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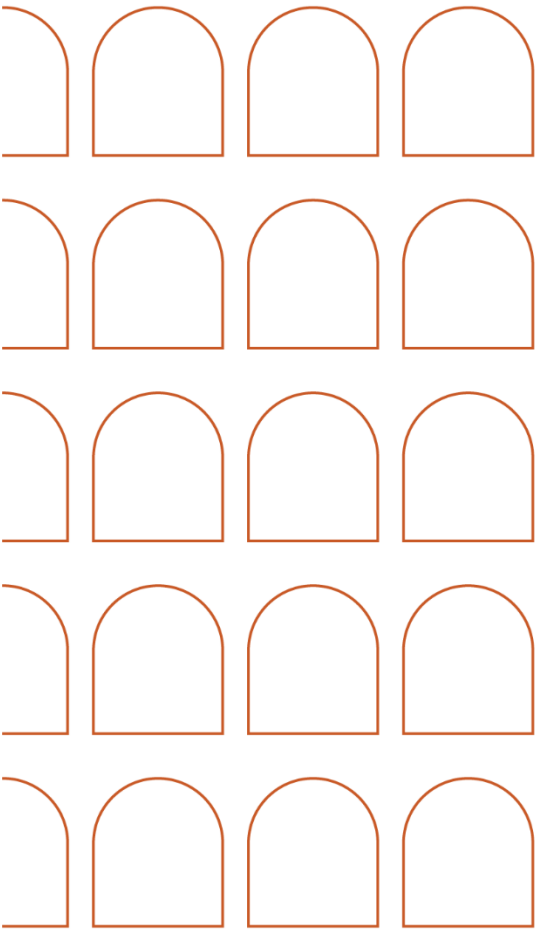

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Thoughtful Competition Law: Power and Reflexivity

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Abstract

The paper critically engages with the argument that competition law functions as a socially constructed power structure. In doing so, it examines competition law as a system dealing with legal and empirical facts. It develops the theory of competition law system as the sum of multiple choices of exclusion and inclusion being shaped by several inconsistent determinants such as the basic legal structure, politics, science and culture. The paper demonstrates how these choices are triggered by cycles of epistemological re-examinations, which are either practice-oriented or fueled by broader socio-economic or political events.

Keywords

Competition law; power structures; reflexivity; epistemology; antitrust; consumer welfare standard; market dynamics

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Nicolas Petit is Professor of Law and Head of Department at the European University Institute, as well as invited Professor at the College of Europe. The author dedicates this paper to Professor, Judge, and Advocate General Nils Wahl, whose unique Opinions have ushered in a more common sensical, rational and thoughtful approach to EU competition law. In particular, the author wants to highlight his paradigm-shifting work in the Cartes Bancaires, Intel, and MEO cases. The author would like to thank his friend and good colleague Professor Nikolas M. Rajkovic for helping sharpen his mind on the difficult topic addressed in this article. Finally, the author acknowledges editorial assistance from Pankhudi Khandelwal.

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1. Introduction: Competition law as a Power Structure

What does it truly mean for a legal practitioner or scholar to engage in competition law, beyond merely applying existing rules. Outside competition law circles, one can identify a generic argument that garners traction: the practices of competition jurists whether – explicit or implicit – socially construct power relations.[1] In that sense, competition law practices shape a form of political structure. This resonates, to an extent, with Professor Katarina Pistor's argument that property, contract, and trust laws may be better understood as linguistic practices – or coded languages – that enable the generation of private wealth, social exclusion, and the promotion of inequality. The consequence, as Pistor asserts, is that competition law, like other kinds of law and economics, instantiates social practices that construct and maintain, rather than "correct", imbalances of power within private law relations:

> *The masters of the code of capital, that is, the private attorneys who fashion different assets as capital mostly in private law also tend to have privileged access to regulators and tax authorities and often vet their coding strategies with them before applying them*.[2]

