

Antitrust Law & Economics Under Attack: Populism Versus Innovation

Dr. Aurelien Portuese¹

The economic analysis of antitrust laws is on the wane. The Chicago School influentially developed an antitrust approach with the principle of economic efficiency as the North Star of enforcement analysis. Robert Bork has seminally singled out *The Antitrust Paradox* of his time: Antitrust suppressed the competition it should foster. Conducive to an economic analysis of antitrust laws, “Borkian” antitrust has nonetheless experienced continuous criticisms. Recently, powerful assaults revived an old antitrust approach—the populist approach. Self-proclaimed the “Neo-Brandeisians” after Justice Louis D. Brandeis who extolled small businesses and mocked the “Curse of Bigness,” antitrust populism represents a paradigm-shift away from antitrust law & economics in favor of greater discretionary power in redesigning markets for the sake of a market competition made of small business units.

This article argues that the limits of the Borkian antitrust do not justify embracing the populist Brandeisian antitrust. Antitrust is at a crossroads: It can reject Brandeisian antitrust without necessarily reverting to a passé Borkian antitrust. Economic analysis of antitrust laws remains relevant only if we take efficiency seriously—namely, as including not only allocative and productive efficiencies but also and most importantly, dynamic efficiency (i.e., innovation). An economic analysis of antitrust laws relevant to today’s (and tomorrow’s) economy can only be innovation-centric. Dynamic efficiency in the antitrust analysis would avoid the misguided populist antitrust approach, but it would also frame antitrust analysis in line with Schumpeterian principles. If innovation matters, Schumpeterian competition needs to be the cornerstone of a renewed economic analysis of antitrust laws.

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Law Economics And Antitrust Law Economics And Antitrust

Terry Calvani, John J. Siegfried



Law Economics And Antitrust Law Economics And Antitrust:

Law, Economics and Antitrust Paddy McNutt, 2005-01-01 those who are dealing with antitrust issues the book is very useful and if somebody has already acquired the basic economic principles underlying antitrust regimes one should read this book Pal Bela Szilagyi and Dorina Juhasz Erasmus Law and Economics Review The book is quite often an interesting read and provokes plenty of unexpected thoughts Scholars familiar with the public choice literature and American antitrust law could benefit from the stimulating questions McNutt raises throughout and for the wealth of examples from European competition law Scott E Graves The Law and Politics Book Review Patrick McNutt s book is a brilliant expos of the interaction between law economics and antitrust The author an economist and distinguished regulator handles both the legal and economic material deftly It is provocative particularly when dealing with issues such as the efficiency of competition and the effectiveness of antitrust rules His case studies are particularly compelling The book is written with huge flair and great learning It combines theoretical and practical considerations The comparative coverage is excellent A must read for all interested in law and economics Antitrust specialists will discover many novel and valid insights David O Keeffe University College London UK and College of Europe Bruges Belgium This book continually stimulates the reader to think about the issues in non standard and illuminating ways following new and significant directions Yet the discussion always is authoritatively grounded in the author s extensive knowledge of the pertinent law and the relevant economic analysis William J Baumol New York University US and Princeton University US Professor McNutt provides a refreshing and different perspective on the important fundamental issues underlying competition law and policy Barry E Hawk Skadden Arps Slate Meagher Flom LLP US In this accessible yet rigorous textbook Patrick McNutt presents a clear and refreshing approach to a wide range of topics in law economics and antitrust The issues covered include duty and obligation contracting liability property rights efficient entry compensation oligopoly pricing issues in strategic antitrust and merger analysis Using a selection of case studies where appropriate and examples based in game theory the book examines these issues from both a law and economics and a microeconomics perspective Emphasis is placed on a thorough assessment of the economic and legal arguments blending the rigours of microeconomic analysis with common law standards The analysis contained in the book will not only review and indeed adapt neoclassical economic analysis but will also apply some of the methodology from the relatively new paradigm known as law and economics to many of the issues The book also addresses the increasing overlap between emerging approaches in public choice and in law and economics Practitioners in competition law and regulation of utilities will draw great value from this original and pertinent volume as will scholars in the areas of regulation competition law competition policy and law and economics

