

How the Theory of Dialectical Antitrust Perceives the Role of Competition Authorities

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Competition policy and law play a pivotal role in the development of the European market process. This role, however, becomes subject to revision in the time of recession. Historically each period of economic downturn is accompanied by severe critique and substantial limitation of the principles of free market with undistorted competition. Crisis cartels and similar otherwise restrictive practices often become not only tolerated but even encouraged by the regulators. This compromise is seen as an inevitable trade-off between competition and other legitimate societal goals, such as industrial growth, social stability, total welfare and sometimes even national security. On the other hand, each regulatory 'turbulence', which is caused by the revision of the role of competition within the markets, can be also seen as a fruitful time for introducing new elements to the competition policy itself and testing new theories of competition. Dialectical antitrust is one of these theories. This article explores the role of competition authorities in the period of economic crisis applying methodological apparatus of the theory of dialectical antitrust.

1. DIALECTICS AND ANTITRUST

The idea of dialectics has ancient roots, as every notion in legal philosophy. It is a method of analytical investigation which explores the object by its opposite. The process of dialectical analysis is more important than its very outcome. Every notion is seen as contestable by definition. Each tension between thesis and antithesis leads to synthesis, which in turn becomes a new thesis. Thereby the process of investigation moves to the next stage, where newly established synthesis is antithesised again (and again) by the new counterargument. This perpetual spiral contestation is seen as an essence of discovery process. In this sense dialectics rejects a holistic belief in an absolute truth, acknowledging that both thesis and antithesis can be simultaneously correct. Thus dialectical epistemology should not be seen in its simplistic form as a merely middle way between thesis and antithesis. It is a process-oriented enterprise; its value is not in the outcomes, but in the operation itself. In this sense dialectics has a lot in common with competition in the markets. Competitory process is also more important than its outcomes.²

Dialectics can be applied to the analysis of competition policy and law in several contexts. Apart from the abovementioned direct correlation between dialectical thinking

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²There are two conceptual visions of competition in the markets. According to 'utilitarian' approach, competition policy and law should be applicable only if they can generate better outcomes for society (economy, consumers, industries etc.). According to 'deontological' view, on the contrary, competition is seen as an essence of liberal democracy, which deserves its protection regardless of the outcomes it produces. The paper is developed according to the latter vision of competition.

and competitory process³ in the markets, dialectics can be used (and is implicitly used) for performing a balancing act, whereby competition as a societal value of healthy democracy 'competes' with other legitimate economic values for being prioritised by policymakers.⁴ In this situation, the policymakers have to decide which value should get its priority over the others. Often this act of balancing, due to its inductive nature, is undertaken by the regulators *ad hoc* on a case-by-case basis, although sometimes a rule-based approach can be also effective.

Dialectics is also presented in the domain of antitrust when a regulator has to decide which of available tools should be applied in order to 'fine-tune' a competitory process itself. In this case the choice is between *ex ante* or *ex post* instruments. Ontologically both methods do not exclude one another, because they are overlapping in the subject of their regulation. Therefore the tensions between *ex ante* and *ex post* regulatory tools are irresolvable and they can be seen in their mutually productive dialectical interdependence.

Another important area of the interplay between dialectics and competition lies in the comparison of different antitrust schools. Inasmuch as none of the mainstream doctrines is capable to solve all existing internal conflicts of antitrust policy, there is a possibility of applying the elements of different schools depending on the context. Such a synthesis should not be seen as a mechanical synchronisation, but rather as a polyphonic composition. This synthesis brings an added value to existing antitrust scholarship without reducing the original meaning of each school. Finally, dialectics is used in the analysis of competition policy for deciding *when* and *how* to draw the line between the *natural* and the *regulated* competitory process. The former is driven by the 'invisible hand'⁵ of the markets,⁶ while the latter is designed by legitimate public authorities. This last dimension of dialectical antitrust is the most important for defining the role of competition agencies in the period of economic recession. Therefore the following parts of this article are devoted solely to this aspect of the theory of dialectical antitrust.

