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OPENNESS AND INTEGRITY IN ANTITRUST

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ABSTRACT

Reasonable disagreements are pervasive in antitrust, yet the leading antitrust systems function in a broadly effective and consistent manner. How can we explain this paradox? The tentative reply to this question is that the two main antitrust jurisdictions have managed to do so by adopting the features of 'responsive law' (RL). Therefore, antitrust institutions could further benefit if they adopt the RL framework to understand and deal with reasonable disagreements.

To support this argument, I contend that reasonable disagreements are endogenous in antitrust systems, as they derive from antitrust's fuzzy mandate, conceptually elastic vocabulary, and rules and standards mode of analysis. In a nutshell, reasonable disagreements are the by-product of two complementary yet antithetical forces of antitrust: openness and integrity. Nonetheless, conventional wisdom has it that such disagreements are temporary indeterminacies that will eventually be eradicated. This view stems from a conceptualization of antitrust as a form of 'autonomous law'. However, this model of law does not take reasonable disagreements seriously and as a result offers an inadequate modus operandi for dealing with them. The 'RL' model, on the contrary, recognizes the endogeneity of reasonable disagreements and the underlying forces that generate them. Instead of attempting to eliminate them, therefore, the RL model suggests that antitrust institutions should seek to tame and exploit them. For this purpose, this model proposes a legal-institutional modus operandi for calibrating the eliciting forces of reasonable disagreements, that is, openness and integrity. The hallmarks of this approach are constructive teleological interpretation, experimentalist network-based enforcement by postbureaucratic enforcers, and courts operating as catalysts.

JEL: A11, A12, A13, B40, B21, B41, K00, K21, K40, K41, K42

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I. INTRODUCTION

Reasonable disagreements are pervasive in antitrust. Rational, well-informed and benevolent members of the antitrust community regularly 'reasonably disagree' about the content of competition norms, the direction of competition policy, or the appropriate remedial response.[1] Such disagreements give rise to 'hard cases'.[2] Hard cases are not cases where the stakes are high or cases that raise complex empirical questions. Hard cases are all the instances where law's indeterminacy, semantic vagueness, or normative uncertainty and complexity obstruct a consensus regarding the interpretation and application of the legal norms. This lack of consensus could concern the goals of the law, the content of key antitrust concepts, or the way antitrust intervention should be organized and carried out. The history of both leading antitrust jurisdictions, the European Union (EU) and the United States, is full of disagreements of that kind. One might think that the triumph of economics, the sharpening of antitrust doctrines and the emergence of compliance and institutional theories would eradicate such disagreements. Yet, this is not the case. Such disagreements still infuse indeterminacy in the law and raise concerns about its clarity, predictability, and effectiveness.

So far two strategies have been employed to deal with such disagreements in antitrust. A top-down strategy assumes that discovering and refining a single, all-embracing goal could bring about the 'end of antitrust history'.[3] In 1978, Bork famously wrote 'antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give ... Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules'.[4] After this stage the task of the antitrust community and institutions would be only to refine their legal reasoning, employ superior economic analysis, and use the optimal enforcement standards and procedures. Every antitrust issue will become a problem of implementation.

[1] Reasonable disagreements involve not only occasions of syntactic or semantic ambiguity, but also cases of conflicting claims about what the grounds of law are (that is, conflicting statements about the content of the law and the method(s) for interpreting it). These disagreements should be distinguished from empirical disagreements about the law (that is, disagreements about whether certain the grounds of law have in fact obtained) and their prevalence indicates that the law is an 'argumentative' and 'interpretive' social practice. Ronald Dworkin, TAKING RIGHTS SERIOUSLY 14–46, 81–130 (Cambridge, MA: Harvard University Press 1977); Ronald Dworkin, LAW'S EMPIRE 4–7, 13, 37 (Cambridge, MA: Harvard University Press 1986).

[2] Ronald Dworkin, *Judicial Discretion*, 60 J. PHILOS. 624–638 (1963); H.L.A. Hart, CONCEPT OF LAW 128–136 (OUP 1961).

[3] I paraphrase here Fukuyama. For the notion of the end of history see Francis Fukuyama, THE END OF HISTORY AND THE LAST MAN 58, 60, 66, 138, 289 (Free Press 1992). The distinction between top-down and bottom-up strategies echoes the epistemological distinction between constructivist and empiricist rationalism discussed thoroughly in F.A. Hayek, LAW, LEGISLATION AND LIBERTY 8–19 (Routledge 1998).

[4] Robert Bork, THE ANTITRUST PARADOX 50 (New York: Free Press 1993).

The alternative is a bottom-up strategy, which assumes that the problem of reasonable disagreement will disappear once the courts—organically or in a common-law fashion—develop an optimal analytical framework through canons of interpretation and input from economics.[5] The common thread of both approaches is that reasonable disagreements are temporary sources of tension that will be eventually eradicated through the traditional legal methods of interpretation and developments in positive economics. After their eradication, no ambiguity or indeterminacy will remain in the law.

Yet, I argue here that the historical evolution of the goals debate as well as its analytical structure showcase that reasonable disagreements are inherent in antitrust. Three key elements make antitrust an inherently open system. Both EU and U.S. competition rules have a fuzzy mandate, are written in conceptually elastic language constantly, and are interpreted by employing a mixture of rules and standards. On this I submit here that reasonable disagreements cannot be fully eradicated because they are ignited by two opposing yet complementary *endogenous* forces of antitrust: openness and integrity. To avoid any confusion, the term 'openness' refers to the conceptual elasticity of legal norms or to the factual sensitivity of law application, whereas 'integrity' means principled, value-laden consistency. Integrity includes not only the fundamental Rule of Law principles, such as clarity, certainty, and coherence, but also the core substantive value of the specific legal field it refers to.[6] A careful look at antitrust systems shows that openness is not only inevitable but also desirable. Without openness, antitrust could become a formulaic and ineffective field of law unable to attain its core objective, the protection, and the promotion of competition. Yet, excessive openness can destabilize the Rule of Law or incite the instrumentalization of antirust. In other words, integrity requires openness, but the latter, if excessive, can undermine the integrity of the law.

If, as I argue here, reasonable disagreements are endogenous in antitrust, then the two aforementioned strategies for dealing with them rely on a false assumption that such disagreements can (and ought to) be eliminated. Such an assumption derives from a conceptualization of antitrust as 'autonomous law' (AL).[7] This term refers to a rule-centred model of law that emphasizes law's independence from any nonlegal domain and identifies the 'Rule of Law' as the core mission of legal institutions.[8] Under this approach, antitrust should

[5] Pablo Ibañez Colomo, *Editorial: The Divide Between Restrictions by Object and Restrictions by Effect: Why We Discuss It, Why It Matters* 11 (2) Compet. Law Rev. 176 (2016).

[6] Dworkin, Law's Empire, *supra* note 1 at 4–11, 31–44.

[7] Philippe Nonet & Philip Selznick, Law and Society in Transition: Towards Responsive Law 53–55 (London: Harper and Row 1978).

[8] For a thorough review of the concept see Jeremy Waldron, *The Concept and the Rule of Law*, 43 1 Ga. L. Rev. 1 (2008).

only seek to remove any undue restraints on trade.[9] From this perspective, competition rules are nothing but prohibitions or 'binary switches' that approve or condemn a practice as legal or illegal.[10] In this context, the task of antitrust institutions[11] is to eliminate antitrust injuries that occurred in the past and compensate the victims of antitrust violations.[12] By conceptualizing antitrust in this way, the AL model concludes that reasonable disagreements are temporary, and proposes a two-fold modus operandi: enforcers should apply the law in a crime-tort fashion[13] by emphasizing individual cases, being fact-driven and backward-looking, whereas adjudicators should operate only as norm elaborators and uphold the Rule of Law.[14] The Rule of Law is the ultimate constraint of enforcers' discretion and the central mission of adjudicators. Nonetheless, the AL modus operandi has not succeeded in keeping its promise to eliminate reasonable disagreements. The reasons behind this failure, it is argued here, could be found in the core assumptions of this conceptual model that does not allow it to take reasonable disagreements seriously.

On the contrary, conceptualizing antitrust as a form of 'responsive law' (RL)[15] allows us to recognize the endogeneity of disagreements in this field of law and suggests that such disagreements can be tamed but not eliminated. From this perspective, antitrust becomes *fully responsive* when it disposes of the appropriate mechanisms for finding a healthy balance between openness and integrity, the two antithetical and complementary forces that generate such disagreements. On this basis, I argue here that the RL model not only offers an analytical framing for understanding reasonable disagreements in antitrust, but can also suggest a legal-institutional modus operandi for dealing with them. Three are the hallmarks of this modus operandi: first, antitrust institutions that engage in constructive, teleological interpretation when dealing with indeterminacy and uncertainty in law; second, enforcers that remain responsive to law's underlying value(s) and open to new learning

[9] David J. Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus (OUP 1998).

[10] Prohibitions are distinguished from commands on the basis of their analytical form. They have the form of rules of just conduct, which merely limit the range of choice of the individuals without prescribing what to do. 2 Friedrich Von Hayek, Law, Legislation and Liberty: The Mirage of Social Justice 128 (University of Chicago Press 1976).

[11] By this term, I refer to both competition authorities and courts when they apply antitrust law.

[12] Harry First, *Is Antitrust Law?* 10 Antitrust 9 (1995).

[13] I follow here Crane's terminology even though various authors have made this distinction without using uniform terminology. For instance, First disinguishes between 'legalistic regulatory' culture and 'bureaucratic regulatory' culture, while Melamed contrasts the 'law enforcement model' to the 'regulatory model'. See First, *supra* note 12 at 10; A. Douglas Melamed, *Antitrust as the New Regulation* 10 Antitrust 13 (1995); Daniel Crane, *Antitrust Antifederalism*, 96 (1) Cal. L. Rev. 1, 32 (2008).

[14] C.W.A. Timmermans, *Judicial Activism and Judicial Restraint*, *in* The Role of International Courts 243, 245 (C. Baudenbacher & E. Busek eds., Stuttgart, German Law Publishers 2008).

[15] Nonet & Selznick, *supra* note 7 at 73–78.

and the context of law;[16] third, adjudicators that go beyond the strict legality review and take into consideration the purposes and effects of the law as well as its institutional dynamics.[17] These features that already exist to a certain degree in modern antitrust systems cannot be justified or properly used if antitrust is viewed as AL. However, these are the features that have permitted U.S. and EU antitrust laws to overcome reasonable disagreements in hard cases.

On this basis, I argue that the RL framework and modus operandi can further improve the capacity of antitrust systems to manage reasonable disagreements. Specifically, constructive teleological interpretation, the key interpretative method of the RL modus operandi, is sensitive to the law's core mission and its normative complexity. It does not pretend that objectivity in law can be achieved simply through canons of interpretation or positive economics. Instead, it focuses on argumentation and interpretive theories and suggests that reasonable disagreements about the goals of the law or the appropriate legal standards can be temporarily settled through the elaboration of the normative underpinnings and the actual effects of the norms. In addition, responsive enforcement invests in the learning and self-correcting capacities of enforcers and emphasizes compliance and problem-solving. Such enforcement uses different techniques and strategies, puts forward participatory, learning-based proceedings, and solves knowledge problems through regulatory conversations and experimentation. Hence, it uses law's openness to solve competition problems in a manner that does not diminish its integrity. Lastly, courts operating as catalysts are instrumental in keeping the legal system open and integrated. Catalyst courts achieve that by setting up platforms for argumentative struggles and by adjusting their depth of review appropriately to keep enforcers responsive.[18] Conscious use of these features will arguably make antitrust systems more capable of dealing with reasonable disagreements in a coherent and effective manner.

In Section II, I provide a typology of reasonable disagreements in antitrust and I focus on the debate around the goals of antitrust to illustrate, from a historical (external) and analytical (internal) point of view, the evolution (i) and the analytical shape (ii) of such disagreements. This analysis suggests that reasonable disagreements are endogenous in antitrust. In Section III, I discuss three key elements of antirust that could explain the endogeneity of such disagreements: its fuzzy mandate, conceptually elastic vocabulary, and rules and standards internal structure. Once the endogeneity of reasonable disagreements in antitrust has been established, Section IV provides a brief sketch and a refinement of two distinct conceptual models of legal ordering,

[16] Ian Ayres & John Braithwaite, Responsive Regulation 3–18, 158–159 (OUP 1992).
[17] Nonet & Selznick, *supra* note 7 at 104–114.
[18] Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 3 Colum. J. Eur. Law 1, 2 (2007).

the AL and the RL. Against this backdrop, I argue in Section V that even though conventional thinking in antitrust views disagreements through the lenses of AL as temporary manifestations of indeterminacy, the RL model takes them seriously by accounting for their endogeneity. In Section V, I provide some indicative examples suggesting that United States and EU antitrust have already adopted certain features of RL to deal with such disagreements. Finally, in Section VI, I develop the RL prescription for taming and exploiting reasonable disagreements. The main argument of this paper is that the RL model can (a) properly diagnose the phenomenon of reasonable disagreement in antitrust, (b) discern certain developments that have allowed U.S. and EU antitrust systems to operate in a coherent and effective way despite the various reasonable disagreements tormenting them, and (c) provide inspiration for dealing with such disagreements in the future.

II. REASONABLE DISAGREEMENT IN ANTITRUST

A. The Persistence of Disagreement

Even a quick look at the modern antitrust literature leads to the following trite inference: the members of the antitrust community, be they scholars, practitioners, enforcers or judges still disagree about the purpose, the function, and the reasons for having antitrust.[19] Such disagreements may revolve around the goals and the conceptual and economic foundations of antitrust (type-a). Antitrust scholars and institutions may, additionally, disagree about the content of key concepts, about the legal standard that could be derived from the existing case law, or about the application of existing case law to new facts (type-b disagreements).[20] Such disagreements can arise even when type-a controversies are settled or put aside. Indicatively, AG Wahl has recently admitted that the precise content of the 'restriction by object' concept is not clear and that the line between restrictions by object and restrictions by effect

[19] Indicatively, Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 44 McGregor L. Rev. 823 (2013); Marco Colino, Sandra, *The Antitrust F Word: Fairness Considerations in Competition Law* (September 7, 2018). Journal of Business Law, Forthcoming ; The Chinese University of Hong Kong Faculty of Law Research Paper No. 2018-09. Available at SSRN: https://ssrn.com/abstract=3245865. J. Bus. L. (Summer 2019); Albert Allen Foer & Arthur Durst, *The Multiple Goals of Antitrust*, 63(4) The Antitrust Bull. 494 (2018); Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J.F. 960 (2018); Joshua Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51(1) Arizona St. L.J. 293 (2019); Ioannis Lianos, *Polycentric Competition Law*, 71(1) Curr. Leg. Probl. 161 (2018); Ariel Ezrachi, *Sponge*, 5(1) J. Antitrust Enforc. 49 (2017).

[20] Renatto Nazzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102 191–288 (OUP 2011); Pablo Ibañez Colomo, *Beyond the More Economic Approach: A Legal Perspective on Article 102 TFEU Case Law*, 53(3) Common Mkt L. Rev. 709, 713–720 (2016).

is blurry.[21] Similarly, in the field of Art. 102 TFEU, it is unclear whether the as efficient competitor test is and should be the only legal test.[22]

Beyond doubt, type-a and type-b disagreements can challenge antitrust enforcement. However, antitrust enforcement faces its own distinct disagreements: should we apply antitrust through a centralized or a decentralized structure? What kind of mixture of infringement decisions, commitments, market investigations, and advocacy can realize antitrust goal(s)? Was the remedy adopted, say in *Google Shopping*, successful or not? When should an antitrust enforcer use behavioural and structural remedies? Such disputes relate to the appropriate enforcement design, strategies, and techniques (type-c disagreements).[23] Such disagreements may continue to exist even if those of type-a and type-b are solved.[24] All three types of disagreements are omnipresent in antitrust theory and practice, yet the two leading antitrust systems operate consistently and effectively. The modern antitrust paradox, thus, is how these systems manage to function in such a way *despite* the existence of such pervasive and multilevelled reasonable disagreements.

Before proceeding further, a caveat is in order. In what follows, I focus on type-a disagreements. Mapping out all possible disagreements in antitrust, even if it were feasible, is not necessary for the argument presented here. *A majore ad minus*, it suffices to show that type-a disagreements are pervasive and endogenous in this corpus of norms. Such a finding entails that antitrust would remain essentially contestable even if type-b and type-c disagreements were settled. If there is disagreement about the purpose of the law, then necessarily there will be disagreement associated with the appropriate legal standards and its antitrust enforcement.

The type-a disagreement pertains to the age-old questions on what are and what should be the goal(s) of competition law. A brief expedition to U.S. antitrust history can illustrate—from an external point of view—how the goals debate unfolded. In the late 19th century, a wave of new monopolists like John D. Rockefeller and J.P. Morgan triggered the 'Trust Movement', which sought to re-organize the American economy around industry-spanning monopolies.[25] Social resistance against this tendency led organized labour

[21] This conceptual conundrum is not new. See Opinion of AG Wahl, Case C-67/13 P, *Groupement des cartes bancaires* EU:C:2014:2204, para 46 and Saskia King, *The Object Box: Law, Policy or Myth?*, 7(2) Eur. Compet J. 269 (2011).

[22] See Nazzini, *supra* note 20 at 224–256.

[23] Daniel Crane, The Institutional Structure of Antitrust Enforcement (OUP 2011); Karen Yang, Securing Compliance (Hart Publishing 2004); Christine Parker, *The Compliance Trap: The Moral Message in Responsive Regulatory Enforcement*, 40(3) L. Soc. Rev. 591 (2006).

[24] Note that since there might be a dialectic relationship between competition norms and their enforcement, there could be interconnections between all types of disagreements.

[25] Rockefeller noted 'growth of a large business is merely survival of the fittest … the working out of a law of nature and a law of God'. Alan Trachtenberg, The Incorporation of America: Culture and Society in the Gilded Age [1982] 70–100 (Hill and Wang 2007).

and farmers to formulate the 'Granger movement' and emulated to an Anti-Monopoly Party.[26] Hence, the driver behind the passage of the Sherman Act in 1890 was the realization that even though free markets were essential for the U.S. economy, they could also produce market failures and lead to autocratic concentrations of economic power and amplify 'inequalities of condition, of wealth and opportunity'.[27] The preservation of deconcentrated industry structures, the dispersion of economic power, and the protection of freedom of trade of *inter alia* small enterprises were the main motivations behind the Sherman Act.[28] During the 1920s and 1930s, antitrust was a faded passion.[29] During these decades, it was not clear whether antitrust can or should be used as an instrument for achieving noneconomic or noncompetition goals.[30]

To be sure, the protection of health, environment, privacy, or the goal of reducing the political power of large businesses (if not translatable into economics) constitute noneconomic goals, whereas the protection of small or medium enterprises, reduction of unemployment, raising of wages, or redistribution of wealth could be considered as economic but noncompetition goals (if not associated with one of the aspects of competition). From this perspective, the scope of the goals debate and, therefore, the ambit of reasonable disagreement was wide during these early years. As a result, reasonable disagreement about the goals of antitrust incentivized the Warren Court during the 1950s and 1960s to apply the law in a maximalist fashion seeking to protect a specific way of economic life.[31] As a result, claims of business

[26] The 'Granger Movement' was established in 1867, by Oliver Hudson Kelley. What drew most farmers to the Granger movement was the need for unified action against the monopolistic railroads and grain elevators that charged exorbitant rates for handling and transporting farmers' products. Solon J. Buck, The Granger Movement—A Study of Agricultural Organization and Its Political, Economic, and Social Manifestations 1870–1880 3–39 (Harvard University Press 1913).

[27] Senator Sherman (a conservative congressman) saw a need for the federal government to respond to widespread popular demands for reforms and protection against the abuses of big businesses. He suggested that if the government failed to do so the country will be facing a more dreadful and radical uprising. 178 21 Cong. Rec. 2, 456–7.

