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Competition Law and Political Influence of Large Corporations – Antitrust Analysis and the Link between Political and Economic Institutions

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Resume: *Economic policy determines the intensity of competition in markets. This gives incumbents the incentive to use their financial resources to influence policymaking in order to restrict competition and maintain or increase economic profits. Public authorities should promote that profits be used rather in welfare enhancing or neutral ways. Is competition law an adequate tool to promote this goal? This paper aims to ground the discussion on legal administrability considerations. The focus is therefore on whether we can design legal standards and identify evidence that courts can use to assess the tradeoffs between static efficiency, political influence of large corporations, and innovation. This paper argues that if political considerations are to be taken into account in antitrust analysis, these should be made explicit and looking at the evidence at hand in each case, in order to avoid enforcement guided by assumptions – such as that increases in market concentration always lead to risks in terms of political influence – that can otherwise be revised on a case-by-case basis.*

1. Introduction

Successful firms can become market leaders and enjoy economic profits as a reward. Some of these industry leaders may operate at a large scale either at the national or international level. In such cases, aggregate profits can be orders of magnitude above that of a typical firm in the countries where they operate. These resources allow firms to embark upon activities that would not be possible otherwise, such as research and development. However, profits may not always be used in welfare-enhancing or -neutral ways. A firm may use part of its financial resources in influencing economic policy to its benefit, which may not always align with that of consumers or the public at large. This dynamic, which is by no means hypothetical, shows that there is a clear link between market power and the political process by which economic policy is determined. Therefore, the question of whether political considerations should play a role in competition law becomes relevant.

The issue is also important in a broader economic policy context. As will be described

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later in this paper, political economy considerations are widely studied in the context of technological progress of leaders and catch up of laggards. In the case of industrialized nations, the right political economy setting can lead to policies that maintain open markets, which in turn leads to innovation that can give firms a technological edge in the global economy. Regarding developing countries, the issue is much more fundamental. Technological catch up leads to sustained growth that lifts people from extreme poverty. Therefore, it is important to curtail the influence of firms that oppose policies that promote innovation and ensure that antitrust at the very least does not enable market structures that run against this goal.

The purpose of this paper is to ground the discussion from the point of view of legal administrability. Therefore, the main question of interest is whether we can design legal standards and identify evidence that courts can use to evaluate the links between economic and political institutions that underpin competition in markets. In this regard, this contribution departs from one of the main proposals of the New Brandeis movement, which is a focus on the competitive process and not on outcomes.[1] If political influence of large corporations is a concern, then this should be made explicit in the analysis and not just be a guiding principle of competition law enforcement, to the extent that such analysis is manageable by courts and administrative agencies.[2] In this way we can capture the mutual reinforcement between economic and political institutions and avoid at the same time the problems encountered in the pre-Chicago era in the United States. We should not enforce competition law in a way that almost any increase in market concentration is objectionable[3] and the expansion of dominant firms through construction of plants and factories is viewed as anticompetitive.[4] These outcomes were the result of enforcing the law based on assumptions and not on evidence. If political considerations can be analyzed on a case-by-case basis, within a coherent framework, and based on useful evidence at hand, then this problem can be overcome.

This paper focuses on the competition law implications of the use of a firm's financial resources to influence policymaking through legal means, such as lobbying and campaign contributions. It leaves out the analysis of harm that can be caused by firms that provide important services for the functioning of democracy, such as news reporting, and at the same time have market power.[5] Both threats are different in nature and therefore their analysis should be conducted separately.[6]

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[1] Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) JECL&Pract 131, 132.

[2] Otherwise, the treatment can be worse than the disease. As Becker puts it, demonstrating that a set of interventions can improve welfare does not mean that in reality government intervention will achieve a better result. The contrary is the equivalent logic of equating the model of perfect competition with how markets actually work. Gary S Becker, 'Competition and Democracy' (1958) JL&Econ 5.

[3] *See Brown Shoe Co, Inc v United States*, 370 US 294 (1962); *United States v Philadelphia Nat Bank*, 374 US 321 (1963).

[4] *United States v Alcoa,* 148 F.2d 416 (2nd Cir 1945).

[5] For an analysis of media markets, *see* Josef Drexl, 'Competition Law in Media Markets and Its Contribution to Democracy: A Global Perspective' (2015) World Competition 367; id, 'Economic Efficiency versus Democracy' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (CUP 2017).

[6] Activities such as lobbying and campaign contributions can be viewed as an investment. A firm that provides a service related to the functioning of

This paper is structured as follows. Section 2 provides an overview of the theoretical underpinnings between economic and political institutions that affect market competition. Section 3 describes how this relationship has been approached throughout history in the United States and the EU. Based on historical lessons and the current state of the art in the literature, section 4 analyzes whether we can design manageable legal standards to introduce political economy considerations in antitrust analysis. Section 5 concludes.