Antitrust Law and Economics John B. Kirkwood, 2004-07 Contains ten papers by prominent authors examining antitrust issues The first paper summarizes the other papers and presents research on the meaning of consumer welfare and the sources of buyer power The next five articles evaluate

antitrust cases to determine whether the decisions reached the relief ordered enhanced consumer welfare *Economics of Antitrust Law* Benjamin Klein, Andres V. Lerner, 2008 **Research Handbook on the Economics of Antitrust Law** Einer Elhauge, 2012 One might mistakenly think that the long tradition of economic analysis in antitrust law would mean there is little new to say Yet the field is surprisingly dynamic and changing The specially commissioned chapters in this landmark volume offer a rigorous analysis of the field's most current and contentious issues Focusing on those areas of antitrust economics that are most in flux leading scholars discuss topics such as mergers that create unilateral effects or eliminate potential competition whether market definition is necessary tying bundled discounts and loyalty discounts a new theory of predatory pricing assessing vertical price fixing after Leegin proving horizontal agreements after Twombly modern analysis of monopsony power the economics of antitrust enforcement international antitrust issues antitrust in regulated industries the antitrust patent intersection and modern methods for measuring antitrust damages Students and scholars of law and economics law practitioners regulators and economists with an interest in industrial organization and consulting will find this seminal Handbook an essential and informative resource **Antitrust Law and Economics of Product Distribution**, 2006 Antitrust Law and Economics of Product Distribution explores the economics of product distribution and examines whether the courts have formulated legal standards consistent with those economic principles focusing on the sale of goods through dealers distributors and franchisees *Antitrust Law and Economics in a Nutshell* Ernest Gellhorn, William E. Kovacic, 1994 *Fair Competition* Joel B. Dirlam, Alfred Edward Kahn, 1970-03-05 The authors attempt to defend antitrust laws against the critics After summarizing 15 years of court decisions they conclude that the Sherman and Clayton Acts have not deviated from their historic and proper path *Welfare Economics and Antitrust Policy - Vol. I* Richard S. Markovits, 2021-10-18 This book is Volume I of a two volume set on antitrust policy analyzing the economic efficiency and moral desirability of various tests for antitrust legality including those promulgated by US and EU antitrust law The overall study consists of three parts Part I Chapters 1-8 introduces readers to the economic moral and legal concepts that play important roles in antitrust policy analysis Part II Chapters 9-16 analyzes the impacts of eight types of conduct covered by antitrust policy and various possible government responses to such conduct in terms of economic efficiency the securing of liberal moral rights and the instantiation of various utilitarian non utilitarian egalitarian and mixed conceptions of the moral good Part III Chapters 17-18 provides detailed information on US antitrust law and EU competition law and compares the extent to which when correctly interpreted and applied these two bodies of law could ensure economic efficiency protect liberal moral rights and instantiate various morally defensible conceptions of the moral good This first volume contains Part I and the first two chapters of Part II of the overall study the two chapters that focus on oligopolistic and predatory conduct of all kinds respectively The book will appeal to undergraduate and graduate students of economics and law who are interested in welfare economics antitrust legality and the General Theory of the Second Best *Antitrust Law* Keith N.

