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## ECONOMICS AND ANTITRUST ENFORCEMENT: A PERSONAL VIEW

Luigi Prosperetti

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### ABSTRACT

*The article briefly reviews the growing U.S. debate - in which senior FTC officials are playing a leading role - concerning the adequacy of the "post-Chicago economic framework" in providing a useful basis to antitrust enforcement. This debate - fuelled by the financial crisis and the growing body of research in behavioural economics - increasingly challenges the key points of that framework, e.g. the rationality of economic agents, the preservation of consumer welfare as the fundamental legality criterion, the emphasis on welfare-reducing regulatory errors. A number of decisions by U.S. courts also point in the same direction. Noting the fact that such a debate has had so far only a limited impact on the European antitrust discourse, which has been mostly concerned with increasing the use of the Chicago framework in European competition policy, the article advocates fostering such a debate in Europe. It would be fruitful if the debate considered - without preconceptions - whether contributions coming from other fields of economic research (particularly concerning the 'stickiness' of markets where consumers are boundedly rational, as suggested by behavioural economics), and from other fields such as strategy and marketing studies may usefully complement the analytical framework of antitrust enforcement in Europe.*

### 1. INTRODUCTION

I am truly grateful to Autorità Garante della Concorrenza e del Mercato (AGCM) for inviting me to comment on such a broad topic in the first issue of AGCM's Journal. I am not an economic theorist (I was many years ago, but subsequently somewhat repented) nor certainly a legal theorist. The only value added, if any, I can bring to the argument is that I had the fortune to live a somewhat varied professional life, doing a lot of applied economic research; teaching economics but also, for a while, business administration; working closely with lawyers and occasionally with judges on a number of cases, not only in the field of antitrust. I also did a stint as a price regulator, and helped running for a couple of years a large utility.

All this has provided me with somewhat more nuanced views than those provided by standard microeconomic theory of what companies do, why they do it, and how they do it, and on the splendours and misfortunes of public policy enforcement. Thus - building on recent debate, but also on such views - I would like to offer here some critical thoughts about how economic and legal analysis have been so far integrated in antitrust enforcement, and how they can be better integrated in the future.

My starting point will be that - over the past few years - doubts have been growing concerning the precise relationship between the

two disciplines, primarily in the jurisdiction - the United States - where such an integration is older, and better established. The debate as we shall see takes many forms, but it is basically concerned with the adequacy of the "post-Chicago economic framework"<sup>1</sup> to provide a sound legal basis to antitrust enforcement.

The rationality of economic agents that underpins such a framework has been questioned on theoretical grounds by developments in behavioral economics, and has been thrown in question by the financial crisis; the framework itself has been criticized for providing too many theories, which are in practice difficult to test and to choose from; more radically, the very notion that antitrust should be concerned only with consumer welfare, giving a higher weight to current consumer welfare has been put into question.

The debate on these issues seems to be less developed in Europe, where the main issues discussed over the past five years or so have been how to better incorporate economics in antitrust law, promoting and "effects-based" enforcement, or - in any case - a "more economic approach". In a way, the European debate seems more preoccupied about how best to apply in Europe to "post-Chicago economic framework", and devoting less energy to think critically about such approach.

On the other hand, I believe that it would be very useful to have an open and frank discussion about this in Europe, especially as antitrust enforcement is being and will be - thanks to the efforts of the Commission -

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<sup>1</sup> Buccirossi, P. (2008), in "Handbook of Antitrust Economics", Cambridge Mass., The MIT Press, provides a very good and detailed overview of this framework.

increasingly played in front of civil judges, and therefore the antitrust discourse will not be conducted anymore within the relatively closed community of antitrust *cognoscenti*, formed by enforcers, lawyers, and economists, trained and used to interact within a rather narrow set of rules. To such a discourse, civil judges will be able to provide precious contributions, on the basis of their very broad experience in ruling on theories of harm in all areas of the Law, and their consummate ability in weighing the value of proofs and technical opinions.

