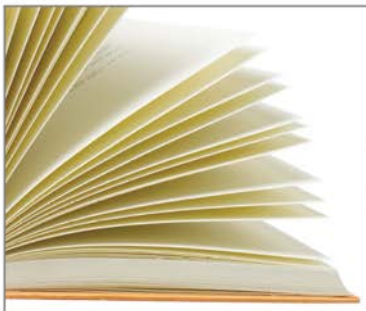

Antitrust Literature Watch

Class Action Spotlight

CRA Charles River Associates

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In this edition of the **Antitrust Literature Watch**, we feature recent papers by attorneys, economists, and academics that are focused on issues pertinent to North American antitrust litigation, with a spotlight on class action litigation. The abstracts included below are as written by the author(s) and are unedited. Author affiliations and titles are reflected in the abstracts and papers. Included in this edition are:

- studies on **class action litigation** discussing reform in earlier-generation class action jurisdictions, statistics on class action filings and recoveries in federal court cases, the role of competition in customers' reactions to announcements of class action lawsuits against firms, proof of injury before and after the Supreme Court's Wal-Mart and Comcast decisions, and the role of states in the era of federalized class actions.
- articles on **algorithms and antitrust** debating how algorithms may affect competition and benefit consumers, the ability of existing antitrust laws to grapple with algorithmic collusion, the potential effects of artificial intelligence (AI)-based pricing algorithms acting without communications to others, and the design of platforms that use AI pricing algorithms to promote competition, improve consumer surplus and increase profits.
- articles on **COVID-19: competitor collaborations, collusion and compliance** debating competitor collaborations during economic downturns such as the current pandemic, antitrust regulators' guidance regarding procompetitive collaboration in relation to enforcement programs, the tools for cartel enforcement and the DOJ's collusion strike force, and uncertainty around price increases in light of state price-gouging laws.
- articles on **digital platforms and the consumer welfare standard** discussing antitrust enforcement in digital and high-tech markets in the presence of network effects and two-sided markets, antitrust enforcement and the adoption of the consumer welfare standard, concentration and bigness in the digital economy and differing views on whether it raises antitrust issues, price competition and platform design in two-sided networks, and the post-Chicago School and recoupment in digital predation.
- studies on **privacy and antitrust** discussing privacy as an element of competition and consumer welfare, Chrome's removal of third-party cookies as de facto privacy regulation, and monopolization remedies relating to data privacy.
- articles on **regulatory and enforcement frameworks** discussing ex-ante and ex-post approaches to antitrust regulation of large technology firms, submissions to the House on using current antitrust law in addressing antitrust issues involving technology platforms, the potential application of AI and machine learning tools by enforcers in tackling monopoly and collusion in digital markets, essential facilities doctrine in the context of access to digital platforms, divergent views on antitrust enforcement beyond vertical mergers, and the role of big data in antitrust.

Class Action Litigation

The State of Reform in First and Second Generation Class Action Jurisdictions

Jasminka Kalajdzic (University of Windsor – Faculty of Law)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703384

While collective redress mechanisms continue to develop in much of Europe and in pockets around the world, the oldest class action regimes are undergoing reform. This contribution explores the state of reform in the first and second generation class action jurisdictions: the United States, Australia, Israel and Canada. Their respective class action procedures are outlined in Sect. 2. Section 3 discusses the reform initiatives of the past two years in each of the four countries. In Sect. 4, common areas of concern as well as areas of divergence are explored. Comparing and contrasting these reform efforts illustrates the evolution of class actions in these countries and provides useful insights for those studying and contributing to the development of newer collective redress systems.

2019 Antitrust Annual Report: Class Action Filings in Federal Court

Joshua P. Davis (University of San Francisco – School of Law)
Rose Kohles (The Huntington National Bank)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696575

Last year, we provided an empirical analysis of private antitrust class action lawsuits and their resolutions in federal court from 2013 through 2018 (the 2018 Private Antitrust Enforcement Report). This Report (the 2019 Private Antitrust Enforcement Report) expands on that analysis significantly. It extends the period under consideration to include the years 2009 through 2019 and addresses new issues. To be sure, in part it revisits the same topics, including the number of antitrust class action complaints that are filed each year, the amount of time they took on average to reach a settlement, the mean and median recoveries, the attorneys' fees and costs awarded, and the total settlement amounts in each year and overall. The 2019 Private Antitrust Enforcement Report also analyzes the law firms that represented plaintiffs and defendants in antitrust class action settlements, describes cumulative results, and tabulates cumulative totals for claims administrators involved in the settlement process.

