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Oles Andriychuk, *The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust Through the Lens of Legal Philosophy*
(Edward Elgar 2017)

Ryan R. Stones*

I.

Debating the most appropriate animating logic of EU competition law has now been generating more heat than light for a number of decades. One might think that nothing more of interest could possibly be written. Yet Oles Andriychuk's ambitious book, *The Normative Foundations of European Competition Law*, certainly challenges that assumption. By synthesising familiar legal and economic antitrust literature with illuminating ideas from philosophy, political theory, and jurisprudence, it injects new life into an arguably tired debate. Wherever one stands on this question, the sheer depth of fascinating interdisciplinary research is undeniable, producing a worthwhile choice for theoretically-intrigued readers.

Section II summarises the argument and structure of *Normative Foundations*. Section III appraises its general value for followers of competition law scholarship. Section IV concludes by critically engaging with two substantive issues.

II. A Deontological Defence of the Competitive Process

Normative Foundations is a very complex work with a relatively straightforward argument. Andriychuk claims that most approaches to competition policy can be sorted into two rival camps on the basis of how they conceptualise the value of economic competition pursued via market intervention; *consequentialists* see virtue in the resultant realisation of external goods (e.g., welfare, innovation) through promoting competition, whilst *deontologists* consider the

* PhD Candidate, London School of Economics and Political Science.

free competitive process as an inherently worthwhile goal in itself, irrespective of outcomes. For the consequentialists ‘the competitive process represents *a means*, whereas for the deontologists it constitutes *an end*’ (p 6).

This bifurcation will be immediately familiar to those abreast with the debate on whether EU competition law ought to be underpinned by the goal of economic freedom or consumer welfare.¹ The novelty of *Normative Foundations* is that it aims to bolster the deontological economic conceptualisation by systematically exploring the importance of the competitive process *per se* from other theoretical perspectives. Given the much-celebrated shift towards a ‘more economic approach’ to EU antitrust, solely animated by optimising consumer welfare,² defending a deontological understanding for guiding and legitimising market intervention might be thought futile. To the contrary, Andriychuk suggests that the value of the competitive process itself ought to be given greater emphasis in antitrust due to its inherent virtue, as recognised by other theoretical disciplines, in constituting the ‘essence of liberal democracy’ (p 7).

The staggering breadth of material consulted to develop Andriychuk’s argument is clear from the earliest pages of *Normative Foundations*. Chapter 2 traces the evolution of the *economic* conceptualisation of competition from roots seldom considered: ancient Greek philosophy, Roman regulation of excessive pricing, and pre-Smithian perspectives on mercantilist monopolies and guilds. The second half of chapter 2 covers the more familiar territory of classical and neo-classical economic theory (e.g., Adam Smith, marginalism), though interspersed with less orthodox discussions (e.g., Marx, economic historicism). It ends by distinguishing Andriychuk’s deontological understanding of the free competitive process

¹ For an overview of the freedom/efficiency debate, see: L Gormsen, ‘The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC’ (2007) 3(2) ECJ 329.

² For a detailed deconstruction, see: A Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016).

from the ‘purely hypothetical’ model of perfect competition (p 31), *seemingly* preferring the dynamic Hayekian formulation of competition as an unpredictable discovery procedure.³

Chapter 3 constitutes a highly detailed historical account of numerous *legal* conceptualisations of competition from both sides of the Atlantic. Andriychuk’s goal is to categorise various schools of thought onto either side of the consequentialist/deontologist divide. In terms of US antitrust, the usual suspects are all present - Harvard, Chicago, Post-Chicago - though are handled with a rare degree of depth concerning their respective methodologies and normative visions for antitrust. The second half of the chapter considers European scholarship. Andriychuk’s primary focus is German Ordoliberalism, portrayed as supporting a deontological stance whereby the competitive process is valued itself as ‘the quintessence of economic freedom’ (p 81). The final section reaches contemporary enforcement by depicting the ‘Brussels’ and ‘Neo-Brussels Schools’ of EU competition law (p 110). The former is understood as an instrumentalisation of economic freedom and legal formalism in pursuit of European market integration. The latter is essentially Andriychuk’s terminology for the ‘more economic approach’ to EU competition law, primarily substituting the consequentialist ‘ethos of consumer welfare’ for the aim of market integration (p 116).

