

All Things Are Possible with Antitrust — CALERA, Capability Standards, and Looking to Europe to Reinvigorate U.S. Antitrust Enforcement

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Introduction

It is becoming a truism to say that competition policy is at an inflection point both in the United States and around the world. For the past forty years, two major trends have driven political economy, each with major implications for antitrust law. The first is rapid technological change, and the resultant unprecedented gains in dynamic efficiency that have enabled the rise of large technology companies that are now scapegoated by an ever growing number of commentators, academics, and policymakers as representing the failure of the consumer welfare standard that has long guided antitrust law. The second is globalization — and, with respect to antitrust policy, the unequivocal failure of the consumer welfare standard to drive any sort of international consensus, with the European model being far and away the dominant player globally among the more than one hundred countries that have created competition regimes over the past few decades. The United States' view is clearly the minority one.

Whereas the post-World War II order was once commonly seen as the triumph of Anglo-American liberalism — if not also the final form of world history — recent events in U.S.

antitrust policy suggest that the European or “ordoliberal” model of neoliberalism may now be ascendant even in the United States, the land where both antitrust law was born and the consumer welfare standard once enjoyed, up until recently, a wide consensus among the antitrust cognoscenti. Known as the Competition and Law Enforcement Reform Act (“CALERA”),² rather than reflect a wooden application of either the neo-Brandeisian neo-structuralism or the economic paternalism of some progressive academics, the most important legislative proposal for U.S. antitrust reform in recent history, in its most important respects, endorses the ordoliberal paradigm developed in Europe after World War II to prevent a return of fascism and construct a new liberal economy, and which has persisted in an evolved form within European competition law jurisprudence.

The Two Reform Movements

Over the past several years, as the drumbeat for antitrust reform has continued its crescendo, commentators have largely adopted a bifurcated model for conceptualizing

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² Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

the paradigms such reforms might embody.³ Standing in for Scylla are the neo-Brandeisians, who for each of the monster's heads name a socio-political goal that antitrust law should help bring about, and unabashedly call to eliminate the consumer welfare standard as the lodestar of antitrust enforcement.⁴ At bottom, their approach resurrects the older structuralist paradigm — hitherto relegated to the dustbin of antitrust history — in the name of protecting democracy and (positive) economic liberty, and elides any distinction between harm to competitors and harm to competition: conduct that is responsible for even the most *de minimis* increases in concentration can constitute an antitrust offense.⁵ For all its purported popularity, the neo-Brandeisian reform at bottom puts new wine into old bottles, with every indication being that both will perish.⁶

The Charybdis of the antitrust reform movement has taken the form of a economic paternalism, advocated largely by a congeries of wonks and academics.⁷ Far from eliminating the consumer welfare standard, these commentators would double down on technocratic antitrust policy by both embracing

a behavioral view of antitrust in lieu of the neoclassical assumptions of rationality reflected in the consumer welfare consensus, and — at least in some areas — would open the Pandora's box of using antitrust law as *de facto* regulation, such as through the elimination of a price-cost test to find a firm's pricing behavior unlawful.⁸ That is, whereas the neo-Brandeisians fail to grasp the distinction between harm to competitors and harm to competition in favor of a myopic focus on the former, the progressive paternalists in effect do the same in favor of the latter — empowering antitrust law to proscribe conduct untethered from any harm to the competitive process.

Ordoliberalism

As a theory of competition policy, ordoliberalism — the cousin of American neoliberalism⁹ — has proven somewhat difficult for American commentators to get their heads around, with some claiming that its role in European competition law has been

³ See Timothy J. Muris & Joseph V. Coniglio, *What Brooke Group Joined Let None Put Asunder: The Need For The Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 35 (Nov. 2020) (distinguishing between neo-Brandeisian proposals to eliminate the recoupment prong and those from a cadre of progressive economists associated with the Stigler Center at the University of Chicago to eliminate the price-cost prong); A. Douglas Melamed & Nicholas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORGAN. 741, 744-45 (2019) (generally distinguishing between the "New Brandeis" line of criticism that rejects the consumer welfare standard and a "progressive" critique that would maintain the broader consumer welfare framework).