The report also addresses new issues, such as distinguishing private antitrust enforcement by particular industries, by type of claim—conspiracy claims (under Section 1 of the Sherman Act) as opposed to claims based on unilateral conduct (Section 2 of the Sherman Act)—and by type of plaintiff—whether claims were brought on behalf of direct or indirect purchasers. The plan is to continue providing similar information on an annual basis. We hope that these reports will prove of interest to the academy and the public and private sectors, and that the data they analyze will provide a firmer empirical basis than would otherwise be possible for private decisions and for public policy discussions and actions related to enforcement of the antitrust laws through private class actions.

Competition and the Reputational Costs of Litigation

Felix von Meyerinck (University of St. Gallen – School of Finance)
Vesa Pursiainen (University of St. Gallen)
Markus Schmid (University of St. Gallen – Swiss Institute of Banking and Finance; University of St. Gallen – School of Finance)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744414

We study the role of competition in customers' reactions to announcements of class action lawsuits against firms. We measure visits to retail outlets using aggregated and anonymized mobile phone data covering approximately 10% of all mobile devices in the United States. The announcement of a class action lawsuit results on average in 3-4% temporary reduction in customer visits to the target firm's

outlets. The effect is strongly dependent on competition. Outlets facing more competition experience significantly larger negative effects. The effect of competition differs across geographic and industry proximity. Close peers, as measured by industry codes, have the largest effect, while geographically both very local (ZIP code-level) competition as well as state-level competition seem to matter. The announcement returns of class action lawsuits similarly depend on competition, with firms facing more competition experiencing more negative announcement returns. Using quarterly accounting revenues and a comprehensive sample of class action lawsuits yields similar results, with firms in more competitive industries experiencing larger reductions in revenue following the announcement of class action lawsuits. Our results suggest that competition is an important component in customers' ability to discipline firms for misbehavior.

No Injury? No Class: Proof of Injury in Federal Antitrust Class-Actions Post-Wal-Mart

Rami Abdallah Rashmawi
Washington and Lee Law Review, Vol. 77, No. 3, 2020
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685898

Efficient private enforcement of the federal antitrust laws is key to the proper functioning of the United State free market. The federal antitrust class-action has long existed as an important tool in the antitrust plaintiffs toolbox. However, over the past twenty years, the Supreme Court of the United States has systematically limited the scope of federal class-actions brought under Rule 23 of the Federal Rules of Civil Procedure. In Wal-Mart Stores, Inc. v. Dukes, and subsequently in Comcast Corp. v. Behrend, the Supreme Court established and reaffirmed a heightened level of inquiry demanded by Rule 23, a stringent, "rigorous analysis."

This Note analyses the effects of this heightened inquiry on federal antitrust class actions. After the introduction, Part II of this Note provides a brief overview of federal antitrust law and federal class action law, covering the goals and policies of each. Part III discusses the doctrinal effects of the landmark Supreme Court decisions in Wal-Mart and Comcast. Part IV outlines the two standards applied by courts in the pre-Wal-Mart era to assess whether an antitrust plaintiff's method of proving injury met the requirements of Rule 23(b)(3). Part V of this Note analyzes these two standards and argues that the less stringent one did not survive the Supreme Court's new post-Wal-Mart "rigorous analysis." Part V then assesses the current state of a de minimis exception, recounting the post-Comcast appellate decisions discussing the exception. Finally, Part VI of this Note concludes and proposes a framework for assessing proof of class-wide antitrust injury to accompany the Supreme Court's new more exacting class certification standards.

The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions

Linda S. Mullenix (University of Texas School of Law)
2019 Vol. 6 BYU L. Rev. 1551 (2019)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703863

In enacting the Class Action Fairness Act of 2005, Congress intended to expand access to federal courts for interstate class actions by creating minimal diversity and removal jurisdiction. Congress stated that a purpose of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."

Despite CAFA, states have retained a role in addressing complex litigation aided by Supreme Court decisions recognizing the independent role of state courts in enforcing local legal norms.

An historical examination of dual system complex litigation illustrates the extent to which federal courts have successfully (or unsuccessfully) intervened in pending parallel state court proceedings through application of abstention, the Anti-Injunction Act, preclusion, and Erie doctrines. Thus, the Court has upheld the right of state courts to maintain state class litigation notwithstanding federal court repudiation of certification of the same litigation. In so doing, the Court has recognized principles of federalism and comity, signaled a "non-interference" stance with state class proceedings, and strengthened the independent role of state courts in complex litigation. Moreover, several federal courts have rejected the primacy of federal courts in applying Rule 23 class certification standards in derogation of countervailing state statutes that would prohibit prosecution of the same class litigation in state court. CAFA additionally recognized a role for state court adjudication of complex litigation by carving out local controversy exceptions to its removal provisions.

