

Cristoforo Osti

**MAKING SENSE OF
GLOBAL ANTITRUST**

Courmayeur, 19 settembre 2014

I. US Antitrust

A. 1890-1978: Political Content

1. Senator Sherman (1890)

*If the concentrated powers of this combination are intrusted to a single man, it is a **kingly prerogative** inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities. If anything is wrong, this is wrong. **If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition, and to fix the price of any commodity.***

2. US 1911 (Standard Oil)

*[the parliamentary debates] conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, **the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress***

3. US 1958 (Northern Pacific)

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

4. Wilson (as president)

If monopoly persists, monopoly will always sit at the helm of government. I do not expect to see monopoly restraint itself. If there are men in this country big enough to own the government of the United States, they are going to own it.

5. US 1978 (National Association of Professional Engineers)

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition" The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain— quality, service, safety, and durability— and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

6. Political bargain: consumers/entrepreneurs, big/small business (Thorelli: alternative to Marxism)

7. Attempts at deconcentration (Neal Task Force, 1968; Hart Bill, 1973)

Temporary conclusion: Antitrust 1890-1978

- ~~It's~~ about monopolies (*antitrust*)
- ~~It's~~ about rivalry
- ~~It's~~ about protecting the democratic system
- ~~It's~~ about competition, not as a means but as an end

Antitrust 1978-Today: ÷Consumer Welfare

“ **Bork’s Antitrust Paradox**

“ **1979 Reiter** (citing Bork)

[the parliamentary debates] *suggest that Congress designed the Sherman Act as a "consumer welfare prescription*

Q.: Does the Court know what consumer welfare means in Bork’s vision?

In short:

1. Consumer Welfare → Total Welfare

(Bork)

2. Efficiency > Total Welfare

- **Competition not an end but merely a means to achieve efficiency**

Posner

[W]e value competition because it promotes efficiency--i.e., as a means rather than as an end

Assumptions about efficiency (which prevails on competition)

- exclusive dealing (free riding assumption)
- predatory pricing (*õno economic senseö assumption)*
- tie-in (*õsingle monopolyö assumption)*
- horizontal mergers (contestability assumption)
- Monopoly is efficient

Trinko

“ Monopoly

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices-- at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.

“ Decision theory

*Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." **The cost of false positives counsels against an undue expansion of § 2 liability.***

3. Antitrust protects competition, not competitors

→ Exclusionary practices not a problem as long as consumer is not affected directly and in the short run

“Problems of such antitrust standard

1. Is devoid of much intellectual consistency

- a. Is based on *à-passé* economics (post-Chicago qualifications and complexities; Behavioral Economics)
- b. Ignores *à-dynamic* dimension
- c. Ignores other dimensions of market power: quality; variety
- d. Never considers *à-actual* effects on consumers
- e. Does not consider medium and long-term effects of practices (and interventions)

- c. Ignores relationship between competition and innovation
- d. Always assumes efficiency
- e. In the end may be mostly a product of ideology

2. *Has lost its legitimacy*

- a. Antitrust has become extremely hard for laymen to understand;
- b. It has lost sight of its *political content*, as it:
 - i. Is lenient vis-à-vis business behemoths in monopolization and merger cases;
 - ii. Affords no protection from business interference in the democratic process;
 - iii. Ignores *capture* effects of consolidations on regulators;
 - iv. Considers rivalry and deconcentration *per se* irrelevant;
 - v. Has reneged on the original *political bargain* between big business, on the one hand, and small business and consumers, on the other

II. EU Competition Law

A. The origins of the ECSC. Monnet meets Dean Acheson and expounds his plan:

[He] was suspecting a sort of great coal and steel cartel, a nostalgic desire of European industrialists and an unforgivable sin for an American, respectful of competition law and free trade [í] much supervision was still required as well as very stringent legal rules ó a true European anti-cartel law - in order to dissipate the suspect of such thing, as well as the thing itself.

Drafted under the supervision of Monnet, õwith meticulous careö by Harvard antitrust professor Robert Bowie, with some intervention from US lawyer George Ball and subsequently, as narrated by Ball himself, õrewritten in a European idiomö by Maurice Lagrange of the Conseil

B. 1973 Continental Can

Court:

the provision [of Article 86] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty.

Mestmäcker:

*competition law does not merely protect a certain degree of market efficiency, **but it protects individual liberties against types of conduct that endanger competition if generalized. The protection of individual liberties is, at the same time, closely linked to the protection of competition as an institution, and to competition law's economic rationale:** Article 82 must, in the medium and long term, protect the possibility that positions of dominance will be corrected by the market. This presupposes the protection of those elements of competition that still persist.*

C. Influence of **Ordoliberalism**?

What is Ordoliberalism?

Was it really on the agenda? Akmar, based on the study of *travaux préparatoires*

Which Ordoliberalism?

Certainly, no hard-core Ordoliberalism (Josten draft, deconcentration).

