

“Competition Overdose”: Curing Markets from Themselves? Ten Points for Discussion

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The new book by two prominent competition law thinkers Maurice E. Stucke (Professor of Law at the University of Tennessee) and Ariel Ezrachi (Professor of Law at the University of Oxford) ‘Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants’ (Harper Business, USA, 2020, pp. 402) has triggered a vivid discussion over the ever-fading question on the goals of competition law, economics and policy and – more broadly – on the very nature of the multifaceted phenomenon of competition. The previous blockbuster of the tandem ‘Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy’ (2016) has generated vocal and diverse feedback, and the authors continue their market success with publishing another thought-provoking piece. The book provokes not only thoughts. From its very title, subtitle, name of chapters, normative position, methodological argumentation and the choice of preprint reviewers, across the selection of case studies and to its very writing style, the book is designed to generate discussion. And for the right reasons. The times when competition policy was perceived as an axiomatic, mathematised, highly technical and pretty much non-controversial area of Law & Economics have gone. Over the last decade, competition has become a great theme again. Full of ideological appeals and statements, mindful of their political pedigree, competition law, economics and policy are transitioning from the mechanistic field of microeconomic modelling to the real world of geopolitical chessboards.

A quick look at the composition of the book, makes clear the authors’ intention to transpose their well-established and highly influential academic reasoning from the narrow world of competition theorists to the broader and more diverse audience. The key objective of the book in this respect is to convince such broader societal circles of the need to reform

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competition policy – or rather to revise our perception of the very essence and the very mission of economic competition as such.

The book is in several senses iconoclastic. As skilful *diagnosticians*, the authors reveal weakness after weakness of the market-centred ethics. The main *cures* offered by the book – both in terms of the normative propositions as well as the politicised vocabulary and intentionally approachable argumentative apparatus – will be appealing to many.

The authors aim to raise (or perhaps to refine) the ethical dimension in the otherwise morally neutral phenomenon of economic competition and its regulation. It is hard to find a reasonable person disagreeing with the normative premises of the book. It is much easier to find one disagreeing with the enforceability of these intentions.

In what follows I'll try to articulate ten points for discussion, written as a reflection on the book. We agree on most of the things, disagreeing rather on nuances. I believe though that some of those nuances are important.

The authors set up the scene in the Preface, noting that unlike most other topics, competition is seldom seen in otherwise divisive politics as a controversial or contested issue. All agree that competition is beneficial for society. Indeed, the eventual perils of competition – like the perils of democracy more generally – are way too milder than all other plausible alternatives. The questionable part of this otherwise undisputable observation is in the phrase “put it another way, have you ever heard *any* lawmaker or policy maker praise any policy for being *anticompetitive*?”¹

My *first* point concerns this ‘*anti*’ part:

A canonical example of a system not indorsing competition policy, would envisage a society based on planned economy, perceiving competition as an unnecessary, redundant and suboptimal means to achieve welfare-centred and/or any other social goal. The ideology of such societies would not advocate an *anti*-competitive approach. It would rather be a *non*-competitive, centrally planned one, where competition is seen as a waste of the collective energy, the energy which should be channelled by the authorities in the planned manner. This logical counterpoint of *non*- (rather than *anti*-) implies the authoritarian ideology of strong

¹ Maurice E. Stucke, Ariel Ezrachi, ‘Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants’, Harper Business, USA, 2020, p. vii (emphases in the original).

dirigisme, where the state “knows better” what is better for each of its citizens than the citizens themselves. History (or at least its ‘end of history’ conception) tells us that such approaches are highly corrupted, erosive, inefficient, discredited and rudimentary. They are. But they still exist, adapting with remarkable effectiveness to the new digital, multi-polar stereo-cacophony of ideas, and often they are still underpinned by the strong, well-elaborated, mature and appealing for many theoretical foundations of the far-left intellectuals. So, my first point is essentially two-fold: (i) the real alternative to the competition-driven markets is not an *anti*-competition, but a *non*-competition ideology; and (ii) of course, the book itself is far from this position and the authors are the pioneers precisely in competition-centred discourse. But challenging so eloquently the very foundational principle of the competition-driven model may indirectly help those aiming to offer the apagogical justification of the non-competition economy.

The agenda of this book is appealing. It is about democracy. Competition *is* about democracy. Competition is the quintessence of democracy. And here is where the review’s second – and one of the central – point begins.