The Court also has recognized the role of state attorneys general in their parens patriae capacity under CAFA to pursue complex litigation on behalf of state citizenry, in spite of defense attempts to evade state court jurisdiction. In addition, state attorneys generals have the right to receive notice of federal class action settlements and to lodge comments or objections to pending settlements that might affect state constituents. Thus, CAFA and the Court have given state attorneys general a relatively robust role in addressing complex litigation and afforded significant protection to state enforcement efforts. The Court also has held that the Securities Litigation Uniform Standards Act of 1998 did not strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only § 1933 Securities Act violations. In enacting SLUSA, Congress did nothing to deprive state courts of jurisdiction over class actions based on federal law.

In sum, although the received understanding of CAFA was to federalize class litigation, state courts nonetheless have continued to perform a role in addressing complex cases. To a significant extent, state courts have been insulated from federal judicial encroachment on states' ability to handle complex litigation in its own courts, and state attorneys generals have in various ways been empowered to pursue aggregate relief on behalf of state citizenry.

Algorithms & Antitrust

Algorithms and Competition Law

Michal Gal (University of Haifa – Faculty of Law)
Thibault Schrepel (Stanford University's Codex Center; Utrecht University School of Law; University Paris 1 Panthéon-Sorbonne; Sciences Po)
Concurrences (May 2020)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3688324

An interview of Prof. Michal Gal by Dr. Thibault Schrepel on the subject of algorithms and competition law. The interview covers subjects such as how algorithms affect competition; cases involving algorithms; the potential benefits brought about by algorithms to consumers; the unique characteristics of algorithmic coordination; algorithmic liability for illegal cartels; personalized services; the creation of digital workforces in competition agencies.

Algorithms and Conscious Parallelism: Why Current Antitrust Doctrine is Prepared for the Twenty-First Century Challenges Posed by Dynamic Pricing

John Fortin (George Mason University)
Tulane Journal of Technology & Intellectual Property, Vol. 23, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676794

As the 21st Century enters its third decade, antitrust laws that are currently in place in the United States must confront an explosion in technological innovation. For many, this explosion is welcome news and will likely lead to a prosperous future for consumers. For others, including Professors Ariel Ezrachi and Maurice Stucke, they believe this future should be perceived cautiously and new antitrust laws and regulations should be erected to replace the old. They contend in their book, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, coupled with their recent law review article, "Sustainable and Unchallenged Algorithmic Tacit Collusion," that in the (near) future, algorithms will be able to collude with one another and modern day antitrust doctrine is not suited to counteract this virulently offensive and illegal behavior.

Specifically, they contend that conscious parallelism poses a significant danger to competition policies and new doctrine should be developed to counter it. This article argues that the United States' conscious parallelism plus factors maintain their value to antitrust regulators and courts even in this highly technical, rapidly evolving environment facilitated by technology. Ezrachi & Stucke's arguments to the contrary are actually belied by the history of the doctrine, the technology itself, and their own arguments and descriptions of the technology.

Furthermore, while some European empirical research sides with Ezrachi & Stucke, the competition authorities and other scholars sufficiently rebut these arguments by pointing out these experiments fail to reflect real world environments. All in all, we should approach this dynamic pricing cautiously and require oversight that is already constructed by regulators over corporations. However, antitrust authorities and courts should not create new laws to combat problems that have already been solved.

Artificial Intelligence, Algorithmic Pricing, and Collusion

Emilio Calvano
Giacomo Calzolari
Vincenzo Denicolò
Sergio Pastorello
American Economic Review Vol. 110, No. 10, October 2020
https://www.aeaweb.org/articles?id=10.1257/aer.20190623

Increasingly, algorithms are supplanting human decision-makers in pricing goods and services. To analyze the possible consequences, we study experimentally the behavior of algorithms powered by Artificial Intelligence (Q-learning) in a workhorse oligopoly model of repeated price competition. We find that the algorithms consistently learn to charge supracompetitive prices, without communicating with one another. The high prices are sustained by collusive strategies with a finite phase of punishment followed by a gradual return to cooperation. This finding is robust to asymmetries in cost or demand, changes in the number of players, and various forms of uncertainty.