Arguments about the social construction of competition law reach beyond the academy. The rise of a neo-brandeisian school of competition policy in the US is a clear sign of practical impact. With its focus on corporate bigness, neo-brandeisianism is distinct from the Pistor argument. However, neo-brandeisianism also advances a power structure narrative. Large firms, their attorneys, lobbyists, and hired academics would hold power not just on markets, but also on politics.[3]

The argument of competition law as a power structure, while attractive, appears implausible. Any practitioner with a modicum of experience understands that any system of law, competition law or else, is far too complex to function as power structures created by group-based hierarchies to dominate others. To be true, the argument would require unrealistically high levels of time consistency, coalition-building effort, and initial value alignment. Competition law, rather, has a messy life. As Justice Oliver Wendell Holmes Jr. famously observed "*the life of the law has not been logic: it has been experience*".[4]

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[1] Steven C. Salop and Jonathan B. Baker, Antitrust, Competition Policy, and Inequality, 104 Geo. L.J. 1-28 (2015), https://scholarship.law.georgetown.edu/facpub/1462 (last visited Feb 17, 2025); Hubert Buch-Hansen & Angela Wigger, Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition Policy, 17 Rev. Int'l Pol. Econ. 20 (2010); Lina Khan and Sandeep Vaheesan, Market Power and Inequality: The Antirust Counter-Revolution and its Discontents, 11 Harv. L. & Pol'y Rev. 235 (2017); Liang Li, A Reconception of Power in Competition Law with Its Application in the Digital Realm, Journal of Competition Law & Economics (2025) nhaf001, https://doi.org/10.1093/joclec/nhaf001.

[2] Katharina Pistor, Theorizing Beyond "The Code of Capital": A Reply, 11(1) Accounting, Economics, and Law: A Convivium 65 (2020). In another essay, Pistor suggests that antitrust codes have "*the power to transform free contracting and markets into a controlled space that gives a huge advantage to sellers over buyers*". Katharina Pistor, Rule by data: The end of markets?, 83 Law & Contemp. Probs. 101 (2020).

[3] Pistor, herself, noted the difference, see above at pp. 116-117.

[4] Oliver Wendell Holmes, Jr., *The Common Law* 5 (Mark De Wolf Howe ed., Little Brown and Company 1963 (1st ed 1881).

What emerges, therefore, is a need for greater sociological and critical engagement on how competition law operates through the practices of competition jurists, and the aim of this paper is to provoke greater social scrutiny into juridical practices that inform the meaning-in-use of competition or antitrust in particular instances and places. Without such an investigation, how can it be possible to debate – no less theorize – competition law development?

So, if engaging in the practice of competition law means something other than enforcing a socially constructed power structure, what is it about? That odd question matters a great deal.[5] Absent a good understanding of what we do as competition jurists, we cannot account for our social practice. The cost of non-reflexivity, in turn, exposes the field to lazy, populistic, and simplistic storytelling rhetorically dressed up as theories.[6] And without some self-critical awareness, it is hard to challenge bad competition law reform proposals (or to promote good competition law reform proposals).

2. Competition Law as a System of Knowing

A more realistic social theory of competition law can be proposed. This theory views a legal system as a system for determining the truth about the interests it purports to protect, what Michel Foucault might describe as a 'site of veridiction,' or a place where truth is established.[7] While civil law seeks the truth about freedom of contract and autonomy, competition law seeks the truth about restraints of competition. Put differently, as a social practice, a legal system is epistemological. It is a system of knowing.[8]

To seek the truth, a legal system first selects ‘legal facts’. The selected legal facts are specified in text or case law. A legal fact in civil law is “consent”. A legal fact in competition law will be an “agreement”. Second, to establish the legal fact, the legal system will accept or reject some ‘empirical facts’. In civil law, the requirement of a written document is one such empirical fact. In competition law, the empirical facts relevant to an agreement will be a “concurrence of wills” or a “meeting of the minds”.

