On the Colombian Antitrust Law and Why It Might Be One Step Ahead of the Antitrust Debate Between Neo-Brandeisians and the Chicago School of Antitrust

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CPI COMPETITION POLICY INTERNATIONAL

August 2020

While writing this short column, The Economist launched a new series of economics briefs, which will be dedicated to what economists are debating and rethinking regarding the basics of economic theory. The first of these six economics briefs poses the debate over the reforms that governments and academics believe are needed to reinvigorate antitrust enforcement.[2] Two leading views, generally seen as conflicting, represent the two sides of the current debate: the Neo-Brandeisians and the Chicago School of Antitrust.

This debate is usually analyzed from an American and European perspective. This is understandable for many obvious reasons. However, it could be beneficial to try and break from this *duopoly* –especially if we believe in the benefits of competition– by shedding some light from younger antitrust traditions. That said, some readers might be surprised that developing countries such as Colombia might have some valuable contributions to enrich this debate. Thus, this is the goal of this short column. Firstly, I will present some ideas that frame the Neo-Brandeisian - Chicago School of Antitrust debate, which are at the center of the current intentions of reforming antitrust. Secondly, I will explain why the Colombian Antitrust Law has already taken some small steps to relieve the Neo-Brandeisian – Chicago School of Antitrust tension, and why it might be well placed to deal with modern antitrust concerns.

The Debate Between Neo-Brandeisian and the Chicago School of Antitrust

A wonderful but concise source to dive into this debate is available in the book The Curse of Bigness, written by Columbia Law Professor Tim Wu. Louis Brandeis and Robert Bork are the well-known opponents of what the main purposes of antitrust enforcement should be.

Louis Brandeis was a Supreme Court Justice who distrusted big businesses because he believed they were incompatible with a healthy economy and with democracy itself. As Professor Wu puts it, Brandeis went even further: "*Brandeis saw an economy dominated by giant corporations as tending to a certain inhumanity. He feared that working in giant corporation might rob the American people of their character: "far more serious than even the suppression of competition is the suppression of industrial liberty, indeed of manhood itself."*[3]

In his fight against giant corporations Brandeis advocated for small business in a way that was, at first sight, contradictory. As Thomas K. McCraw explains: "*For Brandeis and his allies, to be simultaneously against bigness and for consumers was extremely difficult*."[4] In short, Brandeis argued that small businesses relied on high margins to stay afloat because they did not enjoy the large sales of big businesses, which could comfortably compete with low margins without sacrificing their existence.

Here is where the Chicago School of Antitrust comes into play. This antitrust perspective considered that antitrust enforcement was less necessary. In fact, this school believed in self-correcting market forces. As to the origins of the Chicago School of Antitrust, Professor Wu recalls: "*A far more obscure man named Aaron Director would lead the economic attack that would later become known as the Chicago School of Antitrust. (…) Director may have started alone, more or less, but he soon gained an impressive band of followers and associates.*"[5] Among these followers were future federal judges such as Richard Posner, Frank Easterbrook and Robert Bork. Wu continues by stating: "*In other words, they began with a presumption that antitrust was unnecessary, based on the laissez-faire idea that problems work themselves out, and most of the time we live in the best of all possible worlds.*"[6]

Robert Bork became the most influential thinker of this antitrust wave, by defending that the sole purpose of antitrust was the *consumer welfare standard*. Professor Wu goes on and asks:

> "*How did Bork do it? The key was a 1966 paper, "Legislative Intent and the Policy of the Sherman Act," arguably the most influential single antitrust paper in history. There he conducted his own investigation of the debates surrounding the Sherman Act and arrived at an extraordinary conclusion. "Congress intended the courts to implement… only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer… satisfaction" (…), Bork insisted, "courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies."*[7]

In a nutshell, while Brandeis thought the main purpose of antitrust enforcement was to fight big businesses and market concentration, Bork believed that the sole goal of antitrust was to pursue the maximization of consumer welfare. As Professor Wu puts it: "*What did Bork mean by this exactly? He meant that in any antitrust case, the government or plaintiff had to prove to a certainty that the complained-of behavior actually raised prices for consumers.*"[8]

The Colombian Competition Law Approach to the Neo-Brandeisian- Chicago School of Antitrust Debate

There is no such Neo-Brandeisian- Chicago School of Antitrust debate in Colombia, for many reasons. Firstly, and perhaps the most obvious reason, is that the debate belongs mainly to the US jurisdiction and is somewhat alien to the Colombian antitrust context.

Secondly, because the Colombian Competition Authority has not yet faced the challenging cases related to so-called tech giants. Indeed, it is well known that tech giants are raising concerns derived precisely from their bigness, and pose the question of whether the consumer welfare is an adequate standard to enforce antitrust regarding these companies.

