THE NEO-ANTITRUST. BETWEEN ENDS AND MEANS

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Abstract: The article deals with some of the challenges of antitrust agencies when confronting the new world in which private power has increased and has eroded the space and rights of consumers in new ways. In particular, the so-called monopoly power of Big Tech is now exercised upon the costumers not by raising prices or reducing output, but by subjecting them to treatments that may violate their rights, something that does not necessarily break antitrust rules.

In such a scenario, movements, such as Neo-Antitrust, argue in favor of a stronger degree of intervention, in order to come back to the original goals and are in favor of a new reading of antitrust rules, yet none of these rules nor the tools of antitrust authorities have actually been changed. While the Neo-antitrust invokes new recipes, the author underlines the flexibility of competition law – flexibility that gives the law a particular strength and allows it to address new phenomena, such as novel positions of power - but also the need for a cautious approach. Antitrust is a significant component of our legal orders, but it cannot assume the entire burden of countering any new manifestation of private power (for instance the power over unaware consumers’ data).

Indeed, the ends we read in antitrust cannot change the means established by the law to pursue them: the tools at our disposal can be adapted over time, but the rule of law does not allow judicial and administrative authorities to freely expand the means for the sake of whatever noble and even constitutional end.

1. For those who are familiar with US constitutional history, the profound link between the Sherman Act and the main underpinnings of the Constitution is beyond dispute. In those late years of the XIX century a broad political consensus was built upon the populist defense of the small producers against the so-called trusts; it is easy, therefore, to read that Act as nothing more than the product of a populist season. 2 However, it is not so simple, for there is much more in it. There is the principle of the diffusion of power, to be applied both in the public sphere and in society. There is the consequent opposition to powers exercised on others without any legitimacy granted by the people. There is the Jeffersonian view of a society in which anyone has the right to build his own life and to support his family, independently of others. If you like, you may call all this “populism”. However, like it or not, it is also the core of the principles and values upon which the US (and not only the US) Constitution is grounded. 3

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Not surprisingly, these principles and values deeply affected the interpretation of the Sherman Act and for several decades they were treated as the ends of its enforcement. The Supreme Court itself wrote that the rationale of antitrust was not to pursue economic efficiency as such, but to provide checks to restrain economic power and therefore protect – as much as possible – open and plural markets.\(^4\)

In the Seventies – as we all know – things changed profoundly. The Sylvania case, in 1977, was the turning point. Since then, economic analysis has re-invented the interpretation of antitrust laws. Restraint of competition does not necessarily follow any restraint of contractual freedom. Per se prohibitions are based on presumptions that in several cases are not confirmed by actual restraints and should therefore be abandoned on behalf of the rule of reason. There are vertical and sometimes horizontal restraints that do not limit, but rather foster competition among different producers. The “error cost framework” should be applied to any and every case to ensure that behavior that might make markets more competitive not be stifled. Efficiency and consumer welfare are the real aims of antitrust.\(^5\)

This different set of assumptions has led to quite different outcomes in antitrust actions. Furthermore, the doctrinal and political positions in relation to these new outcomes have been quite different from each other. On the one side, the post Sylvania antitrust has been seen as a loss that, despite undeniable technical improvements, no longer safeguards the openness of markets. On the other side, it has been defined as a coherent, principled and workable system of law that serves to replace confused doctrines and populist notions (that is, the best of all possible worlds).\(^6\)

Something that is rarely noticed is that the transition has led to a new reading of the antitrust rules, yet none of these rules have actually been changed, nor have the tools in the hands of antitrust authorities been renewed. Whatever the aim – to reduce power or create efficiency, to protect competitors or competition, to guarantee an open market or consumer welfare – the rules and the tools of antitrust authorities have never been modified. What those rules were meant to do and what they still do is assess whether a specific behavior restrains competition in its given market and whether there are barriers to entry in that market. This is why the most perplexing issue raised by the neo-antitrust is whether it only implies a return to the initial reading of the rules – mostly as far as the aims are concerned – without affecting the content of the toolbox and thus leaving the area of possible prohibitions untouched. In truth, the “neo-antitrust” might also aim to be “new”, and therefore go beyond the settled rules and tools of antitrust.

