1. Introduction

In the last two decades European competition law has undergone a paradigmatic transformation, which in the literature, is known as the more economic approach. Having originally been designed and applied predominantly by lawyers, competition law is largely perceived nowadays as a realm of economics, with a strong influence of empirical statistical methods. As a contemporary methodological motto of European competition policy, the more economic approach, indeed, significantly advanced the discipline. The quantitative analysis and econometric models enabled more complex and sophisticated research into the behaviour of market actors, contributing to the achievement of the normative motto of European competition law: consumer welfare. The language of economics and the ethos of consumer welfare both constitute the core of contemporary European competition law.

Not contesting the methodological significance of economics or the normative importance of consumer welfare, and not intending to offer a reactionary counterpoint to the evolution of European competition law, this book instead seeks to provide a jurisprudential account of the European competition law discourse. The term jurisprudence is taken in this proposal broadly, covering the fields of legal theory, sociology of law and legal philosophy.

The primary objective of the jurisprudential account of competition is to translate the contemporary agenda of European antitrust from the language of economics into that of law. The philosophical aspect of this project has two equally important components: the first relates to competition law, while the second concerns the very phenomenon of competition itself. The former is primarily of a methodological nature. It contemplates the problems of European competition law through the prism of jurisprudence. The essence of the latter is mainly normative. It analyses the competitive process as a philosophical category, understanding by it a dynamic motion, embedded in the laws of dialectics, which generates a constant multilogue between the agents involved. Both aspects have important comparative and interdisciplinary components. The philosophical analysis of (a) European (b) competition and (c) law would be never accomplished if it concentrated solely on the latter two aspects of the problem. Therefore,
the suggested elements (i.e. ‘law’ and ‘competition’) are explored against their European background. The objectives of the EU as reflected in the Treaty on European Union; the Treaty on the Functioning of the European Union (TFEU); case law; and judicial, political and doctrinal sources, are all seen as a common denominator of this project.

Having its conceptual roots in a deontological (non-consequentialist) approach to competition, the normative aspects of this book should, however, be disassociated from the following two intuitive misunderstandings, which can be accordingly labelled as (i) revisionism and (ii) syncretism.

(i) Non-revisionism. The book is interested in the history of European competition law, and it operationalises some important elements of the older doctrines, but it does not seek to revive any purely deontological theories of antitrust, acknowledging the inevitability of economic analysis of contemporary competition policy. Its aim is different: it seeks to provide a contemporary jurisprudential discourse for the analysis of competition law. The discourse is missing, inasmuch as in the current framework the very reference to legal doctrine in the context of competition law is ubiquitously perceived as a legalistic doctrinarism. The role of lawyers tends to be reduced to their technical expertise: how to communicate the economic truth to the legally (narrow-)minded judges. In this sense, the task of this book is to enrich the contemporary analysis of competition by implementing into it the valuable theoretical insights deduced from the jurisprudence. The insights are latently present, but they are seldom actualised in the domain of competition law. The following dilemma occurs: any attempt to implement the abundant experience of jurisprudence to the realm of competition policy faces the necessity to contemplate the specificity of the area, and one of such specificities is that the regulation of economic competition should not be based on anything but the economic rationale, which in turn rejects the richness of jurisprudence, as the latter brings different methodological apparatus and normative solutions to the economic problems. This book is committed to bridging these two realms.

(ii) Non-syncretism: The suggested bridging between the law and economics cannot form a happy medium: this quae sunt Caesaris,