[28] Hovenkamp shows that a major original purpose of the law was to protect smaller rivals, such as the small oil companies attacked and then acquired by Standard Oil. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88(1) Mich. L. Rev. 1, 24–30 (1989).

[29] Robert Pitofsky, *Introduction: Setting the Stage*, *in* The Chicago School Overshot The Mark: The Effect of Conservative Economic Analysis on Us Antitrust 4 (Robert Pitofsky ed., OUP 2009).

[30] Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 Columb. L. Rev. 377 (1965); Louis Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 Univ. Pa L. Rev. 1076 (1979).

[31] The Supreme Court in *Brown Shoe* notes 'we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses'. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962). Even before the era of the Warren Court, though, it was recognized that 'throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively

efficiency were disregarded, mergers between undertakings with very small market shares were blocked and the *per se* analysis was expanded to condemn behaviour that could rarely produce anticompetitive effects.[32] The openness of antitrust brought about a contradictory and on many occasions hard-to-justify or inadministrable form of intervention.[33]

The antitrust community tamed this openness by invoking the integrity of law. Specifically, scholars like Robert Bork and Richard Posner—the main representatives of the influential Chicago School—argued that such openness makes antitrust a scattered incoherent and often contradictory field of law.[34] Their criticism of the antitrust of the 1950s and 1960s gained momentum especially because several U.S. courts used the law to pursue various often contradictory objectives without using objective criteria and solid economic theory.[35] The core argument of the Chicago School was that antitrust law should discard objectives other than the promotion of market competition leading to superior market performance.[36] Otherwise, if the motivations behind the Sherman Act were taken as its goals, contradictions in enforcement would be inevitable.

Chicago's suspicion of excessive openness made a lot of sense at the time. A price-fixing agreement, for instance, may increase prices and harm the consumers but help its parties compete. It might even give them a 'fair' advantage in their economic fight with much stronger corporations. Should enforcers seek to protect the consumers that are harmed by the higher prices or the rivals that decided to pool together their forces to avoid 'ruinous competition' or to organize their resistance against a much stronger upstream corporation? A maximalist understanding of antitrust's goal(s) would easily generate contradictory outcomes: different courts could predictably decide same cases differently. Seeking to preserve antitrust's integrity in the face of excessive openness, the Chicago School reconstructed the goal of the law, defined anticompetitive behaviour as behaviour that restricts output or

compete with each other'. See *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429 (C. A. 2d Cir., per Learned Hand, J.).

[32] There is consensus today that this type of aggressive antitrust enforcement was misguided. Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, *in* THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST 40, 41–43 (Robert Pitofsky ed., OUP 2009).

[33] Bork, ANTITRUST PARADOX, *supra* note 4 at 16, 49, 84, 86, 318, 408–410, 413, 416, 423–24.

[34] Bork referred to the alternative of the economic approach as a set of 'nebulous values' that lead to an 'intellectual mush'. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. ECON. 7, 9 (1966).

[35] Oliver Williamson, *Delimiting Antitrust*, 76 GEO. L.J 271, 272 (1987) (observing that during the 1960s, '[t]he standards for judging an antitrust offense fell so low that respondents not only made no affirmative case for economies as an antitrust defence but even disclaimed economies that were ascribed to a merger by the government').

[36] Daniel Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust*, 79 3 ANTITRUST L.J. 835, 853 (2014).

increases prices,[37] and used price theory to offer powerful efficiency explanations to many practices.

This 'antitrust revolution' created numerous friends and foes, but in general provided adjudicators with a more coherent and administrable analytical framework for decision-making than before.[38] The vast majority of the U.S. antitrust community eventually recognized that because of the Chicago School, antitrust became better (the inherent logic of the system increased) than it had been during the Warren years.[39] In 2008, Crane wrote '[t]here is widespread agreement today among courts, antitrust enforcement agencies, and antitrust practitioners and scholars about the goals of the antitrust enterprise . . . [M]ost contentious issues in antitrust are non-ideological and no longer require appealing to endogenous preferences or foundational views about the legitimacy of the capitalist order'.[40] Hence, the rise of the Chicago School of antitrust significantly reduced, at least temporarily, the scope of disagreements.

Despite Chicago's ascendency during the 1970s and 1980s, and the overlapping consensus around consumer welfare in the 1990s and 2000s, type-a disagreements did not end.[41] Some scholars found Chicago's approach—that is limiting antitrust to structured microeconomic analysis—too narrow and considered the subsequent enforcement style too light-weighed.[42] After the first decade of the 21st century, the competitiveness of American economy declined, and as a result 'a growing number of industries in the U.S. was dominated by a shrinking number of companies'.[43] Rising concentration,

[37] Bork, *supra* note 34 at 7.

[38] Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 214, 217–18 (1985); William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 30–36 (1991). Others maintained that Chicago School gained momentum due to an intellectual and political backlash to the perceived 'inhospitablity tradition' of the Warren Court or because of the Reagan administration's favouring of big businesses. Thomas J. Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 353, 354–55 (1985).

[39] PITOFSKY, *supra* note 29 at 5.

[40] Daniel Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211–12 (2008).

[41] By the late 1980s, several opinions of the United States Supreme Court, along with revisions to the Department of Justice Merger Guidelines, strongly suggested that antitrust authorities had adopted Chicago's exclusive focus on allocative efficiency. See, for instance, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104–07 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 (1977).

[42] Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66(6) CORNELL L. REV. 1140, 1154 (1981); Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1, 3 (1980); Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321,321–22 (1987).

[43] Economist, *Too Much of a Good Thing*, March 26, 2016, available at https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competitiontoo-much-good-thing; Economist, *The Rise of Superstars*, September 17, 2016, available at https://www.economist.com/news/special-report/21707048-smallgroup-giant-companiessome-old-some-neware-once-again-dominating-global; Economist, *The Super Economy:*

higher profits for a few big firms, lowing rates of start-up activity, and widening inequality gaps characterize current American economy. There is a growing consensus that a Chicago-led, hands-off antitrust enforcement has contributed to the decline of competition and the rise of inequality in the United States.[44] In addition, the rise of digital markets and ecosystems has led several scholars in the realization that the Chicagoan price-centric model of understanding antitrust might be too short-sighted.[45] An increasing awareness of the relevance of the nonprice dimensions of competition, such as innovation, quality, and privacy has sparked an opposite tendency away from minimalist antitrust.[46] As a result, several members of the antitrust community seek nowadays for ways to reinvigorate antitrust.[47] It seems that Chicago's attempt to avoid disintegrating openness led to a type of 'thin' or 'closed' antitrust. As a result, the integrity of law motivated an opposite tendency towards more openness.

However, this oscillation between openness and integrity did not bring U.S. antitrust back to the first strand of the goals debate. A fragile consensus has arisen today according to which the goal of U.S. antitrust is to protect 'the competitive process so that consumers receive the full benefits of vigorous competition'.[48] This consensus implies that the first strand of the goals debate has been virtually abandoned: nobody denies today that the application of this law requires some degree of economic analysis, and nobody seriously argues that antitrust should be used to promote values or goals completely

A Giant Problem, September 17, 2016, available at https://www.economist.com/news/leaders/21707210-rise-corporatecolossus-threatens-both-competition-and-legitimacy-business; Barry Lynn, *America's Monopolies are Holding Back the Economy*, The Atlantic, February 22, 2017, available at https://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358/.

[44] American Antitrust Institute, Report, *A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward*, at 7 (June 2016); Center for America Progress, Report, *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy* at 18 (June 2016); Roosevelt Institute, Report, *Untamed: How to Check Corporate, Financial and Monopoly Power*, at 18 (June 2016).

[45] Tim Wu, *The Blind Spot: The Attention Economy and the Law*, Antitrust L.J. 4–10, 27 (2017); Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710, 717–722 (2017).

[46] OECD, *Considering Non-Price Effects in Merger Control—Background Note By the Secretariat*, DAF/COMP (2018) 2 (June 6, 2018) at 5–32.

[47] Maurice E. Stucke, *Occupy Wall Street and Antitrust* 85 S. Cal. L. Rev. 33 (2012); Jonathan Baker & Steven Salop, *Antitrust, Competition Policy, and Inequality*, 104 Georgetown L.J. 1 (2015); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 Harv. L. Pol'y Rev. 235 (2017); Joseph Stiglitz, *Towards a Broader View of Competition Policy*, *in* Competition Policy for the New Era—Insights from the Brics Countries (T. Bonakele, E. Fox & L. McNube eds., OUP 2017) 4; Ioannis Lianos, *The Poverty of Competition Law*, 2 Cles Research Paper Series (2018), available at SSRN: https://ssrn.com/abstract=3160054.

[48] Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int. J. Ind. Org. 714, 745 (2018).

detached from the idea of market competition.[49] Thus, scholars or enforcers concerned about what appear to be noneconomic or noncompetition values such as healthcare, environment, and privacy attempt to incorporate these values to competition analysis. Rarely do they submit that these values could or should be independent goals of the law.[50]

Hence, reasonable disagreements have been instrumental in defining more precisely the boundaries of antitrust, as the goals debate took a 'more technocratic turn' in the 1980s and the decades that followed. Yet, antitrust did not become technocracy. The technocratic turn did not lead to an ironclad consensus that U.S. antitrust does and should only protect consumer welfare or that it should be applied only after full-fledged economic analysis proving actual consumer harm. Nowadays, it is becoming increasingly clear that consumer welfare and price-output analysis are and should not be the sole drivers of U.S. antitrust analysis even though they remain important anchors of it. In a surprising turn of events, just 10 years after his observation about the 'technocratic turn' of U.S. antitrust, Crane notes:

> antitrust law now stands at its most fluid and negotiable moment in a generation. The bipartisan consensus that antitrust should focus solely on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points.[51]

In other words, the technocratic turn did not eradicate reasonable disagreements regarding the goals of U.S. antitrust. The law was further developed, its boundaries were further clarified and its coherency increased due to the technocratic turn. Nevertheless, the technocratic turn did not transform U.S. antitrust into a completely closed system; the law did not lose its openness. Reasonable disagreements continued to exist and, especially today, often trigger heated debates and polarization about the direction of antitrust policy.[52]

B. The Analytical Structure of type-a Reasonable Disagreements

So far, we have adopted an external point of view and observed that despite the technocratic turn, type-a disagreements still torment U.S. antitrust. Similar disagreements mark the evolution of EU antitrust too. To get a complete picture, though, it is worth analysing how and why scholars, enforcers, and courts continue to debate whether total or consumer welfare, fairness or the

[49] Senator Elizabeth Warren, *Reigniting Competition in the American Economy*, 29 June 2016, available at https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

[50] See Michael Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N. C.L. Rev. 219, 238 (1996) and Shapiro, *supra* note 48 at 714, 745–746.

[51] Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 Va. L. Rev. 118 (2018).

[52] Jacobs, *supra* note 50 at 261.

protection of the competitive process is and should be the goal of the law. The aim of this subsection, thus, is to show that the different stakeholders *can* reasonably disagree about what the goals of the law are and should be and to hint that the line between 'what the law is' and 'what the law should be' is actually blurry in antitrust.[53] For this purpose, I assess here whether the claim 'X *is* or *should* be the goal of the law' can be (or is) reasonably contested. The four more likely candidates for X are total welfare, consumer welfare, fairness, and rivalry.[54] As a result, eight hypotheses are assessed: the positive and the normative total welfare (TW) hypothesis, the positive and the normative consumer welfare (CW) hypothesis, the positive and the normative fairness (F) hypothesis, and the positive and the normative competitive process (CP) hypothesis. Finding that none of these hypotheses cannot eliminate type-a disagreements suggests that the members of the antitrust community do not only *happen* to disagree—as the previous subsection showed—, but they are *bound* to disagree because there is not a single overarching goal capturing what antitrust institutions do and should do.

Many antitrust economists favour total welfare defined as Pareto[55] or Kaldor-Hicks efficiency[56] as the ultimate objective of the law.[57] Total welfare

[53] In other words, I imply here that a legal positivist approach, preaching for a categorical line between law's existence and its merits, cannot properly explain several instances of reasonable disagreement in antitrust adjudication. To be sure, I consider the gist of legal positivism the so-called social thesis. As Raz puts it 'the conditions of legal validity are purely a matter of social facts'. Joseph Raz, The Authority of law: Essays in Law and morality 37–52 (OUP 1979).

[54] Other values, such as consumer choice, can also play the role of the X but they are less likely to succeed. Consumer choice does not imply that every market should allow for a specified number of options, nor does it forbid all reductions in choice, but focuses on 'conduct that artificially limits the natural range of choices in the marketplace'. Neil Averitt & Robert Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 (1) Loy. Consumer L. Rev. 44 (1998). However, economic theory and empirical evidence show many instances where business conduct simultaneously reduces choice and increases welfare in the form of lower prices, increased innovation, or higher quality products and services. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2411 (2012).

[55] An allocation of resources is Pareto optimal if no individual can be made better off without making someone worse off. Allan M. Feldman, *Welfare Economics*, *in* The New Palgrave Dictionary of Economics 721, 722–23 (Steven N. Durlauf & Lawrence E. Blume eds., 2nd ed. 2008).

[56] Kaldor-Hicks efficient is an allocation that results in some persons being better off and some worse off, and the winners could compensate the losers in such a way that, on balance, everybody is better off. David Winch, Analytical Welfare Economics 143 (Penguin 1971).

[57] Roger D. Blair & D. Daniel Sokol, *The Goals of Antitrust: Welfare Standards in U.S. and E.U. Antitrust Enforcement* (2013) 81 Fordham L. Rev. 2497; Kenneth Heyer, *Welfare Standards & Merger Analysis: Why Not the Best?,* Eag Discussion Paper 06–8 5 (2006); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 NYULR 659, 690–98 (2010); Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 Antitrust Bull. 677 (1988); Joseph Farrell and Michael Katz, *The Economics of Welfare Standards in Antitrust*, 2 Compet. Pol'y Int. 3 (2006).

'refers to the aggregate value that an economy produces, without regard for ways that gains or losses are distributed'.[58] For Posner, 'efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further'.[59] To support this argument Posner maintained that the social cost of monopoly is the reason we need antitrust. Monopoly is condemned on the basis that it is inefficient as it misallocates resources and generates a deadweight loss.[60] In a similar vein for Bork '[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare'.[61]

Yet, the normative TW hypothesis is not uncontested. A serious conceptual weakness of this approach is that it cannot give any independent value to competition: if any anticompetitive conduct can be justified as long as its efficiency gains outweigh its distortive impact on competition, then a centrally planned economy or a monopolistic market structure could be justified as long as the welfare gains outweigh the losses.[62] In addition, a total welfare analysis may be unable to account for dynamic efficiency.[63] As already mentioned, one of the greatest challenges of modern antitrust is to address forms of competition that do not revolve around providing the cheapest product and forms of competition harm that derive from something else than raising prices to consumers.[64] Innovation or other nonprice-related parameters of competition, such as data or attention, that cannot be easily quantified could become the blind spot of antitrust if enforcers are monolithically focused on static total welfare analysis.[65] Furthermore, a total welfare analysis that centres around only immediate price effects would ignore welfare losses arising from output effects that occur over time.

Another example of the inadequacy of the normative TW hypothesis could be a merger that lowers prices to consumers but drives some rivals out of the

[58] Phillip Areeda & Herbert Hovenkamp, Antitrust Law at 114a (4th ed. 2014).

[59] *Id.* at 29.

[60] Richard Posner, ANTITRUST L. 41–96 (The University of Chicago Press 2001).

[61] Bork, *supra* note 4 at 91.

[62] Walter Eucken & T. W Hutchison, *On the Theory of the Centrally Administered Economy: An Analysis of the German Experiment. Part II*, 15(59) ECONOMICA 173, 182 (1948); Franz Böhm, *Democracy and Economic Power in Cartel and Monopoly in Modern Law*, *in* THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES 273 (Daniel A Crane and Herbert Hovenkamp eds., OUP 2013).

[63] Scherer argues that although it is difficult to measure, the effects of 'X-efficiency' (the efficiency of production) and of long-run technological efficiency (the rate of useful invention) probably outweigh those of allocative efficiency. F.M. Scherer, *Antitrust Efficiency and Progress*, 62 N.Y.U. L. REV. 998, 1002 (1987).

[64] Several scholars criticize modern antitrust for becoming too price-centric or price fixated. Maurice Stucke & Allen Grunes, BIG DATA AND COMPETITION POL'Y 107–118 (OUP 2016); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 328 (2012).

[65] Wu, *supra* note 45 at 4–10; Hovenkamp, *supra* note 38 at 256.

market. Such a merger would be condemned, if the harm to rivals results in a loss in aggregate producer surplus that outweighs the gain to consumers. Similarly, a vertical restraint that lowers prices, but excludes rivals would be condemned, if rivals' loss exceeds consumers' gain. In such cases, a TW-driven antitrust would protect competitors instead of promoting consumer welfare and competition.[66] On this basis, it has been argued that total welfare is normatively unappealing because it does not necessarily maximize long-run consumer welfare and it can lead to conduct that harms the consumers.[67] It should be added that total welfare requires a complex economic analysis similar to the one required from a central planner and thereby is inadministrable.[68] Even Bork and Posner recognized that if total welfare were perceived as requiring a full-fledged welfare analysis to prove competition harm, courts would simply lack the capabilities to apply antitrust.[69] Hovenkamp also notes that 'the general welfare standard [which] requires that all consumer losses be quantified and compared with producer efficiency gains (. . .) is impossible to apply in any but the most obvious cases'.[70] More than this, if taken to its extreme, the normative TW could diminish law's integrity: antitrust would stop being law if it were simply a branch of applied microeconomics totally dependent on empirical analysis.[71]

The positive TW hypothesis is even more contestable. In fact, it is widely recognized that antitrust institutions do not run a full-fledged welfarist analysis to condemn a practice as anticompetitive.[72] In cases where some factors indicate competitive harm, while others suggest benefits, the courts on most occasions do not measure gains and losses but use economically informed burden shifting to make inferences on whether or not the law has been violated.[73] Furthermore, in both the U.S. and the EU price-fixing arrangements

[66] The proponents of the total welfare approach commit this error because they disregard the relationship between goals and means. Scalia noted in *Newport New* that '[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means'. Thus, antitrust should not be understood as a legal device for maximizing output, but as an 'output-maximizing device through the protection and promotion of competition'. *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995).

[67] Steven A. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 348–353 (2010).

[68] Herbert Hovenkamp, *Progressive Antitrust*, 1 U. Ill. L. Rev. 71, 92 (2018).

[69] Bork noticed that 'weighing effects in any direct sense will usually be beyond judicial capabilities'. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373, 387–90 (1966). Posner observed that antitrust analysis should search 'for ways of avoiding prohibiting efficient, albeit non-competitive, practices without having to compare directly the gains and losses from a challenged practice'. Posner, *supra* note 60 at 87.

[70] Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 83 (2018).

[71] For a similar argument see Oles Andriychuck, *Dialectical Antitrust: An Alternative Insight into the Methodology of EC Competition Law Analysis in a Period of Economic Downturn* 31 (4) ECLR 155, 163 (2010).

[72] Hovenkamp, *supra* note 70 at 25.

