

ANTITRUST POLITICAL SIDE

Andrea Piletta Massaro*

Abstract

The 2021 *Juris Diversitas Conference*'s topic was 'The Dark Side of the Law' and the aim of this article is that of exploring the 'dark side' of competition law. This discussion, as we will highlight below, is of particular importance in the current social and economic scenario, characterised by the rise of the so-called 'tech giants' and by the transition towards a more sustainable economy. Competition law, especially from the 1970s to the present days, has been viewed as a highly technical – and often technocratic – discipline, with its broad law provisions filled by the fundamental intervention of economic analysis. Of course, this view is correct, but it may result oversimplified. Indeed, competition law has a very deep 'dark side', which lies in its political foundations. This characteristic of antitrust law is particularly evident in the U.S. experience, but cannot be ignored also in the European context. Moreover, recently adopted competition law regimes, such as the South African one, have a strong political imprinting.¹ In fact, as every legislation, competition law follows a policy direction, which is rooted into the constitutional dimension of every legal system. This concept has been brilliantly exemplified by the 'sponge' figure proposed by Professor Ariel Ezrachi.² Moreover, the issues which are dealt with by competition law, often implying fundamental choices of economic and industrial policy, render this political side paramount in the interpretation of antitrust statutes. Anyhow, for

* Research fellow, Università di Torino; adjunct professor, Università di Bologna, Université Catholique de Lyon (UCLy). andrea.pilettamassaro@unitn.it

¹ The South African Competition Act No. 89 of 1998, at point 2, expressly states that, inter alia, its provisions are aimed to promote employment and advance the social and economic welfare of South Africans; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote a great spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons. The text of the South African Competition Act No. 89 of 1998 is available at <https://www.compcom.co.za/wp-content/uploads/2021/03/Competition-Act-A6.pdf> (accessed 12 March 2022).

² Ezrachi (2017).

the sake of clarifying, we are not suggesting here that competition law shall be guided by politics, this would be a major mistake. However, we are sustaining that the ‘revolution’ advanced by the so-called Chicago school has – in the words of Professors Stucke and Steinbaum – ‘hijacked’ competition law from its roots.³ In particular, the focus on economic efficiency has often led to a failure in including a broader set of elements into the assessment of potentially anticompetitive conducts. This, as a consequence, has moved away the antitrust discipline from its constitutional background, which is very different from the political realm. Thus, what we are suggesting is to recalibrate the interpretation of competition law into its foundational dimension, that, as we will demonstrate, can be found – with some needed specification that will be delivered below – in the primary concept of liberal systems: Economic freedom.

Finally, a correct understanding of the goals of competition law other than those identified by neoclassical economic thinking might prove essential to find the better solution in order to tackle the ever-increasing market power exercised by tech giants, which, as suggested especially by Tim Wu, closely resembles the big trusts which led to the enactment of the first – and still most famous – modern antitrust statute, the Sherman Act. In particular, Professor Wu draws a parallelism between the 1800 *fin de siècle* ‘gilded age’ and the current ‘new gilded age’.⁴⁵ Only if we understand in depth the soul of competition law, we would be able to fine-tune tools that can be effective in challenging the current market concentration rates. Of course, antitrust shall not be seen as a cure for every disease, but, as we will see, some outstanding economics scholars sustains that a reduction of the current levels of market power may prove beneficial in reducing negative outcomes such as, for instance, increasing income inequalities.

3 Steinbaum and Stucke (2019).

4 We make reference to the Sherman Act as the first modern antitrust statute, although provisions aimed at regulating competition were present even in the Roman Empire, with the Lex Iulia de Annona, dated around 18 b.C.. Recently, also the EU Commission’s Executive Vice-President M. Vestager made reference to this Roman law in the speech A New Era of Cartel Enforcement, delivered at the Italian Antitrust Association Annual Conference, 22 October 2021, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en (accessed 11 February 2022).

5 Wu (2020).

Given this introduction, which summarises the gist of our arguments, this contribution will be articulated as follows: The first part will deliver an insight into the foundations and the evolution of U.S. antitrust law. The same will be carried out with reference to EU competition law in the following part. The third part will establish a link between market concentration and inequalities and it will suggest some policy changes in order to refine the application of competition law vis-à-vis the ‘new gilded age’ scenario. Then, conclusions will be drawn.

Indice Contributo

ANTITRUST POLITICAL SIDE.....	488
Abstract.....	488
Keywords.....	490
1. The ‘inner side’ of U.S. antitrust law	490
2. The development of EU competition law	497
3. The political side of competition law as a cornerstone for future developments	504
4. Conclusion	508

Keywords

Antitrust - Competition Law – Policy - Comparative Law - Market Power

1. The ‘inner side’ of U.S. antitrust law

The process culminated with the enactment of the abovementioned Sherman Act represents without any doubt the moment in which antitrust law gained its role as a

fundamental tool for the regulation of a market economy system. The discussions that led to the proposal of the Sherman Act bill and the relevant congressional debates are fundamental to cast light on what were the objectives that the antitrust legislation was intended to pursue in the late 1800 U.S. system. The hostility towards monopoly positions was well rooted in the common law history as it dates back to the XVII century's England, when the well-known *case of monopolies* was decided by the Queen's Bench in 1602⁶ and the *Statute of Monopolies* was passed into law in 1624.⁷ However, this primordial concern for monopolies was focused on public monopolies granted by the Crown. Contrariwise, the situation in the XIX century's American economy was different and the fear was directed towards private monopolies, created by means of schemes like pooling or the use of typical common law figures like the trust.⁸ In particular, the latter scheme allowed directors of different and competing firms to exchange voting proxies in order to coordinate their companies' pricing policies.⁹ Given this premise, whilst the American economy was undergoing a transformation into mass production, new comers were less likely to enter the market due to high fixed cost and big companies, such as *Standard Oil*, were becoming increasingly dominant in the U.S. economy.¹⁰ Historian Richard Hofstadter described this metamorphosis by stating that *bigness had come with such a rush that its momentum seemed irresistible. No one knew when or how it could be stopped.*¹¹ The natural outcome of the described situation was the enactment of the Sherman Act on 2 July 1890.

