

The Nexus between Competition, Trade and Industrial Policies in Times of Economic Crisis

Introduction

The concept of ‘competition policy’ includes in its broadest sense “*all policies relevant to competition in the market, including trade policy, regulatory policy and policies adopted by governments to address the anti-competitive policies of enterprises, whether private or public*”¹. In its most narrow sense, it only includes the laws or policies regulating the anti-competitive behaviour of companies².

Competition policy, like any other policy, was triggered by certain phenomena in society at a given moment in time. As the initial phenomena have unfolded and become more complex, so has competition policy. In Europe, the first state to have adopted a “*competition law*” was Germany in 1923, but the variant of this law mostly commented is the 1958 *Gesetz gegen Wettbewerbsbeschränkung*. Imposed by the US as a condition for granting back sovereignty to the new German state, the law was meant to do away with the risk of a highly cartelized powerful economy, similar to the one that had facilitated Hitler’s rise to power³. As to the origin of the Sherman Act in the US, this can be found in a declining agricultural sector, the 1879-1893 depression and the gold standard⁴. These factors together with the monopolies of the railways and of industrial trusts led the Republicans to adopt US’s first antitrust act, which was meant to be a reply to the complaints of the farmers⁵.

What do these simple historical examples tell us about legal instruments? Among other things, they show that behind any policy there are deeper, more meaningful rationales than what meets the eye. They also show that “covert” links may exist between the most distinct policies.

Over the last four years, since the breakout of the economic crisis, industrial policy intervention and external trade have made it back in the lime light, as means to achieve rapid growth and offer some relief from the negative consequences of the crisis. Under the competitive pressure exercised by developing countries and in the absence of significant internal consumption, for many EU industries there was no other option but restructuring. This general climate of disenchantment has to a certain extent increased the risk of protectionist measures. However we will argue that competition policy if properly construed could deliver some useful answers to the economic crisis.

¹ Business Guide to the World Trading System, Commonwealth Secretariat, International Trade Centre UNCTAD/WTO, Geneva ITC/CS, 1999, p. 286.

² Ibid.

³ Lisa Murach-Brand, *Antitrust auf deutsch. Der Einfluß der amerikanischen Alliierten auf das Gesetz gegen Wettbewerbsbeschränkungen (GWB) nach 1945*, Mohr Siebeck Verlag, Tübingen, 2004.

⁴ George J. Stigler, *The Origin of the Sherman Act*, The Journal of Legal Studies, Vol. 14, No. 1 (Jan., 1985), pp. 1-12.

⁵ Ibid.

There are several historical arguments supporting this view. The aftermaths of World War II offered a suitable playfield for very interesting economic experiments. In order to deal with a devastated European economy, governments used to a large extent subsidies as well as trade protection measures⁶. In this context, competition rules were considered as an entirely different policy, having as purpose the protection of new industries and improving exports. When the 70's oil crisis revealed the cracks in sectoral interventionist policies, the 80's saw the beginning of a new type of de-regulated capitalism with minimum state intervention⁷. Until 2008 with the collapse of the financial markets, this approach seemed to be working ideally. The question that begs to be asked is where to draw the line between necessary state intervention and regulation and market distorting state intervention. It is our belief that governments, while facilitating innovation, they should refrain from repeating the mistakes of the post-war industrial policy. What is dearly needed is an inclusive approach, where competition, trade and industrial policies are used together to help create growth. With an adequate emphasis on competition policy, industrial policies can flourish in markets free of any governments' influence or of companies' anti-competitive behaviour.

In this sense, the European Commission set out a series of objectives for industrial policy in its Europe 2020 Flagship initiative, among which: support for SME enterprises and improving the business environment⁸. The Commission Communication states that: *“An ambitious strategy framework for a new industrial competitiveness policy must put the competitiveness and sustainability of European industry at centre stage. This requires that industrial policy is understood in its wider sense: First, it is about those policies that have an impact on the cost, price and innovative competitiveness of industry and individual sectors, such as standardisation or innovation policies, or sectoral policies targeting e.g. the innovation performance of individual sectors. Second, it is **necessary to consider the competitiveness effects of all other policy initiatives** such as transport, energy, environmental or social and consumer-protection policies, but also the single-market policy or trade policies. They are crucial components of the overall package as they can have an important influence on the cost, price and innovative competitiveness of industry”*⁹. From this we can deduce that according to the Commission industrial policy, competition and trade are indispensable in order to “put the EU economy on a dynamic growth path”¹⁰.