Thirdly, and most important, at least for the purpose of this column, it is because Colombian Antitrust Law has since 2009 adopted a mixed approach to antitrust theory, which combines some of the Neo-Brandeisian and the Chicago School of Antitrust's ideas. Of course, this was not explicitly discussed during the 2009 reform to the Colombian Antitrust Law. In other words, I do not believe that lawmakers had Brandeisians ideas or the Chicago School of Antitrust in mind when writing and discussing the 2009 antitrust reform. Nevertheless, the purpose of Colombian Antitrust Law in practice involves a mixed approach to the Neo-Brandeisian and Chicago School of Antitrust tension by explicitly stating three main goals of antitrust enforcement.

Article 3 of Law 1340/2009 states that antitrust enforcement is particularly intended to promote: (i) free participation of companies in the market; (ii) consumer welfare; and (iii) economic efficiency. It is important to mention that these are not the only goals of antitrust enforcement under Colombian Antitrust Law, but they are the main ones under this provision.

This is of great importance in guiding the Colombian Competition Authority's antitrust investigations and enforcement. Additionally, as readers may observe, the Neo-Brandeisian and Chicago School of Antitrust ideas are incorporated in this triad of antitrust goals. The

Chicago School of Antitrust component is represented by the *consumer welfare* and arguably by the *economic efficiency* standards.

On the other hand, the Neo-Brandeisian approach is incorporated in the form of the *free participation of companies in the market*. This is a broad goal that serves many antitrust means, such as reducing barriers to entry on companies willing to challenge the incumbents; enforcing against anticompetitive conducts from dominant incumbents that use legal tricks to exclude small and medium-size enterprises trying to grow larger in order to be able to compete vigorously; being stricter on merger controls regarding big companies pursuing to buy out smaller competitors that are becoming a threat to dominant incumbents; and so on.

Over more than 10 years the Colombian Competition Authority has interpreted article 3 and enforced antitrust law while bearing in mind this triad of goals. Therefore, my understanding is that the Colombian Competition Authority examines anticompetitive conducts by carefully weighing the consumer welfare standard, economic efficiency, and free participation of companies in the market. This is why, I believe, the Colombian Competition Authority relies on a tool that is perhaps absent or not explicitly incorporated by law in other jurisdictions, which do not count on such a triad of purposes that reduce the tension between Neo-Brandeisians and the Chicago School of Antitrust.

In addition to these legal and economic considerations, there is a political one that gives the Colombian Competition Authority an advantage with regard to the Neo-Brandeisian – Chicago School of Antitrust debate. Because this triad of antitrust enforcement purposes are already stated by law, there is no need to engage in a political debate over the purposes that should be part of the law in order to reinvigorate antitrust enforcement. In a world of extreme political radicalism and polarization, trying to agree on matters of what should be done to revive antitrust enforcement are of great complexity. Especially because, although antitrust purposes are grounded in economics, they involve a political and a philosophical aspect. This last aspect is one reason why the Chicago School of Antitrust defenders classify Neo-Brandeisians as "*hipsters of antitrust,*"[9] since they believe they lack the rigorous methodology inherent to the Chicago School.

Final Thoughts

To conclude, this triad of antitrust enforcement purposes places the Colombian Antitrust Law one step ahead of the Neo-Brandeisian – Chicago School of Antitrust debate, and thus might place the Colombian Competition Authority in an appropriate position to deal with challenging antitrust cases in the future as well. In fact, as I suggested, the Colombian Competition Authority already has a legal tool for weighing the free participation of companies in the market against the consumer welfare standard. This means that the contestability of the market is an important economic and legal principle for the Colombian market economy. Of course, as it has been during the last 10 years of antitrust enforcement, this analysis is performed on a case by case basis.

Perhaps this is exactly what The Economist suggested on how to reinterpret the consumer welfare standard in the direction proposed by Carl Shapiro of the University of California, Berkeley: "*The "protecting competition standard," to make clear that it takes into account all the harm that anti-competitive practices might do to consumer welfare, including that which is indirect or diffuse.*"[10]

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[2] The Economist, What more should antitrust be doing? The first of a series on areas where economists are rethinking the basics (Aug. 7th, 2020), https://www.economist.com/schools-brief/2020/08/08/what-more-should-antitrust-be-doing

[3] TIM WU, THE CURSE OF BIGNESS, ANTITRUST IN THE NEW GILDED AGE 41 (COLUMBIA GLOBAL REPORTS, 2018)

[4] THOMAS K. MCCRAW, PROPHETS OF REGULATION 105 (THE BELKANP PRESS OF HARVARD UNIVERSITY PRESS, 1984)

[5] WU, *supra* note 2, at 84, 85.

[6] *Id*.

[7] *Id*., at 88.

[8] *Id*.

[9] The Economist, *supra* note 2.

[10] *Id*.