To develop these thoughts, I will start below with a brief review of the growing doubts expressed about the state of Industrial Organisation by several senior antitrust enforcers in the United States, a country where it is still thought by many that, over the last several decades, antitrust has "evolved" in some sort of rigorous economic discipline, and therefore "*antitrust enforcement in the modern era is a technical and technocratic enterprise*"<sup>2</sup>. As we shall see, there is some serious disagreement on this, and it will be instructive to review these doubts. I will then briefly suggest that it would be reasonable to broaden the scope of antitrust law enforcement by considering the contributions that may come from other fields, and in particular behavioral economics and business economics. I will finally briefly comment upon the European debate, and argue that the growing activity by civil judges in the enforcement of competition law will

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<sup>2</sup> Crane, D. (2012), *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, in "Stanford Law Review Online", vol. 65, n. 13, as quoted by Lao, M. (2013), *Ideology Matters in the Antitrust Debate*, in "Antitrust Law Journal", vol. 79, forthcoming, available at <http://ssrn.com/abstract=2328329>, who provides several equivalent quotes.

further enrich the relationship between competition law and economics in Europe.

## 2. A 'TOO-ECONOMIC APPROACH'? GROWING DOUBTS OVER THE ATLANTIC

For several decades, mainly through the work of the Chicago school, in the United States the mandate and the decision rules of antitrust enforcers have been clearly defined by two basic ideas.

The embrace of Judge Bork's work by the US Supreme Court, according to which "*Congress designed the Sherman Act as a consumer welfare prescription*"<sup>3</sup>, has led to consider the preservation of consumer welfare (whatever precisely this may mean) as the goal of antitrust enforcement. Thus, as Judge Posner famously remarked, "*the isomorphism [between legal doctrine and economic theory] becomes an identity when, as in antitrust, (but not only there), the law adopts an explicitly economic criterion of legality*"<sup>4</sup>.

Having taken from economics a legality criterion, it was a logical development to progressively absorb from the same source legal theories of harm. In particular, neoclassical price theory has provided the fundamental analytical instrumentation. The broader "law & economics" movement also supplied the view that how welfare effects are distributed across society, or - depending on the preferred interpretation - across consumers,

should not concern antitrust enforcement, as the government has and should use other policy instruments to take care of distribution issues. Hence, "*influenced by economists' criticism of prior precedent, the US Supreme Court and enforcement agencies have steadily reversed antitrust doctrine that was inconsistent with price theory*"<sup>5</sup>.

Second, Judge Easterbrook's powerful analysis<sup>6</sup> of the consequences of the errors that antitrust enforcers necessarily make in a world of incomplete information, provided further clear guidelines for antitrust action, arguing that a "*false negative*" i.e. the acquittal of a behaviour that actually reduces welfare is socially less costly than a "*false positive*", whereby a behaviour that does not reduce welfare is incorrectly sanctioned.

In particular, for single-firm behaviour, there is a very high risk that "*we will confuse real competition with exclusion, and thus harm consumers with serious barriers to entry*"<sup>7</sup>. Thus, there is a clear but limited role for competition enforcement: "*law has a comparative advantage over markets, then, when legal processes are rapid, when false positives are rare (or quickly corrected), and when markets are sluggish about correcting false negatives. These criteria are met for naked cartels (which may be condemned quickly and with great assurance that condemnation is appropriate) and for large mergers in markets with serious barriers to entry (the market*

<sup>3</sup> Cit., p. 14.

<sup>4</sup> Posner, R. (2008), *How Judges Think*, Harvard University Press.

<sup>5</sup> Devlin, A., Jacobs, M. (2010), *Antitrust Divergence and the limits of economics*, in "Northwestern University Law Review", Vol. 104, available at <http://ssrn.com/abstract=1429541>.

<sup>6</sup> Easterbrook, Frank H., (1984), *The Limits of Antitrust*, in "Texas Law Review", 63.

<sup>7</sup> Easterbrook, F.H. (1986) "Workable Antitrust Policy." Michigan Law Review, 1986.

power from which may take a long time to erode through competitive pressure)<sup>8</sup>.