³The term 'competitory' reflects the essence of competition more precisely than its synonym 'competitive', inasmuch as the meaning of the latter also semantically encompasses the notion of 'competitiveness' (i.e. the ability to compete). See *below*.

⁴See e.g. Phedon Nikolaidis, 'The Balancing Myth: The Economics of Article 81(1) & (3)', *Legal Issues of Economic Integration* 32(2), 2005: 'In competition law, 'balancing' can have two related meanings. First, it may mean the consideration of non-competition objectives... In this case, we have [either] expansion of the scope of competition rules beyond their traditional goals of protecting the competitive process... [or] the limitations on competition rules for the purpose of accommodating other policy concerns. For example, state aid is permitted under certain conditions for providers of services of general economic interest or for strengthening cohesion or for protecting the environment... In its rulings in *Albany* (C-67/96) and *Wouters* (C-309/99), the European Court of Justice also accepted that the attainment of social and regulatory policy goals in collective agreements and certain professional regulations, respectively, may also be weighted against competition concerns...'

⁵The idea of 'invisible hand' has been developed by Adam Smith in his famous 'The Wealth of Nation' work. According to this metaphor, an individual pursuing his own self-interest tends to also promote the good of his community. However Smith himself acknowledged the necessity for the limitation of certain economic behaviours: Adam Smith, 'An Inquiry into the Nature And Causes of the Wealth of Nations', Prometheus Books, 1991: 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices...'

⁶Christian Kirchner, 'Goals of Antitrust and Competition Law Revisited', 'The More Economic Approach to European Competition Law', Edited by Dieter Schmidtchen, Max Albert and Stefan Voigt, Mohr Siebeck, Tübingen, 2007: 'Competition is shaping the institutional framework of markets to a considerable degree. It is defining the limits of freedom of contract in order to keep the interaction process open and to keep the rivalry alive.'

2. THE IMPACT OF THE ECONOMIC CRISIS ON COMPETITION POLICY

As has been mentioned above, each economic crisis tends to shake doctrinal convictions of the advocates of liberal democracy in the omnipotent nature of free markets with undistorted competition. The reason for this partly lies in our uncritical perception of the mechanism of free markets as well as its assumed universality. Free markets as well as undistorted competition should be seen not as the most effective way of governing the economy (i.e. not in their utilitarian sense), but rather as a matter of principle, as an ideological presupposition of healthy liberalism (i.e. in their deontological sense). In that latter sense, the idea of free markets becomes uncompromising, since it takes its stand in the 'pantheon' of the decisive societal values. In this case no other discussion about the compromise is possible. On the contrary, if acknowledging that free competition is the issue of the *economic effect* and not only the issue of *the ideological choice*, it becomes possible to argue that in the difficult times free markets can be compromised to achieve more economically valuable short-term results. For the sake of consistency and due to the fact that the discourse of current debates about the role of competition in the times of recession is predominantly placed exactly in the latter, efficiency-based, reasoning, it is necessary to overview the main approaches to solving this conundrum.

Schematically one can define three conceptual approaches to the role of free market regulation in the period of recession. From the left side of the political spectrum, it is possible to argue that the recession shows ineffectiveness of competition ethos, inasmuch as competitory process has led the economy to the downturn. Therefore, the Smithian ideas of profit maximisation as the driving force of the economic efficiency should be either rejected or significantly limited. The role of state regulation should be, on the contrary, substantially increased, inasmuch as it is more predictable, 'fair' and balanced. The society cannot rely on the principle of free markets, since it is not a universal tool. In some situations it works well, in others it does not, and one cannot say in advance which outcomes the markets would generate next time.

