



The Goals of EU Competition Policy: Beyond Consumer Welfare?

SANDRA MARCO COLINO

What do Louis Brandeis, hipsters and fairness have in common?



FAIRNESS



Is it desirable/possible to bring fairness considerations into the application of competition law?

- ▶ **Procedural** fairness: seen as indispensable
- ▶ **Substantive** fairness: including non-economic aims in competition law and policy – highly disputed

The battle for the 'soul' of antitrust

- ▶ Two sides:
 - ▶ Those who defend that the markets work more efficiently when (almost entirely) unconstrained by regulation
 - ▶ those for whom economics is just 'one of the tools used to carry out the *spirit* of the law' (Eleanor Fox) → **room for fairness considerations**
- ▶ Debate recently exacerbated:
 - ▶ Influence of antitrust around the world grows
 - ▶ US antitrust is 'stalling'

Boost of competition law/antitrust

- ▶ Antitrust as a 'viral phenomenon'
- ▶ Over 130 antitrust regimes in the world
- ▶ Antitrust serves different purposes depending on needs of jurisdiction:
 - ▶ Developed economies: allocative efficiency
 - ▶ Developing economies: distributive efficiency
 - ▶ Catering for society's weakest members
 - ▶ Guaranteeing equal opportunity for all to fend for themselves

Antitrust in the US

- ▶ Considered the birthplace of modern antitrust (Sherman Act 1890)
- ▶ Since the 1970s antitrust policy influenced by the Chicago School
 - ▶ Robert Bork's *Antitrust Paradox*: simple (simplistic?) 'judge-friendly theory of economics that allowed judges to dismiss antitrust cases quickly'
 - ▶ Reagan administration used it to shift antitrust policy towards neoclassical economics and *laissez-faireism*
 - ▶ Conservative enforcers and judges appointed
- ▶ Struggling to respond to escalating market concentration and inequality
- ▶ Recent examples:
 - ▶ *Ohio v American Express (Amex)* 2018: 'big blow to antitrust law and its traditional mission of helping consumers and fostering economic competition' (Tim Wu)
 - ▶ *AT&T/Time Warner* merger (2018): approved despite 'ample history that when businesses obtain monopoly power they become less interested in innovation or passing on margin improvements to consumers' (Richard Levick)

How did we get here?



- ▶ Trickle-down economics: 'a rising tide will lift all boats'
- ▶ Antitrust undesirable for imposing undesirable restraints on big firms
- ▶ Stripped on moral or social purpose, it was relegated to pursuing the most blatant forms of collusion
- ▶ Consequences: markets are displaying record levels of concentration, market entry is low, inequality is on the rise

Competition policy implications

How has this affected antitrust doctrine?

- ▶ Legalists v discretionarlists (Pablo Ibáñez Colomo)
 - ▶ Legalists: fairness would contaminate antitrust with arbitrariness; consistency and predictability fundamental
 - ▶ Discretionarlists: competition law is impregnated by values of society; attention to fairness and consumer protection issues
- ▶ Emergence of New Brandeis School (“hipster antitrust”):
 - ▶ Call for fairness considerations
 - ▶ Link between permissive antitrust and inequality
 - ▶ Intention of Congress forgotten, requires developing more sophisticated enforcement principles to effectively single out and combat harmful anticompetitive conduct
 - ▶ ‘If antitrust plaintiffs injured by truly anticompetitive actions lose their lawsuits because the profit-maximization hypothesis is too blunt an instrument to permit a court to appreciate the merits of their claims, it is not a satisfactory response to assert that the victims of anticompetitive actions have no inherent call on the law’s protections’ (Edwin Hughes)

EU competition law beyond consumer welfare

- ▶ Competition Commissioner Margrethe Vestager refers to fairness
- ▶ Abuses of market power harshly treated
- ▶ Google Android case: record €4.34 billion penalty imposed for
 1. Tying (must-have) Google Play Store app pre-installation of other apps;
 2. Giving financial incentives to smartphone manufacturers for the exclusive pre-installation of Google Search on Android devices; and
 3. Precluding manufacturers from offering rival (“forked”) versions of Android if they wished to pre-install Google apps
- ▶ Excessive or unfair prices also punished (AKKA/LAA case)
- ▶ Predatory pricing (*Qualcomm*)