An important consequence of such a powerful framework is that - as markets necessarily tend towards equilibrium, and in equilibrium resources are allocated efficiently - antitrust should mostly be concerned with losses in current consumer welfare. Intertemporal issues (i.e. the effects on future welfare of current company behaviour) should not be considered to be particularly relevant, as market forces in most cases will take care of them. And even if they did not, antitrust enforcers, when considering possible future welfare effects, will make often mistakes and, on the basis of Easterbrook's theory, if they decide to assign such effects a substantial importance, there will be a high probability of error, which will not be easily corrected by the market, and entail a very likely reduction in future consumer welfare. Thus, to put it simply, there is nothing wrong with employing static price theory to intrinsically dynamic antitrust problems: it is the best, or more precisely the least bad thing, antitrust enforcers can do.

While economists debated rather ferociously several points of the Chicago school, this proved a very adaptable theoretical construct, and successfully integrated several insights arising from transaction cost economics<sup>9</sup>, and also absorbed many results provided by the game-theoretic approach to Industrial Organization.

<sup>8</sup> *Ibidem*.

<sup>9</sup> See Hovenkamp, H. (2010), *Harvard, Chicago and Transaction Cost Economics in Antitrust Analysis*, in "Antitrust Bulletin", 613, 2010; "U Iowa Legal Studies Research Paper" n. 35, available at <http://ssrn.com/abstract=1592476>.

Such an absorption process was effectively assisted by legal experts. As Hovenkamp (2010) points out, the true marriage of law and economics in antitrust should indeed be largely attributed to the work of Areeda and Turner<sup>10</sup>, whose *Antitrust Law*, through its various editions, "never explicitly embraced any particular economic "school." At no time in its history could it be identified with the old Harvard school, which was closely associated with the structure-conduct-performance paradigm in industrial organization... nor has it ever explicitly embraced the Chicago school... Its economics reflects the fact that both the Harvard and Chicago schools have moderated their views toward the center. The *Antitrust Law* treatise is in fact something of an economics scavenger, picking and choosing among economics' diverse theories for doctrine that is both theoretically defensible and administratively useful<sup>11</sup>.

A remarkable achievement is that the transformation of highly complex economic theories in administrative rules was achieved without almost no need for formal analysis: as Rosch (2009) remarks, the three fundamental textbooks in modern antitrust thinking in the United States - Bork's *Antitrust Paradox*, Posner's *The Antitrust Laws*, and Areeda and Turner's treatise - contain no mathematics at all.

This has been a very successful intellectual and public policy enterprise. Over the past decade, however, there has been a growing dissatisfaction with such a state of the matter by US antitrust officials, which is particularly interesting as most of those participating in the

<sup>10</sup> Areeda, P., Turner, D., (1978), *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Boston, Little Brown.

<sup>11</sup> Hovenkamp, H. (2010), cit. p. 4.

discussion were certainly highly sympathetic with the Chicago tradition.

In 2003, Tim Muris, Chairman of the Federal Trade Commission (FTC), remarked that “*I am struck that, despite the enormous recent volume of theoretical, highly mathematical Industrial Organization literature, its effect on antitrust policy and law has been quite small*”<sup>12</sup>. Similar manifestations of unease with the practical usefulness of economic models have been provided by other FTC officials: Commissioner Rosch has wondered what to do about the current “*economics cacophony*”<sup>13</sup>, stressing that “*economists who use complex formulae to express their conclusions respecting the economics considerations in antitrust cases are of little practical value*”<sup>14</sup>. Wright (2013) states that “*the proliferation of theoretical explanations for business conduct gives rise to a model selection problem by antitrust authorities*”<sup>15</sup>.

More radically, two leading US antitrust experts (one of them a senior judge), who again are certainly sympathetic with the Chicago school, have remarked that “*the simple fact is that economics does not yet provide a useful understanding of the relationships among market structure, competition and*

*innovation*”<sup>16</sup>, and indeed neoclassical price theory “*has limited ability to yield objectively verifiable conclusions with respect to business practices, the long-term effects of which cannot be predicted with any sort of accuracy*”<sup>17</sup>.

