Nikola ILIĆ, PhD*

Devlin, Alan J. 2021. ***Reforming Antitrust*****. Cambridge, the United Kingdom & New York, United States: Cambridge University Press, 330.**

“Every reform movement has a lunatic fringe.”

Theodore Roosevelt

Since 2020, the US antitrust law has been undergoing a massive overhaul. Congress has introduced several new bills, including the Klobuchar Bill, which could radically amend the pillars of the US antitrust law.[1] The New Brandeis movement, on one side, claims that these bills will reduce the market power and industry concentration, and make the US economy prosper (Klobuchar 2021, Hawley 2021). On the other side of the spectrum, many scholars strongly disagree with the proposed amendments and warn of possible adverse economic consequences (Crane 2020, Hovenkamp 2021). Alan J. Develin’s book, with new ideas and stances on antitrust law reform, could significantly contribute to this ongoing public debate.

The book consists of three logical parts. In the first part, the author describes in detail the role and features of the US antitrust law. In the second part, he analyses the warning signals in the US economy that may indicate or justify the need for antitrust law reforms. Finally, in the last part of the book, the author discusses possible reforms and the future evolution of the US antitrust law.

* Assistant Professor, University of Belgrade Faculty of Law, Serbia, *nikola.ilic@ius.bg.ac.rs*.

[1] Ilić (2022) provides a detailed review of the Klobuchar Bill and the antitrust law reform.

Each of these three major parts in the book further consists of three subsections – all related to the antitrust law reform in one way or another. The reader may take those subsections separately, depending on individual preferences and interests in specific antitrust topics. Regardless of their choices, in any event, the reader finds a gold mine of references and a fairly objective analysis of burning antitrust law issues.

The author opens the first part of the book by posing a relatively simple question. What is the purpose of antitrust law, i.e. what is its *raison d'être*? After an in-depth discussion, he admits that maximizing competition – in the most simplistic sense of the term – would be self-destructive, and, thus, it is not and should not be the sole purpose of antitrust law. Perfect competition leaves no room for a considerable profit margin, meaning that firms cannot recoup their fix-cost investments in R&D (i.e. they cannot innovate) and consequently cannot considerably improve their productivity. Furthermore, the author points out that the protection of consumers also cannot be the purpose of antitrust law because consumer interests can justify almost any government intervention in a market.

It might seem that by noting what the purpose is not, the author intentionally avoids explaining what the purpose of antitrust law should be. However, while this may disappoint some readers, it may also assist others in learning more about antitrust law and preparing them for a more detailed discussion about the role of antitrust law and burning issues, such as market power and industry concentration.

Market power and industry concentration are at the heart of the ongoing public debate calling for radical antitrust law reform in the US. The Neo-Brandeisians claim that big companies, such as Google, Amazon, Microsoft, Facebook, etc., possess significant market power. This enables them to take over incumbent competitors and increase their profit margins, i.e. further increase their market power. In this way, these big companies may considerably increase the industry concentration and prices and, thus, harm the US economy and consumers. In the opinion of the Neo-Brandeisians, the radical antitrust law reform should break this causal link, decrease industry concentration, and make the US economy great again! However, supporters of neoclassical economics fundamentally challenge this line of reasoning by questioning the alleged causal link and warning of potential adverse economic consequences that the planned antitrust law reform may have.

The author contributes to this debate in two ways. First, he meticulously describes the historical development of the US antitrust law and policy and discusses the initial purpose of the antitrust law. Second, he unbiasedly and in detail presents the core attitudes of the opposing sides in the ongoing

debate. While doing so, the author tries to provide sufficient evidence for readers, based on available findings in economic theory and evidence, to help them reach independent and impartial conclusions. For instance, the author analyses "the missing link: concentration and market power". Even though the title of this subsection in the book is suggestive, the author uses more than 140 relevant references and invokes the most important theoretical and empirical findings on the link between concentration and market power from the early twentieth century to the present. He provides plenty of food for thought and enables readers to observe different factors that may affect concentration and market power (such as characteristics of industries and products, the potential for innovation and further development, etc.). In other words, the main finding that the causal link between concentration and market power is fragile and often missing is objective and well supported. Therefore, the author's conclusions could be relevant for all participants in the debate and all the readers – those inclining toward neoclassical economics, as well as those supporting the New Brandeis movement.

The second part of the book discusses the warning signals in the US economy that may be a sound reason for antitrust law reform. One can immediately notice that the author excludes (i.e. does not consider) signals such as economic inequality, environmental protection, cultural diversity, etc. In this way, the author implicitly (and consistently with the first part of the book) implies that the antitrust law is not the proper policy tool for addressing those and similar concerns raised by the New Brandeis movement. The signals that the author is concerned about are solely those related to an ostensible competition decline.

