps explain why the impact of a merger on sustainability is not a direct concern under the analysis of mergers, whether as part of the competition assessment or as a concern that should be integrated in the assessment of the merger under Recital 23.

It might be argued that this third principle does not solve the following puzzle: if a dominant company pollutes because it faces no competition and has no incentive to improve its practices while at the same time consumers express their distaste at the firm's ecological insensitivity, is this not a form of exploitative abuse which EU antitrust law protects under Article 102(b) TFEU? After

[42] JA Ordover and RD Willig, 'An Economic Definition of Predation: Pricing and Product Innovation' (1981) 91 *Yale Law Journal* 8.

[43] There are gaps in antitrust coverage, of course. See eg S Stroux, *US and EC Oligopoly Control* (Kluwer, 2004).

all, there is case law suggesting that sloth is an abuse of a dominant position. In *Höfner v Macrotron*, for example, the European Court of Justice (ECJ) held that if a Member State confers a monopoly over the provision of a service to an undertaking in such a way that the undertaking 'is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind'[44] then there is an infringement of competition law which may be imputed to the state of the undertaking. However, observe that in this judgment emphasis was also placed on the exclusionary effects of the legislation: nobody else could offer the service in competition with the public body entrusted with providing the service. The harm thus was to the competitive process, and so this case law falls within the first principle.

The fourth and final principle is that antitrust law need not apply if the interest protected by antitrust is already safeguarded by another more specific regulatory instrument. An example is the application of Article 102 TFEU to excessive prices of pharmaceuticals. Insofar as there is effective price regulation, there is no need to apply Article 102 TFEU, but as soon as a medicine's price falls outside of the regulatory framework, one may check excessive prices using antitrust. Other commentators (and the Commission in the *Bayer/Monsanto* case) have suggested that this fourth principle should be wider. They state that antitrust should not apply if another regulatory intervention would address the harm better than competition law. This is incorrect because antitrust's broad reach is precisely what allows one to apply it in instances where there is a regulatory gap. In particular when considering EU competition law, we can find examples of antitrust cases that have identified a regulatory gap which is then filled by the legislator.[45] Furthermore, there can always be better ways of addressing harm to competition or to consumer welfare than the application of competition law, but we apply competition law when we are confident that enforcement serves as a systematic means of protecting a given interest.

Armed with these four principles we can discuss one recent addition to the tasks of competition law which some are calling for: addressing inequality. This is based on the observation that increased concentration caused by lax antitrust

[44] Case C-41/90, *Höfner and Elser v Macrotron GmbH*, EU:C:1991:161 [31].

[45] One refusal to deal settlement in the field of computer reservation systems for airlines led to a regulation that addressed the sector as a whole; Regulation (EC) 80/2009 on a Code of Conduct for Computerised Reservation Systems [2009] OJ L35/47; an attempted Art 102 case against roaming led to the roaming regulation applicable to all operators; Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast) [2012] OJ L172/10; a spate of cases against multilateral interchange fees led to the incomplete regulation of these fees Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions [2015] OJ L123/1; and litigation in national courts regarding collecting societies led to legislation to try to ensure more competition in this sector Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.

enforcement has contributed to growing asymmetries of wealth. Antitrust is called to 'say its piece'.[46]

To a certain extent, EU antitrust law addresses economic inequality indirectly in two ways.[47] First, by keeping markets open it tries to create a level playing field among entrepreneurs. According to the ECJ, 'a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators'.[48] Second, some national competition authorities applying Article 102 TFEU to challenge excessive prices charged by pharmaceutical companies have observed how bringing the prices of a drug down reduces the cost to the public health system, benefiting all patients and taxpayers.[49] Here the exercise of prosecutorial discretion can be used to address conduct that has an adverse effect on the poorest segments of society. This can be developed further, for example by prosecuting cartels among supermarkets rather than looking for collusion among auction houses. However, neither of these approaches requires a radical rethinking of EU competition law. The emphasis remains on keeping markets open or protecting consumers.