Essence of ordoliberalism (Franz Böhm):

*the real motives behind the enactment of antitrust law were [. . .] **not economic efficiency and the effectiveness of economic control, but social justice and civil liberties which were held to be threatened by monopolies.***

Paramount: Idea of competition: ≠freedom of competitionø ≠complete competitionø

Competition as *Entmachtungsinstrument*

“ preserving allocative efficiency

“ avoiding the democratic system being captured by powerful economic interest groups

“ maintaining legitimacy

D. 30 years pass, and Commission adopts the "more economic approach"

Commission's 2004 Article 81.3 Guidelines (since repealed):

The objective of Article 81 [now 101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.

[But: "competitive process", "competition on the merits"]

[Merger Guidelines; Article 102 Guidelines]

Statements of Commissioner Monti

E. 2007 British Airways

Moreover, as the Court has already held in paragraph 26 of its judgment in Europemballage and Continental Can, Article 82 EC is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC.

AG Kokott:

The starting-point here must be the protective purpose of Article 82 EC. The provision forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.

Competition as an Institution: Relativization of private law rights (freedom of contract and of competition) for the general well-functioning of the market within a public law

F. 2009 Glaxo (parallel trade)

General Court:

[T]he objective assigned to Article 81(1) EC [1] is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question.

But, Court of Justice:

With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position.

[1] it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.

III. The *new* national systems

123 countries and 6 international organizations

- A. ICNø Report on the Objectives of Unilateral Conduct Laws (34 countries and the European Union):
 - a. **Ensuring an effective competitive process (32);**
 - b. Promoting consumer welfare (30);
 - c. Enhancing efficiency (20);
 - d. **Ensuring economic freedom (13);**
 - e. **Ensuring a level playing-field for small- and medium-sized enterprises (7);**
 - f. **Promoting fairness and equality (6);**
 - g. **Promoting consumer choice (5);**
 - h. **Achieving market integration (4);**
 - i. Facilitating privatization and market liberalization (2);
 - j. **Promoting competitiveness in international markets (2).**

[German agency, the *Bundeskartellamt*, considers that ðthe protection of competition as an institutionö, ðprevails as a direct goalö, in the sense that all others, including consumer welfare, descend from it *indirectly*]

B. Brazil, China, India, South Africa

- i. Protection of fair competition (China);**
- ii. Repression of economic power (Brazil);** such goal is so strongly enshrined in the Brazilian system that *õ*domination of the relevant market \ddot{o} is considered illegal as such and mergers can be blocked which *õ*may result in the domination of the relevant market \ddot{o} . similar is the *prevention of monopolistic conduct (China)*;
- iii. Enhancement of efficiency (China; India; South Africa);**
- iv. Protection of the social public interest (China) or of *õ*public interest \ddot{o} in general (South Africa);**
- v. Protecting employment (South Africa);**
- vi. Protecting social welfare (South Africa);**
- vii. Promoting a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (South Africa).**
- viii. Protection of the social function of property (Brazil);**
- ix. Defense of consumers (Brazil; China; South Africa);**
- x. Promoting technical progress (China);**

- xi. Ensuring that the operation of business is lawful, honest, in good faith, conduct is strictly self-disciplined, accepts social supervision, and does not damage the interests of consumers (China);**
- xii. Promoting the adaptability of the national economy (South Africa);**
- xiii. Promoting development (South Africa);**
- xiv. Promoting the healthy development of the socialist market economy (China);**
- xv. Advancing a unified, open, competitive and orderly market system (China);**
- xvi. Preventing the abuse of administrative power by public bodies (China);**
- xvii. Avoiding an arbitrary increase in profits (Brazil);**
- xviii. Eliminating barriers to entry (Brazil);**
- xix. Preventing exclusive conduct against competitors (Brazil; South Africa);**
- xx. Avoiding exclusion in the advertising market (Brazil);**

- xxi. Avoiding fraudulent price oscillations (Brazil);**
- xxii.Preventing Resale Price Maintenance and similar practices (Brazil, China, India, South Africa);
- xxiii.Reinforcing the competitiveness of small and medium-sized business operators (China; South Africa);**
- xxiv.Mitigating serious decrease in sales volume or obviously excessive production during economic recessions (China);**
- xxv.Safeguarding the justifiable interests in the foreign trade or foreign economic cooperation (China) or ãexpand opportunities of participation in the world marketö (South Africa);**
- xxvi.Preserving national economic development (China);**
- xxvii.Preserving national security (China).**

In sum:

Clear preference for an antitrust enforcement not focusing exclusively or even mainly on consumer welfare or rather efficiency *stricto sensu* but on the openness of the market contrasting monopolies, openness, fair competition, prohibition of exclusionary conduct aimed at competitors, fight against monopolies, protection of small business and consumers and even, as we have seen, on wealth redistribution.

New antitrust countries see their antitrust as much more in line with the true meaning of antitrust as it has developed for decades in the advanced countries themselves

C. Asian Countries

- *Different relevance of competition considerations: rivalry is not a social value and actually it is highly suspect* (Hofstede, Pape)
- **Highly differentiated systems:** competition is mostly on products rather than price; economy is export-oriented rather than tending to respond to consumer demand; State has an important role to play and a parallel State economy exists alongside the private one; production is scattered across national boundaries; demand is volatile; markets are too small to achieve economies of scale; different areas of the same countries have different production and competition models.

