3

The Poverty of Competition Law

The Short Story *

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3.1 INTRODUCTION

For a long time considered a fringe topic, of interest for developing and emergent economies, the question of inequality and poverty has recently taken centre stage in mainstream competition law scholarship in developed countries. Some of this literature deplores the current state of competition law, which has largely ignored this issue, and argues for a different paradigm that would actively engage with economic inequality and its causes. This literature on the goals of competition law does not also usually engage with the issue of the strategies available to address economic inequality concerns. One may adopt the strategy of *removing* the various obstacles identified that generate and support the specific form of inequality of interest and/or the preferred strategy of *compensating* through the transfer of adequate resources the individuals (or groups) affected by inequality, the latter being the strategy preferred by economists because of the separation in welfare economics of issues of efficiency from issues of distributive justice.[1]

While thought-provoking and suggesting a variety of reforms, these studies have not so far offered a coherent theoretical argument and framework explaining why equality, and its various facets, should become a concern for competition law, and how this will interact with the existing economic efficiency- and/or consumer surplus-oriented paradigm of competition law. If one is to take equity concerns seriously, it becomes essential to provide a solid theoretical framework that would engage with the arguments put forward by those defending the status quo. These are essentially three: (1) the need for competition law to develop concepts and measurement tools that justify, from a welfare perspective, the recourse to state intervention in markets, welfare being narrowly

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[1] See, for instance, the way this debate is framed in the recent book by M. J. Trebilcock, *Dealing with Losers: The Political Economy of Policy Transitions* (Oxford University Press, 2015).

defined, for methodological and ideological reasons; (2) the availability of other, presumably more effective, institutions than competition law to deal with inequality; and (3) the existence of a trade-off between equality and efficiency, meaning that focusing on equality may harm economic efficiency.

This Chapter mostly engages with the last two arguments.[2] I show how the mainstream paradigm of competition law tackles issues of economic inequality in an indirect and implicit way, distributive justice choices often remaining unacknowledged and almost never addressed upfront. Taking a social contract perspective, and noting the hybrid nature of competition law, which is a tool of economic order, but also a form of social regulation, I argue that issues of distributive justice and economic inequality should take a more visible and significant role in competition law analysis.

The study then turns to the institutional question, examining the various instruments that governments use in order to equalise, and the respective role of more conventional tools against inequality, such as taxation, concluding that the institutional argument against equity concerns in competition law does not stand serious scrutiny. I examine the various instruments that governments use in order to equalise, and the respective role of more conventional tools against inequality, such as taxation. I then delve into the availability of equally effective alternative institutions and compare their advantages and disadvantages to competition law. I critically assess the argument that there is a trade-off between equality and efficiency, and that focusing on equality may harm economic efficiency, which has often led to prioritising economic efficiency concerns at the expense of less equality.

The final part revisits the question of what is to be equalised. Drawing on the idea of 'complex equality', I argue for a fairness-driven competition law whose purpose will be to equalise the structural position of the individual (or collective) agents in the various overlapping social spheres in which they are active, so that economic power is not easily converted to cultural or political power. I will briefly examine the contours of this fairness-driven competition law, hopefully showing that competition law's enrichment with equity concerns is both politically necessary and conceptually appealing.

3.2 COMPETITION LAW FOR REDUCING INEQUALITY: A POPULIST APPROACH?

A number of authors have recently put forward the idea that competition law should aim to reduce inequality, in addition to its more conventional set of

[2] A longer study also explores the first one (I. Lianos, 'The Poverty of Competition Law – The Long Story' (CLES Research paper 2/2018, UCL Faculty of Laws).

objectives.[3] This may lead to more aggressive competition law enforcement against the abuse of market power.[4] The consumer welfare standard should be calibrated to prioritise antitrust action that takes into account the distribution of income and wealth and that benefits the middle class and the less advantaged.[5] These authors accept the possibility that 'anticompetitive conduct by the less well-off that extracts wealth from the rich might not be condemned',[6] and argue for antitrust remedies that primarily benefit less advantaged consumers.[7] Conduct may be considered anticompetitive 'if it harms middle- and lower-income consumers, even while benefiting wealthier consumers and shareholders'.[8] Accepting these suggestions would imply the inclusion of an explicit distributional perspective in the enforcement of competition law.[9]

There are various ways this concern may be operationalised. Economic and social equality can be recognised as one of the goals of competition law, along with consumer welfare and efficiency,[10] for instance by forming part of a broader and explicit 'public interest' standard. This would give a higher priority to public interest goals than consumer welfare and efficiency, such standard also applying in non-merger cases.[11] Proponents of this idea call for a greater simplification of antitrust rules, away from the complicated and expensive to implement rule-of-reason approaches, which are perceived as defendant biased. They are also in favour of structural remedies, instead of 'complicated conduct remedies', which would make antitrust agencies more accountable and transparent.[12]

According to these authors, antitrust should aim to tame economic concentration and to distribute economic ownership and control. This will prevent unjust wealth transfers from consumers to firms with market power, and will preserve open markets.[13] In their view, the simplification of antitrust should aim to restore 'a progressive-populist antitrust under the citizen interest standard', breaking with the past lax approaches towards mergers, monopolisation and vertical restraints. This may go as far as challenging the possession of damaging monopoly and oligopoly power by firms through some form of 'no-fault' monopoly or oligopoly doctrine, whenever possessing a monopoly or an oligopoly 'inflicts substantial injury and cannot be justified on operational grounds, such as economies of scale'.[14]

3 See, among others, J. B. Baker and S. C. Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 *Georgetown Law Journal* 1, 11; L. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 *Harvard Law and Policy Review* 235, 245.
4 Baker and Salop, 'Antitrust, Competition Policy, and Inequality', 22–3.
5 Ibid., 18–20.
6 Ibid., fn. 61.
7 Ibid., 20.
8 Baker and Salop, 'Antitrust, Competition Policy, and Inequality', 24.
9 See, T. Atkinson, *Inequality: What Can Be Done?* (Harvard University Press, 2015).
10 Baker and Salop, 'Antitrust, Competition Policy, and Inequality', 25.
11 Ibid.
12 L. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 *Harvard Law and Policy Review* 235, 276.
13 Ibid., 279.
14 Ibid., 285. These proposals are reminiscent of some suggestions made in the past. On the basis of this declaration of the inability of Section 1 of the Sherman Act to deal with the 'oligopoly problem' and

The emphasis on 'populist' antitrust is understood as a counterpoint to the technocratic consensus built over the last three decades, first in the US, then in the EU and some other jurisdictions, that competition law should rely on the learnings of neoclassical price theory and on economic efficiency considerations, although the extent of influence of the latter varies from jurisdiction to jurisdiction.[15] Technocracy presupposes the systematic integration of scientific (here economic) expertise in policymaking and implementation. In addition to the criticisms, a growing number of competition law scholars have also expressed concern over the apparent dissociation of competition law technocracy from the political sphere, and the resulting 'democratic deficit' that has probably ignited the 'populist' backlash we have observed in recent years.[16]

These different proposals have been criticised, and the debate is still ongoing among the competition law and economics expert community. Although it seems relatively uncontroversial that lack of competition and market power may contribute to inequality, a more fundamental issue consists in understanding whether reduced competition in markets constitutes one of the most significant sources of inequality, or whether it plays a relatively minor role, in which case, it could be argued that one should take care of other, more 'significant causes' of economic inequality. These other causes may relate to inheritance of wealth and human capital inequality, which acts cumulatively along the various generations and may lead to substantial differences in economic power and consequently inequalities in income. These may be exacerbated by the possibility of those possessing capital to use these assets as collateral in order to obtain loans on financial markets, something that is not possible for those that do not hold capital (property, tangible and intangible assets), and who exclusively rely on their labour, which cannot be used as collateral.[17]

As valid as these concerns may appear, it could be argued that the consumer welfare approach prevailing in most competition law systems around the world already takes into account some of these distributive justice concerns. But, is this the case?

the difficulties of expanding the scope of both Sections 5 of the FTC Act and 2 of the Sherman Act, the White House Task Force on Antitrust Policy (the *Neal Report* of 1968), and the Industrial Reorganization Act proposed by Senator Philip Hart in 1972 suggested the targeted breakup of tightly oligopolistic industries, a prospect that was heavily opposed by antitrust conservatives, influenced by the Chicago school of antitrust economics, whose intellectual influence began to rise in the 1970s (P. C. Neal, W. F. Baxter, R. H. Bork and C. H. Fulda, 'Report of the White House Task Force on Antitrust Policy' (1968) 2 *Antitrust Law and Economics Review* 11; S. 3832, 92nd Congress, 2nd Session (1972)).

15 This could be considered as the essence of the 'economic approach' in competition law. For a discussion of the view of antitrust as technocracy, see D. A. Crane, 'Technocracy and Antitrust' (2009) 86 *Texas Law Review* 1159.

16 H First and S Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81(5) *Fordham Law Review* 2543.

17 For a discussion of this distinction between capital and labour as a contributing factor to inequality, see G. M. Hodgson, 'How Capitalism Actually Generates More Inequality'; G.M. Hodgson, Conceptualizing capitalism: A summary, (2016) 20(1) *Competition & Change*, 37 (Evonomics), available at http://evonomics.com/how-capitalism-actually-generates-more-inequality

3.3 THE CONSUMER WELFARE APPROACH AND DISTRIBUTIVE JUSTICE CONCERNS

In its simplest, the case for intervention against market power is based on an understanding that a substantial position of market power forms the classic case of market failure.[18] Market failure is a general term describing situations in which market outcomes are not Pareto efficient. Pareto efficiency occurs when resources are so allocated that it is not possible to make anyone better off without making someone else worse off. This is an abstract concept, which is grounded on the theoretical construct of general equilibrium, which looks at the economy in its entirety, that is, where all markets are considered together. In practice, though, the case against monopoly (as the archetypal example of market failure due to market power) is based on partial equilibrium analysis, which looks at only one market at a time, characterised by its demand and supply curves.[19] In a nutshell, to focus on a single market rests on the assumption that the levels of income and the prices of both substitute and complement products are fixed. Otherwise, an increase in income levels would shift the demand schedule outwards.[20]

By definition, this assumption does not consider the implications of a change of prices of substitute or complement products in a market on income levels. This is a quite heroic assumption to the extent that each market is analysed independently of others and interdependencies between prices in one market and income levels in another are usually not taken into account. Although the partial equilibrium model may be useful for analysing distributional consequences within the same relevant market, it ignores distributional implications in the other parts of the economy. Although from the point of view of economic efficiency, this simple summary of a complex system may provide sufficient information when analysing the effects of a price change on a specific market, from the point of view of equality, it is less so, to the extent that the analysis in this case would be to analyse the distribution of wealth among the people of a community, by definition active in multiple markets, as consumers, workers, shareholders, etc. But this is the price to pay for the benefits of the simplicity of the model and the capacity to draw inferences from it.

Consequently, the distributional implications of an anti-competitive activity within a relevant market are the bread and butter of competition law. The trigger for competition law enforcement is (likely) changes to consumer surplus caused by an increase in price/restriction in output due to the exploitation of market power (or,

18 Part of the discussion in this section and the following one draws on I. Lianos, V. Korah with P. Siciliani, *Competition Law: Analysis, Cases and Materials* (Oxford University Press, 2019).

19 See, for a discussion, G. J., Werden, *Antitrust's Rule of Reason: Only Competition Matters* (US Department of Justice – Antitrust Division, 2013).

20 The same holds for a reduction in the price of complement products (which correspond to a discount in the price for the combination of products); whereas a reduction in the price of substitute products would shift the demand schedule inwards (since consumer would demand a similar price reduction to keep purchasing the product sold).

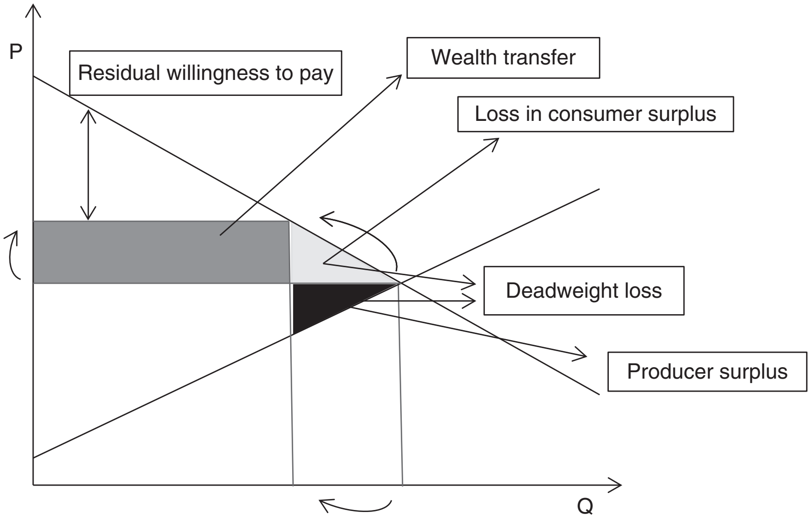

FIGURE 3.1 Market power and efficiency

more concretely, the likelihood that an increase in market power will lead to its exploitation). This is basically treated as a proxy for consumer welfare, although the exact definition of this term is a matter of controversy.[21]

Consumer surplus can be graphically depicted as the area under the downward sloping demand curve but above the price charged (i.e. the residual consumer willingness to pay) (see Figure 3.1). Total surplus is the sum of consumer and producer surplus, the latter roughly corresponding to the accounting concept of operating profit margin, so that changes in producer surplus should equate to changes in profits.