[73] Herbert Hovenkamp, *Antitrust Balancing*, 12(2) N.Y.U. J.L. Bus. 369 (2016).

are considered *per se* illegal or restrictions by object. The main rationale is that such conduct could distort the nerve system of the economy or reduces the strategic uncertainty that is required for decentralized decision-making.[74] Such arrangements can never be justified under U.S. antitrust, whereas in the EU even though the defendants can invoke Art. 101(3) TFEU such defence is not simply a total welfare one. Hence, no TW defence is allowed for such a behaviour and it is highly unlikely that any cartelists would be able to avoid sanctions if they prove before an authority or a court that their conduct was welfare enhancing or that the existing competition was 'ruinous'.[75]

Another example that illustrates why the positive TW hypothesis does not hold is merger control. In both the U.S. and the EU, the prospective analysis of merger control examines how a concentration can affect competition by comparing the competitive conditions that would result from the notified merger with the conditions that would have prevailed in absence of the merger. Even though the relevant authorities regularly examine whether the downward pricing pressure resulting from merger-induced efficiencies is sufficient to offset the upward pricing pressure induced by the merger itself (following thus a TW approach), they do not limit their analysis to price effects.[76] Competition authorities often assess also the impact of a merger on innovation quality or privacy.[77] Moreover, if the positive TW hypothesis were true then merger analysis would be solely focused on output. Competition authorities would ban a merger that is likely to reduce the volume of sales, and clear one is likely to increases output and thus TW.[78] Yet, competition authorities examine many other factors and especially the effect of mergers on consumer prices.[79] In addition, the existing practice strongly indicates that a merger to monopoly would not be cleared if the merging parties could convincingly show that the transaction will not lead to price increases or output reductions. Similarly, a merger that is likely to increase prices is not likely to fly, even if the parties

[74] Case C-8/08, *T-Mobile* ECLI:EU:C:2009:343, para 35; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–222 (1940).

[75] U.S. Courts persistently consider the ruinous competition defence as 'nothing less than a frontal assault on the basic policy of the Sherman Act'. *United States v. National Society of Professional Engineers*, 435 U.S. 679, 695 (1978). The fact that excessive competition is unlikely to be a winning defence of price fixing implies that 'either we don't trust those models, or we don't believe in a purely welfarist total surplus standard'. Farrel and Katz, *supra* note 57 at 6–7.

[76] Case M.8084—*Bayer/Monsanto, European Commission Decision* C(2018), April 11, 2018; Case M.7932—*Dow/Dupont, European Commission Decision* C(2017), March 27, 2017 at 2001–9, 2043–48, 3017–22.

[77] U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), *Horizontal Merger Guidelines* (19 August 2010) [hereinafter US HMG] 2, 10, 20, 23, 26, 31; European Commission, *Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings* [2004] OJ C 31/03 paras 8, 15, 38, 45, 71 [hereinafter EU HMG].

[78] Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Trade-offs*, (1968) 58 Amer. Econ. Rev. 18 (1968).

[79] US HMG, *supra* note 77 at 2, 4,7, 24, 29 31 and EU HMG, *supra* note 77 at para 8.

demonstrate offsetting cost efficiencies.[80] Thus, the positive TW hypothesis does not hold.

To assess the normative CW hypothesis a semantic ambiguity needs to be clarified first. Bork, among the first to use this term,[81] argued that it is 'a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternate state of affairs through judicial decree'.[82] Put differently, Bork defined consumer welfare as referring to 'the wealth of the nation', namely the sum of consumer and producer surplus. Accordingly, Bork's consumer welfare includes only the deadweight loss, which captures the social costs of monopoly, and ignores the wealth transfer from consumers to monopolies.[83] As a result, a practice that increases seller's power and reduces their costs will be deemed a consumer welfare improvement in Bork's parlance if the cost savings to producers exceed the harm to consumers. Naturally, many scholars criticized him for using consumer welfare as a synonym for allocative efficiency, general welfare, or Pareto optimality.[84] However, a 'true consumer welfare standard', as Salop notes, refers to the aggregate welfare of consumers as consumers, disregarding the welfare of producers.[85] It thus requires antitrust to condemn a conduct only if it reduces the welfare of buyers by increasing prices or reducing output, irrespective of its impact on sellers. For example, a merger that both reduces rivals' costs and leads to price increases would be considered benign under a Borkean CW standard, if the cost reduction is greater than the price increase, but not under a 'true CW' standard.[86] Let us assume then that the normative CW hypothesis refers only to consumer surplus as Borkean CW is considered today a misnomer.[87]

Consumer welfare is much easier to measure empirically—that is, through statistical or econometric analysis—and leads to more administrable rules and

[80] Hovenkamp, *supra* note 68 at 18–21.

[81] The American Economic Association's Economic Literature database contains fewer than 50 entries published before publication of 'The Antitrust Paradox' using the term but over 3,000 since.

[82] Bork, *supra* note 4 at 61.

[83] Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 ANTITRUST 881, 885–887 (2014).

[84] Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 437 (2009). Werden argues that most of these criticisms are misleading because Bork referred to allocative efficiency to the extent it does not interfere significantly with productive efficiency. Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 723 (2014).

[85] If consumers lose from a practice then it is counted as inefficient, or anticompetitive, even if producers gain more than consumers lose. Hovenkamp, *supra* note 68, at 89.

[86] Salop convincingly argues that under a true consumer welfare standard the gains to the merging producers do not count; only the effect on consumer prices is relevant. Salop, *supra* note 67 at 339–340.

[87] Note that if CW is defined in Bork's terms, it will face the same objections raised against the normative TW hypothesis.

standards.[88] One could argue though that consumer welfare is too static: it may lead enforcers to condemn a practice that reduces prices by 5 percent even when such condemnation were reducing the annual rate at which innovation lowers the cost of production by 1 percent.[89] Alternatively, it could be reasonably argued that consumer welfare is too narrow: if consumer welfare is meant to capture only short-term effects on price and output, it is incapable of capturing the architecture of market power in the 21st century market place.[90] Yet, it is clear today that consumer welfare could (at least in theory) be interpreted broadly and dynamically so as to incorporate nonprice dimensions of competition such as privacy, innovation, and quality and allow enforcers to identify nonprice-related manifestations of market power.[91] Nonetheless, there is more forceful objection against the normative CW hypothesis. One could reasonably claim that there is no convincing substantive reason for evaluating the welfare of consumers as bearing greater weight than the welfare of producers.[92] From this angle, total welfare, despite its shortcomings, seems to provide a superior conceptual framework, and a better normative justification of antitrust for it relies on formal equality of all economic agents and values all economic agents the same.[93] Another formidable objection against the normative CW hypothesis is that it could condone efficiency-enhancing monopsony.[94] As a result, the normative CW hypothesis may lead to scenarios where competition is totally eliminated from the market.

The positive CW hypothesis seems to describe to a significant extent the decision practice of U.S. authorities and courts.[95] Yet, if only consumers matter, then a buying cartel or a horizontal merger that increases buyers' power would be perfectly legal as long as it does not inflict any consumer harm. Regularly though, competition authorities condemn such practices or block such mergers.[96] In Europe, even though consumer welfare is a key motivator of Commission's policy,[97] the European Court of Justice (ECJ) has

[88] Hovenkamp, *supra* note 68 at 93.

[89] Frank H. Easterbrook, *Ignorance and Antitrust*, *in* ANTITRUST, INNOVATION AND COMPETITIVENESS (T.M. Jorde & D.J. Teece eds., 1992), 119.

[90] Digital ecosystems or critical intermediaries may be able affect competition upstream or foreclose the market without having any short-term price effects. Khan, *supra* note 45, at 716.

[91] OECD, *supra* note 46, at 5–32; *Dow/Dupont*, *supra* note 76 at 2001–8, 3240–56.

[92] Note that consumer welfare usually refers to the buyer size of the market regardless of the size of the buyers.

[93] Nazzini, *supra* note 20 at 49–50.

[94] Meese, *supra* note 57 at 673–685; Heyer, *supra* note 57 at 28.

[95] Hovenkamp, *supra* note 68 at 88.

[96] Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSPECT. 155, 158 (2007); Louis Kaplow & Card Shapiro, *Antitrust*, *in* HANDBOOK OF LAW AND ECONOMICS (Mitchel Polinsky & Steven Shavell eds., North Holland 2007) 1168.

[97] European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, *OJ C 45, 24.2.2009*, para 19 [hereinafter Guidance Paper].

explicitly rejected the claim that consumer welfare is the sole goal of the law in *GlaxoSmithKline*:

> 'there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anticompetitive object (. . .) Article [101(1) TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such'. Consequently, Zimmer is correct in noting that an analysis of American and European law reveals that competition law is not limited to consumer welfare as both jurisdictions 'interpret competition as a concept that not only protects competition among sellers but also among buyers'.[98]

The normative F hypothesis has few supporters and many challengers. This is mainly because the word 'fairness' can be extremely elusive and rarely leads to clear-cut legal standards.[99] The persistence of this hypothesis, however, indicates that total or consumer welfare cannot ostracize questions of justice from antitrust.[100] Fairness could refer to the unfair wealth transfer from consumers to sellers due to substantial market power.[101] For Kirkwood and Lande, such wealth transfer is unfair because it is a taking of property without consent and compensation. If understood in this way the F hypothesis corresponds to a broad consumer welfare notion that includes the deadweight loss and the wealth transfer incurred by substantial market power. Such an understanding of the F hypothesis leads to a refined CW standard because it shields it against the purchaser's bias (that is, as the unfair transfer is not unidimensional). Accordingly, the F hypothesis interpreted in this manner can address the problem of monopsonistic power. Yet, such an approach could be too price-centric or too static. For instance, a total welfare proponent could reasonably argue that a merger may lead to an unfair wealth transfer but it substantially increases innovation incentives and output and therefore should be allowed. If the F hypothesis is defined in this manner, the above-mentioned objections against the normative and the positive CW hypothesis could be raised against it as well.

[98] Daniel Zimmer, *The Basic Goal of Competition Law: to Protect the Opposite Side of the Market*, *in* The Goals of Competition Law 486, 491–492 (Daniel Zimmer ed., Edward Elgar 2012).

[99] Ahlborn J. Padilla & Christian Ahlborn, *From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, in European Competition Law Annual 2007: A Reformed Approach to Article 82 EC 55, 61, 63–64, 75–83 (Claus-Dieter Ehlermann and Mel Marquis eds., Hart 2008). For an interesting conceptualization of fairness see Horton, *supra* note 19 at 835–852.

[100] As Rawls insightfully notes 'Justice is the first virtue of social institutions as truth of systems of thought'. From this angle, all normative hypotheses examined here could be viewed as attempts to address a question of justice that lies at the heart of antitrust: under what condition is antitrust fair? John Rawls, A Theory of justice 3 (Harvard University Press 1971).

[101] John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 198 (2008).

Alternatively, the normative F hypothesis could imply that suppliers and purchasers should be protected against 'exploitation'.[102] However, traditionally, concerns about excessive prices are perceived as going beyond the scope of antitrust and the capacity of antirust institutions. The main reason behind this attitude is that price floors are likely to lead to excessive producer surplus at the expense of the consumers, whereas price ceilings are likely to lead to prices below the market markup that usually protect the consumers at the expense of the producers. In other words, such policies block the interplay between supply and demand—the gravitational forces of competition—and require a special public policy justification due to the inefficiencies they generate. Therefore, sectoral regulators or some other public body is more legitimate in making such decisions. Excessive prices though could be a competition problem when they are the by-product of barriers to entry or market foreclosure by a monopolist.[103] It thus becomes clear that if interpreted in this way the F hypothesis can hardly offer a distinct normative justification to antirust as it does not provide reasons for having antitrust laws others than the ones provided by the TW or the CW hypotheses. In addition, even though there are some antitrust provisions that link up to the problem of excessive prices, only very few decisions deal with such issues.[104] Thus, also a positive F hypothesis with this content is hardly verifiable.

A different meaning could be given to the notion of exploitation. Exploitation could refer to the protection of trading partners and to the problem of unequal bargaining power.[105] However, if antitrust had such a goal, it would have to continuously interfere in a maximalist and aggressively egalitarian way to level the playing field.[106] Such a policy seems justified when pursued by a sectoral legislator with an explicit mandate, but it is hard to justify as a competition authority's task. Unequal bargaining power raises competition concerns when it is associated with substantial market power and when it leads to market foreclosure or consumer harm in the form of higher prices, lower quality or innovation suppressing. Otherwise, the exploitation of economic dependence seems to be more of a tort than an antitrust problem. Again, if this is the content of the positive F hypothesis, then the decisional practice of both U.S. and EU antitrust institutions suggests that such concerns can be only marginal and context dependent.[107]

[102] Zimmer, *supra* note 98 at 491.

[103] Mario Motta & Alexander De Streel, *Excessive Pricing in Competition Law: Never Say Never?*, Kalmar: Swedish Competition Authority 14, 22–26 (2007).

[104] Case 27/76 *United Brands v. European Commission*, OJ L 95 of April 1976.

[105] Masako Wakui and Thomas K. Cheng, *Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity*, 3(2) J. Antitrust Enforce. 302, 305–311 (2015).

[106] Robert Nozick, Anarchy, State, and Utopia 161–163 [1974] (Basic Books, Inc. 2001).

[107] Refusal to deal cases could be seen as supporting this hypothesis even though such cases are equally compatible with the other three hypotheses.

Lastly, the normative CP hypothesis consists in the thesis that 'competition as process' is the overarching idea that unifies antitrust's main concerns: distrust of power, concern for consumers' sovereignty, and commitment to opportunity for entrepreneurs.[108] This hypothesis could be also grounded on the ordoliberal school of thought that views competition as a decentralized decision-making process that counteracts concentrations of public and private power.[109] In this sense, competition law is the core of an 'economic constitution' that sets 'rules of the game' and safeguards the market as a plebiscitary mechanism for allocating resources. For the ordoliberal thought, thus, competition norms revolve around a foundational commitment to a transaction-based order and constitute the equivalent of constitutional law norms and principles such as the principle of separation of powers, the rules that set checks-and-balances mechanisms, and the principle of federalism.[110] From this perspective, the purpose of antitrust is to maximize freedom or guarantee 'equal freedom for all' and to this end it imposes limitations 'upon the freedom of each and every one and to this extent implies a kind of coercion for each and every person concerned'.[111] Antitrust is the 'Magna Carta of free enterprise' for it enables this kind of institutional or structural freedom and levels the playing field.[112] Hence, according to the CP hypothesis, antitrust is legitimized to the extent that it ensures that consumers can make meaningful choices and producers have opportunities to participate in the market. The purpose, then, of this area of law is to guarantee open and competitive markets.

A powerful argument developed by Hayek offers additional support to this hypothesis: competition is a process of discovery; 'a procedure for discovering facts, which if the procedure did not exist, would remain unknown or at least would not be used'.[113] Competition is a sensible procedure to employ

[108] Eleanor Fox, *Modernization of Antitrust: A New Equilibrium*, 66(1) Cornell L. Rev. 1140, 1154 (1981); Tim Wu, *The "Protection of the Competitive Process" Standard*, 14 Columbia Public Law Research Paper 612 (2018).

[109] For a discussion of ordoliberal thought with regards to competition law see Elias Deutscher and Stavros Makris, *Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus*, 11(2) Compet. L. Rev. 181, 192 (2016).

[110] Tim Wu, The Master Switch 299 (2010) (comparing the separation of powers principles in the U.S. constitution to antitrust principles).

[111] Franz Böhm, *Rule of Law in a Market Economy*, [1966], *in* Germany's Social Market Economy: Origins and evolution 54 (Alan T. Peacock and Hans Willgerodt eds., Macmillan 1989).

[112] *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). This statement has been interpreted in a libertarian way in *Trinko* 'The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system'. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Yet, the ordoliberal understanding of competition (reflected also in *Topco*) should not be confused with the libertarian or laissez faire approach endorsed in *Trinko*.

[113] F.A. Hayek, *Competition as a Discovery Procedure*, 5(3) Quart. J. Aus. Econ. (2002). To be sure, I consider Hayek as a libertarian or 'fourth generation ordoliberal thinker' (as Behrens puts

only if we do not know beforehand who will perform best. If we knew, then competition would be nothing but a highly wasteful method of achieving the respective goal. This approach captures a key element of competition: competition cannot be simply reduced to an outcome-based value that ought to be maximized; it has also a procedural dimension. This dimension is inherent in the concept of competition and is captured nicely by MacCallum:[114]

X competes with Y where there are actions Ax and Ay and goals Gx and Gy such that:

(1) X does Ax with the intention of achieving Gx;
(2) Y does Ay with the intention of achieving Gy; and
(3) X achieves Gx only if Y does not achieve Gy.[115]

The normative CP hypothesis focuses on preserving a competitive process and an open market structure. On this basis, the proponents of this approach argue that if a practice impedes competition as a process and has a negative economic effect it should be prohibited, because antitrust is and should promote welfare—in any sense of the term—by protecting the competitive process.[116] This approach can offer a convincing normative justification for antitrust but it cannot fully guide its interpretation.[117] For instance, the competitive process should be further defined: is it effective, workable, perfect, or complete competition the state of affairs that ought to be maintained? In addition, distortions of competition are usually identified by tracing prices increases or output restrictions, the primary metrics of the TW and the CW approach. What then is the unique legal standard deriving from the CP hypothesis? Hence, the rivalry approach can be invaluable in providing some rules of thumb and in helping antitrust authorities avoid the pitfalls of the TW and the CW approaches, but falls short from providing a full normative justification of antitrust laws and comprehensive interpretative guidance to antitrust institutions.

The positive CP hypothesis is equally powerful. For instance, the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice has said: 'Although we believe competition maximizes consumer welfare, the ultimate standard by which we judge practices is their effect on competition, not on consumer welfare. (. . .) We are just as concerned with lost competition

it). Yet, his conceptualization of competition in this piece reflects well some key aspects of the ordoliberal thinking towards competition.

[114] Gerald MacCallum, *Competition and Moral Philosophy*, *in* Legislative Intent and Other Essays on Law, Politics, and Morality (Marcus Singer & Rex Martin eds., University of Wisconsin Press 1993).

[115] For an interesting discussion of this idea of competition see Oliver Black, The Conceptual Foundations of antitrust 8–16 (CUP 2005).

[116] Werden, *supra* note 84, at 36. Wu, *supra* note 108, at 1–3; Khan, *supra* note 45, at 737–35.

[117] Jean Tirole, Economics for the common good 487 (Princeton University Press 2017).

among upstream input suppliers as we are with lost competition among sellers of finished goods downstream.(. . .) Rather than focusing on measuring consumer welfare in an academic fashion we are looking more broadly at the effects of business practices on competition'.[118] In a similar vein, Werden argues that U.S. courts and enforcers focus solely on how a challenged restraint affects the competitive process.[119] Furthermore, the ECJ in several Art. 102 TFEU cases has defined abuse as conduct that deviates from 'normal competition' or 'competition on the merits', which the dominant company has a special responsibility to maintain. Yet, nobody can deny that in many instances the courts have used the as efficient competitor test—that derives from the TW or CW approach—to determine whether a specific conduct constitutes a violation of antitrust norms.[120] Hence, the case law that can be ascribed to the CP hypothesis could be equally well be regarded as deriving from the TW or the CW approach.

More than 30 years after Bork's remark that coherency in antitrust will naturally follow after settling the goals debate,[121] there is still reasonable disagreement about what antitrust institutions do and should do.[122] The pervasiveness and the analytical structure of reasonable disagreements indicate that antitrust is a normatively open system of norms bounded only by its integrity. This is why, various hypotheses have and will continue to be proposed as per the best explanation, normative justification, and interpretative device of antitrust norms. The only threshold that these hypotheses have to meet to serve as 'eligible candidates' is to be compatible with the Rule of Law and the core mission of antitrust, namely the protection and promotion of competition in the market. In other words, to serve as candidates, these hypotheses have to be compatible with a minimum integrity standard. But then, why is it the case that antitrust is normatively open in this way?

III. AN EXPLANANS FOR AN EXPLANANDUM

One might wonder whether reasonable disagreements, despite their pervasiveness, are not simply the by-product of ignorance and limited interpretative efforts or whether they are embedded in the law. Is it the fact that we have not yet discovered an ultimate, all-encompassing value, a bullet-proof legal

[118] Renata Hesse, *And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement*, Speech to 2016 Global Antitrust Enforcement Symposium, Washington DC, September 20, 2016, available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.