Platform Design When Sellers Use Pricing Algorithms

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Andrew Rhodes (University of Toulouse 1 – Toulouse School of Economics (TSE))
Matthijs R. Wildenbeest (Indiana University – Kelley School of Business – Department of Business Economics & Public Policy)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691621

Using both economic theory and Artificial Intelligence (AI) pricing algorithms, we investigate the ability of a platform to design its marketplace to promote competition, improve consumer surplus, and even raise its own profits. We allow sellers to use Q-learning algorithms (a common reinforcement-learning technique from the computer-science literature) to devise pricing strategies in a setting with repeated interactions, and consider the effect of platform rules that reward firms that cut prices with additional exposure to consumers. Overall, the evidence from our experiments suggests that platform design decisions can meaningfully benefit consumers even when algorithmic collusion might otherwise emerge but that achieving these gains may require more than the simplest steering policies when algorithms value the future highly. We also find that policies that raise consumer surplus can raise the profits of the platform, depending on the platform's revenue model. Finally, we document several learning challenges faced by the algorithms.

COVID-19: Collaboration, Collusion, and Compliance

Cartels as Crisis Management: Why Collusion May Be Inevitable During Economic Downturns

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Darley Maw
Competition Policy International
https://www.competitionpolicyinternational.com/cartels-as-crisis-management-why-collusion-may-be-inevitable-during-economic-downturns/

The impact of the ongoing COVID-19 pandemic has been relentless, both from direct affliction with the virus itself and from the economic downturn devastating numerous industries. Though the novel coronavirus has ushered in a wave of economic fallout in the United States, it recalls past crises and the emergence of so-called crisis cartels, trying to brace the economic downswing. Given the economic effects of globalization and substantial growth of various industries, cooperation between individuals and companies became inevitable in order for them to survive, even as authorities warn that those who try to take advantage of times of crisis and circumvent anti-competition laws will be prosecuted. This article examines the periods following September 11, 2001, the 2008 financial crisis, and the current COVID-19 pandemic as times of economic distress in the U.S., when crisis cartels emerge.

Competitor Collaborations During COVID-19

Karen Hoffman Lent
Mike Keskey
Competition Policy International
https://www.competitionpolicyinternational.com/competitor-collaborations-during-covid-19/

Antitrust regulators worldwide have had to adopt novel strategies to address the emergency need for collaboration within certain industries to help combat the COVID-19 pandemic. In the United States, the Department of Justice and Federal Trade Commission have issued guidance to address acceptable forms of "procompetitive collaboration" to help respond to the pandemic. As a part of this guidance, the antitrust agencies pledged to expedite their individual guidance programs, FTC's advisory opinion

program and DOJ's business review program. While businesses should not view the new guidance as relaxing or changing antitrust enforcement policies, they still may be able to take advantage of this increase in the usage of the business review programs to better their understanding of acceptable conduct and mitigate risk that stems from potential future collaborations.

Open for Business: Cartel Enforcement and the Procurement Collusion Strike Force's Response to the COVID-19 Pandemic

Chester Choi
Daniel W. Glad
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https://www.competitionpolicyinternational.com/open-for-business-cartel-enforcement-and-the-procurement-collusion-strike-forces-response-to-the-covid-19-pandemic/

A global pandemic and economic disruption make effective deterrence, detection, and prosecution of cartels more important than ever. While COVID-19 is a novel virus, the United States has a long track record of consistent enforcement of the antitrust laws even in times of great crises. Today, the United States has and is using even more tools to address pressing public needs arising from COVID-19. Chief among those tools is the U.S. Department of Justice's Procurement Collusion Strike Force. The Procurement Collusion Strike Force is designed as an inter-agency, virtual force multiplier that not only educates both buyers and sellers to deter antitrust crimes, but also uses traditional investigative tools and cutting-edge data analytics to detect and actively investigate allegations of criminal conduct.

Uncertainty in US Price-Gouging Law Compliance and Defense

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Brady Cummins
Competition Policy International
https://www.competitionpolicyinternational.com/uncertainty-in-u-s-price-gouging-law-compliance-and-defense/

Allegations of price gouging are ubiquitous in the wake of the COVID-19 pandemic. Since the late 1970s, 40 U.S. states have enacted price-gouging laws that restrict price increases during states of emergency. COVID-19 presents the longest and largest state of emergency triggering these laws. These laws are far from uniform across the states, and many consist of vague standards, resulting in significant uncertainty for sellers looking to comply with them. Nationwide sellers face legal and practical challenges navigating this patchwork of state laws during this unprecedented emergency. This article addresses some of the burdensome practical and legal challenges faced by business trying to navigate price gouging laws and offers several possible reforms that states could consider.