Apart from making antitrust enforcement more complex, as most of these theories are highly technical, and enforcers may need to choose among them without having access to the data that would allow a reasonable choice to be made, and often also lacking the rather heavy training in economic theory that such a selection would require, such a state of the matter creates the risk that that one of such authorities may be tempted to choose the theory of harm that quickly fits some of the data that have been gathered during an investigation, and allows to reach quickly a conclusion. Of course, any good economic consultant may do the same. Economic models, to put it differently, are in excess supply vis-à-vis the reasonable demands originating from antitrust enforcement policy needs.

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<sup>12</sup> Muris, T. (2003) “*Improving the Economic Foundations of Competition Policy*”, Federal Trade Commission, Washington.

<sup>13</sup> Rosch, T. (2009), *Antitrust Law Enforcement: What to Do About the Current Economics Cacophony?*, June 1, 2009, Federal Trade Commission.

<sup>14</sup> *Ibidem*.

<sup>15</sup> Wright, J. (2013), *Evidence-Based Antitrust Enforcement in the Technology Sector*, in “*Competition Policy International – Antitrust Chronicle*”, available [www.competitionpolicyinternational.com/assets/Free/WrightMar-13Special.pdf](http://www.competitionpolicyinternational.com/assets/Free/WrightMar-13Special.pdf). See also Wright, J. (2012), *Abandoning Antitrust’s Chicago Obsession: The Case for Evidence-Based Antitrust*, in “*Antitrust Law Journal*”, vol. 78.

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<sup>16</sup> Ginsburg, D., Wright, J. (2012), *Dynamic Analysis and the Limits of Antitrust Institutions*, in “*Antitrust Law Journal*”, Vol. 78, No. 1, 2012, p. 6. See also, for other useful comments, supporting a fuller approach to dynamic competition in antitrust analysis, Farrell, J., (2006), *Complexity, Diversity, and Antitrust*, in “*Antitrust Bulletin*”, vol. 51 n. 1, Teece, D., (2008), *Favoring Dynamic Over Static Competition*, George Mason University – Microsoft Conference, May 15, 2008, Sidak, J.G., Teece, D., (2009), *Dynamic Competition in Antitrust Law*, in “*Journal of Competition law & Economics*”, vol. 5, n. 4 and Evans, D.S., Hylton, K., (2008), *The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust*, in “*Competition Policy International*”, vol. 4, n. 2.

<sup>17</sup> Devlin, A., Jacobs, M. (2010), *Antitrust Divergence and the limits of economics*, in “*Northwestern University Law Review*”, Vol. 104, available at <http://ssrn.com/abstract=1429541>, p. 262.

Critiques, and perplexities, have obviously become much stronger after the financial crisis, which generated growing doubts about the rationality of companies and consumers, about the long-term consequences of rational short-term decisions, and more generally about the wisdom of the *laissez-faire* regulatory attitude that was the consequence of the Chicago tradition and of Easterbrook's views on enforcement errors.

Rosch has written that "*with the recent financial crisis... one has to wonder if the Chicago School's fundamental presumptions are still tenable:... [it may be that the School is] on life support if not dead. Other Republicans, including many who have embraced the Chicago school over the years at least as fervently as I, share this view*"<sup>18</sup>. He proceeded stressing that "*apart from the current economic crisis... the more I read about alternative economic theories, the more I'm certain that the Chicago school does not even accurately portray how buyers or sellers behave*"<sup>19</sup>.

<sup>18</sup> Rosch, T. (2009), *Antitrust Law Enforcement: What to Do About the Current Economic Cacophony?*, June 1, 2009, Federal Trade Commission, p. 7.

<sup>19</sup> The critical remarks coming from liberal legal theorists are of course broader. As Markham, J. (2011) recently put it in *Lessons for Competition Law From The Economic Crisis: The Prospect For Antitrust Responses To The "Too-Big-To-Fail" Phenomenon*, in "Fordham Journal of Corporate & Financial Law" " *It is time to set aside the myth that antitrust law has always had as its sole objective the optimum allocation of productive resources; to restore to antitrust the policies that were jettisoned by the Chicago School... It is modern mythology to suggest that antitrust was never intended to limit the economic and political power of the trusts. [...] What ought to be reconnected with antitrust rules are those policies that were directed at protecting consumers, the freedom of traders, democratic institutions and the economy against the perils of excessive concentrations of corporate economic power. The too-big-to-fail public policy problem overlaps almost not at all with allocative efficiency concerns, but it intersects directly with these other antitrust values. Perhaps the core value of antitrust is its preference for marketplace activity to serve well the needs of consumers.[...]. Had the original intent of the Sherman Act been considered in connection with the recent perplexing*

It is particularly interesting to remark that also US jurisprudence, which has long been quite unanimous concerning the fundamental validity of the consumer welfare standard as a basis to evaluate competitive conduct, both in cartel and monopolization cases, seems to be evolving in a way that may not be particularly surprising from a European point of view, but it certainly is from an American one.