The *second* point concerns the conceptual polarisation of economic market’s ‘hands’:

The authors start with Adam Smith’s omnipotent and omnipresent ‘invisible hand of the market’ metaphor. This is indeed a foundational principle of economic competition, and of liberalism in general. It chiefly concerns the ways in which the markets should be regulated. To use Hayekian ‘atomistic competition’ reasoning, the invisible hand can be seen as an assumption that by pursuing her own interests the individual entrepreneur-atom unintentionally contributes to the greater good of society. This principle shifts the responsibility for designing the market structure and parameters to the very bottom – to market’s real participants, the entrepreneurs. In this sense, it is in opposition to the centrally planned vision, where the state ‘knows best’ what is needed for society, and as such coordinates, navigates, steers and curates the most desirable economic conduct. From this perspective, the invisible hand of the market is juxtaposed to the visible hand of the regulators.

And it is precisely at this juxtaposition where many misconceptions begin. The proponents of the principle of the invisible hand are automatically equated to the adherents of

the hands-off laissez-faire approach to the economy; and the proponents of the model with strong elements of state intervention are automatically qualified as the supporters of the planned economy. To an extent, this is correct, but the overlap is only partial. It is perfectly acceptable to be a committed protagonist of the idea of the invisible hand while supporting simultaneously the idea of strong(-er), targeted, well-substantiated and accountable regulatory interventions (after all, competition law by its very definition is one of the most obvious interventionist instances of such regulatory encroachment into the spontaneous functioning of the markets).

No society can function without a harmonious coexistence of both market hands. The differences are in the unique constellation of checks and balances between them and the overarching societal preferences. Both hands function simultaneously in the regulatory body of each society. In this sense, as any normal pair of hands, they are mutually supportive. There is no need to juxtapose them. The juxtaposition and polarisation reduce the complex relationship between the two market hands to a zero-sum correlation. So, my point is that the invisible hand is inevitable, and it is impossible to eliminate from the market processes in any meaningful way (it is not to say that the book argues for such a possibility – it rather implicitly allows for it).

The *third* point concerns the measurability of the 'invisible hand':

We often neglect in competition circles that the real power of the idea of the invisible hand is not only – as an anti-interventionist libertarian would submit – in its magical ability to deliver better economic outcomes than its centrally planned alternative could offer. This indeed is usually the case, but conceptually, it is a matter of judgement and empirical facts. However, the market's invisible hand metaphor has another, much less commonly noted dimension: the invisibility as such.

Over the last decades the very nature of competition law has become trivialised, misconstrued and distorted by a new uncritical neoclassical microeconomic consensus. The only legitimacy recognised by the currently dominant Law & Economics discourse of competition policy is based on measured numbers, provable formulas, and calculable benefits. Both ex-post competition law and ex-ante regulatory intervention become legitimate only after the market processes predetermined by the *invisible* hand are properly *visualised* via the

mathematical microeconomic metrics. Such a *scientification* of the discipline becomes a new must, and this distorts the very idea of the *invisibility* of the hand.

The book *does* criticise this approach, but also from this zero-sum perspective: the book *is* against the price theory reductionism, but it equates such a reductionism to the non-intervention approach, showing how the neoclassical economics could justify pretty much *any* rational action. I agree with this point. But my argument is that there are not *two* but *four* options.

The *visualisation* of the *invisible* hand is indeed a methodology used by those advocating a hands-off approach (e.g. Chicago School) but equally by the proponents of the more proactive use of competition policy interventions. In the same vein, the proponents of the more interventionist competition policy are not necessarily those advocating for the visible hand of regulation as described above. There is no direct correlation between (i) the invisible hand and (ii) laissez-faire; (iii) the visible hand and (iv) the interventionist policy. These four categories can coexist in various combinations:

(i) one can be *sceptical* about the ability of the current mathematical methodology to comprehend the *invisible* market processes while remaining an adherent of the more *proactive* regulatory approach;

(ii) one can be *sceptical* about the ability of the current mathematical methodology to comprehend the invisible market processes while remaining an adherent of the more *non-intervention* regulatory approach;

(iii) one can be *supportive* about the ability of the current mathematical methodology to comprehend the invisible market processes while remaining an adherent of the more *proactive* regulatory approach; and

(iv) one can be *supportive* about the ability of the current mathematical methodology to comprehend the invisible market processes while remaining an adherent of the more *non-intervention* regulatory approach.