Digital Platforms and the Consumer Welfare Standard

Antitrust Enforcement in the Digital Economy: US

Kristian Stout (International Center for Law & Economics (ICLE))
The Global Antitrust Institute Report on the Digital Economy 16
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733711

Antitrust enforcement in digital and high-tech markets is not disconnected from traditional antitrust theory or practice. Yet, unique features of firms operating in digital and other high-tech markets can necessitate modification of doctrine. For example, modern antitrust enforcement in digital markets needs to take seriously the presence of network effects in two-sided markets and the procompetitive justifications for various kinds of product design decisions that may otherwise appear to harm competitors under older models of antitrust enforcement. The goal, however, remains enforcement of the consumer welfare

standard, even if enforcers and courts must be sensitive to features particular to digital markets.

This chapter takes the 2001 D.C. Circuit opinion in Microsoft as an inflection point in digital antitrust enforcement. With that case we can first clearly see all of the various threads pulled together that run through modern antitrust enforcement in high tech cases. This chapter begins with a brief overview of the precursor cases that informed enforcement up until the late 1990s before devoting attention to Microsoft and the subsequent cases that shape modern antitrust enforcement in digital markets.

Antitrust in Retrograde: The Consumer Welfare Standard, Socio-Political Goals, and the Future of Enforcement

Elyse Dorsey (George Mason University – Antonin Scalia Law School, Faculty)
The Global Antitrust Institute Report on the Digital Economy 4
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733666

Part I of this Chapter examines the history of antitrust law to contextualize the current debate regarding the consumer welfare standard. It addresses the numerous legislative history arguments and examines the courts' experience enforcing the antitrust laws over the last 130 years, tracing the reasoning behind antitrust law's developments and its adoption of the consumer welfare standard. Part II describes what the consumer welfare standard is and how it operates today, demonstrating its robustness and articulating its many benefits—to the courts, to enforcers, to firms, and to the public at large. Part III turns to the current debate, analyzing the validity and identifying the shortcomings of the arguments neo-Brandeisians proffer in support of abandoning the consumer welfare standard. Part IV concludes.

Is the Digital Economy Too Concentrated?

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The Global Antitrust Institute Report on the Digital Economy 12
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733695

Concentration in the digital economy in the United States has sparked loud criticism and spurred calls for wide-ranging reforms. These reforms include everything from increased enforcement of existing antitrust laws, such as challenging more mergers and breaking up firms, to an abandonment of the consumer welfare standard. Critics cite corruption and more systemic public choice problems, while others invoke the populist origins of antitrust to slay the digital Goliaths. On the other side, there is skepticism regarding these arguments. This chapter continues much of that skepticism.

Predatory Pricing and the Flaws in Brandesian Economics Challenging Recoupment Theory

John Fortin (George Mason University)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676799

The technology industry has seen rapid growth over the last few decades and many populists and reformers seek to reign in this growth with amendments to various antitrust regulatory structures. This paper continues my previous analysis of these general reforms while specifically analyzing predatory price discrimination and recoupment theory. Brandesian economists wish to swing the antitrust sword to protect small businesses against big corporations. Advocates look at the policy of bigness and claim that permitting its existence must be incorrect and that the courts should counteract bigness with antitrust litigation results shaped not based on economics and consumer welfare but on policy concerns.

The critic of the current antitrust system that provides the most relevant and thorough critique of the current system is Yale's Lina Kahn in her student note Amazon's Antitrust Paradox. While her note raises several concerns with Amazon's business strategy, she specifically targets the structural

dominance of Amazon through an alleged predatory price discrimination scheme aimed at undercutting competition and establishing its monopoly in the ebook marketplace. Kahn analyzes Amazon's growing market dominance along with the alleged difficulties in reigning in its market power through modern day antitrust authority. Most striking, is Khan contention that the Apple v. United States case should have examined Amazon's role in why the book publishers developed a price fixing and exclusionary scheme against Amazon.

These arguments, while in theory may seem particularly compelling for reformists who are troubled by the rise of big tech; are in fact flawed. As I advocate below, claiming predatory price discrimination as a theory of harm is illogical as a practical matter and opening up this theory would be cumbersome on courts, would lead to perverse results, and would not increase consumer welfare.

Price Competition and Platform Design in Two-Sided Networks

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458973

The owners of large online platforms, like Airbnb or Amazon Marketplace, are able to affect the probability that a given buyer observes a given seller on their platform. Buyers and sellers therefore interact on a bipartite graph with links between them weighted by the probability of observation. Platform owners are then able to design the network by choosing the observation probabilities. A seller's price is decreasing in their Bonacich centrality. In order to maximize profits, the platform owner connects an entrant to buyers according to a measure of their own centrality in the graph. While a network where buyers observe and trade with all sellers with probability one maximizes consumer surplus, such a network does not necessarily maximize the platform's profit. The platform owner faces a trade-off between increasing observability and reducing competition, which explains why buyers tend not to be able to observe all sellers on online platforms. If sellers are identical, increasing seller prominence for any consumer segment increases competition, and profit is maximized when it is randomized across all sellers.