[119] Werden, *supra* note 84, at 16–22 (arguing that the competitive process standard is the one standard that is truly consistent with both the Supreme Court's case law).

[120] Nazzini, *supra* note 20, at 224–258.

[121] Bork, *supra* note 4, at 50.

[122] Jonathan Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, The Antitrust Source 1 (2015).

standard, and an optimal theory of compliance what triggers the above-mentioned disagreements, or are these disagreements somehow inevitable? Can we assume that at some point we will find the optimal substantive and procedural standards that will not raise any reasonable critique, and therefore the only problem of the law would be one of implementation?[123] The previous section focused on type-a reasonable disagreements to illustrate a general phenomenon of antitrust laws. By unravelling the history of the goals debate in the United States, we showed that the members of the antitrust community fiercely disagree (and still do) about the foundations of this field of law. This section also showed that the analytical structure of such disagreements suggests that these interlocutors did not just *happen* to disagree, they were *bound* to disagree as no normative, or positive hypothesis can offer a unifying theory of the reasons for having and the ways for interpreting antitrust. In this section, I will explain why such disagreements are inevitable in antitrust.

In general, the antitrust community has adopted either a top-down or a bottom-up strategy to deal with the problem of reasonable disagreement. The top-down strategy consists in the attempts to discover and refine a single comprehensive goal, which would bring all reasonable disagreements to an end. Once such a goal is found what would remain for judges, enforcers, scholars, and practitioner at this stage would be only to refine their legal reasoning, employ superior economic analysis, and use the optimal enforcement standards and procedures.[124] Starting from such a premise, the members of the antitrust community have embarked in an endless quest for 'the soul of antitrust', proposed single lodestars, such as total or consumer welfare, and formed intellectual camps and alliances, friends and foes. Yet, as we showed above in Section II.B, despite all efforts, no single goal has appeared capable of giving end to all reasonable disagreements. The alternative strategy recognizes that there is not clear winner in the goals debated and follows a bottom-up and more legalistic way of proceeding. According to this strategy, the problem of reasonable disagreement will disappear once the courts develop in a common-law fashion an optimal analytical framework through canons of interpretation and input from positive economics.[125] It is sufficient thus that antitrust disputes are litigated, economists conduct empirical studies and provide evidence to sustain or debunk lawyers' arguments, judges decide cases in a transparent and well-justified manner, and experts criticize or applause

[123] For the distinction between 'content disputes' and 'application disputes' see also Jules Coleman, *Negative and Positive Positivism*, 11 J. Legal Studies (1982).

[124] Bork, *supra* note 4 at 50.

[125] Pablo Ibañez Colomo, The Shaping of EU Competition Law 3–22 (Cambridge University Press 2018).

these decisions.[126] The common thread of both strategies is that reasonable disagreements are exasperating, but temporary, sources of tension that will be eventually eradicated. After their eradication, no ambiguity or indeterminacy will remain in the law.

Contrary to this approach, I argue here that there are four key features of antitrust that indicate that reasonable disagreements are endogenous in this corpus of norms.[127] This field of law relies on a fuzzy mandate, uses a conceptually elastic vocabulary, is developed as a blend of rules and standards due to the complexity and changing nature of its subject matter, and is not accompanied by an ideal institutional or enforcement theory. I analyse these four features in turn arguing that these features suggest that reasonable disagreements are the by-product of the oscillation between two complementary yet antithetical forces of antitrust, openness, and integrity.

First, antitrust laws in both sides of the Atlantic are grounded on a fuzzy mandate.[128] For instance, the history of Sherman Act has been told in significantly divergent ways.[129] Relying on the legislative debates at the time of the Sherman Act's enactment, Bork argued that the intent of Congress was mainly to protect consumers from harm done by cartels while not undermining efficiency.[130] In the same line, Posner argued that the framers of the Sherman Act 'appear to have been concerned mainly with the price and output consequences of monopolies and cartels'.[131] On the other hand, Lande maintains that Sherman Act intended to give consumers a property right to competitive outcomes.[132] In other words, Sherman Act according to Lande aimed to prevent unfair acquisitions of consumers' wealth by firms with

[126] Foer & Durst, *supra* note 19, at 507 (calling this approach 'the black box strategy' and highlighting that its main strength is that it does not require a clear-cut answer to the goals debate or theoretical justification of its results. They recognize though that this approach alone cannot ensure predictability).

[127] To be sure, antitrust is not special in this respect. Reasonable disagreements are not unique to antitrust, but a general phenomenon in law and may exist in various—even though not necessarily in every—legal field. However, specific analysis is needed to investigate whether and how reasonable disagreements manifest themselves in a specific legal field. For this reason, I examine here in detail the shape, the structure and the causes of reasonable disagreements in antitrust. Such analysis implies that the special case of antitrust can teach a lot about law in general and that the analytical framework presented here could have further applications beyond antitrust.

[128] Robert Baldwin et al., UNDERSTANDING REGULATION 27–28 (OUP 2012).

[129] Philip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983).

[130] Robert Bork, *Legislative Intent and the Policy of Sherman Act*, 9 J. L. ECON. 21–31 (1966). Bork's view sparked stark criticisms, see John J. Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 S. U.L. REV. 335, 339–40 (1981); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 1880–1918′, 50 OHIO ST. L.J. 257, 260 (1989).

[131] Posner, *supra* note 60 at 23.

[132] Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 632, 634–9 (1989) (stating that law's primary purpose is 'to prevent consumers from paying prices that exceed competitive levels').

market power.[133] Hovenkamp argues that Sherman Act drafters conceived competition in terms of individual liberty and freedom of choice.[134] Others suggest that the legislative history of antitrust laws—including Clayton Act and Robinson-Patman Act—tells a more complicated story about original intent involving the protection of small and medium enterprises.[135] In addition, other seminal antitrust scholars maintain that antitrust 'is rooted in a preference for pluralism, freedom of trade, access to markets, and freedom of choice'.[136] Given that a definitive reading of Sherman Act's legislative history has proven impossible so far,[137] it has been proposed that courts should regard the original intent as tabula rasa and follow the most appealing policy within the textual range of Sherman Act.[138]

In Europe, the mandate behind the competition norms is even more fuzzy. Many scholars disagree about what is exactly the content of the original intent behind the antitrust provisions incorporated in the treaty. Gerber argues that this intent includes removing distortions of competition. Schweitzer maintains that this intent revolves around protecting the competitive process, whereas Behrens supports the view that ordoliberal ideas have accompanied the drafting as well as the interpretation and application of EU competition law since its inception.[139] On the contrary, Akman contends that the historical purpose of EU competition law was to increase efficiency.[140] Even though it seems plausible to argue that the protection of effective competition that enhances consumer welfare and innovation is the primary goal of EU competition law, it is equally, if not more, credible to contend that the normative foundation of the law lies in the protection of competition 'as an institution of freedom' that seeks to ensure a decentralized coordination process for the allocation of resources

[133] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 74–77 (1982).

[134] Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 Iowa L. Rev. 1019, 1025 (1989).

[135] Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 233–38 (1960).

[136] Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936, 936 (1987).

[137] Thomas Sullivan et al., Antitrust Law, Policy and Procedure: Cases, Materials Problems 1–22 (7th ed., LexisNexis 2014).

[138] Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1702–03 (1986).

[139] Heike Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, *in* European Competition Law Annual 2007: A Reformed Approach to Artilce 82 EC (Ehlermann & Marquis eds., Hart Publishing 2008); Peter Behrens, *The Ordoliberal Concept of "Abuse" of a Dominant Position and Its Impact on Article 102 TFEU*, *in* Abuse Regulation in Competition Law (Nihoul & Takahashi eds., forthcoming), available at https://ssrn.com/abstract=2658045. For additional literature supporting the view that the philosophical foundations of EU competition law were influenced, to a large extent, by the German ordoliberal school see David J. Gerber, *Constitutionalising the Economy: German Neoliberalism, Competition Law and the "New" Europe*, 42 Am. J. Comp. Law 25, 64 (1994).

[140] Pinar Akman, *Searching for the Long-Lost Soul of Article 82 EC*, 29 Oxf. J. Leg. Stud. 267 (2009).

resting upon the guarantee of freedom and equality of opportunity. Thus, the mandate of EU antitrust remains sufficiently fuzzy to allow for various legal standards, enforcement strategies, and institutional structures. Consequently, neither U.S. nor EU legislative history of antitrust laws can extrapolate a single objective to the attainment of which should enforcers and courts look for.

The second reason explaining the persistence of reasonable disagreements lies on the conceptually elastic language of most of antitrust terms. All core competition rules contain open-textured concepts.[141] For instance, some of the key concepts of EU antitrust such as 'undertaking', 'restriction by object or effect', 'effect on trade', 'abuse of dominant position' do not have clear-cut meaning and have been defined by EU courts in a functional or teleological way. Likewise, U.S. antitrust uses equally elusive terms such as 'restraint on trade', 'monopolization' or 'attempt to monopolize', and 'substantially lessen competition'. Judicial definitions of even the word competition have gone through an evolution in both U.S. and EU antitrust.[142] Therefore, applying such 'essentially contested concepts' always require significant interpretative efforts; it involves defining the semantic core and the penumbra of the concept as well as articulating and evaluating different conceptions of the concept at stake.[143] Naturally, different conceptions of the key antitrust concepts lead to disagreements about the appropriated legal standards and enforcement techniques.[144]

The conceptual elasticity of antitrust vocabulary and its fuzzy mandate are not only a source of indeterminacy. Simultaneously, they are the key elements that allow antitrust to remain open and able to incorporate new knowledge. For example, the antitrust treatment of vertical restraints changed when positive economic analysis of markets showed that vertical integration is likely to

[141] As Hart notes 'in all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable, (. . .) but there will also be cases where it is not clear whether they apply or not'. Hart, *supra* note 2, at 123.

[142] Bork identified five distinct meanings of competition. Bork, The Antitrust Paradok, *supra* note 4, at 58–61. In the EU Lorenz argues that effective competition means workable competition, whereas Whish is more in line with a consumer welfare approach. Moritz Lorenz, An Introduction to EU Competition Law 21–22 (Cambridge University Press 2013); Richard Whish & David Bailey, Compet. L. 1, 19–24 (7th ed., OUP 2012).

[143] Most key antitrust terms could be perceived as 'essentially contested concepts' namely concepts 'the proper use of which inevitably involves endless disputes about their proper uses on the part of their users' due to their internal complexity, contestability, modifiability, and multipurpose use. Such concepts require some kind of value judgement to be applied. As a result, there can be no judicial 'knock-out' or general principle in determining their meaning and application. W.B. Gallie, *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society 167, 179, 189, 191 (1955).

[144] Tim Wu, The Curse of Bigness 31 (Columbia Global Reports 2018).

result in lower consumer prices.[145] In the same line as our understanding of dominant position evolved from a static and structural conception to a more dynamic and behavioural due to a focus on market power, the law easily adapted accordingly.[146] Dominant position is no longer inferred from the undertaking's market share alone, and detailed market power analysis is required to characterize a firm as dominant.[147]

In a similar vein, the Commission without contravening European Union Merger Regulation (EUMR) or departing from the Horizontal Merger Guidelines (HMG) managed to go beyond a price/output analysis and develop a robust innovation-based theory of harm in *Dow/Dupont* and *Bayer/Monsanto*.[148] Even though some criticize the Commission as engaging in a 'quantum leap',[149] the Commission's analysis is anchored on the HMG's explicit statement that 'increased market power' is defined not only as the ability to profitably increase prices, but also as the ability to profitably diminish innovation or affect negatively other parameters of competition.[150] Based on such a brief statement and its previous practice the Commission considered that the merging of two close competitors with significant overlaps in a number of innovation spaces in a structurally oligopolistic, innovation-driven industry could lead to a significant impediment of innovation competition.[151] To reach such a conclusion the Commission relied on a rather rich conception of innovation that includes innovation incentives and innovation output, and has a behavioural and a structural dimension.[152] These decisions are a good example of how the Commission can produce a comprehensive framework of analysis and forceful theories of harm even when it can only rely on relatively succinct legislative and policy documents. Put differently, these decisions show that antitrust openness even though it generates reasonable disagreements can also make antitrust adaptable and effective.

The above examples indicate that antitrust has an enormous capacity for refinement without a legislative reform through legal interpretation due to its conceptual elasticity and fuzzy mandate. These examples, additionally, show that antitrust has the tendency to transcend the artificial separation

[145] William Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, (98) Harv. L. Rev. 983 (1985).

[146] International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007, available at https://www.internationalcompetitionnetwork.org/working-groups/unilateral-conduct/.

[147] Anne Witt, The More Economic Approach 181–190 (Hart Publishing 2016).

[148] *Bayer/Monsanto*, *supra* note 76 at 69; *Dow/Dupont*, *supra* note 76 at 279, 1995.

[149] Nicholas Petit, *Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?*, available at https://ssrn.com/abstract=2911597.

[150] EU HMG, *supra* note 77 at para 8.

[151] By using the notion of innovation spaces the Commission overcame the problems that innovation competition raises to market definition in *Dow/Dupont*, *supra* note 76 at 283, 342–402, 1956–8, 2008–34.

[152] *Bayer/Monsanto*, *supra* note 76 at 103, 1025–29, 1036; *Dow/Dupont*, *supra* note 76 at 2122.

between positive and normative economics due to the openness of its core mission, the protection, and promotion of competition.[153] Deciding what should be the antitrust response on the basis of an empirical inquiry of the economic consequences of a practice is a task of positive economic analysis.[154] Deciding whether a practice that reduces consumer welfare while increasing total welfare should be allowed or condemned involves a normative inquiry, a value judgement, or dialectical reasoning. The openness of antitrust invites both types of decisions. As a result, legal interpretation in antitrust inevitably invokes both positive and normative economics and moral reasoning. This kind of openness naturally triggers disagreements, yet it also enables the law to adjust to new knowledge and changing circumstances.

The third reason behind reasonable disagreements could be traced to the fact that antitrust regulates a complex and constantly changing subject matter: markets. To effectively do so, antitrust has to use both rules and standards.[155] Rules 'establish legal boundaries based on the presence or absence of well-specified triggering facts', have formal realizability, and, thus, maximize clarity by constraining discretion.[156] Rules also give concrete guides for decision-making geared to narrow categories of behaviour and prescribe narrow patterns of conduct.[157] An example of a rule could be: a dominant position cannot be found if an undertaking has market share below 40 percent. However, an undertaking with 60 per cent market share may not be able to exercise significant market power due to a maverick or an equally economically strong buyer, whereas on the other hand an undertaking with a market share as low as 35 percent could be dominant in an oligopolistic market with high barriers to entry. Hence, even though rules can maximize legal clarity and certainty by eliminating discretion they generate false positives or false negatives.[158]

[153] Positive economic analysis intends to describe the economic consequences of a phenomenon, whereas normative economic analysis is a subgenre of ethics; it is concerned about the normative appeal of a certain economic value. Herbert Hovenkamp, Economics And Federal Antitrust Law 44–45 (West Group 1985).

[154] *Id.* at 44–45; Richard Posner, Economic Analysis of Law 17–19 (2nd ed., Little Brown Company 1977).

[155] Dworkin defines a rule as 'applicable in all or nothing fashion' in contrast to a principle, which 'states a reason that argues in one direction but does not necessitate a particular decision'. Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14–18 (1967). For a much broader definition that collapses the distinction between rules and standards see H.M. Hart & Albert Sacks, The Legal Process: Basic Problems in the Making and application of Law 155 (University Casebook Series 1995).

[156] Giorgio Monti, EC Competition Law 16–18 (Cambridge University Press 2007).

[157] By this definition, Hughes distinguishes rules from principles, namely from vaguer signals which alert us to general considerations that should be kept in mind in deciding disputes under rules. Graham Hughes, Law, Reason and Justice; Essays in Legal Philosophy 111 (NY University Press 1969).

[158] Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "per se" vs Rule of Reason*, 2(2) JCLE 215 (2006).

The above explain why antitrust institutions regularly use standards. Standards require the decision-maker to engage in a wide-ranging inquiry and exercise discretion.[159] Their advantage is that they can make decisions more accurate. Yet, they cannot fully eliminate error costs and usually bear higher administrative costs compared with rules.[160] It is not surprising, therefore, that antitrust institutions always seek to identify an optimal balance between rules and standards.[161] They opt for rules whenever the error costs can be tolerated, and they set out standards when the cost of implementing the standard is less than the error cost of a rule.[162]

Since their early history, EU and U.S. antitrust laws have been applied also by recourse to standards.[163] For instance, the American debate on *per se* rules and the rule of reason,[164] or the European debates on 'restrictions by object v. restrictions by effect,' or 'forms v. effects' show that antitrust analysis necessarily operates with rules and standards.[165] Notably, the difference between rules and standards lies in how much we need to know before reaching a conclusion about a specific practice.[166] In fact, antitrust analysis has never been entirely effects-based or utterly formalistic. It has always relied—in varied degree—on economically informed and outcome-sensitive legal forms.[167] In this respect, the above-mentioned American and European debates, regardless of their differences, are essentially disputes about how far should we take account of the effects of a practice to sustain a legal inference.[168]

These observations explain why in antitrust legal reasoning on most occasions follows defeasible and not propositional logic and boils down to probabilistic argumentation.[169] The 'nature' of markets and the mission of antitrust necessitate the use of rebuttable presumptions, burden-shifting mechanisms,

[159] Richard A. Posner, The Problems Of Jurisprudence 42–53 (Harvard University Press 1993).

[160] Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 Antitrust L.J. 505, 515–520 (2012).

[161] Christiansen & Kerber, *supra* note 158 at 219–220, 233–6.

[162] Trade-offs must often be made between cheap-to-enforce, rigid rules that risk producing error, and costly-to-enforce standards that can yield more precise results according to the goals of competition law.

[163] Cyril Ritter, *Presumptions in EU Competition Law*, 1–5, available at https://ssrn.com/abstract=2999638.

[164] Richard Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 Tex. L. Rev. (1984); Frank Easterbrook, *The Limits of Antitrust*, 63(1) Tex. L. Rev. 1, 14–39 (1984); Hovenkamp, *supra* note 70, at 5–12.

[165] Barak Orbach, *The Durability of Formalism in Antitrust*, 100 Iowa L. Rev. 2197, 2203–2206 (2015).

[166] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999).

[167] Orbach, *supra* note 165, at 2206–14, 2221–2.

[168] Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on Sylvania Decision*, 45(1) UCLR 1, 14–15 (1977) (stating that 'in fact, all legal analysis operates under per se rules').

[169] John Pollock, Logic: An Introduction to the Formal Study of Reasoning, 9–24, available at https://johnpollock.us/ftp/LogicIntroduction/Logic%20text.html.

rules and standards, and probabilistic reasoning. This is why antitrust, wherever it exists, is also written in a conceptually elastic language. Without these elements, antitrust would undeniably become more determinate but it would lose its openness, and subsequently its integrity. Even though the elements discussed here make antitrust intrinsically vulnerable to reasonable disagreements, they also enable it to be precise and open to new learning, and capable of contextual application. In one word, reasonable disagreements despite the legal anxiety they trigger allow antitrust to be responsive as shown below.

IV. MODELS OF LAW

So far, we have seen that certain elements make antitrust a normatively open system of norms and as a result trigger reasonable disagreements. Such disagreements are ordinarily perceived as temporary sources of indeterminacy and uncertainty that must or will be eventually eradicated. In this section, I will show that such a point of view derives from a conceptualization of antitrust as 'AL'. On the contrary, conceptualizing antitrust as a form of 'RL' is compatible with the explanation of reasonable disagreements given in the previous section. Specifically, conceptualizing antitrust as RL allows the conclusion that reasonable disagreements are the by-product of the oscillation between openness and integrity, and due to this reason are not only inevitable but also invaluable in antitrust.