However, the provisions provided for by the Sherman Act were (and still are) drafted in a broad shape, thus rendering the correct interpretation of the relevant legislative intent necessary. Indeed, in this sense, the same U.S. Supreme Court in *Apex Hosiery Co. v. Leader* affirmed that *the vagueness of its language, perhaps not uncalculated, the courts have*

⁶ Queen's Bench, 1602, *Darcy v. Allen (The Case of Monopolies)*, (1602) 77 E.R. 1260.

⁷ Wu (2020), 54; Lianos, Korah, Siciliani (2019), 52.

⁸ Amato (1998), 13. The English edition of the book is titled *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market*, published by Hart Publishing, 1997.

⁹ *Ibidem*, 13-14.

¹⁰ Thorelli (1954), 161-163.

¹¹ Hofstadter (2008), 196.

been left to give content to the statute, and, in the performance of that function, it is appropriate that courts should interpret its words in the light of the legislative history and of the particular evils at which the legislation was aimed.¹² This interpretation can be viewed also as an ‘adaptation’ of the relevant provisions to the ever changing social and economic environment. In this sense, a metaphor was used to describe U.S. antitrust law, which has been viewed as a pendulum swinging among the various interpretations.¹³ The first movement of that pendulum could be seen during the years immediately after the Sherman Act’s enactment, characterised by a strong enforcement of antitrust provisions. In particular, in the 1897 *Trans-Missouri* case,¹⁴ the U.S. Supreme Court adopted a rigid structuralist approach, although the cartel at stake would have proven beneficial for consumers, because it would have kept railway tariffs down after years of fierce price competition.¹⁵ In particular, the Supreme Court argued that *competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom.*¹⁶ This strictly structural interpretation of antitrust rules was then refined by the same Supreme Court some years later, while deciding for the break-up of Standard Oil. In this case, the Court affirmed that the Sherman Act prohibited unreasonable and undue restraints of trade, thus establishing a sort of ‘rule of reason’.¹⁷ However, this exception was assessed on structural basis, like showed by the 1918 *Chicago Board of Trade* judgement, where a pricing scheme in favour of smaller wheat producers was deemed lawful.¹⁸ This approach, aimed at applying antitrust law in order to keep a competitive market structure, appears in line with the primary intent expressed by Senator Sherman in the relevant Congressional

¹² U.S. Supreme Court, decision 27 May 1940, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), at 489.

¹³ Broder (2016), 5; Fox (2008), 77.

¹⁴ U.S. Supreme Court, in decision 22 March 1897, *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

¹⁵ Amato (1998), 15-16.

¹⁶ 166 U.S. 290 (1897), at 337.

¹⁷ U.S. Supreme Court in decision 15 May 1911, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), at 1. See also Wilgus (1911), 645 and Baker (2019), 37.

¹⁸ U.S. Supreme Court, decision 4 March 1918, *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). See also G. Amato (1998), 17.

Records.¹⁹ In particular, a competitive marketplace, characterised by rivalry among market players, was intended to grant the absence of excessive powerful firms.²⁰ Other benefits, such as lower prices or increased efficiency, were seen only as a beneficial by-product of the competitive process, but not as ends in themselves.²¹ This interpretation is brilliantly summarised in the police patrol metaphor provided by Thorelli, who affirmed that antitrust enforcers shall control the *highways of commerce* [...] *to keep the road open for all and everyone.*²²

This approach to antitrust law continued until the Great Depression, when anti-monopoly legislation was at a certain extent ‘frozen’ due to the State’s attempt to overcome the crisis. However, empirical studies suggest how this system, if compared to a competitive one, only had the result of postponing the economic recovery.²³ Subsequently, antitrust law was again applied according to a structuralist paradigm, based upon what Baker addresses as a ‘political bargain’ in regulating the economy. In particular, a market economy system protected by antitrust rules was preferred to a regulatory model or a complete *laissez-faire* approach.²⁴ This period saw – among other judicial pronouncements – the famous opinion delivered by Judge Learned Hand in the *Alcoa* case,²⁵ when he stated that the Congress enacted the Sherman Act to *put an end to great aggregations of capital because of the helplessness of the individual before them.*²⁶ Furthermore, he emphasised that *it is possible, because of its indirect social or moral effect, to*

19 Orbach (2013), 2262; Vaheesan (2019), 480-481. It is however worth clarifying that the final Sherman Act that was passed was not a creation of Senator Sherman alone. Instead, it was the outcome of an intense parliamentary debate, which produced lots of amendments to the bill. See Orbach (2014), 892.

20 Osti (2015a), 228.

21 Fox (2008), 88.

22 Thorelli (1954), 226.

23 Combe (2020), 68.

24 Baker (2019), 38-41.

25 U.S. Court of Appeals for the Second Circuit, decision 12 March 1945, *United States v. Aluminium Co. of America et al.*, 148 F.2d 416 (2d Cir. 1945).

26 148 F.2d 416 (2d Cir. 1945), at 428.

*prefer a system of small producers, each independent for his success upon his own skill and character to one in which the great mass of those engaged must accept the direction of a few.*²⁷

However, the subsequent period, starting from the 1970s to the present days, saw a complete change of direction of the antitrust pendulum, which shifted towards an almost exclusive focus on economic efficiency. This ‘revolution’ was promoted by the so-called Chicago School²⁸ and, *inter alia*, by its prominent figure Robert Bork, author of *The Antitrust Paradox*.²⁹ According to Bork *the essential objective of antitrust is to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or no loss in consumer welfare*.³⁰ However, the real significance of the expression ‘consumer welfare’ is virtually impossible to assess.³¹ Bork gave importance to aggregate welfare, while others – and the Courts – preferred a consumer welfare approach.³² The first episode of this shift can be seen in the *Sylvania* case,³³ when the Supreme Court allowed a vertical restraint scheme by stressing its importance for the efficiency gains it would have delivered. In doing so, the Court made direct reference to the Chicago Scholars’ works.³⁴ Afterwards, the consumer welfare standard became the lodestar of antitrust law, at the point that the same Supreme Court, in *Reiter v. Sonotone*,³⁵ stated that the *Congress designed the Sherman Act as a ‘consumer welfare prescription’*.³⁶

27 148 F.2d 416 (2d Cir. 1945), at 427.