Usually, looking at changes in total or consumer surplus makes no difference in practice, since both tend to move in the same direction, as graphically captured by the deadweight loss, which is the loss of consumer and producer surplus due to a restriction in output caused by an increase in price, and stands to signify how allocative efficiency has worsened due to the exploitation of market power. As put by Werden '[a] nything enlarging the metaphorical pie offers a potential Pareto improvement because it is possible to make at least one individual better off while no one is worse off'.[22]

In this sense, the case against the exploitation of substantial market power, if one takes an economic efficiency perspective, is not linked to the transfer of wealth from

[21] One may, for instance, refer to the use of the term 'consumer welfare' by R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1978), 66, advancing a 'consumer welfare prescription' for US antitrust law, but basically confusing this concept with allocative efficiency (loss of total surplus), as he conceived 'consumer welfare' as an efficiency and not a distributive justice goal. For a discussion, see K. Heyer, 'Consumer Welfare and the Legacy of Robert Bork' (2014) 57(S3) *Journal of Law and Economics* S19.

[22] Werden, *Antitrust's Rule of Reason*, 28.

consumer to producers over those (infra-marginal) units of output still sold (i.e. the rectangle in the graph above, also called wealth transfer), but merely on the lost transactions which could have taken place under a more competitive scenario (i.e. the deadweight loss).[23] In any case, for operational purposes the focus is on consumer harm, as captured by the (likelihood of) higher prices and lower quantity; bearing in mind that in practice hardly anyone in the field of enforcement ever actually attempts to measure/estimate actual changes in either total or consumer welfare.[24]

Beside allocative efficiency, it is often argued that a competitive equilibrium will also maximise productive efficiency, where output is produced with the least amount of resources, given the current set of production technologies – i.e. demand is served by the most efficient firms. This is not, however, always the case, in the sense that there are market configurations where a trade-off between allocative and productive efficiencies triggered by an increase in a position of substantial market power might emerge. Oliver Williamson put forward the possibility of a trade-off between allocative inefficiency and productive efficiency, coming to the conclusion that small cost savings may offset relatively larger price increases, thus entailing a more permissive standard for antitrust enforcement.[25] However, his conclusions were reliant on strong assumptions, such as that the market configuration before the increase in market power was competitive; whereas if firms had already some degree of market power (so that prices were already above costs) total welfare would most likely be reduced, i.e. alongside consumer welfare.[26]

The Williamsonian trade-off between productive and allocative efficiency also takes place within a static framework, that is holding technology and the product space fixed. In reality, firms compete also through innovation, which could either be process oriented (i.e. increasing productive efficiency) or product oriented (improving the variety and/or quality of their offer). Under these circumstances, the trade-off is not as much between productive and allocative efficiency, but between dynamic and allocative efficiency, the former, more elusive, concept capturing the idea that product innovation, where firms compete on quality (horizontal and vertical)

[23] The irrelevance of distributional concerns is normally justified with reference to the 'compensation principle' (also called the Kaldor–Hicks efficiency criterion, or potential Pareto improvement) which posits that, if gainers can compensate losers and still be better off, the change observed in the partial equilibrium analysis is desirable. That is to say, even if the compensation never actually takes place, it is down to the political system to take care of the redistribution of the 'pie' (the separability thesis).

[24] There are some examples of competition authorities commissioning studies into the effects of their past decision, thus basically assessing whether their intervention (or lack thereof) has increased consumer surplus. For an overview, see, OECD, *Impact Evaluation of Merger Decisions* (2011) available at www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf

[25] O. E. Williamson, 'Economies as an Antitrust Defense: Welfare Tradeoffs' (1968) 58 *American Economic Review*, 18.

[26] M. D. Whinston, 'Antitrust Policy Towards Horizontal Mergers', in *Handbook of Industrial Organization* (Elsevier, 2007), vol. III, ch. 36, 2374.

attributes, as opposed to price/quantity in a static fashion, is equally important for the maximisation of social welfare in the long run.

Traditionally, the analysis of market power, and the corresponding trade-offs outlined above, focus on economic efficiency and do not explicitly deal with distributional issues. The case against monopoly is motivated by the desire to correct for the inefficiency caused by lost (marginal) transactions (or volume effect) – the deadweight loss – rather than the implicit wealth transfer from consumers to producers over (infra-marginal) transactions. Moreover, reliance on firms' profitability as a guide for enforcement is problematic in light of the difficulty to tell whether high profits are the results of superior efficiency/quality, or the outcome of anticompetitive entry and expansion barriers. Focusing on the source of the superior profits of the firms, superior efficiency/quality or anticompetitive strategies, indicates some form of 'moral' judgement on the worthiness of curative action, which may be motivated by the idea that competition law should promote competition 'on the merits', and that a successful competitor should not be turned away when he wins. It may also result from a more Schumpeterian idea that superior profits may lead to an innovation race that would be overall welfare enhancing (in the sense that technological progress will spur an increase of total surplus).

However, it is possible to build a broader narrative for intervention, on the basis of some wider conception of 'consumer welfare' or 'consumer harm'. The concept of 'consumer harm' has been used to promote the view that competition law takes into account only the interests of a group, consumers, and not those of other groups of actors in the economy (e.g. managers, shareholders, employees). From this perspective, the various expressions of consumer harm employed in competition law (i.e. consumer welfare, consumer harm, consumer choice) may be linked, to varying degrees, to the principle of distributive justice. Certainly, the concept of distributive justice has multiple dimensions and its meaning has evolved through time,[27] but it is possible to define it as referring to the morally required distribution of shares of resources among members of a given group, either because of their membership to that group or in accordance with some measure of entitlement which applies to them in virtue of their membership. This is understood dynamically, that is across various situations in the specific jurisdiction. Rights and duties in distributive justice are thus 'agent-general', as they relate to a specific category of actors or group.

There may be various theoretical justifications for an approach that would favour consumers, if one starts from the hypothesis that there is a state of inequality in the structural position of the group of 'consumers' vis-à-vis other groups in society. One could argue for a public choice/political economy view based on the relative weakness of consumers' lobbying compared to firms' or workers' lobbying,[28] to the extent that their heterogeneity and their great numbers make collective action in

[27] See, S. Fleischacker, *A Short History of Distributive Justice* (Harvard University Press, 2005).

[28] See D. Neven and L.-Hendrik Röller, 'Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control' (2005) 23 *International Journal of Industrial Organization* 829.

their interests more difficult to organise. Competition law may also have been designed to offer an institutional bias in favour of consumers,[29] to the extent that other areas of law prioritise the interest of other societal groups (e.g. labour law–the interest of workers, company law–the interest of shareholders, intellectual property law the–interest of inventors).

One may also take a social contract perspective, such as that put forward by John Rawls[30] to argue for the protection of consumers, rather than other groups that may be affected by a restriction of competition.

According to Rawls's first principle of social justice, each person was recognised as having an equal right to the most extensive liberties compatible with similar liberties for all, a principle to be inscribed in the political constitution. Rawls's second principle of social justice advances that social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and, second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle or maximin).[31] His justification of this principle of justice makes use of a thought experiment, a hypothetical situation called the 'original position', where individuals (an impartial observer) choose the basic principles of the society behind a 'veil of ignorance', that is without knowing their own position in the resulting social order, as well as being ignorant of their personal identities, individual social standing and chances in life.[32] The original position thought experiment relies on several assumptions. First, Rawls assumes that people are self-interested and make choices in order to maximise the primary goods they would use for carrying out their life plan, without however having any knowledge as to the distribution of endowments in society. Second, Rawls assumes that people are extremely risk averse, hence their choice, at the original position, to promote the situation of the least advantaged group.

Under the difference principle, Rawls favours the establishment of institutions that would maximise the improvement of the 'least-advantaged' group in society, by enabling these individuals to exercise control of wealth and other economic resources. This avoids Rawls the need to make any interpersonal comparisons of utility, between rich and poor persons, as what counts is the welfare of the least well-off person. By 'least advantaged' group Rawls refers to 'those belonging to the income class with the lowest expectations'.[33] Although the advantaged may deserve their

29 J. Farell and M. Katz, 'The Economics of Welfare Standards in Antitrust' (2006) 2(2) *Competition Policy International*.

30 See, most notably, J. Rawls, A *Theory of Justice* (Harvard University Press, 1999, first pub. 1971).

31 Ibid., 63–73.

32 Rawls's impartial observer arrives at rational decisions under conditions of uncertainty. In contrast, Harsanyi's impartial observer makes decisions under conditions of risk and therefore may take into account the frequencies of different income levels. See, J. Harsanyi, 'Cardinal welfare, individualistic ethics and interpersonal comparisons of utility', (1955) 63 Jourrnal of Political Economy 309.

33 J. Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), 59.

greater share of surplus because of their greater contribution to production, it is important to also aim to improve the 'least advantaged group' in society to enhance their active participation in the communal deliberative life of the community.[34] Rawls also recognises the role of 'reflective equilibrium' which enables a deliberative process under a coherence account of justification that may adjust the initial decision of general justice principles, that is, the current set of beliefs deduced from the hypothetical thought experiment of the original position, with a process of reflective deliberation incorporating a wide range of diverse moral commitments into a coherent moral system in which all moral beliefs are consistent and mutually supporting.

Would adopting a Rawlsian perspective that incorporates an equality concern, in the sense of a maximin social welfare function, imply the choice of a consumer welfare approach? Hence, the category of 'final consumer' may be considered as the 'least advantaged' category, whose interests an impartial observer may opt to protect, when designing the desirable social order behind a veil of ignorance.

This may provide a theoretical justification for a distributive justice principle that would promote the interest of final consumers in competition law. The same principle may justify weighing more the effects of an anticompetitive conduct on low-income categories of final consumers, as opposed to efficiency gains passed on to a wealthier category of final consumers or suppliers, by integrating some distributional weights, on the assumption that it is more likely that corporate shareholding, either directly, or indirectly through pension funds, is more widespread for the rich than for the poor.[35]

[34] Hence, this is independent of their eventual contribution to the productive process (G. Warnke, *Justice and Interpretation* (Polity, 1992) 10), although as Rawls remarked 'it seems impossible to avoid a certain arbitrariness' in defining the category (*Theory of Justice*, 98). In more recent work Rawls defined the 'least advantaged' in relation to the share they have of primary goods, noting also (*Justice as Fairness*, 57–61) that 'the least advantaged is not a rigid designator'. However, even if one takes the view that Rawls requires some form of participation in the productive process for the 'least advantaged' category, it may easily be argued that in the digital economy consumers participate in the production process by enabling their data to be harvested by digital platforms and then used as input in the input–output process that ends up with the monetisation of 'big data' in product or financial markets.

[35] On the use of distributional weights in competition law, see *Superior Propane*, where the Canadian Bureau of Competition when considering the possible trade-off between efficiencies and likely anticompetitive effects, took into account, with regard to the latter, not only the loss in allocative efficiency but also the socially adverse portion of the wealth transfer from lower-income residents (the consumers) to bulk propane retailers (the suppliers), thus adhering to a 'balancing weights' approach (Federal Court of Appeal, *Canada (Commissioner of Competition)* v. *Superior Propane Inc. and ICG Propane Inc.*, [2001] 3 FC 185, paras. 139–40; *Canada (Commissioner of Competition)* v. *Superior Propane Inc.* ('Propane'), Competition Tribunal redetermination (2002), paras. 47–57; upheld by Federal Court of Appeal, *Canada (Comm'r)* v. *Superior Propane Inc. and ICG Propane Inc.*, [2003] FC 529). For discussion, see R. O. Zerbe and S. Knott, 'An Economic Justification for a Price Standard in Merger Policy: The Merger of Superior Propane and ICG Propane' (2004) 21 *Research in Law and Economics* 409.

If one refers to the criterion of income, in order to define the 'least advantaged' category, it will not necessarily follow that competition law should protect consumers, as opposed to shareholders or employees. In some circumstances (e.g. a luxury good market), final consumers may have a higher, on average, income than the suppliers of these goods, in particular if the latter are small and medium firms.[36] However, in most cases, this does not occur. Alternatively, it may be argued that final consumers are the 'least advantaged' group if one focuses on the competitive process, as they may be exploited by intermediary consumers (e.g. retailers) or suppliers, without having the possibility of passing on these losses to anyone else in the value chain (unless, for example, they are also suppliers in other relevant markets). All market actors are, to a certain extent, final consumers, while not all of them are necessarily suppliers, competition law being non-applicable to employment relations. This would suggest that competition law should aim to protect final consumers, but not necessarily intermediary consumers.

Notwithstanding this indirect link between competition law and distributive justice it may be argued that competition law does not address inequality directly, to the extent that it intervenes only when there is market distortion following the exercise of market or economic power; hence, there is already some indication of a possible reduction in economic efficiency.

3.4 IS THERE A DIRECT LINK BETWEEN COMPETITION LAW AND INEQUALITY?

The first issue one needs to determine is whether market distortions and the exercise of market power constitute the main cause for economic inequality. Many causes could explain the recent rise in poverty and inequality: the globalisation of production, the erosion of collective bargaining systems, the continued drop in real wage values, tax evasion or unfair tax systems. However, market power may be a significant source of both inefficiency *and* inequality. Joseph Stiglitz notes that 'today's markets are characterised by the persistence of high monopoly profits',[37] rejecting Joseph Schumpeter's view that monopolists would only be temporary. He also argues that 'policies aimed at reducing market power can accordingly play some role in the reduction of inequality', although he remains

[36] Although it has been convincingly argued that this holds only in very few situations and that, in most cases, '[t]he returns from market power go disproportionately to the wealthy – increases in producer surplus from the exercise of market power accrue primarily to shareholders and the top executives, who are wealthier on average than the median consumer', as highlighted by Baker and Salop, 'Antitrust, Competition Policy, and Inequality', 11–12.