2. The link between economic and political institutions

Income growth requires economic institutions that enable complex transactions such as long-term capital investment to develop or adopt the latest technologies.[7] Some countries have been successful in fostering such institutions and others have not. That is why we observe large differences in income per capita around the world. Adjusted for purchasing power, the average resident in the European Union has an annual gross income of over USD 46 thousand while the average Bangladeshi makes do with USD 5 thousand. In Burundi, the poorest country in the world, that figure is USD 782.[8] We have known for quite some time that institutional settings in which financial resources flow efficiently, the political situation is stable, and economic policy is less volatile are associated with higher productivity and incomes. However, the question of why some countries succeed in establishing such an environment and others do not has been the subject of great debate, prompting the Economist to write that "economists understand little about the causes of growth".[9]

To solve these shortcomings, there is a growing body of literature that incorporates the study of politics, which growth theory used to leave out. Economic and political institutions are mutually reinforcing. The degree of competition in markets depends on political decisions. Trade policy, for example, determines how much pressure national firms face from international markets. Depending on how much influence incumbents have relative to other stakeholders such as consumers, politicians may be more or less prone to dismantle trade barriers.

There is a large body of literature that studies this mutual feedback from a historical, theoretical, and empirical perspective. Economic historical approaches focus on identifying the circumstances under which prosperity increased in past civilizations.[10] The current level of wealth enjoyed in the world, mostly in the developed nations, can be traced back more directly to the historical context of the Industrial Revolution so it is useful to start there.

The Industrial Revolution was preceded by the Glorious Revolution, which resulted in

democracy, on the other hand, can affect political processes without committing financial resources, for example, by changing the way it provides the service. Therefore, the decisions are different from an economic standpoint.

[7] The study of economic growth from an institutional perspective can be traced back to Douglas North, 'Institutions and Economic Growth: An Historical Introduction' (1989) World Development 1319.

[8] <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=EU-BD-BI> accessed on 7 January 2021. The magnitude of these differences is a relatively new phenomenon from a historical perspective. According to economic historian Angus Maddison, just before the Industrial Revolution, the wealthiest economies in the world, the United Kingdom and the Netherlands, had a per capita income level of around 4 times that of the poorest region in the world, back then (and still to this day) Africa. Angus Maddison, *The World Economy: Historical Statistics* (Development Centre Studies, OECD 2003) 262.

[9] 'Economists Understand Little About the Causes of Growth' (*The Economis*t, 12 April 2018). Available at <https://www.economist.com/finance-and-economics/2018/04/12/economists-understand-little-about-the-causes-of-growth> accessed on 7 January 2021.

[10] *See* Angus Maddison (2003, supra n 8); Douglas North (1989, supra n 7); Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Crown Publishers 2012).

the Bill of Rights that stripped economic policy away from the Crown and vested it under the British Parliament's power. The Glorious Revolution itself was preceded by a long period in which most monopolies in the United Kingdom's economy were abolished, which opened economic opportunity to segments of society other than the nobility and clergy. All these developments happened as a result of power struggles between different segments of society, usually a side demanding more political say to be able to shape economic rules and another side bent on maintaining the status quo.[11] These developments put in place the economic institutions that were a prerequisite for the string of innovations, such as the steam engine, that spurred unprecedented economic growth. These disruptive innovations caused a political cataclysm, which is why it is unsurprising to find historical evidence on how monarchs and ruling elites continuously opposed protecting inventions and the spread of innovation.[12]

Inspired by historical insights and more contemporaneous examples of successful and disastrous industrial policies, there have been efforts to model and explain why some countries are able to transition to innovation economies and catch up with the technological frontier. Acemoglu et al. model a "political economy trap" that causes countries' economic growth to stagnate as a result of a positive feedback loop between incumbency rents and the pay offs that politicians derive from different policy choices. The model describes the choice of competition policy or political openness that politicians promote as a function of the relative pay-offs they obtain from incumbent firms compared to the pay-off that that can come in the form of votes from the general public when promoting policies that increase productivity. If incumbency rents are high enough, which also depends on the level of competition, established firms will be able to buy a protectionist policy.[13] In other words, low competition leads to high incumbency rents, which increases the likelihood that the state will favor policies that close markets to the benefit of politically powerful constituencies.[14]

There is also empirical evidence on how effective political influence is in shaping economic policy. Jung and Duso find that campaign donations from telecommunications companies at the state level in the US have been effective in promoting favorable regulation regarding costs of operation (for example, distance from antenna to antenna) and price caps.[15] In Brazil, Claessens et al. find that campaign donations to winning candidates for congress and contributions to candidates affiliated with the president are associated with better access to finance from state-controlled banks.[16]

The influence of companies and organized interest groups would not be a problem to the extent that there can be competing interests that balance each other, which in the end can result in policies favorable to all. That is why Mitra finds that free trade can be an equilibrium with endogenous lobby