28 Reference to the Chicago School is a way of simplifying the historical reconstruction. Indeed, as pointed out by Kovacic (2020), 459, whilst other scholars, like those linked to the so-called Harvard School, contributed to this change.

29 Bork (1978).

30 Ibidem, 91.

31 According to Orbach (2013), 2275, the phrase “consumer welfare” has mostly served as a source of debate among scholars but has no accepted meaning in antitrust. The history of the consumer welfare standard undermines its validity and its rationalization defies common sense. See also Ezrachi (2017), 61.

32 Baker (2019), 45. Hildebrand (2017), 7; Schmalensee (2008), 13.

33 U.S. Supreme Court, decision 23 June 1977, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

34 Amato (1998), 29-30.

35 U.S. Supreme Court, decision 11 June 1979, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

36 Ibidem, at 343.

The following years saw a steady decrease in the number of antitrust cases brought, especially in the field of monopolisation. On the other hand, the Courts adopted ever more rigorous standards for plaintiffs in order to succeed in lawsuits.³⁷ The consequence has been a languishing state of U.S. antitrust enforcement,³⁸ to the point that, not casually, it became central in almost all the latest Presidential campaigns. Anyhow, also reform efforts, like the Antitrust Modernisation Commission in the early 2000s did not change the situation.³⁹ Conversely, in 2003 the Supreme Court expressed a sort of ‘praise’ for monopolies in the famous *Trinko* decision.⁴⁰ The opinion of the Court, delivered by Justice Scalia, affirmed that *the opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.*⁴¹

In conclusion, these are the two sides of U.S. antitrust enforcement. We could name the bright side the interpretation given during the foundational years of the antitrust discipline and until the ‘Chicago revolution’. Then, the dark side emerged, and it relegated in a secondary – if not null – position all the societal objectives linked to the maintenance of a competitive market structure through antitrust enforcement. All this was done for the sake of efficiency, but, as Professor Fox correctly pointed out, the exasperate research for efficiency can lead to what she called an ‘efficiency paradox’, *i.e.* where monopolies stem at the detriment of innovation and, in the end, in damage of efficiency itself.⁴² This is evident and can result particularly perilous in the current

³⁷ See, for instance, the standard adopted in predatory pricing cases by the Brooke Group decision, U.S. Supreme Court, decision 21 June 1993, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209. See also U.S. Supreme Court, decision 26 March 1986, *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See Khan (2017), 727-730; Scott Memphill and Weiser (2018), 2051; Vaheesan (2015), 82.

³⁸ Wu (2020), 118; Steinbaum and Stucke (2019), 599.

³⁹ Broder (2016), 8-13.

⁴⁰ U.S. Supreme Court, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, (02-682) 540 U.S. 398 (2004) 305 F.3d 89.

⁴¹ *Ibidem*, at III.

⁴² Fox (2008), 77.

economic scenario, where tech giants are continuously increasing their share of market power, which, more dangerously, by means of a sort of transitive property, can turn into political power.

However, the new appointments by President Biden appear to suggest a change of direction. In fact, ‘Neo-Brandeisians’ Lina Khan and Tim Wu were appointed, respectively, as Federal Trade Commission (FTC)’s Chair⁴³ and at the National Economic Council,⁴⁴ together with Jonathan Kanter as Assistant Attorney General at the Department of Justice’s Antitrust Division.⁴⁵ Indeed, this time of ‘reorientation’ needs a competition policy aimed at reaching the concept of desirable competition expressed exactly a century ago by Justice Brandeis in his dissenting opinion for the *American Column* judgement.⁴⁶ Critics of a ‘polycentric’ competition policy⁴⁷ should remind that, according to Professor Pitofsky, *it is bad history, bad policy, and bad law to exclude certain political values in interpreting antitrust law*.⁴⁸

However, before trying to find solutions capable of reconciling the two sides of U.S. antitrust law, it is worth conducting a brief analysis of EU competition law’s evolution.

⁴³ C. Kang, Lina Khan, a progressive trustbuster, displays get-tough approach to tech in confirmation hearing, *The New York Times*, 21 April 2021, available at <https://www.nytimes.com/2021/04/21/business/lina-khan-ftc.html> (accessed 26 April 2021).

⁴⁴ C. Kang, A Leading Critic of Big Tech Will Join the White House, *The New York Times*, 5 March 2021, available at <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html> (accessed 26 April 2021).

⁴⁵ The White House, President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust, 20 July 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/> (accessed 11 February 2022); L. Hirsch and D. McCabe, Biden to Name a Critic of Big Tech as the Top Antitrust Cop, *The New York Times*, 20 July 2021, available at <https://www.nytimes.com/2021/07/20/business/kanter-doj-antitrust.html> (accessed 11 February 2022).

⁴⁶ U.S. Supreme Court, *American Column & Lumber Co. V. United States*, 257 U.S. 377 (1921) at 413. Professors Ezrachi and Stucke suggests a similar figure with their ‘noble competition’ concept: See Stucke and Ezrachi (2020), 254.

⁴⁷ This concept has been advanced by Lianos (2018).

⁴⁸ Pitofsky (1979), 1051.

2. The development of EU competition law

The evolution of competition law in the European Union apparently has not dark sides, it might be regarded as a regular path. However, blind aspects were present since its foundation. Indeed, if U.S. antitrust law – as we have seen above – can be considered as a reaction to the social fear for the so-called ‘robber barons’, EU competition law lacks this sort of popular legitimation and, at a certain degree, its origins might appear darker, at the point that, during its initial phase, EU competition law was perceived as lacking democratic legitimation.⁴⁹ Two factors may have impacted on the creation of EU competition rules. We are referring, from a political standpoint, to the U.S. influence after World War II, and, from a theoretical perspective, to the Ordoliberal school’s ideas. The degree of involvement attributed to both these factors cannot be precisely measured, although it is undisputed that they both played a fundamental role. In particular, the U.S. influence may be regarded as the propulsive factor which led the European Coal and Steel Community to adopt competition rules, whilst the Ordoliberals’ assumptions might have guided the further development of this regulatory regime.