A more radical approach would entail an aggressive merger policy to prevent higher concentration or breaking up dominant firms with the sole purpose of ensuring less inequality. Would this be consistent with competition law's boundaries? If we apply the four principles above, we can suggest that while today the protective scope of competition law focuses on a certain vision of well-performing markets (affording opportunities for new entry and satisfying consumer demand), there might be a further transformation of EU competition law such as that we saw with the more economics-based approach. EU competition law's core values are not set in legislative stones. However, even if one were to agree to transform EU competition law into a legal system where mergers are prohibited if they risk augmenting inequality among citizens, it is not clear how the third principle would be satisfied. Would less concentration necessarily lead to less inequality whenever we review mergers? If not, then there is no space for inequality as an antitrust standard.

Some might argue that the fourth principle militates against the application of competition law because taxation serves to save the citizens from inequality. To this claim there are two responses. The first, as suggested above, asks whether

[46] Amato (n 3) 108, referring to the oligopoly problem.

[47] See also the important contribution of I Lianos, 'Competition Law as a Form of Social Regulation' (2020) *Antitrust Bulletin* 3.

[48] This was set out first in Case C-202/88, *France v Commission* EU:C:1991:120 [51]. In this case France challenged one of the early Directives opening up the telecommunications market. This dictum has been applied in a number of cases where the dominant undertaking was a former state monopoly.

[49] Italian Competition Authority, 'Annual Report 2019' 19. For the Competition and Markets Authority (CMA) see the latest press release on the Pfizer/Flynn saga: www.gov.uk/government/news/cma-accuses-pharma-firms-of-illegal-pricing. These efforts are hampered by a very high standard of proof. See L Hancher and G Monti, 'Excessive Pricing in Pharmaceuticals: Perspectives from EU Antitrust and Regulation' (forthcoming).

existing levels of taxation solve the inequality problem. It may be that they do not and further intervention is needed. The second is that even if taxation addresses the inequality problem by transferring more resources to citizens, it does not empower them, while blocking a merger addresses the structural inequality between consumers and firms in a different way to taxation.[50]

In sum, antitrust prohibits conduct that harms economic welfare, but the criteria which we use to address the notion of economic welfare may vary as society or technology evolves. The meta-principle of antitrust is that the first principle discussed above is variable and determined exogenously. However, the second, third and fourth principles place some limits as to how far competition law can prohibit conduct that harms certain interests, such inequality among citizens or environmental damage. While we may see sustainability and equality as attributes constituting well-functioning markets, antitrust enforcement might not be well placed to address them consistently because competitive markets are not necessarily likely to yield equality or sustainability. This discussion leaves one question open, which is when is it legitimate for antitrust to change direction and move from protecting one set of interests to another. We pick this up in section V.

IV. Antitrust, Alone?

A. Growing Impermeability

Since the 1970s, there have been Commission decisions that authorised restrictive practices in the name of industrial policy and other non-competition considerations.[51] Amato selected one of these decisions – *Ford/Volkswagen* – as an illustration of the 'permeability of the antitrust principles, which are hybridized and weakened by the joint presence of industrial policy and social cohesion objectives'.[52] In this decision, the Commission allowed the establishment of a joint venture to manufacture a multipurpose vehicle in a deprived area of Portugal. The parties would both contribute to this project, but each would then compete in the retail market by customising the vehicles produced by the plant. The agreement was authorised under Article 101(3) because the plant would use the most advanced production

[50] Both points draw on Lianos, 'Competition Law' (2020).

[51] The place of these decisions in antitrust has been a favourite among PhD candidates at the EUI; see RB Bouterse, *Competition and Integration: What Goals Count?* (Kluwer, 1994); W Sauter, *Competition Law and Industrial Policy in the EU* (OUP, 1998); C Townley, *Article 81 EC and Public Policy* (Hart, 2009); C Talbot, *Competition law in times of crisis: case studies of the European passenger airline sector and the Irish beef industry* (EUI, 2016); J Mulder, *Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness* (Hart, 2018).