This is not a marginal issue. It has an impact on the very notion of antitrust, which – since the beginning and in the broadest sense – has always


\(^6\) S.B. Sacher, “Twelve Fallacies of the ‘Neo-Antitrust’ Movement”, in George Mason University, Law & Economics Research paper Series, 19-12.
been applied to market power, exercised through typified behavior in restraint – not just regarding the rights of others, but in terms of competition. Now, several demands of the neo-antitrust supporters remain within the borders of this notion, for they only plead for a more stringent use (objectionable as it might be) of the existing tools. But does this remain the case also when the power of big tech companies is challenged over the sale of their customers’ data? Or, even more, when those companies are challenged over their right to subject customers to surveillance, in order to collect tradable data regarding their activities and tastes?

These are the demands and the problems we should deal with today, in any discussion of the neo-antitrust. And yet, too frequently (and mostly in the United States), debate seems very general and unspecific. It either aims to justify the new horizons of antitrust or, conversely, to disqualify its ambitious expectations. In such terms, it becomes an ideological debate, which we will not enter into here. Our interest is to test the potential and the limits of the antitrust tools vis-à-vis the new demands, on the assumption that the ends we read in antitrust cannot change the means established by the law to pursue them. Of course, the means – the tools at our disposal – can be adapted over time, something that has occurred repeatedly over the years. But stepping out of antitrust in the name of antitrust is a different thing altogether, and would demand envisaging something else entirely.

2. Let us now examine, upon these simple premises, the behavior at which the neo-antitrust is aimed. Such behavior includes restraints and exclusionary conducts, easily classified according to the usual antitrust categories: self-preference and refusal of data are frequent in the digital era, for example. Moreover, the well-known dispute on how to treat “refusal to deal” does not change the picture. Indeed, any proposed solution of said dispute lies within the traditional boundaries of antitrust.

It is not so simple with the expectations of the neo-antitrust supporters in the area of agreements (horizontal as well as vertical) and of mergers and acquisitions. Here too they advocate the use of traditional tools; however, some of these tools have been progressively abandoned. Take per se prohibitions, based on presumptions, for example. Let us assume that not only efficiency, not only consumer welfare, but also (indeed, first and foremost) combating power is restored as a legitimate end of antitrust. Does it justify the return to per se prohibitions?

The original rationale of per se prohibitions was the evidence offered by previous cases, in which the prohibited conduct had always been adopted to restrain competition: the case of price fixing is exemplary. No further investigation was needed to assess the same restraint in the case to be decided upon. But over time, we could avail ourselves of a more sophisticated analysis of the facts. Furthermore, economic analysis has indisputably demonstrated that even price fixing can be used not to reduce, but to foster competition. This is what happens when the producer sets a maximum price for the sale of his product by the distributor to the final consumer. Here, both the intent and the outcome are the reduction of the distributor’s margin in order to increase the competitiveness of that product in the relevant market.
Those who have introduced economic analysis into the interpretation of antitrust rules – mostly the Chicago school and its followers – have been criticized from several angles. The priority of efficiency over competition is the paramount reason behind criticism, from which others have consequentially followed. According to these critics, the notion of consumer welfare is unilateral: consumers may be satisfied by walking from one shop to another and making their own choice, more than by finding the product they need at a low price in one or two shops only. Furthermore, the error-cost framework is too generous in respecting the false positive, which generates a somewhat reversed per se rule to the damage of competition.

Now, even those who agree with these objections should be aware that they do not dismantle the sound economic analysis that has greatly improved the interpretation and the enforcement of antitrust laws, going beyond the legalistic formalities and the approximate common sense of the lawyers. But there is even more: even from a legal angle, per se prohibitions are objectionable. The principle of legality – which is implicitly or explicitly adopted by most of the liberal democratic constitutions of our time – does not allow afflicting measures to be based on presumptions automatically applied by the Courts. A case-by-case assessment of the facts is a constitutional prerequisite that economic analysis allows us to satisfy with appropriate methodologies.

3. By putting per se prohibitions aside, we reject a too simplistic solution for problems that, however, do exist. It is a fact that in several sectors (the pharmaceutical industry is one), bigger companies have absorbed smaller ones step by step. While there may have been no immediate effect of foreclosure at each step, competition was eventually lessened to a significant degree. Furthermore, there is the specific area of promising start-ups that, in innovative, technological sectors, fall in the hands of Big Tech. There is no actual foreclosure here, either. Indeed, frequently, the start-up’s production continues, precisely because it has entered into the solid frame of Big Tech. But what about the future, is it not a pre-emption of future competition?