[37] J. Stiglitz, 'Monopoly's New Era' (2016) available at www.project-syndicate.org/commentary/high-monopoly-profits-persist-in-markets-by-joseph-e–stiglitz-2016–05

careful of setting this as an explicit aim of competition law.[38] Other economists have been equally vocal on the need for a robust competition law intervention against economic inequality. Tony Atkinson has suggested the integration of explicitly distributional dimension into competition policy, among some of his proposals for limiting the growing inequality.[39] A recent report of the Council of Economic Advisers to the White House published in April 2016, tracks the rise of the concentration of various industries in the US, and notes that the 'majority of industries have seen increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012'.[40] Is increasing economic concentration leading to higher degrees of inequality of wealth? This may be a difficult question to answer in view of the overall tendency of wealth concentration that has been observed during the twentieth century and at least part of the nineteenth century,[41] and according to more recent studies, apparently since the fourteenth century,[42] although one should note the various measurement and data-related difficulties for such research endeavours.

There might, however, exist a link between the effects of concentration and the unequal distribution of wealth. In the age of 'secular stagnation'[43] and intense financialisation, when return to capital exceeds economic growth, rentiers or senior executives, which form the bulk of the richest 1 per cent of the population, may

38 J. Stiglitz, 'Towards a Broader View of Competition Policy', in T. Bonakele, E. Fox and L. McNube (eds.), *Competition Policy for the New Era – Insights from the BRICS Countries* (Oxford University Press, 2017), 4, 15; J. Stiglitz, N. Abernathy, A. Hersh, S. Holmberg and M. Konczal, *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity* (Norton (Roosevelt Institute), May 2015, www.rewritetherules.org).

39 Atkinson, *Inequality*, 126–7 ('competition policy should embody explicit distributional concerns').

40 White House CEA, 'Benefits of Competition and Indicators of Market Power' (April 2016), available at www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf ; G. Grullon, Y. Larkin and R. Michaely, 'Are U.S. Industries Becoming More Concentrated?' (31 August 2017), available at https://ssrn.com/abstract=2612047

41 See, for instance, F. Alvaredo, A. B. Atkinson, T. Piketty and E. Saez, 'The Top 1 Percent in International and Historical Perspective' (2013) 27(3) *Journal of Economic Perspectives* 3–20; A. Atkinson, T. Piketty and E. Saez, 'Top Incomes in the Long Run of History' (2011) 49(1) *Journal of Economic Literature* 3; T. Piketty, G. Postel-Vinay and J.-L. Rosenthal, 'Wealth Concentration in a Developing Economy: Paris and France, 1807–1994' (2006) 96(1) *American Economic Review* 236; J. Roine and D. Waldenström, 'Long Run Trends in the Distribution of Income and Wealth', in A. Atkinson and F. Bourguignon (eds.), *Handbook of Income Distribution* (North-Holland, 2015), vol. II, 469.

42 G. Alfani, 'Economic Inequality in Northwestern Italy: A Long-Term View (Fourteenth to Eighteenth Centuries)' (2015) 75(4) *Journal of Economic History* 1058; G. Alfani, 'The Rich in Historical Perspective. Evidence for Preindustrial Europe (ca. 1300–1800)' (2017) 11(3) *Cliometrica* 321.

43 L. Summers, 'The Age of Secular Stagnation: What It Is and What to Do About It', *Foreign Affairs* (17 February 2016) (noting the imbalance between excessive savings and investment, pulling down interest rates, savings tending to flow into existing assets, thus causing asset price inflation and rising economic inequality).

see their share of total wealth increase. One may also rely on empirical evidence linking higher concentration following mergers to higher prices,[44] and evidence showing that in 'winner-take-most' competition, where 'superstar firms' command growing market shares and become highly profitable, one may observe a larger decline in labour's share.[45] This has obviously an impact on economic inequality.

A recent paper of the OECD 'Market Power and Wealth Distribution' shows a substantial impact of market power on wealth inequality.[46] According to the study which relies in terms of methodology on some work previously completed by Comanor and Smiley in 1975,[47] market power may account for a substantial amount of wealth and income inequality.[48] The report found that the increased margins charged to customers as a result of market power will disproportionately harm the poor who will pay more for goods without receiving a counterbalancing share of increased profits as they are not usually shareholders, while the wealthy benefit more from higher profits, due to their generally higher ownership of the stream of corporate profits and capital gains. This study only explored eight developed jurisdictions, thus showcasing the need for equivalent studies to be performed in the context of emergent/developing countries.

Tackling market power in order to improve the position of consumers is therefore good for inequality given that lower prices (or, better still, higher quality/price ratios) improve the purchasing power of disposable income and consequently benefit the poorest quintile, in particular if this leads to lower prices for the goods/items they usually purchase. Moreover, where high profits are siphoned off by corporate elites (i.e. rather than returned to dispersed shareholders), the concern might be that the resulting concentration of income (and, over time, accumulated wealth) is deployed to lobby against redistribution fiscal policies aimed at addressing economic inequality. From a macroeconomic perspective, the concern may be that high profits induced by anticompetitive entry and expansion barriers are not reinvested. The resulting low levels of corporate investments would not only reduce aggregate demand, but also suppress productivity growth, which would ultimately constrain

44 See J. Kwoka, *Mergers, Merger Control, and Remedies* (MIT Press, 2014); J. Kwoka, 'Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes' (2013) 78(3) *Antitrust Law Journal* 619.

45 D. Autor, D. Dorn, L. Lawrence, F. Katz, C. Patterson and J. Van Reenen, 'Concentrating on the Fall of the Labor Share' (2017) 107(5) *American Economic Review* 180.

46 OECD, *Market Power and Wealth Distribution*, DAF/COMP(2015)10, available at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)10&docLanguage=En

47 W. S. Comanor and R. H. Smiley, 'Monopoly and the Distribution of Wealth' [1975]89(2) *Quarterly Journal of Economics* 177.

48 See A. K. Dutt, 'Stagnation, Income Distribution and Monopoly Power' (1984) 8 *Cambridge Journal of Economics* 25 (on a model constructed to depict the Indian economy arguing that reducing monopoly power may have positive effects on both economic growth and income distribution).

wage growth.[49] Shareholders and senior executive managers benefit from returns to capital, and constitute eventually the primary group to gain from market power and monopoly rents. Their share in the total income and wealth increases, in comparison to other groups in society, as returns to capital exceed the rate growth of output and income (wages).[50] It is possible that in the long run, the situation of the largest part of the population (wage workers, small and medium firms shareholders and the unemployed following the exclusion from the market of 'inefficient' firms and economic sectors) will see their income and/or share of wealth stagnate or decrease, while the most affluent parts of the population will benefit from a phenomenal increase of wealth, as this has been documented, at least since the 1970s.[51] Inequality may rise even if the lowest quintiles may also benefit from some additional growth, and the absolute level of poverty reduced. The issue here may be 'relative' and 'subjective poverty', and inequality, rather than 'absolute poverty'.[52] Under these circumstances, aggressive antitrust enforcement ought to be welcome from a distributional perspective as well.

Would this argument hold if one moves to a general equilibrium-plus approach and takes into account income effects in other markets on which the specific agents are present in one way or another (as consumers, senior executives, shareholders, workers)? Some have argued that, at least in the developed world, all consumers are also owners of businesses, and hence they could benefit from monopolistic price increases.[53] Professor Crane has expressed doubts as to the possibility of performing the complex analysis that would be required for an explicitly distributive competition law, as competition authorities would need information about a large number of factors, such as 'the relative wealth of producers and consumers, overcharge pass-on rates, the effects of market power on employees of the firm, the distribution of

49 'Too Much of a Good Thing – Profits Are Too High. America Needs a Giant Dose of Competition', *The Economist*, 26 May 2016, available at www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing

50 See the analysis in J. Furman and O. Orszag, 'A Firm-Level Perspective on the Role of Rents in the Rise in Inequality' (16 October 2015), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf citing also the work of J. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Norton, 2012).

51 See M. Ravallion, *The Economics of Poverty – History, Measurement and Policy* (Oxford University Press, 2016), 102–5; F. Bourguignon, 'World Changes in Inequality: An Overview of Facts, Causes, Consequences and Policies' (Bank of International Settlements, August 2017) 17–21 (noting the common forces behind the rising trend observed over the two or three last decades in a sizeable number of countries with regard to inequality but also observing that some country-specific factors have been at play).

52 Ravallion, *Economics of Poverty*, 106–10.

53 The argument was first made by Bork, *Antitrust Paradox*, 110 when criticising Oliver Williamson's trade-off. See also D. Crane, 'Antitrust and Wealth Inequality' (2016) 101(5) *Cornell Law Review* 1171, 1186 (noting that '[s]hareholding is far from an exclusively upper class vocation' and also arguing (ibid., 1192) that the argument that 'senior managers are the primary beneficiaries of anticompetitive market structures is weak, at best'. Crane argues instead that 'increases in market power yield higher wages for blue-collar employees').

rents between managers and shareholders, the progressive or regressive effects of antitrust violations where government entities are the purchasers, and the distribution of rents among classes of managers'.[54]

Such concerns should obviously be watered down if one takes into account developing and emerging economies, where a few local conglomerates or global multinationals control the economy, there is lack of capital for new entrepreneurs and labour mobility is quite limited.[55] There is significant empirical literature on the welfare losses resulting from monopoly power for the poorest parts of the population,[56] and on the benefits of competition for taming corrupt elites that want to take advantage of the liberalisation process.[57]

Furthermore, it has also been claimed that an 'undifferentiated increase in antitrust enforcement – actions to augment and strengthen enforcement as a general matter' may also produce regressive effects as it can block voluntary action by private firms pursuing wealth redistribution goals.[58] There are indeed circumstances where the relationship between policies aimed at promoting competition and economic inequality is not straightforward. Low levels of corporate investment may result from excessive capacity spurring cut-throat price competition. This can be particularly the case where competition takes place on a global scale and the bargaining power of the local workforce is greatly undermined (e.g. steel production). Similar dynamics can take place where the mobile factor of production is not capital (i.e. with employers threatening to relocate where the cost of labour is lower) but labour itself, thanks to immigration at all skill levels, from seasonal or construction workers to knowledge-economy professionals. Under these circumstances, the common belief is that only firms' top executives can emerge as winners from these ultra-competitive labour markets, whereas the rest of us (i.e. the 99.9 per cent) feel the pressure. These concerns may prompt protectionist calls for state intervention aimed at restricting competition, with the result that both productive and allocative efficiency would suffer. That is to say, policies that may cause economic inefficiencies may be called upon to address economic inequality.

54 Crane, 'Antitrust and Wealth Inequality', 1174.

55 This point is conceded by D. A. Crane, 'Is More Antitrust the Answer to Wealth Inequality?' (winter 2015–16) *Regulation* 18, 19.

56 See, for instance, G. Porto, N. Depetris Chauvin and M. Olarreaga, *Supply Chains in Export Agriculture, Competition, and Poverty in sub-Saharan Africa* (World Bank and CEPR, 2011) (exploring a number of case studies in Africa with regard to cotton, coffee, tobacco and cocoa); J. Argent and T. Begazo, 'Competition in Kenyan Markets and Its Impact on Income and Poverty: A Case Study on Sugar and Maize' (World Bank Policy Research Working Group 7179, January 2015); and the examples included in World Bank and OECD, *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth. Trade and Development* (World Bank, 2017).

57 See, for instance, A. Banerjee, R. Hanna, J. Kyle, B. A. Olken and S. Sumarto, 'The Role of Competition in Effective Outsourcing: Subsidized Food Distribution in Indonesia' (March 2017), available at www.povertyactionlab.org/sites/default/files/publications/553_The-role-of-Competition_in-Effective-Outsourcing_March2017.pdf (regarding outsourcing of food-delivery services).

58 D. Crane, 'Antitrust and Wealth Inequality' (2016) 101(5) *Cornell Law Review* 1171, 1175.

One should also integrate in this analysis dynamic efficiency concerns that are increasingly at play in competition law enforcement. It is often argued that hyper-competitive rivalry is the norm in digital industries subject to 'winners-take-all' competitive dynamics, where a position of super-dominance is the market outcome of strategies based on very aggressive pricing and/or relentless product and process innovation. On the one hand, competition 'for' (rather than 'in') the market means that consumers benefit greatly from lower prices, more convenient mode of consumption and strong innovation. On the other hand, 'winner-takes-all' dynamics raise concerns about excessive economic (and, thus, political) power concentrated in very few massive corporations, to the benefit of a new breed of corporate elites consisting of technical (rather than finance) experts. The picture is made gloomier by the concern that these high-tech giants are the driving force behind automation, which threatens to further weaken the employment prospects of future generations and therefore could have important distributional consequences for a large part of the population. In summary, this would be a world where economic scarcity is no longer the foundation of the market-driven allocation mechanisms underpinning modern capitalistic societies, and where policies aimed at promoting competition in the pursuit of (allocative, productive and dynamic) efficiency could be seen as self-defeating. In contrast, an approach focusing on equality of opportunity for small local entrepreneurs to prosper and achieve a larger scale may become more appealing, despite the possibility of economic inefficiencies.

3.5 IS COMPETITION LAW THE MOST ADEQUATE TOOL AGAINST ECONOMIC INEQUALITY?

The implicit assumption for those criticising competition law intervention aiming to reduce the occurrence of inequality, is that the tax system is a more efficient way of engaging in redistribution than the regulatory system, or a specific facet of the latter, such as competition law.[59] However, one may reverse the order of these arguments and suggest instead that it is *only* if the question of fair and equitable income distribution is addressed by the political system that it may be legitimate for competition law to focus exclusively on economic efficiency.