Hylton,2003-03-27 Preface p xi 1 Economics p 1 I Definitions p 1 II Perfect Competition Versus Monopoly p 9 III Further Topics p 21 2 Law and Policy p 27 I Some Interpretation Issues p 28 II Enacting the Antitrust Law p 30 III What Should Antitrust Law Aim to Do p 40 3 Enforcement p 43 I Optimal Enforcement Theory p 43 II Enforcement Provision of the Antitrust Laws p 47 Appendix p 64 4 Cartels p 68 I Cartels p 68 II Conscious Parallelism p 73 III Conclusion p 89 5 Development of Section 1 Doctrine p 90 I The Sherman Act Versus the Common Law p 90 II Rule of Reason and Per Se Rule p 104 III Conclusion p 112 6 Rule of Reason and Per Se Rule p 113 I The Case for Price Fixing p 113 II Per Se and Rule of Reason Analysis Further Developments p 116 III Per Se Versus Rule of Reason Tests Understanding the Supreme Court s Justification for the Per Se Rule p 129 7 Agreement p 132 I The Development of Inference Doctrine p 133 II Rejection of Unilateral Contract Theory p 140 8 Facilitating Mechanisms p 144 I Data Dissemination Cases p 145 II Basing Point Pricing and Related Practices p 154 III Basing Point Pricing Economics p 160 9 Boycotts p 166 I Pre Socony p 166 II Post Socony p 170 III Post BMI Sylvania p 181 IV Conclusion p 184 10 Monopolization p 186 I Development of Section 2 Doctrine p 186 II Leveraging and Essential Facility Cases p 202 III Predatory Pricing p 212 IV Conclusion p 228 11 Power p 230 I Measuring Market Power p 230 II Determinants of Market Power p 235 III Substitutability and the Relevant Market Cellophane p 237 IV Multimarket Monopoly and the Relevant Market Alcoa p 239 V Measuring Power Guidelines p 243 12 Attempts p 244 I The Swift Formula and Modern Doctrine p 244 II Dangerous Probability Requirement p 248 13 Vertical Restraints p 252 I Resale Price Maintenance p 252 II Vertical Nonprice Restraints p 262 III Manufacturer Retains Title p 267 IV Agreement p 270 14 Tying and Exclusive Dealing p 279 I Introduction p 279 II Early Cases p 284 III Development of Per Se Rule p 286 IV Tension Between Rule of Reason Arguments and Per Se Rule p 295 V Technological Tying p 301 VI Exclusive Dealing p 303 Appendix p 307 15 Horizontal Mergers p 311 I Reasons for Merging and Implications for Law p 311 II Horizontal Merger Law p 317 III Conclusion p 330 Appendix p 330 16 Mergers Vertical and Conglomerate p 333 I Vertical Mergers p 333 II Conglomerate Mergers p 344 III Concluding Remarks p 351 17 Antitrust and the State p 352 I Noerr Pennington Doctrine p 354 II Parker Doctrine p 371 III Some Final Comments Error Costs and Immunity Doctrines p 375 Index p 379 **Economics of Regulation and Antitrust** W. Kip Viscusi, Joseph Emmett Harrington, John Mitcham Vernon,2005-08-19 A substantially revised and updated new edition of the leading text on business and government with new material reflecting recent theoretical and methodological advances includes further coverage of the Microsoft antitrust case the deregulation of telecommunications and electric power and new environmental regulations This new edition of the leading text on business and government focuses on the insights economic reasoning can provide in analyzing regulatory and antitrust issues Departing from the traditional emphasis on institutions Economics of Regulation and Antitrust asks how economic theory and empirical analyses can illuminate the character of market operation and the role for government action and brings new developments in theory and empirical methodology to bear on these questions The fourth edition has been substantially

revised and updated throughout with new material added and extended discussion of many topics Part I on antitrust has been given a major revision to reflect advances in economic theory and recent antitrust cases including the case against Microsoft and the Supreme Court's Kodak decision Part II on economic regulation updates its treatment of the restructuring and deregulation of the telecommunications and electric power industries and includes an analysis of what went wrong in the California energy market in 2000 and 2001 Part III on social regulation now includes increased discussion of risk analysis and extensive changes to its discussion of environmental regulation The many case studies included provide students not only pertinent insights for today but also the economic tools to analyze the implications of regulations and antitrust policies in the future The book is suitable for use in a wide range of courses in business law and public policy for undergraduates as well as at the graduate level The structure of the book allows instructors to combine the chapters in various ways according to their needs Presentation of more advanced material is self contained Each chapter concludes with questions and problems

Antitrust Arthur D. Austin, 1976

Antitrust and the Triumph of Economics Marc Allen Eisner, 1991 Eisner contends that Reagan's economic agenda reinforced by limited prosecution of antitrust offenses was an extension of well established trends During the 1960s and 1970s critical shifts in economic theory within the academic community were transmitted to the Antitrust Division and the FTC shifts that were conservative and gave Reagan a background against which to operate

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Global Antitrust Economics - Current Issues in Antitrust and Law & Economics Douglas H. Ginsburg, Joshua D. Wright, Elisa Ramundo, 2016-03-21 Concurrences Review in partnership with the Global Antitrust Institute of the Law Economics Center held the Global Antitrust Economics Conference at George Mason University School of Law on May 29 2015 is book presents contributions on five current issues in Antitrust and Law Economics Use and abuse of economic evidence in antitrust cases Market definition v Market power Can they be reconciled Coordination issues Information exchange and price signaling Negotiating settlements remedies Do you really need to consent Corporate liability individual liability Double paying

Economic Analysis and Antitrust Law Terry Calvani, John J. Siegfried, 1979

Intellectual Property and Antitrust Mariateresa Maggiolino, 2011-01-01 This book brings to bear Professor Maggiolino's considerable skills as a comparative competition law scholar on what is perhaps the single most important competition policy issue facing us today namely how to use IP policy and competition policy in tandem to further both economic competition and competition in innovation Professor Maggiolino's book covers a large range of IP practices by dominant firms where competition law can be invoked including sham litigation and product design improper infringement actions predation and refusals to license This book is well researched well written and completely up to date Every serious competition law antitrust and intellectual property scholar and practitioner should regard it as must reading

