

Competition Law and Human Rights: a Complex Relationship

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Introduction

Competition law, as it is commonly understood throughout the world today, is anchored firmly in neo-classical price theory and concerned primarily with allocative and productive efficiency, reduced prices and increased output.¹ It operates mostly for the benefit of the individual end consumer² and to safeguard competition,³ and claims to be unconcerned with the identities of the winners and losers of the competitive process. Questions about distributive justice, the environment or human rights are not only deemed to be beyond the remit of this conception of competition law but also opposed to its goals.

An enquiry into the foundations of competition law reveals, however, that the relationship between competition law and human rights is, in fact, more complex. It appears that whilst competition law eschews the more commonly recognised human rights, such as the right to health or to food, it is anchored in, and, through its operation, bolsters other human rights, such as the right to property and the right to trade. This article explores the factors underpinning competition law's dichotomous relationship with human rights in an attempt to understand whether there is a possibility or indeed a need for competition law to more fully embrace traditional human rights concerns.

To this end, this article is organised as follows: section 1 traces the neoliberal roots of competition law, section 2 examines competition law's approach towards human rights in selected instances, section 3 explores the possibilities and limitations of broadening the horizon of competition law analysis. The final section concludes.

1. Understanding the dichotomy

The key to understanding competition law's turning away from one set of human rights whilst being rooted in another lies in the history of the economic thought upon which it is founded.⁴ In the aftermath of World War II, both neoliberals and human rights advocates were concerned with threats to human dignity and liberty. However, the solutions that the two groups offered were markedly different. Whilst human rights delegates focused on safeguarding social and economic rights,⁵ German ordoliberal and neoliberal thinkers aimed to revive or, if need be, establish a set of moral values that would secure a competitive market, not simply as a more

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¹ Herbert Hovenkamp, 'Antitrust Policy After Chicago' 84 Mich. L. Rev. 213 (1985), 226-229. For a discussion of the consumer welfare standard as applied in US antitrust see Barak Y. Orbach 'The Antitrust Consumer Welfare Paradox', *Journal of Competition Law & Economics*, 7(1), 133-164.

² In the EU context the term 'consumer' has been interpreted to encompass all indirect and direct users and thereby to include competitors of the supplier in downstream markets. Pinar Akman, "'Consumer" versus "Customer": the Devil in the Detail' (2010) 37 *Journal of Law and Society* June 2010, Vol. 37, No. 2 (June 2010), 315.

³ Alison Jones, Brenda Sufrin, Niamh Dunne, *Jones & Sufrin's EU Competition Law: texts, cases and materials* (7th edition Oxford University Press 2019), 15; Commissioner Vestager 'Protecting consumers from exploitation' https://wayback.archiveit.org/12090/20191129221154/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en (accessed 15 June 2021).

⁴ Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019), 4.

⁵ *Ibid*, 5.

efficient resource distribution system but as the very basis of a civil society and a support for individual rights.⁶

The ordoliberal and the neoliberal believed that a market society requires a framework that fosters submission to the interpersonal results of market process at the expense of the deliberate pursuit of collectively formulated ends.⁷ Among the neoliberals, Hayek particularly was of the view that the competitive market order embraced all mankind and urged that ‘conduciveness to that order’ form the ‘standard’ by which all institutions are judged.⁸ This meant that to the extent that rights supported market relations, the neoliberals actively promoted them. However, when claims for rights interfered with the competitive market, by requiring state intervention and non-market forms of obligation and redistribution, they opposed them vehemently.⁹

Therefore, in the competitive world order, as conceived of by the neoliberals, the right to liberty is the right to do anything that does not harm the market; the right to equality is the right to equality before the law; the right to security is the right of the competitive market to be protected from those who are unable to adjust themselves to its demands; the right to property is the right to keep foreign investments safe and to move capital freely across borders.¹⁰ The market that Hayek and his contemporaries, seek to protect and nurture is built upon subconscious precognitive responses to price signals¹¹ and unlike the view of the Chicago School economists, who have come to dominate competition law thinking since the 70s, cannot be understood, let alone be predicted, through formal mathematical modelling and forecasting.¹²

Despite its rich and somewhat varied economic history, in the early 2000s, EU Competition policy came to reflect the values of the Chicago School and in a culmination of nearly a decade long shift towards ‘a more economic approach’, fully embraced allocative efficiency and consumer welfare as its guiding principles.¹³ Unlike US antitrust however, EU competition law interpreted the term ‘consumer’ to include indirect and direct users, as well as competitors of the supplier in downstream markets.¹⁴ Further unlike the US, EU competition law viewed price only as a shorthand for assessing output, choice, quality, and innovation in products and services offered to consumers, rather than as the sole indicator of welfare.¹⁵ In recent years, the EU Commission has also emphasised the need of ensuring a ‘fair deal’ for consumers,¹⁶ as long

⁶ Ibid, 8, 10.