However, in order to understand this development, some steps backwards are deemed necessary. Europe saw in increasing degree of monopolisation and market power before World War II. More precisely, the German economy suffered a heavy downturn after the World War I. In this context, and given the Weimar Republic’s profound weakness, some large firms started supporting Hitler’s National Socialist party, which then reached the power in 1933. In particular, large firms were not initially supportive to the Nazi party, but the promise of political and economic stability, matched to the eventual risk of a communist revolution, convinced them to support Hitler. The consequence was an increased cartelisation of German economy, where firms were intended to serve the scope of the nation.⁵⁰ This system is referred to as a ‘capitalist planned economy’, where property rights were maintained, but the State kept the right to intervene in the economic realm.⁵¹ The consequences of this

⁴⁹ First and Waller (2013). On the relationship between ‘technocracy’ and competition law, see, inter alia, Vaheesan (2018); Crane (2008).

⁵⁰ Gerber (1998), 147; Wu (2020), 35-38; Stucke and Ezrachi (2020), 189. See also Sweezy (1941), 27-28.

⁵¹ Wu (2020), 39-40; Stucke and Ezrachi (2020), 189.

high degree of market concentration in the hands of the Nazi regime, unfortunately, are well known to everyone. For this reason, after World War II, the Allies were particularly worried by the possibility that the German industrial system could return to such a level of market power, which – this is maybe the best, although practically worse, example – turned deeply into political power in support of the Nazis. Consequently, so as to avoid a newly established German dominant position over the coal and steel industry, a common control in this sector was needed.⁵² In this context competition rules were deemed necessary, and the U.S. undoubtedly played a role in their establishment. According to Osti, the input for the adoption of competition provisions came directly from the U.S. officials, which saw the European Coal and Steel Community (ECSC) as a big coal and steel cartel.⁵³ However, according to Gerber, the involvement of the U.S. happened ‘behind the scenes’.⁵⁴ What is certain is that ECSC’s competition rules were drafted by Robert Bowie, a Harvard University antitrust professor, then working for the U.S. High Commissioner for Germany. Afterwards, the provisions were translated into a European idiom by Maurice Lagrange of the French Conseil d’État.⁵⁵ In this context, the propulsive figure shall be identified in Jean Monnet. In the end, the ECSC’s competition rules were translated into the subsequent Rome Treaty without any substantial amendment.⁵⁶

After the EEC establishment, competition rules were not intended as a tool to achieve, *inter alia*, also social purposes, like the Sherman Act.⁵⁷ However, they served as an instrument in order to reach the creation of the common market and the erosion of national barriers to the free movement of goods.⁵⁸ This approach can be found in

⁵² Gerber (1998), 335-336.

⁵³ Osti (2015a), 237; Osti (2017), 51-52.

⁵⁴ Gerber (1998), 338.

⁵⁵ Ibidem, 338-339; Osti (2015a), 238.

⁵⁶ Osti (2015a), 237.

⁵⁷ The Sherman Act’s social purpose is referred to by Thorelli (1954), 227, stating that the Sherman Act embodies what is to be characterized as an eminently ‘social purpose’.

⁵⁸ Wesseling (2000), 11-12, reporting how this need was central in the Spaak Report’s considerations. See also Gerber (1998), 352; Ezrachi (2017), 53; Whish and Bailey (2018), 23-24.

the very first cases dealt with by the Court of Justice. For instance, in the *Consten and Grundig* case,⁵⁹ the Luxembourg Court stated that the allegedly anticompetitive agreement under scrutiny was intended *to separate national markets within the Community, it is therefore such as to distort competition in the common market.*⁶⁰

Subsequently, and in parallel to the market integration goal, EU competition rules gained an increasingly precise content,⁶¹ which was seen in the protection of a competitive market structure in the internal market. In particular, in the seminal *Continental Can* decision,⁶² the ECJ stated that article 86 of the Treaty (now article 102 TFEU) *is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.*⁶³ This approach appears consistent with the declarations made in the EEC foundational years by the first Competition Commissioner, Hans von der Gröben, who affirmed that the Treaty *requires the establishment of a system which will provide a general assurance that competition in the Common Market will not be distorted.*⁶⁴ This concept was then stressed by the Court of Justice also in more recent years, in particular while ruling on the *British*

⁵⁹ European Court of Justice, decision 13 July 1966, joined cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission*. See also ECJ, Decision 25 November 1971, case C-22/71, *Béguelin Import Co. v. S.A.G.L. Import Export*, paras 14-18; decision 8 November 1985, joined cases from C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82, *N.V. IAZ International Belgium et al. v. Commission*, para 23, 45; decision 6 April 2006, case C-551/03 P, *General Motors BV v. Commission*, para 67-68; decision 16 September 2008, joined cases from C-468/06 to C-478/06, *Sot. Léloukas and Sia EE et al. v. GlaxoSmithKline AVEE Farmakeftikon Proionton*, paras 65-66; decision 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission (GlaxoSmithKline)*, para 61; decision 17 February 2011, case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB (TeliaSonera)*, paras 20-21.

⁶⁰ ECJ, *Consten v. Grundig*, cit, at 343. See also Lianos, Korah, Siciliani (2019), 131-142; Wesseling (2000), 24.

⁶¹ In this sense, Ibáñez Colomo and Kalintiri (2020), 322, sustain how the objectives of competition law are defined on an ex post incremental basis and not by means of an ex ante choice.

⁶² European Court of Justice, decision 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*.

⁶³ *Ibidem*, para 26.

⁶⁴ Commissioner Hans von der Gröben, *Competition in the Common Market*, speech delivered during the debate on the draft regulation pursuant to Articles 85 and 86 of the EEC Treaty in the European Parliament, 1961, 5, available at <http://aei.pitt.edu/14786/1/S49-50.pdf> (accessed 5 May 2021).