The Post-Chicago Antitrust Revolution: A Retrospective

Christopher S. Yoo (University of Pennsylvania Law School; University of Pennsylvania – Annenberg School for Communication; University of Pennsylvania – School of Engineering and Applied Science)
U of Penn, Inst for Law & Econ Research Paper No. 21-02
University of Pennsylvania Law Review, Vol. 168, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3750218

A symposium examining the contributions of the post-Chicago School provides an appropriate opportunity to offer some thoughts on both the past and the future of antitrust. This afterword reviews the excellent papers with an eye toward appreciating the contributions and limitations of both the Chicago School, in terms of promoting the consumer welfare standard and embracing price theory as the preferred mode of economic analysis, and the post-Chicago School, with its emphasis on game theory and firm-level strategic conduct. It then explores two emerging trends, specifically neo-Brandeisian advocacy for abandoning consumer welfare as the sole goal of antitrust and the increasing emphasis on empirical analyses.

What Brooke Group Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation

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Joseph Coniglio (Sidley Austin LLP)
The Global Antitrust Institute Report on the Digital Economy 35
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733758

This chapter proceeds in five parts. The first provides a brief history of the law and economics of predatory pricing doctrine in the United States, and how a revolution in economic and legal thinking spurred by Areeda and Turner's seminal work led to Brooke Group and replaced the regime typified by the Supreme Court's troubled decision in Utah Pie Co. v. Continental Baking Co. The second surveys the basic objections to the current consensus on predatory pricing that the two groups of reactionaries have articulated, while the following two parts defend both the recoupment and price-cost prongs as requirements to win predatory pricing claims against digital firms. At bottom, efforts to divorce one prong from the other fail to overcome the powerful and lasting insights not just of Areeda and Turner, but of the very nature of antitrust as a legal regime "passed for the 'protection of competition, not competitors.'" The last part contains concluding remarks.

Privacy & Antitrust

Antitrust & Privacy

James C. Cooper (George Mason University – Antonin Scalia Law School, Faculty)
The Global Antitrust Institute Report on the Digital Economy 32
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733752

This Chapter discusses the theories behind the call to incorporate privacy into antitrust and identifies some potential legal and economic hurdles to their application. Chief among them are (1) the extent to which privacy is an important dimension of competition; (2) identifying the underlying anticompetitive conduct that gives rise to a reduction in privacy; and (3) understanding that the benefits and costs of data collection are inexorably intertwined, with the net impact of a reduction of privacy on consumer welfare depending on heterogenous tastes for privacy and customization that are likely to be correlated in complex ways. Further, this Chapter also addresses potential First Amendment issues raised by using antitrust to condemn certain types of data collection and use, as well as problems that may arise to the extent that incorporating privacy into antitrust renders liability standards more uncertain.

Google as a De Facto Privacy Regulator: Analyzing Chrome's Removal of Third-party Cookies from an Antitrust Perspective

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Dimitrios Katsifis (Geradin Partners)
Theano Karanikioti (Geradin Partners)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3738107

Online advertising is what funds free online content. Since its birth in the 1990's, it has evolved into a multi-billion-dollar industry. At the core of this industry lies the ability to identify and track users through various technical means, such as web cookies. Online tracking for advertising purposes has sparked privacy concerns, and is subject to a growing body of regulation across the world. But the most important rules seem to come from a handful of large technology platforms, namely Google and Apple. In their capacity as suppliers of the most popular browsers and smart mobile OSs, these companies are

taking a series of measures in the name of user privacy that restrict the ability to identify users, thus shaking the very foundations of online advertising.

In what is a first in a series of papers exploring Google and Apple's role as de facto privacy regulators for online advertising, we propose to explore in detail Chrome's decision to phase out support for third-party cookies, accompanied by a set of proposals known as the Privacy Sandbox. Considering that Google is the subject of growing antitrust scrutiny in the US and Europe, we query whether Chrome's decision raises any antitrust concerns – and if so, how such concerns fit within existing antitrust investigations. At a conceptual level, we use this paper as an opportunity to reflect on the relationship between competition law and privacy and the trade-offs regulators may have to make.

Monopolization Remedies and Data Privacy

Erika Douglas
Virginia Journal of Law and Technology, Vol. 24, No. 2, 2020
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694607

As a former agency head explains, antitrust litigation is like fishing: "everybody likes to catch them, but nobody wants to clean them." Antitrust enforcers around the world are eager to catch digital platforms with monopolization cases, but little attention is being paid to the remedies that will follow.

