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On the Political Nature of Competition Law: Interview with Oles Andriychuk

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Oles Andriychuk joined Strathclyde (Glasgow, UK) in January 2019 as Senior Lecturer in Law. He is Co-Director of the Strathclyde Centre for Internet Law & Policy and member of Strathclyde Centre for Antitrust Law & and Empirical Study. He has completed a monograph on the philosophical foundations of European Competition Law and Policy (Edward Elgar, August 2017). His current work focuses, among other things, on such phenomena as big data and the power of algorithms, the regulation of social networks and new media, post-truth and post-modern law, antitrust and disruptive technologies, electronic communications, platform convergence and net neutrality.

Resume: One of Oles's latest research is questioning the political nature of competition law – a topic at the same time challenging yet a little provocative in this period of competition law turbulence. However, it goes without saying that there is a real need to address the subject: the link between law and politics is so obvious that we would be blind not to approach it. *Law is political*, and one speaks well about legislative and jurisprudential policies. However, we often like to believe competition law could have escaped this political aspect, thanks to the rationality of the economic science and the legal formalism on which its enforcement relies. Plus, it is commonly acknowledged that it necessary for competition law to be politically neutral as market regulation crystallizes political cleavages and thus implies, as a body of law, a duty of independence in the judgement process. In his work, Oles provides for a brilliant and critical analysis of the relationship between competition law and politics, questioning the assumption that today competition law is still neutral.

1° You draw a distinction between two periods: *modern* and *post-modern* competition law & economics. Could you please tell us more about these two periods?

Thank you, Maya, David. Congratulation on launching such a great initiative. Of course, each historical categorisation is non-linear and somehow metaphorical. There are no signposts on the road of evolution: Pre-modern; Modern; Post-modern. With this caveat in mind, we can clearly see that competition law, economics and policy are changing and transforming very rapidly, and this is not an incremental but qualitative change. A jump. For me it is a change, not a mutation. I do not pathologize the process, but it indeed has some features, which may be called problematic.

So, what do I mean by this catchy modern/postmodern categorisation? Modernity implies the reliance on rationality, calculability, measurability, encyclopedism. For decades competition policy was inherently modernist – be it the modernism of legal formalism or the modernism of microeconomic calculus. I am particularly focused on the latter, as the former has been rebutted so fiercely by most of us anyway. So, economically rationalised competition policy, or as I label it an "axiomatic" competition policy is based on the fundamental assumption that there is an economic Truth, which we as enforcers, decision-makers, members of legal and economic teams have to discover. It is a scientification of competition policy; in law this connotate well with a belief in the inquisitorial model of Justice. The Truth exists. And our task is to discover it. It reminds me The Emperor's New Clothes story, where everybody is dancing around the King trying to show to him how scientific and truthful their econometric modelling (or interpretation of legal precedents) are. We were playing this game obediently for many years. Everybody would have occasional moments of scepticism and disbelief. But these were refuted and faced stoically as growing pains. Nobody wants to look fool in front of the King. The truth exists. It's just me who is sceptical. Because I know so little. And they do. Mathematics never lies. Neither case-law does. In a *relatively stable* 'end-of-history' world this vision worked *relatively stably*. But then the critical mass of uncertainties outweighed the scale. The concurrent – though not necessarily dependent – events such as financial crisis, radicalisation of societies and polarisation of political elites, digital revolution, the emergence of surveillance capitalism, maturing of Big Tech, polarisation of international trade, turbulences with Euro-centric vision epitomised in Brexit, current pandemic and many other less emblematic events have cumulatively disproved the religious beliefs in and obedience to the universal wisdom of neoclassical economics underpinning the axiomatic antitrust. Competition policy is moving from microeconomics to geopolitics. And this is a

move from modern- to postmodern competition. Suffices to say two things: 1) Postmodern competition policy is inherently political. Political choices are not toxic in this model. If axioms and sophisticated theories contain only one version of truth, and if two opposed views can be equally meticulously presented using the same apparatus, the absolute scientific truth is unachievable. It does not exist at all. It is not a category of social science. The truth only exists in natural sciences, not social ones. 2) Postmodern competition policy is ideologically neutral. It is descriptive. Not normative. It does not bring an alternative agenda. It only relativises the absolutism of the two wings of the modernist antitrust: legal formalism and economic axiomatism. Relativises, not refutes. If no truth is absolute, or rather if no absolute truth exists, the choice in hard cases – and we are not talking about trivial cases – is ultimately political. Obviously, political does not mean arbitral. The freedom to decide is bounded by the institutional constraints in which each decision-maker is embedded and from which each decision-maker originates. The choice is still drafted, framed in sound legal and economic language. Visually, it looks as mainstream as each decision made in modernist stage. On the appearance they are indistinguishable. Just the former pretends to serve the absolute truth while the latter only ticks the absolute truth box. For the former the truth is the aim; for the latter a truth is a necessary condition.