But:

- Maybe not so different from original US values;
- Canada, Germany, UK, all have "public interest" provisions in their merger legislation;

D. Developing economies

1. Fight against Monopolies acquires a special pre-eminence:

- a) keeps rivalry alive;
- b) keeps access to market or market expansion open for possibly more efficient and/or more innovating competitors
- c) limits political pressure for avoiding that the system be rigged.

2. Growth: for the élite?

Lower echelon of society may benefit from greater efficiency and economic advancement, but the divide between classes may become so steep as become politically unacceptable and challenge the credibility and legitimacy of the whole system.

In so far as competition law, in fostering growth remains oblivious to the issue of income equality, it may work in the sense of not only increasing the social divide, but even poverty and unemployment of certain areas or industries (e.g.: small retailers when supermarket chains enter the market).

E. Additional Benefits of a Vigorous Antitrust Enforcement

1. Innovation

Arrow ⇔ Schumpeter

True no clear relationship between *concentration* and innovation. But rather clear one between *competition* and innovation

Porter

*Innovation provides products and services of ever increasing consumer value, as well as ways of producing products more efficiently, both of which contribute directly to productivity. **Innovation, in this broad sense, is driven by competition.** [í] One need only review the dismal innovation record of countries lacking strong competition to be convinced of this fact. Vigorous competition in a supportive business environment is the only path to sustained productivity growth, and therefore to long term economic vitality.*

2. Size (e.g., financial meltdown)

Stiglitz

too big to fail, too interconnected to fail, and too correlated to fail [1]

*there is **an implicit government subsidy**, and it leads to an uneven playing field for getting access to capital at lower interest rates--there is well-documented evidence on that--and it distorts behavior and imposes enormous costs on the rest of our society.*

3. Inequality

In so far as **income inequality brings to a decrease in the propensity to consume**, inequality is an important, perhaps the most important, element in the laggard growth which has characterized in the latest years most Western economies.

4. Inclusion (Acemoglu and Robinson , Why Nations Fail)

Institutions matters

Inclusive economic institutions that enforce property rights, create a level playing field, and encourage investments in new technologies and skills are more conducive to economic growth than extractive economic institutions that are structured to extract resources from the many by the few [1] Inclusive economic institutions, are in turn supported by, and support, inclusive political institutions

American antitrust (Robber Barons)

*Markets can be dominated by a few firms, charging exorbitant prices and blocking the entry of more efficient rivals and new technologies. Markets, left to their own devices, can cease to be inclusive, becoming increasingly dominated by the economically and politically powerful. Widespread monopoly, backed by the political power of the elite, contradicts this. **But the reaction to the monopoly trusts also illustrates that when political institutions are inclusive, they create a countervailing force against movements away from inclusive markets.** [1] *Trusts busting in the United States in contrast to what we have seen in Mexico, illustrated this facet of the virtuous circle. While there is no political body in Mexico restricting Carlos Slim's monopoly, the Sherman and Clayton Acts have been used repeatedly in the United States over the past century to restrict trusts, monopolies, and cartels, and to ensure that markets remain inclusive.**

Conclusions

An antitrust focusing on preserving the competitive process, rivalry, and containing monopolies:

1. Is consistent with antitrust's history

2. Restores antitrust's legitimacy in the community

3. Is workable

4. Fosters Innovation

5. Limits systemic risks

6. Promotes the growth of nations not only in their economic but also in their social and political dimensions

IV. Suggested Applications

“Antitrust focusing on **rivalry and the containment of economic power** as a means to protect and preserve both functions of antitrust:

“ **Consumer-welfare based** and (wealth maximization and efficiency)

“**Non consumer-welfare based** (protection of the democratic process; variety; legitimacy of system)

So

“Mergers, in particular horizontal and conglomerate ones: where the political content is at its strongest, behavioral economics bias are significant, and research shows the outcome may be blatantly inefficient);

“ A more active enforcement in the media sector;

“ In monopolization cases, a much closer look at the assumption that harming competitors may be almost *per se* innocuous, as quite simple such enforcement concept in the medium term inevitably achieves is favoring the monopolization of the market; same for the tricky *as efficient competitor* test;

“In vertical restraints cases, leave it to the defendant to show that efficiencies generated exceed perceived harm (e.g. price raise)

“A greater recourse to **behavioral economics**, as in the area of unilateral or collective consumer manipulation (e.g., extended warranties and credit card cases; supermarkets; mergers; telephone charges) where suppliers have actually an incentive to exploit such biases, including because not doing so would impact on their profits and market shares and increasing the quality and transparency of their services would meet no positive response from consumers;

“ A constant supervision of network effects and patent exclusionary practices;

“A more balanced re-consideration of **divestiture** remedies in any form of antitrust enforcement, as experience shows that this may at times and in the long run be the only effective means to restore and preserve competition;

“ A more active supervision of **oligopolies** and so-called co-ordinated effects in he areas of restrictive agreements, **monopolization** and mergers.