[11] For a more detailed account, *see* ibid.
[12] Ibid.
[13] Daron Acemoglu, Philippe Aghion and Fabrizzio Zilibotti, 'Distance to Frontier, Selection, and Economic Growth' (2006) JJEA 37, 65.
[14] On similar models regarding innovation policy choices and organized interest groups, *see also* Per Krusell and José-Víctor Ríos-Rull, 'Vested Interests in a Positive Theory of Stagnation and Growth' (1996) RevEconStud 301; Gene M Grossman and Elhanan Helpman, 'Electoral Competition and Special Interest Politics' (1996) RevEconStud 265.
[15] Tomaso Duso and Astrid Jung, 'Market Conduct and Endogenous Lobbying: Evidence from the US Mobile Telecommunications Industry' (2007) JICT 9.
[16] Stijn Claessens, Erik Feijen and Luc Laeven 'Political Connections and Preferential Access to Finance: The Role of Campaign Contributions' (2008) JFinEcon 554, 566, 568–569, and 571–573 (tables 5–10).

formation, since different levels of the supply chain have different preferences regarding the market price of inputs and end-consumer products.[17]

However, the evidence does not support a theory of balancing between interest groups that can ultimately benefit the general public. Based on a study of 1779 policy issues in the United States, Gilens and Page find that median voter interests do not align with those of the higher-income population and interest groups. In addition, median voter preferences appear to have no bearing on the likelihood that a policy will be adopted. In contrast, the preferences of interest groups are found to have a significant effect on policy outcomes.[18]

Lastly, regarding factors closely related to competition law, firm size – both in absolute and relative terms – has been found as a good predictor of lobbying activity. Kerr et al. examine lobbying data in the United States on publicly traded companies. They find that, even within large firms, there is a big variation of lobbying activity associated with market cap size.[19] Akcigit et al. find similar results in Italy, where market leaders are more likely to invest in political connections and at the same time reduce their research and development efforts.[20]

Throughout history, politicians and judiciaries have made choices on how antitrust law approaches this mutual feedback. The next section provides an overview focusing mainly on the US and the EU.

3. A brief historical overview of the relationship between antitrust law and democracy

At its inception, antitrust law in the US was indeed conceived as a measure against concentration of economic power that was incompatible with a democratic system of government.[21] This approach was dominant in the case law in the pre-Chicago era.[22] Indeed, concerns that the concentration of wealth could put an end to democracy were prominent at different milestones of US competition law, such as the Standard Oil decision,[23] the subsequent presidential election where the future of antitrust enforcement was discussed, the Great Depression, Franklin D. Roosevelt's antimonopoly speech before Congress in 1938, post WWII de-cartelization and de-monopolization of defeated powers as part of the post-war world order, and bipartisan support to strengthen antitrust enforcement during the Cold War.[24]

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[17] Devashish Mitra, 'Endogenous Lobby Formation and Endogenous Protection: A Long-Run Model of Trade Policy Determination' (1999) AmEconRev 1116.

[18] Martin Gilens and Benjamin I Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) Perspectives on Policies 564.

[19] William R Kerr, William F Lincoln and Prachi Mishra 'The Dynamics of Firm Lobbying' (2014) AEJ: Economic Policy 343.

[20] Ufuk Akcigit, Salome Baslandze and Francesca Lotti, 'Connecting to Power: Political Connections, Innovation, and Firm Dynamics' (2018) National Bureau of Economic Research.

[21] Although there were attempts to frame efficiency as the legislative intent – most notably by Robert Bork, 'Legislative Intent and the Policy of the Sherman Act' (1965) JL&Econ 7 – currently the consensus is that antitrust law was conceived as an instrument against special interests. *See* Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (HUP 2005) 40; Spencer Weber Waller, 'Antitrust and Democracy' (2019 FlaStULRev 807, 809; Eleanor M Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) LIEconI 317, 319-320.

[22] *See Brown Shoe Co, Inc v United States*, 370 US 294, 316 (1962); *United States v Aluminum Co. of America* 148 F2d 416, 428 (1945).

[23] *Standard Oil v United States,* 221 US 1, 83 (1910) (Harlan, J, concurring).

[24] For a more detailed overview, *See* Spencer Weber Waller (2019, supra n 21) 807, 809-811; and Eleanor M Fox (2019, supra n 21) 317, 319-321.

This concern regarding the compatibility of concentrated economic power and democracy disappeared from the case law following the Chicago revolution in the late 1970s. However, the topic has gained prominence in both the political and academic agenda in the US with the New Brandeis movement.[25]

The antitrust component of the Better Deal espoused by Democrats states that "because concentrated market power leads to concentrated political power, [large] companies deploy armies of lobbyists to increase their stranglehold on Washington."[26] In the Republican Party, political power concerns were one of the main focus points during the recent congressional hearing attended by the CEOs of Amazon, Apple, Facebook and Google. Specifically, a number of Republican representatives were concerned with the threat from platforms such as Facebook and Google to censor conservative content.[27] During the same hearing, democrat representatives echoed historical concerns from Jefferson, Brandeis, and Sherman on the perils posed by the concentration of economic and political power. Representative Cicilline closed his opening statement with the following remark: "Our founders would not bow before a king nor should we bow to the emperors of the online economy."