A. Autonomous Law

In 1978, Nonet and Selznick came up with a typology of three legal systems: they distinguished between repressive law AL, and RL.[170] This work is considered relevant here for two reasons. First, it offers a framework, which could be particularly useful for understanding certain phenomena and features of antitrust, and for refining the antitrust enterprise. The second reason pertains to the methodological approach endorsed by these scholars. Nonet and Selznick adopted a sociolegal, 'integrative' approach that sought to unite different legal theories and disciplinary fields.[171] This broader social science perspective aims to bring together the 'external' and the 'internal' point of view to capture the functioning of different legal orderings.[172] This method makes

[170] Nonet & Selznick, *supra* note 7 at 18–28. This work fleshes out the bare tenets of the 'Berkley Perspective'. Never intending to form a settled school of thought in the traditional sense, these writers sought to make jurisprudence more relevant and alive by reintegrating legal, political and social theory. Philippe Nonet, *For Jurisprudential Sociology*, 10 L. Soc. Rev. 525 (1976); Philip Selznick, *Sociology and Natural Law*, 6 Nat. L. Forum 84 (1961).

[171] Jerome Hall, *From Legal Theory to Integrative Jurisprudence*, 33 Cin. L. Rev. 153 (1964).

[172] Hart famously deployed the distinction between *external* and *internal* perspectives towards law. The internal point of view is the perspective of participants in the system that use the norms

their typology robust and has inspired the RL modus operandi proposed in Section VII.[173] One qualification should be made here: in what follows, I use the Nonet and Selznick's framework as an inspiring starting point. Yet, the book 'is more a prolegomenon to a theory of law rather than a finished and full-blown theory of law'.[174] Thus, I propose certain refinements that could develop the basic framework further and make it more relevant for antitrust today.

Nonet and Selznick's typology intended to grasp the key features and functions of three distinct forms of legal ordering in reference to the sociological, jurisprudential, and institutional aspects of law. For this purpose, they developed three ideal types that bring together and conceptualize different elements of various legal and institutional realities. These three models are not mutually exclusive, but describe a continuum and purport to shed light to different aspects of legal reality. In the same actual legal system, for instance, elements of autonomous and repressive law can survive and coexist. Furthermore, the appearance, say, of RL elements does not require a radical break with an AL legal ordering, and does not entail that the transition is full or irreversible.

The AL model refers to a rule-centred model of law that claims law's independency from politics or any other nonlegal domain.[175] Nonet and Selznick describe the distinctive institutional arrangement that characterizes this model as resting upon a core feature: lawmaking categorically differs from law application.[176] Besides, the Rule of Law defines the *raison d'être* of the legal system and sets its boundaries. Although Nonet and Selznick do not fully explain what they mean by Rule of Law, for the purposes of the present study

as sources of authority and reasons for action. The external point of view is the perspective of outsiders that discern patterns of behaviour. Hart, *supra* note 2, at 89–91, 242–243, 254.

[173] Nonet and Selznick's typology was descriptive and conceptual (see Nonet & Selznick, *supra* note 7, at 8–17). Thus, the prescriptive component proposed in section VII is not developed in the original but hopefully remains loyal to its key tenets.

[174] Allan C. Hutchison, *Book Review: Law and Society in Transition*, 24 Am. J. Jur. 207, 212 (1979).

[175] I do not discuss here the notion of 'repressive legal ordering' because it is not relevant for the purposes of the present argument. It suffices to say that repressive law refers to a situation where the state has the monopoly of legitimate violence but is not constrained by the Rule of Law. Under this model, the main function of law is to legitimatize power and secure hierarchies of privilege and dependency. Consequently, the legal institutions are concerned only about achieving conformity, and they heavily rely on coercion and social apathy. Law and politics are integrated, and law is subordinate to political power. No matter how appalling this legal system may seem, it contains the 'germ of justice' and sets by itself the conditions for its transformation. This means that even though repressive law protects the rulers by legitimizing their privileges, it simultaneously provides opportunities for criticizing the authority and, therefore, creates the preconditions for AL. See Nonet & Selznick, *supra* note 7, at 29–52.

[176] For an elaborate discussion on why this distinction is artificial see Ingo Venzke, *The Role of International Courts as Interpreters and Developers of Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 Loy. L.A. Int. Comp. L. Rev. 99–131 (2011).

I understand Rule of Law on formal and procedural terms.[177] The formal aspect implies that for rules to qualify as 'law' or 'good law', they must be sufficiently general; publicly promulgated; prospective; at least minimally clear and intelligible; free of contradictions, relatively constant; possible to obey; and administered in a way that does not wildly diverge from their obvious or apparent meaning.[178] The procedural aspect refers to certain procedural principles such as the right to a hearing by an impartial and independent tribunal, the right to representation by counsel at such a hearing, the right to make legal argument, or the right to hear reasons from the tribunal when it reaches its decision.[179]

In this regard, the AL model understands the law as a set of rules and considers the Rule of Law as its essential mission.[180] Fidelity to the law—that is, strict adherence to rules—is the primary virtue of this model. Under this model, openness is a source of subjective value judgements and of arbitrary policymaking in the disguise of law, which should be rejected. Legal institutions must simply apply the law and for this purpose they need to engage solely in 'pure' legal reasoning. Enforcers and administrators can have some discretion, which, however, remains unchecked as long as they meet the rule-of-law requirements. Adjudicators, on the other hand, have no discretion and must under any cost refrain from policymaking. They should only employ canons of interpretation to determine 'what the law is'.[181] As the President of the ECJ, Koen Lenaerts, puts it, the mission of the judiciary is to 'uphold the

[177] For some scholars Rule of Law can include some additional substantive components such as the protection of property (Richard Epstein, Property Rights and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State 10 (Harvard University Press 2011)), human rights (Tom Bingham, The Rule of Law 67 (London: Allen Lane, 2010)) or a substantive dimension of democracy (World Justice Project, *Rule of law index* (2011 ed.), available at https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2011-report). However, Raz cautions that we should not try to read into Rule of Law other considerations about democracy, human rights, and social justice (Raz, *supra* note 53, at 211). For purposes of analytical clarity, I follow here Raz' advice.

[178] In this sense, the Rule of Law could be broken down to eight principles: generality, publicity, prospectivity, intelligibility, consistency, stability, practicability, and congruence. Lon Fuller, The Morality of Law 33–38, 63–81 (Yale University Press 1964). In an autonomous legal order, Rule of Law could be a normative ideal for good law *or* a criterion of legal validity. On the contrary, under RL, Rule of Law is necessarily a criterion of legal validity (for example, a legal provision that runs counter to the Rule of Law undermines law's integrity and thus it is not considered law).

[179] A.W. Tashima, *The War on Terror and the Rule of Law*, 15 Asian AM. L.J. 245, 262–5 (2008).

[180] To be sure the AL model corresponds to certain forms of legal positivism but not to all of them. For instance, Hart's sophisticated version of legal positivism is closer to the RL model than to the AL. Hart, *supra* note 2 at 132, 141–7, 252–9, 272–6, 254–259.

[181] John Austin, *The Province of Jurisprudence Defined* (first published 1832, W.E. Rumble ed, CUP 1995) 157; Hans Kelsen, the General Theory of Law and State 113 (A. Wedberg trans., New York: Russel and Russel 1961).

Rule of Law'.[182] Hence, under the AL perspective, political power is exercised within the confines of the law and the application of the law is a neutral, value-free, essentially nonpolitical exercise.[183]

The concept of the Rule of Law plays a two-fold, external and internal, role in this model. First, it functions as a strategy of legitimacy (external function).[184] Policymakers are legitimate and unconstrained to make their decisions as long as they accept the supremacy of the law, whereas the law remains the supreme authority of the system, as long as it does not interfere in the political domain.[185] Simultaneously, if the judge steps in the political process by going beyond her duty to state 'what the law is', she will lose her legitimacy and will be discredited as 'doing politics' or engaging in judicial activism.[186]

The second function of the Rule of Law under the AL model consists in determining the functioning of legal interpretation (internal function). From this internal point of view, the AL model plays out in two ways: according to the first version, legal interpretation is insulated from political, moral, or any other type of nonlegal reasoning (AL 1.0).[187] According to an updated version of AL (AL 2.0), legal institutions can use knowledge from nonlegal domains, for example economic analysis, when a legal provision explicitly authorizes them to do so.[188] This variant supposedly saves law's autonomy, as it insulates legal hermeneutics from value judgements, whereas it allows the use of scientific (value-neutral) knowledge. For instance, legal institutions apply antitrust by

[182] In particular, Lenaerts argues that judicial legitimacy is external and internal. External legitimacy is ensured as long as the courts do not intrude in the political process and respect the principle of separation of powers. Internal legitimacy refers to the quality of the judicial process. Koen Lenaerts, *The Court's Outer and Inner Shelves: Exploring the External and Internal Legitimacy of the European Court of Justice*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 1–5 (Maurice Adams et al. eds., Hart 2013).

[183] To be sure the AL model does not argue that the law itself is neutral or value free, it mainly claims that its application and interpretation could be an autonomous enterprise, meaning an enterprise insulated from nonlegal domains. For instance, Kelsen defined law solely in terms of itself and eschewed any element of justice, which was rather to be considered within the discipline of political science. Hans Kelsen, PURE THEORY OF LAW 474, 477–85, 517–22 [1934, 1960] (M. Knight trans., University of California Press 1967).

[184] Nonet & Selznick, *supra* note 7 at 55–56.

[185] *Id*. at 39 (noting that AL is the by-product of a historical bargain where 'legal institutions purchased procedural autonomy at the price of substantive subordination').

[186] John Temple Lang, *Has the European Court of Justice been Involved in "Judicial Legislation"?*, 96 SVENSK JURISTTIDNING 299 (2011); T.C. Hartley, *The ECJ, Judicial Objectivity and the Constitution of the EU*, 112 L. QUART. REV. 95 (1996).

[187] This is a direct consequence of the external function of the Rule of Law. From an AL perspective if adjudicators attempt to determine the content of law by supplementing legal with moral or normative economic reasoning, they would stop being objective dispensers of a received impersonal justice, and they would be transformed into partial spokesmen of some substantive and subjective idea of justice. Nonet & Selznick, *supra* note 7 at 57–59, 66–67.

[188] By making such a claim, the AL model adopts an exclusive legal positivism strategy: moral reasoning as any other substantive nonlegal knowledge could be incorporated in law when this is provided by a legally valid norm. Raz, *supra* note 53, at 16; Kelsen, *supra* note 183, at 161.

utilizing positive but not normative economics. This strategy allows nonlegal knowledge to be used by legal institutions in an *applicative*, nonlaw-creating manner. In this way, the AL model updates its internal function so as to maintain its core understanding and assumptions about the law.

At this point, it becomes clear that the AL model conceives the law as a rule-based and court-centred enterprise. The relationship between the courts and administrative bodies is static and one-directional: administrators apply the law or exercise discretion within the boundaries of the law, whereas the courts either accept or annul their output. In this constellation, the Rule of Law sets the boundaries and defines the core mission of both legal institutions. Adjudication is perceived as the paradigmatic function of law, relies on canons of interpretation, and is either uncontaminated by other types of reasoning or knowledge (AL 1.0) or contaminated by nonlegal but still neutral and value-free input (AL 2.0).[189] In both variants, courts receive input (factual and legal claims) and generate output, that is, they elaborate the norms, impose sanctions to infringers, and determine victims' compensation. The courts look inwards, in the legal texts and case law, and use their own processes and standards to determine what the law is.[190] Conceptual reasoning, legal formalism, and expert opinions are the main components of their hermeneutics.

B. The Emergence of RL

RL may emerge from the inherent tensions of law when it operates autonomously. The very effort to develop an autonomous legal order can make law incapable of effectively regulating emerging realities or materializing its core values.[191] When the application of the rules is (or pretends to be) not informed by purposes, consequences, and value judgements, frictions between formal-procedural and substantive justice may arise. Focusing solely on the formal and procedural ideal of the Rule of Law may deprive legal institutions from developing their problem-solving capacity, and as a result thwart law's integrity.[192] These endogenous contradictions may push an autonomous legal order to its limits and trigger an existential crisis. To survive and regain its legitimacy, such autonomous legal order may abandon some of its essential features, and at least implicitly recognize the limitations of AL's modus operandi. This internal process may incentivize a legal system to adopt a responsive attitude. In other words, the tensions between formal-procedural and substantive rationality, and the inability of even AL 2.0 to eradicate reasonable disagreements pose a dilemma to the legal institutions:

[189] Nonet & Selznick, *supra* note 7 at 62.
[190] Scott & Sturm, *supra* note 18 at 3–4.
[191] Nonet & Selznick, *supra* note 7 at 70–72.
[192] *Id*. at 78–86.

they can either maintain the AL modus operandi and face a dead end or tend to the RL model to find a way out of it.[193]

A brief contour of the key elements of the RL model is due at this point. According to this conceptual model, there is an interdependence between the legal and other social spheres, and thus law should be perceived in a more inclusive way as a value-laded system of rules, principles, and practices aimed at problem-solving. For RL, law is a normatively and cognitively open system of norms where rival argumentative practices emerge and compete with each other to provide solutions to problems of human praxis. Contrary to AL 1.0, RL suggests that the application of law cannot solely rely on formal legal reasoning, but should incorporate knowledge from other domains and focus on problem-solving.[194] Contrary to AL 2.0, RL suggests that even a legal system that accommodates nonlegal knowledge through specific legal provisions cannot remain (normatively) autonomous, because law application involves a mixture of formal legal reasoning, technocratic nonlegal knowledge and value-laden judgements. In this way, RL broadens the field of the legally relevant and seeks to incorporate to legal reasoning not only scientific knowledge, but also normative evaluations about the purposes and effects of legal action.[195] Simultaneously, unlike AL, RL is concerned about enforcement problems and institutions dynamics.

Legal institutions may put aside the modus operandi of AL and adopt a responsive attitude when they are confronted with reasonable disagreements in hard cases.[196] Such cases make visible the indeterminacy and gaps in law as well as the normative uncertainty that permeates legal systems.[197] Such cases do not occur only when there is semantic or normative uncertainty or when the law is silent,[198] but also when a legal norm is neither applicable nor inapplicable, or when valid legal norms both applicable at once clash and there

[193] These endogenous dynamics can be affected by external events. For instance, new technologies can create a reality that cannot be properly regulated by the existing legal norms. Another example is when new economic learning reveals previously unknown effects of legal rules. Such external events can expedite the legitimacy crisis of AL.

[194] As Hart puts it in the penumbra of legal rules, judges inevitably exercise moral judgement. This is 'in effect an invitation to revise our concept of what the rule is' H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71(4) Harv. L. Rev. 71, 72 (1958).

[195] Lon Fuller, *American Legal Realism*, 82 U. Pa. 429, 434 (1934).

[196] An example of AL 2.0 using an inclusive legal positivist strategy to deal with the problem of reasonable disagreement could be found in Hart, *supra* note 2 at 258–9.

[197] According to Kelsen, 'every law-applying act is only partly determined and partly undetermined'. Kelsen, *supra* note 183 at 349.

[198] Arguably, this is not a problem because law deals with silence through deontic logic closure rules. For instance, Raz argues that when a legal norm is linguistically vague, because its source is vague or linguistically indeterminate, the said norm gives a legally binding obligation to the courts to engage in moral reasoning so as to interpret it. Joseph Raz, *Incorporation by Law*, 10 Legal Theory 12–14 (2004).

exists no third legal norm that resolves the conflict.[199] When dealing with such cases, legal institutions may realize the limitations of the AL model: they may look at the records of past institutional decisions, may employ the conventional canons of interpretation, may even use value-free, scientific knowledge when explicitly required, and still remain unable to eradicate reasonable disagreements.[200] As a result, they may opt for the so-called RL modus operandi which, as explained below, consists in constructive teleological interpretation, postbureaucratic enforcement, and catalytic adjudication. Thus, legal institutions consider reasonable disagreements as a negative state of affairs (which must be eradicated) only when they adopt an AL conceptualization of law. In addition, by seeking to eradicate instead of taming such disagreements, AL-institutions end up failing to materialize the value(s) of law. On the contrary, the RL model considers reasonable disagreements an inevitable by-product of the actual functioning of a legal system that cannot and should not be eradicated; a 'natural force' of law that could be both creative and destructive. From this standpoint, the aim of legal institutions is to discipline the forces of law that generate such disagreements in a way that materializes law's mission.

Nonetheless, it is worth asking why the communication crisis of a 'reasonable disagreement' emerges in the first place? Such a disagreement inevitably arises when the law is so open-textured that its application requires a fresh choice. As Hart has noted, law uses authoritative general language and general classifying terms to regulate reality. Yet, 'in all fields not only that of rules, there is a limit inherent in the nature of language, to the guidance which general language can provide' and, thus, 'canons of interpretation cannot eliminate though they can diminish these uncertainties'.[201] On this basis, Hart underlines that the open texture of law leaves to courts a law-creating power: courts need to make a fresh—even though not arbitrary or irrational—choice, so as to render initially vague standards determinate, resolve uncertainties of statues, or develop and qualify rules only broadly communicated by precedents.[202] More than this, Hart insightfully explains why 'a fully articulated legal system detailed enough to determine in advance all the instances of its application' would be a *false ideal*: our 'relative ignorance of fact' and 'relative indeterminacy of aim' oblige the law to communicate through general standards of conduct.[203] In this sense, openness is a general feature of law that could be traced in several fields of law—not only in antitrust—and is useful when the factual context or the mission of the law is complex.

How does an AL system react when confronted with reasonable disagreements? The first option, as already noted is the AL 1.0 approach. To

[199] Raz, *supra* note 53 at 70 (noting that 'no closure rule, however ingenious, can guarantee to eliminate these latter types of gaps').
[200] Dworkin, Law's Empire, *supra* note 1 at 7.
[201] Hart, *supra* note 2 at 126.
[202] *Id*.136.
[203] *Id*. 128.

maintain law's autonomy, AL 1.0 submits that legal forms could fully guide law application without any need to exercise any choice. To achieve its purpose, the AL 1.0 suggests that a legal system should seek to attain the above-mentioned false ideal by freezing the content of each rule so it has the same meaning in every case of its application. In such an occasion, legal clarity and certainty will be maximized, but the law will become over- or under-inclusive.[204] From this perspective, AL 1.0 corresponds to 'mechanical jurisprudence' and suffers from the vice known in legal theory as formalism or conceptualism.[205] In its quest to exorcize openness and indeterminacy, the AL 1.0 method will end up with a rigid and ineffective legal system. Eradicating reasonable disagreement by closing off the law is like throwing the baby out with the bathwater.

The second AL option for dealing with reasonable disagreements consists in AL 2.0. Nonetheless, even in this updated version AL cannot fully eradicate reasonable disagreements. The main reason for this inadequacy is that when confronted with indeterminacies or gaps, legal institutions cannot always apply value-free knowledge and of course they are not free to apply the law as they wish. At this point, the AL 2.0 method may raise the following defence: in hard cases, legal institutions, even though they have to engage in a value judgement, they are under a legal obligation to apply the 'morally best extra-legal principles'.[206] However, this defence is unconvincing even in AL model's own terms because it admits (without offering any *further* guidance in this respect) that law application sometimes requires value judgements and moral reasoning.[207] Hence, instead of preserving the AL model's purity, this line of defence underlines that law is an open normative system the operationalization of which requires normative investigations, as well as extra-legal knowledge.[208] In this sense, a legal system following the AL 2.0 method inevitable incorporates some of the key assumptions and prescriptions of the

[204] AL 1.0 forces 'to settle in advance and in the dark issues which can only reasonably be settled when they arise and are identified'. Hart, *supra* note 2 at 130.

