ARTICLE ISSN 2523-1766 September 2024

ALBANIAN LAW JOURNAL

EU ENLARGEMENT AND EU COMPETITION LAW: THE CASE OF EXCLUSIVE DISTRIBUTION AGREEMENTS

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ALBANIA Law Journal

EUROPEAN MOVEMENT ALBANIA

PUBLISHER

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YEAR OF PUBLICATION

September 2024

This publication contents are the sole responsibility of European Movement Albania, Albanian Law Journal and its authors.

ALBANIA Law Journal

EUROPEAN MOVEMENT ALBANIA

Introductory Remarks 03

Variability of what "competition" means (or should mean) in economic theory 04

Variability of what "competition" should pursue in economic theory 04

Variability on how the law should promote competition 06

EU Competition law and constitutional framework 06

The political goal of the creation of a single European market and the case of exclusive distribution agreements 07

- The first days: from Consten and Grunding to MasterCard 07
- From the guidelines on vertical restraints 2010/C 130/01 until today 09

The case of EU enlargement 10

Conclusions 11

References 12

If one looks around for a definition of "competition law", one finds that it has to do, roughly speaking, with promotion and protection of competition. Competition law, in fact, is the field of law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by firms in the markets they operate in[1].

It is not univocal, however, either what "competition" should mean and how the law should promote it. The definition of what "competition" means, in fact, depends on the relative evolution of legal and economic theory in any given jurisdiction and is influenced by several political and institutional concerns that make that concept variable among different legal systems[2] and within the same jurisdiction over time, as it will be commented below, under § 5.

The main scope of this article is to highlight how enlargement of the EU will pose, with reference to new member States, interpretative problems similar to those faced by the European Commission and Courts in the first decades of the EEC, a question that will be dealt with in §§ 6 and 7.

However, I find it appropriate to introduce the issue by deepening the idea that the concept of "competition" is variable and not rigidly defined, so that some insights on how the concept of competition has been understood over time and the law has been intended to pursue it are provided at §§ 2, 3 and 4.

A brief reference to EU constitutional architecture will be made in § 5. This passage will serve to clarify the interplay between EU competition law and other constitutional principles, with special reference to the prevailing objective of the creation and maintenance of a single European market.

Variability of what "competition" means (or should mean) in economic theory

The concept of "competition", in economic theory, refers to a scenario where two or more firms are in a position of mutual rivalry with the aim of increasing their respective sales of goods or products at the expense of the other(s)[3]. Even in economic theory, however, this concept has evolved over time both as regards its definition and its reference paradigm – i.e.: the contextual elements providing relevance, significance and value to the concept itself[4]. Therefore, this concept, especially when used in general terms, cannot be considered definitely settled in any given time: as noted by Stiglitz, in fact, "while almost all economists applaud competition, the concept of competition has many different meanings"[5].

At a very general level, one may distinguish among what have been defined the "naturalistic" and "institutional" views of competition. This classification is very simplifying but appears suitable for highlighting the two different conceptual approaches to the concept at stake. "Naturalistic" theories understand the market as a phenomenon independent of, and pre-existing with reference to, the laws that discipline it. Therefore, they claim, with different intensity, that competition develops and flourish independently of any legislation and that any regulatory intervention is capable of reducing its efficiency and efficacy[6].

The "institutionalist" theories, on the other hand, believe that the existence of a market presupposes the existence of a minimum regulatory compendium that guarantees the validity, effectiveness and certainty of trade. In this perspective, there cannot be any "competition" or "market" without a normative framework that provides the institutional and legal tools necessary for a market to work ensuring stability, predictability, enforceability of contracts etc.[7].

Variability of what "competition" should pursue in economic theory

Also the concept of "competition" that should be used as a benchmark of how satisfactorily any single market should work varies over time. It is somehow trivial, e.g., to believe that the ideal and more desirable state of competition is that called "perfect competition". This was defined by Adam Smith as the scenario where there are so many firms in the same market that each of them faces horizontal demand and realizes that any increase of price would determine losing all its customers[8].

Of course, there is a rationale behind the idea that "perfect competition" is perfect. Since Adam Smith[9], such a scenario is understood as a technique of allocating resources to their most highly valued uses. Therefore, "perfect competition" reaches "Pareto efficiency"[10], i.e.: a situation where there are no longer any ways left to make one person better-off (or any resource better used), unless we are willing to make some other person worse-off (or any resource worse used)[11].

Under a theoretical point of view, this peculiar scenario for competition actually maximises available resources. Since there can be only one disposition where all and each resource is allocated in their most efficient use and since such a scenario must be stable to keep this efficient allocation over time, the model of perfect competition intrinsically led to the economic theories of equilibrium[12].

However, besides the fact that no market has ever reached all conditions for "perfect competition" to be in place[13], if one considers the economic formalisation of this models (the so-called Arrow-Debreu model[14]), one realises that, here, "most of the features of competition [...] are absent"[15] since there is no incentive to develop better products or cheaper production techniques. In "perfect competition", in fact, profit does not occur in the long run equilibrium because, if it did, new firms would enter the industry (given a lack of barriers to entry) until any profit is brought back to zero[16].

It is in this respect that John Maurice Clark developed, in 1940, the concept of "workable competition", which refers to a competitive scenario which is workable in any single real market, alternative to the economic theory of perfect competition[17]; a sort of second-best option[18]. No consensus was ever found in economic literature on the criteria required for "workable competition" to be in place[19]. Under this perspective, competition law is currently understood as a field of law that promotes or seeks to maintain the best conditions of competition compatible to each single market[20].

Workable competition, however, may take on different aspects. Oligopoly is theoretically an intrinsecally anti-competitive market structure, since it is characterised by a significative interdependence between competitors that makes it prone to collusion[21]. However, if one focuses on behaviour instead of market structure[22], oligopolies can be highly competitive[23].