The *fourth* point concerns the enforceability of the ethical standard of competition:

The authors offer a basic economic model to distinguish between the toxic and the noble competition – or the race to the bottom vs. the race to the top. Two conditions must be satisfied: (i) the alignment of competitors' individual and collective interests and (ii) the

absence of the harm, which cannot be de-escalated. A vivid illustration of these conditions is offered: playing ice-hockey without a helmet allows some competitive advantage in a sense that the player has a slightly better vision, a slightly faster reaction and a bit more comfortable general feeling. These advantages are obviously outweighed by the dangers emerging from such an unsafe conduct. Evidently, the race to the bottom would imply that some players would try to compensate the lack of other skills with the excessive braveness, and the overall outcomes would be worse than the counterfactual scenario when all players (or the league) agree upon an increase in the safety standards, making wearing a helmet compulsory. They contrast it with the 'noble competition', the race to the top, by providing an example when an ice-hockey player begins practicing a performance enhancing (but healthy) diet, nudging the others to reciprocate.

This ethical criterion of distinguishing between the toxic and noble or good and bad instances of competition does sound temptingly appealing, though such an approach raises a question about its enforceability and universal applicability. As for the former, the examples with helmet and diet are clear: the bottom and the top. But how could we transpose it to the real-life competition cases? Even leaving aside the paradigmatic example of the collusion between two tobacco manufacturers, which by increasing prices on cigarettes unintentionally contribute to the public health by reducing cigarette consumption (it is hard to imagine anyone in competition community arguing for a more benevolent approach to such a conspiracy), competition usually concerns ethically neutral issues.

As far as the universal applicability criterion concerns, my problem with such an ethics-driven theory appears to be that it may well serve the purposes of choosing enforcement priorities, but it is not very clear how to use it in a predictable manner to the industries, the very existence of which are ethically questionable. The traditional competition policy is ethically agnostic. Prioritisation is beyond the ambit of the theory of competition. Unless we assume that the purpose of the book is mainly in helping the enforcers to select the right cases for investigation.

The *fifth* point concerns the function of the 'invisible hand':

One of the central assumptions of the book is that if left unregulated, competition is likely to lead to the situations where the competitors will not only compete on the merits, but will start using commercial strategies, which compromise safety and quality. Again, to a large

extent I agree with the authors: competition should never be left unregulated. There is neither economic interest nor ethical value in pursuing the highest possible level of competition on each market anytime for its own sake. There is no linear dependency between the intensity of competition and its merits, the benefits it delivers to society.

This implies on one hand that the authors are right by challenging the reductionist axiomatic discourse of competition policy; on the other hand, however, I find it difficult to agree with the exposition of the invisible hand, which almost inevitably would lead to the suboptimal or harmful societal outcomes. In real life, no society ever allows a totally uncontrolled functioning of the invisible hand: there are always some regulatory, legal and institutional constraints limiting and channelling the competitive process. In an abstract theoretical modelling, such an assumption is also not entirely convincing as there would always be a competitive entry from another market, which would improve the imperfections. This is an orthodox elaboration of the Schumpeterian notion of innovation qua 'creative destruction': the destruction is painful and harmful, but the invisible hand of the market would sooner or later remedy the market failure and a new cycle of competition would trigger the new innovative dynamics. Of course, in reality nobody knows how long this "sooner or later" would take, and of course, in reality no society and no regulator are prepared to sit and wait just observing the destructive elements of the model: they would step in trying to remedy the imperfections faster and better than the invisible hand would eventually do. But this does not deny the theoretical possibility of the invisible hand to sort everything out on its own. It was just never given a chance to do so – and for the right reasons of course.

The *sixth* point concerns the separation between the good and bad instances of competition (humane vs. human):

The authors argue that there are two types of competition: good and bad, noble and toxic, and the aim of each society and the professional competence of each enforcer is to distinguish between them, to separate the wheat from the chaff, to encourage the former and to minimise the latter. This is a very intuitive and understandable policy imperative. Each society, and each regulator is keen to encourage good practices and discourage the harmful, there is nothing problematic about that. The book, however, seems to go beyond this. It essentially narrows down the scope of the competitive process to the noble elements. The toxic competitive process seems not only to be undesirable in the sense of not worth being

prioritised, but also is less attributable to the very term 'competition' – or at least to the term 'competition as a societal value'.

In an imaginary timeline where (i) competition emerges in a new market, (ii) then some toxic practices are identified, which may or may not necessarily lead to the societally harmful implications, and then (iii) an intervention is initiated when the harm is caused, the authors' model would legitimise the intervention at the stage (ii) as the authors believe that (ideally) the toxic competition should be stopped (or at least discouraged) not when it begins harming, but earlier, when it becomes toxic (the harmful consequences are not noticeable yet, but they are with us already ipso facto).