Chapter 4 is arguably the most significant of *Normative Foundations*. It is the point at which Andriychuk’s original contribution to the literature crystallises, but is also where competition lawyers may begin to feel slightly out of their depth. It challenges the prevalent consequentialist conceptualisation of competition in contemporary antitrust law and economics, myopically focused upon welfare implications, by articulating the rich deontological valuation of freedom through the competitive process *per se* in philosophy and political theory. Andriychuk reconceptualises the positive and negative potential of economic

³ F Hayek, ‘Competition as a Discovery Procedure’ (2002) 5(3) QJ Austrian Economics 9. Andriychuk’s support is far from unambiguous (‘[i]t is hard to disagree with Hayek...’ (p 33)).

freedom in competition, traceable to ancient Greek theorising on its beneficial progress and detrimental strife, as akin to dialectic reasoning in philosophy. The second part of chapter 4 considers the competitive process as ‘multidimensional phenomenon’ in pluralistic liberal democracy (p 143), as reflected in elections or the marketplace of ideas. These manifestations are frequently justified not for selecting ‘the *best* party or the *best* idea’ but owing to a deontological belief in the competitive process itself (pp 146-147). Andriychuk thus argues that the thin consequentialism of welfare-obsessed economic competition underpinning contemporary antitrust is incongruous with a broader faith in competition as an inherently desirable process. The final section of Chapter 4 develops a logical framework whereby freedom to compete is understood as possibly (i) authorised, (ii) prohibited, and (iii) re-authorised for deontological or consequentialist reasons (p 166). Andriychuk argues that the possibility of *deontological* re-authorisation for anticompetitive agreements is missing from Article 101 TFEU, as 101(3) only permits *consequentialist* justifications for exemption. Chapter 7 therefore proposes a new Article 101(4) TFEU to remedy this inconsistency.

Andriychuk is careful to distinguish deontological faith in the competitive process *per se* from absolutism. In a pluralistic liberal democracy devoid of a hierarchy of values, promoting economic freedom in the competitive process ‘should compete’ itself with conflicting norms for protection (p 151). Chapters 5 and 6 therefore explore balancing: the former is a highly abstracted analysis of various theoretical means for reconciliation; the latter shifts to the specific context of balancing in legal disputes. It is supplemented by some brief but intriguing jurisprudential inquiries, especially on the lessons from the interaction of law and morality in legal philosophy for the meeting of law and economics in antitrust. As preliminary evidence for Andriychuk’s belief that exploring competition scholarship and legal theory together could prove mutually enriching (p 259) they surely warrant further development, though probably require an entire book themselves.

III. 'Dazzling' Interdisciplinary Research

On two occasions in *Normative Foundations* Andriychuk appeals to the ancient image of the Ouroboros, the serpent consuming its own tail, as a symbol for simultaneous creation and destruction (pp 168-169, 261). This is connected to his wider use of dialectics from philosophy to understand concepts - e.g., competitive freedom - as both liberating and potentially damaging at the same time. Analogous duality could be attributed to *Normative Foundations* itself. Its novel combination of many different disciplines - law, economics, politics, philosophy - into a coherent whole is simultaneously its undeniable strength and potential downfall. It is a truly *dazzling* display of interdisciplinary research, both impressively illuminating and blindingly bright.

Through introducing fascinating concepts and debates from other disciplines, *Normative Foundations* significantly contributes, albeit indirectly, to the stale debate in European competition law between market intervention driven by economic freedom or maximising efficiency. The clarity with which numerous complex ideas are synthesised and presented to the reader, presumably with a background in law and/or economics, is highly commendable. Skimming through the extensive bibliography or footnotes in advance, one might wonder how the author could ever coherently fuse ancient Greek poetry (p 12), systems theory (p 182), and an article titled 'Kabuki and Shakespeare' (p 128), all inside a book with 'European Competition Law' on its cover. Yet Andriychuk is arguably successful in masterfully unifying such diverse intellectual sources to produce a consistent, intricate argument.

Nevertheless, there are a few sections beyond the safe familiarity of chapters 1 to 3 where the ordinary competition scholar, perhaps less attuned to non-economic theoretical literature, might feel somewhat lost. This is not to suggest that *Normative Foundations* ought to be 'dumbed-down' for greater appeal; to the contrary, such intellectually-demanding inter-

disciplinary writing is perhaps unavoidable to bring these enriching concepts to the attention of antitrust scholars. Yet the reviewer's relatively sound grasp of more ethereal scholarship beyond bread-and-butter competition law and economics was tested, for instance, by the abstract discussion of balancing in chapter 5, or the psychoanalytical concepts of libido and sublimation in chapter 4. Rather than undermining Andriychuk's presumed intention of demonstrating a critical mass of deontological conceptualisations of competition, pruning some of the more esoteric passages would perhaps have clarified his argument and analysis further, rendering *Normative Foundations* more palatable to its intended audience of antitrust scholars and practitioners.