This article examines a new source of complexity for those monopolization remedies — data privacy. In particular, it considers remedies that require access to, or disclosure of the information held by digital platforms, to restore online competition. How are such "data access" remedies impacted by the rise of consumer data privacy law?

As the article explains, neither current theory nor past monopolization cases answer this question. Existing theories on the interface between antitrust law and data privacy are focused on liability. Their application may therefore miss the distinct privacy impacts that arise at the remedies stage of a case. Past monopolization cases that ended in data access remedies often ordered disclosure of company, not consumer, information. Individual data privacy was simply not relevant. The rare historical cases that ordered disclosure of consumer information pre-date the rise of U.S. data privacy law from the mid-1990s to present. For the first time, antitrust remedies may well have to contend with consumer privacy protection, and the control such protection can impart over competitively important data.

The article calls for antitrust analysis to consider data privacy in the design of remedies, particularly for digital platforms. Without such analysis, remedies may unwittingly cause privacy harms that outweigh the benefits to consumers from restored competition. A remedy that causes such a reduction in consumer welfare would undermine the purpose of bringing antitrust enforcement action.

The article concludes with discussion of two potential approaches for implementing the proposal. The first focuses on obtaining consumer consent to remedial disclosure and use of data. The second focuses on legislative or judicial definitions of data privacy interests that exclude remedial disclosure. Both demand careful consideration of consumer privacy, and the new complexity it creates for monopolization relief.

Regulatory & Enforcement Frameworks

Antitrust and Ex-Ante Sector Regulation

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The Global Antitrust Institute Report on the Digital Economy 25
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733740

Using ex-ante regulation to replace inefficient and ineffective ex-post litigation based antitrust is a familiar refrain for those interested in regulating large technology firms. But the narrative that antitrust is either solely or predominantly based on ex-post litigation is a false narrative, as both the current antitrust laws and its institutions incorporate many of the features that reformers put forth as ex-ante regulation. As a matter of optimal regulatory design, this is not surprising, as a true ex-ante approach will incorporate both approaches.

In the U.S., the Supreme Court has expanded its implied immunity and related common law limits on the use of the antitrust laws in response to the potential costs of inconsistent and overlapping regulation. This forces an ex-ante choice between antitrust and sector specific regulation when addressing specific problems associated with regulated industries. We suggest the ex-ante choice between antitrust and sector regulation be made based on the comparative institutional advantage of each approach, and that such an approach will result in the allocation of duties to deal and price setting to sector specific regulators. Because both approaches are imperfect vehicles for controlling competition, both the initial allocation between antitrust and regulation and the choice to regulate in the first place should be undertaken with caution, and expected to involve a long, slow, and costly evolution towards a more efficient system of antitrust and regulation.

Big Tech and Antitrust – Calling Big Tech to Account Under U.S. Law

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On March 4, 2020, we submitted a statement to the Antitrust Subcommittee of the House Judiciary Committee to assist it in its investigation of competition in digital markets. The version that we post here includes a “prescript” that highlights some of the important events relevant to our statement that have occurred in the five months since our statement was originally submitted.

Our statement reviews the problems that have been and are likely to be encountered in using current antitrust law to deal with the issues that the Big Tech platforms present. Based on our original statement, and subsequent events, we emphasize three points. First, we think it is time to bolster and reinforce the FTC’s powers. This is especially urgent given concerns about political interference with Justice Department investigations. One important way to bolster the FTC is to make clear that the Commission has the power to engage in antitrust rule-making, which we argue is the most likely vehicle for setting out clear rules to deal with the gate-keeping power of the Big Tech platforms. Second, we urge the United States to end its isolation from the international dialogue among competition authorities and join with other agencies in an effort to control these platforms. Third, we urge Congress to adopt a National Competition Policy that would provide a meta-policy statement for interpreting U.S. antitrust law and move antitrust law from a focus on a narrowly-defined consumer welfare standard to a broader conception.

Can AI Replace the FTC?