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Caesari approach has failed and the current situation in antitrust is the consequence of such methodological holism. The dilemmatic nature of the problem cannot be solved by cherry-picking the best bits of economics and law. Such an uncritical merger would caricature the idea of interdisciplinarity. The epistemic borders of the disciplines cannot be eliminated. Instead, different accounts of the explored phenomena should be available. The book intentionally focuses on a jurisprudential account, being interested in the economic approaches only insofar as they are seen as explananda and not as explanans. This jurisprudential purism does not claim exclusivity, but it does claim universality: the non-exclusivity clause implies that alternative solutions for the competition problems are acknowledged; the universality clause means that a jurisprudential approach is able to offer a comprehensive account of the subject. Most of the discussions in the economic literature on the issues of competition policy have direct analogies in jurisprudential debates. These analogies, however, have not been systematically operationalised so far. The difference between the economic and the legal analysis is that the former is being widely used by both lawyers and economists, while the latter is available in the realm of competition only ad marginem, for purely formal purposes and most often ad hoc. The sporadic operationalisation of jurisprudence cannot make up the lacuna and often can, conversely, diminish its reliability. The methodological hypothesis is hence that, apart from economics, the discourse of competition law should benefit from the comprehensive implementation of the important aspects of jurisprudence into it. Such implementation does not eliminate the interdisciplinary aspects of the research inasmuch as the very phenomenon of competition is by its nature interdisciplinary (see the normative background of the research). In addition, in order to succeed, the jurisprudential account of competition law should be fully up to date on the economic merits of the issue, but such understanding of the economic aspects of competition should not eliminate its juristic nature. In other words, the main materials of the suggested bridge are norms-and-rights and not costs-and-benefits.

Any study on the nature of competition law inevitably requires the analysis of its three main components, namely: (i) the specificity of the phenomenon of competition itself; (ii) the essence of the law taken as a set of particular social norms; and (iii) political, economic and cultural interests of society which inherently predetermine application of any law. The first dimension reflects the internal nature of competition; the second dimension explores the formal requirements for its existence; the
third dimension analyses on the external level the scope of its interaction with other societal interests in general as well as the scope of application, protection and promotion of competition in particular. From the systemic point of view these three aspects of competition law are both inseparably linked and mutually dependent. In practice they are hardly distinguishable at all, so long as the general preconditions of the effective performance of economic system (iii) require a coherent application of antitrust law (ii) which in its turn influences the very understanding of the phenomenon of competition (i).

Unlike in practice, from the positive, analytical, perspective the issues of the essence of competition, the nature of law and the broader interests of society are not necessarily strictly correlated to one another. Each of these three aspects of competition law can be explored in isolation. Arguably, this synthetic separation of ‘competition’, ‘law’ and its ‘efficiency’ can yield on the methodological side, inasmuch as this exercise helps to understand each of the three aspects of competition law in a deeper and more neutral way.

The structure of this study is designed in a way which reflects the three-dimensional nature of competition law as mentioned above. It implies that competition law will be explored from the internal perspective of competition; from the formal perspective of the law; and from the external perspective of politics. All three narratives are ‘foreign languages’ for one another. Therefore the issues related to their interaction will be specifically addressed too. The development of different narratives is a synthetic theoretical exercise. This implies that in order to maintain the consistency of each of the three dimensions, some arguments are presented in a refined, unconditional and uncritical manner. This reflects the methodology of the book. At some points it intentionally ‘dives inside the boxes’, striving to develop the logic of their functioning from an internal perspective only.

This ‘inside the box thinking’ can be criticised for its inability to look at the ‘broader picture’. The issues of the ‘broader picture’, its constellation and the functioning of its elements are explored separately; they do not serve here their ordinary task of being a practical counterpoint to the theoretical analysis. They are not perceived as synchronisers or harmonisers of the internal self-centricity of the three narratives of competition law. Such ‘broader picture’ issues as ‘common sense’, ‘practicality’, ‘general interests’ or ‘efficiency’ will, on the contrary, be explored ‘narrowly’, as factors which are constantly influencing the internal functioning of different narratives, impelling them to abandon their self-centricity for the benefits of the general system. These ‘broader picture’ issues do not predetermine the purpose of this book, and they are not perceived as a common denominator or raison d’être for the existence of the internal nar-
ratives. The ability of the ‘broader picture’ issues to influence the internal narratives or the decision-making process in general is recognised and respected. Yet due to their practical, ad hoc nature, any systematisation in this respect is problematic and unrepresentative for the methodology which has been selected for this research. It is beyond its limits to explore the statistical or any other empirical instruments which are arguably able to systematise these factors. For this reason empiricism will be addressed as a phenomenon and will not be applied as a method or a universal remedy as it often appears to be from the practical perspective.