⁷ Ibid, 12.

⁸ Friedrich Hayek, *Law, Legislation and Liberty, vol. 2: The Mirage of Social Justice* (Routledge, 1998), 113.

⁹ Whyte (n. 4), 12

¹⁰ Ibid, 24-25.

¹¹ Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), 233.

¹² Ibid, 231-232.

¹³ It is evident from early decisions of the EU Commission that in addition to protecting consumers the EU Commission also examined the long-term effects of impugned practices on market structure. See for instance Case 6/72, *Continental Can* EU:C:1973:22, para 12.

¹⁴ Pinar Akman, ‘“Consumer” versus “Customer”: the Devil in the Detail’ (2010) 37 *Journal of Law and Society* June 2010, Vol. 37, No. 2 (June 2010), 315.

¹⁵ See for instance, EU Commission’s Guidance Paper on Article 102 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN) (accessed 15 June 2021).

¹⁶ See for instance, Commissioner Vestager ‘Fairness and competition’ 25 January 2018 https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en (accessed 15 June 2021).

as it does not detract from the overarching emphasis on consumer welfare or from its focus on competition rather than on competitors.¹⁷

Therefore, despite its more expansive approach towards consumer welfare, EU Competition Law allows little room for a discussion to the human rights, such as the right to health and the right to food that require state intervention for their realisation. Both these rights were first articulated in the Universal Declaration of Human Rights 1948.¹⁸ In 1976 these rights were more specifically addressed in the International Covenant on Economic, Social and Cultural Rights,¹⁹ and later explained by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 12 on the Right to Adequate Food²⁰ and General Comment no. 14 on the Right to the Highest Attainable Standard of Health.²¹ In terms of Article 2 of the Covenant, state parties are only obliged to realise these rights progressively, ‘to the maximum of their available resources’ and ‘by all appropriate means, including particularly by the adoption of legislative measures.’²²

2. Competition law and human rights

Notwithstanding the dichotomy in competition law’s relationship with human rights, officials and scholars have urged and explored the possibility of utilising competition law as a tool for the realisation of human rights. This section explores two of these attempts.

The right to health

The case for utilising competition law for the realisation of the right to health is made at the intersection of trade, intellectual property and competition law in exploration of how the WTO and TRIPS agreements and competition law may regulate the pharmaceutical industry in a way that also helps realise the right to health.²³ Abbott, notes that the TRIPS agreement relating to competition, ‘provide substantial flexibility’ to countries to formulate their own competition policy which, in turn, allows them to take human rights interest into account in developing these policies.²⁴

Abbott further notes that ‘the principal object of competition law is consumer protection’ in the sense of protecting ‘the interests of consumers in obtaining access to goods and services at ‘market’ prices,’²⁵ and recommends that developing countries in particular, formulate *per se* rules to address abusive licensing as well as certain practises related to sales and marketing.²⁶ He further recommends that right to health may also inform a rule of reason or effects based analysis of potentially anti-competitive conduct as part of the gamut of ‘interests’ impacted by

¹⁷ Commissioner Vestager ‘Protecting consumers from exploitation’ https://wayback.archive-it.org/12090/20191129221154/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en (accessed 15 June 2021).

¹⁸ Article 25(1) of the Universal Declaration of Human Rights 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 2 July 2021).

¹⁹ Article 11 and 12 of the Covenant <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed 2 July 2021).

²⁰ <https://www.refworld.org/docid/4538838c11.html> (accessed 2 July 2021).

²¹ <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed 2 July 2021).

²² Article 2 ICESCR (n.19).

²³ Frederick M Abbott ‘The ‘Rule of Reason’ and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS’ in Cottier, J. Pauwelyn & E. Bürgi, eds., *Human Rights and International Trade* (OUP 2005), 279.

²⁴ *Ibid*, 286.

²⁵ *Ibid*, 289.