An oligopolistic market, in particular, can be consistent with the Schumpeterian model of evolutionary process of continuous innovation and "creative destruction" (schöpferische Zerstörung)[24]. Other theories based on contests focus on "technological change and quality, producing new and better products, and accompanying the products with new and better services"[25]. Scenarios of "imperfect competition", however, are not straightforward to formalise and it is not always clear whether they invariably lead to economic efficiency[26].

Of course, if this alternative view is held, the idea that competing markets must be directed towards a stable equilibrium situation loses value and desirability while, on the contrary, competition is understood as a process of continuous variation whose efficiency consists precisely in the destructive innovation of the economic incentives produced by economic profits available for competitive firms[27].

Variability on how the law should promote competition

It is clear that the debate on what meaning should be attributed to the concept of competition determines a plurality of theories on what the role of the law should be in promoting the affirmation and maintenance of competition on the market.

If one believes that the market is a pre-legal state and best develops its potential in the absence of external interventions, then one tends to believe that the law should avoid, as far as possible, interfering in regulating the market, and should limit itself to the role of "night watchperson", i.e. guarantor of the freedom and property rights of economic operators[28].

If one adheres to an institutionalist vision and considers the market as a cultural construction shaped by the history and common feeling of each system, and not as a pre-existing fact in nature, then one inevitably believes that legislative intervention in the market is necessary for the very existence of competition and its progress can be legitimate and appropriate.

More in general, as regards the issue at stake, the different approaches can be ordered according to an ideal scale of measurement of their confidence in the functioning of market automatic correction mechanisms – which is rather high, e.g., for antitrust schools like Chicago[29] and low for those inspired by Harvard[30].

EU Competition law and constitutional framework

If one had to define the antitrust paradigm adopted by the EU, one had to note, first of all, that the concept of "market" underlying EU competition law is built on the basis of an "institutionalistic" matrix (inherited from the ordoliberal roots of the current EU economic constitution), rather than "naturalistic" one. This means that it tolerates the intervention of the law to shape competition if deemed necessary to better achieve the EU's objectives. Under EU constitutional law, however, competition law plays a pivotal role and constitutes a foundational principle of the whole EU institutional architecture[31]. It is settled EU case law, in this sense, that the principle of free competition is provided as a residual rule of regulation of economic activities. This means that it can be derogated by legislation but any derogation need comply with proportionality in its broad meaning, as developed by EU case law[32].
It is useful to note, for the purposes of this article, that any derogation to (free) competition may be justified, under EU competition law, by two alternative classes of needs. The first class of needs is aimed at providing a regulatory discipline for the purpose of the best functioning of the market with respect to endogenous anti-competitive dynamics[33]. In this sense, the scopes pursued by EU competition law relate to enhancing efficient functioning of the market and consumer welfare[34] so that competitive dynamics inconsistent with such scopes are likely to be considered in breach of competition and subject to legislative adjustment.

The second class of needs requires to take into account, even in the regulation of markets, the needs of political and social solidarity among European citizens beyond any consideration limited to economic efficiency alone. In this sense, it must be recognised that, within the EU legal system, the model of competition law is that of "social market economy" (Soziale Marktwirtschaft)[35], which is construed around a competitive economy model, which is tempered by social and political considerations which are feared not to find sufficient satisfaction[36] if their achievement is left to the "invisible hand"[37].

Now: it is true that traditionally "European competition law is predominantly focused on maximizing consumer welfare. This overarching purpose (which is supported by economic theory) leaves little place for safeguarding non-economic values, such as sustainability"[38]. However, it is proposed that the current interpretation, where competition law, which evolved towards a "more economic approach", is "an integral part of the European economic constitution, should change in light of the constitutional goal of a European social market economy"[39].

The political goal of the creation of a single European market and the case of exclusive distribution agreements

Among the (few) non-strictly-economic goals pursued by European competition law one must mention the political objective of the creation of a single European market, which has been influencing for decades the way competition law has been interpreted. I believe that this can be considered, under a systemic point of view, a non-economic goal since, in some instances, it has determined applications of competition law even contrary to economic principles in light of the political goals which were pursued.

EU law has always linked the application of competition law to the goal of the creation of a single European market. The principle, however, was differently applied in the past, when private barriers were still in place and were not abolished, yet.

Let us take as an example the application of the prohibition of anticompetitive agreements to distribution agreements and, in particular, to exclusive distribution agreements[40].

I. The first days: from Consten and Grunding to MasterCard

The problem of their relevance with respect to the prohibition of anticompetitive agreement at that time provided in art. 85 EEC Treaty (then art. 81 EC Treaty and now art. 101 TFUE) emerged in the 1960s, when the European single market was still far from completion. In the leading case on this issue, Consten and Grunding v Commission[41], the Court of Justice highlighted that distribution agreements that allowed the parties to compartmentalize the market on a national basis could have replicated, by contract, the national trade barriers that had instead been abolished by legislation and therefore hindered the free flow of goods across borders, thus preventing the achievement of the single European market[42].

The need to reach a single European market was considered prevalent on other goals, even that of economic efficiency[43], so that the agreement was considered falling within the prohibition of anticompetitive agreements as a a restriction of competition by object.

The "competition" protected by law was the one that had to be exercised on the entire single European market. There was no way, in Consten and Grundig, to argue that the agreement was clearly pro-competitive. It was not relevant – or, better: it was not enough relevant at that time, because the political scope of the creation of a single European market was considered prevalent on the mere economic efficiency in cross-border distribution agreements.

This ruling remained the most important point of reference in this matter, even in in following cases, like Société Technique Minière v Maschinenbau, the Court of Justice somehow balanced the absoluteness of the prohibition with the need to assess whether the impact of the exclusivity agreement was "appreciable" on trade between Member States[44].