Airways case.⁶⁵ Here, the Court, recalling the previous *Continental Can* ruling, declared that *Article 82 is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC.*⁶⁶

The above-described approach is one side of EU competition law, but, starting from the new millennium, a darker side – cognate to the ‘Chicago revolution’ – emerged under the name of ‘more economic approach’. In particular, the quest for efficiency and lower prices became central also in the European discourse and ‘consumer welfare’ made its appearance as competition law’s guiding principle,⁶⁷ as stressed by then Competition Commissioners Mario Monti and Neelie Kroes, as well.⁶⁸ However, some criticism stemmed about this ‘economisation’ of EU competition law. In particular, it has been sustained that relying on economics often lead to an illusion of certainty, especially in case difficult evaluations of long-term effects in comparison to short-term ones shall be carried out.⁶⁹ Moreover, the focus on efficiency and price levels may have partially shifted the focus of EU competition law’s enforcement away

⁶⁵ European Court of Justice, decision 15 March 2007, case C-95/04 P, *British Airways plc v. Commission*.

⁶⁶ *Ibidem*, para 106. In this sense it is worth mentioning the statement at paragraph 68 of the opinion delivered on this case by Advocate General Kokott, who affirmed that the provision [Article 82 EC] forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of the 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. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.

⁶⁷ Wu (2020), 118-119; Osti (2015a), 243; Osti (2015b), 114.

⁶⁸ See, *inter alia*, Commissioner Mario Monti, *The Future for Competition Policy in the European Union*, speech delivered at the Merchant Taylor’s Hall, London, 9 July 2001, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_01_340 (accessed 19 October 2021); Commissioner Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, speech delivered at the European Consumer and Competition Day, London, 15 September 2005, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 (accessed 2 May 2021). See also the Policy Opening address at the conference *Competition and Consumers in the 21st century*, Brussels, 21 October 2009, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_486 (accessed 2 May 2021), when Commissioner Kroes stated that today we have the right political context for promoting consumer welfare.

⁶⁹ Blockx (2019), 484-487.

from the broader set of policy objectives contained in the whole EU Treaties system.⁷⁰ This can be affirmed even though the Court of Justice adopted a more economically oriented approach in some recent decisions, such as *Intel*.⁷¹ Here, the Luxembourg Court sustained, *inter alia*, that efficiency advantages may counterbalance a disadvantage for competition, but only if they benefit the consumer.⁷² However, the Court made also explicit reference to the previous and abovementioned *British Airways* judgement, thus implying a certain degree of consistency in its case law and not a complete shift towards a pure ‘efficiency oriented’ consumer welfare approach. In this sense, eminent scholars have indeed affirmed that despite the more efficiency-oriented approach by the ECJ in *Intel*, *positive law still supports the view that EU competition law pursues multiple goals*.⁷³ In fact, as sustained also by the European Commission itself, the European ‘version’ of the consumer welfare standard refers *not only to price reduction, but also to quality and innovation*.⁷⁴

Nevertheless, the panoply of policy objectives we are referring to in this article shall not constitute the primary object of competition law, but shall be regarded as positive consequences of a healthy competitive process on the market. In this light, competition law is compliant with the social market economy objective sets out by article 3, paragraph 3, TEU. The social market economy and the focus on the regularity of the competitive process as such is rooted in the Ordoliberal tradition, which certainly constitutes a theoretical background for the interpretation of EU competition provisions. The Ordoliberal tradition was born as a reaction to the abovementioned raise of market power which turned into political power during the Nazi era. In a nutshell, quoting Franz Böhm, they were concerned by *the issue of private*

⁷⁰ *Ibidem*, 491.

⁷¹ European Court of Justice, decision 6 September 2017, case C-413/14 P, *Intel Corporation Inc. v. Commission*.

⁷² *Ibidem*, para 140.

⁷³ Lianos, Korah, Siciliani (2019), 120.

⁷⁴ European Commission, Competition Policy in Support of Europe’s Green Ambition, Competition policy brief 2021-01, September 2021, 1-2, available at <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF> (accessed 11 February 2022).

power in a free society.⁷⁵ In this sense, the Ordoliberalists advocated for an ‘economic constitution’ centred on rules directed at avoiding the distortion of competition as such.⁷⁶ As seen for certain Brandeisian assumptions with regard to U.S. antitrust law, this approach was intended as a *metriotes*⁷⁷ between socialist economic planning and an unregulated *laissez-faire* liberalism. In particular, Ordoliberalists believed that the maintenance of a competitive market would have delivered equality of opportunities for individuals, thus delivering an inclusive society.⁷⁸ Moreover, the rejection of monopoly positions and of excessive industrial conglomerates would have kept the *Ordnung* safe from undue economic influence into the political realm.⁷⁹ In order to preserve this system, a ‘strong state’ – which is to say not being able of being captured – was needed.⁸⁰ This requirement stemmed again from the history of the Nazi regime, which gained its power on the ‘ruins’ of the weak Weimar Republic.⁸¹ In this sense, the *political* need for a market freed from undue influences can be summarised by the words of former Italian President of the Republic Luigi Einaudi, who stated that *economic freedom is the necessary condition for political freedom*.⁸²

In light of the above, in a social market economy system, citizens should thus receive a ‘fair share’ from the market activity.⁸³ This ‘fair share’, expressly mentioned by article 101, paragraph 3, TFEU, shall be regarded as one of the positive consequences brought by a healthy competition on the market. This constitutes also the manner in which the much-debated concept of *fairness* should be addressed in EU competition

⁷⁵ Böhm (1960), 162, quoted by Gerber (1998), 235. See also Gerber (1994), 29-30.

⁷⁶ Gerber (1998), 245.

⁷⁷ Intended as the classic ideal of measure and moderation, which is brilliantly represented by the expression *aurea mediocritas* by Horace, Odes, II, 10, 5.

⁷⁸ Gerber (1998), 241; Ahlborn and Grave (2006), 200; Rieter and Schmolz (1993), 100.

