

Unclassified

English - Or. English

26 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Interaction between Competition and Democracy – Note by Poland

6 December

This document reproduces a written contribution from Poland submitted for Item 8 of the 144th OECD Competition Committee meeting on 5-6 December 2024.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03556284

Poland

1. Introduction

1. In this contribution prepared by the Polish Office of Competition and Consumer Protection (UOKiK), we share our observations on the link between competition and democracy.
2. This contribution should be construed as a discursive text and is not intended to provide any definitive statement on the policy implemented by our agency. References to views of specific authors made in this contribution are not meant as endorsement of these views (unless stated otherwise) or support for any of the authors.
3. Since the subject of competition and democracy has been already covered in academic literature, including the articles listed by the Secretariat in the call for contributions, we focus on our own perspective and practical examples that might be of interest to the OECD, other delegates, and interested parties. In consequence, we provide only limited comments on theoretical and normative issues.
4. The contribution is divided into three parts, discussing: (a) competition and democracy in general; (b) examples of interactions between competition and democratic decision-making; (c) democracy-related cases in antitrust enforcement.

2. Competition and Democracy

2.1. General remarks

5. Making links between competition and democracy causes controversy. Historically, antitrust enforcement and democracy were depicted as close to each other.¹ However, with the rise of the Chicago School and the more economic approach, combining antitrust with non-economic concepts became a contentious issue.
6. Generally, some argue that the link between competition and democracy is mutually reinforcing (positive-positive), with competition having a positive effect on democracy and democracy having a positive effect on competition, creating a positive feedback loop.² However, at least in theoretical terms, this link can also be negative-negative (negative feedback loop), positive-negative (e.g., competition contributes to more democracy, but democracy can be destructive for competition), or negative-positive (e.g., democracy contributes to establishing an environment conducive to competition, but

¹ See e.g. Elias Deutscher, 'The competition-democracy nexus unpacked – competition law, republican liberty, and democracy' (2022) 41 Yearbook of European Law 197, 201-203.

² This view seems to be argued by e.g. Eleanor Fox, albeit with the word "market" being used instead, see: Eleanor Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) Legal Issues of Economic Integration 317 ('*Democratic societies naturally adopt markets. Democratic governance and market economics are mutually supporting*'), 328 ('*The links between democracy and markets are virtuous*').

competition may harm democracy).³ Furthermore, hypothetically, this influence can be positive in some areas, and negative in others. Aside from this “internal” relationship, competition and democracy may also have an “external” relationship, in the sense that they may both contribute to some other value that is pursued by a society, i.e. when working together, they may both further some other goal, even if they do not have any meaningful impact on each other.⁴

7. This short outline creates a number of combinations that could be further tested, but are still far from answering the question about the actual relationship between competition and democracy. This is because the number of possible scenarios to be investigated also grows with each different definition of “competition” and “democracy”. The impact of “competition” on democracy will likely be different, if competition is defined as a policy of market decentralisation (de-concentration), and different if one assumes that competition is a shorthand for consumer welfare maximisation. Likewise, democracy can be defined as “liberal democracy” or merely as a form of government where the “demos” can influence the government and where this influence is a crucial/defining element of political reality.⁵

8. From this angle, interactions between competition and democracy are not an easy subject. The bare notion of “competition” causes controversy in antitrust – adding “democracy” to this equation does not make it any easier. This difficulty seems to largely sum up much of the aversion of the sceptics from e.g. the Chicago School towards going beyond the consumer welfare standard and non-economic notions.⁶ Still, in the context of large technological and geopolitical changes that impact markets, democracy becomes more often presented as at stake. In this context, the Secretariat’s suggestion to discuss links between competition and democracy is very timely.

2.2. Competition as a paradigm?

9. Defining “competition” and “democracy” is not unproblematic, with most stakeholders supporting both but often having conflicting views on what they are.⁷ It would

³ As regards positive-negative relation, consider, for example, a following hypothesis: competition acts as an “equaliser” that contributes to more dispersed power in a society, making it – for the sake of the argument – more “democratic”. However, cutthroat competition creates also nuisances that the democratic society wishes to eliminate, deciding to restrict “competition” by legislative acts. An interesting example could be various “work-life balance” agreements. For instance, Robert Bork, *The Antitrust Paradox* (first published 1978, Bork Publishing 2021) 84 seems to argue that undertakings agreeing on a work-life balance issues would effectively run a hardcore cartel – yet, those kinds of arrangements can equally well be made into law by a democratic society and eliminate “competition” this way. As regards negative-positive, consider, for instance, various scenarios of “toxic” competition that in a long-term have a negative impact on the society and social welfare, see: Maurice Stucke and Ariel Ezrachi, *Competition Overdose* (Harper Business 2020).