IV. Critical Engagement

As to the substance of *Normative Foundations*, it is possible to raise two critiques: 1) the somewhat stylised depiction of certain schools of antitrust thought; and 2) the uncertain consequences and indirect focus of Andriychuk's defence of a deontological approach to competition policy.

1. Heroes and Villains of Antitrust

Andriychuk's general account of the trans-Atlantic rival schools of antitrust thought in chapter 3 is arguably one of the more sophisticated comparative analyses within competition literature. It is highly recommended for those interested in the history of such economic and legal intellectual development. Andriychuk's portrayal of his heroes and villains of antitrust does, however, seem rather stylised at times.

With regards to the heroes, Andriychuk is clearly fond of German Ordoliberalism. This is understandable; when depicted as one of Europe's 'deontological antitrust traditions' (p 123), where free competition is a 'prerequisite for liberal democracy' rather than solely a means to optimise welfare (p 95), it provides historical roots for his argument. The utility of the

portrayal does not, however, render it accurate. Although a common interpretation in competition scholarship,⁴ a more complex understanding within Ordoliberalism of the consequentialist efficiency/deontological freedom conflict is becoming apparent.⁵ It's also abundantly clear that Andriychuk is aware of such heterogeneity, later conceding that all mainstream economic theory implies some concern for efficiency and asserting that Ordoliberalism 'does not embrace the concept of absolute economic freedom' (p 112-113). By also contrasting the rival social policies of the Freiburg School and the Social Market Economy sub-groups (pp 102-103), he similarly demonstrates an awareness of disagreement within Ordoliberalism and its gradual intellectual evolution. These concessions to complexity are, however, too little too late. It is hard to avoid the feeling that Andriychuk continues, albeit wittingly, a somewhat reductionist take of Ordoliberal competition policy to serve his advocacy of a deontological conceptualisation of its value.

The villainy of the Chicago School can also be considered overdone. Their consequentialist understanding of competition policy as solely pursuing welfare is undeniable, thus falling on the 'wrong' side of Andriychuk's argument in favour of the competitive process protected *per se*. The problem is not one of categorisation but *characterisation*: Andriychuk over-amplifies their consequentialist predisposition into a dogmatic obsession with economic efficiency. In what 'can hardly be seen as proper interdisciplinarity' but essentially amounts to a 'subordination of law' (p 65), efficiency leaves legal certainty 'overruled' (p 62). Their singular devotion to minimal intervention is also said to orient their transparent shift from advocating case-by-case antitrust analysis towards *per se* rules of legality (pp 62-63). Unfortunately, Andriychuk's vilification of Chicagoan consequentialism overlooks their key

⁴ E.g., D Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law, and the "New" Europe' (1994) 42(1) AJCL 25; P Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29(2) OJLS 267.

⁵ See particularly: P Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in *Abuse Regulation in Competition Law, Proceedings of the 10th ASCOLA Conference* (forthcoming).

concern for, as Robert Bork stressed, the ‘predictability of the law’.⁶ Indeed, as is clear from the earliest pages of *The Antitrust Paradox*, Bork’s critique of US antitrust was not simply about economic efficiency, but also ‘consideration of the virtues appropriate to law *as law*’.⁷ Adopting consumer welfare as a ‘common denominator’ for the appraisal of antitrust norms⁸ was of economic and *legal* merit as ‘[n]o businessman can know that the law is if the “law” depends upon the sympathies and prejudices’ of the judiciary.⁹ Richard Posner’s change to advocating *per se* legality for non-price vertical restraints¹⁰ and Frank Easterbrook’s promotion of rule-based frameworks of administrable presumptions vis-à-vis case-by-case analysis, represent attempts to reconcile efficiency-promoting norms *and* legal certainty, so as to ‘guide businesses in planning their affairs’.¹¹ As with his neat presentation of the Ordoliberal as good deontologist, Andriychuk’s depiction of the Chicagoans as extreme consequentialists is a little too stark. It fits his narrative, but not quite the complex reality of their respective writing.