⁴ See, e.g. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 737 (2017) ("The current framework in antitrust fails to register certain forms of anticompetitive harm and therefore is unequipped to promote real competition—a shortcoming that is illuminated and amplified in the context of online platforms and data-driven markets.").

⁵ See, e.g. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (finding a merger between two retail groceries unlawful for having a combined share of less than 8% in a market where the four largest firms had an approximately 25% share).

⁶ See, e.g. Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* 45 J. CORP. L. 101 (2019); Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495 (2020); Joseph V. Coniglio, *Why The 'New Brandeis Movement' Gets Antitrust Wrong*, LAW360 (Apr. 24, 2018).

⁷ For a statement, see GEORGE J. STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT (2019).

⁸ See Muris and Coniglio, *supra* note 3.

⁹ See generally MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS* (Senellart et al. eds., Burchell trans., 2008) (1979) (discussing the relation between American neoliberalism and European ordoliberalism).

overstated.¹⁰ Forged in the ashes of Europe after World War II, the ordoliberal paradigm represented an attempt to use competition law to create a liberal market order that approximated the atomistic ideal of the classical economists as a third way alternative to laissez faire capitalism and socialism.¹¹ For early ordoliberals, market power was the central evil in a market economy, and the purpose of competition policy was to act as a disempowering force to protect the individual autonomy of market participants. To this end, ordoliberals promoted a standard under which firms were required to act “as-if” they were in a competitive market, whereby “performance competition” that benefitted consumers was permitted, but “impediment competition,” which was injurious to rivals, was prohibited.

Notwithstanding the undoubted influence that the economic approach embodied by American neoliberalism and the consumer welfare standard has had on the development of European competition policy, the latter remains broadly consistent with the core ordoliberal framework. And, to be sure, it is a straw man to suggest — as some do — that on the ordoliberal view harm to competitors is not necessarily sufficient to show harm to competition. To be unlawful, the conduct must also be “capable of restricting competition,” which can take the form of naked restraints, restraints otherwise unlawful by object, or those that are found to be capable of restricting

competition by virtue of their effects.¹² As such, the European approach represents a deviation from the consumer welfare standard not, as is sometimes surmised, by failing to distinguish harm to competitors from harm to competition, but by its causation standard — a capability, rather than the but-for or likelihood standards.¹³

A Third Way Again?

So understood, the ordoliberal-European model, as evolved, represents a third paradigm for U.S. antitrust reform that is both distinct from and, in some respects, more nuanced than either the neo-Brandeisian or the progressive economic proposals. Unlike the neo-Brandeisians, with their knee-jerk policies and reactionary rhetoric, the ordoliberal model is careful not to deem conduct that increases market concentration as unlawful in and of itself, but only when there is the capability that competition will be restricted. In making this determination, the ordoliberal-European model can readily avail itself of economic analysis, especially when applying a by effect rule to evaluate business conduct. Moreover, with its emphasis on consumer choice — as opposed to the neo-Brandeisians’ fixation on market structures — it shares the consumerist orientation of the American model, albeit from a more deontological or “rights based” perspective,

¹⁰ Kiran Klaus Patel & Heike Schweitzer, *Introduction*, in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW 7* (Kiran Klaus Patel & Heike Schweitzer eds., 2013) (noting how notable American studies on ordoliberalism and the development of EU competition law fail to “reflect the more recent research”).

¹¹ For a discussion, see Joseph V. Coniglio, *Economizing the Totalitarian Temptation: A Risk-Averse Liberal Realism For Political Economy And Competition Policy In A Post-Neoliberal Society*, 59 SANTA CLARA L. REV. 703, 713-16 (2020).

¹² See Case C-413/14, *Intel Corp. v. European Comm’n*, ECLI:EU:C:2017:632; Case T-286/09, *Intel Corp. v. Commission*, ECLI:EU:T:2014:547.