⁴ For example, competition and democracy can both contribute to individual liberty, defined as non-domination, see Deutscher (n 1).

⁵ The last caveat, i.e. the people’s influence being a crucial element, seems relevant since on a technical level, the people, due to sheer numbers, will always have some influence on the government.

⁶ This sentiment does not cease to be present, see e.g. Thibault Schrepel, ‘Antitrust Without Romance’ (2020) 13 *New York University Journal of Law & Liberty* 326.

⁷ Aside from general discussions about what “competition” means, which have been subject to numerous debates, we would like to draw attention to two perspectives: one showing that the language of competition can be used to pursue various ends, see: Stucke and Ezrachi (n 3) 146

seem useful in that regard to investigate what actual political/economic model can be discerned out of the competition-democracy entanglement, and for what reason this specific model is desirable, i.e. why it offers competitive advantages over other possible models, with both of its constituent elements (i.e., competition and democracy) being at the same time in some way similar and/or mutually-reinforcing.

10. Using a different vocabulary than the Secretariat, some authors have argued that in liberal market democracies, competition serves as a paradigm in three areas: market (economic competition, i.e. simply “competition” in the Secretariat’s framework), politics (democratic elections/processes, i.e. simply “democracy” in the Secretariat’s framework), and culture (free speech – not present in the Secretariat’s call for contributions).⁸

11. Looked at from this perspective, competition in each of these areas serves as a discovery mechanism, i.e. an arrangement that allows discovering relevant social facts through interactions between multiple relevant actors. If accepted, this proposition contributes to an understanding of the link between competition and democracy as one that leaves room for changes and reconfigurations to take place. Thus, market competition assumes that the position of the current market leader can be challenged and that new products can emerge.⁹ Likewise, the political leadership is subject to periodical electoral assessment and may lose power in a peaceful process.¹⁰ Without attempting to provide a full definition, and merely suggesting possible starting points for a further discussion, market competition and democratic processes (i.e., competition and democracy, within the framework suggested by the Secretariat for this roundtable) can be seen as having a preference towards adaptive changes; conversely, they both pose a challenge towards cemented structures, socio-political stagnation, and perpetuating established conditions.

(discussing kudzu); and another tracking how the intensity of enforcement has been changing, while the support for more enforcement has remained similar, see: Filippo Lancieri, Eric Posner, and Luigi Zingales, ‘The Political Economy of the Decline of Antitrust Enforcement in the United States’ (2023) 85(2) *Antitrust Law Journal* 441. When it comes to democracy, in legal realist terms, one could argue that the only certain thing about democracy is that whenever some group loses power relative to other groups, the more likely it is that this group will consider such a change “undemocratic” and leading to “democratic backsliding”. Conversely, whatever policy is desired by some group, this policy will likely be “democratic” and “supporting democracy”.

⁸ Oles Andriychuk, *The Normative Foundations of European Competition Law* (Edward Elgar 2017) 10 (speaking about competitive process in relation to politics, culture, and the economic sphere). The role of free speech in this triangle is not unambiguous. This is because free speech can be taken as characterising cultural processes, while at the same time it remains one of the core values of democracy, crucial from the point of view of democratic processes.

⁹ When phrased in such a simplistic way, this proposition could likely be easily challenged. When attempting to define “competition”, one would need to add to this proposition further clarifications such as “challenged in a realistic timeframe”, “in a fair process”, “with everyone competing on the merits”. All of those qualifications involve further ambiguities that will likely never disappear from antitrust debates.

¹⁰ Same as with market competition, this proposition would likely require further qualifications. For instance, elections should be “fair” and the “peaceful process” should not just be peaceful, but should take place automatically, and not as a concession made by the ruling political group. For example, in 1989, the Polish communist government agreed to share power with the representatives of the Solidarity movement, yet this act of sharing power was not a natural part of the political system. One can then compare this to what Deutscher (n 1) 200 calls “benevolence” – the “benevolence” of the communist government did not yet make the system free, liberty-supporting, and “republican” in the proper sense (not until 1991 and fully free elections).