In Europe, after WWII, the most influential school of thought behind the amendments and adoption of new competition laws was ordoliberalism, which emerged as a fusion of ideas between the Freiburg School and other neo-liberal schools of thought throughout Europe.[28] This school of thought was also deeply concerned about the harms that large corporations could pose to democracy.[29]

One of the main considerations of intellectuals such as Walter Eucken and Franz Böhm was the idea of a strong state independent of the influence of large corporations. This ideal was based on their perception of state capture during the Weimar Republic, in which competition law and economic policy was applied, according to them, in favor of established national champions. The ordoliberal ideal was centered on freedom of enterprise, which could only be achieved through clear rules that kept markets open to the entire population.[30]

Although political economy considerations do not appear explicitly in EU leading cases, it is undeniable that to this day important parts of EU competition law are shaped by ordoliberal ideas. The law on rebates is one case in point. The law tackles aggressive pricing without imposing a below-cost standard. In addition, the standard of proof for countervailing efficiencies is much higher than the one required to prove

[25] For a summary of the main ideas behind the New Brandeis movement, *See* Lina Khan (2018, supra n 1) 131.

[26] 'A Better Deal: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power'. Available at <https://abetterdeal.democraticleader.gov/the-proposals/crack-down-on-abuse-of-power/> accessed on 7 January 2021.

[27] *See, for example,* opening statements of Rep Jim Sensenbrenner (R-Wisconsin) and Rep Jim Jordan (R-Ohio), and questionings from Rep Gregory Steube (R-Florida) and Jim Jordan. Full hearing available at <https://www.youtube.com/watch?v=1s1uWo1_bzg&t=10715s> accessed on 7 January 2021

[28] David Gerber, 'Constitutionalizing the Economy: German Neoliberalism, Competition Law and the "New" Europe' (1994) AmJCompL 25, 73.

[29] Manfred E Streit, 'Economic Order, Private Law and Public Policy the Freiburg School of Law and Economics in Perspective' (1992) JITE 675, 689.

[30] For an overview of ordoliberal thought and works of its main proponents, *see* David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (OUP 2001) 245-250.

anticompetitive effects. All the Commission needs to prove is that the conduct is capable of producing harm[31] but the undertakings under investigation have to produce evidence of actual and quantifiable efficiencies, not just hypothetical or feasible ones.[32] These rules clearly do not foster economic efficiency as understood in price theory but reflect a preference for making economic opportunity available to more firms regardless of the prices that consumers pay in the short term.

A similar point could be made regarding the by object treatment of resale price maintenance. The justification of such a rule cannot be found in economic efficiency, which would lead to analyzing the effects of the conduct in each case, but rather in the freedom of enterprise concept espoused in ordoliberal economics.

Outside the US and the EU, the link between political and economic institutions is, according to Fox, also visible in the simultaneous transition from communism and central planning to democracy and market economies in Eastern Europe as well as in inclusiveness-oriented competition policies in Sub-Saharan African countries, such as South Africa and Namibia.[33]

At this point it must be acknowledged that the described approaches suffered major flaws of implementation. In the US, the Chicago School of thought was successful in changing the analytical foundations of the law, partly because it presented a coherent theoretical framework to promote decisions consistent with a policy goal. Before that, the law allowed for results that were becoming harder to defend. The courts expressly stated that they were striking a balance in favor of an economy of small and medium-sized producers at the expense of consumer welfare.[34] This was done without articulating an analytical framework with which this tradeoff was analyzed. This led to objections to almost any increase in market concentration[35] and a deep suspicion of most any conduct from dominant firms that resulted in exclusion of competition, regardless of efficiency considerations.[36] US antitrust law was guided by the assumption that unconcentrated markets were the best way to protect the economic freedom that is compatible with a democratic system of government. There was no opportunity to prove that in some cases this assumption was incorrect.

The same criticism can be directed at EU law on rebates and other areas of unilateral conduct. Assuming that maximizing consumer choice is good policy leads to contradicting reasoning within judgments. In the case of rebates, the CJEU objects to rebates that coerce a customer to stay with the dominant provider because competitors cannot match the low price. The Court never explains why buyers would be benefitted by

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[31] CJEU, 06.09.2017, Case C-413/14 P *Intel Corporation Inc v European Commission* [2017] ECLI:EU:C:2017:632; CJEU, 06.10.2015, Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651 paras 31, 74.

[32] CJEU, 30.09.2003, Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR-2003 II-04071, ECLI:EU:T:2003:250, para 109 ff. Although the CJEU judgment in *Intel* has shed light on what kind of evidence may prove countervailing efficiencies, the fact still remains that the undertaking has to prove actual efficiencies and the Commission satisfies its burden of proof with a probable anticompetitive effect. *See* CJEU, C-413/14 P *Intel Corporation Inc v European Commission* [2017] (supra n 31).