In the author's opinion, one of the most visible warning signals is the raising consolidation in specific US industries, such as the airline industry. The big wave of consolidation, driven by mergers and acquisitions, significantly reduced the number of market participants in these industries. In the airline industry, Delta acquired Northwest Airlines in 2008, United Airlines purchased Continental Airlines in 2010, and American Airlines merged with US Airways in 2013.[2] As a result, only three companies (American, United, and Delta) account, along with the low-cost carrier Southwest Airlines, for almost three-quarters of the industry sales. These companies have increased their profit margins (pre-COVID) and, in some cases, significantly decreased their services. The same happened in the US mobile phone industry,

[2] The DOJ assessed and approved all these mergers and acquisitions, the latter two under additional conditions.

video-content programming, insurance, food, beer industries, etc. Moreover, all these anecdotal observations seem to be confirmed by various statistical analyses of the US industrial concentration.[3]

In the author's opinion, the consolidation phenomenon is noticeable at the voter level and thus "fuels a political reawakening in antitrust" (p. 119). The New Brandeis movement often uses consolidation examples and industry concentration as irrefutable evidence that the US faces a massive competition issue.[4] The author does not explicitly deny those claims. However, he attempts to bring some objectivity to this debate by claiming that the trend of consolidation and industry concentration is more modest than the New Brandeis movement would suggest. To support this argument, among other sources, the author invokes the OECD report (2018) that evaluates industry concentration in the US. The report explicitly states that "concentration in US markets is more likely to be increasing than decreasing, though the increase is not a dramatic one". [5] The same report concludes: "even where there is evidence to suggest an increase in concentration, in the absence of evidence on the movements of other indicators it is extremely difficult to draw any conclusion on whether there has been a change in competitive intensity."

However, the author notably omits some significant parts of the OECD report, such as the part stating that "mark-ups and profits in the US have significantly increased" or the general remark that the broad measure of concentration "tells us little about competitive intensity".[6] While this may cast a shadow on the author's objectivity, it certainly does not undermine his conclusions on the New Brandeis movement and political reawakening.

Some of the readers may even conclude that the author is against antitrust reforms based on the critiques of the New Brandeis movement and the relativization of the issues such as consolidation and industry concentration. However, it seems the author supports antitrust law reform, but not for the same reasons as the New Brandeis movement. This becomes obvious in the third part of the book, where he rethinks some of the fundamental principles of the US antitrust law and discusses its further evolution.

---

[3] Among other sources, the author refers to the US Council of Economic Advisers study (2016), White and Yang (2017), and Grullon *et al.* (2019).

[4] See, for instance, Amy Klobuchar's (the New Brandeis movement prominent supporter) statement, available at: *https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement* (last visited 5 May 2022).

[5] The report is available at *https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf* (last visited 5 May, 2022).

[6] *Ibid.*

First, it seems the author is not satisfied with the antitrust law enforcement in the US. He claims that the antitrust agencies are too afraid of making mistakes when accessing mergers, and, thus, they have a relatively small number of cases of challenged mergers. In the author's opinion, these agencies should challenge more mergers, i.e. bring more antitrust cases to the courts and make more Type I errors. The main argument for such a claim is that the market will eventually undo the mischief of a Type I error that blocks procompetitive mergers. By contrast, a Type II error, which would allow harmful mergers to materialize, may take years for the market to erode. In addition, the author claims that an increase in the number of challenged mergers, i.e. antitrust cases, would lead to more consistent antitrust law enforcement and further evolution of the common law. Interestingly, he is not concerned about the magnitude of the Type II errors and what could happen if the DOJ loses its already damaged credibility due to those errors. One thing is clear, a prominent Washington-based antitrust lawyer, such as the author of this book, would not complain about additional cases.

When considering further antitrust law development, the author suggests replacing the consumer-welfare standard with a new effect-based standard founded on "preserving competitive pressure". The book does not provide detailed guidelines on specifying and interpreting the suggested legal standard in antitrust law practice. Instead, it concludes, once again, that the FTC and DOJ should bring and lose more cases because the litigation clarifies the scope of the law and leads doctrine to evolve. Following the same line of reasoning, the author suggests altering the relevant market definition in antitrust cases in a way that it becomes broader. Namely, a broader defined relevant market could shift the antitrust law focus from protecting competition and consumer welfare to preserving competitive pressure. Consistently with other ideas in this book, implementing a broader relevant market definition would lead to more antitrust cases in practice and further evolution of the US antitrust law.

Finally, it remains upon the readers to decide whether the author is trying to bring some objectivity to the public debate concerning the antitrust law reform or to represent a new interest group in this debate – the US antitrust lawyers. It is important to emphasize that one does not exclude the other. Regardless of the author's intentions and objectives, in any event, one thing is for sure – readers interested in antitrust law and the ongoing antitrust legislative reform in the US will enjoy this book.

REFERENCES

[1] Hawley, Josh. 2021. *The Tyranny of Big Tech*. New York: Regnery Publishing.

[2] Klobuchar, Amy. 2021. *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age*. New York, Toronto: Alfred A. Knopf.

[3] Organization for Economic Co-operation and Development (OECD). 2018. *Market Concentration*.

[4] US Council of Economic Advisers. 2016. *Benefits of Competition and Indicators of Market Power*. Washington, DC.

[5] White, J. Lawrence, Jasper Yang. 3/2017. What has been Happening to Aggregate Concentration in the U.S. Economy in the Twenty-First Century?. *Contemporary Economic Policy* 38: 483–495.

[6] Hovenkamp, Herbert. 2021. The Looming Crisis in Antitrust Economics. *Boston University Law Review* 101: 489–545.

[7] Grullon, Gustavo, Yelena Larkin, Roni Michaely. 4/2019. Are US Industries Becoming More Concentrated?. *Review of Finance* 23: 697–743.

[8] Crane, Daniel. 1/2020. The New Crisis in Antitrust (?). *Antitrust Law Journal* 83: 253–268.

[9] Ilić, Nikola. 1/2022. The Klobuchar Bill: Is Something Rotten in the US Antitrust Legislative Reform?. *Annals of the Belgrade Faculty of Law* 70: 101–120.