

Precautionary Antitrust: Competition Without Innovation

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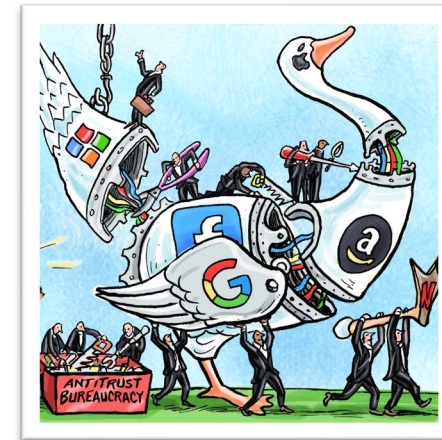
March 24, 2022
Guest Lecture, Judge Douglas Ginsburg's course

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The Neo-Brandeisian Revolution in Antitrust

- How to better explain the on-going paradigm shift in antitrust?
- Target most innovative companies
- Error-cost framework proves inadequate
 - False negatives are condemned
 - False positives are denied
- Regulatory preferences to err on the side of caution (risk-aversion)
 - Disruption/Innovation seen skeptically
 - Status quo/Protection preferred



Hypothesis

- The precautionary principle entered antitrust policy
- Antitrust shuns away from innovation
- Because innovation is “dynamic efficiency”, antitrust departs from antitrust economics to revert back to a political enforcement of antitrust



Defining the Precautionary Principle

- The precautionary principle has two distinct formulations:
 - Where there are possibilities of large or irreversible serious effects, scientific uncertainty should not prevent protective actions from being taken (UNCED Conference, Rio, 1992)
 - Where there are possibilities of large or irreversible serious effects, action should be taken, even if there is considerable scientific uncertainty (EU Legislation)
- U.S. has a more skeptical approach to precaution because of preeminence of the cost-benefit analysis:
 - In the *Benzene* case, the U.S. Supreme Court held in 1980 that agencies cannot regulate on the basis of mere conjecture about uncertain risks

Precautionary Principle: The Status Quo Bias

- In 1999 the Trade Commissioner of the EU, Pascal Lamy, asserted:

“In the U.S., they believe that if no risks have been proven about a product, it should be allowed.

“In the EU it is believed something should not be authorized if there is a chance of risk.”

- What about competition risk to the market structure?



Precautionary Principle



Uncertainties



Hypothetical risks

No actual harm



Ex ante interventions



Reversed burden of
proof

Lowered standard of
proof



Irreversible
(irreparable) harm



Regulatory compliance
over liability system

Outline

I. European Precautionary Antitrust

II. American Precautionary Antitrust

**European Competition Enforcement and the Digital Economy:
The Birthplace of Precautionary Antitrust**
Aurelien Portuese

INTRODUCTION

European competition law enforcement in the digital economy reveals a strong, yet healthy, tension. On one hand, administrative agencies, both at the European Union (E.U.) and national levels, began enforcing competition laws in digital markets with an increasingly precautionary approach. On the other hand, courts reacted by significantly restraining these interventions, reinstating the basic legal principles.

1. Uncertainties

- Reports and legislative proposals acknowledge the vast uncertainties surrounding potential regulatory interventions
- Market uncertainties/novelties justify new regulatory proposals
- Market tipping: regulate new technologies before too late
- Disrupters as generating uncertainties



2. Hypothetical Risks

Google Shopping (2017) => no evidenced harm, potential risk of harm

Google Android (2018) => no evidenced harm, dominant position strengthened by the practices

New Competition Tool / DMA

- « structural risks to competition »
- « risks on the structure of competition »

Rhetoric of « choice » over « harm »
Consumer choice v consumer harm



3. Ex Ante Interventions

- Interim measures / Urgent measures
 - Broadcom (2019): 1st time in 20 years
 - Article 22 DMA
- Permanent ex ante interventions
 - *New Competition Tool: ex ante regulation*
 - Blacklisted practices (Article 5 & 6 DMA)
 - Intervention despite lack of abuse
 - Intervention despite lack of dominance
 - Intervention despite no market definition

Parliamentary questions

5 July 2017

Question for written answer E-004559-17
to the Commission
Rule 130
Ramón Luis Valcárcel Siso (PPE)

5k 15k

E-004559-17

Subject: Applying precautionary measures in antitrust cases

Answer in writing

The Commission has fined Google EUR 2.424 billion for violating competition rules in the online search engine market. The sanction is the result of an investigation that has been going on for more than seven years.

The decision could not be reached until the end of the investigation. However, companies affected by the unfair practices identified have reported that their business was severely damaged as a result of those practices during the years that DG Competition took to come to a verdict.

In the face of this situation, Commissioner Vestager has suggested that temporary measures may be introduced to oblige companies being investigated in antitrust cases to cease unfair practices even before those practices have been proven to exist.

The aim of those measures would be to have DG Competition respond to any sign of unfair practices in such a way that those affected by the practices would not have to wait the several years that it usually takes to close investigations of that type. However, the type of signs that could warrant introducing those measures has not yet been established, nor what type of measures they would be. Could the Commissioner provide more detailed information on the proposal?