[33] Eleanor M Fox (2019, supra n 21) 325-327.

[34] *Brown Shoe Co v United States*, 370 US 294, 344 (1962).

[35] *United States v Philadelphia Nat Bank*, 374 US 321, 363-364 (1963) (stating that a merger that leads to a firm controlling 30 percent of the market is clearly an undue threat that "warrants dispensing . . . with elaborate proof of market structure, market behavior, or probable anticompetitive effects.").

[36] *United States v Alcoa,* 148 F.2d 416 (2d Cir. 1945).

increases in price by the dominant firm, which would make buying from competitors rational again. It could be that more competitors in a market lead to stronger innovation incentives. However, again the problem is that there is no explicit analytical framework to assess tradeoffs between static efficiency and other economic goals.

In light of these problems, the next section analyzes whether introducing political economy considerations through legal standards and evidence that capture the relationship between politics and economics in market competition is a better solution than operating under assumptions of political threats or, at the other extreme, disregarding this relationship altogether.

4. Is competition law an adequate tool to address concerns arising from the political power of large corporations?

In antitrust scholarship, few question whether political influence of large corporations poses a threat to democracy. The debate is on whether competition law is an adequate tool to address the problem. As a starting point, we can define the social harm of concern. In short, we can describe the problem as follows: when successful firms grow and become market leaders, they are rewarded with accompanying market power and profits. At this stage, firms have the incentive to use those profits to increase their influence on politicians in several ways in order advance their interests over those of the general population.[37] Public policy should then be aimed at curbing this incentive and rather promote that profits are used in welfare-enhancing activities such as R&D.[38]

Against this background and on an abstract level then it can be said that at the very least antitrust law enforcement should not interfere with other policy tools aimed at curbing political power of dominant firms such as campaign finance regulation and policies that promote an educated and informed citizenry. Therefore, the first question that arises is whether a competition law focused on efficiency or – more narrowly – on consumer welfare can conflict with other policy efforts to address undue political influence of large corporations. If the answer is negative, then there is a stronger case for not adjusting the guiding principles of antitrust law and its rules.

It has been argued that a competition law that focuses on harm arising from market power is indeed coherent with policy that aims at curtailing political influence of large corporations, since the structural problem is market power.[39] Indeed, if introducing political economy considerations in antitrust litigation has its own associated costs, then the law should not be changed unless these additional analytical factors lead to better results in terms of preventing and deterring social harm.

Political economy considerations can be introduced in various ways. One could analyze **(1)** whether a given market structure can lead to increases of a firm's power over the political process, **(2)** whether a firm's influence on politicians enhances its market

[37] *See* William R Kerr, William F Lincoln and Prachi Mishra (2014, supra n 19): The authors find that firm size is indeed a good predictor of lobbying activity and even within large firms, there is a big variation of lobbying activity; Ufuk Akcigit, Salome Baslandze and Francesca Lotti (2018, supra n 20) (finding similar results in Italy, where market leaders are more likely to invest in political connections and at the same time reduce their research and development efforts).

[38] Or at least in welfare neutral ways such as paying dividends.

[39] Richard A Posner, *Antitrust Law* (Chicago Univ Press 2001) 25.

power, and **(3)** whether a firm's political activism is anticompetitive.[40] In general, the introduction of a new point of contention increases litigation costs. The analysis of these points is in addition highly complex, which in turn increases the cost burden. Shapiro goes as far as stating that introducing such considerations could incentivize corruption and jeopardize the rule of law since the enforcement agencies could use antitrust as a tool to target political enemies with enforcement actions.[41]

We can for now leave aside the discussion of whether there are legal standards that make the analysis of the aforementioned issues more manageable. Focusing on a more abstract level, we can say that if enforcement that alleviates social harm from market power indirectly addresses the problem of political influence, then the additional benefits of introducing considerations around (1) decrease. However, political influence can be affected by conduct that has a bearing on firm size but is permissible under a market power focus. First, a firm's expansion through acquisitions in other geographical markets within a country may not have significant effects on concentration levels in properly defined antitrust markets but still create an entity large enough to wield political influence.[42] In addition, conglomerate mergers may not trigger any market power or consumer welfare concerns but, in the same way as in the previous example, enable entities large enough to pose a threat in terms of political power.[43] These two examples show that large entities that do not enjoy a high price-cost margin can still generate significant aggregate profits because of their size, which enables them to spend resources on influencing policy. This can cause harm relevant in an antitrust sense if such influence is used to close markets or stall innovation.

In addition, there are areas of the law where efficiency considerations can trump market power concerns. For example, a merger that substantially increases concentration may be allowed on grounds of cost efficiency gains. In such a case, the downward pressure on price given the cost reductions may be greater than the upward pressure caused by increased concentration and therefore the transaction can be beneficial from a static point of view. Both forces however increase the price-cost margin of the resulting entity and its size, which in turn increases total profits. If there is evidence that such profits will be used on political activism, from a dynamic point of view, consumers and the general population may suffer from the merger.