²⁶ *Ibid*, 290.

it.²⁷ He argues that the WTO Appellate Body's decision in which it differentiates otherwise functionally equivalent products on the basis of their impact on health,²⁸ may be extended to differentiating between different forms of potentially anti-competitive conduct depending on the effect on public health.²⁹

From a purely competition law perspective, the difficulty with Abbott's suggestion is its somewhat superficial consideration of the consumer welfare standard. Although he correctly notes that competition aims to protect consumer interest,³⁰ he does not explore the implications of the fact that according to the neo-classical price theory put forward by the Chicago School, this interest is almost exclusively defined in terms of price quantity, and choice available to the consumer. In particular, he does not engage with the possible contradiction that may arise for competition authorities if attempts on their part to regulate the pharmaceutical sector in a way that secures the right to health results in consumers paying higher prices these products.³¹

The right to food

Unlike the right to health enquiry, the exploration of the possibility of connecting competition law and the right to food undertaken was carried out exclusively within the framework of competition law with the objective of understanding whether mainstream competition law may be re-oriented to address right to food concerns and whether substantive competition law values may be reconciled with the international human rights values.³²

With respect to re-orientation of mainstream competition law, it was noted that the global food value chain is populated by large multinational organisations that exercise considerable buyer power in upstream markets. It was therefore, proposed that competition law address buyer power (whether it arises from concentration at any point on the global food value chain or through vertical integration)³³ and thereby prevent powerful buyers from exploiting small suppliers and the vulnerable consumers, particularly those located in developing countries.³⁴ It was further proposed that and competition authorities be allowed to exercise extra-territorial jurisdiction so that they may expand the scope of their enforcement beyond direct consumer effects within their jurisdiction.³⁵

In seeking to resolve the inherent incompatibility between competition law and the right to food, it was suggested that faced with a choice between different interpretations of competition law provisions, competition law enforcers should prefer an interpretation that maximises right to food values whilst still preserving the competitive process.³⁶ It was further suggested that this may be achieved either by creating a dialogue between the spheres of efficiency and rights

²⁷ Ibid, 293.

²⁸ *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* AB-2000-11 WT/DS135/AB/R (12 March 2001). For a report of the WTO Panel on the case (18 September 2000) see, https://www.wto.org/english/tratop_e/dispu_e/135r_a_e.pdf (accessed 6 July 2021).

²⁹ Abbott (n.23), 293.

³⁰ Ibid, 289.

³¹ For an example of such a contradiction see Authority of Consumers and Markets' analysis of analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow' <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow> (accessed 8 July 2021).

³² Ioannis Lianos, Amber Darr 'The Hunger: Connecting the Right to Food & Competition Law' in Lianos, Ivanov, Davis (eds) *Global Food Value Chains and Competition Law* (CUP, forth 2021).

³³ Ibid, 456.

³⁴ Ibid, 455.

³⁵ Ibid, 457.

³⁶ Ibid, 461.

or integrating the two into a single framework. Support was drawn from the work of Pigou³⁷ and Sen³⁸ among others, to demonstrate the various strategies that may be employed for generating communication between and enabling the congruent development of the right to food and competition law values whilst preserving their respective boundaries as well as those that would allow the integration of these values to develop a ‘polycentric competition law’.³⁹

The justiciability conundrum

The proposals for an expansive interpretation of competition law still do not overcome the fundamental difficulties of adjudicating upon these rights⁴⁰ that arise due to the rights to health are food being stated only in very general terms in the Covenant and due to state parties to the Covenant only having an obligation to progressively rather than absolutely realise these rights. However, two cases, both from South Africa, cases provide hope in this regard.

The first of these, *Government of Republic of South Africa v Grootboom* concerned the right to housing of a group that had been forced to squat on private land due to the appalling conditions in which they were living. The Constitutional Court of South Africa found that the government’s housing programme breached the right to housing as it contained no apparent relief for those, such as the Grootboom group, who had no roof over their heads and were living in intolerable crisis conditions. However, rather than requiring the government to immediately provide shelter to the Grootboom group, the Court directed it to adopt reasonable measures to ensure that affected persons would have access to some form of shelter. The Court also allowed the government latitude in crafting the final remedy and did not dictate budgetary outlays for housing programmes.⁴¹