[205] Roscoe Pound, *Mechanical Jurisprudence*, 8(8) Colum. L. Rev. 605, 608 (1908). By the term formalism, I refer to approach according to which solely source-based (posited) norms and content-independent legal reasoning suffices to determine legal outcomes. For a more refined version of formalism, see Frederick Schauer, *Formalism*, 97(4) Yale L.J. 509, (1988).

[206] Joseph Raz, *Legal Principles and the Limits of Law,* 81(5) Yale L.J. 823, 847–8 (1972). See also Hans Kelsen, Introduction to the Problems of Legal Theory 460 [1934] (Paulson & Paulson trans., OUP 1992) (recognizing that 'when a legal body applies the law, the interpretation of the applicable law through a *cognitive act* combines with an *act of will* through which the body applying the law makes a choice between the possibilities revealed by cognitive interpretation').

[207] John Gardner, *Legal Positivism: 5 $^{1}/_{2}$ Myths*, 46 Am. J. Jur. 211–8 (2001) (maintaining that 'legal positivism militates against the assumption that judges should only and always apply valid legal norms').

[208] Joseph Raz, Practical Reason and Norms 152–4 [1975] (Princeton University Press 1990).

RL model. Otherwise, it would remain vulnerable to RL's critique that it cannot account for and deal with the problem of reasonable disagreement.[209]

As the AL model cannot fully guide their interpretive efforts or navigate their enforcement enterprise, legal institutions may adopt a more responsive attitude. This attitude implies that legal institutions stop being concerned only about procedurally of formally valid decisions, and seek instead to attain the substantive ideals underlying the legal provisions. As a result, they deepen their understanding of the purpose of the law, invest in their cognitive competence, and substantive capabilities. They also use 'constructive teleological interpretation' to forge operational legal tests. This method of operation will be analysed further in Section VII.[210] It is worth noting here, though, that it refers to an interpretative enterprise under which the relevant key concepts and case law serve as building blocks of an argument (or an interpretive theory) about what is the best account of the law in virtue of a specific case. Such a method of interpretation demands from the judge to decide among the various interpretive theories the one that best fits and justifies the law. This method of interpretation, which is permissible only within a RL framework, takes seriously the normative openness of law and its purpose, is sensitive to the consequences of legal interpretation, and espouses a problem-solving and result-oriented attitude towards the law.

Yet, as already mentioned the RL modus operandi does not stop in legal hermeneutics but extends to institutional practices. A distinction should be made here between the two main and distinct legal institutions—enforcement and adjudication. Responsive administrative bodies that opt for responsiveness abandon some AL features and operate as postbureaucratic organizations. Bureaucratic organizations, the hallmark of AL, use mainly formal and procedural rationality and are concerned about administrative regularity, whereas stakeholders address them only through officially established legal channels. Such enforcers understand their purpose as explicit and fixed, their internal organization is hierarchical, and their external communications with other bodies pass only through formal channels. In contrast, postbureaucratic bodies are mission-oriented and flexible; they are organized internally in the forms of teams and task forces, and they communicate openly with external bodies. They encourage participatory procedures, explain their reasons for action,

[209] The alternative to exclusive legal positivism, 'inclusive' or 'soft' legal positivism brings a legal system well into the RL model. This happens because inclusive legal positivism goes a step further and argues that legal validity can be partly determined by moral tests and facts, namely by normative investigations. Jules Coleman, *Negative and Positive Positivism*, 11 J. Legal Stud. 139 (1982); Wilfred Waluchow, Inclusive Legal Positivism (Oxford: Clarendon Press 1994).

[210] Nonet and Selznick without engaging in the interpretation debated note that in deciding specific cases, legal reasoning becomes closely congruent with the logic of moral and practical judgement. Nonet & Selznick, *supra* note 7 at 89. Thus, using constructive teleological interpretation as a key method of interpretation is one of the refinements of the original theory proposed here.

and welcome feedback from stakeholders and epistemic communities.[211] Postbureaucratic bodies are also concerned about cognitive capacity and substantive authority; they are open to nonlegal domains of knowledge, and they adopt a problem-centred approach. They are also often organized as network structures and rely on institutional interactions so as to learn from each other and apply the law contextually.

Adjudicators following the RL model realize that they do not operate in an institutional vacuum but as chains in a multilevel governance structure that affects administrative bodies' capacity to apply the law effectively. They combine scientific, value-laden and formal legal reasoning, as they recognize that conceptual interpretation and legal formalism would not suffice to solve the hard cases. In such instances, responsive adjudicators do not restrain themselves in only reviewing the legality of the output of the administrative bodies. They participate in an argumentative practice, open a dialogue with administrators to affect their normative elaborations and capacity building;[212] and seek to promote the way nonlegal actors understand the legal norms as *reasons for action* and as a *problem-solving device*.[213] In a nutshell, instead of being simply norm-elaborators and law-applying institutions, courts that opt for responsiveness use the law to structure focal points of intra and inter institutional and private argumentative activity. They operate as catalysts, namely (a) as argumentation platforms where different interpretive theories about the law compete and occasionally one prevails over another and (b) as responsiveness motivators, that is, as nodes of an institutional network that can imbue other actors with to engage in effective and responsive problem-solving.[214]

At this point, it becomes clear that a legal order become responsive when enforcers operate as postbureaucratic institutions and adjudicators as catalysts when confronted with reasonable disagreements. The AL model suggests that upholding the Rule of Law will suffice to deal with and even eradicate eventually such disagreements. Yet, on such occasions, legal institutions may realize that the fundamental Rule of Law principles do not suffice to materialize the underlying values of the relevant legal field. Concerned about law's integrity, legal institutions may recognize that Rule of Law principles set boundaries to the law but cannot fully guide legal interpretation in hard cases. As a result, they may adopt a responsive attitude and exploit law's openness to materialize its purpose.[215] Thus, motivated by integrity concerns, legal institutions may transcend the artificial divide between law application

[211] *Id*. at 95, 99–100.
[212] Scott & Sturm, *supra* note 18 at 5–10.
[213] *Id.* at 5–10.
[214] *Id.* at 5–10.
[215] See also Foer & Durst, *supra* note 19 at 507 (noting that 'administrative efficiency can be a justification for a model, but within a democratic polity the model has to be viewed as not only internally consistent and providing a reasonable degree of predictability and administrative

and lawmaking, abandon the ineffective AL modus operandi, and adopt a responsive attitude.[216]

The RL model thus recognizes that reasonable disagreements result from two antithetical yet complementary endogenous forces of the law: openness and integrity. This conceptual framework allows such a conclusion for it does not view the law simply as a set of rules but as a purposive enterprise. Unlike that of AL, the RL model does not perceive the law as an entirely independent, self-sufficient and self-governing system, but rather as a *special* instrument for achieving *social purposes*. For RL, legal systems earn their legitimacy and maintain law's authority to the extent that they manage to realize law's purpose when reasonable disagreements arise. According to the RL model, law is a reasonably open and purposive system. But its purpose cannot be achieved with any means because this would sacrifice its integrity.

From a RL point of view, it is the oscillation between openness and integrity that creates reasonable disagreements and tensions in the application of the law. If legal institutions overemphasize law's openness by relaxing the rule-of-law requirements, law may lose its capacity to restrain officials and protect its subjects. Such an attitude could lead to the instrumentalization of law.[217] Law's instrumentalization would imply that legal institutions disregard the independent value of Rule of Law, or use the law for achieving goals unrelated to its core mission and underlying values. In such an occasion, the law stops being a *special* instrument for achieving a purpose, and it loses its integrity. Excessive openness can also harm law's integrity by making the legal system too easily affected by developments in other nonlegal domains.[218] Law's openness can, moreover, create compliance problems, because law's subjects may be unable to predict the decisions of legal institutions. Simultaneously, legal institutions may incur significant error and administrative costs in their attempt to incorporate new and sophisticated scientific knowledge and engage in contextual law application. It should be also noted that as institutions become more open to their stakeholders, they can also become more vulnerable to regulatory capture.[219]

feasibility, but enough of a sense of justice to receive widespread public support based on outcomes over time').

[216] Nonet & Selznick, *supra* note 7 at 77. The RL model recognizes that the separation of powers principles does not entail a separation of law-making powers from law-applying powers, but rather the separation of legislative powers of law-making (that is, unrestrained power to posit new norms as legally valid) from judicial powers of law-making (that is, interpretative power to make new norms by combining source-based and merit-based arguments).

[217] Nonet & Selznick, *supra* note 7 at 76 (noting that instrumentalization is a feature of a repressive law order).

[218] This could be a reason explaining why competition law, even if it were possible, should not become simply a branch of applied microeconomics as some Chicagoans envisaged. Frank Easterbrook, *Allocating Antitrust Decision-making Tasks*, 76 GLJ 305, 305 (1987).

[219] Nonet & Selznick, *supra* note 7 at 76, 102.

Nonetheless, the absence of openness (if it can ever exist) can make the law rigid and incapable of materializing its objective. Consequently, the main challenge of RL is to calibrate openness and integrity. For this purpose, the said model advocates in favour of a specific legal-institutional modus operandi.[220] The first step of this approach consists in legal institutions understanding the law as a purposive multistep institutional enterprise. This change of view will, subsequently, incentivize legal institutions to try to integrate the substantive, formal, and procedural dimensions of law and engage in constructive teleological interpretation to settle reasonable disagreements. In addition, given that this model recognizes that legal hermeneutics alone cannot solve all indeterminacies in law it also suggests that enforcers need to behave as postbureaucratic institutions and interact with each other in network structures sensitive to openness and integrity concerns.[221] The prescriptive part of the model closes with the suggestion that courts function as 'catalysts' so as to keep enforcers responsive.[222]

To sum up, three are the core claims of RL model: (a) reasonable disagreements are the by-product of two endogenous forces of law, openness, and integrity and cannot be eradicated, only tamed, (b) legal institutions may become responsive when they tormented by reasonable disagreements, understand the law as a purposive enterprise, and take seriously the role of openness and integrity in the operation of a legal system (descriptive claim), and (c) balancing openness and integrity could keep legal institutions responsive, namely capable of effectively dealing with reasonable disagreements in the future (normative claim). Table 1 summarizes the discussion up to this point.

V. TAKING REASONABLE DISAGREEMENTS SERIOUSLY

It might be obvious that AL 1.0 is mechanical and rigid for antitrust. Yet, one might wonder why the AL 2.0 approach—invoking canons of interpretation and positive economics—cannot eradicate reasonable disagreements. Thanks to economics, we increasingly acquire a better understanding of the welfare implications of market behaviour, and we become increasingly more capable to devise appropriate legal rules or standards and enforcement techniques.[223] Nevertheless, economics have not yet brought us to the end of antitrust history, and it is overoptimistic or even a false ideal to think that they could do so.

A Commission's old statement summarizes some of the key reasons behind AL 2.0's inadequacy. As the Commission noted, 'economic theory cannot be

[220] See Section VII.

[221] Ayres & Braithwaite, *supra* note 16 at 54–100.

[222] Talcott Parsons, THE SOCIAL SYSTEM 15–44 (London: Routledge & Kegan Paul Ltd 1970) (noting that there are four minimum conditions that enable legal systems to survive: adaptation, goal attainment, integration, and latent pattern maintenance).

[223] Areeda And Hovenkamp, ANTITRUST LAW 381 (3rd ed 2010).

Table 1. A typology of legal orderings

	AL	**RL**
Goal	Rule of Law	Integrity
Legitimacy	Legality	Materialization of law's substantive goal in a Rule of Law compatible manner
Methodology	Exclusive legal positivism	Inclusive legal positivism Interpretivism Legal realism
Legal hermeneutics	AL 1.0: Formal legal reasoning Legal formalism OR AL 2.0: Legal formalism and usage of scientific, nonlegal knowledge	Traditional methods of interpretation (as in AL 1.0 and AL 2.0) *and* constructive teleological interpretation
Enforcement	Narrow delegation Rule of Law sets the boundaries of enforcers' discretion	Open delegation and constraints of enforcers discretion are set by law's integrity
Enforcers' institutional organization	Bureaucratic	Postbureaucratic networks
Adjudication	Norm elaborators	Catalysts (argumentative platforms and responsiveness motivators)

the only factor in designing antitrust policy because (a) economics necessarily relies on simplified assumptions and stylized theoretical modes that cannot take into account the complexities of real markets, (b) economics is just one of the several relevant sources of policy, which has to be applied in the context of existing legal texts and case law, and (c) a full economic analysis will be very costly in identifying restrictions of competition'.[224] With regards to point (a), Wils has underlined that there is not one but many economic theories, Lianos has shown the difference between economic models and reality,[225] and Devlin and Jacobs have highlighted the epistemological limitations of economic analysis in antitrust and therefore the need for an error analysis.[226] Point (b) indicates that, as argued here, antitrust is a relatively open system of norms, whereas point (c) implies that the AL 2.0 modus operandi is likely to be ineffective due to excessively high implementation costs.

One additional reason why economics cannot eradicate reasonable disagreements relates to the fact that antitrust is *law*: it necessarily uses general classifications to communicate standards of conduct and achieve social control.[227] For instance, Bork notes that 'weighing effects in any direct sense will usually be beyond judicial capabilities'.[228] Thus, the mission of economic analysis is to show the potential welfare effects of different categories of practices. Subsequently, adjudicators will develop objective criteria and presumptions to 'divide transactions likely to be predominantly favourable to consumers through the creation of efficiency from those likely to be predominantly injurious through their suppression of competition'.[229] In the same line, Posner argues that antitrust analysis should search 'for ways of avoiding prohibiting efficient, albeit non-competitive, practices without having to compare directly the gains and losses from a challenged practice'.[230] In other words, the two most famous proponents of efficiency and economic analysis recognize that courts should not 'attempt to measure the efficiencies since measurement, for all practical purposes, is impossible'.[231] This is also the reason why Hovenkamp supports the normative CW hypothesis instead of the TW one[232] and suggests that the judicial construction of balancing is mostly a myth.[233] Along the same lines, Easterbrook contends that the irresolvable

[224] European Commission, *Green Paper on Vertical Restraints in EC Competition Policy*, COM (96) 721, January 22, 1997, para 86.
[225] Wouter Wils, *The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance*, 37(4) World Compet. L. Econ. Rev. 405; Ioannis Lianos, *Global Food Value Chains and Competition Law*, BRICS Report (2018).
[226] Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 William Mary L. Rev. 75 (2010).
[227] Hart, *supra* note 2 at 124–136.
[228] Bork, *supra* note 69 at 387–90.
[229] Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 Colum. L. Rev. 401, 410 (1965).
[230] Posner, *supra* note 60 at 29.
[231] Bork, *supra* note 69 at 387–90.
[232] Hovenkamp, *supra* note 68 at 88–89, 93.
[233] Herbert Hovenkamp, *Antitrust Balancing*, 12 2 N.Y.U. J. L. Bus. 369 (2016).

empirical uncertainty about the workings of markets and the capabilities of courts support forgoing factual investigations and adopting a streamlined model of antitrust enforcement focused on minimizing error costs.[234] On this basis, it could be argued that the AL 2.0 promise to eliminate disagreements by recourse to positive economics is significantly constrained by the juridical structure of antitrust.

A fifth reason why positive economic analysis, and therefore the AL 2.0 method, cannot eradicate reasonable disagreements lies in the fact that economics cannot provide comprehensive criteria for doing so.[235] The debate between the Chicago and the Post-Chicago School is illustrative of this point.[236] Both schools share the view that economics is 'the essence of antitrust' and that protecting consumer welfare, defined in terms of allocative efficiency, should be its exclusive goal.[237] Yet, these two schools disagree over a set of issues such as the measure of market power, the competitive assessment of tying, vertical restraints, and predatory pricing, as well as about the durability of cartels and oligopolies.[238] As Jacobs shows, despite the technocratic flavour of this debate, what divides the two schools is a set of different views on human nature, firm behaviour and judicial competence.[239] In other words, even though these two schools agree on certain fundamental issues they turn out as pursuing essentially different policies in several matters because of divergent views about the efficacy of government intervention in private markets and the judicial capacity to understand economic data and arguments.[240] On this basis, Jacobs notes that 'far from having marginalized the role of value choice in antitrust, the ascendancy of economics underscores its enduring importance'.[241] Choosing between different economic theories

[234] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 977–80 (1986).

[235] More precisely, the absence of an economics meta-theory prevents antitrust community from resolving reasonable disagreements purely on economic grounds. Larry A. Alexander, *Modem Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St. L.J. 3 (1981).

[236] These schools represent competing views about the nature of market and the effectiveness of institutional intervention. Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1978); Hovenkamp, *supra* note 38 at 215.

[237] Jonathan B. Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 Antitrust L.J. 645, 646 (1989).

[238] The Post-Chicago arguments on these matters could be found in Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 Antitrust L.J. 3 (1992); Phillipe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 A. Econ. Rev. 388 (1987); Charles A. Holt & David T. Scheffman, *Strategic Business Behaviour and Antitrust*, *in* Economics & Antitrust Policy 39, 47–63 (Robert Larner & James Meehan eds., Praeger 1989); Steven Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 Antitrust L.J. 187, 194–201 (2000).

[239] Jacobs, *supra* note 50 at 219.

[240] In addition, both schools admit that empirical economic inquiries yield in many occasions ambiguous answers. Frank H. Easterbrook, *Allocating Antitrust Decision-making Tasks*, 76 Geo. L.J. 305, 308–09 (1987).

[241] Jacobs, *supra* note 50 at 225.

necessarily involves choosing between different normative orderings and making value judgements.[242] Consequently, both positive and normative economic analyses are necessary for applying antitrust and simply focusing on the former does not eradicate the necessity of the latter.

It becomes clear at this point that the AL model does not do justice to reasonable disagreements by considering them as temporary sources of indeterminacy or uncertainty that can be eliminated through conceptual legal interpretation and positive economics input. In other words, the AL model misdiagnoses the problem and for this reason it proposes an inadequate modus operandi for dealing with it. On the contrary, conceptualizing antitrust as a form of 'RL' is compatible with diagnosing that such disagreements derive from tensions between antirust's openness and integrity, and thus are endogenous.

VI. RESPONSIVENESS IN ACTION

If the previous analysis is correct and reasonable disagreements are endogenous in antitrust, a paradox emerges: how is it possible that EU and U.S. antitrust systems operate in general in a coherent and effective manner when reasonable disagreements in antitrust are so ubiquitous and persistent? The response given here is that antitrust institutions on many occasions have adopted features of RL, even though the antitrust community, when analysing the problem of reasonable disagreement, usually adopts an AL point of view.

A comprehensive discussion of the RL features of EU and U.S. antitrust goes beyond the purposes of the present study. For our purposes, it suffices to give only a few examples of responsiveness. First, antitrust institutions in several cases interpret vague concepts by resorting to the purpose of the law or the potential effects of an interpretation. For instance, when the ECJ was asked whether the restriction of competition derives from an 'agreement', a 'concerted practice', or a 'decision of an association of undertakings', it clarified that the three concepts overlap and noted that there is no need for a clear-cut distinction because Article 101 TFEU 'is *intended* to apply to all collusion between undertakings, whatever the form it takes'.[243] In addition, when confronted with the question 'what is an undertaking' the ECJ took a functional approach and noted that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal

[242] Sen argues that economics has two origins. The first relates to ethics and is concerned about human ends and motivations. The second is associated with an engineering approach and is concerned with primarily logistic issues (instructions on material prosperity) rather than ultimate ends. For Sen, good economics involves utilizing both the ethical and the engineering approach. Amartya Sen, On Economics and Ethics 2–7 (Blackwell Pub 1988).

[243] Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, para. 108.

status of the entity or the way in which it is financed'.[244] Instead of focusing on the legal form of the entity, the Court investigated whether the nature, aims, and function of the entity's activity warrant the conclusion that it engages in an economic activity. Accordingly even though these concepts such as 'agreement' and 'undertaking' seem fairly 'legal' and technical, AL 1.0 or 2.0 cannot justify the actual legal outcomes in hard cases: the judges in these cases did not determine the content of the law by using solely legal forms, the text of the treaty or some original intent. They also did not simply use scientific, nonlegal input (for example, positive economics). Instead, they viewed antitrust as a purposive mission and engaged in constructive teleological interpretation.