¹³ The nature of harm to competition as encompassing consumer choice, as opposed to merely consumer welfare, is a further crucial distinction between the European and American approaches. See Joseph V. Coniglio, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism*, COMPETITION POL’Y INT’L ANTITRUST CHRON. (Aug. 2017).

rather than the utilitarian or welfarist one that typifies American neoliberalism and U.S. antitrust policy.¹⁴

Consistent with this rights based framework, the ordoliberal-European approach also differs greatly from the paradigm of the progressive economists in light of its emphasis on harm to the competitive process, as opposed to a technocratic maximization of consumer welfare. Here again, the case of predatory pricing is instructive. Whereas for the progressive economists, the price-cost test is seen as an intent-focused test that is unnecessary to determine real world effects on consumer welfare, the European framework makes the price-cost test, as a measure for determining whether a firm has competed on the merits, the bedrock of its predation jurisprudence: pricing below average variable cost is *per se* unlawful, and pricing above average variable cost but below average total cost is unlawful if part of an exclusionary scheme, of which intent — another non-welfarist measure of the merits of a firm's behavior, as opposed to actual effects — is an important factor.¹⁵

The Competition and Antitrust Law Enforcement Reform Act

This ordoliberal lens, much more so than the theories of the neo-Brandeisians or the progressive economists, puts CALERA into its

clearest focus. Introduced by Senator Amy Klobuchar, CALERA is careful not to commit the neo-Brandeisian error of striking the consumer welfare standard from antitrust jurisprudence and treating the distinction between harm to competitors and harm to competition as one without a difference. And, to be sure, while CALERA's elimination of the below-cost pricing and prior course of dealing elements for predatory pricing and refusals to deal rules respectively are a thinly veiled nod to the progressive economists, its most far-reaching and general proposal is to formally change the causation standard for finding that mergers and exclusionary conduct harm competition to an "appreciable risk"¹⁶ — which, like the European "capable of restricting competition," is a potentiality standard that could do much to lessen the importance of empirical economics within current antitrust practice.

Put simply, while validating the program of the progressive economists with respect to certain rules dealing with species of unilateral conduct, the antitrust framework CALERA endorses appears to be, for all practical purposes, the European one: mergers or unilateral conduct that harms rivals will be unlawful if they create a meaningful risk, or are capable, of harming consumers, which will presumably one day expressly be interpreted to include reductions in "consumer choice."¹⁷ Indeed, over the past few years, high level

¹⁴ See Heike Schweitzer & Kiran Klaus Patel, *EU Competition Law in Historical Context*, in THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW 222-23 (Patel and Schweitzer eds., 2013) (linking the policy of the European Court of Justice, as embodied in *Continental Can*, with a "rights-based approach").

¹⁵ See Case C-62/86, *AKZO Chemie BV v. Commission* [1991] ECR I-3359.

¹⁶ CALERA §§ 4(b), 9(a). To be sure, Clayton §7 may already be said to include a potentiality standard by condemning mergers that "may" lessen competition substantially, which is preserved in CALERA. However, as a matter of agency practice, the "may" standard is applied using but-for and likelihood causation thresholds.

¹⁷ See Pallavi Guniganti, *Simons includes harm to workers and choice in competition mission*, Global Competition Review (Feb. 5, 2018). <https://globalcompetitionreview.com/article/usa/1153360/simons-includes-harm-to-workers-and-choice-in-competition-mission>.

policymakers have been not so quietly emphasizing how capability causation standards already exist within existing U.S. law, specifically for causation in monopolization cases.¹⁸ The key precedent is *U.S. v. Microsoft*, where the D.C. Circuit found Microsoft's conduct to be unlawful because it was merely "reasonably capable" of harming competition.¹⁹ While this standard has a limited application presently,²⁰ enacting CALERA would effectively generalize it to cover all mergers and exclusionary conduct, and thus in a rather Fabian fashion radically transform the consumer welfare standard without abandoning it — precisely the sort of thing, it should be noted, of which the consumer welfare revolutionaries have been increasingly accused.²¹

How Much Is Possible?