In the same direction, in Metro SB-Großmärkte GmbH & Co. KG v Commission[45] the Court of Justice acknowledged that selective distribution systems could be justified if they lead to efficiencies, such as maintaining a certain standard of service, but insisted on the need to prevent market fragmentation, so that adopted a favourable assessment of selective distribution systems but prohibited restrictions on parallel imports.

A similar ruling emerged as regards franchise agreements. In Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis[46] the Court of Justice recognized that franchise agreements, including exclusive distribution, could promote competition by allowing small businesses to compete more effectively. However, considerations on economic efficiency were considered not capable of justifying restrictions of cross-border trade.

Similarly, in Sandoz Prodotti Farmaceutici SpA v Commission[47] the Court of Justice maintained a strict stance on market segmentation, reflecting the priority on market integration over potential economic efficiencies, and upheld the Commission's decision that exclusive distribution agreements with export bans were restrictive by object.

No matter how much restrictions on parallel trade could be justified with respect to economic efficiency in pharmaceuticals: the Court of Justice decided to upheld the Commission's decision to prioritize market integration also in GlaxoSmithKline Services Unlimited v Commission[48], ruling that restrictions on parallel trade were incompatible with the single market, even if it showed a significant opening to efficiency considerations.

This orientation was certainly upheld after Internet become available to consumers in Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence[49]. The importance of market integration was capable of contrasting outright bans on internet sales within a selective distribution system insofar as they would prevent consumers from accessing the internal market, regardless of any claimed economic efficiencies.

Of course, the prohibition was confirmed also in cases where market segmentation was not the object but the effect of an agreement, as it happened in MasterCard Inc. v Commission[50], a case dealing with interchange fees. Here the Court of Justice showed available to balance the need to prevent market fragmentation with the potential efficiencies of agreements but, even if

it adopted a more sophisticated economic analysis, still prioritized market integration.

It ought to be noted, even if just by the way, that the same need to promote the creation of a single European market influenced supported similar decisions also with respect to horizontal market allocation agreements (European Sugar Industry[51]) and abuses of dominant position under art. 86 EEC Treaty (then art. 82 EC Treaty and now art. 102 TFUE) consisting in restrictions of supplies to distributors who engaged in parallel imports (United Brands v Commission[52]).

II. From the guidelines on vertical restraints 2010/C 130/01 until today

Over time, the Court of Justice began to complain about a lack of economic analysis on the part of the commission and to require greater quality in its antitrust decisions, as it happened in the landmark judgment in European Night Services v Commission[53].
Even with respect to vertical restraints the Court showed available to consider efficiency arguments a higher weight than in the past, as it clarified in Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence[54] - even if in the specific case were considered insufficient and considered the restrictions within selective distribution systems examined disproportionate. In GlaxoSmithKline Services Unlimited v Commission[55] the Court accepted the argument that restrictions on parallel trade could be justified by efficiency considerations, thus setting a precedent for allowing restrictions when justified by significant efficiencies.

The pro-competitive nature of exclusive distribution agreements, however, become relevant in black-letter rules when the goal of the creation of a single European market could be considered in the process of being accomplished or accomplished tout court. Only after that the European Commission promoted a revision of the way competition law was interpreted and applied and eventually issued, among others, the guidelines on vertical restraints 2010/C 130/01[56], where it was acknowledged the pro-competitive potential of exclusive distribution agreements[57].

The following case law is consistent with this interpretative evolution. In Coty Germany GmbH v Parfümerie Akzente GmbH[58], e.g., the Court ruled that a selective distribution system prohibiting authorized distributors from using third-party online platforms could be justified to protect the luxury image of the products. The Court, here, recognised the efficiency of maintaining brand image as a valid justification for certain restrictions, shifting the balance between market integration and economic efficiency.

The idea that the prohibition of anticompetitive agreements is also aimed at achieving an integrated single European market is still present today in the current Guidelines on vertical restraints (2022/C 248/01)[59]. However, the single market was already in place, in 2022, and the Commission and the European Courts recognised a much greater relevance to economic considerations in the assessment of whether vertical restraints fall within the prohibition laid down in art. 101 TFUE[60]. This may be observed in some of the cases mentioned above, such as Pierre Fabre[61] and Coty[62], and also in other decisions such as Guess v Commission[63].

The case of EU enlargement

Competition law is certainly a foundational principle of EU economic law. The evolution described above, under § 6, clearly shows, however, that under the EU constitution there are principles that prevail on those pursued by competition law, such as those of the European integration and the creation of a single European market. This means that there are objectives that prevail over those promoted by EU competition law and only after those objectives are achieved, competition law can be interpreted and applied only with reference to economic efficiency.

It is relevant, in these days, to question how competition law will be interpreted and applied if and when candidate new member States (Albania, Bosnia-Herzegovina, Moldavia, Montenegro, North Macedonia, Serbia, Türkiye, Ukraine)[64] will join the EU.

On the one hand, one could question whether a differentiated interpretation of EU competition law could be appropriate. When the candidate new member States presented their application, they were required to enact competition legislation consistent with that disciplined in the TFUE[65]. One may reasonably expect that this explicit reference to black-letter legislation may be integrated with an implicit reference to the current interpretation by the EU Commission and the ECJ[66]. This requirement makes one believe that EU competition law will continue to be applied unchanged even with reference to these new markets that will need to comply with, and adjust to, current legislation and case law. On the other hand, however, after their joining, the problem of the creation of a single market will emerge one more time, at least in relation to the need to integrate the already existing European single market with the markets of the new member States. No doubt that this goal should, and will, be considered as prevailing on any other efficiency concern, exactly the same way it happened in the 1960s, when the decision on Consten and Grunding v Commission was issued.

I claim that this issue will be certainly considered as a relevant feature of those specific markets and will be relied on in order to allow exceptions to efficiency consideration in order to promote European integration and the creation of a broader single European market.