New jurisdictions: China's competition policy

- ▶ Art 1 Anti-Monopoly Law (AML): 'protection of fair competition in the market' a goal of Chinese competition policy
- ▶ Cases:
 - ▶ *Qualcomm* (2015) fined ¥6.08 billion for
 1. charging unfairly high patent license royalties
 2. tying the sale of its standard essential patents (SEPs) to non-SEPs
 3. making the sale of their baseband chips conditional on the acceptance of unreasonable patent licensing agreements
 - ▶ *Tetra Pak* (2016) fined ¥667.7 million for
 1. Tying sale of packaging goods to filling machinery and technical service
 2. Imposing unjustified exclusive dealing obligations on upstream supplier
 3. Offering retroactive, loyalty-inducing discounts on packaging materials
- ▶ Exploitative and exclusionary abuses may be unlawful



Going beyond consumer welfare: criticisms

Industrial policy

- ▶ 'political interference either within antitrust or from outside of antitrust (such as through the political process or sector regulation), in which economic analysis that is not based on antitrust economics may shape antitrust enforcement' (Danny Sokol)
- ▶ Fairness almost unavoidably included here
- ▶ EU: protection of the interests of competitors and consumers express goals of EU competition policy
- ▶ China: multiplicity of goals, unreasoned decisions
- ▶ 'some of MOFCOM's decisions have been attempts to frame political concerns within the language of economic analysis' (Sokol)

Protectionism

▶ EU:

- ▶ Google Android decision described as 'protectionism masquerading as consumerism' (James Pethokoukis)
- ▶ 'Your tax lady [Vestager], she hates the US' (US President Donald Trump speaking to European Council President Donald Tusk)
- ▶ Explained by different purpose and shape of EU competition policy, supposed to strive for 'constant improvements of the living and working conditions of European citizens', removing obstacles to 'guarantee steady expansion, balanced trade and fair competition', and committed to "'educating the differences existing between the various regions'

▶ China

- ▶ 'A significant proportion of the high-profile cases appear to involve big foreign firms' (Mark Williams)
- ▶ Authorities under pressure 'to aggressively target foreign companies in order to protect and bolster indigenous Chinese companies and businesses' (Thomas Horton)
- ▶ Too early to tell



“ Antitrust is dead ... as a consumer, I don't have any problem with prices, quality of products—I think it's great—and neither does my cat, who is an avid consumer of extremely expensive cat food. So we're happy. I don't have any reaction really to the concerns being expressed about concentration, monopoly ”

RICHARD POSNER

Problem: Posner is speaking as a *wealthy* consumer

Way forward

Things to consider

- ▶ Stagnation of antitrust in the US: policy developing purposefully with its back turned to moral and social justice
- ▶ Invigorated debate suggests reconsideration of Chicago school influence
- ▶ Antitrust has gained a 'political salience' which had not been felt since 1912 (Roosevelt) – see Elizabeth Warren's promise to break up tech companies
- ▶ Solutions:
 - ▶ Policies aimed at reducing market power can accordingly play some role in the reduction of inequality (Joseph Stiglitz)
 - ▶ Need for bright lines to avoid arbitrary enforcement: fairness is 'a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice' (George Stigler)
 - ▶ Greater scholarly attention to fairness: '[t]he wealth of scholarly interest in the efficiency consequences of antitrust doctrine has not been matched by concomitant attention to the issues of why and under what circumstances plaintiffs in antitrust suits have legitimate claims to the law's protections, regardless of the actions' effects on the market' (Hughes)
 - ▶ Rediscovering the spirit of the law

Issues for the panel discussion

- ▶ Does antitrust needs to be ambitious and aim to curtail market power in and of itself?
- ▶ Work of the European Commission and EU courts in delineating the boundaries of a workable new standard
 - ▶ EU: harsh stance on abuse of dominance, increasing tendency to block big mergers – but economic analysis appears to take centre stage in recent decisions
 - ▶ China: balance between fair competition and legal certainty, but need to substantiate decisions with thorough reasoning
- ▶ Enhancing cross-border dialogue crucial to launch a new, fairness-conscious era of antitrust



END

Queries or questions: s.marccolino@cuhk.edu.hk