The choices of relevant legal and empirical facts needed to apply the law can be conceptualized under two types. To start, there are choices of inclusion. Some facts are added because they are deemed relevant to apply the law. For example, US antitrust law and, to some extent, EU competition law include a “consumer welfare standard” (“CWS”) filter for the evaluation of business conduct and merger transactions.[9] By adding a CWS filter to the

[5] David Lefkowitz, Systematicity, normativity, and The Nature of International Law, 43 Revus Journal for Constitutional Theory and Philosophy of Law (2021).

[6] Saying that law is political in nature does not imply that all choices in the development and application of the law will be inherently political. And it fails to see those multiple corrections by other political input processes, like the justice system and human rights. The fact that law has a political origin does not mean that the law is political.

[7] Michel Foucault, The Birth of Biopolitics: Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality 32 (Thomas Lenske ed., Graham Burchell trans., Palgrave Macmillan 2008).

[8] Gunther Teubner, How the Law Thinks: Toward a Constructivist Epistemology of Law, 23 Law & Society Review 727 (1989).

[9] The consumer welfare standard has been used in both policy documents and case laws in the EU. See, for instance, Commission (EU) ‘Green Paper on Vertical Restraints in EC Competition Policy’ (Green Paper on Vertical Restraints) COM (96) 721 final, 22 January 1997; Case C-501/06 P,

evaluation of exclusionary conduct, competition law seeks to know the difference between conduct or transactions leading to efficient rivalry (by convenience, low prices, high output) or inefficient rivalry (by convenience, high prices, low output).

On the other hand, there are choices of exclusion. Some facts are subtracted because they are deemed irrelevant to apply the law. For example, mergers that do not significantly lessen competition in product markets are cleared, even if they give rise to wage cuts or adverse impacts on labor markets.

Why is this relevant? If one looks at a competition law system as the sum of multiple choices of exclusion and inclusion, it strikes the mind that the law is not, and cannot be a socially constructed power structure. The reason is this: several inconsistent determinants shape the choices of inclusion or exclusion of empirical facts. Its mode of evolution is driven by practice, so competition law does not necessarily change in a rational way.[10]

3. Determinants constraining the Fabric of Competition Law

The first determinant is the basic legal structure, understood as the fundamental legal sources and institutions. In the European Union ("EU"), the law is very specified compared to the US antitrust statute. The language of Article 101 of the Treaty on the Functioning of the EU ("TFEU") talks of "undertakings", of "competition", and an exception rule is written down in a third paragraph.[12] In the US, Section 1 of the Sherman Act talks more broadly of any "person", of "trade", and there is no exception rule.[11] Thus, EU law gives competition lawyers less flexibility regarding choices of exclusion and inclusion. In the GSK dual pricing case, for

GlaxoSmithKline Services v. Commission, ECLI:EU:C:2009:610; Case C-209/10 Post Danmark A/S v Konkurrencerådet ECLI:EU:C:2011:342, paras 56, 67.

[10] See Sir Peter Roth, The Continual Evolution of Competition Law, 7 Journal of Antitrust Enforcement 6 (2019). [12] Article 101 TFEU reads as "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, - any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[11] Section 1 of the Sherman Act reads as "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court." [14] Case C-501/06 P, GlaxoSmithKline Services v. Commission, ECLI:EU:C:2009:610.

example, the Court of Justice of the EU ("CJEU") refused to soften the per se rule against agreements limiting parallel imports. The defendants were trying to argue that their market division practices were neutral on prices to consumers.[14] The Court rejected the argument on the ground that nothing in Article 101(1) TFEU required proof that agreements deprive consumers of certain advantages in order to have an unlawful anti-competitive object.