I am not sure that this will determine the application of the old Consten and Grunding v Commission prohibition telle quelle. The developments in the application of European antitrust law that have occurred in the meantime have certainly changed the way of applying that discipline. To mention just two of these developments: in the meantime greater competence and sensitivity has developed in the field of economic analysis[67] and EU competition law has moved from an approach unbalanced in favour of per se prohibitions towards one more open to the application of the rule of reason[68].

Therefore, there is perhaps room for a different approach to that previously adopted in Consten and Grunding v Commission. Nonetheless, I am sure that the problem of the expansion of the European single market in the new member States will be an issue that will have to be taken into consideration in the application of EU competition law and will certainly be considered capable of prevailing, one more time, over considerations based on economic efficiency.

Competition law seeks to promote and protect market competition by regulating anti-competitive practices among firms. However, defining "competition" and determining the legal frameworks to promote it are complex tasks influenced by evolving legal and economic theories and varying political and institutional contexts.

Economic theories on competition have evolved, reflecting different conceptual approaches which highlight the dynamic nature of the competition concept and its dependency on evolving economic paradigms. The objectives that competition should achieve also vary. Initially, "perfect competition", characterized by many firms and horizontal demand curves, was seen as the ideal. However, perfect competition is rarely observed in real markets. John Maurice Clark's concept of "workable competition" emerged as a more pragmatic alternative, recognizing the inherent imperfections in real markets.

The debate over the definition of competition influences various legal theories on promoting competition. Proponents of minimal interference argue that markets naturally correct themselves, necessitating only a "night watchperson" role for the law. Conversely, institutionalists argue that markets are cultural constructs shaped by historical and social contexts, requiring active legislative intervention to ensure competition.

The EU adopts an institutionalist approach to competition, which allows for legal intervention to shape market dynamics. The creation of a single European market has been a pivotal non-economic goal influencing EU competition law. This objective often supersedes strict economic efficiency considerations. Historically, the European Court of Justice (ECJ) prioritized market integration over efficiency, as seen in cases like Consten and Grundig v. Commission, where distribution agreements that compartmentalized markets were prohibited to ensure free movement of goods. Over time, the Court has increasingly considered economic efficiencies but continues to emphasize market integration as a fundamental goal.

The potential enlargement of the EU to include new member states like Albania, Bosnia-Herzegovina, and Ukraine poses significant interpretative challenges for competition law. While these countries are required to adopt competition legislation consistent with EU standards, integrating their markets with the existing single European market may necessitate prioritizing political integration over economic efficiency. This scenario mirrors the early days of the EEC when the primary goal was market integration. However, the contemporary approach may differ due to advancements in economic analysis and a shift from rigid prohibitions to a more nuanced "rule of reason" approach.

[1] This is an approach frequently find in university manuals: A. Jones, B. Sufrin, EU Competition Law: Text, Cases, and Materials, VI ed., Oxford, Oxford University Press, 2016; R. Whish, D. Bailey, Competition Law, IX ed., Oxford, Oxford University Press, 2018; P. Craig, G. de Búrca, EU Law: Text, Cases, and Materials, VI ed., Oxford, Oxford University Press, 2015. See also, M.D. Taylor, International competition law: a new dimension for the WTO?, Cambridge, Cambridge University Press, 2006.

[2] Besides the trite comparison between the UE and USA antitrust systems [E. Elhauge, D. Geradin, Global Competition Law and Economics, 2nd ed., Oxford, Hart Publishing, 2011; A. Gavil, W. Kovacic, J. Baker, J. Wright, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy, III ed., Eagan (MN), West Academic Publishing, 2016; F. Lévêque, H. Shelanski (Eds.), Antitrust and Regulation in the EU and US: Legal and Economic Perspectives, Northampton (MA), Edward Elgar Publishing, 2010]. one could consider the peculiarities shown in legal systems where competition law was introduced in recent times. By way of example, there is debate as to the objectives that should be pursued in the application of Singapore competition law, with special reference to the need that EU case law is not applied with too overt reliance in that legal system because of its different normative bases: K. Khoo, A. Sng, Singapore's Competition Regime and its Objectives, in Singapore Journal of Legal Studies, March 2019, 67-107. See also, with reference to Asian markets: R.Y.M. Li, Y.L. Li, The Role of Competition Law(Act): An Asian Perspective, in Asian Social Science, 9(7), 47-53.
Similarly, there is much debate on how competition law should be designed and applied in developing countries, because of the peculiar features of their social, political, economical and legal context: U. Aydin, T. Büthe, Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits, in Law and Contemporary Problems, 79(4), Success and Limits of Competition Law and Policy in Developing Countries,2016, 1-36.

[3] L. Pepall, D. Richards, G. Norman, Industrial Organization: Contemporary Theory and Empirical Applications, V ed., Hoboken (NJ), Wiley, 2014; J. Tirole, The Theory of Industrial Organization, Cambridge (MA), MIT Press, 1988; L.M. Cabral, Introduction to Industrial Organization, II ed., Cambridge (MA), MIT Press, 2017.

[4] A paradigm is the conceptual tool defining methods and problems and solving problems accepted by a given community: see T. Kuhn, The structure of Scientific Revolutions, Chicago, University of Chicago Press, 1962. Paradigms influence interpretation in two ways. First, they allow one to detect objects and relationships that each paradigm allows to detect, but they prevent detection of objects and relationships incompatible or "hidden" to it (at 151). Paradigms, in other words, provide schemes with which is it possible to "order" the world (at 44), so that without such schemes there would be only a "great blooming, buzzing confusion" (at 141, quoting William James). Second, and consequently, the paradigm accepted in each moment represents the conceptual tool with which one defines problems that are considered solvable and the relevant solution methods. See pp.58 and 138, where reference is made to "normative" functions of paradigms.

[5] J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 191; see also H.L. Moore, Paradoxes of Competition, in The Quarterly Journal of Economics, 20(2), 1906, 211.

