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Antitrust and the Political Center

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“Aligning oneself with the left, as with the right, is only one of the numberless ways open to man of being an imbecile: both are forms of moral hemiplegia.”

Ortega y Gasset, *The Revolt of the Masses* (1930).

Economic policies have traditionally been characterized or labeled pursuant to the simplistic, and hence popular, *summa divisio* between right and left. Discussions about the economy in many nations worldwide continue to be greatly influenced by dogmatic principles disconnected from objective analyses. Left wing political actors generally tend to favor all-left approaches, and right wing political actors favor all-right stances;² both have a tendency to negate that there may also be merit in opposing views. Still today, economic discussions more resemble religion classes than technical and objective debate over a technical subject of the maximum importance.

This piece posits that the recent expansion of antitrust and its incorporation as one of the core elements of economic regulation worldwide may contribute to infusing some sensible centrist logic into the regulation of markets, particularly in emerging economies. This was the thought manifested in a recent blog entry in *Chillin' Competition* that CPI has asked me to develop.³ This is no easy task, for it is difficult to argue what may not be more than an exercise of wishful thinking in progress, even more so when sensitive political ideologies are at issue.⁴ That is why these pages aim neither at persuading nor providing an objective account of reality; their only aim is to throw some raw ideas out there with the hope that they will eventually be refined through discussion.

It is nevertheless comforting to see that others have recently brought antitrust enforcement together with too much needed centrist economic policies. At the end of 2012, against the background of stagnant economies in the European Union and the United States, and in the light of the inequalities characterizing developing economies, a series of influential publications pointed at the need to adopt “radical centrist policies” and, remarkably, antitrust was accorded a primary role in the pursuance of a centrist agenda.

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² Although the right and left labels are misleading and portray political affiliations in an incomplete or simplistic manner, given the extension of this piece we will hereinafter also resort to them.

³ See *Antitrust and Political Imbecility*, available at <http://chillingcompetition.com/2012/11/12/antitrust-and-political-imbecility/>

⁴ The fact that I'm writing this text during my Christmas holidays and typing only with one hand because of an injury adds on to the hardship...

An editorial in *The Economist*, for instance, stated that it is necessary to steal ideas from both left and right to tackle inequality in ways that do not harm growth, and considered that “[t]he priority should be a Rooseveltian attack on monopolies and vested interests, be they state-owned enterprises in China or big banks on Wall Street. The emerging world, in particular, needs to introduce greater transparency in government contracts and effective anti-trust law.”⁵

Establishing a link between a political attitude such as political centrism and antitrust may at first sight appear odd to many of us who, devoting our professional lives to this discipline, have developed a justified tendency to dislike the idea of giving leeway to political considerations within antitrust analysis. We have a natural reflex to reject movable considerations that would risk infusing undesirable subjectivity into an already open discipline: balancing legal certainty and commonly accepted economic principles is already hard enough.

But this reluctance to accept political intromission has largely contributed to the current configuration of antitrust, which I would argue is a centrist one. The development of the basic principles underpinning antitrust law has, for the most part, taken place in isolation from direct political influence. On the contrary, the history of antitrust is one of a constant quest to devise wise and practicable rules in the light of sound and consolidated economic knowledge. Unlike other legal fields of particular relevance in the economic sphere—like, let’s say, tax law—, antitrust discussions tend to be driven less by ideology and more by technical criteria.

One can think of several reasons why this is so. First, antitrust is a judicial construction as opposed to a legislative one; the scarce and ample wording of both the Sherman Act and the European Treaties accord courts a role that these do not enjoy in other legal areas (particularly in non-common law jurisdictions). Second, the legislative (politicians) have largely tolerated this, probably because antitrust has never been a sensitive issue for ordinary citizens (voters). Third, until recently antitrust has been mostly thought of and applied in very few jurisdictions, and by a small and intellectually active community of professionals—two characteristics which have enhanced the interactions and the ensuing commonalities across jurisdictions. Finally, the core economic substrate underlying antitrust law critically contributes to the technical nature of this legal discipline.

The result is an area of law that some regard as highly complex or technical. Such quality might be inconvenient from the point of view of legal certainty, but it also stands as testimony of the fact that antitrust has not resorted to simple solutions to avoid complexity and that, on the contrary, it engages in a permanent effort to face complexity, to reason through it, and to distill it into a set of applicable rules. This status of permanent evolution driven by reasoned critique, by a rule of reason, is one of the factors that make our discipline unique and fascinating.