I do not disagree that the competitive process should be tamed. My disagreement is with defining the moment for such intervention. I think the intervention should be envisaged only at the level (iii) of the abovementioned timeline, and the reasons for such intervention can vary – occasionally, the noble-toxic criterion could be the reason; occasionally, other interests could prevail (even if this could imply protecting the toxic and restricting the noble). I do not think the toxicity/nobleness of competition should be sufficient criterion on its own for making a policy choice. This would disqualify the toxic competition from being competition in any meaningful, politically acceptable way. At the very best, toxic competition would be seen – and is seen by the authors – as an instance, which is tolerable due to the deficit of regulatory attention, due to its overall insignificance or just because we live in an imperfect world. Toxic competition is perceived by the authors as a kind of competition in the moment of its decay.

The *seventh* point concerns the analysis of the phenomena of competition and freedom:

It is important to note many similarities between the two phenomena. Economic competition – alongside with political and cultural incarnation of the competitive process – is part and parcel of freedom. The phenomenon of freedom is often divided into its positive and negative incarnations. Some see the relationship between the negative and positive freedoms as a progressive, linear development from the former to the latter. Negative freedom is often associated with chaos, anarchy, disorder, while positive – with conscious, rational choice, a manifestation of human will, intellectual maturity and responsibility. From the perspective of ethics these two aspects of freedom are hierarchically subordinated: the negative is below, the positive is above and sometimes they are antagonised: the voice of the negative freedom

should be muted, tamed, domesticated, and the voice of the positive freedom should be endorsed as the only one reflecting ethical standards of Humanity. The 'noble vs. toxic' ethical approach appears to qualify to this taxonomy: noble competition is superior; toxic – inferior.

Another Western philosophical tradition looks at the positive and negative sides of freedom differently. It perceives both as mutually supportive, and mutually dependent dialectical polarities, each of which constitute the indispensable component of the phenomenon of freedom. Similar to the former vision, they also generally agree that the origins, the foundations of freedom are based on its uncultivated side. Genealogically, freedom is negative. It originates from the Chaos. Both philosophical traditions (let us call the former monists and the latter dualists) loosely agree on the negative origins of freedom. The disagreement starts with what should we do with the negative freedom. The vision adhered by monists sees the negative freedom as something pathological, as something which has to be colonised, rationalised, nurtured, tamed, enlightened. The dualists look at the negative freedom (and thus at the toxic competition) as a fuel, vital energy, driving force of human life generally and as an inseparable part of the phenomenon of freedom in particular. Like the monists, the dualistic tradition fully supports the need to cultivate the negative freedom into the positive one, and like the monists, it attributes a greater value to the positive freedom than to the negative one, but it does not pathologise the negative one per se. Negative freedom of the human being is her Libido, an energy, which moves all the desires. If left uncultivated, this natural energy can lead to many distortions and pathologies, but it is not a pathology itself. Negative freedom of the market is toxic competition, and if left unregulated, it would also lead to various distortions and pathologies. But the toxic competition is not a pathology itself. By its characteristics the toxic competition is much closer to the *invisible*² hand of the market than the cultivated, noble, competition, which is rationalised by various ethical imperatives, constraining thereby the very 'magic' of the *invisibility*.

According to the dualist vision, removing the elements of spontaneity, invisibility, negativity from the substance of freedom would make it a different substance, a 'non-freedom', a 'something else'. According to monists, such a removing is hard to achieve, but it

² Oles Andriychuk, 'The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust through the Lens of Legal Philosophy', Edward Elgar, 2017, p. 139: 'As Berdyaev claims, the 'spirit emanates not only from the Deity but also from the primal pre-existential freedom, from the Ungrund', [...] revealing thereby the dialectical dynamism of freedom, composed of two antagonistic elements, which constantly collide. The Ungrund or the abyss 'is prior to and indeed the source of being'. [...] Freedom thereby is perceived as a partly created and partly spontaneous phenomenon'.

is possible. And even if in some instances it is not possible, it is yet highly desirable, it is a manifestation of our progress and our high ethical standards.

The *eight* point concerns the issue of balancing:

It is perfectly possible to have a competition overdose, and the authors must be credited if only for making this rather iconoclastic statement so clearly. However, the overdose is possible because in each specific case a society may have different priorities. Competition is not sacral, and it can be compromised, overbalanced (as any other societal interest can) if other societal interests have a priority. The decision about the diagnosis of the overdose is a political, not ethical.

What the authors propose seems to be a replacement of the mathematical yardstick of validity of competition by the ethically driven, non-mathematical one. And such a replacement is done internally, within the domain of competition. My view is that such a prioritisation can only take place externally, and it would not be logically inconsistent to use the ethical standard as one of the external yardsticks for assessing when, how and to what extent the value of the competitive process should be compromised for, outweighed by another important societal value.