4. Reversed Burden of Proof

- Compliance measures of the DMA de facto operates a shift in the burden of proof
- CALERA Bill shifts the burden of proof
 - No justifications available for “unlawful acquisitions”
 - Exclusionary conduct: Section 26A(c) : presumptions (1) + limitations of the exceptions to the presumption (2d)
 - Sec. 13b: “If direct evidence in the record is sufficient to prove actual or likely harm to competition, an appreciable risk to competition sufficient to satisfy the applicable statutory standard, or that the effect of an acquisition subject to section 7 of the Clayton Act (15 U.S.C. 18) may be to create an appreciable risk of materially lessening competition or to tend to create a monopoly or a monopsony, neither a court nor the Federal Trade Commission shall require definition of a relevant market in order to evaluate the evidence, to find liability, or to find that a claim has been stated under the antitrust laws.”
 - No explicit reversal of burden of proof, but strong presumptions and limited exceptions

Vestager considers shifting burden of proof for big tech

Emily Craig
31 October 2019

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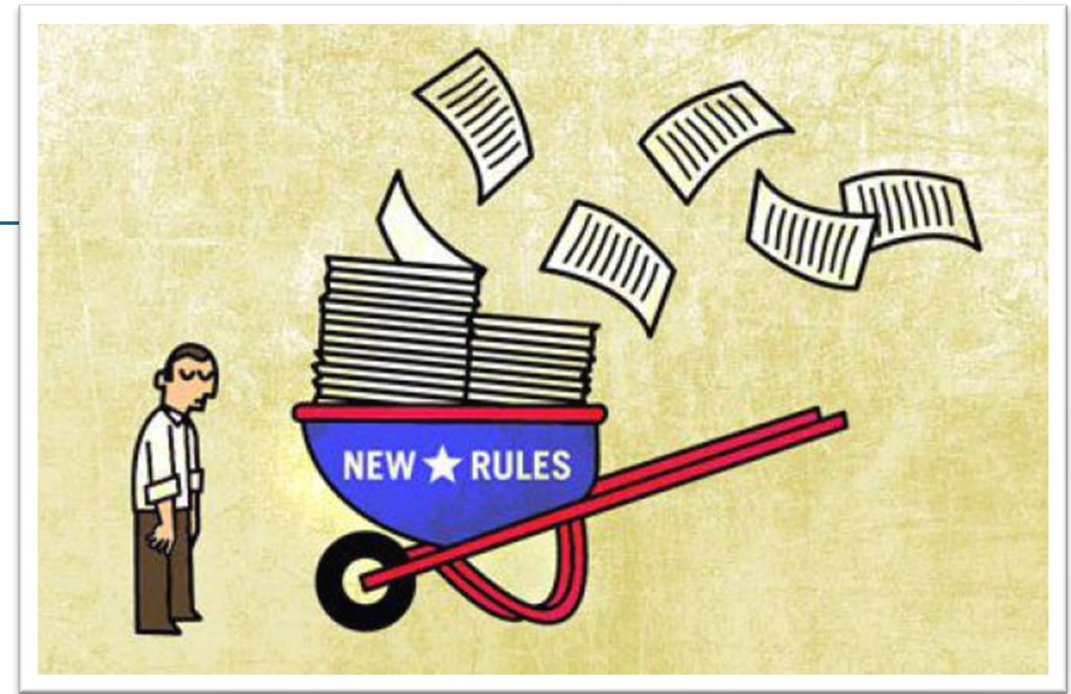
5. Irreversible Harm

- Para 26 DMA: “In such a situation, it appears appropriate to intervene before the market tips irreversibly.”
- Article 22 DMA: “In case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers, the Commission may, by decision adopt in accordance with the advisory procedure referred to in Article 32(4), order interim measures against a gatekeeper on the basis of a prima facie finding of an infringement of Articles 5 or 6.”
- Vestager, Fordham October 2020: “ It’s when markets are moving rapidly that interim measures matter most. They can prevent irreparable harm to competition during the time it takes to reach the final decision. They do something else too.”
- Vestager, U.S. Subcommittee on Antitrust, 2020: “This is a part of our toolkit that we had not used for some time, but it allows us to stop behaviour that is likely to result in serious and irreparable harm to competition, provided that we can prove that a prima facie infringement of competition rules is ongoing.”



6. Regulation Instead of Liability

- Liability is supposedly
 - Too slow
 - Too weak
 - Too inefficient
- Regulatory compliance necessary according to Neo-Brandeisians and Ordoliberal
- Paradigm-shift: ex ante precautionary rules to avoid triggering ex post liability
- Inciency doctrine: combatting incipient behavior before any likelihood of harm



Beyond European Precautionary Antitrust: American Precautionary Antitrust

- Antitrust bills
- Absent antitrust reforms, FTC's rulemaking
- Shift from ex-post to ex-ante rules of competition
- Why FTC rulemakings on “unfair methods of competition” UMC is:
 1. Probably Illegal
 2. Certainly Harmful

American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority

AURELIEN PORTUESE | JANUARY 2022

The FTC plans to follow Europe's precautionary approach to antitrust by enacting preemptive rules of per se illegality. But American precautionary antitrust is both unlawful and economically harmful, as it opposes dynamic competition, which benefits consumers and innovation.