[6] See, e.g.: F.A. von Hayek, The Road to Serfdom, Chicago (IL), University of Chicago Press, 1944; F.A. von Hayek, The Constitution of Liberty, Chicago (IL), University of Chicago Press, 1960; M. Friedman, Capitalism and Freedom, Chicago (IL), University of Chicago Press, 1962; M. Friedman, R. Friedman, Free to Choose: A Personal Statement, San Diego (CA), Harcourt, 1980.

[7] M.J. Trebilcock, R.L. Daniels, The Role of Law in Economic Development, Oxford, Oxford University Press, 2008; R.P. Malloy, Law and Market Economy: Reinterpreting the Values of Law and Economics, Cambridge, Cambridge University Press, 2000; P. Manzini, R.J. Van den Bergh (Eds.), Law, Economics, and Antitrust: Towards a New Perspective, Northampton (MA), Edward Elgar Publishing, 2010; A. Greif, Institutions and the Path to the Modern

Economy: Lessons from Medieval Trade, Cambridge, Cambridge University Press, 2006; F. Gilardi, The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe, Northampton (MA), Edward Elgar Publishing, 2008.

[8] J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 192.

[9] A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776.

[10] G. Debreu, Theory of Value: An Axiomatic Analysis of Economic Equilibrium, New Haven (CT), Yale University Press, 1972.

[11] Said in other words, this is a situation where all possible Pareto improvements have already been made. A Pareto improvement may be defined as any change that leaves everyone in a society better-off (or at least as well-off as they were before): V. Pareto, Manuale di Economia Politica, Milano, Società Editrice Libraria, 1906, translated into English much later: V. Pareto, Manual of Political Economy (A.S. Schwier, Ed.), London, Macmillan, 1971.

[12] The idea of spontaneous equilibrium of the economic system (albeit in the awareness of its eventuality and not absoluteness) is found, for example, in D. Hume, Political Discourses, 1752 and in J.-B. Say, Traité d'économie politique, ou simple exposition de la manière dont se forment les richesses, 1803 but was elaborated within the neoclassical school of economics, whose founders are considered Carl Menger (Grundsätze der Volkswirthschaftslehre, 1871), William Stanley Jevons (The Theory of Political Economy, 1871) and Léon Walras (Éléments d'économie politique pure, 1874). On this issue with reference to economic analysis of law see: E. Marchisio, Reflections on the 'Just Price' in Times of Crisis (with Reference to Coronavirus … but not only), in European Review of Contract Law, 17(3), 2021, 285-314.

[13]Among these conditions one may mention: a number of buyers and sellers so large that make them unable to influence prices and impose them to be price takers; homogenous products; no barriers to entry or exit; no externalities; non-increasing returns to scale and no network effects; perfect factor mobility; perfect information; zero transaction costs: R.H. Bork, The Antitrust Paradox, II ed., New York, Free Press, 1993.

[14] The theory of perfect competition has its roots in late-19th century economic thoughtand was firstly defined by Léon Walras [J. R. Hicks, Léon Walras, in Econometrica, 2(4), 1934, 338-348]. The theory was formalized by K. Arrow, G. Debreu, Existence of an Equilibrium for a Competitive Economy, in Econometrica, 22(3), 1954, 265.

[15] J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 194.

[16] R. Lipsey, Introduction to Positive Economics, London, Weidenfeld & N, 1975, 217.

[17] J.M. Clark, Towards a Concept of Workable Competition, in American Economic Review, 30(2), 1940, 241–56.

[18] R.G. Lipsey, K. Lancaster, The General Theory of Second Best, in Review of Economic Studies, 24(1), 1956, 11–32.

[19] S.H. Sosnick, A Critique of Concepts of Workable Competition, in The Quarterly Journal of Economics, 1958, 380-423; S.H. Sosnick, Toward a Concrete Concept of Effective Competition, in American Journal of Agricultural Economics, 1968, 827-853.

[20] For practical reasons, such as antitrust enforcement or public policy analysis, "workable competition" could be defined as a scenario where, "after the structural characteristics of its market and the dynamic forces that shaped them have been thoroughly examined, there is no clearly indicated change than can be effected through public policy measures that would result in greater social gains than social losses": J.W. Markham, An Alternative Approach to the Concept of Workable Competition, in The American Economic Review, 1950, 361.

[21] M. Ivaldi, B. Jullien, P. Rey, P. Seabright, J. Tirole, The economics of tacit collusion, Toulouse, IDEI, 2003.

[22] P.J. McNulty, Economic theory and the meaning of competition, in Quarterly Journal of Economics, 1968, pp. 639-56.

[23] P. Dubey, D. Sondermann, Perfect competition in an oligopoly (Including bilateral monopoly), in Games and Economic Behavior, 65, 2009, 124–141.

[24] J.A. Schumpeter, Capitalism, Socialism and Democracy, New York, Harper, 1975 (or. 1942).

[25] J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 193.

[26] J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 193.

[27] In some instances, competition is even introduced when markets manifestly do not work, in order to gain efficiency by facing hostile competitors in the same market – as it seems to be the case when the concept is used with reference to education: J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 194. Here, the paramount variable to an higher efficiency is not the horizontal demand faced by competitors but exit, voice and loyalty as mechanisms capable -of controlling the competitors' behaviour in a given market: J.E. Stiglitz, The Meanings of Competition in Economic Analysis, in Rivista Internazionale di Scienze Sociali, 100(2), 1992, 194.

[28] Reference is made to the so-called "night-watchman state", which is a model of a state that is minimal and whose powers are limited to those of an enforcer of the non-aggression principle (military, police, and courts), thereby entrusted with the sole scope of protecting citizens from aggression, theft, breach of contract, fraud, and in charge of enforcing property laws: T.R. Machan, Anarchism and Minarchism. A Rapprochement, in Journal des Economists et des Estudes Humaines, 14 (4), 2002, 569–588; R. Nozick, Anarchy, State, and Utopia, New York, Basic Books, 1974; M.S. Ostrowski, Towards libertarian welfarism: protecting agency in the night-watchman state, in Journal of Political Ideologies, 13 (1), 2014, 107–128.