According to moderate approach, the free market ethos has been proven to be insufficient and it has to be supplemented by state regulation. The advocates of this approach would claim that free markets cannot work without regulation, the economic recession shows that the regulatory control has to be more severe/better targeted and it should be expanded to some new areas in order to achieve better results. They do not see competition neither as a panacea nor a universal tool to generate efficiency. Therefore, competition policy should be redesigned in order to take into account 'the faults of the past' and prevent them in the future.⁷ Antitrust in this perspective is seen purely in its instrumental sense: As

⁷As an example of this approach see e.g. the speech of newly appointed Assistant Attorney General for Antitrust, US Department of Justice Christine A. Varney, 'Vigorous Antitrust Enforcement In the Challenging Era', Center for Economic Progress, May 11, 2009: 'As Shakespeare once put it – 'what's past is prologue'... The current economic challenges raise unique issues for antitrust authorities and private sectors. We are faced with market conditions that force us to engage in a critical analysis of previous enforcement approaches. That analysis makes clear that passive monitoring of market participants is not an option. Antitrust must be among the frontline issues in the Government's broader response to the distressed economy'.

far as it works, it should be supported, as soon as it stops working, it has to be redesigned. Antitrust for them is not (only) about competition and freedom to compete, but (also) about consumer welfare, market efficiency, industrial growth and economic sustainability.

From the right-wing ideological sight, competition is still the most appropriate solution to solve the crisis. Each economic crisis results in the survival of most adoptable and innovative companies. The recession is seen as a Darwinian evolutionary process, coming through which the companies and industries would become ever stronger. Regulatory intervention, on the contrary, is seen as a *Pandora box*, which is very dangerous to open and impossible to close afterwards. The recession is seen as a transition to new economy, once described by Schumpeter as ‘creative destruction’.⁸

None of the three scenarios are presented in their clear form in the present-day political discourse. Furthermore, paradoxically traditional advocates of strong state intervention, being driven by retribution sentiments want the governments to refrain from ‘unfair’ and ‘disproportional’ spending of tax-payers money for saving the banking and some other industries. They insist upon the punishment of greediness. On the other hand, those who traditionally advocate a libertarian approach to the economy, being driven by corporate solidarity, recommend the governments to bail out the industries and companies who suffered most. This is explained by the fact that banks and big manufacturers could be compared to a vascular system for the economy and employment respectively.

Some inconsistencies in the argumentation of all three approaches can be eliminated by understanding that the very notion – and not merely the role – of competition must be re-conceptualised. When competition does not work, maybe there is something wrong not in the idea of competition policy itself, but in the way how we perceive it. In the following section the paper offers a methodological tool for the analysis of correlation between the ‘invisible hand’ of the markets and the ‘visible hand’ of regulation from the perspective of the theory of dialectical antitrust.

3. INVISIBLE HAND AS A SOCIETAL LIBIDO

A superficial interpretation of the Smithian idea of the invisible hand of the markets makes an impression that markets can be self-sustained. According to this approach, every intervention into the market process is a violation of the principle of a free market economy. As has been pointed out by many authors,⁹ the idea of free-from-regulation

⁸Joseph A. Schumpeter, ‘Capitalism, Socialism and Democracy’, George Allen & Unwin, London, 1976 – ‘The opening up of new markets, foreign or domestic, and the organisational development from the craft shop and factory ... illustrate[s] the same process of individual mutation ... that incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.

⁹The doctrinal critique of this point has been elaborated inter alia by two Italian thinkers and politicians Luca Einaudi and Giuliano Amato. Luca Einaudi conditioned the markets to their regulators, (‘carabineers who protect existing order’), - Luigi Einaudi, ‘Selected Economic Essays’, Edited by Luca Einaudi, Riccardo Faucci and Roberto Marchionatti, Palgrave Macmillan, 2006. This notion has been contextualised to the regulation of competition by Giuliano Amato i.a. in ‘Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market’, Hart Publishing, 1997.

markets ('cowboy-style') is semantically insolvent. It is unrealistic to contrast free market to state intervention. The notion of a functioning market inherently presupposes the rules under which it operates. To enable fluent transaction of goods and services the agents have to establish such compulsory preconditions as currency, time, place for agreements, scale of measurement, code of conduct, quality standards, liability for breaching the contract, defence against violence, consumer protection as well as many other prerequisites. The very existence of market is also subject to an enforceable legal system and strong protection of property rights. All those tasks are impossible to achieve without regulation. Even ultra-libertarian anarchic theories do acknowledge at least minimal role of public authorities in the marketplace. Inasmuch as regulation is unavoidable for the very existence of the markets, its presence does not make them automatically restricted. Thus markets can be dialectically free and regulated in the same time.