Let us go back to the past contrasts between US and European antitrust agencies. If we look at the case of General Electric Honeywell, from a few years ago, we might conclude that no antitrust intervention would be admissible in the U.S. while in Europe – at least in principle – future foreclosure would be debatable. We all remember that, for the GE Honeywell merger, the European Commission had explicitly admitted the benefits for the consumer in the short run, but that it deemed the ensuing advantages over competitors would be such that competition would become impossible in the future. The reaction from the US was: “We are more humble in assessing the future”.7 So they preferred to stick to the immediate advantages

for the consumers. Undoubtedly, the conflicting views expressed on that case were rooted in different notions of consumer welfare. However – and this too demands notice – such differences were and remain well within the boundaries of the traditional antitrust cultures and of the different use these cultures imply about the antitrust weaponry.

In relation to cases we may face now, according to the demands of the neo-antitrust supporters, it has to be said that not even the European Union would have an immediate, positive solution. Actually, the existing turnover thresholds are too high to allow investigations on mergers between big and small companies or between Big Tech and a promising start-up. However, this obstacle can be removed quite easily, without even touching the basic antitrust rules. It is enough to modify the regulation on mergers, as has been done repeatedly in the past. Indeed, a proposal to this end has been advanced by three professors: Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer. Appointed by the EU Commission to produce a report on “Competition Policy for the Digital Era”\(^8\), the professors drafted a prudent paper; they did not suggest an immediate modification of the thresholds. However, as they put it: “where a dominant platform and/or ecosystem which benefits from strong network effects and data access, which acts as a significant barrier to entry, acquires a target with a currently low turnover but a large and/or fast-growing user base and a high future market potential, the case would deserve attention.” To this end, a new threshold based on transaction value could be introduced.

Of course, adapting the threshold would not solve the problem. It would simply allow the problem to be opened, and it would not be a simple one at all. To the contrary, the problem would be very controversial. Various important assessments would need to be made: whether the acquirer would avail itself of barriers to entry due to network effects; whether the smaller target would come to represent a competitive constraint; whether the acquisition would increase the barriers to entry and therefore the acquirer’s market power. These are all very difficult questions indeed, and they carry the risk of answers surrounded by the uncertainties of an unknown future. However, humble as we want to be in relation to the future, it has to be admitted that economic analysis and its sophisticated models can lend a powerful hand in reducing those uncertainties and in clarifying those scenarios that are most likely to stem from action or inaction on individual cases. Nevertheless, we remain within the boundaries of traditional antitrust and of previously experienced divergences.

4. The boundaries themselves are challenged when the tech giants are challenged regarding the power they hold over their frequently unaware costumers. The list of such powers includes the power to extract data from customers, whatever site they access; the power to sell that data to third parties, for whatever use

\(^8\)The Report, delivered in April 2019, can be read in the EU Commission’s site: ec.europa.eu/competition/publications/reports.
they want to make of it; the power to impose innovations upon users, creating situations in which the only practical way out for them is to accept.

This is power, beyond any reasonable doubt. Is it a power that can be fought by using antitrust tools? The German antitrust agency, the Bundeskartellamt (BKartA) has used a bypass in order to fight that power: namely, it has treated the violation of the privacy rights of customers as an abuse.9 Others propose to treat that power as a manifestation of monopoly power, which can be neutralized by dismantling the monopoly. However, even the author of this proposal10 to admit that the monopoly is just a dominant position; how that power can be reached and curbed has yet to be seen.