In the context of the crisis, the problems revealed themselves to be of structural nature and not merely conjectural. Since the break out of the crisis, growth has failed to happen and this has been attributed to the fact that markets are not working accordingly, i.e. markets are not as efficient as they could and/or should be. This led the OECD and the ICN to strengthen

⁶ Bradford J. DeLong, *Post-WWII Western European Exceptionalism: The Economic Dimension*, available at: http://www.j-bradford-delong.net/Econ_Articles/ucla/ucla_marshall2.html. Accessed on 07/08/2012.

⁷ Ibid.

⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Industrial Policy for the Globalisation Era. Putting Competitiveness and Sustainability at Centre Stage, Brussels, COM (2010) 614.

⁹ Commission Communication, supra 8, p. 5.

¹⁰ Ibid.

cooperation and thus the efficiency of the national competition authorities, also by fostering more convergence what the rules are concerned. In spite of the refusal to include competition policy on the WTO agenda during the Cancun meeting in 2003¹¹, there is a growing consensus over the fact that for the proper functioning of the international markets, competition policy is a vital component. It could be argued that trade and competition policy are interlinked components, no other two policies being as consistent and as connected. Most topics dealt with under the WTO umbrella concern to some extent competition and in the future there is a clear possibility to introduce competition policy in the trade area, in order to allow countries to seek redress for competition infringements within WTO.

However, even before the outbreak of the economic crisis there was an increasing interest at international level in discussions on competition policy¹². Several factors have been highlighted as contributors to this phenomenon. First of all, it would appear that as state barriers to trade are being negotiated away, distortions to international trade resulting from anticompetitive behaviour of enterprises become increasingly important¹³. Secondly, as trade liberalization develops also fostered by an impressive network of foreign direct investment agreements, the trans-border element of any anti-competitive practice of an enterprise becomes more and more plausible, its effects having an impact on several countries¹⁴. Lastly, international rules in the area of services and intellectual property, aimed at safeguarding the trade interests of companies established in other countries, call for similar international cooperation to restrict the anti-competitive business practices engaged in by such enterprises¹⁵.

After the outbreak of the crisis, there was a sensitive change in the rhetoric: “*Open economies grow faster than closed economies.*”¹⁶ Indeed, trade appears to be indispensable in the pursuit of the much needed economic growth. However, a series of additional policies are also needed in order to be able to harvest the positive results of trade liberalization. Among the most fundamental is competition policy, alongside “*the establishment of an adequate system of economic governance, including institutions and rule of law, which are crucial for property rights and for lowering transaction costs. Further policy complements (such as a sound regulatory framework and appropriate labour market, macroeconomic and investment policies) together can facilitate the allocation of resources to increasingly productive employment while ensuring an adequate social safety net and adjustment assistance.*”¹⁷

¹¹ WTO, MINISTERIAL CONFERENCE, Fifth Session, Cancún, 10 - 14 September 2003, WT/MIN(03)/20, 23 September 2003.

¹² Reasons for including trade and competition in the WTO work programme, in the Business Guide to the World Trading System, supra 1, p. 287.

¹³ Ibid. Types of business practices that can have anti-competitive effects and affect international trade are: horizontal restraints, vertical restraints, abuse of a dominant position and mergers.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ OECD Report, TRADE AND THE ECONOMIC RECOVERY: WHY OPEN MARKETS MATTER, May 2010, p.3. Available at: <http://www.oecd.org/trade/45293795.pdf>. Accessed on 07/08/2012.

¹⁷ Ibid.

Industrial policy, on the other hand, is most frequently aimed at granting a market advantage to a certain enterprise or economic sector. For this reason, industrial policy has been defined as "*an effort by a government to alter the sectoral structure of production toward sectors it believes offer greater prospects for accelerated growth than would be generated by a typical process of industrial evolution according to static comparative advantage. ... Credit directed at specific sectors with below-market interest rates for long-term and working capital, sectorally differentiated profit taxes, subsidized electricity rates, research and development subsidies, control of the entry and exit of firms, export targets, and highly differentiated tariffs and nontariff barriers are all forms of industrial policy.*"¹⁸

The two main conflicts between industrial and competition policy concern the relevant time frame and the effects that foreign entry can have on the market¹⁹. What the relevant time frame²⁰ is concerned, it is accepted that intellectual property rights have a negative impact on competition in the short run.²¹ Nevertheless, in the long run the temporary monopoly rents create incentives to innovate and thus insure a future competition between existing products and new, improved ones.²² For this reason, competition law should be toned down when applied in the context of intellectual property, although a rather consistent case law limiting IPRs in the name of competition emerged already in the 1980s²³.