This empirical fact by no means diminishes the role of an 'invisible hand'. Quite the contrary, the 'invisible hand' is an indispensable component of the free markets; it constitutes the distinctive feature of them. The discussion between economic liberals and protectionists has a perpetual nature and rather productive consequences, the results of which can be harmful only when some party would definitely win them.¹⁰

Each individual by maximising its own welfare maximises the total welfare. The 'invisible hand' as an internal stimulus to generate welfare can be compared to the notion of *libido*. Both, invisible hand and libido, are driving forces for evolutionary development, yet none of them is surfacing. Indeed, the personal life without libido is meaningless. Libido constitutes the driving force for evolutionary development. Similarly, not only a freedom but also a desire to compete is essential for markets. However, although life without libido/invisible hand does not make much sense, life only with libido/invisible hand is impossible either. Libido and restraints go hand in hand. They are inseparable. The same is the case with the markets. An invisible hand of the market is inevitable but by no means sufficient component for its functioning. The visible hand of a regulator is indispensable as well. Both hands are in a dialectical interplay with one another. They are correlated as form and essence (one is impossible without the other). Often such interplay is nothing else than a conflict, but here it is the algorithm of market's functioning.

Societies which consider that competition constitutes a core value for their evolution require regulatory intervention in the domain of competition. Competition should be not only preserved, but also protected and, if possibly, promoted. Thereby states become responsible for the 'fine-tuning' of the competitive process and accordingly public authorities intervene in the markets for many legitimate reasons. Regulatory activities of the state are too broad to be coherent. Most of them are 'merely' incoherent, some fairly conflicting, whereas others are mutually exclusive. Since states are required to achieve conflicting goals by conflicting means, they often face the necessity to make rational (sometimes tragic) choices: One cannot prioritise everything. Competition as a societal value of liberal democracies also belongs to the public domain which has to be protected. However, competition as well as all other legitimate economic interests cannot be protected in its entirety. Hence, competition goals can be compromised, but only on the external level

¹⁰For the history of the discussion between advocates of 'invisible' and 'visible' hands in the UK context see Frank Trentmann, 'Free Trade Nation', Oxford University Press, 2008.

of regulation, where the balancing act requires compromises by its very essence. Yet on the internal level competition should be seen in its deontological sense, as a separate value, which is independent from other legitimate economic values, such as consumer welfare.¹¹

4. TWO TYPES OF MARKET FAILURES

Not all kinds of state intervention are directed to *repair* market ‘failures’, some are performed to *enhance* the proper functioning of the markets, others – to substitute them. The very notion of market *failure* is subjective and is predetermined by the external political choices rather than the descriptive theoretical models. Analytically, markets never fail. In this respect they are similar to Darwinian selection process, which can be modified but never abolished. Regulators accept some of the market solutions, others are not accepted, yet all of them remain to be the *answers*, which provide the *language* of the markets with its fullness, plenitude and completeness. From a market theory perspective, ‘the taste of the apples’ is not decisive. Institutionally, the markets of ice-cream and the markets of illegal drugs have much more similarities than the products, which are selling on them. The ‘colour’ of markets is irrelevant; the common feature of all ‘white’, ‘grey’ and ‘black’ markets is that all are driven by the invisible hand of the spirit of enterprise (on the one part) and external regulation of policymakers (on the other).