12. From this angle, it seems that (market) competition will generally be supportive of a healthy “democratic” system – this might be so, because insofar as competition allows challenging undertakings’ market positions, it also facilitates upward and downward social mobility, lowering the chance that any social group would strengthen its economic position for long enough to also entrench it by political means. It could be questioned though to what extent democracy facilitates competition. On the one hand, if accepted as true that competition contributes to a healthy democracy, one could say that there are good incentives for a democratic society to work in favour of competition, as this ensures the survival of democracy itself.¹¹ On the other hand, already at the theoretical and more speculative level, the link in that regard seems less predetermined, with democracy having a potential of either working for or against competition, depending on circumstances.¹² In fact, this view on democracy seems to be in line with a tendency to add to “democracy” such qualifications as “liberal democracy” or “liberal market democracy”. Had those characteristics been intrinsic to democracy, there would be no need to add them.¹³

2.3. Democracy, constitutional law, and the axiology of antitrust enforcement

13. Democracy as such is not mentioned in the Polish Competition Act in any capacity. However, the Polish Constitution specifies that the government (understood broadly, i.e. as the executive, legislature, and judiciary) implements the model of “social market economy”, i.e. the model originally advocated by ordoliberals, who in turn influenced the perception of antitrust and competition in Europe.¹⁴ From the ordoliberal perspective, market competition can be seen as part of a larger system of building a healthy democratic society.¹⁵

14. While the application of such abstract constitutional terms to antitrust cases might seem unlikely in actual decision-making, the link between antitrust enforcement and constitutional law found its way into case law in our jurisdiction.

¹¹ Senator Kefauver’s 1950 antitrust speech can be seen as an example of this kind of attitude, see: Robert Pitofsky, ‘The Political Content of Antitrust’ (1979) 127 *University of Pennsylvania Law Review* 1051, 1062-1063. Generally, this also seems to be the point made by e.g. Fox (n 2).

¹² More generally, this problem can be further linked to a more classic issue known in political theory, i.e. the ability of democracy to be self-destructive in the sense that absent special limitations, a democratic society can elect an autocratic government and abandon democracy.

¹³ In that sense, one could question Eleanor Fox’s view (see n 2) that: ‘*Democratic societies naturally adopt markets*’ – unless one defines “democratic society” in a very specific way (or assume that every system of producing and distributing goods is a “market”), democracy does not seem to have a natural capability that would “naturally” lead it to adopt markets (competition). It seems more realistic to say that democratic societies do what they believe should be done at given time.

¹⁴ Since this contribution might be of interest to non-European readers, it seems useful to note that the ordoliberal concept of “*social market economy*” does not mean a “*socialised*” economy, but rather aims at emphasising that market economy is a social (organic) phenomenon, see e.g. Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009) 107, outlining Friedrich Hayek’s scepticism towards the term due to “social” serving as a “weasel-word” and Ludwig Erhard’s explanation that what he means by it is that: “*the market economy as such is social, not that it needs to be made social*”.

¹⁵ In the US context, Barry Lynn calls a similar set of rules “*the American system of liberty*”, see: Barry Lynn, *Liberty from All Masters* (St Martins Press 2020) 74-98.

15. For example, in the *Sucha Beskidzka* case, the ordoliberal axiology of Polish antitrust became a point of contention between the Court of Appeals and the Polish Supreme Court. The case concerned an abuse of dominance consisting in excessive pricing by a local water and sewage undertaking. The Court of Appeals set aside an infringement decision in this case, referring to the US *Trinko* case when discussing its reasons for doing so. It concluded that undertakings should be in a position to charge higher prices to recoup investments. Following an appeal, the Polish Supreme Court directly commented on the references to *Trinko* and the axiology used by the Court of Appeals. It concluded that the goals and methods of assessment under Polish antitrust differ from those that had been followed by the US Supreme Court in *Trinko*. This was mostly based on a more ordoliberal view on the economy than that held by the US Supreme Court in *Trinko*.

16. While in *Sucha Beskidzka*, the Polish Supreme Court was focused on the methods of assessment, the fact that it referred to the ordoliberal axiology can be construed as meaning that other ordoliberal concepts (e.g., the role of democracy) are of relevance as well (as they are part of the same axiology).