It is therefore important to take into account the institutional framework for equality-focused state action, such as progressive taxation in the specific jurisdiction, before arriving at any conclusion as to the superiority of other mechanisms of redistribution, such as taxation. The inability of the EU to employ fiscal instruments

[59] This is related to the discussion over the comparison between taxation by regulation and direct taxation, the latter being considered more efficient, *under* very specific conditions (A. Atkinson and J. Stiglitz, 'The Design of Tax Structure: Direct versus Indirect Taxation' (1976) 6 *Journal of Public Economics* 55–75), or more generally the relative efficiency of the income tax system vis-à-vis the legal system in general for redistributing income (L. Kaplow and S. Shavell, 'Why the Legal System Is Less Efficient than the Income Tax in Redistributive Income' (1994) 23 *Journal of Legal Studies* 667).

to systematically redistribute wealth across the Union should therefore be a relevant fact. EU Member States differ greatly in their levels of wealth. McDonnell and Faber note that powerful firms are not randomly distributed across Europe, and hence 'producer surplus is likely to accrue primarily to the most powerful and wealthy EU members, increasing existing wealth disparities at the margins'.[60] Efficient rules that would focus only on total surplus with no attention to the allocation of that surplus between producers and consumers (which is excluded by efficiency analysis as a distributive justice issue) will tend to pump wealth in the 'wrong' direction.[61] In the absence of adequate resources and EU competence to mitigate these distributional consequences across the Union (in view of the absence of an EU corporate income tax and the low wealth transfer from rich to poor Member States (assuming that the qualification of 'rich' and 'poor' states represents average disposable income for consumers)), there may be a less strong argument for separating efficiency, allegedly the domain of competition law, and equality, which should be dealt with by another instrument, such as taxation, in the EU than in jurisdictions, such as the United States, which possess the adequate fiscal instruments to pursue redistribution at the federal level.

More generally, it is questionable that redistributive policies implemented through the taxation system could be considered as a superior option to integrating redistributive concerns in competition law. The claim that the tax system is superior to competition law in redistributing income relies on the idea that the economic system is designed in such a way that it would be possible to eliminate disparities of economic power that lead to wealth and income inequality by introducing changes in the tax schedule to improve the position of the weaker parties. An extreme scenario would be to consider that taxing monopoly profits will be a superior option than implementing competition law remedies with the aim of addressing the monopoly problem. Taxing monopoly profits may not always be a good idea, in view of the subsequent wealth transfers this may entail (as firms may pass on these taxes to consumers). Nor does it deal with the underlying imbalances of economic/bargaining power between the economic actors, which have been at the source of inequality. What it does, as Emmanuel Voyiakis rightly notes in a different context, is to 'increase consumers' *purchasing* power, leaving their bargaining position unchanged'.[62]

The differential of economic power is converted to an imbalance in the 'structural position' of the least advantaged, for instance the poorer consumers, vis-à-vis those with a stronger structural position, the well-off in the specific context, i.e. a firm in a dominant position.[63] Indeed, having additional resources, through the wealth

60 B. McDonnell and D. A. Farber, 'Are Efficient Antitrust Rules Always Optimal?' (2003 Fall) *Antitrust Bulletin* 807–35, 825.

61 Ibid.

62 E. Voyiakis, *Private Law and the Value of Choice* (Hart, 2017), 195.

63 On the concept of structural position, see A. J. Julius, 'Basic Structure and the Value of Equality' (2003) 31 *Philosophy and Public Affairs* 321.

distribution effect of taxation, would not put consumers in a better bargaining position, insofar as they would still occupy the structural position that led to their structural weakness in the first place, in essence the lack of a next best alternative in a monopolised market.[64] To the extent that such structural weakness is to continue, the maintenance of the wealth transfer mechanism, necessary for the transaction to be considered 'fair', would require consumers to resort to some bargaining power in the overlapping game of the political sphere. However, to the extent that economic power may be converted to political power, one may doubt that such a structural position equaliser would operate effectively.

More fundamentally, Voyiakis asks what makes us think that consumers or citizens will have 'a general reason to favor increases in their purchasing power over protections against the use of businesses' superior bargaining power'?[65] Surely, purchasing more and cheaper products is an option that any consumer has reason to value, but, as Voyiakis rightly observes with regard to private law, but this is also relevant in our context, it is not always in the consumers' general reasonable interest to favour rules that value increases in purchasing power rather than preferring competition law enforcement that would leave their structural position less exposed.[66] This is true, in particular, if one takes into account the risk that structural unbalances will not be corrected by effective wealth transfers in the future, in case the economic bargaining power of the dominant undertakings, for instance, is leveraged to political bargaining power that may oppose progressive taxation.

It therefore seems that the argument often made that taxation will be a superior system of wealth redistribution than regulation or competition law, takes a quite narrow perspective. First, it ignores the institutional framework, which might be different in each jurisdiction, and the likelihood that redistribution through taxation may not be a realistic option in the specific political or economic context. Second, it assumes that consumers, or the least advantaged category, will prefer an increase in their purchasing power following the implementation of a system of progressive taxation, which nevertheless will deal only superficially with the problem of the structural weakness of their position vis-à-vis the monopoly, to the implementation of competition law with the aim of taming, or eventually eradicating, the main source of the unequal outcomes in this case, the imbalance of structural positions between the consumers and the monopoly.

Similar arguments have been made with regard to the possibility of satisfying equity concerns through other instruments of state intervention than competition

64 Voyiakis, *Private Law*, 196.

65 Ibid.

66 E. Voyiakis, 'Contract Law and Reasons of Social Justice' (2012) 25 *Canadian Journal of Law and Jurisprudence* 393. A similar conclusion may be reached if one takes the no-envy approach to determining what is a fair allocation of resources (see our analysis below). As Ayal rightly notes, '[e] nvy of consumers (or other producers, unable to enter the lucrative market) granted, it is aimed not at the profit itself, but at the superior position granted to the monopolist pre-existing market imperfections' (A. Ayal, *Fairness in Antitrust* (Hart, 2014), 179).

law, for instance economic regulation. It has been argued that competition law should focus on economic efficiency and the interrelated concept of consumer surplus, leaving to regulation the task of addressing equity concerns.[67] This position rests on the following implicit assumptions: (1) economic regulation is available in the specific economic sector; (2) economic regulators offer a superior institutional mechanism to competition authorities to take into account fairness concerns; (3) economic regulation can take sufficiently into account equity concerns so that there is no need for additional intervention by competition law; (4) there is some form of allocation of tasks between economic regulators and competition authorities, the latter focusing on making markets work better for people, only from a (narrow) economic efficiency perspective, while the former is perceived as a tool whose purpose is to replace the price signalling role of the market,[68] through price regulation, or to 'correct' the market outcome, markets, as a form of social organisation, failing in this case to satisfy social welfare.

In my view, these assumptions and the position of these authors reflect a theoretical confusion and conceptual misunderstandings. First, economic regulation is not always available, and for good reason! In most cases markets work relatively well for social welfare and there is no need for the state to step in in cases of market failure. Our analysis puts forward the idea that in monopolistic and concentrated markets, market failure may take different forms to the traditional output, price or innovation effects, and may negatively affect the type of equality cherished by the specific social contract.[69] These equality effects may be taken into account by economic regulation, but in case they have not, and this is clear if the sector is unregulated, then there is no reason for competition law to ignore these concerns. To the extent that opportunities for regulation are often limited, and the regulatory process burdensome, competition law may be a cheaper institutional alternative to take into account these equity concerns.

Second, it is possible that regulation may take sufficiently into account fairness concerns. However, it is not clear that this will be done in the most efficient (i.e., less wasteful) way. Regulation may be quite intrusive to economic freedom and free markets. It is more prone to capture than competition law (which is applied horizontally to all sectors and thus raises lower risks of capture), and includes, in most cases, of a less advanced arsenal of 'smart' regulatory technologies than competition law, either in targeting intervention, or in remedying the market problem identified. For instance, competition does not impose similar duties on dominant firms and firms without market power, and its application rests on a careful consideration of the specific economic and legal context on a case-by-case

67 See Chapter 13 in this volume.

68 This is the classic perception of the price system by F. A. Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519.

69 That could be equality of income, wealth, gender equality, or as I argue in this study complex equality.

basis, or on the development of standards of intervention for specific types of practices, following some economic analysis. Competition law can be both backward-looking and forward-looking, and relies on a minimal, almost architectural, intervention on incentives so that markets operate smoothly. Economic regulation is sector specific and thus more prone to the risk of capture. It is often only forward-looking and enables less targeting as it is usually framed in a way that casts a wide net even over conduct adopted by non-dominant firms. It also relies on the idea that market incentives do not suffice to promote the social good. Hence, because of its flexibility, the competition law tool may be a superior institutional alternative to regulation in reconciling economic efficiency and equity concerns, while still largely relying on the market system.

Third, even if regulation takes into account fairness concerns, competition law may still intervene in order to ensure that the regulatory option chosen is proportional to the market problem identified.[70] To the extent that fairness-related regulation is often national, in view of the lack of a broader EU competence in the social sphere, EU competition law may ensure that regulation will not negatively affect, also from a fairness perspective, the population of other Member States. However, the different nature of the relation between the federal and the state levels in the US may justify a different approach.

Fourth, the separation of tasks between regulators, who are presumably interested in fairness, and competition authorities, which are exclusively preoccupied with economic efficiency, is both descriptively wrong and normatively self-defeating. Regulators take into account both economic efficiency and fairness concerns. In many jurisdictions, they can implement competition law and may impose competition law remedies, in addition to regulatory ones.[71] Their mission statement often includes extensive duties to promote competition, as well as to preserve the public interest. Competition law may intervene in order to establish the structural conditions that will make markets work for the benefit of the people, eventually also integrating in the competition analysis broader public interest concerns that go beyond the usual focus on price and output. Competitive and contestable markets may provide sufficient opportunities for 'voice' and participation of all affected

70 EU competition law accepts the cumulative application of competition law and economic regulation. *Ex ante* regulation by a national regulatory authority does not prevent the *ex post* intervention on the basis of EU competition rules. See Case C-280/08 *Deutsche Telekom AG* v. *Commission* [2010] ECR I-9555; Case C-295/12, *Telefónica SA and Telefónica de España SAU* v. *Commission*, ECLI:EU:C:2014:2062. For a more detailed analysis, see G. Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) 4(2) *Competition Law Review* 123; J. Tapia and D. Mantzari, 'The Regulation/Competition Interaction', in I. Lianos and D. Geradin (eds.), *Handbook on European Competition Law – Substantive Aspects* (Edward-Elgar, 2013), 588. Concerning UK competition law, see G. Monti, 'Utilities Regulators and the Competition Act 1998', in B. Rodger (ed.), *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010), 139.

71 See, for instance, the model followed in the UK, where the UK legislator has chosen a regime of concurrent jurisdiction with regard to the application of EU and national competition law by sector-specific regulators in their area of competence.

interests,[72] their outcome being judged fair to the extent that adjustments are made to ensure that the problems of missing markets and asymmetrical bargaining power are neutralised. It is only if reliance on markets fails to achieve fair *and* efficient outcomes that governments should turn to economic regulation. By not giving a chance to the institution of markets, following competition law intervention and adjustment, to prove that they can deliver fair outcomes, and by bypassing markets altogether in favour of regulation, such proposals would yield results that are counter to those anticipated by their proponents.

3.6 EQUITY AND EFFICIENCY: IS THERE A TRADE-OFF?

The opposition to an increasing role for equity concerns in competition law is often motivated by the perception that such inclusion will necessarily lead to the demise of economic efficiency as the main principle guiding the 'soul' of competition law. The literature on the 'goals of competition law', initiated during and after the Chicago school revolution conceptualises efficiency and fairness as antagonistic to each other. By doing this, it promotes a conceptualisation of their relation as a pair of 'binaries', in the way Derrida understood this term, that is, a pair of related concepts opposite in meaning, but also, as he explains, an opposition that remains profoundly arbitrary and unstable.[73] I believe that the disputes we may have over the way the principle of justice is implemented in competition law, reflect differences not only over what the political and legal culture of our societies entails, with regard to the level of acceptable economic power to be exercised in markets or the 'normal' level of economic inequality that a markets-based society could aspire to,[74] but also differences over which institutional arrangements could better implement such 'consensus' over levels of acceptable economic power and/or 'normal inequality'.[75] This section challenges the conceptualisation of equity and efficiency as separate spheres that are in an antagonistic relation to one other, requiring from the decision-maker some trade-off exercise. In section 3.6.1, I explain why conceiving their interaction as a static trade-off might not reflect the true nature of their relation. In section 3.6.2, I also question the possibility of a dynamic trade-off between equity and innovation.

[72] See, for instance, the 'participation-centred' approach of N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press, 1997).

[73] J. Derrida, *Margins of Philosophy* (Harvester Wheatsheaf, 1982) 195.

[74] See, for instance. F. Bourguignon, *The Globalization of Inequality* (Princeton University Press, 2015), 163 referring to 'normal' level of economic inequality as the conditions 'prior to the last two or three decades'.

[75] As I have explained in a different study, exploring the question of the goals of competition law should be preceded by examining the question of institutional choice and comparative institutional analysis. See I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', in I. Lianos and D. Geradin, *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar, 2013) 1 (also available at the SSRN).