The same nonformalistic, teleological reasoning underlies the 'single, overall agreement' doctrine.[245] Under this doctrine, undertakings can be held responsible for the overall cartel even if they are not involved in all its operations on a day-to-day basis or do not participate in all of its constituent elements. Participation in the overall agreement is sufficient to establish the responsibility if the Commission proves that the undertaking 'knew, or must have known', that the collusion in which it participated was part of an 'overall plan' intended to distort competition. Thus, legal formalities or their absence do not preclude antitrust liability, and the Commission does not have to provide the evidence of actual engagement of an undertaking with each and every element of the said anticompetitive practice. Such an approach takes into consideration the economic realities (that is, how cartels operate in practice) and gives to the law the necessary flexibility to be gapless and materialize its purpose: eliminate and deter collusive practices. By adopting such an approach EU antitrust went beyond the AL model.

Such teleological and consequences-sensitive reasoning is also not unknown to the other side of the Atlantic. The rule of reason analysis, the standard mode of antitrust scrutiny in the United States, provides clear evidence supporting this point. What led to the rule of reason analysis was the observation that only unreasonable restraints of trade should be condemned under the Sherman Act despite the overly broad language of Section 1 of the Sherman Act.[246] Restraints that are always or almost always so inherently damaging to the market that they warrant condemnation without further inquiry into their effects on the market or the existence of an objective competitive justification are considered *per se* illegal.[247] When a restraint of trade is not *per se* illegal, a fact-specific inquiry into whether a restraint of trade is 'unreasonable' is

[244] Case C-41/90 *Höfner and Elser v Macroton GmbH* [1991] ECR I-1979, para. 21; Case C-309/99—*Wouters and Others* [2002] ECR I-1577, para. 57.

[245] Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94, T-335/94—*LVM v Commission* [1999] ECR II-931, para. 773.

[246] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 346 (1897); *Standard Oil of N.J. v. United States*, 221 U.S. 1, 64–65 (1911).

[247] *U.S. v Socony-Vacuum Oil Co.*, 310 U.S 150 (1940); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972)

warranted.[248] Yet, the exact content of the rule of reason analysis and its dividing line from the *per se* category have been a matter of interpretive contestation.[249] In general, the *per se* category refers to an irrefutable presumption of unlawfulness that applies only to naked restrictions—that is, restrictions that lack procompetitive virtues and the profitability of which depends on market power—, whereas the rule of reason analysis is conventionally viewed as a balancing exercise.[250]

However, as Hovenkamp has shown, rather than conceiving these juridical constructions as classifications of restraints, they should be seen as modes of analysis, which are performed based on economically informed presumptions and burden-shifting mechanisms.[251] Instead of silos, *per se* and rule of reason are parts of a continuum or a 'sliding scale' with different fact finding requirements for different situations.[252] From this perspective, a rule of reason analysis involves showing market power and potential or actual anticompetitive effects, whereas a *per se* analysis does not require proving market power and the anticompetitive effects are largely inferred from the conduct itself.[253] The categories of practices, which will be assessed through a *per se* or a rule of reason analysis may alter based on historical experience, economic knowledge, and normative orientation. This implies that the factors that have affected whether a certain practice is assessed in one way or another have been concerns about the purpose of U.S. antitrust (that is, what is and what should be its goal), judges' capabilities, and the potential effects of certain categories of commercial practices.

The changing classification of vertical restraints is another illustrative example of U.S. antitrust's responsiveness. In *Dr. Miles* the Court viewed minimum resale price maintenance (RPM) clauses as unlawful *per se* without assessing market power or anticompetitive effects.[254] Yet, in 2007 in *Leegin,* the Supreme Court overruled nearly a century of authority and applied the rule of reason.[255] Maximum RPM was considered unlawful in *Albrecht* in 1968, whereas in *Khan Oil* it was submitted to a rule of reason analysis, 'which can effectively

[248] *United States v. Trenton Potteries Co*., 273 U.S. 392 (1927).

[249] For two different judicial approaches see *United States v. Addyston Pipe & Steel Co*., 85 F. 271, 283–84 (6th Cir. 1898) and *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) 246 ('The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition'.). Maurice E. Stucke, *Does the Rule of Reason violate the Rule of Law,* 42(5) UC Davis. Rev. 1375 (2009).

[250] *United States v. Microsoft Corp*., 253 F.3d 34, 59 (D.C. Cir. 2001).

[251] Hovenkamp, *supra* note 70 at 31–36, 38–40, 64; Areeda & Hovenkamp, *supra* note 223, at 1507.

[252] *California Dental Association v FTC*, 526 U.S. 756, 780–81 (1999) 780–781.

[253] *Newman v. Universal Pictures*, 813 F.2d 1519, 1522–23 (9th Cir. 1987), cert. Denied, 486 U.S.

[254] *Dr. Miles Med. Co. v. John D. Park & Sons Co*., 220 U.S. 373 (1911) 399–400.

[255] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007) at 888–89.

identify those situations in which it amounts to anticompetitive conduct'.[256] The underlying rationale of these shifts was the gradual realization that vertical restraints are less likely to have anticompetitive effects than horizontal ones. Purely vertical agreements were considered to be competitively neutral or benign, unless they were accompanied by an additional element likely to have a negative impact on competition in the form of upstream exclusion, downstream foreclosure, or cartel facilitation. The core argument that justified this change of attitude was that such restraints alone are unlikely to lead to output reductions and price increases, and thus harm the consumers, as long as there is intense inter-brand competition (that is, absent a horizontal effect).[257] We see, accordingly, that the interpretive struggles revolved around the purpose of antitrust and the consequences of its interpretation, as well as the purpose and effects of the said practices clearly affected the development of the law.

Up to this point, I have given some examples of constructive teleological interpretation being already at play in U.S. and EU antitrust. Yet, as already noted, constructive teleological interpretation is only one of the hallmarks of RL, whereas 'responsive postbureaucratic enforcers' is another. EU antitrust enforcement, for instance, is organized around a decentralized yet hierarchical network of enforcers with the Commission as primus inter pares communicating and coordinating its activities with the activities of the nodes (that is, the national competition authorities).[258] In addition, the Commission (not less than the National Competition Authorities (NCAs)) disposes of a wide range of enforcement tools of varied intensity. As a result, on several occasions the Commission has not applied the law in a crime-tort manner, but used market investigations and commitments or soft law instruments to investigate the market context, send signal to the various stakeholders and maximize compliance.[259] There are also many instances where the Commission has intervened in a continuous manner and with both a restorative and prophylactic attitude.[260] Furthermore, the internal structure of the Commission into problem-solving oriented task forces, and the creation of the office of Chief

[256] *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); State Oil Co. v. Khan, 522 U.S. 3 (1997).

[257] *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 54–55.

[258] Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1/1. See also *Wouter PJ Wils, Competition Authorities: Towards More independence and Prioritisation?*, 39 King's College London Law School Research Paper 110–11 (2017); James S. Venit, *Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty*, 40 Common Mkt L. Rev. 545, 562–563 (2003).

[259] This enforcement armoury allows the Commission to be a 'responsive regulator'. Ayres & Braithwaite, *supra* note 16 at 4–7.

[260] Commission's intervention in the energy sector through market investigation, commitments (primarily), and infringement decisions is a good example of this attitude. For the broader issue see Ioannis Lianos, *Competition Law Remedies in Europe: Which Limits for Remedial Discretion?*, 2 Cles Research Paper (2013).

Competition Economist in 2003 demonstrate its concerns about epistemic capacity and delivering results.[261] Lastly, the various guidelines and guidance papers could be perceived as interpretative theories that attempt to reconstruct the law (that is, as manifestations of constructive teleological interpretation at work).[262]

To conclude our analysis, a last example should be given of courts behaving as catalysts. Since its inception, antitrust raises the following question: how does economic complexity affect judicial decision-making, and how can a judge tackle competition problems that are at least partially economic in nature?[263] In the early years, the EU Courts responded to this question by formulating a doctrine of judicial deference.[264] According to this doctrine, EU Courts would engage in a comprehensive review of the Commission decision, unless that decision contains a 'complex economic assessment'.[265] This means that in principle EU Courts, in recognition of the existing institutional balance and the relevant division of labour, would apply two different standards when assessing Commission decisions. They will exercise marginal or limited review over technical economic issues, and full, comprehensive review over any other nontechnical, general legal issue.[266]

Yet, the establishment of the General Court created in 1988 (at the time Court of First Instance) led to an intensification of judicial review.[267] Without dismissing the formulation of the doctrine, the General Court (GC) went beyond what the doctrine implied and engaged in an increasingly more meticulous review of the Commission decisions. In most occasions the ECJ upheld this approach. Progressively, both courts departed from the doctrine

[261] Michelle Cini & Lee Mcgowan, COMPETITION POLICY IN THE EUROPEAN UNION 15–37 (2nd ed. Palgrave 2008).

[262] Commission Guidelines on the application of Article 81(3) of the Treaty, OJ No. C 101 of 27 April 2004; Guidance Paper, *supra* note 97; EU HMG, *supra* note 77.

[263] Michael Baye & Joshua Wright, *Is Antitrust Too Complex for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, J. L. ECON. (2009), available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888.

[264] Cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 229, 343, 347

[265] This formulation has been repeated in voluminous case law. See Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para. 62; and Case C-7/95 P *Deere v Commission* [1998] ECR I-3111, para. 76; Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires 'CB' and Europay International SA v Commission* [1994] ECR II-49, para 109; Case T-112/99 *Metropole Television and Others v Commission* [2001] ECR II-2459, para 114.

[266] Marc Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, 2(4) J. EUR. COMPET. L. PRACT. 296 (2011).

[267] See especially Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* [1998] ECLI:EU:T:1998:198, paras 51–53, 162; Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*, [1996] ECR II-00649, paras 114–123; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, paras 124, 128–132, 135–141 188–336; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3619, paras 87–88.

and reviewed more thoroughly issues that in the past were considered as 'complex economic assessments'. For instance, in *Clerstream*, *Tetra Laval* the General Court questioned Commission's market definition,[268] whereas in *Astra Zeneca* the ECJ recognized that Commission's assessments of technical matters are not immunized from judicial review due to their technical nature.[269] In *Woodpulp,* the Court reviewed substantial body of complex economic arguments, and it even appointed its own economic experts to assess the rate of recovery of costs in a predatory pricing situation.[270] In *Airtours*, *Tetra Laval, Microsoft,* and *Ryanair*, the General Court reviewed new economic theories and detailed econometric studies.[271] In *Deutsche Telekom,* both Courts assessed Commission's calculations for finding a margin squeeze.[272]

These cases suggest that even though the shell of the doctrine survived, the functioning of judicial review changed. Both EU courts kept scrutinizing more thoroughly the economics of Commission decisions, whereas they did not hesitate to annul a decision if they remained unconvinced about the Commission's assessment of economic data. As economic analysis was becoming more and more prominent in EU antitrust and the Commission was moving from a form-based to a more economic approach, the Court increased its expectation and level of scrutiny so as to ensure that the Commission would remain responsive and apply the law effectively.

VII. CALIBRATING OPENNESS AND INTEGRITY

The previous analysis suggested that responsiveness is already a part of our current antitrust reality. In this section, I present in a more detailed manner the RL modus operandi (that is, the normative claim of the RL model) in a more detailed manner. The aim of the analysis is to show concretely how the RL model can benefit antitrust. As already noted, the AL model does not take reasonable disagreements seriously and fails to resolve them. The RL model, however, has more modest aspirations: by recognizing that reasonable disagreements are 'natural phenomena' of antitrust, it aspires only to tame their eliciting forces, that is, openness and integrity. Hence, first of all, this model helps us to see that openness and integrity are simultaneously the source and the solution of the problem. From a RL perspective, reasonable

[268] Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] II-03155, paras 47–74.

[269] Case C-457/10 P *Astra Zeneca v Commission* ECLI:EU:C:2012:770, paras 36–52.

[270] Joined Cases C-89/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Alhstrom Osakeyhtio and Others v Commission* [1993] ECR I-1307 para 163.

[271] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, paras 17–48, 158–181; *Tetra Laval v Commission, supra* note 267, at paras 23, 119; Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 19; *Microsoft v Commission, supra* note 267 at para 482; Case T-342/07 *Ryanair v Commission* 6 July 2010, paras 30, 139–195, 447–525.

[272] T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, para 185 and Case 280/08 P *Deutsche Telekom v Commission*, para 143.

disagreements are not only inevitable but also desirable: they exercise constant pressure for improvement; they help antitrust law and enforcement avoid formalism, adapt in changing circumstances, and materialize its core mission.

We can imagine writing all antitrust laws in the form of clear-cut rules, specifying a very clear and narrow objective and prescribing the precise economic method for their application.[273] This type of antitrust would be easily enforced in a crime-tort fashion, whereas adjudicators would not need to do more that exercising a strict legality review. In such case, antitrust would approximate the AL model, but would lose its integrity. Without openness, it would transform it into a set of rigid rules incapable of incorporating new learning and taking into consideration the market context. Antitrust as AL would be helpless in front of the challenges of modern economy. If eradicating openness would make the law formulaic and ineffective, too much openness could lead to its instrumentalization or create tensions with the Rule of Law. Being, for instance, too sensitive to changes in economics could transform antitrust enforcement into a highly unclear, unpredictable, and costly enterprise. On such occasions, openness becomes part of the problem not of its solution.[274]

We can, thus, portray openness and integrity as communicating vessels: (i) their complementary relationship means that up to a point, the more open the law is the more integrated is likely to be and (ii) their antithetical relationship means that above or below this point openness clashes with integrity. Openness has 'increasing positive returns' up to a point, beyond this point it brings decreasing positive returns to the law's integrity. Thus, the relationship between openness and integrity could be represented as an inverted U curve (see Figure 1). Figure 1 also implies that equilibria between openness (horizontal axis) and integrity (vertical axis) could and should be found. From this angle, a mechanism for the finding of such equilibria can make antitrust responsive.

Consequently, by relying on the RL model, we can propose a legal-institutional approach for calibrating openness and integrity. This approach involves three key elements: (i) constructive legal interpretation as an additional method of interpretation complementing the traditional ones (that is, grammatical, historical, systematic, teleological), (ii) enforcers that behave as responsive postbureaucratic institutions and cooperate with each other in networked structures, and (iii) adjudicators that function as catalysts (that is,

[273] It is true that the elimination of openness could entail the end of reasonable disagreements in antitrust. The reverse (that is, sacrificing integrity for the sake of openness) is absurd, because in this case competition law will stop being law (see Section V).

[274] Put differently, excessive openness may entail that a responsive legal order becomes repressive. Enlarged discretion, instrumentalism, and blurring law with policy could lead to the 'death of law'. See ft 179 above and Nonet & Selznick, *supra* note 7 at 82–83. For this reason, the notion of integrity, incorporating the formal, procedural and substantive dimensions of law, sets a rather demanding ideal for a legal system to qualify as responsive.

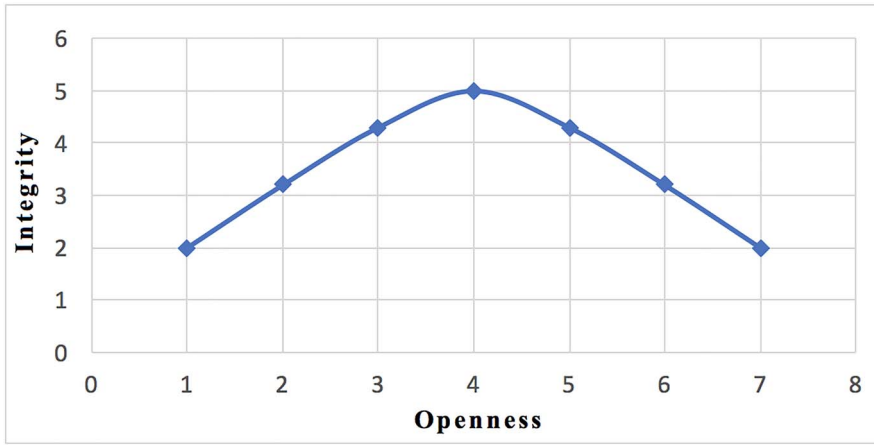

Figure 1. Openness v Integrity: an Inversed U-curve.

as argumentative platforms and responsiveness motivators). I analyse in turn these three key elements that can make antitrust (more) responsive.

The responsiveness approach starts from the premise that antitrust is a purposive legal mission that seeks to materialize the promotion and protection of competition as a multifaceted ideal.[275] This ostensibly mundane remark links questions of legal interpretation with questions of legitimacy. It makes clear that respecting the confines of the Rule of Law is necessary, but not sufficient for successfully applying the law. The success of antitrust intervention depends also on the degree by which it manages to attain its core ideal. In addition, this mundane remark implies that the responsiveness approach adopts a reflexive attitude towards the goals debate.[276] Given that the 'protection and promotion of competition' is a multidimensional and multilayered ideal that can be pinned down only by recourse to intermediary values such as total welfare, consumer welfare or rivalry, the present approach highlights the need for constructive legal interpretation. If antitrust is a legal field, where law, policy, and economics intertwine and the line between legality and legitimacy is blurred, constructive teleological interpretation could be particularly useful for the effective application of the law.

But what is exactly constructive teleological interpretation? Constructive interpretation is a 'matter of imposing purpose on an object or practice in order to make it the best possible example of the form of genre to which it is taken to

[275] Monti, *supra* note 156 at 2 (stating 'it is hard to provide a definition of 'competition' everyone will agree with, or to obtain consensus about the reasons for having competition law').

[276] This means that competition law could be understood as an 'autopoietic system'. Niklas Luhmann, *The Autopoiesis of Social Systems*, *in* Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems, eds. 172 (F. Geyer and J. Van d. Zeuwen eds., London: Sage 1986).

belong'.[277] It opens a dialogue about the purpose, rules, and effects of the law and advocates in favour of a purposive, principle-based and results-oriented interpretative attitude.[278] This approach suggests that legal institutions should recognize plaintiff's and defendant's argumentation as parts of interpretive theories about the law, namely as argumentative attempts to reconstruct the object of the law by virtue of its purpose. Then, they should choose the interpretive theory that presents the law in its best light and generates legal outcomes that both *fit* and *justify* it.[279]

The best interpretive theory is the one that fits and justifies a legal solution in the most plausible way in view of the existing case law and of the core mission of the field. The 'fit' element implies that the interpretive theory must account for the paradigmatic aspects of antitrust law.[280] The justification component consists in putting antitrust norms in their best light by taking into consideration their purposes, functions, and effects.[281] Thus, the interpreter needs to theorize—even reconstruct—the purpose served by the practice whose interpretation she seeks.[282] As a result, what is considered as legally irrelevant under AL becomes relevant by informing interpretive theories that use a mixture of pure legal reasoning, technocratic nonlegal knowledge and value-laden judgements to reconstruct the purpose of the law in light of its effects. Under this method of interpretation, the RL model avoids the clutches of rigid formalism and adapts the law to its context. Simultaneously, it keeps the law open and increases its capacity to attain its underlying values without losing its integrity.[283]

This interpretive attitude brings about several benefits for antitrust. It avoids the deadlocks of the holistic approaches that attempt to eliminate disagreements by reducing competition law to a single value, be that total or consumer welfare or freedom to compete.[284] Simultaneously, it accepts

[277] Dworkin, Law's Empire, *supra* note 1 at 49–53.

[278] *Id.* at 45–86, 225–227.