[52] Amato (n 3) 62. This decision is also interesting having regard to the first section of the paper because judged with the more economics-based approach it is unlikely that one would find a restriction of competition. Indeed, many joint ventures among car-makers exist today, none of which have attracted the attention of competition agencies. For the business motivation, see A Brandenburger and B Nalebuff, 'The Rules of Co-opetition' (2021) 99 *Harvard Business Review* 48.

technology, the vehicle would include several technical features and would have low emissions and fuel consumption. In addition, the Commission observed that the joint venture would create jobs in Portugal, contributing to the reduction of regional disparities. What was the relevance of these considerations? According to the decision: 'This would not be enough to make an exemption possible unless the conditions of Article 85 (3) were fulfilled, but it is an element which the Commission has taken into account'.[53] This ambiguous statement is as unhelpful as the Commission's rejection of non-competition factors in the *Bayer/Monsanto* decision discussed in section III. Here too the Commission fails to make clear the role that these factors should play in tolerating a restriction of competition. As we explained in section II, Amato considered that this approach should be a thing of the past because the revision of the Treaty emphasised that industrial policy could not be pursued at the expense of competition.

Are these days of generous antitrust exemptions behind us? In 2004 the Commission clearly thought so. It issued a soft law document to interpret Article 101(3) where it took two positions in relation to this provision that indicate an attempt to align it to the more economics-based approach that it had developed for Article 101(1) TFEU. The first condition (that the agreement must contribute 'to improving the production or distribution of goods or to promoting technical or economic progress') was said to only include efficiency gains.[54] The fact that the agreement could also contribute to securing other Treaty goals would only be considered if those goals could be 'subsumed under the four conditions' of Article 101(3).[55] This ambiguous phrase, coupled with the Commission's statement that 'the objective of Article [101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources',[56] served as a clear indication that *Ford/VW* was not going to be followed. The emphasis on consumer welfare also shaped the Commission's interpretation of the second condition (that the consumers must receive a fair share of the resulting benefit). The Commission took the view that this means that 'the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article [101(1)]'.[57] However, this is not faithful to the letter of the Treaty and means that the Commission instead weighs up the overall impact of the agreement on consumer welfare. This is in line with the more economics-based approach but out of sync with the Treaty, requiring a wider analysis of the positive effects of an agreement.

Further confirmation of the more economics-based approach is the Commission's and the courts' more attentive assessment of the efficiency claims

[53] Case IV/33.814, *Ford/Volkswagen* [1993] OJ L20/14 [36].
[54] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 [50].
[55] ibid [42].
[56] ibid [13].
[57] ibid [85].

brought by firms. In nearly all the analyses of the application of Article 101(3) post-modernisation the Commission has found that the claimed positive effects were not demonstrated or that the agreement was not indispensable to achieve the stated positive effects.[58] Finally, the efficiency defence as redesigned in the Guidelines is now also the same defence that applies in Article 102 TFEU and under the EU Merger Regulation. This brings coherence to the EU's antitrust enterprise: harm is shown when conduct reduces economic welfare, but defendants may disprove this by revealing how the practice in question improves welfare instead.

B. Calls for a Rebalancing

However, there are calls for a widening of the exemption provisions. These calls are justified because the approach by which justifications for anticompetitive conduct are narrowed is not in line with the case law of the ECJ. While the courts have not always been clear about the role of other factors in competition law analysis, reference in the case law has been made to the benefits from securing stable employment, the impact of conduct on media pluralism, the avoidance of overindebtedness and facilitating future innovation efforts.[59] Of these calls to sideline competition law two are particularly notable and discussed here.

The first is the political pressure that the Commission found itself in when it blocked the merger between Siemens and Alstom, which would have created a global powerhouse in high-speed trains because it considered the merger would harm competition. Some Member States have launched a campaign to facilitate the integration of industrial policy considerations in merger control to reverse this approach, allowing industrial policy to trump competition considerations.[60] Likewise, the European Parliament 'encourages the Commission, on a case-by-case basis, to take into account a longer-term vision encompassing the global dimension and potential future competition in its competitive assessments' and to revise merger guidelines 'to take into account efficiency gains linked to mergers, including the challenge of EU industrial competitiveness'.[61] This appears to be a step back into the kind of industrial policy that the Commission fought against by the use of the economic approach. The Commission's more recent clearance of

[58] See eg Case C-382/12 P, *Mastercard v Commission* EU:C:2014:2201; T-491/07 RENV, *Groupement des cartes bancaires (CB) v Commission* EU:T:2016:379.

[59] The case law is reviewed in G Monti and J Mulder 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' (2017) 42 *European Law Review* 635. See also O Brook 'Struggling With Article 101(3) TFEU: Diverging Approaches Of The Commission, EU Courts, And Five Competition Authorities' (2019) 56 *Common Market Law Review* 121, and the works at n 51 above.