2° Epistemologists including Friedrich von Hayek wrote long ago that the methods of social sciences cannot be as objective as the ones of hard sciences. Economic theories are indeed based on premises which are often hardly empirically verifiable and can lead to completely different solutions depending on the political sensibility of the economist or the school of thought he belongs to. For instance, essential facilities are dealt with differently by economic theory in the EU and in the US, while in both cases, these theories are based on a sound and rational method. Hence my question: even in the modern competition law & economics period, do you think that neutrality of economic science was factually accurate, or was it only a belief? Has there been a real "scientific era" of competition law? In other words, do you think that things have really changed, or is the recognition of the political nature of competition law & economics just a doctrinal acknowledgement of something that has always existed?

You are absolutely right. Looking at the livelihood of the phenomenon of competition through the prism of mathematical modelling is and always was reductionist and myopic. Hayek was clear about it when criticising attempts to visualise, comprehend the invisibility of the market's

hand. If you know the technique, you can use it everywhere. You can measure love, poetry, vine – and you would not be wrong, this would be acceptable in many instances. Disciplines are inherently expansionist. In the stable times using mathematics was beneficial for the governments and decision-makers more generally. Confronted with so many incommensurable choices, they had a chronic headache with comparing the incomparable and compromising on the uncompromisable. And then you have a clear, substantiated solution based on calculable metrics. Do not look at the scaring formulas and sophisticated techniques, these are for the experts. You should care about the results. And here they are. It was working, and it will continue working. Yet in the modernist times there was a conventional requirement, a public consensus that these models should be treated as the reflections of truth, whereas in the postmodern times they remain only as indispensable conditions for being placed on decision-maker's table. Does the proposed solution meet the legal formality and economic rationality thresholds, can it be framed into their vocabulary, can it look as dry, mainstream, non-eccentric decision? If yes, thank you, leave it on the table, we will decide which one meets better our political interests. Add to this another important dimension: other powerful jurisdictions do apply competition rules selectively and some opportunistically. It is a regulatory race to the bottom, where all keep their poker faces, but only we appear to continue playing by the rules and taking them as the absolutes.

3° You consider that post-modern competition law enforcement is not characterized by a quest for the *true* solution anymore but by the task of choosing the *better one* in a political sense. This solution has to be at the same time politically suitable and scientifically correct – *i.e.* based on sound economics and respecting legal formalism. Could we thus state that there is a reversal of the classical syllogistic reasoning – which is starting from the rule and using a deductive method to reach the solution – as it now seems that we start from the solution and then think about the possibility to justify it?

I think it is hard to say it in a better way than you did. Just to note that it was always the case. Nobody enters into the court room being driven by the motives of discovering the absolute truth. The incentive is to win the case. Next trial, next client, diametrically different situation – you change your hat without a shadow of shame. And again, the situation is not pathological. Or at least, it is not the aim of the postmodern competition theory to offer the remedy to this problem (for whom it is a problem). If postmodern competition theory has any normative agenda, it's agenda would be the glorification

of the competitive process – let the legal and economic teams compete. After all such dialectics is a value in itself, this is the essence of adversarial adjudication in general, and the postmodern competition theory does recognise this as a new old norm. Do not try to comprehend the invisible hand by doing mathematical reverse-engineering. Do not try to rationalise the decision-making process by imposing the metrics of inquisitorial, axiomatic jurisprudence. After all, the former is the essence of liberal democracy; the latter – of authoritarianism. This is not to say that the postmodern competition theory adheres to non-interventionist laissez-faire ideology. No, it is ideologically neutral, and allows a greater freedom of choice for those who are assigned by the people to make such choices.

4° Politics is characterized by its flexibility, opportunism and partiality; whereas law has to be foreseeable, permanent and unbiased. Do you think that we are or could be using competition rules as a tool to preserve the economic interests of EU without discrediting the legal nature of competition law? Is there a limit to the politization of the enforcement of competition rules?