The following three terms require some preliminary clarification: competitive process; welfare and social market economy. At this point it should only be pointed out that the term ‘competitive process’ is ambivalent and does not fit perfectly for the theory of antitrust, and in particular for the purposes of the book. Linguistically its double meaning can cause misunderstanding. ‘Competitive’ is the adjective of both ‘competition’ and ‘competitiveness’, which, despite their similar etymological roots, characterise two different phenomena. In its first meaning, ‘competitive’ implies ‘involving rivalry’, in other words, the process which is central for competition itself. Its second meaning, however, is ‘sufficiently low in price or high in quality to be successful against commercial rivals’, or it reflects a mere ability to compete and does not require the existence of competition as such. While the term ‘competitive process’ itself makes sense predominantly in its first reading, such derivative phrases as ‘competitive markets’ or ‘competitive environment’ can have both meanings. For instance, the term ‘competitive economy’ can mean both the economy with competition as well as the economy which is strong enough to compete on the international level. The latter can be achieved without competition and to its detriment. It has been suggested elsewhere to use the term ‘competitory’, which reflects the semantics of the term ‘competition’ more appropriately, however due to uncommonness thereof priority is afforded to the more usual term. The specificity of the term ‘welfare’ will be addressed in more details in the relevant chapter (4). It suffices to say now that in most of the cases it will be used in its generic, broad meaning, which implies health, happiness, prosperity and well-being in general. The meaning of the term ‘social market economy’ is also context dependent and it is also explored in Section 3.2.1, which analyses the origins of the European concept of competition. As a more general term it is used to describe the model in

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which private market incentives are circumscribed by more general social public concerns, trying to coexist in a mutually enhancing way.

It will be argued that all the main approaches to antitrust policy and law can be divided in this respect into two rival groups. The pragmatic schools claim that the main or the central goal of competition should be measured by its broader impact on economic life. They perceive competition in its instrumental, applied sense and will be labelled ‘utilitarian’ or ‘consequentialist’. These approaches will be juxtaposed with those doctrines which claim that the competitive process itself constitutes an important societal value and should be protected regardless of (or at least without strong conjunction with) the economic outcomes which it can eventually deliver for society. These views are marked by the term ‘deontological’ (also known as the axiomatic human rights-based approach). In other words, for the utilitarian schools the competitive process represents a means, whereas for the deontologists it constitutes an end.

The rivalry between these two approaches to competition is characterised by three interrelated elements which require some clarification. (1) Although the book tends to reflect all the main arguments and doctrinal points of different antitrust schools, it intentionally underlines – sometimes in an explicitly synthetic manner – these differences between and, conversely, does not fully explore the doctrinal discrepancies within, the two approaches. This method is used in order to illuminate the central point of the suggested taxonomy, which is the role of the competitive process in the economic life of society. It leaves on the periphery all other possible criteria for classification of different antitrust schools. (2) As will be argued below, it is acknowledged that all reasonable schools of law, economics and politics in one way or another recognise the importance of welfare and are in this sense utilitarian. Otherwise, the social legitimacy of these visions, let alone the seriousness of their authors, would be rightly challenged. The deontologists do not claim that the values or rules should be protected only for their own sake, as a kind of religious dogma. The rule-centred models are enhanced because they are finally beneficial for society, individuals or welfare. The genuine difference between the utilitarians and the deontologists is not that the former promote welfare and the latter

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Introduction

do not. This statement will be correct only if these schools are scrutinised on the same level of abstraction: if under the same set of circumstances (institutional, factual, behavioural etc.) a certain action which is prohibited by formal rules should still be authorised or not. Only at this level is the comparison appropriate and might the statement be correct. The reason why the deontologists prefer rules over the eventual effectiveness of breaking them is finally predetermined exactly by the interests of common welfare but on the higher level of generalisation. This most general welfare-centred imperative is factored out of considerations altogether by the deontologists due to its repetitiveness and triviality. They concentrate their attention exactly on the situations when formal rules conflict with immediate interests of society or individuals, implying that the obedience to the rules is itself in the long-term interests of society and individuals. Therefore the deontological approach is often ‘uncritically criticised’ for its rigidity, formality and lack of sympathy to the real interests of society. The more detailed analysis of correlation between rules, principles and policies will be offered in the chapter which explores legal foundations of competition law. (3) The rivalry between the two approaches to the role of the competitive process in economic life is also articulated so explicitly in order to prove the effectiveness of the dialectical method of research. Its epistemological purpose is to instrumentalise the hidden potential of the productive conflict between the two subjects of interaction in order to generate added knowledge of the object of this research.