3. Democratic functioning of competition policy

17. Antitrust agencies are often technocratic bodies with independence guarantees vis-à-vis market actors and other government bodies (typically those enjoying a more direct democratic mandate). In this context, there have been controversies over antitrust decision-makers assessing broad ranges of issues.¹⁶ On the one hand, it is argued that the technocratic nature of competition enforcement contributes to good market functioning.¹⁷ On the other hand, the closer the interaction between antitrust decision-makers and democratic interests, the more democratic participation and deliberation one could expect (this is because such participation/deliberation might contribute to the understanding of democratic expectations).¹⁸

18. Some authors have argued that antitrust is effectively about allocating “coordination rights”.¹⁹ In that regard, an interesting subcategory of cases that could possibly further illuminate the interaction between competition and democracy might be the activities of professional associations (lawyers, medical professionals, financial auditors).

19. Professional associations often operate based on a government sanction (i.e., the legislature, which enjoys a democratic mandate, allocates certain rights and duties to a professional association; this typically includes rule-making). Those professional associations are subject to antitrust rules, but at the same time exercise some democratic

¹⁶ See e.g. Jean Tirole, ‘Socially responsible agencies’ (2023) 7(4) *Competition Law & Policy Debate* 171. This includes both decision-makers who are formally part of the executive branch (e.g., administrative agencies) and the judiciary. Judicial activism and frictions between the judiciary and democratic decision-making have been of particular controversy to some representatives of the Chicago School, like Bork (n 3).

¹⁷ See e.g. Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (Belknap Press 2019).

¹⁸ On the democratic mandate/legitimacy of antitrust agencies, see e.g. Anna Gerbrandy, ‘Addressing the legitimacy problem for competition authorities taking into account non-economic values: the position of the Dutch Competition Authority’ (2015) 40(5) *European Law Review* 769.

¹⁹ Sanjukta Paul, ‘Antitrust as Allocator of Coordination Rights’ (2020) 67 *UCLA Law Review* 378.

power (partly conferred upon by the legislature, and partly derived from the professionals belonging to the association and deciding how their profession will be performed).

20. From our point of view, some of the friction in that regard can be seen in the *Homeopathy* case which we discussed in our contribution to another OECD roundtable in 2023.²⁰ The *Homeopathy* case concerned a decision of the Polish National Board of Medical Doctors which dissuaded its members from using homeopathic treatments. The decision was found to be anticompetitive – the case used a simple theory of harm based on an assumption that competition between legally traded medical products should remain undistorted and that consumers should have an option to choose such a treatment. The court of first instance annulled the decision, saying that competition should be protected “in the public interest”. The court pointed out inter alia that: (a) competition protection itself is not an objective; (b) competition is a means to “*achieve a certain positive outcome – an outcome which should be positive for the entire society, the entirety of consumers*”; (c) patients have “*a right*” to be treated with methods with documented medical effectiveness. Understandably, both the language of competition and “rights” could be used to argue the case either way, with the actually relevant issue being which actor (the professional body sanctioned by the legislature, the antitrust agency, the court) is best-placed to make a binding decision and exercise democratic responsibility/accountability for the outcome.²¹ Somewhat connected to this issue, albeit applicable to all areas of economic activity, might be the case of so-called “expressive” boycotts.²²

21. In our jurisdiction, the tension between democratic decision-making and competition law enforcement could also be argued to be present in local cases concerning municipal rule-making. Under the case law of Polish courts, local law-making authorities (e.g., city authorities) can be subject to antitrust enforcement. In other words, while national legislation cannot be struck down under antitrust enforcement and the national legislature cannot be found to violate antitrust laws, local authorities can be found liable for antitrust violations consisting in adopting local legal rules that restrict competition. In consequence, local authorities can, for example, abuse a dominant position by adopting local legal rules that exclude competitors and secure the market position of a dominant undertaking owned by the local authorities (e.g., a local utility company). Such cases may also concern sustainability and environmental issues.²³ So far, those type of cases have been decided in favour of competition enforcement.

4. Role of democracy in application of competition policy

4.1. What types of cases can be of interest?

22. While over the last decade much interest has been shown in sustainability cases as something potentially close to the competition-democracy intersection, it seems to us that

²⁰ OECD, ‘Advantages and Disadvantages of Competition Welfare Standards – Note by Poland’ (2023) DAF/COMP/WD(2023)34 <[https://one.oecd.org/document/DAF/COMP/WD\(2023\)34/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)34/en/pdf)>, para 21-23.