As Devlin (2012) critically remarks, "*properly understood as a prophylactic device aimed at arresting practices that are harmful to consumer welfare, the courts have steadily transformed [antitrust] into something different... [rewriting] the rule of reason to require the best outcome available, rather than a mere improvement*"<sup>20</sup>. This author reaches such a conclusion on the basis of a broad overview of recent jurisprudence of appellate and lower courts in the United States, remarking that they are increasingly adopting a "*less-restrictive alternative*" standard: in doing so, they are placing upon the defendant the burden of proving that its actions not only do not decrease welfare, but that there does not exist any alternative which is more favorable to consumers. He concludes that such a standard is bound to make "*antitrust as an affirmative tool of public policy, instead of using it as a barrier against social-welfare-reducing activities. By seeking to facilitate more open competition in the future by restricting practices that are undeniably efficient day, antitrust enforcers may paradoxically provide consumers with less.*

*decision to solve the too-big-to-fail problem by creating even bigger banks, perhaps a different and more tempered outcome might have emerged from the process?*". For the scope of the present article, I find it more useful to concentrate about critiques coming from "inside" the Chicago tradition.

<sup>20</sup> Devlin, A. (2012) in *Antitrust as Regulation*, in "San Diego Law Review", vol. 49, n. 3, p. 65, offered a thorough overview a number of cases.

A further symptom of the growing uneasiness of US law towards the adherence to Chicago-oriented economic theories is of course also supplied by the 2009 withdrawal by the US Justice Department, under the Obama administration, of its own 2008 report on single firm conduct, widely held to generate an overall weakening of enforcement, by abandoning the goal of protecting consumer welfare, relying too heavily on economic theory, and introducing a number of requirements for undertaking action against such behavior as to make it nearly impossible to produce an effective enforcement effort<sup>21</sup>.

Thus, doubts are indeed growing in the U.S. about the extent to which antitrust relies on post-Chicago economic theory, both as a source of legality criteria and of administrable theories of harm.

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<sup>21</sup> Three of the FTC Commissioners released a statement to the effect that "the [DOJ's] report, if adopted by the courts, would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act." [...]. First, while the Supreme Court has declared the welfare of consumers the primary goal of antitrust laws, the Department's report is chiefly concerned with firms that enjoy monopoly or near-monopoly power, and prescribes a legal regime that places these firms' interests ahead of those of consumers. Second, the report seriously overstates the level of legal, economic, and academic consensus regarding Section 2 [...]. The report relied too heavily on economic theory in the consideration of applying antitrust law. [...]. The Department's premises lead it to adopt law enforcement standards that would make it nearly impossible to prosecute a case under Section 2." [...]. In short [...] the Department's Report erects a multi-layered protective screen for firms with monopoly or near-monopoly power. As an inevitable consequence, dominant firms would be able to engage in these practices with impunity, regardless of potential foreclosure effects and impact on consumers. Indeed, it appears that the Department intends for this screen to apply even when a firm uses two or more of these practices collectively, instead of just one practice individually."

### 3. BROADENING THE SCOPE

The source of the growing dissatisfaction of US enforcers, and of the pervasive and continuing differences in enforcement policies between the two sides of the Atlantic<sup>22</sup> has in part a technical origin.