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The application of AI and Machine Learning (ML) techniques is becoming a primary issue of investigation in the legal and regulatory domain. Antitrust agencies are into the spotlight because antitrust is the first arm of government regulation by tackling forms of monopoly and collusive practices in any markets, including new digital-data-driven markets. A question the antitrust community is asking is whether antitrust agencies are equipped with the appropriate tools and powers to face today's increasingly dynamic markets. Our study aims to tackle this question by building and testing an ML antitrust algorithm (AML) based on an unsupervised approach, devoid of any human intervention. It shows how a relatively simple algorithm can, in an autonomous manner, discover underlying patterns from past antitrust cases classified by commuting similarity. Thus, we recognize that teaching antitrust to an algorithm is possible, although we admit that AI cannot replace antitrust agencies, such as the FTC. Today, having an increasingly fast and uniform way to enforce antitrust principles is fundamental as we move into a new digital economic transformation. Our contribution aims to pave the way for future AI applications in markets' regulation starting from antitrust regulation. Government's adoption of emerging technologies, such as AI, appears to be the key for ensuring consumer welfare and market efficiency in the age of AI and big data.

Essential Facilities Doctrine: Access Regulation Disguised as Antitrust Enforcement

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The Global Antitrust Institute Report on the Digital Economy 22
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733729

This chapter describes the emergence of the EFD and reviews its development against the background of major trends in the continuing evolution of federal antitrust law. It then analyzes recent Supreme Court cases that have questioned and thereby undermined EFD, even though lower courts claim to derive the doctrine from the Court's earlier precedents. The main focus is on the emerging recognition by the Court that ongoing economic regulation of a monopoly business under the guise of antitrust is neither consistent with the fundamentals of the federal antitrust statutes, nor with basic institutional capacities of courts and antitrust enforcement agencies, as distinct from legislatures and the purpose-built agencies that engage in economic regulation pursuant to statute. The conclusion suggested by this analysis is that EFD is no more useful as a response to concerns about access to digital platforms than to the other situations that have led to the Court's profound doubts regarding EFD. The asserted competitive problems targeted by EFD claims may change as technology and business practices evolve, but the fatal weaknesses of EFD persist. If and to the extent digital platforms can be objectively shown to demonstrate any need for mandatory access by customers, competitors or others, mandatory access remedies should be addressed—if justified by responsible and conscientious policy analysis—through rules and institutions distinct from those of antitrust.

The Antitrust Divergence at the FTC: Beyond Vertical Mergers

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Partisan splits on antitrust enforcement are not new, but some recent divides have gone beyond the usual differences between Republicans and Democrats. Today, we see disagreements among commissioners at the Federal Trade Commission on foundational aspects of competition policy, such as the goals of enforcement, the FTC's burden of proof, and the role of economic evidence. This divergence found its fullest expression in two vertical merger consent decrees—Staples/Essendant and Fresenius/NxStage Medical—but the policy differences that led to such divergent views in those cases are unlikely to stay limited to the vertical merger context.

In many respects, the recent divergence among commissioners on key aspects of merger enforcement echoes the broader debate in legal, economic, and policy circles about the goals and effectiveness of recent antitrust enforcement. The implications for practitioners and their clients (as well as agency staff) are negative, including longer merger reviews and less predictable enforcement.

The Role of Big Data in Antitrust

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The Global Antitrust Institute Report on the Digital Economy 7
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733677

There is an astounding amount of data generated every moment. While the use of data has always been essential for a well-functioning market economy, the current scale, scope, and speed at which data is collected, organized, and analyzed is unprecedented—leading to the apt label of "big data." Importantly, an entire infrastructure has been built around data including cloud computing, machine learning, artificial intelligence, and the 5G wireless network.

In this chapter, we discuss the role of big data in antitrust with a particular focus on the rise and success of large digital platforms—as the importance of data has caught the attention of various reports on the digital economy and also raises issues involving privacy. We begin with an economic overview of data and what sets it apart from other firm assets. In this discussion, we will also assess the question of whether big data represents a sizeable barrier to entry that hinders the ability of entrants to compete on equal footing.

Next, we discuss data in the context of network effects. While network effects traditionally are associated with a network of people, some have hypothesized that the advantages that data confers to platforms can also be framed as type of network effect. The idea is that data creates a feedback loop of more data, which ultimately results in an impregnable bulwark against competition. We aim to demonstrate that, while there are commonalities between using data and network effects, there are important differences and distinctions worth highlighting.

We also explore a number of relevant legal considerations involving big data and antitrust. Generally, should courts administer cases that involve big data differently? Should there be a stronger presumption of market power when a large platform possesses big data? On the other side of the coin, can combining big data assets result in merger-specific efficiencies?

Finally, big data is increasingly discussed as a potential remedy for competition problems involving platforms. Proposals range from allowing users to more easily port their data across platforms to forced data sharing and interoperability. We examine the incentive effects from imposing such remedies and potential unintended consequences. Ultimately, these proposals are putting the cart before the horse, as remedies without an actual showing of an antitrust violation is not antitrust enforcement but sector regulation.

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