However, since the term market failure is commonly accepted, there is a necessity to distinguish between two different ‘failures’: An internal and external. The first is related to the proper functioning of the markets as a value-neutral system. Such ‘failures’ need regulation of the very mechanisms of the markets. They have to be fixed not because they provide the best solution for society, but because they have been broken. Thus the internal market failures take place when the market process does not work properly due to some inside (e.g. breach of contract) or outside (e.g. economic recession) factors. This type of market ‘failures’ would require regulatory intervention for the purposes of the market functioning as such. This intervention is undertaken for the correction of the markets regardless of their societal importance.

The second sort of market failures are related to the outcomes which markets offer. Even the proper functioning of the markets can cause negative outcomes for society.¹² Therefore it requires many different regulators to intervene, in order to correct this external failure. Thus the external market failures occur when the outcomes which are generated by the market process are unsatisfactory from the broader regulatory perspective. Thereby, on the one hand regulatory intervention is necessary for the markets themselves (i.e. regulation to correct internal market failures) and on the other – regulatory intervention is required to balance the outcomes of the markets with other legitimate societal values (i.e. regulation to correct external market failures).

¹¹According to those scholars who advocate act-utilitarian approach to antitrust, the ultimate goal of competition is protection of consumer welfare. Thinkers from deontological tradition (e.g. Austrian School or rule-utilitarians) consider that competition as a process should be protected, which in its turn will have a positive effect of consumer welfare.

¹²In the previous example of black markets, state regulators strive to prohibit them because they are illegal (hence, undesirable from the societal perspective). However, the illegality of black markets does not eliminate their ontological feature of being the ‘markets’.

5. COMPETITION - COMPETITORS - COMPETITIVENESS

The terms 'competition', 'competitors' and 'competitiveness' are often used in antitrust scholarship as synonyms. Yet these three terms have very different nature. The right to compete is not indispensable for the existence of competition, since technically competition can take place between only those who do not need their right to compete to be protected: They are ready to compete, relying solely on their own power and ability to survive within the market battle.¹³ The right to compete is a distinctive feature of *some* models of competition; nonetheless it is not the prerequisite of the very existence of competition.

The right to compete is an attribute of social-market economy, which emphasises not only on the procedural equality and *laissez faire*, but also on the distributive elements of the society, it considers that no society can guarantee a sustainable economic growth, unless it provides a fair share of its total welfare to all its members and not only to their most successful fraction. This is the reason, why the right to compete is considered as an important economic right. Its protection has not much to do with competition as such. It is protected not for the sake of preserving an effective competition, but rather for the expenses of it. They constitute two different economic substances.

Another 'phonetic twin' of competition, which has to be separated from it, is competitiveness.¹⁴ Competitiveness refers to the ability and readiness to compete, and does not depend upon existence of competition as such. Furthermore, there are several means how to achieve competitiveness, and only one of them presupposes competition. Competitiveness is an external feature, while competition is on the contrary an internal process.¹⁵ European industrial policy is a typical example of competitiveness. Its main purpose is external. It is preoccupied with the position of Europe in the international context. Currently competition is considered as a tool to achieve European competitiveness, but other economic policies do not necessarily share European premises in the effectiveness of competition. Some of them consider that a planned-economy can provide more efficient results in terms of their competitiveness (or ability to compete) within the international markets.¹⁶ The goals, related to industrial policy within the global economy can be achieved by several alternative means: Competition, protectionism, planned economy, authoritarianism...

As it has been emphasised for many times by the DG COMP and in particular by Commissioner Neelie Kroes, the European Union has its long history of correlations between industrial and competition policies, which now enters a new era.¹⁷ The Commission abandons an old-fashion approach to industrial policy, which is one related to

¹³The right to compete is seen by some scholars (e.g. Ordoliberal School) as a quintessential constitutional right (see i.a. Christian Joerges, Florian Rühl, 'Social Market Economy' as Europe's Social Model?', EUI Working Papers, Law, 2004/08.). Ordoliberal School places the emphasis on the passive rights to enter the markets for (predominantly) weaker parties. Therefore the criterion of 'workable' competition in this respect would be low barriers to entry rather than the desire to enter the markets (as it would be the case for Austrian School).