3.6.1 *Equity and Efficiency: Separate Spheres and the Static Trade-off Position*

People enter into cooperation with other people to the extent that this cooperation may produce a joint surplus that would not be possible absent that cooperation. Assuming that individuals have the incentive to cooperate with others, and consequently limit their freedom of action to a certain extent, in order to increase their welfare through cooperation, this joint surplus will be 'the difference between the benefits (net of direct costs) each gains from the joint activity and the benefits each would receive in their next best alternative'.[76] Each participant in a joint project should therefore receive benefits at least as great as in their next best alternative, to maintain their incentive to participate in the joint project (the so called participation constraint).[77] As long as the 'participation constraints' of all participants to the cooperative project are satisfied, the question of distribution is settled in an economically efficient way.[78] What matters is not the distributive outcome as such, for instance that each participant enjoys an equal share of the joint profit, but the fact that each participant has been able to get a payoff equivalent to their next best alternative. Absent this rent from the joint surplus collected by the participants, these will have no incentive to enter into the joint activity at the first place. It is possible to imagine that a single participant could gain the most important part of the joint profit if, for instance, he makes take-it or leave-it offers to the rest of the participants that are only 'barely superior to their next best alternatives'.[79]

If one focuses on efficiency in consumption, the resulting allocation will be Pareto efficient as the joint surplus is net of the participants' next best alternatives, the surplus being allocated in such a way that it would not be possible by any reallocation to make people better off without making anybody else worse off.[80] In practice, applying such a criterion may be quite rare, as in most situations some of the participants might be incurring losses from what would have been their next best alternative, for instance had there not been a move from one state of the economy to another. Economists have put forward the potential Pareto improvement criterion (or Kaldor–Hicks efficiency), which advances that if the magnitude of the gains from moving from one state of the economy to another is greater than the magnitude of the losses, then social welfare is increased by making the move even, if no actual compensation is made.[81] According to Kaldor–Hicks efficiency, an outcome is efficient if those that are made better off can, *potentially*, compensate those that were made worse off, with the resulting outcome still being Pareto-optimal. The

76 S. Bowles, *Microeconomics – Behavior, Institutions, and Evolution* (Princeton University Press, 2004), 168

77 Ibid., 171.

78 Ibid.

79 Ibid.

80 Ibid.

81 J. R. Hicks, 'The Foundations of Welfare Economics' (1939) 49(196) *Economic Journal* 696; N. Kaldor, 'Welfare Propositions in Economics and Interpersonal Comparisons of Utility' (1939) 49 (145) *Economic Journal* 549.

winners should, in theory, be able to compensate the losers, but there is no requirement that compensation should be effectively paid.

It is true that this outcome may not be considered fair to the extent that it leads to an unequal allocation of the joint profit, should one consider that fairness requires that the joint surplus produced be allocated equally between the participants. However, fairness, in the form of equality of outcomes in the allocation of the surplus, is not a concern for welfare economics, which simply focuses on the size of the pie, rather than the way the pie is distributed for consumption. Welfare economic analysis carefully separates questions of efficiency from questions of distributive justice. This separation is explained by a number of crucial assumptions.

The first is what has been called 'the Second Fundamental Theorem of Welfare Economics', according to which if one assumes that all individuals and producers are selfish price takers, then almost any Pareto-optimal equilibrium can be supported via the competitive mechanism, provided appropriate lump-sum taxes and transfers are imposed on individuals and firms.[82] The main idea is that in the long run the competitive process will eliminate any benefit from the joint surplus that is higher than the participation constraints of each of the participants. This further assumes that 'only competitive equilibrium transactions take place', a quite heroic assumption which, in the best-case scenario, only holds in the very long term.[83] The theorem also implies that if a particular state of the economy is judged to be desirable, it may be achieved through lump-sum transfers, for instance progressive taxation and the welfare state. This separates issues of efficiency from issues of distributive justice, but for the reasons we explained above, this may not necessarily take place.

A second assumption is that allocational outcomes may not affect distributional outcomes, which is also quite unlikely, as the existing allocation of resources determines the next best alternative for each of the participants and consequently the distribution of the joint surplus. Hence, the second welfare theorem of economics denotes a status quo bias for the existing allocation of resources, which is deemed to be efficient. However, the existing resource allocation may be the product of an unjust initial distribution of income that may contravene principles of social justice, as these are defined by non-utilitarian theories of justice.

Conversely, conflicts relating to the fair distribution of rents may contribute to inefficiency, to the extent that resources may be spent on advancing distributional claims and rent-seeking that deviates resources away from productive activities.[84] Participants may also be driven in their selection for technologies and the organisation of their activity to activities that increase their share of the joint surplus, rather than to those increasing the size of the joint surplus. Finally, it is possible that joint-

82 M. Blaug, 'The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated' (2007) 39(2) *History of Political Economy* 185.
83 Bowles, *Microeconomics*, 172.
84 Ibid.

surplus-generating activities may be blocked following intense conflicts over the distribution of the joint surplus and 'bargaining breakdowns leading to foregone mutual beneficial opportunities'.[85]

Modern economics recognise that most markets are characterised by externalities, imperfect competition and generally market failures. Most of the time, curative action undertaken in order to 'correct' these market failures, with the aim of establishing the conditions of the first theorem of welfare economics, will not succeed in bringing in a Pareto-efficient outcome, the best-case scenario being a Kaldor–Hicks-efficient outcome. Hence, the situation will often call upon the application of the second welfare theorem and wealth transfers. But this leads to an indirect effect flowing from this conceptualisation of efficiency and fairness/equality as two separate realms: the idea that their logic may not always be convergent and that, at some level, pursuing economic efficiency may come at the price of less equality. Hence, in this view, society should face a trade-off between equality and efficiency.

Assuming that there is a trade-off, and that the domain of this trade-off is quite large (if one takes the view that the situations in which the logic of efficiency and equality are not convergent constitute the majority of cases), the question is how this trade-off should be made, and by whom. The separability thesis assumes that issues of efficiency should always come first, in which case I can think of two possible approaches. One approach would be to leave the decision over the appropriate trade-off to the political realm, and its own mechanisms of resolving conflicts between policy values, economics-driven competition law only focusing on the generation of efficient outcomes, rather than on the generation of fair outcomes, the appropriate level of fairness vis-à-vis the appropriate level of efficiency (the trade-off) being a value-laden judgement that unelected officials should not be authorised to make in a democratic society.[86] However, this approach ignores the distributional implications of relying solely on an economic efficiency criterion, something we have highlighted above (as the fact that efficiency and equality are conceived as separate does not exclude that there may be some form of interaction between the two, producing effects across the two separate realms). Nor does it explain why the same argument against decisions being made by unelected officials cannot also be opposed to decisions made solely under the guise of the first fundamental principle of welfare economics, to the extent that the choice of economic efficiency inevitably produces distributional implications. Another approach would be for an economics-driven competition adjudicator to explore the social implications of the choice of

85 Ibid., 173.

86 The separability between questions of economic efficiency and issues of distribution has been criticised by L. Robbins who advanced the view that there is a distinction between normative and positive economics but that economists should avoid value-laden policy recommendations, without making explicit their normative predispositions (' Economics and Political Economy' (1981) 71 *American Economic Review* 1).

different examples of trade-offs between efficiency and equality, on the basis of the dominant cultural norms prevailing in the specific political community (by elaborating, for instance, a sort of culture-dependent social welfare function).

But, these are not the only options on the table. One may conceive that the relation between efficiency and equality is not divergent, but mostly, or almost always, convergent, thus starting from a different premise. In order to illustrate with some examples how these different conceptions of the relation between equality and efficiency play out in economic scholarship, I will compare two different visions of this interaction.

The first view is that of economist Arthur Okun, who in his influential book *Equality and Efficiency – The Big Tradeoff*, published in 1975, set, to a large extent the consensus view in economics and public policy, for the next three to four decades.[87] While accepting that in some cases efficiency and equality have convergent logics, Okun focused on situations where society 'deliberately' opted for equality, by establishing entitlements and rights, noting that this choice could compromise efficiency, which he views as intrinsically related to the existence of markets.[88] This theoretical conception of market-free space of rights notwithstanding, Okun recognises that, in reality, 'the marketplace transgresses on virtually every right',[89] giving the example of the disadvantaged position of the poor with regard to equality before the law, the link between money and political power (in particular campaign financing, lobbying), the fact that the transgression of equal political rights often leads to consumer harm. With regard to the 'corrective strategy' that needs to be developed, he disfavours 'general efforts to curb bigness and wealth', although he notes that limiting the scope of economic activity and markets controlled by the 'plutocrats' (in particular conglomerate mergers) can help a little.[90] Instead, he opts for 'specific aids and sanctions', which will not bring 'complete equality', but might correct serious transgressions of money 'on the domain of rights'.[91] Okun considers both equality of income/wealth and equality of opportunity, which, he notes may lead to greater equality of income, but also constitutes 'a value in itself'.[92] Okun starts from the premise that equality and efficiency are equally valued, and 'in places where they conflict', 'any sacrifice of either has to be justified as a necessary means of obtaining more of the other (or possibly of some other valued social end)'.[93] He does not examine the latter option but focuses on the bilateral relation between efficiency and equality, and to which of the two values the decision-maker should give priority. His position is that in performing this trade-off (balancing) of these conflicting values, 'the social constitution should not seek to

87 A. M. Okun, *Equality and Efficiency – The Big Tradeoff* (Brookings Institution, 1975, repub. 2015).
88 Ibid., 5.
89 Ibid., 22.
90 Ibid., 30.
91 Ibid., 31.
92 Ibid., 83–4.
93 Ibid., 88.

settle forever the precise weighting of inequality', but should instead weight equality heavily, and rely on the democratic process to 'select reasonable weights on specific issues as they arise'.[94]

One may contrast this view with that of British economist Ken Binmore who understands the relation between equality and efficiency as complementary, rather that antagonistic, both being considered as necessary conditions for the emergence of a social contract that would bring together different people by promoting a common set of understandings allowing them to coordinate their efforts, or, in other words, 'coordinate on a particular equilibrium of the game of life that we play together'.[95] Binmore takes an 'evolutionary approach to social contract theory', advancing three levels of priority for a social contract to be 'internally stable', that is to be maintained without the need for a specific external enforcement agency: first, it should be stable, the social contract not needing any 'glue' but holding together by coordinating human behaviour on an equilibrium in the game of life.[96] In my opinion, although this may slightly misrepresent Binmore's position, that stability can be compared to the criterion of 'systemic resilience', which I will explain in more detail in section 3.8.[97] The second priority of a social contract is efficiency, as each society competes with the social contacts in other societies and being efficient, or in other words avoiding waste, enables the specific society to compete successfully with other social groups in the game of life. The third priority for the social contract to hold together is fairness. This is a particularly important principle, as there may be various efficient equilibria available as possible social contracts, thus making it necessary for society to select one of these on which to coordinate.[98]

For Binmore, fairness norms provide an 'informal equilibrium selection device' in the repeated game of life and the necessary coordination of collective decisions in society.[99] Not any efficient outcome will be considered as socially optimal. Only the efficient outcome that is also fair in the specific society and context. What counts as fair depends on the specific culture, fairness norms differing in different times and places, but also on the 'deep structure' of 'universal principles of justice', devised with the assistance of the mechanism of interpersonal comparison effectuated at a hypothetical original position under the veil of ignorance, a method employed by John Rawls and John Harsanyi, although with different results in each case.[100] Binmore laments that '[m]odern economic textbooks usually have little to say

94 Ibid., 94.
95 K. Binmore, *Natural Justice* (Oxford University Press 2005) 3–14, 4.
96 Ibid., 4–5
97 Binmore notes that utilitarianism fails to recognise the first priority of stability (ibid., 189).
98 Ibid., 14. Again Binmore considers that a utilitarian distribution 'will be in difficulty' at this third level of priority (ibid., 189).
99 Ibid., 197.
100 Ibid. 15–17. The first one advanced that the application of such interpersonal comparison using the device of the original position will lead to an egalitarian distribution of goods and services, while the second argued that the use of this device will lead to a utilitarian distribution.

about fairness' and criticises the 'myth' that 'there is a necessary trade-off between equity and efficiency'; he also notes that neoclassical price economists 'mostly brush the problem of distribution under the carpet altogether by defining any efficient outcome to be socially optimal', and thus rejecting any possibility that a particular efficient outcome is unfair.[101] He expresses discontent with the one equilibrium models used in economics, such as the neoclassical ideal of a perfectly competitive market, which explain why there is no role for fairness in these models.[102] He remarks that we may need to select from a wide variety of efficient Nash equilibria and fairness norms will constitute the backbone of the selection process effectuated in the hypothetical original position. He criticises the 'schizophrenia' of micro economics to reject interpersonal comparisons of utility, and its narrow focus on 'economic surplus', simply because 'maximizing economic surplus is what happens when a perfectly competitive market operates without constraint.'[103] According to Binmore, this 'dishonest argument makes the operation of the market seem socially optimal only by slipping in the assumption that each extra dollar is equally valuable no matter to whom it is assigned', although most of us would rather spend a tax dollar on 'relieving the suffering of the poor and needy rather than providing tax breaks for the rich and powerful'.[104] Binmore believes that fairness norms evolved out of the need to select from multiple efficient equilibria, therefore finding the idea that some trade-off between equity and efficiency is necessary as making 'no sense at all'.[105]

One may argue instead for an 'envy' criterion in which a single efficient equilibrium will be deemed fair if nobody would envy the bundle of commodities assigned to someone else, or in other words that people at any given time will, at least weakly, prefer their own bundle of commodities to all others.[106] Although Binmore finds that this would be 'a lot more respectable' than arguing for a trade-off between efficiency and fairness, he finds that the no-envy criterion is unsatisfactory, because it only focuses on the assignment of bundles of goods/possessions and their subjective valuation and overlooks the fact that when interpersonal comparisons are made one may focus on empathetic preferences, each person imagining herself/himself in

101 Ibid., 66.
102 Ibid., 66–7.
103 Ibid., 116.
104 Ibid.
105 Ibid.
106 An allocation is deemed fair if none envies the bundle of commodities another has. See H. Varian, 'Equity, Envy and Efficiency' (1974) 9 *Journal of Economic Theory* 63; A. Feldman and A. Kirman, 'Fairness and Envy (1974) 64 *American Economic Review* 995; H. Varian, Dworkin on Equality of Resources' (1985) 1 *Economics and Philosophy* 110; C. Arnsperger, 'Envy-Freeness and Distributive Justice' (1994) 8 *Journal of Economic Surveys* 155. For an application of this approach in competition law, see the excellent analysis provided by Ayal, *Fairness in Antitrust*, 164–81. The no-envy criterion may provide a proxy for welfare without necessarily proceeding to an interpersonal comparison of utility as it simply enables each person to make a choice about her/his preferred bundle of commodities. 'Comparisons are thus *within* and according to subjective valuations, and not *across* individuals' (ibid., 168, emphasis in source).

another person's shoes. Binmore provides the example of an interpersonal comparison between a person who is poor with another who is rich but suffers from clinical depression, to show the futility of the no-envy argument so long as this only focuses on the possession of bundles of commodities.