As Devlin and Jacobs (2010) summarise, "*the long-run effects of a practice are not subject to determinate analysis. Without an ability to quantify the long-term effects of present conduct, competition enforcers are compelled to weigh current facts against a probabilistic future. As large swathes of business conducts have the potential to have economic consequences in both the short and the long-run, the*

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<sup>22</sup> As Devlin, A., Jacobs, M. (2010), *Antitrust Divergence and the limits of economics*, in "Northwestern University Law Review", Vol. 104, available at <http://ssrn.com/abstract=1429541> point out, the differences between the U.S. and Europe in the legal treatment of several types of behaviour seem to arise whenever the short-term and long-term competitive consequences of a given behaviour are likely to be opposite to each other, and therefore they must somehow be compared and balanced by the enforcement entity. Refusal to supply provides here the quintessential example: where in the United States there is substantial reluctance to require a dominant firm to share the fruits of its investments with its competitors, the European Union has a well-developed theory of "essential facilities". In this case, the EU seems to put a higher value on short-run competition, and the US a higher one on long-run competition. However, considering predation, an opposite view emerges, as the requirement of recoupment under US law places a higher value on short-run effects, and a lower one on future effects. Tying, instead, is considered under EU law as harmful for its long-run effects. Views concerning vertical issues are again different, as the United States sees them as a source of efficiency, even if they may damage competitors in the short run. Conglomerate mergers may pose competition problems in Europe, but they are regarded as harmless in the United States, and the list may continue for quite some time. Thus, the differences are complex and do not seem to follow a single pattern with e.g. one area being systematically more sensitive to short term effects than the other.

*inability to weigh such potentially offsetting effects accurately is especially problematic”.*

If we remain within the limits of price theory, such problems cannot be efficiently addressed, unless one takes the Easterbrook view that it is always wise to err on the side of *laissez-faire*. If one steps outside such limits, and has nothing substantial to offer, some authors consider it likely that antitrust enforcement may go back to its infancy, i.e. relying on political thinking. Devlin and Jacob (2010), e.g., fear that *"in the absence of a useful economic theory ... the foundations of [various approaches to specific types of firm behaviour] are inevitably political, valid for each system on its own terms, and somewhat informative for others, but hardly "correct" in some provable fashion"*<sup>23</sup>.

I do not think that it is however reasonable to fear any sort of a drift towards a "politically correct" approach to antitrust unless we choose to adhere totally to the post-Chicago economic framework of analysis. There is an obvious alternative, i.e. to broaden the theoretical tools with which we approach competition policy, considering in particular what behavioral economics may have to say concerning non-rational behavior, and what business economics may have to teach us about actual company behavior in complex environments, so as to use fully complement the post-Chicago framework.

Behavioral economics looks increasingly promising. As a recent survey by Tor (2013) makes clear, while initially research on the interface between behavioral economics and antitrust concentrated on the analysis of firm conduct, there is now a growing body of research that explores how, when consumers are only boundedly rational, *"markets can generate*

*outcomes that are very different from those predicted by rationality-based models"*: in other words, under bounded rationality, the markets may not self-correct as predicted by standard price theory, or may do so only slowly. He concludes that *"one immediate implication of behavioral antitrust is that the law must account for both behavioral regularities and behavioral irregularities. When fashioning antitrust doctrines and enforcement policies, courts and agencies will do well to factor in the likelihood of systematic deviations from assumptions of rationality on the part of consumers and firms overall"*<sup>24</sup>.

This is a promising area of research and discussion, because of course it increases the importance of intertemporal effects. Where consumer behavior is "sticky" as a result of bounded rationality, an Easterbrook-type of approach is no longer correct.

The second area to consider, I think, is the theoretical and empirical body of research coming from business studies, and specifically marketing and strategy studies. To put it simply, do we really think that the only way to learn about oligopoly pricing behaviour is the study of theory of games, while it would be useless to analyze (say) also some cases utilised in some major international business school in courses teaching students how actually to do pricing? I find this hard to believe.

A further substantial value-added that such fields of research may bring to antitrust enforcement is the ability to analyse non-price variables, such as innovation and quality.

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<sup>24</sup> Tor, A. (2013), *The Market, the Firm, and Behavioral Antitrust*, in "Oxford Handbook on Behavioral Economics and the Law", Forthcoming; Notre Dame Legal Studies Paper No. 1447. Available at <http://ssrn.com/abstract=2293733>, p. 21.