[29] The Chicago school developed in the 70s and was confident that markets correct themselves without government intervention. One of the most notable consequences of this approach is that antitrust is sometimes seen as unnecessary, since markets self-regulate themselves. In this view, the main role of competition authorities is that of fighting against cartels, which constitute the "supreme evil for antitrust" [Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)]. Some actions that Harvard would consider to be anticompetitive could be viewed, in this perspective, as capable of promoting competition, e.g. as regards mergers and vertical restraints. See, among many: R.A. Posner, Antitrust Law: An Economic Perspective, Chicago (IL), University of Chicago Press, 1976; R.H. Bork, The Antitrust Paradox: A Policy at War with Itself, New York, Basic Books, 1978; K.N. Hylton, Antitrust Law and Economics, Oxford, Oxford University Press, 2003; J. Van Overtveldt, The Chicago School: How the University of Chicago Assembled the Thinkers Who Revolutionized Economics and Business, Evanston (IL), Agate B2, 2006; F. Easterbrook, The Limits of Antitrust, in Texas Law Review, 63(1), 1984, 1-40.

[30] The Harvard school, at least in its original approach developed in the 30s-50s, supported a "structural" approach to competition law which led scholars to believe, roughly, that market structures are capable of determining, inevitably, certain types of anticompetitive conduct. In its further development the Harvard School redefined its scope, increased its focus on conduct, and reduced its trust in aggressive judicial intervention. See, among many: J.K. Galbraith, The New Industrial State, Boston(MA), Houghton Mifflin, 1967; P.E. Areeda, H. Hovenkamp, Antitrust Law: Interpretation and Implementation, III ed., New York (NY), Aspen Law & Business, 1996; H. Hovenkamp, The Antitrust Enterprise: Principle and Execution, Harvard, Harvard University Press, 2005; T. Wu, The Curse of Bigness: Antitrust in the New Gilded Age, New York (NY), Columbia Global Reports, 2018; E. Elhauge, Antitrust Law: Policy and Practice, IV ed., Goleta (CA), Foundation Press, 2020; J.E. Kwoka Jr., The Antitrust Revolution: Economics, Competition, and Policy, VII ed., Oxford, Oxford University Press, 2021.

[31] R. Nazzini, Foundations of European Union Competition Law: The Objective and Principles of Article 102, Oxford, Oxford University Press, 2011; M. Motta, Competition Policy: Theory and Practice, Cambridge, Cambridge University Press, 2004; K.-U. Kühn, J.M. van Reenen, N. Bloom (Eds.), The Economics of European Competition Law: Concepts, Application and Measurement, Chicago (IL), University of Chicago Press, 2018; A. Jones, B. Sufrin, EU Competition Law: Text, Cases, and Materials, VI ed., Oxford, Oxford University Press, 2016; V. Korah, Foundations of EU Competition Law: The Objective and Principles of Article 101, Oxford, Hart Publishing, 2011.

[32] ECJ, 26 November 1985, Miro, Case 182/84, ECLI:EU:C:1985:495; ECJ, 13 November 1990, Fedesa, Case C-331/88, ECLI:EU:C:1990:391; ECJ, 5 May 1998, United Kingdom v. Commission, Case C-180/96, ECLI:EU:C:1998:192; ECJ, 10 March 2005, Tempelman and Others v. Directeur van de Rijksdienst voor de keuring van Vee en Vlees, Joined cases C-96/03 and C-97/03, ECLI:EU:C:2005:145. See also Advocate General Tesauro's Opinion in ECJ, 13 November 1991, Commission v. Netherlands, Case C-68/89, ECLI:EU:C:1991:409.
This is a concept made of three different conditions: justification (consisting of a risk for the correct functioning of the competitive mechanism or in conflict with a constitutional interest that needs to be protected alongside, or even to a prevalent extent, compared to that of competition); suitability to achieve the purpose (otherwise the interest that justifies the measure would not be satisfied in the concrete case); and proportionality to the pre-established purpose (otherwise the abstractly recurring justification would make legitimate the only less invasive remedy in the competitive dynamics).
This European principle derives from the German principle of proportionality in its broad meaning (Verhältnismäßigkeitsprinzip) developed in German law as a criterion founding the legitimacy of the limitations imposed by the law on individual freedoms; principle constituted, precisely, by the presence of a Legitimer Zweck (i.e. justification) and the occurrence of the requirements of Geeignetheit (suitability), Erforderlichkeit (necessity) and Angemessenheit (adequacy): D. Leczykiewicz, Proportionality in the Law of the European Union, Oxford, Oxford University Press, 2013; I.G.G. Gagliuffi, J.M. Pavia (Eds.), Proportionality in Law: An Analytical Perspective, New York (NY), Springer, 2013; M. Cohen-Eliya, I. Porat (Eds.), Proportionality and Constitutional Culture, Cambridge, Cambridge University Press, 2013. In USA law and with a comparative perspective see: E.T. Sullivan, R.S. Frase, Proportionality Principles in American Law: Controlling Excessive Government Actions, Oxford, Oxford University Press, 2013.

[33] What has been termed self-defense of the market, which can lead to 'replicating' competitive conditions otherwise absent or insufficient in a given market: P. Selznick, Focusing Organizational Research on Regulation. Comments on some Aspects of Public and Private Bureaucracy as They Bear on Regulation, in R.G. Noll (Ed.), Regulatory Policy ad Social Sciences, Berkeley, University of California Press, 1985, 363 f..