In light of the scenarios explained above, there are circumstances under which the added benefits of introducing considerations regarding the impact of a given market structure on political influence of firms may still be substantial. These benefits must be weighed against the costs of analyzing this relationship within judicial proceedings.

Regarding considerations around (2) and (3), if there is social harm that arises from a firm's attempts to influence policy, then a focus on market power alone leaves out harm that

[40] This is not an exhaustive list. As mentioned in the introduction, a related problem is that of firms that provide services essential to democracy such as media content. *See* Josef Drexl (2015, supra n 5); id (2017, supra n 7). In such situations, the source of the problem is not the relationship between firm executives and politicians but the way in which firms provide the services that are relevant for the functioning of a democracy.

[41] Carl Shapiro, 'Antitrust in a Time of Populism' (2018) IJIO 714, 716, 746.

[42] Arthur Guerra Filho, 'Party Funding, Competition Law and the Protection of Political Democracy' (2016) QMLJ 79, 85.

[43] Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (Pearson 2005) 23.

could be identified by analyzing whether political activism has a bearing on market power or if it can be considered anticompetitive behavior. Therefore, the question of whether manageable legal standards can be designed to address these problems also becomes relevant.

From the point of view of legal administrability, the analysis of (1) and (2) shares similarities because, in essence, what has to be captured is a firm's political influence and the relationship between this and competitive variables such as market structure and market power. In short, these two types of considerations aim to capture the mutual feedback between competition and political influence. The analysis of (3) is quite different because it implies an assessment of the effects on competition of lobbying on a specific issue. In addition, from a legal perspective, it entails an analysis of the balance between political rights and freedom of enterprise. The analysis of these factors is therefore conducted separately in the following two subsections.

a. Legal standards and evidence that captures the relationship between competition in markets and political influence

As a starting point, we can approach the problem of designing a legal standard to identify when behavior aimed at influencing policy can lead to or reinforce a conclusion on the existence of market power. A firm can try to gain influence on politicians through campaign contributions, lobbying, and hiring former government officials, among others, so the legal standard should cover this behavior. In addition, the standard should capture the link between this type of conduct and market power. Lastly, to be meaningful in terms of policy, the standard should be grounded on our best understanding of the phenomena involved.

First, the standard should differentiate between active attempts to influence policy from passive attempts. If, for example, a government agency is conducting inquiries to determine the desirability of a given regulatory proposal, and it invites industry participants in order to obtain a complete picture, the participation of firms in this context does not show that they have or may have undue influence over the decision-making process. Whereas if a firm makes substantial campaign contributions to a politician, hires lobbyists that spend time trying to persuade such politician or his aides of a given policy option, or hires former staff of his office that may have better access to the politician's ear, such conduct can indeed give a firm influence over economic policy that favors it over the interest of consumers and the general public.

Behavior that actively seeks to influence economic policy should raise concerns of undue political influence. Such influence can increase market power if it is used to promote policy that closes markets or raises rivals' costs. For example, an influential firm could pressure market regulators to scrutinize it less strictly or, conversely, to enforce the regulations with more rigor on competitors and potential entrants.[44]

From an empirical perspective, expenses on campaign donations and lobbying are a good measure that can be plotted against a variable of interest such as policy outcomes, as done

[44] For a more in-depth overview of the criteria that can be used to clarify the impact of a firm's political activism on market power, *see* Francisco Beneke, *Market Entry and Competition Law in Latin America: The Role of Economic Development in Antitrust Analysis* (Springer, forthcoming).

in the studies described in section 2. If one can establish that such expenditures have a robust association with the likelihood of adopting competitive-relevant regulations in a given market, then a court or administrative agency could conclude that a firm's, or group of firms', political activism leads to greater market power than could be predicted by models using traditional variables such as market concentration. Trends in political activism expenses in the market can also be informative if the court or agency is relying on an indirect assessment of harm based on relevant market definition and its structure.

The feasibility and costs of introducing this analysis will vary depending on the institutional setting in each jurisdiction. In the United States, for example, expert testimony on statistical estimations is evaluated by juries and generalist judges, which has led to an inconsistent application of the law.[45] Such problems are alleviated in the case of specialized administrative agencies and chambers within a court, as in the European Union.

When the direction of effects that are being analyzed is from political influence to market power, then competition law enforcement does not need to abandon the consumer welfare standard. The only change we are making is introducing a new variable in the analysis of market power. On the other hand, when we want to analyze the effects of a given market structure on political activism of firms, then the consumer welfare standard may be too narrow to capture the relevant harm. This is because political influence can affect welfare beyond the specific market analyzed.