Competition Law, Innovation and Antitrust Hedvig Schmidt, 2009-01-01 a must read for anyone wanting to study tying in more detail the book offers a very thorough analysis of tying together with

some recommended improvements to the way in which tying is currently assessed under the EU and the US antitrust rules

Common Market Law Review Schmidt s Competition Law Innovation and Antitrust is a superb introduction to the subject of tying arrangements and other bundled sales in high technology markets principally as they are treated under US antitrust law and EU competition law Schmidt thoroughly assesses the economics of such arrangements the benefits they confer and the potential harms they impose and then gives a positive introduction to the law This is a comprehensive treatment of its subject and an indispensable aid to the competition law scholar or practitioner Herbert Hovenkamp University of Iowa College of Law US This innovative book assesses the hotly debated topic of tying from three different perspectives competition law economics and intellectual property rights It highlights the faults and benefits of the current approaches to tying under EC competition law and US antitrust law In the light of modern economic thinking the recent review of Article 82 EC and Sherman Act Section 2 the author identifies a more economic approach to tying that moves away from the per se illegality label that has so far impinged on tying case law Hedvig Schmidt recognizes the significance that tying can play on innovation and product development and thus suggests a new approach which carves out a safe haven for technological integrated products to ensure continuous stimulation of innovation With comparative assessments and investigations this book is a must read for academics specializing in competition law and theory as well as practitioners and policy makers of competition law and intellectual property

Predatory Pricing in Antitrust Law and Economics Nicola Giocoli, 2014-01-10

Can a price ever be too low Can competition ever be ruinous Questions like these have always accompanied American antitrust law They testify to the difficulty of antitrust enforcement of protecting competition without protecting competitors As the business practice that most directly raises these kinds of questions predatory pricing is at the core of antitrust debates The history of its law and economics offers a privileged standpoint for assessing the broader development of antitrust its past present and future In contrast to existing literature this book adopts the perspective of the history of economic thought to tell this history covering a period from the late 1880s to present times The image of a big firm such as Rockefeller s Standard Oil or Duke s American Tobacco crushing its small rivals by underselling them is iconic in American antitrust culture It is no surprise that the most brilliant legal and economic minds of the last 130 years have been engaged in solving the predatory pricing puzzle The book shows economic theories that build rigorous stories explaining when predatory pricing may be rational what welfare harm it may cause and how the law may fight it Among these narratives a special place belongs to the Chicago story according to which predatory pricing is never profitable and every low price is always a good price

Post-Chicago Developments in Antitrust Law Antonio Cucinotta, Roberto Pardolesi, Roger van den Bergh, 2002-01-01

This work offers a critical evaluation of the Chicago approach to antitrust The authors discuss the economic foundations of competition policy and the different ways in which both American and European competition law does or does not take account of economic insights

The Economics of the Antitrust Process M.B. Coate, A. Kleit, 1996-05-31 This book focuses on

the antitrust process and how that process affects the efficiency of antitrust law enforcement The contributors share a wide range of experiences in the antitrust process including academia the legal environment and both private and public sectors The book deals first with merger activities followed by non merger enforcement initiatives and concludes with an examination of the future role of antitrust *New Developments in Competition Law and Economics* Klaus Mathis, Avishalom Tor, 2019-03-26 This book further develops both the traditional and the behavioural approach to competition law and applies these approaches to a variety of timely issues It discusses several fundamental questions regarding competition law and economics and explores the applications of competition law and economics In turn the book analyses the interplay of intellectual property rights and patents in various aspects of competition law and investigates the impacts that developments in information technology such as big data analytics have on competition law The book also discusses the impact of energy law reforms on energy markets from a competition law perspective Competition law is a classic field of economic analysis This is largely due to the fact that competition law uses terms such as market price and competition and must therefore rely on economic know how and analyses In the United States economic analysis has greatly influenced not just the scholarship on antitrust law but also judicial decisions and agency enforcement Antitrust law and economics are based on the traditional paradigm of neoclassical economics which relies on the assumption that the market players i e consumers and producers are rational This approach to competition law was later received in Europe under the banner of a more economic approach For the past two decades behavioural law and economics which seeks to generate better insights into legal phenomena by providing more realistic psychological foundations for economic models and to offer a multitude of applications in legislation and legal adjudication has challenged the traditional economic approach to law in general and more recently to competition law specifically

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