[34] The European Commission itself, in its web site, under the heading “Competition”, among the objectives, it is stated: “enhance consumer welfare and efficiently functioning markets in the EU by protecting competition”
(https://commission.europa.eu/topics/competition_en). The interplay between efficient functioning of the market and consumer welfare is found, e.g., in: A. Stadler, Competition Law and Consumer Protection, Northampton (MA), Edward Elgar Publishing, 2014; D. Geradin, A. Layne-Farrar, EU Competition Law and Economics, Oxford, Oxford University Press, 2012; E. Buttigieg, M. Myszinska-McCabe (Eds.), The Protection of Competition in Europe, Oxford, Routledge, 2013; C.-D. Ehlermann, M. Marquis (Eds.), The Goals of Competition Law: The Fifth Aspasia Conference on Competition Law and Policy in Europe, Oxford, Hart Publishing, 2009. The OECD consider the consumer welfare standard as the prevailing one in the application of competition law: OECD, The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards, OECD Competition Policy Roundtable Background Note, OECD, Geneva, 2023, in www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternativestandards-2023.pdf..
In a comparative perspective, John B. Kirkwood and Robert H. Lande, in their article of 2008 on USA

antitrust law, claim that "the ultimate goal of antitrust is not to increase the total wealth of society, but to protect consumers from behavior that deprives them of the benefits of competition" and that "when conduct presents a conflict between protecting consumers and improving the efficiency of the economy (e.g., a merger that raises prices but reduces costs), no court in recent years has chosen efficiency over consumer protection", with the sole exception of "the law's determination to protect small sellers from price fixing and other anticompetitive behavior by buyers": J.B. Kirkwood, R.H. Lande, The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency, in Notre Dame Law Review, 191, 2008, 84.

[35] The concept of the social market economy refers to an economic theory in which the regulation of economic activities is aimed at achieving both market freedom and social justice as objectives. It originates from the Ordoliberalism of the Freiburg School founded by Walter Eucken (who established the journal Ordo in 1940, from which the movement derives its name) and was first theoretically formulated by Wilhelm Röpke, with further legal elaboration by Hans Grossman-Dörth and Franz Böhm. At the core of this economic doctrine lies the idea that economic freedoms are a necessary condition for the full realization of the individual but not a sufficient one. Accordingly, it is believed that the State (or similar public entities with regulatory powers) should intervene to correct imbalances that limit individual freedom. This doctrine clearly identifies market freedom as a residual discipline and confines public corrective interventions to addressing market dysfunctions when the market itself fails to produce outcomes consistent with the social model in question. See, among many: E.K. Hunt, J.G. Williamson (Eds.), The Social Market Economy: Origins, Rationale, Application, Oxford, Oxford University Press, 1998; L.P. Feld, O. Farkas (Eds.), Ordoliberalism and the Social Market Economy: A Historical Introduction, Berlin, Springer, 2017; D.C. Mueller, The Social Market Economy: Theory and Practice, Cambridge, Cambridge University Press, 2006; A. Grunbacher, A. Tyszka (Eds.), The Political Economy of the Social Market Economy: An Introduction, Oxford, Routledge, 2020; H.-J. Chang, The German Social Market Economy: An Option for the Transforming and Developing Countries?, University of Cambridge, Department of Applied Economics, Working Paper No. 437, 1994.

[36] The criterion of "sufficiency" need be defined with reference to political, social, and cultural parameters in a given legal system at a specific historical moment. In this hypothesis, public intervention is justified by non-economic intentions considered prevalent or at least equivalent to the principles of the market economy, thus requiring a balancing judgment. On this issue see: J. Bomhoff, Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse, Cambridge, Cambridge University Press, 2013; E. Ellis (Ed.), The Principle of Proportionality in the Laws of Europe, Oxford, Hart Publishing, 1999.

[37] According to the well-known metaphor by A. Smith (The Theory of Moral Sentiments, 1759, and Inquiry into the Nature and Causes of the Wealth of Nations, 1776), which he used to represent Providence, whereby the selfish pursuit of one's own interest in the free market leads to satisfying the interest of the entire society, thus transforming "private vices" into "public virtues".Subsequently, after Léon Walras and Vilfredo Pareto, the "invisible hand" has generally been understood as a metaphor for the economic mechanisms that regulate the market economy in such a way that individual behaviour, aimed at seeking maximum individual satisfaction, leads to the well-being of society.

[38] R. Claassen, A. Gerbrandy, Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach, in Utrecht Law Review, 12(1), 2016, 1-15.

[39] A. Gerbrandy, Rethinking Competition Law within the European Economic Constitution, in Journal of Common Market Studies, 57(1), Special Issue: Rethinking the European Social Market Economy, 2019, 127-142.

[40] This is the scenario where "the supplier agrees to sell its products to only one distributor for resale in a particular territory. At the same time, the distributor is usually limited in its active selling into other (exclusively allocated) territories": Guidelines on Vertical Restraints 2010/C 130/01: "Exclusive distribution or similar restrictions may be helpful in avoiding free-riding" (§ 2.2, 151).

[41] ECJ, 13 July 1966, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, Joined cases 56 and 58-64, ECLI:EU:C:1966:41.

[42] Literally, in Consten and Grundig v Commission it was noted that “what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between member states in a manner which might harm the attainment of the objectives of a single market between states”.

[43] This is the way the European Court of Justice put it in Consten and Grundig v Commission: “the fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may “affect” such trade [...]. In the present case, the contract between Grundig and Consten, on the one hand by preventing undertakings other than Consten from importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting those products to other countries of the common market, indisputably affects trade between member states. These limitations on the freedom of trade, as well as those which might ensue for third parties from the registration in France by Consten of the Gint trade mark, which Grundig places on all its products, are enought to satisfy the requirement in question”.

[44] ECJ, 30 June 1966, STM v Maschinenbau Ulm, Case 56-65, ECLI:EU:C:1966:38.

[45] ECJ, 25 October 1977, Metro SB-Großmärkte GmbH & Co. KG v Commission, Case 26-76, ECLI:EU:C:1977:167.

[46] ECJ, 28 January 1986, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, Case 161/84, ECLI:EU:C:1986:41.