In *Volvo v. Veng*²⁴ the Court stated that: "*the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position*". Also, in *Microsoft*²⁵, the General Court emphasized that: "*the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82*

¹⁸ M. Noland and H. Pack, *Industrial Policy in an Era of Globalization: Lessons from Asia*, Washington, D.C.: Institute for International Economics, 2003, p.10.

¹⁹ Douglas H. Brooks, *Industrial and Competition Policy: Conflict or Complementarity?*, ADBI RESEARCH POLICY BRIEF No. 24, 2007, p.5. Available at: <http://www.adbi.org/research-policybrief/2007/05/02/2239.industrial.policy>. Accessed on 07/08/2012.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ AB *Volvo v. Erik Veng* (UK), Case 238/87, [1988] E.C.R. 6211; *Consorzio Italiano Della Componentistica Di Ricambio Per Autoveicoli v. Regie Nationale Des Usines Renault*, Case 53/87, [1988] E.C.R. 6039; Commission Decision No. 89/205/EEC, O.J. L 78/43 (1988); *Radio Telefis Eireann RTE v. Commission*, Case T-69/89, [1991] E.C.R. 485; *Independent Television Publications Ltd v. Commission*, Case T-76/89, [1991] E.C.R. 575; see also *Radio Telefis Eireann (RTE) v. Commission*, Joined Cases 241-42/91, [1995] E.C.R. 743.

²⁴ AB *Volvo v. Erik Veng* (UK), Case 238/87, [1988] E.C.R. 621, para. 8.

²⁵ Case T-201/04 [2007] E.C.R. II-3601.

*EC. It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse*²⁶.

When it was introduced, competition policy was aimed at supporting small and medium sized companies and at creating a level playing field for them when dealing with the big incumbent suppliers²⁷. Subsequently the interest shifted towards consumer interests²⁸. In a similar way, industrial policy starts first by supporting the interests of a limited number of agents, focusing all the while also on creating efficiencies for the whole industry in the long run²⁹. It is therefore suggested that “[t]he greater emphasis on long term focus in industrial policy ... competition policy should be designed flexibly to accommodate industrial policy”,³⁰. Another point of divergence is the situation of entry of foreign firms on the domestic market. While in the short run this may increase competition, if entry takes place through mergers which increase market power, competition policy might look into future cases of abuse of dominant position³¹. However, industrial policy is generally rather skeptical when it comes to foreign entry³², which is why “an advocate of industrial policy could be a keen supporter of measures to bolster competition between domestic firms while simultaneously seeking to shelter them from foreign competition. ... industrial policy of the ‘sheltering’ type tends to work better when intense rivalry between domestic firms spurs them to improve productivity and performance—a finding that calls for a strong competition law enforcement to complement certain national industrial policies”.³³

As a matter of principle, competition policy opposes most industrial policies if one starts from the premises that under perfect competition, innovation is the only means of attracting consumers and staying in business³⁴. However, the reality is that governments encourage sometimes collaboration between undertakings in order to achieve economies of scale and to finance research and development³⁵. Also, they may implement industrial policies for promoting “national champions”, which would be able to compete on international markets³⁶. Expansive R&D may warrant some immunity from competition, as is the case with IPRs, where patents award 20 years of protection³⁷. In some circumstances, competition suppresses innovation and stands for “the vacuity of relentlessly pursuing the ideal of perfect competition”³⁸. Moreover,

²⁶ Ibid, para. 331.

²⁷ Douglas, supra note 19, p. 6.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Douglas, supra note 19, p. 6.

³¹ Douglas, supra note 19, p. 7.

³² Ibid. This is so because, at least in part, foreign entry is less subject to control by domestic authorities.

³³ S. J. Evenett, *Would enforcing competition law compromise industrial policy objectives?* in Brooks, D. H. and S. J. Evenett, *Competition Policy and Development in Asia*, London, 2005, Palgrave Macmillan, p. 68.