[60] 'Manifesto for a European industrial policy fit for the 21st century', available at www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/02/1043_-_a_franco-german_manifesto_for_a_european_industrial_policy_fit_for_the_21st_century.pdf

[61] European Parliament resolution of 9 June 2021 on competition policy – annual report 2020 (2020/2223(INI)) paras 68 and 69.

a merger between Fiat and Peugeot might be read as the Commission caving to such pressure: Bruno Le Maire, the French economics and finance minister, and Stefano Patuanelli, his Italian counterpart, said that they 'warmly welcome' the merger, which will create a 'new European champion'.[62] However, on the facts, the merger was allowed subject to commitments to ensure that there was no distortion of competition.[63] In other words, the Commission's favourable view means that industrial policy may be pursued by states or firms provided that the actions do not distort competition. As Amato suggested, the EU Treaties themselves place a limit on this: not only is the EU's industrial policy premised on the existence of competitive markets, but Member States too are obliged, on the basis of Article 120 TFEU, to pursue their economic policies 'with a view to contributing to the achievement of the objectives of the Union'. This includes 'the principle of an open market economy with free competition, favouring an efficient allocation of resources'.

The second is pressure brought to bear largely by industry, which takes the view that there is insufficient guidance to allow firms to understand what kinds of horizontal cooperation might be authorised when parties seek to collaborate to contribute to achieve sustainability objectives. Some national competition authorities have also taken the view that some forms of industry cooperation should be authorised when a restriction of competition is compensated by reduced harms to the environment.[64] At a technical level this discussion raises the following questions: if rivals agree to switch to a mode of production which pollutes less but increases the prices of the products they sell, can this restriction of competition be authorised? Given the Commission's current interpretation of Article 101(3) TFEU it is not clear how far reduced pollution could qualify as an efficiency and since consumers pay more for the resulting product the second requirement for exemption is not met either.

At the time of writing the Commission is proposing a revision of its Guidelines on horizontal agreements which accommodate the need to facilitate this kind of cooperation. In particular, the Commission takes a wide view of the notion of efficiencies, including 'the use of cleaner production or distribution technologies, less pollution'.[65] It also suggests a slight widening of the notion of consumer benefits. The Commission suggests that consumers may secure a gain from efficiencies in three ways: (i) by individual use-value (eg, there is better choice of products consumers desire); (ii) by individual non-use value (ie, consumers pay more but they are willing to do so knowing that their choice of buying a product produced

[62] J Ewing, 'Fiat Chrysler and Peugeot Approve a Merger They Need to Survive' *New York Times* (4 January 2021).

[63] Case M.9730 – *FCA/PSA* (21 December 2020).

[64] Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law' (2020), Authority for Consumers and Markets (Netherlands), 'Draft Guidelines on Sustainability Agreements' (2021).

[65] European Commission, 'Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2022), para 578.

in a sustainable way has a desirable impact on society); (iii) by obtaining a collective benefit (eg, society as a whole benefits from the reduced pollution and if some of the persons buying the products are likely to me members of that society then these collective benefits can count).[66]

To give this some flesh: suppose all toothbrush makers agree to switch from plastic to biodegradable materials with the result that prices rise. On the Commission's view there could be a gain to consumers in three ways: some consumers may benefit individually by having more choice of biodegradable toothbrush; others may agree to the higher price knowing that society is made better off; and society as a whole (which includes those who buy toothbrushes) gains because of reduced pollution and reduced plastic waste that needs to be disposed. In taking this approach, the Commission seeks to utilise existing economic tools to better measure the impact of conduct on markets. This approach thus seeks to fit sustainability into the economic paradigm that has been developed during the past 25 years.

There are two concerns with this policy stance. The first is the risk of type 2 errors: will the Commission exempt cartels that yield no benefits to society?[67] In this respect the Hellenic Competition Commission's idea of developing a sustainability sandbox by which one can select certain initiatives and monitor the extent to which they yield the positive effects they promise can serve as a mechanism to avoid these risks.[68] The second is that since tolerating antitrust exemptions because sustainability constitutes an economic gain for society could be taken further and additional economic gains could be brought in to justify restrictions of competition. Here, boundaries have to be established.