In general terms, it can be reasonably argued that the growth of companies in the digital sector has been accompanied by a remarkable self-restraint in our antitrust agencies. The antitrust agencies have explained such an approach by constantly using the argument that innovation in this sector is rapid, frequently unexpected and – as such – can subvert the existing order of the market much more easily than could any antitrust action. This argument is supported by convincing evidence: in the early years of the sector, dominant companies were regularly and quickly superseded by new comers. Nowadays, however, that golden age is over. A few giants seem solidly stable in their dominant positions. Therefore, the initial caution shown by antitrust authorities is no longer justified. It is a fact that, today, massive actions are being brought against Big Tech, both in Europe and in the US. Due to this reinvigorated attention, most of these actions put under scrutiny behavior that falls into an area usually investigated in antitrust: namely, where others are excluded or discriminated against or where, in one way or another, competition is reduced. Attention has also been paid to excessive pricing, at least in Europe, where the Treaty explicitly mentions it as abuse. Excessive pricing is a behavior that, in the past, antitrust authorities had ignored, mostly because it seemed to be an issue better dealt with by regulatory agencies. However, excessive pricing is a restriction of competition when a vertically integrated company practices it towards competitors in its own market. When excessive prices fall upon consumers directly, they are not a restriction of competition. In the worst case, they are consequential to previous restrictions of competition that have given the interested company a dominant or a monopolistic position. Companies that hold dominant or monopolistic positions may harm consumers in a variety of ways, yet such behavior cannot fall under the jurisdiction of antitrust just because it is, or may be, the consequence of restrictions of competition. The case of excessive pricing has something more: it has a close and direct connection to competition. Excessive pricing does precisely what competition intends to avoid: namely, depriving the consumer of the margin above the costs. However, such

9 The (monumental) decision can be read in the site bundeskartellamt.de.
reasoning is hard to apply to most other behavior.

The problem with the so-called monopoly power of Big Tech is that such power is exercised upon the costumers not by raising prices or reducing output, but by subjecting them to treatments that violate their rights – something that does not necessarily break antitrust rules. On what legal basis could antitrust authorities exercise their jurisdiction on such behavior? Is rejecting efficiency and restoring the fight against abusive powers a sufficient legal basis for antitrust action? Personally, I sympathize with this reinstatement, but whether it provides sufficient grounds for antitrust authorities to punish behavior that lies beyond the restraints foreseen by our laws is another matter.

5. The authors of the EU report mentioned above have rightly underlined the flexibility of competition law. That flexibility gives the law a particular strength and allows it to address new phenomena, such as novel positions of power. However, the authors also admit that there are limits to such flexibility; not even the “broad, open and general rules” of competition law can be interpreted so widely as to include all behavior by which a paramount power can be exercised. Were it so, we would not have consumer protection laws, unfair trading laws or data protection laws. To the contrary, the General Data Protection Regulation – adopted by the European Union in 2016 – offers eloquent evidence that rules are needed to counter a substantial part of the actions that neo-antitrust supporters suggest should be incorporated into the antitrust jurisdiction.

Of course, there are no barriers between different areas of law; new rules in one of them can have an impact in others. In Europe we have art. 102 of the EUFT, in which abuses are listed, but the list is not exhaustive, so other behavior could still fall under this open notion. Let us take the case of some behavior that violates the GDPR or other specific new regulations. Should it be brought under the attention of an antitrust authority, there might room for that behavior to be treated as an abuse. This is what the BKartA has done in the Facebook case, mentioned above, even though, in that case, the Dusseldorf Oberlandesgericht has subsequently denied the abuse, for, in its view, the conduct was not anticompetitive.11 Nonetheless, in principle the two areas of regulation, and the consequent jurisdictions, are not mutually exclusive.

In conclusion: vigorously calling our antitrust family to exercise its own responsibilities vis-à-vis a new world in which private power has increased and has eroded the space and rights of consumers in previously unimaginable ways, is not only very generous, but also appropriate. Indeed, there is room for such maneuvering, reading for those who might share my opposite position here.


11 C. Osti & R. Pardolesi, “L’antitrust ai tempi di Facebook”, to be published in Mercato, Concorrenza, Regole, 2019, n.2, thoroughly analyze both the BKartA’s decision and the ruling by which the Dusseldorf Oberlandesgericht has suspended its enforcement. In such article the authors argue that not necessarily antitrust is limited to scrutinize “restraints” of competition. Therefore, it is an essential
after years in which – for much of the family – the border between sound economic analysis and laissez-faire has appeared very thin. There are limits, however. Antitrust is a significant component of our legal orders, but it is still just one part. It cannot assume the entire burden of countering any new manifestation of private power, even if we agree that fighting power was its original aim. There are ends but there are also means: the rule of law does not allow judicial and administrative authorities to freely expand the means for the sake of whatever noble and even constitutional end.

REFERENCES