Binmore's conceptualisation of fairness norms relies on the 'mental machinery' of 'empathetic preferences', that is the ability of humans to imagine themselves into the position of other human beings, without necessarily that meaning that they feel any concern for others' welfare.[107] In a repeated game, the expression of individual's empathetic preferences will lead to the emergence of an 'empathy equilibrium' which would encapsulate the choice of a standard of interpersonal comparison in use in the specific society when the evolutionary game reaches a Nash equilibrium.[108]

The approach put forward by Binmore emphasises the futility of the trade-off between efficiency and fairness, both values being important for the stability of the social contract. Fairness norms enable the selection of one among many efficient equilibria that would maximise the chances of the specific social contract to survive and be internally stable without the presence of an omnipotent external enforcement agency.[109] This is critical if a new technology, innovation or environmental change unexpectedly expands or reduces the available set of efficient equilibria to be selected. Demands for a fair distribution of the surplus will in this case be particularly strong, making it necessary to rely on some fairness norms on the basis of an egalitarian bargaining solution, as this is framed by the past history, culture and values of the society in question. In the long term, a market mechanism may erode the moral values of the society in question, but social systems 'take time to find their way to an equilibrium', while 'fairness evolved to provide *short-run* resolutions to the equilibrium selection problem'.[110] Although Binmore recognises some limits in his approach, this work shows the weak theoretical foundations of the trade-off conception of the relation between efficiency and fairness and the importance of taking care of even short-run inequality effects.

3.6.2 *Equity and Innovation: the Dynamic Trade-Off Position*

The trade-off conception of the relation between efficiency and equity/fairness has also been quite influential in envisioning their interaction in a dynamic or evolutionary perspective. In this case, the trade-off is not set in present terms but relates to the view that pursuing equality may affect innovation.

107 He distinguishes empathetic preferences from sympathetic preferences, which concern the individual's personal preference to sympathise with another human being (Binmore, *Natural Justice*, 114–15).

108 Ibid., 126.

109 Ibid., 170–5.

110 Ibid., 184.

Drawing on the work of Austrian economist Joseph Schumpeter,[111] some literature distinguishes between firms that 'deliberately strive to be leaders in technological innovations' and those that 'attempt to keep up by imitating the successes of the leaders'.[112] Competition is not static but dynamic, and thus leads to a process of continuing disequilibrium fundamentally different from the static price competition depicted by neoclassical price theory with winners and losers. The market is considered as 'a device for conducting and evaluating experiments in economic behavior and organization', leading to the elimination of the less innovative firms and tipping the market to the innovation leaders. The market structure thus evolves to one involving large firms with considerable degree of market power, but this is 'the price that society must pay for rapid technological advance' as these firms have the 'capability advantages' in terms of risks spreading, economies of scale in R&D, financial resources for taking care of the sunk costs of the research, as well as the 'appropriability advantages' for better protecting their innovations through IP rights.[113]

In essence, the argument is that the static costs of a concentrated market structure and the exercise of market power may lead to welfare losses because of output restriction (and higher prices). However, these losses may be traded-off by a faster rate of growth of productivity because of investments in innovation and pushing even further the production possibility frontier of the specific economy. More importantly, product innovation benefits to consumers in the long run. Figure 3.2 is an attempt to portray the positive welfare implication of Schumpeterian competition long-term.[114]

Here, it is the demand schedule that is shifted outwards to the right as a result of product innovation. This demand shift reflects the fact that consumers have higher willingness to pay for the new generation of products which, therefore, supplants the current generation. Let's assume first that the latter, however, was produced under competitive conditions (i.e. the product life cycle reached the maturity stage of commoditisation). Similarly to the previous trade-off between productive and allocative efficiency, the assessment of the net impact in terms of total welfare requires the balancing between the anticompetitive deadweight-loss triangle and the procompetitive quadrilateral shaped area.

In this case, however, rather than being entirely appropriated by the dominant firm in the form of higher producer surplus, the procompetitive effect is mostly beneficial to consumer, thanks to higher consumer surplus. This is even more the

111 J. Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Row, 1942) 84 ('[C]ompetition from the new commodity, the new technology, the new source of supply, the new organization ... competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their very foundations and their very lives').

112 R. N. Nelson and S. G. Winter, *An Evolutionary Theory of Economic Change* (Harvard University Press, 1982), 275.

113 Ibid., 278.

114 The next two paragraphs draw on Lianos et al., *Competition Law*.

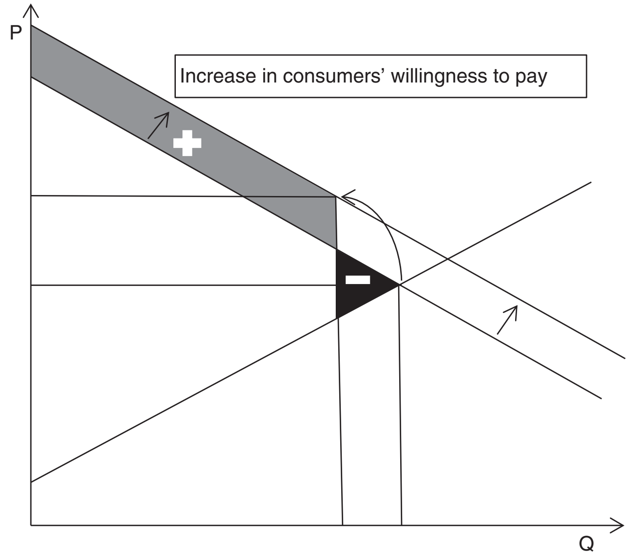

FIGURE 3.2 Dynamic efficiency and the Schumpeterian trade-off

case where the sellers of the displaced product had market power (i.e. as in the sequence of monopolist), so that allocative efficiency was already not being maximised. Under these circumstances, the disruption due to dynamic competition would be unambiguously beneficial for consumers.

These approaches put forward the need to protect the incentives of large firms to innovate, on the assumption that these will invest their profits in R&D. However, there are various problems with this assumption. First, as it is recognised even by authors advocating a dynamic competition approach, the Schumpeterian trade-off may be different from industry to industry; in particular, in an industry marked by cumulative innovation, 'a more sheltered competitive environment, with its associated higher mark-ups, does lead to more rapid productivity growth'.[115] Second, one may take with a grain of salt the argument made sometimes that the reduction of the profits of large firms following competition law enforcement, immediately and to a similar extent, affects their incentives to fund R&D. Indeed, recent studies show that, for instance in the pharma sector, companies do not invest the majority of their profits in R&D, but prefer instead to buy their own shares to provide higher revenues

115 Nelson and Winter, *Evolutionary Theory of Economic Change*, 350. The same authors remark that 'Schumpeterian competition selects both on inventions and on firms, and moulds market structure as well as the flow of technology. But it also proceeds in part through conscious social policy. Thus, for example, antitrust laws were put in place to prevent or retard the growth of concentration.' The authors raise the possibility that an industry dominated by a large firm that has 'lost its innovative prowess' and by imitating competitors, barricades the industry 'from the entry and growth of small innovators', in particular in sectors where experience counts.

to their management and shareholders.[116] Other studies have shown that a lot of R&D in this sector is publicly funded, state resources funding the riskier parts of the pharma R&D effort, and that the rate of innovation has fallen with few new drugs being brought into the market, as a result of reduction of the part of profits spent on R&D and the prevalence of the share-buybacks practice.[117] Companies prefer to retain earnings and distribute them to shareholders and the management leading to an increase of conspicuous consumption (and reinforcing asset bubbles),[118] rather than invest them in R&D.[119] Investments in R&D are increasingly concentrated in a few sectors across most of the mature economies.[120] Firms may also employ cash hoarding as a defensive tool in order to protect their current stock of technology, and not in order to invest in new technologies. Statistics show that business investment has steadily declined since the late 1970s, if measured as a share of GDP.[121]

Companies may also prefer to buy potential competitors rather than compete on innovation with them, as this is indicated by a considerable increase of M&A transactions in recent years. The concept of research has also changed – a lot of money is actually spent on product adaptation, design and development, copying a feature or add-on from another product or adjusting the product stock to local demands, the D, and little is spent to the R.[122] Growth in real investment on R&D is declining, the US National Science Foundation reporting that its measure of R&D intensity has flatlined since 1995.[123] Many companies have reacted to problems with their R&D strategy by outsourcing R&D to smaller firms that can take bigger

[116] W. Lazonick, 'Profits without Prosperity' (2014) 92(9) *Harvard Business Review* 46.

[117] M. Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem Press, 2013).

[118] On 'conspicuous consumption', see T. Veblen, *The Treaty of the Leisure Class* (1st edn 1899, Pennsylvania State University Press, 2003).

[119] See, for instance, some recent research on big pharma: Lazonick, 'Profits without prosperity', 46–55; W. Lazonick and M. Mazzucato, 'The Risk–Reward Nexus in the Innovation–Inequality Relationship: Who Takes the Risks? Who Gets the Rewards?' (2013) 22(4) *Industrial and Corporate Change* 1093–1128; P. Gleadle et al., 'Restructuring and Innovation in Pharmaceuticals and Biotechs: The Impact of Financialisation' (2014) 25 *Critical Perspectives on Accounting* 67–77. At a broader level, it can also be seen how financialisation alters a firm's incentives away from investment and in favour of short-term shareholder's return (O. Orhangazi, 'Financialization and Capital Accumulation in the Nonfinancial Corporate Sector: A Theoretical and Empirical Investigation on the US Economy, 1973–2004' (2007) MPRA Paper No. 7724, available at: https://mpra.ub.uni-muenchen.de/7724); M. Mazzucato, 'Financing Innovation: Creative Destruction vs. Destructive Creation' (2013) 22(4) *Industrial and Corporate Change* 851–67.

[120] See for example G. Clark, 'Winter Is Coming: Robert Gordon and the Future of Economic Growth' (2016) 106(5) *American Economic Review: Papers and Proceedings* 68–71.

[121] Ibid., 29.

[122] F. Erixon and B. Weigel, *The Innovation Illusion* (Yale University Press, 2016), 33.

[123] Ibid., 34, noting that 'R&D intensity, measured as the share of industry-level R&D expenditure to sales, increased in the seed sector from 11.0% in 1994 to 15.0% in 2000 before falling back to 10.5% in 2009'.

risks.[124] Once the R&D investments have begun to mature into innovative products, large companies have acquired them and integrated them into their global value chains.[125] This may affect the innovation and entrepreneurial ethos and consequently the trade-off to be made, should one take stock of the fact that a lower percentage of profits will be invested in innovation in view of the lower profitability of R&D research.[126] In the absence of some assurance that large firms will invest their profits to promote innovation and increase the production possibility frontier, rather than in other activities, the Schumpeterian trade-off may not justify the sacrifice of allocative efficiency incurred and the resulting inequality, just because of the promise of some future innovation gain.

Challenging the idea that there is a trade-off between efficiency/innovation and equality brings forward the need to reconceptualise competition law integrating a fairness/equity perspective.

3.7 A FAIRNESS-DRIVEN COMPETITION LAW: COMPETITION LAW FOR COMPLEX EQUALITY

An important feature of the recent focus on economic inequality is the perception that the concentration of economic power and rampant economic inequality is affecting other spheres of social activity that are not usually related to the market, such as politics and academia. There is a widespread perception in public opinion and commentators, that a small group of concentrated interests have rigged the political process undermining democracy, or more generally the autonomy of the political and cultural order vis-à-vis the economic order. There are studies documenting how corporate lobbying is directly related to firm size.[127] The highest echelons of business and multinational companies benefit from tax cuts, special tax regimes or practice elaborate forms of tax evasion at the same time as austerity policies, salary cuts and taxes rise for the least well off and the middle class.[128] Some have put forward the view that the rising economic concentration may be explained

[124] See, for instance, P. Gleadle et al., 'Restructuring and Innovation in Pharmaceuticals and Biotechs: The Impact of Financialisation' (2014) 25 *Critical Perspectives on Accounting* 67–77

[125] Comanor and Scherer point out how M&A may have been used as a safety net for companies against the uncertain prospects of innovation projects or to acquire synergies in R&D (W. S. Comanor and F. M. Scherer, 'Mergers and Innovation in the Pharmaceutical Industry' (2013) 32 *Journal of Health Economics* 106–13. Similar analyses can also be found in Gleadle et al., 'Restructuring and Innovation', 67–77.

[126] See Gleadle et al., 'Restructuring and Innovation', 67–77.

[127] M. D. Hill, G. W. Kelly and R. A. Van Ness, 'Determinants and Effects of Corporate Lobbying' (2013) 42(4) *Financial Management* 931.