V. Finding the Boundaries of Antitrust

Recall that one of Amato's key points was that once antitrust is stripped of its extraneous policy baggage, its enforcement should be in the hands of an independent authority and not a political body like the Commission.[69] With the ECN+ Directive imposing clear independence criteria for NCAs, the Commission's continued role in antitrust appears increasingly hard to justify. As we have suggested, the Commission's substantive reorientation of competition law through the use of economics has been its means of asserting a de facto independent role. Its adjustment of procedures to ensure that these are fair is also an effort to establish its

[66] ibid, paras 588–609.

[67] MP Schinkel and L Teuren, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' in SJ Holmes, D Middelschute and M Snoep (eds) *Competition Law, Climate Chance and Environmental Sustainability* (Concurrences, 2021).

[68] Hellenic Competition Commission, 'Public consultation: Proposal for the creation of a sandbox for sustainability and competition in the Greek market', available at www.epant.gr/en/enimerosi/sandbox.html

[69] See also G Amato, 'A European Cartel Office?' in *Collected Courses of the Academy of European Law* Volume VIII, Book 1 (Kluwer, 1997).

legitimacy.[70] The Commission's ability to resist relaxing competition law in light of the financial crisis and the pandemic are further indications of the independence of the Commission.[71] Whether this institutional design is sustainable in the long run remains to be seen. In particular, with banking union and the Digital Markets Act, the regulation of significant players is being centralised in EU institutions and this might push the development of independent enforcement authorities.[72]

Whatever new institutional design arises, patterns discussed in this chapter suggest that the contours of antitrust are contested, both when determining what conduct constitutes an antitrust offence (section III) and in determining whether anticompetitive conduct should be tolerated in the name of other interests (section IV). Professor Amato foresaw the arrival of a coherent approach to antitrust, and if we take his approach there seem to be three forces that allow for a legitimate change in antitrust policy: changes in the economy which make antitrust more or less suited for protecting certain interests (eg, globalisation makes it harder to contain political power); changes in our understanding of economics;[73] and constitutional changes (eg, Treaty reforms). This leads to the current consensus, which has rightly been described as a monocentric approach to antitrust.[74] In contrast to this, others have drawn on social contract theories to suggest that changes in this social contract could be the driving force for a recalibration of antitrust prohibitions and exemptions.[75] I hesitate to agree with the use of the social contract because it seems to me that this is a grand bargain among members of society which calls for an overall assessment of all state policies to determine how each is best calibrated to achieve justice. It seems invidious to just reset competition policy on the basis of changes in the social contract. Furthermore, changes in the social contract have to be signalled by a strong consensus. Just because more scholars and politicians express concerns about inequality or the environment may not be sufficient to rethink antitrust.

And yet, as Amato showed, antitrust changes emphasis across time, but it is reasonable to demand some limits. The EU's constitutional texts can be used to find some: there is enough in the EU Treaties to suggest that industrial policy considerations cannot serve to authorise anticompetitive conduct. But there is not much else in the Treaties that constrains the interpretation of competition policy, because it is expected to operate within the wider framework of the social market

[70] HL Karlsson, *Conceptualising Procedural Fairness in EU competition Law* (Hart, 2020).

[71] D Chalmers, G Davies and G Monti, *European Union Law: Text and Materials*, 4th edn (CUP, 2019) 878–79; G Monti, 'Business cooperation in times of emergency: The role of competition law' Competition Policy International – EU News (May 2020).

[72] G Monti and A de Streel, 'Improving Institutional Design to Better Supervise Digital Platforms' (CERRE, 2022).

[73] It has been shown that economic analysis serves as a more powerful constraint on the Commission than do judgments of the ECJ. P Ibáñez Colomo, *The Shaping of EU Competition Law* (CUP, 2018) 328.

[74] Lianos, 'Polycentric Competition Law' (2018).

[75] See in particular Lianos (n 47).

economy that the EU seeks to establish and sustain.[76] Likewise, economics is not a science that constrains antitrust. The current monocentric consensus appeals to a specific reading of economics, but nothing prevents the use of alternative economic frameworks to address markets.[77] As one economist has shown, 'different economic theories have different views on how markets work or fail to work'.[78] In his view policy should be shaped by a richer reflection taking into account all economic theories.