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<sup>23</sup> Cit., p. 282.

Admittedly, price theory has made several advances in incorporating such variables in its models, but the need to keep a mathematical treatment has made profound simplifications a necessity: typically, firms do not compete on price, or quality, or innovation. They compete on all three, but such a behaviour is too complex to be analysed on the basis of abstract Industrial Organisation models, unless of course a good economist introduces some clever assumptions in such models, that make them workable, but also very distant from reality.

A frequent objection to any broadening towards these fields of research, is that they may not lead to firm predictions, as price theory does. However, as the discussion above has shown, the “firmness” of these predictions may well be, at least partially, an illusion. Ginsburg and Wright (2012), e.g., stress that by doing so the results of antitrust scrutiny would become more uncertain, because courts and agencies would need to consider a trade-off between current and future consumer welfare, instead of concentrating - as they have traditionally done in the United States - on how to maximize current consumer welfare, the very root of antitrust enforcement. They also point out that, in doing so, they would need to refer to bodies of research which have not reached the degree of precision obtained by industrial organization, and that - in any case - antitrust agencies and courts “*are neither organized nor staffed in such a way as to incorporate learning from fields far removed from industrial organization economics*”<sup>25</sup>.

<sup>25</sup> Cit., p. 17.

There will indeed be practical problems, but I find it hard to share the view that an incorrect decision based upon a framework which may not correctly represent the competition process is better than the development of better decisions, based on a broader body of analytical findings and empirical evidence. As we saw above, lower U.S. courts seem to be worrying about this<sup>26</sup>.

In any case, broadening the view towards these disciplines is not an easy job. Some experiments in cross-fertilization have been made in the past<sup>27</sup>, with a notable contribution of Michael Porter - the leading thinker in strategy research for a generation - on how to consider more fully the effects of mergers<sup>28</sup>, but they do not seem to have produced any particular impact on antitrust thinking, and even less on antitrust enforcement. But almost a decade has gone by, and several things have happened which have weakened the intellectual sway that neoclassical price theory has held on legal analysts and policymakers. Strategy research has also considerably progressed: perhaps it would be useful to try again.

<sup>26</sup> And of course, if antitrust bodies were convinced of that they should employ resources which provide them with expertise in (say) business strategy, they would not find it hard, in any case, to find first-class business strategy experts.

<sup>27</sup> See the discussion in Oberholzer-Gee, F., Yao, D. (2010), *Antitrust - What Role for Strategic Management Expertise?*, in “Boston University Law Review”, vol. 90, n. 4, both distinguished Business Administration Professors at the Harvard Business School. For an earlier discussion, coming from two equally distinguished economists, and coming to the same conclusion, see Katz, M., Shelanski, H., (2007), *Mergers and Innovation*, in “Antitrust Law Journal”, vol. 1, n. 22.

<sup>28</sup> Porter, M. (2001), *Competition and Antitrust: Towards a Productivity-based Approach to Evaluating Mergers and Joint Ventures*, in “Antitrust Bulletin”, vol. 66, n. 4.

#### 4. CONCLUSION

As I have discussed above, all is not well in the relationship between legal and economic analysis in U.S. antitrust enforcement. Indeed, all is not well within antitrust economics: as Wright (2006) remarked "*the focus on theory of the past few decades has left antitrust practitioners and academics dissatisfied. The highly formalised theory did not produce readily testable implications, nor did it lend itself to available data. [...]. I suspect that the disconnect between industrial organisation economists and antitrust policymakers was a function of the popularity of game-theoretic approaches and the desire to formalise that has swept through economics...[such a desire was] largely independent of the needs of antitrust policymakers*". The financial crisis, and the growing awareness of the importance of the results originating from behavioral economics are certainly further complicating the picture.

In Europe, however, antitrust enforcers seem to be less preoccupied by these matters, and in general the discussion over the past few years has followed a different agenda, being seemingly more preoccupied with developing a "more economic approach".

I do not think that this should be interpreted as an indication that there is a growing consensus in the European antitrust community that we should go all the way to Chicago, taking the preservation of consumer surplus as the sole objective of antitrust, relying exclusively on price theory to analyze antitrust matters, and adopting a benign *laissez-faire* towards single-firm conduct.