[279] The determination of what is legally valid, Dworkin says, is settled by choosing the best interpretive theory. For example, when we are called to decide whether a certain conduct is courteous our decision turns on the best theory of what 'courtesy' is. Similarly, when we decide whether a certain proposition is or is not legal, we turn to the best theory of what the law 'is'. Dworkin, Law's Empire, *supra* note 1 at 1–44, 52.

[280] Timothy Endicott, *Herbert Hart and the Semantic Sting*, 4 Legal Theory 283 (1998).

[281] Scott Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, 77 Public Law And Legal Theory Working Paper Series 35 (2007) (noting that a purpose 'fits' the object to the extent that it recommends that the object exists or that it has the properties it has. A purpose is 'justified' to the extent that it is a purpose worth pursuing).

[282] Dworkin, Law's Empire, *supra* note 1 at 51–53, 421–2.

[283] For instance, constructive teleological interpretation provides criteria for rational reconstruction of outmoded or inappropriate precedents.

[284] Adam Smith insightfully observed that 'the propensity to account for all appearances from as few principles as possible' is a common feature of all people but could be found especially in philosophers who engage in such endeavours as means to display their ingenuity. Adam Smith, The Theory of Moral Sentiments 299 [1790] (Oxford Clarendon Press 1975).

that normative discussions do and should affect legal interpretation through the articulation of interpretive theories. It cautions though that what is often called the 'goals debate' is futile, unless it becomes *internal* and takes the form of a debate about the operational standards of the law.[285] Moreover, it puts into perspective the dominant orthodoxy of consumer welfare. Consumer welfare, under this perspective, is not the ultimate end of the law or the 'end of antitrust history', but a particularly useful standard for identifying instances where competition is distorted or restrained. Promoting innovation, ensuring equality of opportunity, or safeguarding consumer well-being could, in a similar way, become key proxies of consumer welfare or articulations of antitrust's core mission, as long as they are accompanied by operational legal tests. Accordingly, this method of interpretation makes intramural what is often viewed as an external normative debate and indicates that antitrust' fuzzy mandate, elastic vocabulary, and rules and standards mode of analysis are not a weakness but a strength. They allow for antitrust openness under which several interpretive theories compete for providing the account that best fits and justifies the law.

As interpretive theories attempt to give a convincing account of the law they are sensitive to input from economics about past or future effects. Consequently, an additional benefit of constructive teleological interpretation is that it opens antitrust to both positive and normative economic inputs. More importantly, though, the responsiveness approach debunks the myth that antitrust can solely rely on positive economics and be applied in a value-free fashion.[286] It makes clear that value judgements underlie antitrust analysis even in its technocratic form, namely when it avoids noncompetition, noneconomics considerations and focuses on consumer welfare, allocative efficiency (or some other economic value), and uses econometric analysis. This does not mean that the responsiveness approach denies the numerous benefits of positive economic analysis. It merely implies that there is not a categorical but only a blurring line between positive and normative economics.[287] Hence, both positive and normative economics could be legitimately used to construct

[285] Jacobson, *supra* note 122 at 5 (noting that the question today is what the standard should be in assessing the economic consequences of a practice or a transaction).

[286] Modern economics has made many efforts to acquire a nonethical character. In 1930, Robbins maintained 'it does not seem logically possible to associate the two studies [economics and ethics] in any form but mere juxtaposition. Economics deals with ascertainable facts; ethics with valuations and obligations'. Lionel Robins, An Essay on the Nature and Significance of Economic Science 132 (Macmillan 1932). This line of thinking became fashionable in modern economics, but there are sufficient reasons casting doubt on its merits. Yew Kwang Ng, *Value Judgements and Economists' Role in Policy Recommendation*, 82 Econ. J. 1014 (1972); Kenneth Boulding, *Economics as a Moral Science*, 59 Am. Econ. Rev. 1 (1969); Phillipe Mongin, *Value Judgements and Value Neutrality in Economics*, 72 Economica 257 (2006).

[287] Sen, *supra* note 242 at 8–9, 78–9.

a legal standard that best fits and justifies the law under the circumstances of a specific case.[288]

At this point, the proponents of the AL model for antitrust could object that the use of normative economics would make the application of the law similar to policy and push enforcers and adjudicators to go beyond the confines of the Rule of Law. Even though there is no scientific way of making value judgements associated with normative economics, there are several methods to address value conflicts in legal reasoning.[289] Consequently, by openly recognizing the inevitable role of value judgements in legal interpretation, we do not turn antitrust into a less technocratic or arbitrary field of law. We simply dismiss the pretence of scientific objectivity. Such disenchantment is likely to lead to more robust legal reasoning. For instance, given that welfarist balancing is often a myth and no court or enforcer actually measures all the welfare implications of a specific practice before condemning or approving it, choosing one among many evidence-based and value-laden interpretive theories under the criteria of 'fit' and 'justification' may make legal reasoning more transparent, allow for refinement of existing doctrines, and in the end lead to better outcomes.

Realizing the role of normative economics in antitrust will also reflect developments in philosophy of science. Modern philosophy of science recognizes that normative substrata underlie the foundation of scientific theories and that any scientific theory hinges unconsciously, but in a significant measure, upon its correspondence with the value system of the theory-builder.[290] Yet, even though modern philosophy of science has admitted that value judgements sometimes define the scientific enterprise, this has not entailed the end of empirical inquiry, and does not counsel against the continued pursuit of objective knowledge.[291] Hence, the responsiveness approach by admitting the role of normative economics and value judgements in antitrust explains why reasonable disagreements are persistent in antitrust, and why they cannot be eradicated but only tamed through economically informed, data-based, and value-laden legal hermeneutics.[292] This is why, the responsiveness approach suggests that value judgements and normative economics choices, being inevitable, should not be hidden under the rug but put out in the open air and stress tested through their proxies. In so doing, this approach avoids

[288] Jacobs, *supra* note 50 at 219.

[289] See Giovanni Sartor & Henry Prakken (eds.) Logical Methods of Legal Argumentation 43–118, 119–140 (Springer 1997); Robert Alexy, A Theory of Legal Argumentation 211–286 (OUP 1989); Phan Minh Dung, *On the Acceptability of Arguments and Its Fundamental Role in Nonmonotonic Reasoning, Logic Programming and n-person Games*, 77 Artif. Intell. 321, 325–334 (1995).

[290] Thomas S. Kuhn, The Structure of Scientific Revolutions 111–35, 171–73 [1962] (2d ed., University of Chicago Press 1970).

[291] For a distinction between moral and scientific objectivity see Julian Reiss & Jan Sprenger, *Scientific Objectivity*, The Stanford Encyclopedia of Philosophy (Winter 2017 ed.), available at https://plato.stanford.edu/archives/win2017/entries/scientific-objectivity/.

[292] Nicos Stavropoulos, Objectivity in Law 125–164 (Clarendon Press 1996).

the uncertainty associated with encrypted policy discussions and stimulates compliance.[293] It also allows for legal change without undermining law's integrity: enforcers or adjudicators can revisit a doctrine that relies on a misguided interpretive theory and, thereby, improve the state of the law. Moreover, compared with the AL approach, the RL approach is more likely to lead to legitimate and effective normative elaborations and allow for fruitful interactions between different legal institutions.[294]

Notably, the RL approach suggests that reasonable disagreements cannot be addressed exclusively by sharpening our legal hermeneutics. Much of the indeterminacy and uncertainty of the law can be tackled by appropriate enforcement techniques and strategies. To fully appreciate the contribution of the responsiveness approach in antitrust enforcement, we need to compare first this enforcement style with the one associated with AL. The crime-tort modus operandi of AL advises enforcers to focus exclusively on eliminating antitrust injuries that occurred in the past and protect law's beneficiaries from harmful acts.[295] Competition rules are, thus, conceptualized as binary switches that identify a practice as legal or illegal, pro or anticompetitive.[296] Such enforcement style emphasizes individual cases, is fact-bound and backward looking.[297]

However, crime-tort enforcement cannot deal satisfactorily with mixed behaviour, namely with behaviour that despite its anticompetitive effects may bring important efficiencies to the market.[298] By simply prohibiting this conduct, consumers will be deprived of the benefits of large aggregations of capital. On the other hand, by simply permitting this behaviour in virtue of its welfare enhancing qualities, competition in the market may be significantly impeded with unpredictable ramifications for innovation, variety, and quality.[299] Instead of merely condemning past injurious behaviour, enforcers could apply the law in ways that manage market behaviours and structures to capture the efficiencies inherent in large aggregations of capital or joint ventures, whereas minimizing their inefficiencies.[300] This requires that enforcers pay attention to both the pro and anticompetitive sides of the behaviour so as to weed out the

[293] John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. Rev. 965, 967–94 (1984).

[294] Constructive teleological interpretation can enhance the effectiveness of regulatory conversations and is closely linked to courts operating as catalysts and thus make the system as a whole more responsive.

[295] First, *supra* note 12 at 9–10.

[296] Hayek, *supra* note 10 at 128.

[297] First, *supra* note 12 at 9–10; Melamed, *supra* note 13 at 13–14.

[298] Crane, *supra* note 13 at 32.

[299] In many occasions, it is impossible to engage in an accurate balancing of pro and anticompetitive effects of a conduct when incommensurable values or goals are at stake such as quality. See Rebecca Haw Allensworth, *The Commensurability Myth*, 69(1) Vand. L. Rev. 1, 24–44 (2016).

[300] Crane, *supra* note 13 at 32.

anticompetitive from the procompetitive elements of the same behaviour, and intervene to offer guidance to market players for more competitive solutions.

From this angle, the crime-tort model leaves enforcers with insufficient tools given the complexity of modern industrial and digital markets.[301] It concentrates antitrust intervention on identifying a past, frequently elusive, sinful act instead of supervising the capital-concentrating effects of markets and seeking to identify the optimal structure and behaviour for market players.[302] In this sense, the crime-tort model focuses on legality issues and puts aside legitimacy concerns. It does also not provide sufficient guidance to antitrust enforcers. For example, under this model, enforcers do not know how to prioritize different violations of the law and courts cannot evaluate their selection of cases. Accordingly, the crime-tort model does not help enforcers to articulate a comprehensive enforcement policy and leaves them unguided in cases where openness clashes with integrity.[303]

In contrast, responsive enforcement without negating the crime-tort model expands and improves it. The basic premise of this model is that enforcers viewing antitrust as a purposive mission should seek to prevent firms from inflicting distortions of competition—for example, by engaging in welfare-minimizing behaviour—, while also creating incentives for firms to engage in procompetitive practices. Responsive enforcers are, thus, like gardeners who tend a plant to create the most favourable conditions for competitive market to grow and flourish.[304] To be responsive, enforcers need to pursue the goal of the law through different proscriptive and prescriptive, proactive, and reactive enforcement tools, and strategies.[305] They should also escalate and de-escalate their intervention depending on the players' response.[306] They, additionally, need to set up participatory, learning-based procedures that enable them to learn by different stakeholders and create forums where different stakeholders can participate and affect public policy.[307] In a nutshell, enforcers to be responsive they should not be preoccupied only with punishing and deterring, but also be concerned about compliance, learning, and trust-building.[308] They need to punish or persuade after understanding the context and the

[301] First, *supra* note 12 at 10; Melamed, *supra* note 13 at 11.

[302] Crane, *supra* note 13 at 46.

[303] For a compelling case supporting the inevitability of discretionary judgements by enforcers see Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 39 (University of Illinois Press 1976).

[304] F. A. Hayek, The Road to Serfdom 71 (University Chicago Press 2007).

[305] Pablo Ibáñez Colomo, *On the Application of Competition Law as Regulation: Elements for a Theory*, 29 Yearbook of European Law 261, 263–276 (2010).

[306] See John Braithwaite, *Types of Responsiveness* in Regulatory Theory: Foundations and Applications 117, 118–121 (Peter Drahos ed, ANU Press 2017).

[307] Warren Bennis, Beyond Bureaucracy: Essays in the Development and Evolution of Human Organization 96 (McGraw-Hill 1973).

[308] Fiona Haines, Corporate Regulation: Beyond 'Punish or Persuade' (Oxford: Clarendon Press 1997).

motivations of those involved, and stimulate compliance through voluntary cooperation.[309]

Responsive enforcers can improve their expertise and enforcement skills if they operate in a networked structure where each node disposes a wide variety of tools and communicates with the others before and after making a key decision.[310] Compared with a centrally organized hierarchical structure, such a network is more capable of learning and allows for more innovation and adaptability in the interpretation and application of competition law.[311] In other words, a networked structure can combine traditional command and control strategies with experimentalist governance that facilitates 'learning from difference' and 'learning by doing' experimentation. This is possible because in such a structure, different nodes can test different theories of harm or remedies, communicate and learn from each other, monitor, and revisit their performance. Therefore a networked structure allows for experimental enforcement and stimulates 'regulatory conversations', namely formal, informal, and semi-formal processes of communication through which the nodes interact, build common understandings, and express their divergent opinions.[312] By sharing experiences, exchanging knowledge, testing their theories and remedial design, and revisiting their common performance, enforcers are likely to accumulate the knowledge necessary to settle several reasonable disagreements. In other words, if antitrust enforcement operates as a deliberative process continually revised by its participants in light of new experience, it is likely to solve problems that cannot be settled by legal hermeneutics alone.[313] In this sense, a network of responsive enforcers is likely to trace equilibria between openness and integrity.

The last component of the responsiveness approach relates to the role of courts in antitrust enterprise. The AL model understands courts as norm elaborators and rights enforcers. From this point of view, in public enforcement, courts need only to investigate whether enforcers respect the Rule of Law when punishing a violation of an antitrust prohibition and refrain from substituting enforcers' complex economic assessment for their own.[314] When it comes to private enforcement, courts should investigate whether the plaintiff has been harmed by a violation of an antitrust prohibition. However, if courts follow this legalistic culture and restrain themselves to such a strict legality review,

[309] Ayres & Braithwaite, *supra* note 16 at 7–15.

[310] The present approach suggests that the responsiveness of antitrust would be enhanced if it is applied through a network-based structure that relies on and facilitates regulatory conversations. On the contrary, the AL model does not impose any other additional constrain or benchmark for institutional cooperation except the Rule of Law.

[311] Maartje De Visser, Network-based Governance in EC Law 7–14 (Hart Publishing 2009).

[312] Julia Black, *Regulatory Conversations*, 29 J. L. Soc. 163 (2002).

[313] Wouter Wils, *The European Commission's "ECN+": Proposal for a Directive to Empower the Competition Authorities of the Member States to be More Effective Enforcers*, 4 Concurrences 60, 64 (2017)

[314] *Consten and Grundig v. Commission*, *supra* note 264 at paras 343–7.

enforcers would be left without any guidance about how to be responsive. Their residual discretion would remain unchecked: as long as the rule-of-law requirements are met, adjudicators will not exercise any other check to enforcers' practice. In addition, the courts will intervene only when antitrust governance fails and refrain from improving the functioning of the system.

Nonetheless, this type of adjudication cannot maintain the responsiveness of antitrust. First, it strictly separates legality from legitimacy and accountability. As a result, it discourages using antitrust's openness to ensure its integrity. In addition, this type of adjudication disregards the role of constructive teleological interpretation and thereby leaves antitrust vulnerable to clashes between openness and integrity. Third, it offers insufficient guidance to enforcers when they exercise their residual discretion. As a result, enforcers will not have incentives to improve their cognitive capacity and substantive competence. Fourth, this type of adjudication ignores that courts can act as arbiters of interactions across different levels of governance and institutional nodes and improve the enforcement of antitrust.

To ensure enforcement's responsiveness, courts need to get rid of the legalistic culture of AL and operate as catalysts in a multilevel antitrust governance system. This means, first, that courts need to function as platforms of argumentation and openly recognize the added value of constructive teleological interpretation. Put differently, the courts should function as terrains where various competing interpretive theories compete and occasionally one of them prevails over another. As noted by Scott and Sturm, the catalyst role invites the courts to recognize that they face a wider range of choice than simply deferring or dictating outcomes and that many hard cases require a combination of knowledge from different domains.[315] By functioning in this way, courts are likely to shed light to the normative foundations, the purpose and the consequences of all possible interpretations of the antitrust norms. They are also likely to enable legal change when necessary: revise or overrule precedent when this is demanded by law's integrity.

The second way according to which courts can operate as catalysts is by assuming their role as responsiveness motivators. This means that courts could exercise their decision-making powers to enhance the capacity of other actors to make legitimate and effective decisions.[316] For this purpose, courts need to recognize their dynamic relationship with enforcers; not simply assess the legality of enforcers' decisions, but also evaluate whether enforcers were indeed responsive. When enforcers are proven unresponsive, judicial catalysts should discipline them so as to restore or promote the responsiveness of the system. To operate as catalysts, courts need to encourage enforcers to provide full and fair participation to all stakeholders, monitor the epistemic or informational bases of enforcers' decisions, and require transparency and accountability as

[315] Scott & Sturm, *supra* note 18 at 1, 2, 5–10.
[316] *Id.* at 1, 5.

an essential element of enforceability.[317] By adopting such a role, courts will incite enforcers to engage in constructive teleological interpretation and set the conditions for normatively motivated and accountable inquiries in case of reasonable disagreement. In addition, they will enhance the capacity of the antitrust enforcement to remain open (for example, by engaging in modest experimentalism) and integrated (for example, by not diminishing the uniform application of the law).

VIII. CONCLUSION

In this article, I argued that reasonable disagreements cannot and should not be fully eliminated from antitrust as they are triggered by the conflict of two endogenous forces: openness and integrity. Openness and integrity are simultaneously in a complementary and antithetical relationship. The fuzzy mandate, conceptually elastic vocabulary, and rules and standards mode of analysis of antitrust imply that this field of law is and needs to remain open to realize its goal, namely the protection and promotion of competition. Yet, openness can undermine antitrust's integrity by destabilizing fundamental Rule of Law principles or by inciting law's instrumentalization. Hence, even though we cannot legitimately imagine an antitrust that is not open, its openness inevitably poses challenges to its integrity. Reasonable disagreements are the price to be paid for antitrust's openness.

Even though reasonable disagreements appear to be endogenous in antitrust, the antitrust community has on many occasions considered them as temporary and eradicable. This diagnosis derives from viewing antitrust through the lenses of AL. Such an approach, however, underestimates the problem of reasonable disagreement. The RL model, on the contrary, openly recognizes and can explain the endogeneity of such disagreements.

Nonetheless, this misdiagnosis is not the only weakness of the AL model. This model cannot fully explain the way antitrust is interpreted and applied in the two leading jurisdictions. In its strongest version, AL allows for teleological interpretation but this *telos* is some original or systematic intent. Yet, ordinarily, antitrust adjudicators have interpreted the sparse competition norms by *giving* a purpose that makes the antitrust enterprise meaningful. Normative discussions and value judgements have always found their way in antitrust litigation and especially in grave occasions of reasonable disagreement. Furthermore, antitrust enforcers have frequently and still do behave to a certain extent as responsive postbureaucratic institutions, not simply as law enforcers as the AL model suggests. Lastly, antitrust adjudicators on many occasions do not function merely as norm elaborators, but as catalysts: they enable interpretive struggles about the purpose of the law and monitor or rectify the responsiveness of antitrust enforcement. In this regard, the added value of

[317] *Id.* at 10–16.

the RL approach lies at bringing additional clarity by admitting that antitrust institutions do not operate in an applicative but in a rule-creating manner, and by recognizing that not only positive but also normative economics (and other value judgements) play a crucial role in legal interpretation.

However, the added value of the RL model does not stop there. This model proposes a modus operandi that could be more effective in dealing with reasonable disagreements than the one proposed by AL. This modus operandi revolves around (a) constructive teleological interpretation, (b) responsive enforcers organized in networked structures, and (c) adjudicators that operate as catalysts. If antitrust institutions view competition law as a form of RL, they might be more able to make value judgments, incorporate new knowledge, and apply the law contextually without diminishing its integrity.