²¹ As regards the possibility of arguing the case either way, in our 2023 contribution (see n 20), we explain that even without dropping the consumer welfare standard, it seems possible to argue that the case had positive/negative impact on consumer welfare, depending on interpretation.

²² Hillary Greene, ‘Antitrust Censorship of Economic Protest’ (2010) 59(6) *Duke Law Journal* 1037.

²³ See OECD (n 20), para 24.

a much closer theoretical link is that between competition and free speech/media pluralism. This is because free speech can be considered one of the core elements of democracy. This link has been already subject to academic research, both in the United States and in Europe.²⁴

23. As noted in our 2023 contribution to another OECD roundtable, we have received complaints concerning so-called “private censorship” on social media.²⁵ So far, we have not decided to open any investigation with regard to those cases. In 2024, however, we decided to open a preliminary investigation in connection with Meta/Facebook’s policy with regard to Polish newspapers.²⁶

24. Some authors have also noted that certain forms of coordination between undertakings could be of relevance both from the point of view of competition and free speech (and thus potentially also democracy).²⁷

25. Since 2020, we have also dealt with two mergers at the intersection of competition and free speech. In the *Orlen/Polska Press* case, we cleared a merger between Orlen (state-owned oil company) and Polska Press (newspaper conglomerate). The merger was challenged by the Polish Human Rights Commissioner (ombudsman), who pointed out that the concentration had a negative impact on free speech. The court confirmed our decision. In turn, in *Agora/Eurozet*, we blocked a merger between two radio stations, arguing the case based on a standard theory of harm. The case was appealed. The courts concluded that we did not prove the case to the requisite legal standard.

²⁴ See, e.g., Maurice Stucke and Allen Grunes, ‘Antitrust and the Marketplace of Ideas’ (2001) 69(1) *Antitrust Law Journal* 249; Greene (n 22); Neil Chilson and Casey Mattox, ‘[The] breakup speech: Can antitrust fix the relationship between platforms and free speech values?’ (*Knight First Amendment Institute*, 5 March 2020) <<https://knightcolumbia.org/content/the-breakup-speech-can-antitrust-fix-the-relationship-between-platforms-and-free-speech-values>>; Gregory Day, ‘Monopolizing free speech’ (2020) 88 *Fordham Law Review* 1315; Evelyn Douek, ‘The Rise of Content Cartels’ (*Knight First Amendment Institute*, 11 February 2020) <<https://knightcolumbia.org/content/the-rise-of-content-cartels>>; Jan Polański, ‘The marketplace of ideas and EU competition law: Can antitrust be used to protect the freedom of speech?’ (2022) 2021 *YSEC Yearbook of Socio-Economic Constitutions* 199; Cezary Banasiński and Marcin Rojszczak, ‘The role of competition authorities in protecting freedom of speech: the PKN Orlen/Polska Press case’ (2022) 18(2) *European Competition Journal* 424; Jan Polański, ‘Antitrust shrugged? Boycotts, content moderation, and free speech cartels’ (2023) 19(2) *European Competition Journal* 334; Jan Polański, ‘Limits, Limitations, and Outer Boundaries of Antitrust: Censorship, Free Speech, and Dominance’ (2023) 7(2) *Market and Competition Law Review* 95. See also Ariel Ezrachi and Viktoria Robertson, ‘Can competition law save democracy? Reflections on democracy’s tech-driven decline and how to stop it’ (2024) *Journal of Antitrust Enforcement* 1 (speaking about the marketplace of ideas).

²⁵ See OECD (n 20), para 34.

²⁶ The investigation concerns how newspaper content is shown on Facebook, see: <https://uokik.gov.pl/en/meta-preliminary-investigation>.

²⁷ Douek (n 24); Polański, “Antitrust Shrugged?” (n 24).

4.2. Possible ways to feature democracy in competition policy

26. It seems that democracy-related issues could theoretically be featured in at least three ways in competition policy.²⁸ Starting from least to most difficult, these ways are following.

27. First, an antitrust agency may actively prioritise certain issues or markets to better accommodate democratic interests.²⁹ For example, if a jurisdiction considers that there are too few free speech avenues for citizens to effectively exercise it (with detrimental effects on democracy), an agency could consider taking active steps to increase competition in this area. This could hypothetically come down to standard antitrust enforcement (e.g., investigating whether entry in the market is not restricted due to collective boycotts or abuse of dominance) and competition advocacy (e.g., learning whether there are regulatory barriers to entry that could be removed).

