Preface

Everybody agrees that competition policy is beneficial for the economy. We all know that competition helps keep prices down and stimulates innovation, growth and consumer choice. Yet it is here where the consensus dissolves. Various visions on the very phenomenon of competition as well as its role in a broader set of economic policies have competed fiercely for many decades. The area of competition law, economics and policy is known for its hot discussions among the proponents of different views and theories. This book is focused on the most existential aspects of these conflicts, presuming the beneficial essence of them. It has several key objectives and offers several key messages.

The main argument of this book is that the economic (alongside political and cultural) aspect of competition constitutes the essence of democratic governance and as such should be treated as an autonomous political goal. It should not be always subordinated to the benchmark of efficiency or any other economic value, by which we often evaluate the performance of competition policy and even define its legitimacy. The book explains why competition deserves its regulatory protection not only when reliable evidence of its positive economic impact exists. It will be demonstrated that the current reductionist trend of narrowing down the category of competition to its economically beneficial outcomes exclusively is conceptually confusing, methodologically misleading and ideologically wrong. Semantically, the very gist of competition is embedded in the Smithian notion of the invisible hand. Competition by definition implies such subjective elements as spontaneity, unpredictability, contest, rivalry and luck. It would be naïve to argue that any sustainable economic governance can rely solely on the rationale of the invisible hand. Yet it is also naïve to attempt to transform the whole spectrum of competition’s attributes to the measurable yardstick of economic calculus. And it is equally naïve to narrow its scope to welfare-oriented goals exclusively. Visualising the invisible hand is an intriguing exercise, but the exercise is futile by definition.

The above-mentioned argument will be investigated from various points of view. The argument cannot be put forward in isolation and requires a number of ancillary supportive claims. Each chapter of this
book develops one or two such claims. Schematically, the algorithm is as follows: (1) tracing the evolution of economic thoughts on competition; (2) showing when exactly (and why) the dominant neoclassical perception of competition overshot the mark; (3) consulting other disciplines (namely, philosophy and legal theory) in the search for a concurrent non-economic theory of (economic) competition; (4) comparing the economic incarnation of competition with its political and cultural incarnations; (5) putting forward a normative hypothesis, which consolidates current European competition law with the philosophical theories of competition and its jurisprudential apparatus; (6) smoothing most of the regulatory turbulence emerging from such a proposal by exploring the mechanics of balancing; (7) demonstrating its practical implications.

The book begins with a historical overview of the phenomenon of competition as perceived by different economic schools and theories. It summarises the common trends and offers an explanation of why no mainstream (equilibrium-based) economic theory of competition is sufficient to explain the whole spectrum of attributes of the competitive process, let alone to offer reliable tools for its further improvement. At the very outset, it is important to stress the obvious: the book is not critical of economics as such. Furthermore, the leading role of economics in the area is not even challenged. The book is critical only of monopolisation of the wisdom of competition by the discipline of economics. The criticism is not hostile, but constructive. Several effective methodological mechanisms for mitigating the exclusivity of economics will be offered in different parts of the book and then synthesised into a complete theory of dialectical competition in its conclusion. For example, an analysis of the phenomenon of interdisciplinarity and its application in the area of competition policy will help us to understand paradigmatic algorithms of the relationship between different disciplines. The clash between law and economics is not unique. Law faces similar clashes with other disciplines. For example, ethics invades the area of law in the realm of legal theory. The book offers analysis of very interesting parallels in the relationship of law with economics as seen in the area of competition policy and law with morality as seen in legal theory. Exploring these similarities will help us to understand better the regulatory essence of competition policy as well as to disprove some misleading assumptions, which are popular in the contemporary vision of competition policy. The centre of gravity of competition policy should be shifted from values, which are external/peripheral to the very phenomenon of competition (i.e. welfare, growth, integration or innovation), to the issues that are at its very core: namely, the competitive process. The book tests the hypothesis that the main reason why mainstream economic theories tend to under-appreciate the autonomous character and normative
significance of the competitive process is based on linguistic confusion. These theories (wrongly) equate the concept of competitive process with the phonetically identical concept of perfect competition. Then they subordinate the former to the latter, considering the process as such as (i) unmeasurable; (ii) redundant and (iii) meaningless. And after such subordination is justified and accepted they replace one category with the other; and then the others (where being procompetitive nowadays means being to the benefit of consumers, growth, innovation etc.). The concept of perfect competition, as we know, is a mere model. It is not a value; it is a hypothetical assumption, a mathematical fiction, whereas the concept of competitive process, conversely, is an ideological belief in entrepreneurial freedom as discovery procedure. These two concepts share nothing but the name ‘competition’ and one should not define the other.

The next chapter traces the evolution of competition law, economics and policy in the US and EU. Unlike the previous chapter, this one addresses the history of regulatory mechanisms of competition policy rather than looking at how the phenomenon of competition is understood by economics. It is more descriptive than analytical. It basically reminds the readers of the milestones of the development of competition policy, focusing mainly on the issues, which are discussed in the following chapters of the book. Methodologically, this chapter is comparative. It first compares various schools of competition policy; and then it compares the visions of competition policy as perceived on both sides of the Atlantic. The theory offered in this book is to a large extent based on the premises that in one form or another have been used by various authors/regulators of the past. Yet, most of them nowadays are considered as obsolete or radical. By analysing the history of views on competition, this chapter reveals the key pitfalls of such theories offering effective solution/mitigation of these obstacles. Despite exploring all major schools of contemporary competition policy, attention is devoted mainly to Ordoliberalism. This set of theories today is often caricatured and marginalised. Being in general supportive of its key premises, the book, however, does not aim to offer an apologetic vision of Neo-Ordoliberalism, trying rather to extract and conceptualise further those components of Ordoliberalism that are necessary for developing an original theory of competition policy, the theory of dialectical competition. The same can be said about the Austrian (and Hayekian) schools of competition: some central arguments and observations on the phenomenon of competition are internalised by this book, yet the key normative proposition about unregulated competition qua spontaneous order is accepted in very revised and mitigated form.