You are right political choices are less deterministic than the legal and economics ones (pretend to be). I do not advocate the need for a greater flexibility per se. Well, in some sense I do, but only concomitantly. The prescriptive agenda is much thinner than the descriptive one, and its central message is that you cannot continue playing chess when your vis-à-vis play Fischer random chess. You will be losing each game. As you are a grandmaster, you will be fighting heroically. But ultimately, you will lose. But this is not my central point. My central point is mainly apagogical. Pick randomly any hard competition case and read the decision. Do you really think that the interests framed in the categorical language of the decision are prioritised basing on some overarching objective truth of wisdom? Each hard case has its narrative, driving force regardless of how you label the period: premodern, modern or postmodern. The indeterminacy is always with us. I am not sure about economic theory, but legal philosophers have de-pathologized the indeterminacy ages ago. When the world appeared to be stable, it was acceptable to play the hide-and-seek game. Is it now? And answering the part of your question concerning the limits of the flexibility and arbitrariness, we all are parts of our culture, the human-centred culture embedded in the principles of rule of law, fairness, non-discrimination, procedural neutrality, narrow expert-competence and all the rest of it. All these and many other limitations are and will always be with us. They work as the most reliable safeguards against the voluntarism of the benevolent dictator. And all these factors are always the

ingredients of each decision. You cannot overcome them. If you want a straight answer, it would be that the political nature of the postmodern competition policy implies bidding farewell to the absolutism of the inquisitorial axiomaticity of competition law, economics and policy. It is not an economics- or law- free frivolous ruling of political arbitrariness.

5° You wrote that "*[competition policy] is only one of many public policies and the choice between (and within) them is ultimately political one".* Henceforth, shouldn't policymakers assume their will to shape the economy according to their interventionist strategy by adopting an *ad hoc* policy outside the scope of competition rules rather than taking the risk of distorting the economic and legal concepts long ago established by the case law?

This leads us to the question of political balancing. Each (major) (political) decision leads to many butterfly-effect implications. Political decisions often face difficult choices. Values, interests, competences, rights, benefits – these are all different currencies, which can barely manage to find a common denominator when discussed internally. The problem is that they are convertible. If you want to communicate effectively your message to lawyers you talk about the norms, if you want to be heard by the economists, you shape the same interests into the language of benefits. If you talk to your constituency before the election, your vocabulary is readjusted accordingly. All interests are incommensurably unique and commensurably comparable. And they are unique and comparable simultaneously. This is what I call in my monograph the dialectics of in-/commensurability. Look at the decision-making mechanism of the European Commission: each Commissioner is simultaneously bound by the goal, specific to its area of her direct responsibility and the holistic interests of the Union (or the Commission if you wish). I think we can adjust for this purpose the marketplace of ideas metaphor. And this apropos, shows a short-sightedness of those who believe that the independence of competition authorities from the broader governmental marketplace of ideas – or that the independence of competition from political choices – is a precondition for the effective functioning of the competitive process. This was kind of okay in the modern times, when everything appeared to be stable and predictable, but these days such an enthusiastic campaigning for separation of competition agencies and policy from broader (geo-)economic agenda is either myopic parochialism or institutional self-preferencing or both. Competition policy is part and parcel of other public policies, and other public policies are part and parcel of competition policy. After all, we should not

forget that such isolationist feeling motivates not only competition circles but all other policies too. This implies compartmentalisation of politics, where everybody is concerned with her own value, interest, goal, putting it at the centre of the political processes.

6° What do you think of Commission's project to adopt a special *ex ante* regulation in order to address the issues raised by the digital platforms' economic models?