³⁴ Whish Richard, *Competition Law*, Oxford University Press, 2009, p. 14.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Whish, supra note 34, pp. 14-15.

³⁸ Whish, supra note 34, p. 15.

competition policy already takes various other policies into account and thus allows for some beneficial restrictions of competition³⁹. This is for instance the case of safety legislation, where undertakings are forced to cut costs to the minimum because of competitive pressure and therefore there is the risk of skimping on safety checks⁴⁰. In such situations, the link between competition policy and industrial policy could be taken into account by the Commission when assessing the agreement under Article 101 (3) TFEU⁴¹ or as efficiencies under Article 102 TFEU.

In times of crisis, competition policy should perhaps take industrial policies into account, since “*cut-throat competition*” could lead to prices that are lower than marginal cost and subsequently to insolvency⁴². In conditions of economic duress, it does not appear as unreasonable to “*halt*” competition where industries enter cyclical recession or long-term decline in order for them not to be pushed out of the market⁴³. A too rigid competition policy can actually become undesirable, since it may entail some wasteful effects, such as “*shopping around*”, which itself increases social cost⁴⁴. Similarly, competitors could be incurring additional unnecessary costs with campaigns to promote their products⁴⁵. According to Bower, conventional competition can cause chronic waste in which everyone ends up being less well off⁴⁶. He suggests that attention should be shifted from the supposed evils of cartelization to “*the freedom for firms to exit from an industry if and when they see the opportunity to operate more profitably on another market*”⁴⁷.

Let us be clear about one fact: the view that competition law stands in the way of economic recovery is neither new nor entirely absurd, in particular during a financial crisis such as the current one. Governments may indeed be very tempted to consider that national welfare should take precedence over competition law enforcement⁴⁸ and thus “[*t*]hey may be tempted to succumb to political pressure to champion failing national businesses, ignore the abuse by dominant firms of weakened acquisition targets, and turn a blind eye to competitors clubbing

³⁹ In C-309/99 *Wouters* [2002] ECR I-1577, the Court of Justice of the European Union considered that restrictive rules that are proportionate and ancillary to a regulatory system that protects a legitimate interest fall outside Article 101 TFEU.

⁴⁰ Whish, supra note 34, p. 13.

⁴¹ Ibid.

⁴² Whish, supra note 34, p. 14. This approach was taken by the UK in 1948 and lasted for 50 years, until the Competition Act 1998 was adopted.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Michael Reynolds, Sarah Macrory, Michelle Chowdhury, *EU COMPETITION POLICY IN THE FINANCIAL CRISIS: EXTRAORDINARY MEASURES*, Fordham International Law Journal, Volume 33, Issue 6, 2011, Article 3, p. 1670.

together to protect themselves from falling demand”⁴⁹. However, as can be argued on the basis of the example of the Great Depression in the US⁵⁰, lack of a coherent antitrust enforcement could have as consequence delaying economic recovery⁵¹.

The benefits of an effective competition are all the more important during recession, since it leads to more innovation, triggers economic growth and a general increase of the factors of productivity overall.⁵² “By producing consumer savings through the breakup of cartels or by prohibiting anticompetitive mergers, competition policy stimulates demand and leads to concrete improvements in consumers’ purchasing power. At the same time, competition not only leads to lower prices for consumers (and thereby lowers inflation) but it also reduces price levels in wholesale and intermediary markets”⁵³. Therefore it is important that particularly during the financial crisis no concessions be made with regard to competition law enforcement.

Nevertheless, “extraordinary times may call for extraordinary measures and the Commission and Member States need to tread carefully as they attempt to simultaneously show flexibility in procedure and rigidity in principles”⁵⁴. When it comes to mergers, diminishing the burden of review in order to facilitate emergency transactions, may entail the risk of clearing mergers or acquisitions which are detrimental to consumers⁵⁵. The enforcement of Article 101 TFEU also entails the choice between imposing immense fines on an overall crippled economy and guaranteeing that there is some deterrence against future cartels⁵⁶.

Balancing such interests has put the Commission under a lot of strain. While in the short run not endorsing popular mergers may make the Commission even less popular with Member States’ governments⁵⁷, on the long run, an ill-adjusted flexibility may lead to the ultimate questioning of the very purpose of competition policy⁵⁸.

⁴⁹ Ibid.

⁵⁰ The measures taken in the US during the Great Depression offer a very compelling precedent. The U.S. National Industrial Recovery Act of 1933 foresaw that competitors could negotiate among themselves binding industry codes of fair competition, which would not be analyzed from an antitrust perspective.