The *ninth* point concerns the role of the political in the contemporary competition policy:

We agree on two central matters: (i) that competition policy has important elements of the political, and (ii) that the presently dominant measurability-focused discourse is reductionist. But we disagree about the solution to this conundrum.

For decades the theory of competition was full of conceptual disagreements, but one thing was uniting the protagonists: their critical perception of the role of politics in regulating the competitive process. Political interventions were seen as a really *toxic* issue – by far more toxic than the toxicity discussed in the book. Politics was seen as something inherently exogenous, outer of the discipline, as something ad hoc, as something driven by the factors going beyond the disciplinary analysis. This for example explains a very negative approach of competition experts to any attempts of correlate competition and industrial policy. Today the instrumentalism of politics is losing its toxicity, and the scientism of microeconomics is

losing its universal acceptance. Authors propose ethics as an external political imperative. I propose macroeconomic interests.

The *tenth* point summarises the central message of the review:

The gist of my substantive discussion with the authors concerns the very value of the competitive process. I argue that alongside with the book's important role in demythologising the dominant approach to competition, embedded in its axiomatic, microeconomic vision – which I agree with – it also offers a solution, which appears to me as a cure of the markets from themselves. The idea of limiting the importance of competition mainly to its noble dimension is not the thesis I would fully subscribe to. I would rather argue that both – noble but also toxic – incarnations of competition are inseparably linked, and that an external intervention is indeed justifiable, but the reason for such intervention should not be an ideological desire to promote the noble incarnation of competition, but a political choice to steer competition to the broader benefits of the relevant polity. My justification of this proposition is derived from the impossibility to separate the toxic aspects of competition from its noble ones. Such an inseparability thesis in my view is a foundational principle of liberal democracy.

Suffices to mention three most obvious aspects of competition, on which the very idea of democratic society is based: political, cultural and economic competition. The political competition is epitomised in elections; the cultural competition – in free speech; the economic – in markets. Firstly, all three aspects can be reduced neither to their efficient parts (which would be the position of the proponents of the measurable, microeconomics-centred vision of competition) nor to their noble parts (the position advocated by the authors of the book). Secondly, none of the three aspects of competition is absolute. And all can be subject to limitation by other societal factors, the factors predetermined by ethical imperatives (authors' view) or by broader political choices – which may or may not include the ethical imperatives (my view).

As far as the first point concerns, we protect elections, free speech and markets not because they necessarily work – let alone work best, let alone work best in all cases. To some extent we do protect them because they work quite well, but also as a matter of principle, as a manifestation of freedom, as a distinctive feature of our liberalism and humanism. Many elections and referendums bring bad and sad results, but this does not compromise our belief

in political competition. Many instances of free speech are harmful and unpleasant, but this does not discredit our belief in freedom of speech. We protect these elements of democracy not (only) because they do work, not (only) because we can measure and calculate the processes and outcomes, but (also) because there are some invisible elements, which should in some sense be protected for their own sake. It is akin to protection of rights: we do not protect them because they are efficient. Otherwise, they would be always self-executable. We protect them as a matter of the societal choice (here we agree), and precisely because they are not (always) efficient. But the choice is not exclusively ethical (here we disagree): it may be either ethical, utilitarian, macroeconomic, societal or any other choice, which is external to competition-centred legal and economic analysis. By undermining the toxicity of competition, we undermine the invisibility of the market process, which evaporates the foundational elements of these instances of competition, reconfiguring its ontological meaning and essence.

Let me conclude by continuing the authors' use of the powerful sport analogy. To some extent, implementing the ideas of noble competition is unavoidable. Noble competition in this sense can be compared to VAR-system. It delivers many advantages, it remedies many instances of unfairness, it helps to deter unsportsmanlike conduct and delivers many positive advantages to the game. But the game itself is full of mini-, micro- and nano-instances of toxic elements, removing which outright is neither plausible nor desirable: where (by whom, when, how and why) to draw the line between the artistic skilfulness, sportsmanship, performance, spirit of contestation and toxicity? What are the costs of such interventions? The rules do identify the manifest instances of toxicity, and VAR-technology in many respects helps to finetune the system, eradicating some and diminishing many other problematic aspects of the game. In this sense, the book offers an approach similar to the VAR-system. A welcoming and very timely proposition. We only have not to throw the baby out with the bath water. I am sure this was not the intention of the two great authors – real Masters of competition law – and I hope this will never happen.