The second determinant is politics. Competition law is said to be traditionally apolitical.[12] In the US and even more in the EU, the conventional wisdom is that competition law enjoys substantial independence from the political influence of the legislative or executive branch. That account is, however, incorrect.[13] Majoritarian politics give rise to the exclusion of facts in the application of competition law. For example, in sectors where legislation imposes a form of economic regulation (e.g., telecoms, railways, postal services …), the duty to perform a thorough economic investigation of the empirical facts is not as heavy as in standard abuse of dominance cases. Conversely, majoritarian politics require consideration of additional facts in the enforcement of competition law. For example, competition cases involving intellectual property regimes demand a review of additional legal facts, like whether a "new product" would have been invented but for a refusal to deal.[14]

The third determinant is science. The law embedded in competition statutes calls for the achievement of certain results. Generally, competition laws purport to deliver free, fair or undistorted competition. That "instrumental" nature of competition laws, as Judge Easterbrook calls it, requires agencies and courts to construct competition statutes with the purpose of the law in mind.[15] For example, specific legislation or doctrines have been developed to cover mergers and acquisitions as legal facts worthy of competition law scrutiny. The reasoning is that mergers or acquisitions reduce rivalry and, in turn, lead to the same risk of substantial lessening of competition that competition laws concern themselves with. Conversely, the prohibition of exploitative practices under abuse of dominance law is a legal fact that has been de facto read out of competition law practice.[16] The reasoning is that a general prohibition of monopoly pricing risks producing false positives that deter entry, expansion, and innovation, in opposition to the objective of the law.

Both examples show that choices of inclusion and exclusion are inherently consequential. The question is whether adding or subtracting legal or empirical facts will increase or decrease market competition. With that in mind, it is no wonder why empirical disciplines focused on

[12] For instance, The European Commission is the sole enforcer of the EU Competition Policy and the European Parliament only has a monitoring role. See Competition policy, Fact Sheets on the European Union, European Parliament (2024), https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy (last visited Feb 19, 2025).

[13] Robert Pitofsky, Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979).

[14] Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission, ECLI:EU:C:1995:98; Case C-418/01, IMS Health, ECLI:EU:C:2004:257.

[15] Frank H. Easterbrook, The Inevitability of Law and Economics, 1 Legal Educ. Rev. 3 (1989).

[16] Gregory J. Werden, 'Exploitative abuse of a dominant position: a bad idea that now should be abandoned', European Competition Journal, 17(3) pp. 682–713 (2021), doi: 10.1080/17441056.2021.1930451.

market structures and firm behavior like economics or business and management science to inform choices of inclusion and exclusion.
The last determinant is culture. US antitrust law evolved from the common law.[17] That foundation embeds absolute faith in competition and the abhorrence of monopoly.[18] Over the past decades, US antitrust law has leaned towards the exclusion of non-competition facts from the antitrust arena. Even progressive antitrust leaders have resisted calls to address broad public policy issues through antitrust law. In 2023, Chair Khan declared that ESG won't stop the FTC, meaning that facts about sustainability would remain excluded from antitrust consideration.[19]

In the EU, by contrast, competition is not uncompromisable.[20] Social expediency considerations detached from competition play a role in the determination of liability. A more open yet limited space has been carved out to credit non-economic benefits as justifications for anticompetitive agreements under Article 101(3) TFEU. In 2023, the EC revised its guidelines on horizontal cooperation agreements to relax the conditions for the admission of sustainability defenses.[24]

What are the implications of understanding competition law as a system of knowing? To start, competition law is a complex aggregate that incrementally consolidates dozens of epistemological choices.[21] As such, the resulting outcome cannot be solely based on ideology. A study of choices of inclusion and exclusion confirms this. Inconsistencies incompatible with ideology become visible. For example, competition law prohibits territorial market protection resulting from an agreement between a firm and its retailers. But territorial market protection is not cognizable when organized within a vertically integrated firm. The choice of exclusion of vertical integration as a possible restraint of competition shows that if EU law embeds a pro-market integration ideology, it is not unbounded. In fact, ideology here is limited by a requirement of practice and science, which is that it would be both hard and inefficient to declare decisions internal to a firm unlawful.