⁵¹ Reynolds, Macrory, Chowdhury, supra note 48, p. 1671.

⁵² Philip Lowe, *Competition Policy and the Global Economic Crisis*, COMPETITION POLICY INTERNATIONAL, Volume 5, Number 2, Autumn 2009, p. 5.

⁵³ Ibid.

⁵⁴ Reynolds, Macrory, Chowdhury, supra note 48, p. 1672.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

Concerning the links between industrial and competition policies, we may argue that to some extent, the increasing lack of confidence in sectoral interventionist policies since the 80's led to the belief that the competition policy is in itself a form of industrial policy. Ensuring a level playing field, preventing market distortion or discretionary interventions could be considered as an acceptable substitute to traditional industrial policy. In a nutshell, the question that needs to be asked is: what sectors and enterprises should be supported? How to select the new technologies, firms, or sectors worth promoting? On this point of view, one has to balance the potential gains of an intervention with the risk of government failures caused by incomplete and asymmetric information. Nevertheless, one question keeps reappearing: how to deal with market failures? In this sense, competition policy has increasingly become a tool to address market imperfections.

Another point worth mentioning would be the link between the shift in the objectives of industrial policies (from specific firms or technologies to horizontal measures) and the movement in competition policy from controlling the coercive power of dominant undertakings towards the maximization of consumer welfare. It is not entirely clear whether such a shift would not also have some adverse consequences, such as the reduction in diversity of existing technologies and a restriction of consumer choice. At the same time, if the conventional industrial policy was – especially in France – more favorable to big firms than to SMEs, it can be argued that horizontal intervention might be profitable for the later ones. As a consequence, the respective evolution of industrial and competition policy might prove rather challenging to interpret. If the shift in competition policy may be more favorable to dominant undertakings (in principle), the shift in industrial policy could also lead to more support for SMEs.

Globally, the links between industrial and competition policy could be analyzed according to the distinction between static and dynamic effects (or allocative and productive efficiency). The case of DPI or the case of the essential facilities doctrine stresses the trade-offs between short run and long run effects of a given intervention, considering its impact on incentives. An industrial-policy oriented government intervention may tolerate some market imperfections (R&D co-operations, information exchanges about investment plans etc.) in order to avoid market failures. Again, the difficulty remains in the assessment of the potential effects of such a tolerance on future market dynamics.

The context of a global financial crisis is consequently very pertinent to investigate such dimensions. On the one hand, the principles of competition policy must be re-affirmed since consumer harm caused by anticompetitive practices is all the more damaging in times of economic distress. On the other hand, one has to carefully assess market practices. For example, what is the counterfactual scenario to be considered when evaluating a given strategy or the welfare impact of a notified merger? The higher the uncertainties about market evolutions, the higher the doubts about the theory of harm and the adequateness of a given remedy. The economic crisis forces a careful consideration of effects-based approaches. It also pleads for the

implementation of a form-based approach with a very high degree of pragmatism. Perhaps in the end this is less important if one considers that competition policy – as industrial or trade policies – is less a matter of technical decisions (based on the maximization of collective welfare) than a matter of political choice.

In the framework of the TEU and TFEU there are indeed faint echoes of a nexus between competition policy, trade and industrial policies. In this sense, Article 9 TFEU⁵⁹ and Article 3 (3) TEU⁶⁰ deserve special attention. Article 9 TFEU holds the institutions and organs of the EU responsible for promoting the goals listed in the Treaties and together with Article 3(3) TFEU it can therefore be seen as the “*social clause*” of the Treaties, which would appear to have been included in the Treaties in order to offer some counter-weight against the very strong emphasis on the internal market⁶¹. Article 9 TFEU is also the reference clause for all other areas of policies and in particular those referring to economic freedoms and competition law, including for the CJEU and the General Court whenever they are faced with the application of free movement and competition provisions⁶². Through their decisions, the courts also contribute to the enforcement of the Union’s policies. Article 3 (3) TEU contains a list of goals which the Union set itself and which starts with the internal market. Competition policy is one of the components of market integration, as is stated in the Protocol 27⁶³. Moreover, the accomplishment of the internal market appears to be connected to other provisions which are equally significant and which as such are a reflection of the industrial policies pursued by the Union: balanced economic growth, price stability, a highly competitive social market economy, full employment and social progress, protection of the environment and scientific and technical progress.