After looking in Chapter 2 at the perception of competition in economics and after providing an overview in Chapter 3 of the development
of the key regulatory schools of competition policy, Chapter 4 offers an analysis of the very phenomenon of competition. While Chapter 2 was mainly critical, apagogoical and discursive and Chapter 3 mainly descriptive and comparative, the next one can be described as analytical, normative and constitutive. It is in a sense one of the main components of the book. Several important tasks are accomplished in the chapter. First, it analyses the phenomenon of competition from the point of view of philosophy. The problem of the competitive process attracted the attention of political, philosophical and legal thought long before the very discipline of economics emerged. Some of the views on competition developed by these disciplines are very relevant today, even though most of them are completely ignored by the dominant competition policy discourse. The chapter begins with a philosophical overview of the ideas on competition from Antiquity to the present day, focusing mainly on those aspects of the phenomenon which can and should be internalised by the domain of competition policy. Another important task of this chapter is to explain the nature of competition by looking at two of its philosophical ‘twins’: dialectics and freedom. Many philosophers have offered very detailed and analytically perfect theories on both phenomena. The knowledge generated in these disciplines will be internalised, ‘translated’ and contextualised. The task of this part of the chapter thus is to enrich the views on (economic) competition, which are often seen in the domain of competition policy as dominant (if not exclusive), while in reality they represent only a (peripheral) part of the theory of competition sensu largo. The chapter has two other objectives: it offers a comparison between the economic part of the phenomenon of competition and its political and cultural parts, arguing that the latter two are conceptually and normatively similar to the economic one, while they are almost never perceived comparatively. The comparison of these three incarnations of competition reveals many intriguing similarities and one drastic difference. It is exactly this difference which underpins the normative proposal of the book. Both in politics (election) and culture (free speech) the competitive process is protected for two main reasons: (i) because it is efficient and (ii) because it is a matter of ideological choice, made by society. In other words, we believe in elections and free speech not (only) because they (always) deliver the best results, but (also) because they are two important ingredients of liberal democracy sensu largo. Neither elections nor free speech guarantee the best performance: we tolerate elements of populism in politics and hate speech in culture. It is not the case with economic competition inasmuch as it remains totally subordinate to efficiency. The practice is tolerated/encouraged only when it is economically efficient. Furthermore, the term ‘efficiency’ is often replaced by the term ‘competition’. It is not uncommon
nowadays to argue that the practice is procompetitive only if it provides positive outcomes for consumers/welfare/growth etc. even though from the perspective of formal logic such a syllogism is a complete fallacy. This analysis enables a normative statement to be made that competition is the distinctive feature of liberal democracy. The theoretical part of this statement forms the foundation of the normative proposal offered in the book. This proposal will be explored in the conclusion, where all components of the theory of dialectical competition are reduced to common denominator and summarised.

Prima facie the normative proposal offered in Chapter 4 of the book may appear radical and unrealistic. If true, these two attributes would make the task of the whole book rather speculative and futile. To avoid this misleading conclusion, Chapter 5 develops a very detailed and scrupulous theory of balancing. The key hypothesis here is that the idea of a normative hierarchy of competition in the pantheon of societal values in liberal democracy does not exempt competition from trade-offs on the regulatory level. In other words, competitive process can remain at the top of the political, economic and cultural values of any liberal democracy, but it can never be protected in its entirety. Compromises are needed; choices are unavoidable. Sometimes, the choices are tragic. The task of this chapter thus is to explore the mechanics of balancing, which is used by any regulatory power/decision-maker in any democratic country. The book offers a number of systematised observations about the phenomenon of balancing, explaining not only the very nature of compromise, but also conceptualising the communicative process between the advocates of different values and those who make decisions. This analysis is made on the ‘objective’ level of constellation of regulatory values as well as on the ‘subjective’ level, where these values compete with each other to be prioritised by the decision-maker. In other words, this chapter analyses the details of the mechanism of balancing and explains why competition policy, while focusing on the competitive process, does not isolate itself from other legitimate regulatory values – including such important values as welfare, growth, market integration or innovation.

After analysing these components of the theory of dialectical competition, the book offers a number of examples where competition policy should benefit from a rich and comprehensive domain of legal theory. The dominant view that competition is mainly the realm of economics is reductionist. Legal theory discusses a number of problems relevant to today’s competition policy. The solutions developed by this discipline are almost never discussed in the area of competition policy. Chapter 6 seeks to remedy this situation, offering a sketchy overview of the problems and the debates in legal theory, which could help to understand better the
problems discussed in the area of competition law. The task of this chapter is to build the bridges between two disciplines that are rather ignorant of each other: the theory of law and the economic theory of competition policy. The book does not argue that legal theory should replace economic analysis. It argues that legal theory should not be ignored in analysing the concept of economic competition in general, and particularly when discussing its legal regulation.

The last chapter of the book has two main objectives. It first offers a summative representation of the proposed theory of dialectical competition. Secondly, it explains how the key theoretical premises developed in the book could be applied in practice. It does not offer a comprehensive ‘translation’ of the whole matrix of legal problems to the theory of dialectical competition, but uses paradigmatic cases as examples of applicability and effectiveness of the theory in European legal practice.