In addition, an epistemological filter suggests that choices of inclusion or exclusion tend to be neutral. Adding or subtracting a legal or empirical fact to the competition inquiry will not correlate with a pro or anti-enforcement outcome. Take the legal fact of 'potential competition'. It can be both the basis for the prohibition of mergers discussed as killer acquisitions or for the

[17] George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 The Journal of Legal Studies 1 (1984); William F. Baxter, The Political Economy of Antitrust, (Robert D. Tollison ed., Lexington Books 1980).

[18] René Joliet, Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power, Volume 31 of Collection scientifique, Université de Liège Faculté de droit (1970).

[19] Lina Khan, ESG won't stop the FTC, WALL STREET JOURNAL (Dec. 21, 2022), https://www.wsj.com/articles/esgwont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135.

[20] Rene Joliet, The rule of reason in antitrust law (Université de Liège, Faculté de droit), 198 p at p. 7 1967). [24] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01).

[21] As the law develops incrementally through discrete choices of inclusion and exclusion shaped by multiple determinants and constraints, it is hard to track all the reasons behind choices of inclusion or exclusion, in one case and the other.

exoneration of mergers owing to wider market definitions.[22] There are two sides to every legal or empirical fact.

4. Cycles of Epistemological Reexamination

Challenging competition law as a socially constructed power structure does not eliminate the need for self-reflection. Is all good and well in the current epistemological equilibrium reached by competition law? Put more concretely, is competition law's knowledge of what is a restraint of competition and what is not aligned with the truth?

The issue is intellectually difficult. We are here at the intersection of 'truth' and 'belief'. Competition laws' knowledge of competition only covers the truth about competition that is believed. The truth about competition that is not believed tends to be ignored by competition laws. Put more simply, competition laws operate in a state of epistemological imperfection, shaped by established beliefs, superstitions, or theories.

At some points in their history, competition laws undergo cycles of epistemological reexamination. A fresh discussion arises over how much legal and empirical facts considered in positive law tell what we ought to know about competition, and its restriction. The discussion aims to remove existing beliefs about competition that are not true and include some new truths about competition declared worthy to be believed.[23]

Two illustrations can help. A first belief that is deeply anchored is that competition comes from substitutes, not complements. That belief leads to beginning every antitrust evaluation with the study of a legal fact known as market definition and the examination of an empirical fact known as demand side substitutability. But is this correct in an age where the emergence of digital "ecosystems" brings to light a new empirical proposition: in platform markets, ecosystem complementors compete with ecosystem leaders?
A second widely held belief of competition law considers that fixed cost efficiencies are not as relevant as variable cost efficiencies.[24] As a result, in coordinated conduct or merger cases, the elimination of fixed cost redundancies is not deemed a cognizable efficiency gain. But is this exclusion faith-based, that is, it is not based on truth? Lack of consideration of fixed cost efficiencies by competition laws leads to blind spots.[25] When fixed cost economies concern sunk assets, firms will repurpose the saved resources towards new investments.

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[22] Richard J. Gilbert & A. Douglas Melamed, Potential Competition and the 2023 Merger Guidelines, 65 Rev Ind Organ 269 (2024); OECD, Concept of Potential Competition, OECD Competition Comm. Discussion Paper (2021), http://oe.cd/tcpc, pg. 10 and 24.

[23] The legal system tries to embed more truth about competition, and to filter out beliefs from the competition truth.

[24] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 031, 05/02/2004, para 80; US Antitrust Division, The Role of Efficiencies in Integrated Merger Analysis, (2015), https://www.justice.gov/archives/atr/role-efficiencies-integrated-mergeranalysis (last visited Feb 19, 2025); European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), para 254.

[25] Louis Kaplow, Efficiencies in Merger Analysis, Harvard Law School John M. Olin Center Discussion Paper No. 1056 (2021), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_1056.pdf.