The second case *Minister for Health v Treatment Action Campaign* relates more directly to the right to health and was just being heard as Abbott was entering into his discussion about trade and human rights.⁴² This was essentially a right to health-based challenge on the restricted availability of the drug ‘nevirapine’ which limited the transmission of HIV-AIDS from mothers to babies. The Court held that the restrictions were not reasonable in the circumstances, and required the government to devise a plan to expedite the availability of nevirapine at public health care facilities throughout the country.⁴³ This case in particular, establishes a conceptual framework for judicial review and enforcement of economic, social and cultural rights, including the right to food, in South Africa and elsewhere and therefore, has implications beyond the immediate assurance of access to HIV/AIDS treatment.⁴⁴

3. The future of human rights and competition law

Despite increasing evidence of the human cost of exercise of market power around the world, and despite trade and competition scholars making a case for the inclusion of human rights

³⁷ Ibid, 462-463.

³⁸ Ibid, 464.

³⁹ Ibid, 465. Also see, Ioannis Lianos ‘Polycentric Competition Law’, (2018) 71(1) Current Legal Problems, 161.

⁴⁰ Ibid, 440-441. Abbott (n.23), 294.

⁴¹ *Government of Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 169. (CC), <<https://www.escri-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc>>.

⁴² Abbott (n.23), 294-296.

⁴³ *Minister for Health v Treatment Action Campaign (TAC) (2002) 5 SA 721* (CC), <<https://www.escri-net.org/caselaw/2006/minister-health-v-treatment-action-campaign-tac-2002-5-sa-721-cc>>.

⁴⁴ Marc J Cohen, Mary A Brown, “Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One”, (2005) 6(1) Sustainable Development Law and Policy, 56.

considerations in competition cases, the future of human rights in a competition law perspective is far from certain. This section examines some of the most persistent concerns.

The place of non-economic values in competition analysis

Human rights are part of a broader category of factors tugging at traditional, efficiency-oriented competition analysis,⁴⁵ and any policy shift with regard to human rights, is likely to be linked to general public interest considerations.

The move against traditional competition analysis is partly driven by the problems arising from dealing with the digital economy, which is dominated by multisided digital platforms that whilst free to users on one side often charge uncompetitive prices to advertisers on the other. These platforms also aggregate and monetise data from users which gives them considerable market power and raises privacy concerns. In the context of the EU,⁴⁶ the Bundeskartellamt attempted to reconcile these competing values in its 2019 decision in the *Facebook/Whatsapp* merger case.⁴⁷ However, this decision is presently under appeal before the CJEU and therefore the issue of inclusion of privacy concerns in competition analysis remains unresolved.⁴⁸

Climate change and sustainability is another source of discontent. Holmes draws upon the constitutional provisions of EU treaties and on remarks by Commissioner Vestager to demonstrate that competition law ‘need not stand in the way of urgent action and co-operation by the private sector to fight climate change’ and can, in fact, be part of the solution.⁴⁹ He refers particularly to Articles 3(1), 3(3), and 3(5), the ‘constitutional provisions’ of the EU treaties,⁵⁰ to argue that sustainability and sustainable development are ‘relevant to applying the rest of the treaties,’⁵¹ and argues that where there is a conflict between sustainability and economic goals the proportionality principle should be applied to strike a balance between the two.⁵² He also claims that given the express provisions of these treaties, the ‘current narrow approach to competition law is certainly not inevitable and is, in many respects, illegal.’⁵³

Most recently, the need to include distributive concerns in competition enforcement is being hotly debated amongst competition scholars. Lianos, for instance, cautions that ‘ignoring inequality could also be subject to criticism, as the various approaches followed in mainstream

⁴⁵ In recent years, competition policy has contended with a number of demands for taking public policy considerations into account. Perhaps the most vociferous of these were in respect of the 2017 *Bayer/Monsanto* merger when the EU Commission was inundated with formal and informal petitions by those concerned with the impact of the merger on food safety, consumer health and the environment. Whilst the Commission acknowledged the importance of these concerns it did not take them into account for the assessment of the merger. EU Commission Press Release 21 March 2018 https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282 (accessed 6 July 2021).

⁴⁶ The right to privacy derives from the ECHR (see Art. 8) https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 8 July 2021) and the EU is committed to protecting it. (See complete guide to GDPR compliance <https://gdpr.eu> (accessed 8 July 2021).

⁴⁷ Bundeskartellamt prohibits Facebook from combining user data from different sources https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html (accessed 6 July 2021).