[47] ECJ, 11 March 1999, Sandoz Prodotti Farmaceutici SpA v Commission, Case T-13/94, ECLI:EU:T:1999:51.

[48] ECJ, 6 October 2009, GlaxoSmithKline Services Unlimited v Commission, Joined cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, ECLI:EU:C:2009:610.

[49] ECJ, 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Case C-439/09, ECLI:EU:C:2011:649.

[50] ECJ, 24 May 2012, MasterCard Inc. v Commission, Case T-111/08, ECLI:EU:T:2012:260.

[51] ECJ, 16 December 1975, European Sugar Industry, Cases 40-48, 50, 54-56, 111, 113 and 114-73, ECLI:EU:C:1975:174.

[52] ECJ, 14 February 1978, United Brands v Commission, Case 27/76, ECLI:EU:C:1978:22.

[53] ECJ, 15 September 1998, European Night Services v Commission, Joined cases T-374/94, T-375/94, T-384/94, and T-388/94, ECLI:EU:T:1998:198.

[54] ECJ, 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Case C-439/09, ECLI:EU:C:2011:649.

[55] ECJ, 6 October 2009, GlaxoSmithKline Services Unlimited v Commission, Joined cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, ECLI:EU:C:2009:610.

[56] Now replaced by the Guidelines on vertical restraints (2022/C 248/01).

[57] E.g.: “exclusive distribution or similar restrictions may be helpful in avoiding free-riding”: para 1.2, § 107(a); “to increase the retailer's sales efforts selective distribution, exclusive distribution or similar restrictions may be helpful”: para 1.2, § 107(f).

[58] ECJ, 6 December 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16, ECLI:EU:C:2017:941.

[59] See para 1.2, § 5, where, in particular, they provide that “article 101 of the Treaty also pursues the wider objective of achieving an integrated internal market, which enhances competition in the Union. Undertakings may not use vertical agreements to re-establish private barriers between Member States where State barriers have been successfully abolished”.

[60] A. Jones, B. Sufrin, V. Korah, EU Competition Law: Text, Cases, and Materials, VI ed., Oxford, Oxford University Press, 2016; I. Lianos, O. Odudu, Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes, Oxford, Oxford University Press, 2012; L. Gyselen (Ed.), Economic Analysis in EU Competition Law, Cambridge, Intersentia, 2009; D. Geradin, A. Layne-Farrar, EU Competition Law and Economics, Oxford, Oxford University Press, 2012; V. Hatzopoulos, The Interface between Competition and the Internal Market: Market Separation under Article 101 TFEU, Oxford, Hart Publishing, 2013.

[61] ECJ, 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Case C-439/09, ECLI:EU:C:2011:649.

[62] ECJ, 6 December 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16, ECLI:EU:C:2017:941.

[63] ECJ, 17 December 2020, Guess v Commission, Case C-621/18, ECLI:EU:C:2020:1028.

[64] See: https://european-union.europa.eu/principles-countries-history/joining-eu_en.

[65] In general, the conditions for accession to the European Union concern compliance with all EU discipline and principles, as well as the consent of European institutions, other EU members, and the voters of the candidate country. The adoption of competition rules prohibiting 'restrictive practices, abuse of dominant positions and public aid which distort or threaten to distort conditions of competition' specifically falls among the fundamental criteria required for this purpose, as defined in the European Council of Copenhagen in 1993, known as the 'Copenhagen Criteria' (see https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3). See, in this regard, in particular: European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency (DOC/93/3), Annex II, § IV, "Furthering Economic Integration".

[66] C. Smitherman, The Enlargement of the European Union and the Regulation of its Competition Policy, Oxford, Routledge, 2016; M.L. Smith, EU Enlargement and Competition Policy: Lessons from the ECECS Countries, in Journal of European Integration, 27(1), 2005, 5-23; I. Lianos, Competition Law of the EU and the Western Balkans: The Necessity of Harmonization, in European Competition Journal, 4(2), 2008, 347-378; M. Faure, J. Lefevere, J., A.G. Karaiskos (Eds.), Competition Law and Policy in the EU and Central Europe: The Impact of EU Accession, Northampton (MA), Edward Elgar Publishing, 2013; N. Green, M. Marquis, European Union Enlargement and the Transfer of EU Competition Policy, in G. Amato, C.-D. Ehlermann (Eds.), EC Competition Law: A Critical Assessment (pp. 403-424), Oxford, Hart Publishing, 2010.

[67] D. Hildebrand, The Role of Economic Analysis in EU Competition Law: The European School, III ed., Alphen aan den Rijn, Kluwer Law International, 2016; I. Lianos, D. Geradin (Eds.), Economic Evidence in EU Competition Law, Cambridge, Cambridge University Press, 2013; A. Claici, A. Komninos, D. Waelbroeck (Eds.), The Transformation of EU Competition Law: Next Generation Issues, Alphen aan den Rijn, Kluwer Law International, 2023; A. Ward, Judicial Review in European Union Competition Law, Northampton (MA), Edward Elgar Publishing, 2020; A. Claici, T. Duso, J. Seldeslachts, Economic Approach to EU Competition Law: Foundations and Limitations, in Journal of Competition Law & Economics, 15(1), 2019, 1-45.

[68] R. Van den Bergh, P. Camesasca, European Competition Law and Economics: A Comparative Perspective. London, Sweet & Maxwell, 2006; F. Ferretti, The Modernization of EU Competition Law Enforcement in the European Union: Fostering a More Effective Competition Culture?, Berlin, Springer, 2014; D. Geradin, A. Layne-Farrar, N. Petit, EU Competition Law and Policy, Northampton (MA), Edward Elgar Publishing, 2012; E.M. Fox, D. Gerard, Antitrust Law in the European Union, Eagan (MN), West Academic Publishing, 2017; H. Ullrich (Ed.), The Evolution of European Competition Law: Whose Regulation, Which Competition?, Northampton (MA), Edward Elgar Publishing, 2006.