The history of competition law is punctuated by cycles of epistemological reexamination. The advent of the Chicago School of Antitrust in the 1960-1970s is one example. It showed that sanctioning below-cost price cuts without including an examination of likely recoupment would lead to consumer harm. The more economic approach initiated in the 2000s in the EU in relation to vertical restraints is another one.[26] It showed that an analysis of vertical agreements detached from market power would condemn efficient distribution systems.

Cycles of epistemological reexaminations provide opportunities to improve the law. The challenge is, however, to avoid substituting past superstitions with new ones. Let us look at some examples where belief undermines epistemological reexamination. The attack on the CWS as a choice of inclusion dictated by a Chicagoan neoliberal ideology is a straw man. Research shows that signs of a consumer welfare principle existed in US case-law from the 1920s, long before the Chicago school.[27] And in many cases where harm to competition is hard to observe – like in vertical agreements and mergers – the addition of a harm-to-consumer filter facilitates competition law enforcement.

Similarly, the choice of inclusion of "innovation competition" only as a theory of harm in merger review is likely fraught by ideology to the extent that it is asymmetrical.[28] If the law accepts that a merger harms long-term innovation through the suppression of rival research and development (R&D) pipelines, it should equally admit that a merger promotes long-term innovation through the efficiency of allowing easier redirection of internal assets towards novel R&D targets.[29]

Up to now, the triggers of cycles of epistemological reexamination have not been discussed. In competition law, scholarship about policymaking initiatives and judicial cases is the usual source. To that extent, epistemological reexamination is mostly practice-oriented. In parallel, cycles of epistemological reexamination may be fueled by broader socio-economic or political events. The Chicago school revolution of the 1960-1970s was supported by concerns that American industries were losing out to Japan. The neo-brandeisian movement drew much energy from the financial crisis of 2007, the Cambridge Analytica scandal, and the Trump election. And the ongoing discussions over the reorientation of competition towards competitiveness, dynamism, and innovation were reignited following the Draghi report showing that European productivity was falling behind the US in 2024.

5. Thoughtful Competition Law

In 2005, former diplomat and public international law Professor Martti Koskemieni wrote a book titled "From Apology to Utopia".[30] Koskemieni's book was mostly an attempt to stimulate a

[26] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance).

[27] Nicolas Petit, A theory of antitrust limits, 28 Geo. Mason L. Rev. 1399 (2020); Lazar Radic and Nicolas Petit, The Superiority of the Consumer Welfare Standard, Available at SSRN (2024).

[28] Nicolas Petit, Innovation competition, unilateral effects, and merger policy, 82(3) Antitrust Law Journal 873-920 (2019).

[29] Richard J. Gilbert, Competition, Mergers, and R&D Diversity, Rev Ind Organ 54, 465–484 (2019), https://doi.org/10.1007/s11151-019-09679-5; Nicolas Petit, Innovation Competition, Unilateral Effects, and Merger Policy, 82 Antitrust Law Journal 873 (2019).

[30] Martti Koskenniemi, From Apology to Utopia (Cambridge University Press 2005).

reflection seeking to disentangle the assumptions underpinning the social practice of public international law. Today, competition law is at a similar juncture. Unless we can explain what we, as competition jurists do, we risk being swayed by a description of our practice as one that operates as the more or less conscious agent of a socially constructed power structure.

This essay presents a new argument: competition law is the social practice of engaging in discussions about the legal and empirical facts that determine what constitutes competition and its restrictions. As a social practice, competition law progresses through cycles of epistemological reexaminations. Episodes of self-reflexivity allow competition law to overcome dogmatism and correct injustices arising from previous inclusion and exclusion choices. An interest in the truth about competition and skepticism towards belief is necessary to keep competition law a "thoughtful" social practice.[31]

[31] We borrow that concept from? Jeremy Waldron, Thoughtfulness and the Rule of Law (Harvard University Press 2023).