I am all in favour of this and similar initiatives of the Commission and some national competition authorities (well, the Commission is not competition authority – this refers us to the discussion in the previous paragraph). So, I think it is unavoidable. Being fully minded of the specificity of competition policy sensu stricto and endorsing the importance of its inner mechanics so to say, I equally see how desperately it struggles to position itself as the authority of truth. And I think the blame should be equally split between both legal and economic wings of the profession. An effective competition policy should have two hands. They are different in terms of functioning, pedigree, priorities and consequences, but they should be mindful of one another. The phrase "but this is for regulators/legislators" is absolutely acceptable in the rhetoric of the parties in the trial but is not for the enforcers. This is particularly the case in the area of the digital economy, which is characterised by so many obvious specificities that if you just continue sitting and preaching the purity of antitrust, would redesign the constellation of economic forces in the world. Our starting position was too strong to feel endangered now. And this is a problem. We are already in the stage when any idea to introduce a meaningful inter-platform competition appears to be pathetic. If we continue the purity game, we will not have strong arguments even in influencing intra-platform competition. At the same time, we should realise that all these attempts are seldom effective. Look at the GDPR, look at the Copyright Directive. Big Tech are omnipotent not because they are intrusive invaders, but because they are the best in everything they do. Including in hiring and lobbying, including in adapting to the new regulatory realities. Add to this the inevitable ten-year gap existing between the strategic planning teams of Big Tech and our regulatory responses. We try to find solutions to the situations envisaged in BigTech headquarters decade/s ago. And they do not stand still, the design new ideas and create new puzzles for competition constantly. Again, most of them we will be addressed in ten years. This is not a bug, but a feature, and there is not much we could do about it. And this is not to say that the new initiatives are futile. They are a must. But we should not

expect that they will be very effective. And they often backfire, creating new opportunities for Big Tech and new barriers for newcomers. The most drastic example is not even the GDPR but Net Neutrality regulation. The prima facie noble principle of the Internet speed equality essentially enables Big Tech companies to cement their dominance. I've just finished writing a big paper on this problem, in which I try to articulate and rebut 7½ myths about Net Neutrality happy to discuss it in detail as this is in my view one of the ways for Europe to recalibrate its shape and position in the global digital race. The central idea is that by softening the rules and allowing regulatory-managed speed prioritisation, we could get a very powerful tool for boosting new entries. Overall, the current format of Net Neutrality rules is based on what I call a dial-up mentality, which in the age of 5G and Internet of Everything appears to be rudimentary. We still treat telcos as the gatekeepers, offering for online platforms an exceptional regulatory bonus: equal speed, forgetting that the real gatekeepers are platforms, not telcos, and that the best way to safeguard the dominance is to raise regulatory rules making competition on the merits impossible. This is a long conversation though, and its nuanced elaboration needs a separate occasion.

7° Do you consider that the enforcement of competition law during the sanitary crisis is a manifestation of the post-modern era you describe?

We clearly see here another manifestation of the rock-paper-scissor existential condition to which all important decisions are always subject to. I think it is a too specific story, happening in each turbulent period, but yes, it reminds us that competition policy is in constant interplay with broader societal interests.

8° Competition law regulates the market, and market regulation is a central political issue which crystallizes the cleavage between liberal and interventionist policies. Provided that competition authorities and courts are independent from the government as from the legislative power, that is to say from the elected institutions of a State, do you think that they have a sufficient democratic legitimacy to take decisions with such political implications?

Normatively, I adhere to the view that liberal policy could be sharpened by interventionist means. Or at least I would not juxtapose liberalism and interventionism. The power of the invisible hand of the market is not diminished by the appropriate regulatory interventions. It is rather distorted by the

attempts to fully comprehend, visualise, mathematise the invisible hand – which is often done for justifying non-intervention. The idea of the invisible hand and the spontaneous order is not that they could and should function without regulatory intervention, but that they capture the mystery of entrepreneurial creativity, the perpetual discovery process. In this sense they generate a real economic value and constitute the essence of liberal democracy. I think I've called them in my book "societal libido". The libido, the creative energy, the passion is the main driving force of our life, but if left unregulated, untamed, it leads to ruinous destructive implications. Same with the invisible hand. We should not calculate it – it is futile – but it is perfectly acceptable, and even necessary to shape, steer, direct and cultivate the process. As to the part of the question concerning the legitimacy mandate, I think my answer to this would be very formal: any public institution, established according to legally binding rules is legal and holds the legitimacy mandate. In this sense, for instance, the legitimacy of the European Parliament before and after 1979 does have only cosmetic differences. So, regardless of the specificities of each national mechanism of the distribution of competences within the state – I leave aside extreme cases, which are probably much less relevant to our field – the legitimacy mandate is with the institution.

Let me at the end express my sincere congratulation to such a fantastic initiative. I am sure your project will establish an appealing and fresh voice in the global competition circles. Let me separately thank you for such wise, well-calibrated and thought-provoking questions. It was my pleasure to answer them.

Interview by Maya-Salomé GARNIER