¹⁴The term 'anticompetitive' is used as an indicator of the harm to three different attributes interchangeably: (i) competition (ii) competitors (iii) competitiveness. Often these three notions are not synonyms, sometime even antonyms. What is harmful to one can be useful to others.

¹⁵Frank Easterbrook, 'Ignorance and Antitrust,' Antitrust, innovation, and competitiveness, Oxford University Press, 1992.

¹⁶e.g. Schumpeter argued that there was no inherent reason why central planning should work less well than free markets in the production of technological innovation.

¹⁷Neelie Kroes, 'Industrial Policy and Competition Law and Policy', 2006 Fordham Comp. L. Inst. 201 (B. Hawk ed. 2007) 'Industrial policy and competition policy: For Europeans... just putting these two notions in one sentence still tends to conjure up a great ideological divide, a divide between Colbertian 'dirigistes' and economic libertarians – on the one hand, a faith in the ability of governments to successfully build, direct and protect the supply side of the economy and on the other hand, a belief that markets should be subject only to rules to guarantee a level playing field, but that markets are otherwise best left to their own devices... As a result ... industrial policy has been rather bad-mouthed by the advocates of competition policy.'

protectionism and launches a new one, coherent with R&D and innovation-oriented purposes of the Lisbon Agenda.¹⁸ Competition policy plays an important role in this process, but both remain to be non-identical.

Despite the deep empirical interpenetration, the theoretical possibility of the separation between industrial and competition policy is still undisputable. Ultimately, they are interdependent and interchangeable tools for the regulation of the marketplaces, but their methods, priorities and emphasises, their very *raison d'être*, are distinctive. While industrial policy strives to achieve the best results within the context of external economic dimension, the competition policy, perceived in its deontological form, is predominantly internal and oriented much more on the process than the result.¹⁹

The difference between the right to compete and the right to competition is not only theoretical. By transposing the notion of competition from the domain of individual rights to the area of collective values, the nature of antitrust is changing: From means, it transforms into ends. Even ineffective competition deserves to be protected on the level of political choices and ideological beliefs. In this sense competition is a synonym of economic freedom.

6. CONCLUSIONS

So can the role of competition in the period of recession be reassessed? In other words, should we still trust in antitrust? The answer would be positive if competition will be seen as an independent societal value which deserves its legal protection and political support regardless of the outcomes it generates. This value should be seen dialectically as absolute, which can be however compromised due to its conflict with other absolute values. The role of competition is implicitly recognised even by the governments which provided immense financial support for some sectors of their economies. Thus even in cases where some commercial institutions have been nationalised, their management board remained to be independent from the states' influence. The reason for this is based in the understanding that an 'invisible hand' of the markets is a more efficient tool for achieving long-term economic benefits than direct state intervention.

¹⁸Neelie Kroes, 'Industrial Policy and Competition Law and Policy,' *ibid.*: '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. I therefore have no qualms in saying that competition policy should form a central plank in any industrial policy.'

¹⁹Compare the US attitude to the role of competition in industrial policy. Antitrust Modernization Commission Report and Recommendations, April 2007: 'Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to 'improve' competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and sometimes, governmental) restraints that frustrate the operation of free-market competition.'

When a state bails out some industries, it is in the position to influence the future design of those industries. For instance, some countries have already proposed that their financial injections into the economy will prioritise environmentally efficient technologies. Similarly, support of the motorcar industry has already resulted in a proposal to implement a special satellite tracker, which would supposedly help the motorists in case of emergency.²⁰ The same approach can be implemented in the area of competition. Inasmuch as the pre-recession antitrust model has been already infringed by the inevitable state aid, it must be redesigned in the way which would enable the legislative and/or regulatory authorities to implement more innovative approaches to competition policy.

²⁰In the future this device can be also used to detect any excess of speed limits. The interest of regulator in this case becomes more tangible.