But economics is not an obligatory methodology that competition authorities must use to determine whether conduct harms competition or whether competition harms should be tolerated in the name of other benefits. It has gained this pre-eminence because by choosing a narrow set of economic parameters, competition agencies can claim to treat all infringements in a coherent manner. It has now become institutionalised as the dominant discourse which serves to challenge the legitimacy of those arguing for antitrust from a different perspective. Insofar as economics is the legally required mechanism to prove harm, it even requires that those advocating another approach should first make a case for changing the law, raising the barriers to alternative discourses.[79] Nothing however prevents the Commission from stating, for example, that exclusionary conduct by a dominant firm is an abuse when it denies the capacity of rivals to compete, without making reference to any school of economic thought, but just by reference to the risk that exclusion makes to the internal market. After all, the test of illegality for all antitrust prohibitions is whether the conduct is 'incompatible with the internal market'. It follows that few real boundaries exist to help us determine what conduct constitutes an antitrust infringement. Given an appropriately sophisticated economic construction restrictions on innovation, reductions in privacy, harm to media pluralism, increases in inequality and harm to the environment could all fall within antitrust law's prohibition.

Alternatively, a political reading of competition law can allow one to make similar findings without the need for complex expertise by simply referring to desired outcomes one expects from markets. As suggested above, in the EU and legal systems where competition laws are open textured, limits are not established by reliance on economics but by four interpretative principles. First, the relevant interests protected by the competition rules are identified; second, the conduct

[76] eg Art 11 TFEU, requiring that environmental protection requirements be integrated in Union policies; Art 9 TFEU, indicating that Union policies take into account inter alia the promotion of a high level of employment, social protection, and the protection of human health.

[77] K Bania, *The Role of Media Pluralism in the Enforcement of EU Competition Law* (Concurrences, 2019); E Deutscher, 'How to measure privacy-related consumer harm in merger analysis?' in B Lundqvist and MS Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar, 2019).

[78] HJ Chang, *Economics: The User's Guide* (Pelican, 2014) 387.

[79] E Popp Berman, *Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy* (Princeton, 2022) 86–88 (tracing the introduction of the economic style at the antitrust agencies in the 1960s) and 189–92 for how this style prevented the emergence of more aggressive antitrust. Chs 9 and 10 for its continued institutionalisation and resilience irrespective of the executive's political orientation.

must fall within the four corners of the legal text; third, an interest is not to be protected by competition law if there is another existing set of rules that takes care of this; and fourth, competition law should not apply if it is shown that it is unable to protect the interest at stake in a systematic manner.

What about antitrust exemptions? It seems clear that the Commission's reinterpretation of Article 101(3) TFEU as an efficiency defence and the transposition of this defence to Article 102 TFEU and mergers is deeply problematic. First, there is good reason why Article 102 TFEU does not have the equivalent of Article 101(3) TFEU: dominant firms damage competition by their very existence, so one should hesitate before allowing conduct in the name of efficiency or the pursuit of any other policy goal. Second, Article 101(3) TFEU creates a lexical ordering.[80] It states that two interests have priority over others: agreements eliminating competition and agreements that do not confer a fair share of benefits on 'consumers' ('users' in other Treaty language versions) cannot be exempted, irrespective of the degree of positive effects they yield. This lexical ordering that gives primacy to competition is strengthened by the proportionality requirement as a result of which an exemption is not available if less restrictive alternatives are possible. As with antitrust prohibitions, the claim here is that parties can seek exemption for agreements that provide a wide range of positive benefits provided these are recognised as such in the Treaty. Creating an industrial champion is included. However, these positive effects are not tolerated if values superior to these (competition and a fair return on users) would be trumped.

In sum, the scope of possible interests protected by the application of competition law as well as the scope of the possible interests that may be considered when allowing some restrictions of competition know no bounds other than that these interests must fit within the economic constitution. Here there is a space for legitimate debate and contestation over what antitrust should do. As we have seen the Treaty provides few restraints save for the lexical primacy of competition over other interests, but this term is itself contested. However, some boundaries of antitrust are to be found inside the legal texts, which limit the scope antitrust intervention and non-intervention.

[80] Along these lines, see also G Ghidini, 'Comment: A short note on the generation of efficiencies in the context of the 'constitutional' principles of European Competition Law' in H Ullrich, *The Evolution of European Competition Law* (Edward Elgar, 2006).