[128] See T. Cavero and K. Poinasamy, 'A Cautionary Tale: The True Cost of Austerity and Inequality in Europe' (2013) 174 *Oxfam Briefing Paper*; European Network on Debt and Development (Eurodad), 'Tax Games: The Race to the Bottom' (2017) *Eurodad Tax Justice Report*; J. Portes and H. Reed, 'Distributional Results for the Impact of Tax and Welfare Reforms between 2010–17, Modelled in the 2021/22 Tax Year: Interim Findings' (2017) *Equality and Human Rights Commission Research Report*.

by a 'Medici vicious circle', 'where money is used to get political power and political power is used to make money': the more firms have market power, the more they have 'both the ability and the need to gain political power'.[129]

The concern over inequality and the corresponding quest for equality should not only be interpreted as a quest for an equal part of resources (as egalitarians would claim) or for improvements in available income for the worse off (as prioritarians would ask), but a quest for equal status at the political realm, and for equal consideration in all other realms of social action. Indeed, the connection between the 'spheres' of politics and markets show, as Michal Walzer wrote, that 'the idea of distributive justice has as much to do with being and doing as with having, as much to do with production, and with consumption, as much to do with identity and status as with land, capital, or personal possessions'.[130]

For Walzer, there has never been a single criterion or a single set of interconnected criteria, for all distributions, 'for no such criterion can possibly match the diversity of social goods'.[131] He puts forward three 'distributive principles': desert, free exchange and need.[132] These rely on a diverse set of criteria, such as merit, qualifications, birth, friendships, loyalty, democratic decision, each having a place, along with many others, and possibly uneasily coexisting with them. Starting from the assumption that society is structured along different 'spheres of justice', he claims that '[t]he principles of justice are themselves pluralistic in form', as different 'social goods' ought to be distributed for different reasons, in accordance to different distributive procedures, by different agents and criteria.[133] All goods are 'social goods' in the sense that they have 'shared meanings because conception and creation are social processes'.[134] That also means that 'goods may have different meanings in different societies'.[135] They can also be 'historical in character, and so distributions, and just and unjust distributions, change over time'.[136] This society- and time-specific definition of 'distributive justice' (or fairness) has also been important in Binmore's work, as we have previously exposed. Walzer finds that the distinctness of these various social meanings should have implications on the way the various criteria of distribution should operate.[137] For

129 L. Zingales, 'Towards a Political Theory of the Firm', NBER Working Paper No. 23593 (July 2017). Of course, other (cumulative or alternative) explanations for market concentration have been put forward. For a comparative discussion of various causes, see J. E. Bessen, 'Accounting for Rising Corporate Profits: Intangibles or Regulatory Rents?' (9 November 2016). Boston University School of Law, Law and Economics Research Paper No. 16-18. Available at SSRN: https://ssrn.com/abstract=2778641
130 M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 3.
131 Ibid., 21.
132 Ibid., 21–6.
133 Ibid., 3.
134 Ibid., 7.
135 Ibid.
136 Ibid., 9.
137 Ibid., 10.

him, 'distributions must be autonomous', as every social good or set of goods should be perceived as 'a distributive sphere within which only certain criteria and arrangements are appropriate'.[138]

Recognising the existence of separate spheres of justice with autonomous distributions also makes Walzer distinguish between 'dominance' and 'monopoly'. Monopoly refers to the situations where a specific social good is monopolized, for instance for scarcity reasons (e.g. water in the desert).[139] Dominance is a more complex concept, as it refers to the control of a social good, whose control commands wide range of other goods, presumably in other spheres of social activity.[140] For instance, economic power may lead to political and cultural power, not only in the sense that it will generate some form of resource dependence, measured by the ability to raise prices profitably on a relevant market, or the ability to exercise superior bargaining power, in the specific social sphere (monopoly), but also because it will influence the options available for each individual agent in other *spheres* of social activity. Dominance will therefore challenge the autonomous distribution criteria applying in the various distributive spheres. In other words, the claim for autonomous distribution criteria for each sphere of justice is meant to challenge the dominance of a social good, rather than just deal with situations of monopoly.

Preserving the boundaries of these 'spheres of justice' becomes a possible strategy if one is to respect the process through which the members of the community develop a diversity of criteria mirroring the diversity of the social goods. Focusing on 'simple equality' implies a claim that the monopolised good should be redistributed so that it can be equally or at least more widely shared. This may result in 'continuous state intervention to break up or constrain incipient monopolies and to repress new forms of dominance'.[141] Hence, once inequalities of wealth or income are dealt with through state intervention, different forms of inequality emerge, leading to new forms of dominance and therefore sites of competition. Indeed, as Walzer notes, 'state power itself will become the central object of competitive struggles'.[142] In particular if 'the state is weak to cope with re-emerging monopolies in society at large', groups attempting to monopolize the state and then to use it in order to consolidate their control of other social goods.[143]

138 Ibid. He further explains: '[t]here is no single set of primary or basic goods conceivable across all moral and material worlds – or, any such set would have to be conceived in terms so abstract that they would be of little use in thinking about particular distributions. Even the range of necessities, if we take into account moral as well as physical necessities, is very wide, and the rank orderings are very different' and things become even more complex 'as we pass from necessities to opportunities, powers, reputations, and so on' (ibid., 8).

139 Ibid.

140 Ibid., 11 ('possess that own, and the others come in train').

141 Ibid., 15.

142 Ibid.

143 Ibid., 16.

The process will end up in a recurrent circle where political power will be mobilised to check monopoly, for instance undertakings with significant economic or market power, but then once the monopoly of money is challenged, political power itself will need to be checked, the process opening opportunities to 'strategically placed' actors to use political power in order to 'seize and exploit important social goods' ('tyranny').[144] There are incentives for adopting such strategy, as power is a 'special sort of good', in the sense that it also operates as a 'regulative agency' 'defending the boundaries of all the distributive spheres, including its own', but may also 'invade the different spheres' and 'override' their social meanings.[145] This problem of recurrent circles of monopoly followed by dominance derives, in Walzer's opinion, from 'treating monopoly, and not dominance, as the central issue in distributive justice'.[146]

'Complex equality' takes a different perspective. It aims to narrow the range within which particular goods are convertible and to vindicate the autonomy of distributive spheres. Specific social goods may be monopolised, but with no particular good being 'generally convertible'.[147] State intervention will not therefore be continuous in this case, and this will reduce the likelihood that the state, and political power, may become the site of competitive struggle, with the aim to capture the state and convert, for instance, political power to economic power. According to Walzer, in a complex egalitarian society, '[t]hough there will be many small inequalities, inequality will not be multiplied through the conversion process and expanded across different social goods, because of the autonomy of distributions and the possibility of more particularized and diffused forms of social conflict'.[148] No citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good. 'Pervasive equality' would just be maintained by avoiding situations of dominance. It will be promoted by an 'open-ended distributive principle' that would respect the autonomy of the different distributive spheres: '[n]o social good x should be distributed to men and women who possess some other good x merely because they possess y and without regard to the meaning of x'.[149]

How could Walzer's theoretical framework be of relevance for competition law? The decline of complex equality may explain the emergence of populist movements in Europe and the United States, as they criticise liberalism and capitalism, and challenge the value of expertise, considered as biased and rigged by economic interests, rather than an independent source of knowledge.[150] Proponents of

144 Ibid., 14.
145 Ibid., 16.
146 Ibid.
147 Ibid., 17.
148 Ibid.
149 Ibid., 20.
150 EU Monitor, 'A Profile of Europe's Populist Parties: Structures, Strengths, Potential' (28 April 2015), available at www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000441777/A_profile_of_Europe's_populist_parties%3A_Structures.PDF; Euromonitor, 'Deutsche Bank

populism criticise the effort of promoting technocratic government instead of political antagonism as the main procedure for policymaking.[151] For the populist project, social antagonisms are not to be tamed by 'deliberative democracy' leading to an elaborate process of consensus-building managed by independent technocrats. They are instead transformed to an ambitious and enthusiastic 'agonistic confrontation' between hegemonic projects.[152] The type of 'expertise' that may be required for the completion of the populist project is also different and relates to the ability of social mobilization in order to constitute the 'people' (be that workers, farmers or in the more recent versions of populism, consumers[153] or even entrepreneurs).[154] It is not linked to the traditional conception of expertise, which relates to a body of technical knowledge, most usually a codified body of knowledge in the context of an academic discipline. By adopting the single narrative of the antagonistic struggle of competing hegemonic projects, populism blurs the boundaries between the different 'spheres of justice' and ignores the complex interplay of various 'orders of worth' functioning according to different tests of justification.[155]

In the competition law field, the competing hegemonic projects would be the 'left-wing' now consumer-focused populist movement versus the 'right-wing' entrepreneurs-focused populist movement, which glorifies monopolies on the basis of a distorted conception of innovation and technological progress on the blind belief that business leaders will be only motivated by the common good. In contrast to the populist approach, an approach relying on the complex equality principle will not view societies as a single order to be dominated by a hegemonic project winning a political 'agon', but an interweaving of multiple orders, a compromise on the basis of the 'common good' eventually developing in order to settle the conflict among the actors with a variable degree of legitimacy. But, crucially, this compromise is fragile, as attempts to determine the common good are bound to reignite the conflict, eventually leading to a different compromise. In contrast to a narrow technocratic approach, which would rely, in the neoliberal tradition, on the market as the unique site of '*veridiction*-falsification' for the action of the various agents (firms, government),[156] an approach inspired by complex equality will be open to a variety of

Research, Who Is Afraid of Populists?' (23 March 2017), available at www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000441789/Who_is_afraid_of_populists%3F.pdf

151 They argue for 'agonistic politics' and 'agonistic democracy'. C. Mouffe, *On The Political* (Routledge, 2005); C. Mouffe, 'Agonistic Democracy and Radical Politics', *Pavilion*, available at pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics

152 E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy – Towards a Radical Democratic Politics* (2nd edn, Verso, 1985); E. Laclau, *On Populist Reason* (Verso, 2005).

153 S. Vaheesan, 'The Evolving Populisms of Antitrust' (2013) 93(2) *Nebraska Law Review* (Article 4).

154 See B. Orbach, 'Antitrust Populism' (2017) 14(1) *NYU Journal of Law and Business* 1 (detailing the emergence of the 'anti-bigness' and the 'anti-enforcement' populisms in US antitrust law).

155 L. Boltansky and L. Thévenot, *On Justification: The Economies of Worth* (Princeton University Press, 2006).

156 M. Foucault, *The Birth of Biopolitics – Lectures at the Collège de France 1978–1979* (Palgrave Macmillan, 2010), 32 (noting that 'inasmuch as prices are determined in accordance with the natural

criteria, respecting the autonomy of these different 'spheres' of social activity and the multiple values they cater for.

What would be the place of a competition law relying on economic, or more broadly, social science expertise, in an era of populism? Is the re-emergence of populist antitrust the only way ahead if competition law is to maintain its legitimacy in a political context characterised by a deep suspicion towards technocracy, in particular economic expertise, and the view that competition authorities, have not acted to prevent the rise in economic concentration and inequality in recent years? Or, is antitrust moving to institutional oblivion, soon to be replaced by direct forms of regulation, or regulation through public ownership, with the alleged aim of 'moralising' economic activity, but, in reality, to subject it to the dictates of political power? If the idea of complex equality is to be taken seriously in competition law, one needs to be equally concerned with the tendency of economic power to expand into the realm of politics, as well as with the tendency of political power, becoming dominant as the sphere of politics is slowly transcending all other 'spheres of justice', to convert itself to economic power, suppressing market freedoms.

To provide an example, 'complex equality' concerns may influence the competition law principles applying to digital platforms that have become the central nervous system of modern capitalist value generation. Some jurisdictions, like the EU, have been quite concerned by the transformation of these digital platforms to important gatekeepers for various economic activities in the digital economy,[157] and of their ability to leverage their economic power (resulting from the control of resources such as big data, advanced algorithms and artificial intelligence, on which the new model of economic production depends) in various domains of activity, including the capture of an even higher percentage of the total surplus value of the respective value chain.[158] Algorithmic firms may harvest immense technological and ultimately economic power differential vis-à-vis their non-algorithmic rivals. Would domain expertise enable these firms to resist the technological prowess of digital platforms, and what could be the appropriate role for competition law in this context? Should competition law be enforced when digital platforms adopt

mechanisms of the market they constitute a standard of truth which enables us to discern which governmental [but one can also add firm] practices are correct and which are erroneous', the 'natural' mechanisms of the market being the invisible hand of Adam Smith and its intellectual progeny (including 'perfect competition').

157 See EU Communication on digital platforms of 25 May 2016 (COM(2016)288 final) 12, noting that '[a]s online platforms play an increasing role in the economy, the terms of access to online platforms can be an important factor for online and offline companies. For SMEs and micro-enterprises, some online platforms constitute important, sometimes the main, entry points to certain markets and data.'

158 This explains the recent focus of competition authorities in Europe on leveraging practices, with the aim to ensure the 'equality of opportunity' of economic operators (European Commission, Case AT 39.740 – Google Search, paras. 332 and 334), as well as recent ideas to regulate from a fairness perspective platform to business relations (Inception Impact Assessment, Fairness in Platform to Business Relation, Ares(2017)5222469, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469_en).

exclusionary practices that may stifle the capacity of non-algorithmic firms to innovate or to develop independent technological capabilities, and thus to limit their technological dependence on them, but by doing so improve their own efficiency? Control of (personal) data by these digital platforms may also affect privacy,[159] but also more generally the democratic process.[160] This could lead to the emergence of an entrenched dominant position or oligopolistic market structure over an essential social good (information) for the proper functioning of democratic debate and providing important economic (and political/cultural) power to the 'big five'.[161] Should competition law also address these concerns? The answers to these questions may vary between different competition law systems.

3.8 THE NECESSARY AND LONG-AWAITED ENRICHMENT OF COMPETITION LAW

The concrete implications of a fairness-driven competition law for the various areas of competition law doctrine are explored in a different study.[162] However, I would like to briefly describe the main changes that, in my opinion, the shift towards fairness entails for competition law. The approach undertaken may vary from jurisdiction to jurisdiction and will largely depend on the hermeneutic conversation that will take place within *each* legal and political system, and the subsequent accommodation of conflicting narratives regarding the relation between the state and the market, or more generally an atomist versus a more social view of humankind's dependence on society to realise the 'human good'.[163]

It is clear that issues of distributive justice and fairness are essential and any effort to sweep them under the carpet to avoid this inconvenient discussion, as unfortunately has been the case in the last thirty years in competition law doctrine, is not only futile, as fairness concerns may return with some vengeance, but also wrong from moral and social theory perspectives. The implementation of fairness concerns

159 See European Data Protection Supervisor, 'Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy' (March 2014); Autorité de la Concurrence and Bundeskartellamt, 'Competition Law and Data' (16 May 2016); US FTC, 'Big Data – A Tool for Inclusion or Exclusion?' (January 2016). Some public authorities have also looked to these questions when exploring the changes brought by platform competition (European Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe', COM/2016/0288 final; House of Lords, 'Online Platforms and the Digital Single Market', HL Paper 129 (2016); OECD, 'Big Data: Bringing Competition Policy to the Digital Era', DAF/COMP(2016)14).