Directly measuring harm beyond the market under analysis would unduly increase litigation costs. It opens an area of contention for which we do not have measures of impact that could be balanced against other economic outcomes. Since political activism of firms is directed at a myriad of issues, such as labor law, product safety, environmental regulations, and so on, a direct measurement of its effects is not feasible in terms of the costs of litigation. However, there can still be a way in which competition law can address the effects of market concentration on political activism in a manageable way.

The assumptions that guide this analysis are: (1) the non-alignment between the interests of consumers and the population at large and those of dominant firms and oligopolies; and (2) the relationship between firm size and market structure, on the one hand, and political influence expenditures, on the other. These assumptions are grounded in empirical evidence, as described in section 2. Based on this, antitrust law could object to market structures based on evidence that shows the strength of the effects on political activism of firms.

In the field of merger control, the authorities could hear evidence on how the resulting market structure will affect market power[46]

[45] Herbert Hovenkamp (2005, supra n 21) 77 ff.

[46] Market structure does not predict market power in every scenario, but empirical evidence on the association between market concentration and price rigidity suggests that in most cases it will. Price rigidity is the responsiveness of price to downward and upward changes in costs. Market concentration is associated with greater rigidity to cost decreases compared to upwards shifts. In other words, as markets become more concentrated, firms become less responsive to cost decreases, which suggests higher economic profits. *See* J Colin H Jones and Leonard Laudadio, 'Price Rigidity, Inflation and Market Concentration: Some Canadian Evidence from the 1970s' (1990) Applied Economics 1625; Ian Domowitz, R Glenn Hubbard and Bruce C Petersen, 'Business Cycles and the Relationship Between Concentration and Price-Cost Margins' (1986) RJE 17(1):1–17; Sascha A Weber and Sven M Anders, 'Price Rigidity and Market Power in German Retailing'

and political influence expenditures. If political activism is not a problem, then the analysis could focus on market power alone. However, if there are political concerns, then the authority could object to the transaction if the effect on political activism is significant.

Another way in which competition law can address the effects of market structure on political activism is by assigning more weight to structural remedies for anticompetitive behavior when there is evidence that the market and firms in question present a problem in this regard. Not all concentrated industries lobby or contribute significant amounts to campaigns. The costs of obtaining evidence on this kind of expenses are not high and therefore introducing this consideration can be reasonable in terms of legal administrability.

b. Legal standards and evidence on anticompetitive political activism

Firms can leverage their political influence to press for policies that close markets to potential entrants or raise competitors' costs. In this case, as previously mentioned, the considerations around legal administrability are different because what needs to be addressed is behavior and not market structure. Therefore, the question is whether we can devise a legal standard and identify evidence that captures anticompetitive lobbying and leaves out political activism on competition-enhancing or neutral policies.

The complexity of this question cannot be overestimated both from a legal and economic perspective. From a legal perspective, depending on the jurisdiction, this can be an unconstitutional encroachment on fundamental rights of firms. In the US, petitioning any branch of government and administrative agencies for policies that lead to anticompetitive results is permitted under the limits of the Noerr-Pennington doctrine.[47] The specific rationale of this result is the construction of First Amendment rights made by the Supreme Court and the fact that expanding antitrust liability for such conduct would go against the legislative intent of the Sherman Act.[48]

In the EU, lobbying was briefly addressed in *EMC Development* by the General Court.[49] The Court stated that normal lobbying by an association was lawful under EU competition law, unless the trade association influences the procedure to the extent of controlling it and undermining it,[50] which are admittedly vague terms. One could find more guidance in decisions addressing vexatious litigation and the abuse of regulatory processes. In *AstraZeneca*, the conduct that was found objectionable was the misrepresentation of information to obtain a patent and the use of regulatory proceedings to impede entry. [51] The Court of Justice of the European Union ruled that the use of regulatory proceedings

(2007) Managerial and Decision Economics 737; Christoph R Weiss, 'Market Structure and Pricing Behaviour in Austrian Manufacturing' (1994) Empirica 115. Price rigidity studies avoid the endogeneity criticism directed at work that focuses on price-cost margins alone. Therefore, from a legal analysis perspective, market structures can trigger a rebuttable presumption of market power as they do in most jurisdictions.

[47] Which is based on the Supreme Court rulings in *Eastern R Conf v Noerr Motors*, 365 US 127 (1961) and *United Mine Workers v Pennington*, 381 US 657 (1965).
[48] *Eastern R Conf v Noerr Motors*, 365 US 127, 138 (1961)
[49] CJEU, 12.05.2010, Case T-432/05 *EMC Development AB v European Commission* [2010] ECR *2010 II-01629,* ECLI:EU:T:2010:189, para 81 and 82.
[50] Ibid.
[51] CJEU, 06.12.2012, Case C-457/10 AstraZeneca AB and AstraZeneca plc v European Commission [2012] ECLI:EU:C:2012:770.

can still fall outside the scope of competition on the merits, even if such use is lawful under other branches of the law.[52] However, it remains to be seen how the same reasoning would be applied by the CJEU to conduct such as lobbying.