That the configuration of antitrust law has not been greatly affected by the influence of small politics (its enforcement, on the contrary, sometimes has) does not mean that a link between antitrust and politics does not or should not exist. Antitrust is far from agnostic or merely technocratic. Like any other legal regime it is ultimately underpinned by core political values. Antitrust rules not only tolerate but, indeed, encourage economic freedom. But at the

⁵ *True Progressivism*, THE ECONOMIST, October 13, 2012, available at <http://www.economist.com/node/21564556>

same time—and this is key—they do not lose sight of the fact that ensuring procedural equality (equality of opportunities) is an indispensable pre-condition for such freedom to exist (hence the focus on the protection of the competitive process and on the removal of barriers to entry).⁶

Antitrust law does not seek the substantive equality that some may associate with the left (antitrust law protects competition, not competitors), but it also fights vested interests and privileges derived from excessive economic power and uncontrolled market forces. Whereas many in the right hold antitrust as an excessively interventionist tool; many in the left criticize it for its liberal endorsement of market forces. The fact that criticism originates from both sides suggests that antitrust is on the right track: the center one.

Following the pendulum-like oscillations that characterize many evolutions in social sciences—antitrust has been corrected, overcorrected, and corrected again by the Harvard and Chicago schools, by European ordoliberalism, and ordoliberal chasers—antitrust might have become closer to a point where its rules strike a sensible balance between equality and the promotion of economic growth. That, I would submit, is centrist economic policy.

One would expect—or rather hope—that the widespread adoption and formal harmonization of antitrust regimes across the world might have the potential of infusing some sensible and not-politically driven attitudes towards markets and the economy, thus acting as an effective remedy to the hemiplegic political imbecility observed by Ortega y Gasset in the quote above.

Indeed, in recent years antitrust has expanded at exponential rates worldwide. Most nations currently have antitrust statutes in force as part of their “economic constitutions,” and many have begun to apply them in an effective manner. Interestingly, most of these statutes are strikingly similar. At first sight one could argue that this universal adoption of antitrust rules speaks for its reasonableness, proven virtues, and ability to be accepted with a degree of consensus all too rare in other areas of economic policy. This is to a great extent true, and it is a tremendous achievement.

Realistically, though, it is also true that the formal harmonization of international antitrust regimes might have something to do with its ample language that leaves leeway to many possible, even divergent, interpretations (which in the worst-case scenarios—in the absence of appropriate checks-and-balances—can even aid strengthening public control over business). To be sure, the formal similarity of the rules does not necessarily mean that they will be applied in a substantially similar manner, particularly in the first stages of evolution in each jurisdiction.⁷

⁶ The protection of the competitive process through the elimination of barriers to entry becomes particularly important in places in developing economies. According to recent studies, the poorest sectors in the developing world spend a relatively high percentage of their income in highly concentrated markets for first-need products. Market de-concentration through effective antitrust enforcement and advocacy in developing economies could contribute to mitigating poverty and to achieving other crucial societal goals. Whether this objective should or not trump efficiency-only considerations is an interesting issue, but one that exceeds the scope of this paper.

⁷ In addition to the possibility that each jurisdiction might have different and even opposed political views, competition authorities in developing economies face several challenges, such as low institutional capacity, lack of human and material resources, fragile social and entrepreneurial structures, inadequate limits to administrative discretion, political opposition to reform, or deficient access to market data.

Without denying the risk that antitrust enforcement can be manipulated in the pursuance of specific political agendas, I would tend to be optimistic. The levels of international cooperation and discussion in antitrust matters, as well as the key roles played by institutions and organizations like the World Bank, the OECD, or the ICN, are all elements that suggest it is reasonable to expect some degree of material convergence, at least at the big picture level.

In any event, the fact that differences will remain in the ways antitrust laws are applied globally does not invalidate the thesis underlying this text. In my view, the very existence and general acceptance of antitrust regimes in jurisdictions with economic approaches as varied as, let's say, China, the United States, Russia, or France is in itself of the maximum relevance. The endorsement of the values underpinning antitrust also implies the recognition that (i) freedom of enterprise and the operation of free market forces through competition generally yields positive results; and (ii) for such freedoms to be real, market forces and excessive market power need to be effectively supervised and corrected and competition is to be fostered through public intervention under the form of antitrust enforcement and advocacy.

The crucial paradox described above—to limit some sorts of economic freedom for the sake of freedom itself—might sound obvious to many of us, but it has not been a feature of the economic policies pursued in many places around the globe. It is submitted that a global acceptance of these simple—yet key—principles through the very enactment of antitrust rules—unless purely cosmetic—constitutes a giant leap towards the construction of sensible economic policies worldwide. Furthermore, the adoption and effective enforcement of antitrust rules across the globe will naturally, and perhaps even unintentionally, bring about some of the consequences that back in the day motivated the very inception of antitrust law, such as the prevention of the concentration of economic/political power in the hands of few.

One could even hope that the incorporation of a center-leaning regime like antitrust as part of the economic governance in developing jurisdictions could even have a spill-over effect over other economic policies like government spending or taxation, where decisions could also be based on no more than objective economic and legal knowledge loyal to two fundamental and, despite the appearances, compatible goals: those of guaranteeing economic growth and equality.