Despite the significant ideological, historical and methodological discrepancies of different deontological approaches to competition, they can supplement each other with respect to the general increase of the role of the competitive process in society. These schools perform their analysis concentrating on different elements of the phenomenon of competition and its interaction with other societal values and they operate with different theoretical premises and apparatus. In spite of this, however, the similarities of the deontological schools are more important than their differences for the theses which the book develops. An attempt is made to synthesise the main theoretical claims of the deontological schools in order to develop a more comprehensive argument in favour of protection and promotion of competition. This research acknowledges the negative externalities of such theoretical ‘merger’, recognising that the normative and ideological discrepancies between these schools combined with different historical contexts in which their arguments were developed require that the problem of their eventual synthesis be addressed with care.

The main hypothesis with regard to the issue of the normative importance of competition is that the competitive process as a social and natural phenomenon constitutes the essence of liberal democracy, which is
perceived for the purposes of the book as a form of political self-organisation of people which bases their main common values on the principles of individual liberty, autonomy and humanism. The political aspects of competition are encompassed in the idea of elections, where different political parties compete with one another using their political programmes for the constituency. In the context of cultural relations, the idea of competition is embedded in the notion of free speech and pluralism. These values reflect the metaphor of the marketplace of ideas, in which different individual opinions and collective positions are freely circulated within society. The more diverse the society, the bigger the discrepancy between these ideas. This implies that they have to compete with each other for public and private acceptance in cultural spheres. In a broader context the same model can be traced in such areas as religion, psychoanalysis, sports and jurisprudence. Each of these four discourses is discussed in the respective sections of Chapter 4.

An independent public value of competition should not be taken as an absolute. Competition alone is neither a sufficient nor even a desirable means of economic and social governance. In a broader regulatory context it should be perceived only as one of many legitimate public goals and one among several ways to enhance societal welfare. The fact that competition cannot be taken as a universal remedy does not imply, however, that methodologically it should be perceived only in its applied instrumentalised sense. Its methodological disentanglement from other public values enables better understanding of its distinctive features, which are peculiar only to it and cannot be substituted by other societal phenomena.

This hypothesis is substantiated by application to the antitrust analysis of some comparative elements, perceiving economic competition from the perspective of psychology and psychoanalysis. The argument is that the competitive process should be treated as a driving force for entrepreneurial activities as ‘a type of energy’; its enhancement implies provision of conditions which either increase the desire to compete or facilitate the very process of competition. The comparison with psychoanalysis is relevant in respect of its treatment of the problem of libido (psychic energy emanating from the individual) which, for the purposes of this research, is analogous to the entrepreneurial spirit of economic discovery. Although libido and natural instincts of a human being are never sufficient to develop a harmonious individuality, at the same time they are indispensable components of this creative process. Libido should be limited, but not

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Introduction

abandoned. It should be contextualised but not eliminated. The life of any human being which is governed solely by his instincts is unmanageable; no society can tolerate it even in principle. It is also meaningless, however, when the instincts are fully subordinated to purely rational interests of the individual or society in general. The second scenario can occur in antitrust when decision-makers try to eliminate the spontaneous order of the competitive instincts by circumscribing them to the rational interests of society entirely.

The book proceeds as follows. Following the general overview of the main topics in this introductory chapter, Chapter 2 looks at the historical evolution of the concept of competition and explores the phenomenon of competition from the perspective of economic theory. The third chapter analyses the conceptual foundations of the US and EU competition laws. The fourth chapter addresses the main theoretical background of the competitive process, comparing the role of competition in political, cultural and economic systems and developing the normative premises of the research. The fifth chapter concentrates on mechanics of balancing, which reflects the main methodological aspects of coexistence of competition with other economic and social values. In the sixth chapter the phenomenon of competition is explored from the broader legal theoretical perspective, contextualising the competitive process with the main theoretical problems of jurisprudence. It concentrates upon the jurisprudential aspects of the problem of balancing, trying to apply the techniques developed in the previous chapter to the legal discourse, with the purpose of demonstrating the significance of the competitive process not only in economic, political and cultural aspects, but also for the law itself. The final chapter explains the normative proposal which this analysis puts forward, explores its practical implications and summarises the main finding of the overall research.