⁷⁹ Gerber (1998), 246, 251-252, 255-256;

⁸⁰ *Ibidem*, 249-250. See also Bonefeld (2012), 633.

⁸¹ Gerber (1998), 235. See also L. Lovdahl Gormsen (2007), 332.

⁸² Einaudi (1948).

⁸³ Hildebrand (2017), 3.

law.⁸⁴ Indeed, although we deem this concept of little practical influence in the day-by-day evaluation of the single cases, it informs the whole system of EU competition law.⁸⁵ In particular, according to Ezrachi, the concept of fairness should not be used to protect competitors, but as an abstract normative value aimed at preserving the competitive process, thus consequently increasing trust in the market.⁸⁶ In this way, *i.e.*, through the maintenance of a competitive market structure as such, competition law can deliver its best results, which includes both societal and inclusive goals, but also benefits related to economic efficiency. Indeed, for the sake of clarifying, it shall be sustained that an economic-based approach shall not be deemed incompatible with the ‘social side’ of competition law. Contrariwise, economic analysis shall be regarded as a fundamental tool in order to reach procedural fairness and certainty during the enforcement of competition rules. However, it shall not amount to an end of competition law in itself. The same applies to social benefits. The main concern shall be placed upon the competitive process, whilst the rest would automatically follow. In this manner, the twofold sides of EU competition law described above can reconcile to provide better results, especially in the present epoch, characterised by the ever-increasing tech giants’ power.

⁸⁴ See, *inter alia*, Dunne (2021), 230; Gerard, Komnios and Waelbroeck (2020); Lamadrid de Pablo (2017), 147.

⁸⁵ In this sense former Director-General for Competition Johannes Laitenberger stated that fairness is a way to express the overall goals and benefits of EU competition policy in a more tangible manner. It is not meant as a self-sufficient, generic legal test to be applied in cases. And certainly, the very concept of “fairness” excludes that it substitutes rigorous, fact-based analysis. See J. Laitenberger, Panel on “Fairness in Unilateral Practice Cases”, speech delivered at the GCLC Conference, Brussels, 26 January 2018, available at https://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf (accessed 6 May 2021). See also Lamadrid de Pablo (2017), 148. Here the Author also sustains that connecting ‘fairness’ to competition law is therefore not a way to divorce the discipline from economics but to reconcile it with society, showing the wider public that it can contribute to their well-being.

⁸⁶ Ezrachi (2018), 13-14. Here it is also reported an interesting passage from former President of the European Commission Jean-Claude Juncker speech at the State of the Union, when he stated that the Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for. See State of the Union 2016, 14 September 2016, 11, available at <https://op.europa.eu/en/publication-detail/-/publication/c9ff4ff6-9a81-11e6-9bca-01aa75ed71a1> (accessed 6 May 2021).

3. The political side of competition law as a cornerstone for future developments

The brief reconstruction provided above of both the U.S. antitrust law and EU competition law's history⁸⁷ was aimed at proving how multifaceted this discipline is. In the 2021 *Juris Diversitas Conference's* context, the aim of this paper was to demonstrate that competition law is not exempt from dark sides. Though, these sides shall be regarded as layers, as a rock's composition. During the primordial phase, only one layer was visible and the observers of this 'competition law rock' could not properly understand its exact composition. Still, they succeeded in establishing the gist of the subject, *i.e.* the protection of the competitive market structure from undue exercise of market power. Anyhow, as the years passed by, and the river of enforcement washed away this 'rock', other strata emerged, thus rendering the framework clearer. In this sense, the interpretation of competition law is a never-ending and always under refinement exercise. Nevertheless, some assumptions might be fixed. In particular, the subsequent strata of our competition law rock precise the mineral composition, but they do not change the nature of our stone, which remains focused on protecting the competitive process. In this sense, our metaphor made clear how in both the U.S. and the EU tradition societal goals and economic ones might be intended as the inner nature of the rock, while the strata are the additional benefits reached through the maintenance of rivalry and competition on the market.

However, in the current economic scenario, some firms appear not to suffer from rivalry on the market and they act as masters in the market in which they operate and in sectors where they try to expand, as well. We are referring to the so-called tech giants. A lot of research on this topic has been done and even more is still to be carried out, and competition enforcers are trying to handle this issue. In a first phase, a lot of reports and sector inquiries have been published, with the aim of understanding how digitalisation and big data are changing the assumptions on which competition enforcement was based.⁸⁸ During a second phase some decisions have

⁸⁷ It is worth specifying that the term 'competition law' is mostly used in the EU context, while the expression 'antitrust law' is more common in the U.S.

⁸⁸ Joint report by the Bundeskartellamt and the Autorité de la Concurrence, Competition law and data, May 2016, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=A3F64F481FEF2A276E34398D5182E41E.1_cid387?_blob=publicationFile&v=2 (accessed 21 May 2021); Report by the European Commission, Competition policy for the digital era, May 2019, available at <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1>

been issued. The most famous one is the decision against Facebook from the German Bundeskartellamt,⁸⁹ which was then confirmed – although, by now, on an interim basis – by the Bundesgerichtshof.⁹⁰ In this ruling, the German Competition Authority did not charge a fine, but imposed behavioural remedies related to the protection of the users’ personal data.⁹¹ Indeed, in this case the Bundeskartellamt relied on the quality degradation stemming from low privacy levels as a parameter for establishing an abuse of dominant position.⁹² Very recently, also the Italian Autorità Garante della Concorrenza e del Mercato (AGCM) issued an infringement decision against Google for abuse of dominant position. In particular, Google has been found guilty of not having granted access to Android Auto to the *Juicepass* application developed by Enel X. Google has been imposed both a behavioural sanction (making Android Auto accessible also to the Enel X’s app) and a fine of more than Euro 100 million.⁹³ It is also worth noting that the Italian Authority observed that the foreclosure of *Juicepass*

(accessed 19 May 2021); Final report by the University of Chicago Stigler Center on antitrust and digital platforms, September 2019, available at <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> (accessed 19 May 2021); Report by the Autorità Garante della Concorrenza e del Mercato (together with Autorità per le Garanzie nelle Comunicazioni and Garante per la Protezione dei Dati Personali), Indagine conoscitiva sui big data, February 2020, available at https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf (accessed 19 May 2021).