It seems more likely that many, if not most, European antitrust economists would indeed proceed in that direction, while there are

widespread concerns among legal experts about the compatibility of a Posnerian legality principle based on consumer welfare with the "freedom to compete principle"<sup>29</sup>. This would seem to be confirmed, at least in directly, by the widespread mistrust in the European legal community towards the "law & economics" approach<sup>30</sup>, which is of course based on the same intellectual framework upon which post-Chicago antitrust economics has been constructed.

European economists have advocated for a few years a "more economic approach", and have found sympathetic ears within the Commission<sup>31</sup>, with a weakening of constraints on vertical restraints, and an increasingly "effects-based approach" to article 102. It is

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<sup>29</sup> For a recent discussion see Lianos, I. (2012) "*The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis*", CLES Working Paper No. 5/2012, available at <http://ssrn.com/abstract=2197025>. In a recent conference in Germany on the "more economic approach" indeed, there was widespread disagreement among participants even about the exact meaning of "consumer welfare", and most of the legal experts did not subscribe to its standard economic definition: see Drexler, J., Kerber, W., & Podszun, R., (2012), (eds.) *Competition Policy and the Economic Approach - Foundations and Limitations*, Edward Elgar Publishing Ltd.

<sup>30</sup> See Lianos, I. (2012) "*The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis*", CLES Working Paper No. 5/2012, available at <http://ssrn.com/abstract=2197025>, for some interesting data about law and economics academic articles originating from different countries. For a critical reflection on the approach, see Denozza, F. (2010), *Il progetto teorico dell'analisi economica del diritto antitrust e il suo fallimento*, in P. Barucci, C. Rabitti Bedogni (eds.), *20 Anni di Antitrust. L'Evoluzione dell'Autorità Garante della Concorrenza e del Mercato*, Giappichelli, Torino.

<sup>31</sup> *Ex multis*, See Neven, D., (2006), *Competition economics and antitrust in Europe*, in "Economic Policy", vol. 21, n. 48 on the "imbalances" between economic and legal experts in the Commission.

however uncertain whether the popularity of such an approach is still growing: in his valedictory speech, the former Chief Economist of the Commission has recently expressed doubts about the cost and procedural feasibility of rules based on the "more economic approach", given the "*basic conflict between the effects-based approach and the goal of a simple administrative procedure*"<sup>32</sup>, and ended up stressing the usefulness (albeit referring to an example taken from State Aid issues) of "*ex-ante conditions*". In any case, success has been greater in Brussels than in the periphery of the Union: as Lianos (2012) notes, "*we have witnessed the propensity of competition authorities, the specialised adjudicators which, one would have expected, would embrace the effects-based approach, to bring largely anticompetitive object cases (rather than anticompetitive effects), thus relying on presumptions and analytical shortcuts rather than sophisticated economic analysis*"

A possible conclusion then is that in Europe there is less debate about the usefulness of post-Chicago economics because several enforcement agencies adopt a highly syncretistic approach. They are not prepared to borrow from economics the criterion of legality upon which they base their decisions. They refer to consumer welfare, but also often use broader criteria, and often the protection of the competition process plays an important role in their decisions. When they think it appropriate, they may utilize one of the several theoretical models offered by post-Chicago economics,

but they do not always refer to such a framework of economic analysis.

I personally find such an approach quite wise, and I am also convinced that the growing role of civil judges in antitrust enforcement in Europe will reinforce the syncretism, as they will bring less sympathy towards pure theory and a healthy scepticism toward expert opinions, that they will carefully weigh in the light of real-life evidence.

In any case, I think that it would be very useful also in Europe to promote a discussion on how antitrust enforcement could be made more beneficial to society considering some of the insights provided by behavioral economics, and also the growing wealth of theoretical and empirical results about firm behavior originating in other fields of research, such as strategy or marketing.

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<sup>32</sup> Kühn, K.U, (2013), '*Good economics*' in administrative proceedings: *Three challenges*, in "Concurrences Journal", n. 3-2013, art. n. 53242, available at website [www.concurrences.com](http://www.concurrences.com).

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