⁴⁸ ‘German court turns to top European judges for help on Facebook data case’, 24 March 2021 <https://www.reuters.com/business/legal/german-court-turns-top-european-judges-help-facebook-data-case-2021-03-24/> (accessed 6 July 2021).

⁴⁹ Simon Holmes ‘Climate change, sustainability, and competition law’ *Journal of Antitrust Enforcement*, 2020, 8, 354–405.

⁵⁰ *Ibid.*, 359.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, 401.

welfare economics also make implicit choices as to the distribution of resources.’⁵⁴ Others such as Baker and Salop warn that unless addressed, ‘inequality may undermine the legitimacy of our social order’,⁵⁵ and Khan and Vaheesan, explore the role of monopolistic and oligopolistic power in the US economy as a mechanism for the transfer of wealth from the many (among the working and middle classes) to the few (at the top of the income and wealth distribution spectrum).⁵⁶

These discussions in the literature notwithstanding, there is no consensus about any of these issues to date and it is predicted that these issues will remain at the forefront of competition debates going forward.⁵⁷

The institutional dimension

Another issue that stands in the way of utilising competition law as a tool for the progressive realisation of human rights, is one of institutional competence and capacity. Several scholars have expressed the view that even if there is a danger that market abuse, particularly, abuse of a superior bargaining position, may undermine the foundations of a competitive market system, these should be addressed in civil courts that are better equipped than competition authorities to deal with contractual disputes.⁵⁸ This hesitation to extend the institutional remit of competition law is only amplified when it comes to the suggestion that competition authorities may consider human rights or indeed, other non-economic values.

Scholars have argued, however, that insisting on institutional purity is a prerogative of developed economies, where the judicial systems are a reasonable and realistic option for less privileged farmers and small suppliers. In developing countries on the other hand, the judicial system ‘may not be in a position to handle such claims effectively ...[because] it is underfunded, overworked, corrupt, lacks the necessary expertise, etc.’⁵⁹ and where the aggrieved farmers and small suppliers lack the necessary knowledge and resources for bringing such claims. In these countries, therefore, it may be necessary for competition law to adopt a remit that is appropriate for their ‘institutional and political context’ and the relative availability and strength of the market and political process, courts and competition authorities.⁶⁰

In arriving at a conclusion in this regard, it may be necessary to undertake a comparative institutional analysis which takes into account the pros and cons of each available institutional choice.⁶¹ In the context of human rights this may mean that if the courts in these countries are not generally accessible or if the distribution mechanisms are ineffective or insufficient, it may be more appropriate to require competition authorities to take cognizance of human rights considerations. Here too, however, it is important to consider the capacity burden such a choice

⁵⁴ Ioannis Lianos, ‘Competition Law as a Form of Social Regulation’ *The Antitrust Bulletin* 2020, Vol. 65(1) 3, 46.

⁵⁵ Jonathan B. Baker and Steven C. Salop, ‘Antitrust, Competition Policy, and Inequality,’ 104 *Geo. L.J. Online* (2015), 6.

⁵⁶ Lina M. Khan and Sandeep Vaheesan, ‘Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents’, 11 *Harvard Law & Policy Review* 235 (2017), 235-236.

⁵⁷ James Keyte, Frédéric Jenny, Eleanor Fox ‘Buckle Up: The Global Future of Antitrust Enforcement and Regulation’ *Antitrust*, Vol. 35, No. 2, Spring 2021.

⁵⁸ Frederic Jenny, ‘The “Coming Out” of Abuse of Superior Bargaining Power in the Antitrust World’ UNCTAD Ad-Hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development, July 2008.

⁵⁹ *Ibid.*

⁶⁰ Briefing Note No. 3 of 2010 United Nations Special Rapporteur on the Right to Food http://www.srfood.org/images/stories/pdf/otherdocuments/20101201_briefing-note-03_en.pdf (accessed 6th July 2021).