⁸⁹ Bundeskartellamt, decision 6 February 2019. An English summary of the decision is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4 (accessed 19 May 2021). The relevant press release is available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2 (accessed 19 May 2021).

⁹⁰ Bundesgerichtshof, decision 23 June 2020. A summary of the relevant press release is available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2 (accessed 19 May 2021).

⁹¹ A joint approach between competition law and privacy was suggested by the European Data Protection Supervisor (EDPS) in the preliminary opinion of 26 March 2014, Privacy and competitiveness in the age of big data, available at https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf (accessed 19 May 2021).

⁹² The approach aimed at linking data degradation to a lower level of quality was brilliantly addressed in the interesting article by Ezrachi and Stucke (2015), 227.

⁹³ Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, Enel X – Android Auto, available (in Italian only) at https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf (accessed 22 July 2021). The relevant press release (in Italian only) is available at <https://www.agcm.it/media/comunicati-stampa/2021/5/A529> (accessed 22 July 2021).

from Android Auto might have created harm to innovation in the electric automotive sector in general, other than to Enel X.⁹⁴ This point is of particular interest, as the decision considered the effects of the anticompetitive behaviour on a growing market also on the basis of policy considerations, such as the importance of the electric vehicles market for the transition towards a more environmentally sustainable mobility. At the European Union level, it is worth mentioning the decisions issued by the Commission in the *Google Shopping*⁹⁵ and *Google Android*⁹⁶ cases. Having regard to the former decision, it was largely confirmed on 10 November 2021 by the General Court, which also upheld the Euro 2.42 billion fine imposed by the Commission.⁹⁷

In addition, legislators are trying to keep the pace of digitalisation. In Germany, for instance, in January 2021 an amendment to the GWB added section 19a, which includes special powers to the German watchdog, together with a fast-track proceeding which skip the appeal in front of the Düsseldorf Higher Regional Court.⁹⁸ In a similar vein, the Italian AGCM recently proposed to the Italian Government an amendment to the competition act in order to strengthen the abuse of economic dependence, with the aim of granting the Authority more effective powers vis-à-vis the tech giants.⁹⁹ At the European level, the Commission has proposed a regulation

⁹⁴ *Ibidem*, point 413.

⁹⁵ European Commission, decision 26 June 2017, case AT.39740, Google Search (Shopping). The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (accessed 15 February 2022).

⁹⁶ European Commission, decision 18 July 2018, case AT.40099, Google Android. The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (accessed 15 February 2022).

⁹⁷ European General Court, decision 10 November 2021, case T-612/17, Google LLC and Alphabet, Inc. v. Commission. The relevant press release is available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf> (accessed 15 February 2022).

⁹⁸ See the explanation on the Bundeskartellamt's website at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB_%20Novelle.html (accessed 19 May 2021).

⁹⁹ AGCM, AS1730 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021, 22 March 2021, 56-57, available at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf) (accessed 19 May 2021).

on a Digital Markets Act, which grants the European watchdog more effective powers towards the so-called digital ‘gatekeepers’ and provides for sanctions which include also divestitures.¹⁰⁰ This proposal is currently under negotiation by the European Parliament and the Council.¹⁰¹

In the U.S., as well, an interesting report about competition in digital markets has been released on December 2020 by the Antitrust Subcommittee of the Committee on the Judiciary.¹⁰² In addition, the U.S. appears to try regaining pace in the enforcement of antitrust rules, as several bills directed at curbing tech giants’ market power are under discussion at the Congress.¹⁰³ Among them, it is worth mentioning the *American Choice and Innovation Online Act*,¹⁰⁴ the *Ending Platform Monopolies Act*,¹⁰⁵ the

¹⁰⁰ The Regulation proposal is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en> (accessed 19 May 2021). A summary of the proposal is available at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (accessed 19 May 2021) and https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347 (accessed 19 May 2021).

¹⁰¹ European Parliament, Digital Markets Act: Parliament ready to start negotiations with Council, 15 December 2021, available at <https://www.europarl.europa.eu/news/en/press-room/20211210IPR19211/digital-markets-act-parliament-ready-to-start-negotiations-with-council> (accessed 15 February 2022). The amended text adopted by the Parliament is available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html (accessed 15 February 2022); Council of the European Union, Regulating ‘big tech’: Council agrees on enhancing competition in the digital sphere, 25 November 2021, available at <https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/regulating-big-tech-council-agrees-on-enhancing-competition-in-the-digital-sphere/> (accessed 15 February 2022); The amended text adopted by the Council of the European Union is available at <https://data.consilium.europa.eu/doc/document/ST-13801-2021-INIT/en/pdf> (accessed 15 February 2022). See also L. Bertuzzi, EU Parliament adopts regulation targeting internet giants, Euractiv, 15 December 2021, available at <https://www.euractiv.com/section/digital/news/eu-parliament-adopts-regulation-targeting-internet-giants/> (accessed 15 February 2022).

¹⁰² Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations, 2020, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (accessed 19 May 2021).

¹⁰³ R. Lerman, Big Tech antitrust bills pass first major hurdle in House even as opposition grows, The Washington Post, 24 June 2021, available at <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/> (accessed 25 July 2021).

¹⁰⁴ U.S. Congress, H.R.3816 – American Choice and Innovation Online Act, available at <https://www.congress.gov/bill/117th-congress/house-bill/3816/text> (accessed 25 July 2021).

¹⁰⁵ U.S. Congress, H.R.3825 – Ending Platform Monopolies Act, available at <https://www.congress.gov/bill/117th-congress/house-bill/3825/text?r=34&s=1> (accessed 25 July 2021).