⁵⁹Article 9 TFEU: “*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*”

⁶⁰ Article 3 (3) TEU: “*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.*”

⁶¹ Jurgen Schwarze, *EU Kommentar*, Helbing Lichtenhahn Verlag, 2012, p. 420.

⁶² *Ibid.*

⁶³ Protocol 27 TFEU: “*PROTOCOL (No 27) ON THE INTERNAL MARKET AND COMPETITION THE HIGH CONTRACTING PARTIES, CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, HAVE AGREED that: To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.*”

Another group of articles relevant in this context is Article 119 TFEU⁶⁴ together Article 120 TFEU⁶⁵, which deal with the Union's economic and monetary policies. Both articles reflect a fundamental choice in favor of an open economy and free competition on which the economic policy of the Union is founded⁶⁶. From a legal perspective, the formula “*open market economy and free competition*” could be interpreted as meaning that a decision for a different economic system would not even be permitted⁶⁷. Free competition is a central provision for the economy of the Union and it also constitutes the reason why any restriction to any economic activity should be justified and should comply with the principle of proportionality⁶⁸.

Article 170 (2) TFEU⁶⁹ referring to trans-European networks contains a similar market economy orientation. The activities of the Union appear to be subordinated to the principles of a system based on open and free competition⁷⁰. The common political infrastructure is therefore to be assessed against two fundamental pillars of the Union, such as the goal to foster a system of unrestricted competition, in the spirit of Protocol 27 as well as to embrace the open market economy with a free competition according to Article 119 TFEU⁷¹. The aim of such a legal structure is to prevent any corruption of competition due to the heavy regulation in the

⁶⁴ Article 119 TFEU: “1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. 2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition. 3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.”

⁶⁵ Article 120 TFEU: “Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.”

⁶⁶ Schwarze, supra 61, p. 1489.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Article 170 (2) TFEU: “Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union”.

⁷⁰ Schwarze, supra 61, p. 1775.

⁷¹ Ibid.

infrastructure sector. Infrastructure policy cannot lead to intervention in the investment decisions of market players, which is why this policy of the Union is grounded both in competition as well as in market economy provisions⁷².

According to Article 173 (1)⁷³ TFEU the very scope of the industrial policy of the EU and of the Member States is to provide the necessary conditions for the creation and maintenance of the industry's ability to compete⁷⁴. The industry of the EU should be given the possibility to reach high income levels both within and outside the Union, in the framework of global competition, hence one nexus to the trade policy of the Union, as defined by Articles 205-207 TFEU.

Based on the arguments mentioned above it can be concluded that in the framework of the TEU and TFEU, competition policy has not been conceived as a policy with a self-standing goal, impression strengthened by high ranking officials:

*“I think it makes no sense to speak of industrial policy and competition policy as distinct one from the other, let alone as antagonistic policies. I would rather define industrial policy as one which frames the structural conditions necessary to ensure economic success in a globalizing economy. And I therefore have no qualms in saying that competition policy forms – or should form – a central plank in any industrial policy.”*⁷⁵ Similarly, *“competition is not an end in itself, but an instrument designed to achieve a certain public interest object, consumer welfare. At the same time, competition policy can contribute to other objectives: in the EU context, for example, it can work towards the success of the strategy for growth and jobs, and form part of the public debate about the role of state intervention and regulation in industry.”*⁷⁶

In spite of the very elusive references to the trade policy of the Union, it cannot be argued that trade policy would be defined and implemented in a vacuum either. Testimonies in that sense are the reference to the EU's “policies” in Article 9 TFEU, as well as the trade-related industrial strategies developed by the Union: the Lisbon Strategy and the Europe 2020 Strategy mentioned above.

⁷² Ibid.

⁷³ Article 173 (1) TFEU: *“The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at: — speeding up the adjustment of industry to structural changes, — encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings, — encouraging an environment favourable to cooperation between undertakings, — fostering better exploitation of the industrial potential of policies of innovation, research and technological development.”*

⁷⁴ Schwarze, supra 61, p. 1789.

⁷⁵ Neelie Kroes, *Industrial Policy and Competition Law & Policy*, speech at Fordham University of Law, 14 September 2006.

⁷⁶ P. Lowe, (2006) 2 EC Competition Policy Newsletter 1.