160 See, for instance, the debate about 'fake news' as being an 'antitrust problem' (S. Hubbard, 'Fake News Is A Real Antitrust Problem' (2017) *Competition Policy International*; S. P. Sacher and J. M. Jun, 'Fake News Is Not an Antitrust Problem' (2017) *Antitrust Chronicle*).

161 These are Alphabet, Amazon, Apple, Facebook, Microsoft.

162 I. Lianos, 'Implementing Fairness in EU Competition Law' (forth. Research Paper 4/2019).

163 C. Taylor, 'The Nature and Scope of Distributive Justice', in *Human Agency and Language – Philosophical Papers* (Cambridge University Press, 1985), 289 (distinguishing the atomist view of Locke and more recently Nozick to the social view of Aristotle and more recently Rawls and Walzer).

requires from competition law enforcers delicate and difficult hermeneutical choices with regard to the principles and values of justice as fairness to be read in the competition law legislation and jurisprudence, in a way that would guarantee the coherence of the specific legal and political system.

According to some, the return to 'populist' antitrust may provide an adequate response to the current rise of inequalities, in particular those generated by the prevalence of the network effects and 'winner takes all' dynamics of the digital economy,[164] at least as long as the existence of market concentration, market power and declining labour share, may be considered among the principal causes of these inequalities. What this means for the area of competition law has been spelled out in various publications of the 'new Brandeis movement',[165] essentially a hermeneutical standpoint that claims to offer a thicker and more genuine meaning to the antitrust law enterprise, arguably in a closer connection to its historical and cultural roots.

These perspectives should not be dismissed out of hand, for the simple reason that they spoil the 'consensus' arrived at in recent decades between the right and the left on the standard of consumer welfare. First, it is not clear what this consensus exactly entails in practice, as consumer welfare or consumer harm, even if it provides a general hermeneutical principle, is notoriously vague, from an operational perspective, and as some prominent authors explain, does not even constitute an element of a competition law offence that 'must be proved independently of the law violation'.[166] Second, there cannot be any 'end of history' moment in competition law scholarship and jurisprudence. The 'overlapping consensus', to use Rawls's term, may change and the legal interpreter should be careful to integrate the important technological and socio-economic transformations unveiling, and to address the various arguments put forward by the different hermeneutical communities of competition law. Third, although antitrust/competition law has historically focused on situations of economic coercion and restriction of competitive rivalry in markets, with the aim of taming the risk of private government, economic power may crystallise in various insidious forms, taking advantage of recent advances in science (e.g. psychology, behavioural economics, business strategy) to frame preferences and influence/nudge individual decision-making. Fourth, competition law takes place in various fields, not only on product markets, but also on financial markets and future markets for innovation, more so as market participants and market experts offer new imaginative market devices to respond to this growing demand for futurity.

164 L. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents (2017) 11 *Harvard Law and Policy Review* 235.

165 L. Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) *Journal of Competition Law and Practice* 131.

166 I refer here to no other than R. Bork who observes that: '[c]onsumer harm is not an element of a Sherman Act offense that must be proved independently of the law violation. Antitrust conclusively *presumes* consumer harm when unlawful behaviour is shown' (R. Bork, 'Trust the Trustbusters: Why Conservatives Are Wrong about Antitrust', in *A Time To Speak* (ISI Books, 2008) 476.

What could be the practical implications for competition law of the concerns raised by the populists? These concerns may not necessarily be addressed through more aggressive competition law intervention in markets. Antitrust 'conservatives'[167] may find comfort with approaches suggesting the expansion of markets and the reconceptualisation of property rights,[168] in order to deal with the complete markets assumption problem that has always bedevilled equilibrium analysis in economics.[169] Other approaches emphasising the role of countervailing bargaining power (of final consumers or other market participants) in order to neutralise economic power and its various sources have also been put forward.[170] However, in my view, such approaches may offer, at best, partial solutions to the concentration of economic power, and to its conversion to inequality, in other spheres of justice.

Some more active and vigilant competition law enforcement may therefore be needed. This involves focusing again on economic concentration as such. A complex equality-driven competition law will view more critically merger activity and the common shareholding of major corporations, which may produce anticompetitive effects across different economic sectors,[171] in view of the financialisation process of the global economy.[172]

[167] By this expression I mean those that fear more type I errors (over-enforcement) than type II errors (under-enforcement).

[168] See, for instance, the recent book by E. Posner and E. G. Weyl, *Radical Markets Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018) (suggesting a greater use of Harberger taxes and the end of the monopoly paradigm of property rights perceived as a right to exclude).

[169] The assumption that consumers may access a full set of insurance contracts and thus be protected against any possible idiosyncratic risk that may affect their individual consumption (e.g. loss of job, accident, stock market boom or bust) deals with the inherent uncertainty of a market system, contingent consumption claims being settled before uncertainty is revealed, and enables economists to assume that individual behaviour coincides with aggregate behaviour, thus greatly simplifying economic analysis and consequently the lessons that may be drawn for both individual and aggregate analysis just by studying either indifferently. For a critical discussion, see T. Jappelli and L. Pistaferri, 'Complete Markets', in T. Jappelli and L. Pistaferri, *The Economics of Consumption: Theory and Evidence* (Oxford University Press, 2017), 46.

[170] See, for instance, M. S. Gal and N. Elkin-Koren, 'Algorithmic Consumers' (2017) 30(2) *Harvard Journal of Law and Technology* 309 (advancing the possibility of consumers to turn also algorithmic and thus tame the technological power of algorithmic firms); I. Arrieta Ibarra, L. Goff, D. Jimenez Hernandez, J. Lanier and E. Glen Weyl, 'Should We Treat Data as Labor? Moving Beyond "Free"' (2017) 1(1) *American Economic Association Papers and Proceedings*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093683 (arguing for providing search engines' users the possibility of resorting to collective bargaining with digital platforms).

[171] J. Azar, M. C. Schmalz and I. Tecu, 'Anti-Competitive Effects of Common Ownership' (15 March 2017) *Journal of Finance*. Available at SSRN: https://ssrn.com/abstract=2427345 or http://dx.doi.org/10.2139/ssrn.2427345; J. Azar, R. Raina and M. C. Schmalz, 'Ultimate Ownership and Bank Competition' (23 July 2016). Available at SSRN: https://ssrn.com/abstract=2710252 or http://dx.doi.org/10.2139/ssrn.2710252

[172] J. Montgomerie and K. Williams, 'Financialised Capitalism: After the Crisis and Beyond Neoliberalism' (2009) 13(2) *Competition and Change* 99–107. For a historical and explanatory analysis of the concept financialisation, with regard to profitability, shareholder value and shifted

A complex equality-driven competition law may also take a wider perspective on economic power, not just focusing on 'market power',[173] but considering all sources of power, rehabilitating concepts such as relational market power or superior bargaining power. This may provide grounds for action in order to avoid the quasi-totality of the total surplus of global value chains being appropriated by 'lead' companies, while leaving a number of market players without proper compensation for their efforts and contributions, when this has negative effects on innovation, productivity as well as long-term consumer interest.[174] We should not forget that the main benefit of markets is to reward productivity. This ensures their resilience as a mechanism of social organisation.

We may also have to focus on consumer *well-being* in markets where this makes sense from a complex equality perspective, where we know that most of the consumers (or people), affected will be among the lower-income strata, or that monopolistic control of the specific social good may lead to the emergence of dominance that can be converted and extended more easily in other markets and other social spheres (outside market exchange). We may want to take a broader perspective, for instance by considering broader public interests that would preserve fairness and social stability, even if this is at the price of some reduction in economic efficiency. This could include effects on employment and the interests of workers and the unemployed, the protection of privacy, the democratic process and media pluralism, or environmental concerns, to the extent that these effects result from restrictions of competition, systemic resilience becoming the driving force of competition law.[175]

New tools may also be added to the competition law toolkit box. It is clear that market definition with its emphasis on price competition may fail to represent the various forms of competitive interaction that take place in the digital economy, and the various other values than lower prices that may animate public policy in specific markets. By focusing on 'horizontal competition', that is the competition from existing firms in a specific relevant market, market definition also ignores 'vertical competition', competition from suppliers upstream or customers downstream, in different segments of the industry, that may represent more meaningful constraints

incentives on innovation, see N. van der Zwan, 'State of the Art: Making Sense of Financialisation' (2014) 12 *Socio-Economic Review* 99–129.

173 See also the proposals of A. Ayal, 'The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail It' (2013) 1(2) *Journal of Antitrust Enforcement* 221.

174 I. Lianos and C. Lombardi, 'Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?' (2016) 1 *Concurrences* 22; I. Lianos, 'Global Food Value Chains and Competition Law – BRICS Draft Report' (1 January 2018). Available at SSRN: https://ssrn.com/abstract=3076160

175 See I. Lianos, 'Polycentric Competition Law' (2018) *Current Legal Problems* 1. For instance, it can be argued that these concerns should be integrated in the competition law analysis in EU law, in view of the social and economic rights included in the Charter and the broader horizontal clauses in the EU Treaties, such as Article 9 TFEU. For a discussion, see I. Lianos, 'Legal Hermeneutics and Competition Law' (CLES Research Paper 5/2019).

to the economic power of dominant companies, in particular in the digital economy.[176]

Vertical competition may also play a more significant role in competition law if the analysis shifts from solely focusing on the generation of even higher surplus value to understanding the allocation of the total surplus value that is generated in the context of a value chain. To the extent that fairness and guaranteeing complex equality become important objectives of competition law, the distribution of the total surplus value may become an important concern. Restrictions to vertical competition may also affect productivity and provide 'superstar' large digital platforms the possibility to pull away from competition and enjoy tremendous levels of profitability, without these accumulated profits being used for productive investments. The conceptual tool of value chain (or global value chain) may offer an excellent mapping tool that could be further used in competition law. Market studies and enquiries may also provide a more complete picture of economic power and of the competitive interactions in an industry, eventually offering further opportunities for better targeting competition law enforcement or for using ad hoc remedies.

The realisation is that for societies to stay stable, they need to stand on two legs: economic efficiency but also fairness, may call for a limited redesign of competition law. This should not only be focusing on efficiency (and consumer surplus or welfare), but also on guaranteeing complex equality. This 'complex equality-driven' competition law may opt for some of the reforms suggested above by the proponents of 'populist' antitrust. However, to the difference of the views put forward by the populists, the boundaries of competition law enforcement should also be clear and limiting principles to state intervention developed in order to avoid the dominance of politics over the marketplace, considered as a separate sphere of justice. Accepting that some degree of inequality of resources may be the consequence of the operation of the various criteria adopted by the different spheres of justice (in the marketplace, competition on the merits), and that promoting equality of opportunities needs to stand on well-designed standards that provide equal consideration to the various interests affected (including the rights of the monopolists and oligopolists)[177] constitute some of the necessary steps ensuring that competition law furthers complex equality and systemic resilience.

Competition law cannot be transformed again to being just a tool of social regulation. In contrast to the period of antitrust populism that followed the Bretton Woods agreements,[178] free circulation of capital globally constitutes one

176 For a more in-depth analysis of the role of 'vertical competition' in the digital economy, see I. Lianos, 'Digital Value Chains and Competition Law' (CLES Research Paper 1/2019).

177 For an interesting argument in favour of considering also the rights of the monopolists, see Ayal, *Fairness in Antitrust*, 122–43.

178 The international economic system resulting from the Bretton Woods included capital controls for the first time at a broad basis to guarantee financial stability after the Second World War. These

of the building blocks of modern financial capitalism, thus intensifying competition between capitals for the most profitable investment.[179] Hence, as long as the free flow of capital remains an essential element of the global capitalist system, competition law should also accommodate economic policy concerns, such as attracting foreign direct and indirect investments as well as promoting productivity.

Competition law may not reverse the trend towards economic inequality.[180] However, in view of the difficulty of the traditional tools of the welfare state to deal with some of the causes of economic inequality, in particular monopoly power, and the fact that social expenses have reached a plateau in some jurisdictions, competition law may fulfil a quite important role in the struggle against economic inequality. From this perspective, the systemic resilience of the social contract may offer a high-end goal that would accommodate both efficiency and fairness concerns. Under these limitations, competition law should provide the necessary balancing force to populism and may become an important tool in promoting complex equality. The choice appears therefore to be broader than the dilemma between the return of 'populist' antitrust and a competition law marginalised in an era of 'populism'.

restrictions were gradually taken away after the collapse of the Bretton Woods system in the early 1970s. However, the Asian crisis of 1997 and the most recent 2008 financial crisis brought back the view that capital controls are not just a tool to mitigate financial crises, but can become a regular monetary policy tool, even if there is no crisis (IMF, 'Strengthening the International Monetary System – A Stocktaking' (22 February 2016), available at www.imf.org/external/np/pp/eng/2016/022216b.pdf).

179 This of course creates constraints for national governments with regard to adopting more 'aggressive' competition law enforcement, although the size of their market, and not just the rates of return on capital, could also play some role in the decision of global capital to flee elsewhere, should competition law enforcement significantly halve its returns on investment.

180 This has been in operation for thousands of years, and temporarily interrupted only because of the impact of the 'four horsemen': war, revolution, systemic collapse and pandemics (W. Scheidel, *The Great Leveler* (Princeton University Press, 2017), 443, observing the 'common root' of these in the 'massive and violent disruptions of the established order', and noting that 'the periodic compressions of inequality brought about by mass mobilization dwarfed any known instances of equalization by entirely peaceful means'. However, the standards of equality to which one may aspire to return to may not be those of the forager societies prior to the Holocene!).