Platform Competition and Opportunity Act,¹⁰⁶ the *Augmenting Compatibility and Competition by Enabling Services Switching Act*.¹⁰⁷ In brief, the *Augmenting Compatibility and Competition by Enabling Services Switching Act* is aimed at promoting competition by lowering barriers to entry and lock-ins, so as to favour interoperability and data portability; the *American Choice and Innovation Online Act* is directed at prohibiting discriminatory conducts by digital gatekeepers, with a specific reference to self-preferencing; the *Ending Platform Monopolies Act* has the objective of curbing the possibility of digital gatekeepers to use abusive conducts allowed by their market dominance in order to expand into adjacent markets; and the *Platform Competition and Opportunity Act* is targeted at prohibiting the so called ‘killer acquisitions’ of competing firms threatening the gatekeepers’ dominant position in a market as well as at impeding acquisitions directed only at strengthening such a position. Having regard to the possible remedies, breakups have been envisaged both in the proposed legislation and in the mentioned Congressional Report.¹⁰⁸

4. Conclusion

The abovementioned initiatives, besides being directed at tackling the excessive market power held by digital gatekeepers, share another common feature: They are all based upon a renewed ‘political’ side behind antitrust intervention. For the sake of clarity, we are not intending here that there is a political influence on antitrust enforcement, which is something that shall be absolutely avoided. We are affirming that there is a new awareness of the *policy*¹⁰⁹ role that competition law shall play in our

¹⁰⁶ U.S. Congress, H.R.3826 – Platform Competition and Opportunity Act of 2021, available at <https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&cs=1> (accessed 25 July 2021).

¹⁰⁷ U.S. Congress, H.R.3849 – Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, available at <https://www.congress.gov/bill/117th-congress/house-bill/3849/text> (accessed 25 July 2021).

¹⁰⁸ U.S. House of Representative, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, cit., 380-381.

¹⁰⁹ The difference between the terms policy and politics is subtle, but of paramount importance for the purpose of this article. Here we want to underline that, according to our view, antitrust law shall be completely immune from political influences. Anyhow, we deem that competition enforcement shall not be detached from the policy considerations and values upon which our societies’ constitutional background is built. The confusion between these two terms probably lies in the union, in the English term policy, of both the reference to the

societies. However, although this ‘multipurpose’ *policy* approach to competition law has its undoubted academic charm, it is not enough alone, and it also ought to be handled with care. Indeed, even tough competition law shall be viewed as composed by our societies’ *policy* substrata, we should not forget what the real aim of competition law, its prominent side, which encompasses all the others, is. We are referring to the protection of the competitive process, of competition as such, as advocated by the Ordoliberals and, a century ago, by Louis Brandeis, who, not casually, has been referred to as an ‘American prophet’ by Jeffrey Rosen.¹¹⁰ Thus, for the sake of concluding, the ‘multipurpose’ approach to competition law necessarily needs to be matched with a ‘multi tool’ strategy to its enforcement.¹¹¹ This means that competition law ought to be ready for the challenges that the economy’s evolution brings. For this purpose, the availability of a variable enforcement toolbox is deemed necessary. In this sense, the ‘common’ *ex post* approach to competition law, which is directed at imposing a pecuniary fine after a long investigation by a competition Authority, appears outdated and new paradigms are needed. In fact, companies such as tech giants may consider a pecuniary fine as the simple ‘cost of doing business’,¹¹² and if this comes years after the harmful conduct, the damage on the market cannot be recovered at all. The policy proposals mentioned in this article, like the new German GWB’s Section 19a or the DMA Regulation proposal, are proof of this renewed approach, as – in line with a structuralist approach to competition law – they involve an *ex ante* assessment of a company’s market position and they provide also for behavioural and structural remedies, instead of pecuniary ones only. Moreover, other tools ought to be empowered to reach the critical mass needed for competition law in the current market scenario. Reference can be made to the abuse of economic dependence, explicitly recognised, *inter alia*, by Section 20 of the German GWB,

practice of government and to the principle or course of action adopted or proposed as desirable, see Oxford English Dictionary (2006). It is here also worth mentioning that in the EU context the Competition Authorities’ independency has been strengthened by means of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published in OJ of the EU 14 January 2019, L 11.

¹¹⁰ Rosen (2016).

¹¹¹ See also Piletta Massaro (2021a).

¹¹² See, *inter alia*, Stucke and Ezechchi (2020), 217.

Article L420-2, *alinéa* 2, of the French *Code de commerce* and by Article 9 of the Italian law on subcontracting in productive activities.¹¹³ This tool is indeed capable of being applied to tech giants' conduct without the high evidentiary burden required for abuses of dominant position. Under another perspective, also private enforcement of competition law needs to be strengthened so as to be applicable also vis-à-vis digital gatekeepers.¹¹⁴ This means that – with reference to private enforcement – the improvements introduced by means of Directive 104/2014¹¹⁵ are positive, but not enough, and tools such as collective redress and third-party litigation funding ought to play a role.¹¹⁶ Therefore, competition law cannot express its 'multipurpose' *policy side* without being also 'multi tool'. Along the lines outlined in this article, competition law's *dark side* can turn into a *bright side*.

¹¹³ Law 18 June 1998, no. 192, published in OJ 22 June 1998, no. 143. At this purpose, it is worth mentioning that in 2021 the Italian Competition Authority suggested the Italian Government to integrate the provision in object with the introduction of a rebuttable presumption of economic dependency with regard to contractual relationships with a platform acting as an intermediary and benefitting of a fundamental tool for reaching a firms' users or suppliers. See Autorità Garante della Concorrenza e del Mercato, AS1730 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021, 22 March 2021, 56, available (in Italian only) at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf) (accessed 23 July 2021).

¹¹⁴ At this purpose it is worth reminding that the abovementioned U.S. Congressional Report has recognised the role that private antitrust enforcement can play in the described scenario. See Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations, cit., 403-404.

¹¹⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union, published in OJ 5 December 2014, L 349.

¹¹⁶ In this sense, the exclusion of competition law from the scope of Directive 1828/2020 appears quite unreasonable. See Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in OJ 4 December 2020, L 409/1. See also Having regard to third-party litigation funding and collective redress, see, inter alia, European Parliamentary Research Service, Responsible Private Funding of Litigation, March 2021, 77-81, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (accessed 11 October 2021); Piletta Massaro (2021b), 96.