28. Second, a restriction of competition that shows connection to a democracy-related issue could lead to higher fines. Higher fines in turn could lead to higher deterrence levels. Likewise, in cases where a restriction of competition took place in the context of well-meant democracy-enhancing initiatives, which nonetheless led to an unlawful restriction of competition, fines could be lower. It seems to us that some authorities take into account such non-standard factors when imposing fines.³⁰ In 2024, when updating our own fine guidelines, we decided to clarify that when imposing fines, we may take into account that a case had an impact on an interest of significant societal relevance (e.g., it concerned privacy, free speech, environment).³¹

29. Third, the democracy-related issue could be taken into account when making a substantive assessment. For example, the fact that a competition restriction has a negative impact on a democracy-related interest, such as free speech mentioned earlier, this could trigger antitrust prohibition more easily.³²

4.3. Other options

30. While a broad discussion about competition policy and democracy has not taken place in our jurisdiction, more limited initiatives have been considered.

²⁸ See also: Ezrachi and Roberston (n 24) 6 (discussing competition dynamic, external benchmark, and integrated approach); Jan Polański, ‘A Positive Program for Antitrust? Enforcement in Times of Political Tides’ (2022) 45(2) World Competition 237 (discussing various levels of intensity in considering a “more political” approach).

²⁹ See, e.g., Tirole (n 16) 173 (*‘sue milk cartels before caviar ones’*), Polański, ‘Antitrust Shrugged?’ (n 24) 357 (applying the milk cartel principle to free speech cases).

³⁰ *Communiqué de l’Autorité de la concurrence relatif à la méthode de détermination des sanctions pécuniaires* (French Competition Authority 2021), para 28.

³¹ *Wyjaśnienia dotyczące ustalania wysokości kar pieniężnych w sprawach związanych z naruszeniem zakazu praktyk ograniczających konkurencję* (Polish Competition Authority 2024), para 26

³² This would be akin to an approach seemingly suggested by Justice Frankfurter in *Associated Press*, 326 U.S. 1 (1945).

31. Private censorship, mentioned earlier in this contribution, has caused controversy in our jurisdiction. This led some government actors to consider adopting measures addressing this issue, albeit outside the scope of antitrust enforcement.³³

32. At the EU level, concerns over media pluralism have led to a regulatory response in the form of the European Media Freedom Act (EMFA). As noted by some authors, of relevance from the competition-democracy perspective are also such regulatory developments as the Digital Services Act (DSA) and the Regulation on Transparency and Targeting of Political Advertising.³⁴

4.4. Antitrust, democracy, and trade-offs

33. Due to its open-textured provisions, antitrust is generally a flexible instrument. Yet, making links between antitrust and democracy-related interests is not without challenges.

34. The main challenge has been outlined at the outset of this contribution: the inclusion of “democracy” to an equation that already uses a different concept interpreted in multiple ways (i.e., “competition”) leads to more uncertainty.³⁵

35. However, what seems to be important in that regard is not to create a false dichotomy under which a narrow concept of antitrust is without controversy, while a broader concept of antitrust needs to always create much legal uncertainty.³⁶ Even the narrowest types of antitrust enforcement involve serious “incommensurability” problems.³⁷ The issue is that there is always some disconnection between theory and practice in antitrust, since antitrust decision-makers operate in conditions of much uncertainty, limited resources, and time constraints, all requiring the creation of a set of workable rules of assessment. In this context, we are open to hear arguments on why and how democracy-related interests could be considered.

³³ Valerie Hopkins, James Shotter, and Javier Espinoza, ‘Hungary follows Poland in taking on Big Tech “censors”’ (Financial Times, 3 February 2021) <<https://www.ft.com/content/6a315d26-c6fe-4906-886d-04cec27a6788>>.

³⁴ See Ezrachi and Roberston (n 24) 9.

³⁵ As put by some authors: “*more moving elements, more possible conclusions*”, see: Polański, ‘Antitrust Shrugged?’ (n 24) 354.