If the law is amended or interpreted in a way in which lobbying can be subjected to competition law review, the remaining issue would be on how the anticompetitive effects be analyzed in court or administrative proceedings. In some instances, the anticompetitive purpose and effect might be clear, say, if the industry is pressing to raise import tariffs of a certain good. Promoting antitrust law exemptions can be another example.

However, the scenario can more often than not be more complex. For example, if the Solar Energy Industries Association in the US lobbies for a tax on fossil fuel energy sources, should Royal Dutch Shell be allowed to sue under sections 1 and 2 of the Sherman Act? The tax would clearly have the effect to make solar energy more attractive relative to fossil fuels but at the same time could be justified under other policy goals such as environmental protection. If the effects of this policy are not readily quantifiable, how should the courts strike the balance? In such a case, courts would be making political decisions, for which representative officials are better suited.

Based on the above, outlawing political activities on competition law grounds should be limited to clear cases, when there is little or no conflict with other policy objectives and when the competitive effects can be readily assessed. Such a standard would cover more than the 'sham exception' under the Noerr-Pennington doctrine,[53] but still apply only to narrowly defined cases. The evidence question would not be different from the assessment of competitive effects of other conduct since what needs to be measured is a market outcome of a proposed regulation.

5. Conclusions

There is a mutual feedback between political and economic institutions that underpin competition in markets and therefore the question of whether antitrust law could or should address political considerations is unavoidable. One such consideration is the use of financial resources on activities aimed at influencing policy, such as lobbying and campaign contributions.

In order to promote a coherent enforcement of the law, political considerations should be an explicit part of the analysis within a framework in which tradeoffs between static efficiency, political influence of incumbents, and innovation can be assessed. In this way, the problems of the pre-Chicago era can be avoided, in which almost any increase in market concentration and conduct by dominant firms was found objectionable.

An additional fact that strengthens the case for taking into account political considerations is that a focus on market power, efficiency, or consumer welfare can lead to conflicting results between competition law enforcement and other policies aimed at curbing the political influence of large corporations, such as campaign finance regulations. For example, horizontal mergers that create efficiencies can lead to substantial short run gains in terms of

[52] Ibid paras 130, 132.

[53] Under the 'sham exception' firms are liable for petitioning, only when the conduct itself has an anticompetitive effect and the petitioning was a coverup. *See Columbia v Omni Outdoor Advertising, Inc*, 499 US 365, 382 (1991).

lower prices, compensating risks of price increases due to market power, which can lead an authority to authorize the transaction based on traditional competition law analysis. However, there is also a risk that the increase in aggregate profits may be used in part on lobbying expenses and campaign contributions in order to influence policies that increase profitability, at the expense of subsequent innovation and the general public. Since firm size, in both absolute and relative terms, is a good predictor of lobbying activities, the problem is not merely hypothetical. However, the decision should be made based on the evidence at hand. If there is no indication that in the specific market in question political activism is a problem, then a transaction such as the one described above should not be objected by the authorities.

In the case of expenditures in political influence, based on the literature, we can identify three issues related to antitrust analysis: **(1)** whether a change in market structure has an effect on political expenditures, **(2)** whether the political influence attained can lead to or reinforce a conclusion of market power, and **(3)** whether the conduct of pressuring politicians to adopt policies that lead to anticompetitive results should be covered by competition law.

This paper has laid out the main considerations around these issues focusing on their legal administrability. Regarding **(1)**, if there is evidence that the market or firms in question deploy substantial resources on political activism, antitrust law enforcement in the market should favor a structural focus. That means prohibiting mergers that increase concentration or favoring structural remedies, such as divestitures.

In the case of **(2)**, evidence on political expenditures can be considered illustrative of the degree of market power of a firm or group of firms. If there is evidence that political expenditures are substantial and have been effective in shaping policy, the degree of market power of firms can go beyond what factors such as cost structure, price, and concentration would indicate. Innovation is less likely to occur in industries where incumbents have sway over policies that have a bearing on current and potential competition.

Regarding **(3)**, legal administrability considerations lead to a narrow prohibition on pressuring politicians to adopt policies that restrict competition. Such a prohibition should be directed only at clear cut cases in which the conflicts with other policy goals other are not relevant or non-existing and when the competitive effects of the policy can be readily assessed. Such a standard would cover more than the 'sham exception' under the Noerr-Pennington doctrine, but still apply only to narrowly defined cases. Firms lobbying government agencies on public tendering requirements can be an example.

This paper lays out starting points of the discussion, rather than definitive conclusions. For example, if there is evidence that market structure has led to increased political activism, I argue that authorities could give more weight to structural remedies when confronted with traditional anticompetitive behavior cases. However, given the drastic changes that such remedies imply, this question should be approached from a holistic point of view of the associated costs. This paper only identifies an additional factor to take into consideration in this discussion.

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