Viewed in this way, CALERA has important implications for both a reinvigorated U.S. antitrust enterprise and global competition policy. The question of just how much potential for competitive harm conduct must have to be unlawful is a tantalizing one for antitrust theorists and metaphysicians alike. And clearly the law rightly imposes bounds.²² Indeed, one

of the most obvious problems with potentiality standards is that they fail what was once more broadly known as the "scholastic tag": *ab esse ad posse valet consequentia*, *a posse ad esse non valet consequentia*.²³ Put simply, conduct that only may harm competition also might not. While it is true that under *Microsoft* a merger between a monopolist and nascent rival might be condemned on the grounds that it is reasonably capable — or rather "creates an appreciable risk" — of harming competition, in cases where this competition is for next-generation, rather than existing, products, it may prove to exceed the bounds of the antitrust laws.²⁴

Viewed as an endorsement of the European model, adoption of CALERA would constitute a major development in international antitrust by virtue of signaling a shift toward moving U.S. competition policy more in line with that in Europe, and raising the possibility of bridging the transatlantic divide in competition policy and approaching international convergence — a feat that was at best economic pie in the sky even at the height of the Washington consensus. Amidst ongoing efforts by the Biden administration to facilitate economic cooperation with Europe, including in

¹⁸ See D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of Fed. Trade Comm'n Issues*, Remarks at GCR Live Antitrust in the Digital Economy (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf; Jeffrey M. Wilder, *Potential Competition in Platform Markets*, Remarks as Prepared for the Hal White Antitrust Conference (June 10, 2019), <https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white>.

¹⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

²⁰ See, e.g. Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 30 (2020).

²¹ Barry Lynn, *No Free Parking for Monopoly Players: Time to Revive Anti-Trust Law*, THE NATION (June 8, 2011) ("A generation ago, when a small crew within the Reagan administration set out to clear the way for a radical reconcentration of power, they did so not by openly assailing our antimonopoly laws but by altering the intellectual frames that guide how we enforce them.").

²² See *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert denied*, 455 U.S. 1016 (1982).

²³ Translated as "from existence, it follows that it is possible; from possibility, it does not follow that it exists."

²⁴ See, e.g. Statement of Chairman Timothy J. Muris, *In re Genzyme Corporation / Novazyme Pharmaceuticals, Inc.* (2004), <https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf>.

antitrust,²⁵ seeing CALERA as a step toward a more European competition policy cannot but take added significance as cohering with a broader geopolitical strategy on the part of the United States — despite the fact that European efforts to curb large technology companies are clearly trending toward more regulatory solutions, rather than a doubling down on competition tools.²⁶

Conclusion

As the most significant proposal for antitrust reform in decades, CALERA will no doubt prove to be a topic of much discussion within the broader antitrust community as calls for reform continue to grow louder from both sides of the political aisle. Notwithstanding some similarities with the programs of both the neo-

Brandeisians and progressive economists, its most wide reaching change of adopting an “appreciable risk” causation standard to evaluate mergers and unilateral conduct is best viewed as an endorsement of the ordoliberal-European approach and its “capable of restricting competition” framework. To the Foucauldian observer, rather than embody a hard break with neoliberal competition policy, CALERA may thus foreshadow merely a replacement of the American model with the European one. Moreover, the question of how potential harm to competition can be and still fall under the antitrust laws raises somewhat thorny and unresolved issues that the antitrust community may have to carefully analyze in the years ahead.²⁷

²⁵ See Press Release, Fed. Trade Comm’n, *FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers* (Mar. 16, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach>.

²⁶ Press Release, D.G. Comp., *Europe fit for the Digital Age: Commission proposes new rules for digital platforms* (Dec. 15, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347.

²⁷ For a recent article on antitrust and causation, see Herbert Hovenkamp, *Antitrust Harm and Causation*, U. of Penn. Inst. for Law & Econ. Research Paper No. 21-10 (Feb 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771399.