³⁶ Eleanor Fox seems to share some of this sentiment, see Eleanor Fox, ‘Consumer Beware Chicago’ (1986) 84 Michigan Law Review 1714, 1718 (‘*Both Chicago and its critics support some rules that are clear and support other rules and inquiries that are more complex*’). There is a difference between academic discussions (where an inclusion of more concepts can lead to more uncertainty as those concepts can be interpreted in different ways, and where all authors communicate their ideas without any adjudicator deciding which view prevails) and actual enforcement (where a single interpretation and simple rules of adjudication can be adopted over time, and where there is ultimately always some final arbiter).

³⁷ Rebecca Allensworth, ‘The Commensurability Myth in Antitrust’ (2016) 69(1) Vanderbilt Law Review 1.

References:

- Allensworth R, 'The Commensurability Myth in Antitrust' (2016) 69(1) *Vanderbilt Law Review* 1
- Andriychuk O, *The Normative Foundations of European Competition Law* (Edward Elgar 2017)
- Banasiński C and Rojszczak M, 'The role of competition authorities in protecting freedom of speech: the PKN Orlen/Polska Press case' (2022) 18(2) *European Competition Journal* 424
- Bork R, *The Antitrust Paradox* (first published 1978, Bork Publishing 2021)
- Chilson N and Mattox C, '[The] breakup speech: Can antitrust fix the relationship between platforms and free speech values?' (Knight First Amendment Institute, 5 March 2020)
<<https://knightcolumbia.org/content/the-breakup-speech-can-antitrust-fix-the-relationship-between-platforms-and-free-speech-values>>
- Day G, 'Monopolizing free speech' (2020) 88 *Fordham Law Review* 1315
- Deutscher E, 'The competition-democracy nexus unpacked – competition law, republican liberty, and democracy' (2022) 41 *Yearbook of European Law* 197
- Douek E, 'The Rise of Content Cartels' (Knight First Amendment Institute, 11 February 2020)
<<https://knightcolumbia.org/content/the-rise-of-content-cartels>>
- Ezrachi A and Robertson V, 'Can competition law save democracy? Reflections on democracy's tech-driven decline and how to stop it' (2024) *Journal of Antitrust Enforcement* 1
- Fox E, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) *Legal Issues of Economic Integration* 317
- Gerbrandy A, 'Addressing the legitimacy problem for competition authorities taking into account non-economic values: the position of the Dutch Competition Authority' (2015) 40(5) *European Law Review* 769
- Greene H, 'Antitrust Censorship of Economic Protest' (2010) 59(6) *Duke Law Journal* 1037
- Lancieri F, Posner E, and Zingales L, 'The Political Economy of the Decline of Antitrust Enforcement in the United States' (2023) 85(2) *Antitrust Law Journal* 441
- Lynn B, *Liberty from All Masters* (St Martins Press 2020)
- Mirowski P and Plehwe D (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009)
- OECD, 'Advantages and Disadvantages of Competition Welfare Standards – Note by Poland' (2023) DAF/COMP/WD(2023)34 <[https://one.oecd.org/document/DAF/COMP/WD\(2023\)34/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)34/en/pdf)>
- Paul S, 'Antitrust as Allocator of Coordination Rights' (2020) 67 *UCLA Law Review* 378
- Philippon T, *The Great Reversal: How America Gave Up on Free Markets* (Belknap Press 2019)
- Pitofsky R, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051
- Polański J, 'A Positive Program for Antitrust? Enforcement in Times of Political Tides' (2022) 45(2) *World Competition* 237
- Polański J, 'Antitrust shrugged? Boycotts, content moderation, and free speech cartels' (2023) 19(2) *European Competition Journal* 334
- Polański J, 'Limits, Limitations, and Outer Boundaries of Antitrust: Censorship, Free Speech, and Dominance' (2023) 7(2) *Market and Competition Law Review* 95

Polański J, 'The marketplace of ideas and EU competition law: Can antitrust be used to protect the freedom of speech?' (2022) 2021 YSEC Yearbook of Socio-Economic Constitutions 199

Stucke M and Ezrachi A, *Competition Overdose* (Harper Business 2020)

Stucke M and Grunes A, 'Antitrust and the Marketplace of Ideas' (2001) 69(1) Antitrust Law Journal 249

Thibault Schrepel, 'Antitrust Without Romance' (2020) 13 New York University Journal of Law & Liberty 326

Tirole J, 'Socially responsible agencies' (2023) 7(4) Competition Law & Policy Debate 171