2. A Consequentialist Approach to the Deontological Defence

In chapter 4, Andriychuk attempts to concretise his overall argument by developing a simple framework for understanding the interplay between deontological and consequentialist conceptualisations of competition. It can be (1) authorised, then (2) prohibited, and perhaps (3) re-authorised, at each stage for deontological (‘D’) or consequentialist (‘C’) reasons (pp 165-166). For example, Andriychuk argues that *political* competition is: (1) authorised as a manifestation of political freedom (D) or because it promotes, for example, accountability (C); (2) specific practices may however be prohibited as constituting authoritarianism or

⁶ R Bork, *The Antitrust Paradox* (2nd edn, Free Press 1993) 405.

⁷ *Ibid* 7.

⁸ *Ibid* 79.

⁹ *Ibid* 81.

¹⁰ R Posner ‘The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision’ (1977) 45(1) U Chi LRev 1, 16; ‘The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality’ (1981) 48(1) U Chi LRev 6, 8.

¹¹ F Easterbrook, ‘The Limits of Antitrust’ (1984) 63(1) Tex LRev 1, 14.

illiberalism that could subsequently endanger political freedom itself (D) or for promoting ideas harmful to others (C); but (3) they may nevertheless be allowed because they are still outweighed by the value of free political competition *per se* (D) or as realising some other (unlikely) societal good (e.g., informing public discourse) (C).

In contrast, Andriychuk argues that the conceptualisation of *economic* competition underpinning Article 101 TFEU is textually and logically inconsistent with this framework. Through reference to external countervailing outcomes from *prima facie* anticompetitive collusion (e.g., ‘technical or economic progress’) the Article 101(3) exemption mechanism only envisages consequentialist, never deontological, re-authorisation at the third stage. In chapter 7 Andriychuk therefore provides the clearest practical proposal of *Normative Foundations*: a new Article 101(4), resolving such asymmetry by permitting the exemption of collusion restrictive of ‘some aspects’ of competition that improves ‘other aspects of competition’ (p 263).

Andriychuk is keen to stress that this is purely a ‘theoretical solution, for the sake of methodological clarity’ (p 264). Although perhaps an unfair response given his deontological stance, it is still necessary to consider the consequences of this highly uncertain recommendation.

Andriychuk *seems* to envisage deontological re-authorisation via Article 101(4) on the basis of some countervailing improvement in competition *internal* to a *prima facie* anticompetitive agreement. His inspirations for this proposition are US sports leagues where clubs are formed into closed associations, thereby facilitating a form of ‘enhanced competition’ (p 268). Extrapolating to the domain of Article 102 TFEU, he also gives the example of public broadcasters where internal competition may still emerge, for example, between rival channels for audience share. If this is the extent of Andriychuk’s practical recommendation, it

is difficult to envisage a circumstance, whether hypothetical or historical, where this justification could be defended, let alone persuasively enough to outweigh external anticompetitive detriment. There may be great truth, therefore, in his claim that the need for, and proposal to solve the absence of, deontological re-authorisation is ‘purely academic’ (p 264).

One can question, however, whether the Article 101(4) formulation he recommends accurately transplants the logic of re-authorisation from political to economic competition. For example, the prohibition (stage 2) of an illiberal political party is re-authorised (3) on deontological grounds, not by highlighting *internal* political competition it also promotes, but by essentially *reasserting* the foundational authorisation for free political competition (1) irrespective of the consequences. If this were a more faithful translation of deontological re-authorisation into EU competition law, it would arguably represent an unprecedented rolling-back of law enforcement that could swallow the Article 101(1) prohibition; the logic would be that anticompetitive collusion should be exempted because the economic freedom to compete in the first place is *per se* valuable, so one is willing to accept the good (freedom to engage in an economic discovery process) with the bad (freedom to collude with rivals). As deontological conceptualisations of competition policy are often thought to lead to *over-enforcement*, this would certainly represent an ironic implication.

The Article 101(4) proposal is arguably a distraction from the fundamental consequences of Andriychuk’s defence of deontological competition that are *not* discussed in *Normative Foundations*: the second level of *prohibition on deontological grounds*, i.e. prohibiting actions that harm the competitive process despite potential efficiencies. Andriychuk’s intention is clearly to make a contribution to this foundational debate in EU competition law, and, of course, *Normative Foundations* is a theoretical work advocating the conceptualisation of competition as a process, a desirable end-state in itself. Nevertheless, the *indirect*

theoretical invigoration of the deontological understanding of antitrust is necessarily of *direct* practical consequence for the reach of EU competition law. That is why the debate matters. And until the deontological approach to competition policy directly addresses and accounts for its own such legal consequences, it will remain less popular than the welfare-focused justification for antitrust, despite rich and sophisticated interdisciplinary theoretical fusions such as this.