⁶¹ Neil K. Komesar, *Law’s Limits* (Cambridge University Press 2001), 169.

will place on the competition authorities who will now be asked to make complex choices and engage in balancing exercises that may be beyond their competence.⁶²

Bring in new rules or sharpen old ones

Perhaps the most difficult obstacle in including human rights, or other non-economic, public policy considerations in competition analysis stems from the core philosophy of competition law which is conceived as a corrective rather than a proactive instrument that intervenes only when free market processes are under threat by abuse of monopolist power, rather than to achieve particular outcomes.⁶³ Limited as this function may seem, it has the benefit of both focus and flexibility. Indeed, one of the criticisms of the Chicago School has also been that in making price its objective it has become outcome rather than process oriented and has caused competition law to lose the dynamic quality to check the abuse of market power in whatever form it occurs.⁶⁴

In order to allow competition law to retain its original dynamic character it is important that any proposals for re-orienting it refrain from attaching particular outcomes to it, no matter how meaningful. An approach that requires competition authorities to make ‘delicate and difficult hermeneutical choices’ with regard to the principles and values of justice that may be read into competition law and applied in competition enforcement, is only likely to replace neo-classical price theory’s narrow focus on prices and output with more socially conscious outcomes and is further likely to generate new and potentially undesirable social and economic externalities that cannot be fully anticipated at this time.⁶⁵

Another possible approach is for addressing human rights concerns in competition analysis is simply to allow competition law to return to its original purpose of ‘ensuring that markets were structured in ways that promoted openness and competition’.⁶⁶ This implies a streamlining rather than widening of competition analysis and refocusing competition authorities on market structures and diverse ways of aggregating market power. Even though such a strategy does not directly achieve human rights objectives, it helps create an environment where such rights are not being abused by the exercise of market power. Such a strategy also has the advantage of being more easily emulated, adopted, and implemented by developing countries.

Conclusion

There are several layers to the complex relationship between competition law and human rights because all human rights, or indeed public interest considerations, are not created equal. So for instance, whilst the right to property is foundational for competition law and competition law bolsters it through its operations, the right to privacy is a core principle of the EU, and in the the digital economy, where market power is directly commensurate with the ability to aggregate data, has a natural connection with competition analysis, and ‘sustainable and balanced growth’ are pillars of the EU treaties and therefore equal in status to market

⁶² For these and other institutional concerns see Frank Easterbrook, ‘The Limits of Antitrust’ (1984) 63 Texas Law Review 1, and William Kovacic and David Hyman, ‘Regulatory Leveraging: problem or solution?’ (2016) 23 George Mason Law Review 1163. For a critical analysis, see Lianos, ‘Polycentric Competition Law’ (n. 39), 206.

⁶³ Michel Foucault, *The Birth of Bio-politics* (Palgrave Macmillan 2010), 109.

⁶⁴ Lina Khan, ‘The New Brandeis Movement: America’s Antimonopoly Debate’, *Journal of European Competition Law & Practice*, 2018, Vol. 9, No. 3, 131, 132.

⁶⁵ Ioannis Lianos, ‘Competition Law as a Form of Social Regulation’ *The Antitrust Bulletin* 2020, Vol. 65(1) 3, 46, 81.

⁶⁶ Khan (n.64).

competition even if not directly related to it.⁶⁷ The right to food and health, however, are social and economic rights—states are under no absolute duty to realise these rights, there is no clear nexus between them and competition analysis and until recently have been considered problems of the developing rather than the developed world.

The complexity is compounded by a lack of clarity as to the expectations of competition law in relation to the social and economic rights. It is not clear for instance, whether human rights values should be included in the theory of harm relating to anti-competitive practices? Should these values be considered in the balancing exercise carried out in the ambit of Article 101(3) TFEU? Or should certain types of conduct be excluded from competition analysis altogether due to its human rights implications? Should these values only be considered in the competition enforcement, or should there be a recognition of the adverse human rights effects of over enforcement, and therefore form the basis of a decision not to enforce?⁶⁸

What is certain, however, that it is time to help competition law cast off the stranglehold of the Chicago School and to reconsider its remit. In doing so, it is important to remember that the story of competition or antitrust law, is no longer simply a European or even a transatlantic story, but rather of a deeply interconnected global economy, with varying institutional frameworks, capacities and economic priorities. The challenge for competition law, of the future is to remain relevant in this complex web of interconnected interests, to continue to play its role in facilitating a global economy, and most importantly to retain its core values of preventing abuse of economic power where the welfare of one segment of society is not bought at the cost of human rights of another.

⁶⁷ Art 3 TEU https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (accessed 8 July 2021).

⁶⁸ Maurice E. Stucke, Ariel Ezrachi *Competition Overdose: How Free Market Mythology Transformed us from Citizen Kings to Market Servants* (Harper Business 2020) 43-47.