KEY TAKEAWAYS

- The FTC holds rulemaking authority to regulate unfair methods of competition (UMC), and one of the regulatory goals it has set for 2022 is to use that power to enact ex ante

Introduction: The Neo-Brandeisian Case Against Innovation



- Innovation = Dynamic Efficiency
- Neo-Brandeisians against efficiencies
 - Rule of reason balances out anticompetitive effects with efficiency/innovation considerations
 - FTC rescinded in 2021 the 2015 statement on Section 5 of the FTC because:

“Importing the rule of reason’s likelihood requirement would abrogate the commission’s statutory mandate to combat incipient wrongdoing before it becomes likely to harm consumers or competition...Tying Section 5 back to this framework (of the rule of reason) offends the plain text, structure, and legislative history of Section 5...”
- Neo-Brandeisians against innovation
 - Evolutionary/Common law process of the courts disparaged: “antitrust away from the courts”

“The case-by-case approach to promoting competition, while necessary, has proved insufficient, leaving behind a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches.” (FTC’s 2022 regulatory priorities)
 - Evolutionary economics as source of innovation disparaged: static competition

The FTC “will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices.” (FTC’s 2022 regulatory priorities)



American Precautionary Antitrust = FTC Rulemakings on UMC



1. UMC Rulemakings : Probably Illegal

- Section 5: “That unfair methods of competition in commerce are hereby declared unlawful.”
- Section 6(g) grants the FTC the power from “time to time to classify corporations and...make rules and regulations for the purpose of carrying out the provisions of this subchapter.”
- Ex-ante rules of on unfair competition? What are UMC?
- January 20, 1914, President Wilson delivered a message to Congress for the creation of the FTC:
 - “The opinion of the country would instantly approve of such a commission, It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of **information and publicity**, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided...”
 - Impossibility to define UMC: Senator Sutherland asked: “”What are unfair methods of competition? Can anybody tell me?” He then suggested that UMC are “an attempt upon the part of one person or a corporation to impose his or its goods or business upon the public as the goods or business of another.” Confusion with UDAP
 - FTC v Gratz, 253 U.S. 421 (1920) : “it is for the courts, not the commission, ultimately to determine as a matter of law what (UMC) include.”

1. UMC Rulemakings: Probably Illegal ‘ed

- *National Petroleum Refines Association v. FTC* (1973):
 - FTC tried to promulgate a rule defining the failure to post octane rating numbers on gasoline pumps at service stations as “an unfair method of competition and an unfair or deceptive act or practice.”
 - D.C. Circuit found that Section 6(g) granted the FTC such regulatory power to engage in *substantive* UMC
 - Magnusson-Moss Warranty – FTC Improvement Act of 1975:

FTC Rulemakings on UDAP: congressional mandate. Since 1975, 7 FTC rulemaking initiatives under MMA, each rule taking an average of 6 years to be adopted.

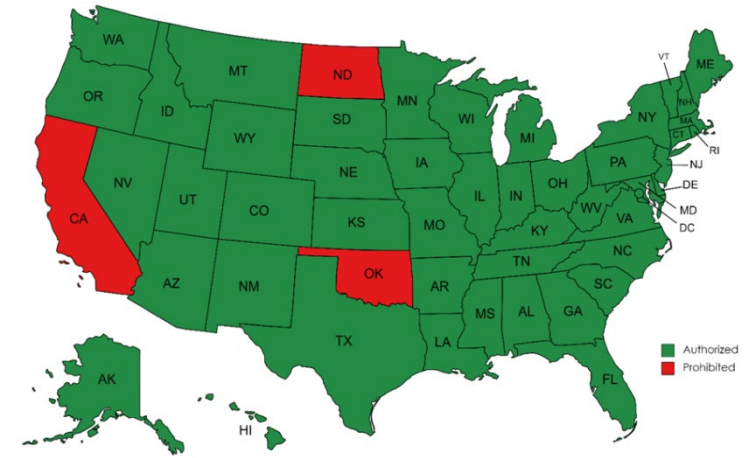
No FTC Rulemakings on UMC: lack of congressional mandate. One rule as UMC rulemaking adopted in 1968 (Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry): magistral failure, rule rescinded in 1995.
 - Substantive UMC Rulemaking cannot be presumed: explicit and precise congressional mandate necessary

2. UMC Rulemakings: Certainly Harmful

- “A recent Executive Order encouraged the Commission to consider competition rulemakings relating to non-compete clauses, surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.” (FTC’s 2022 Regulatory priorities)
- Unclear competition effects of these practices: pro- and anticompetitive effects in need of balancing, not of per se illegality (precautionary prohibition)
- Examples: non-compete clauses, exclusionary contracts (cf. FTC’s [Solicitation](#) for Public Comment on August 2021 referencing 2 petitions from OMI)

2. UMC Rulemakings: Certainly Harmful

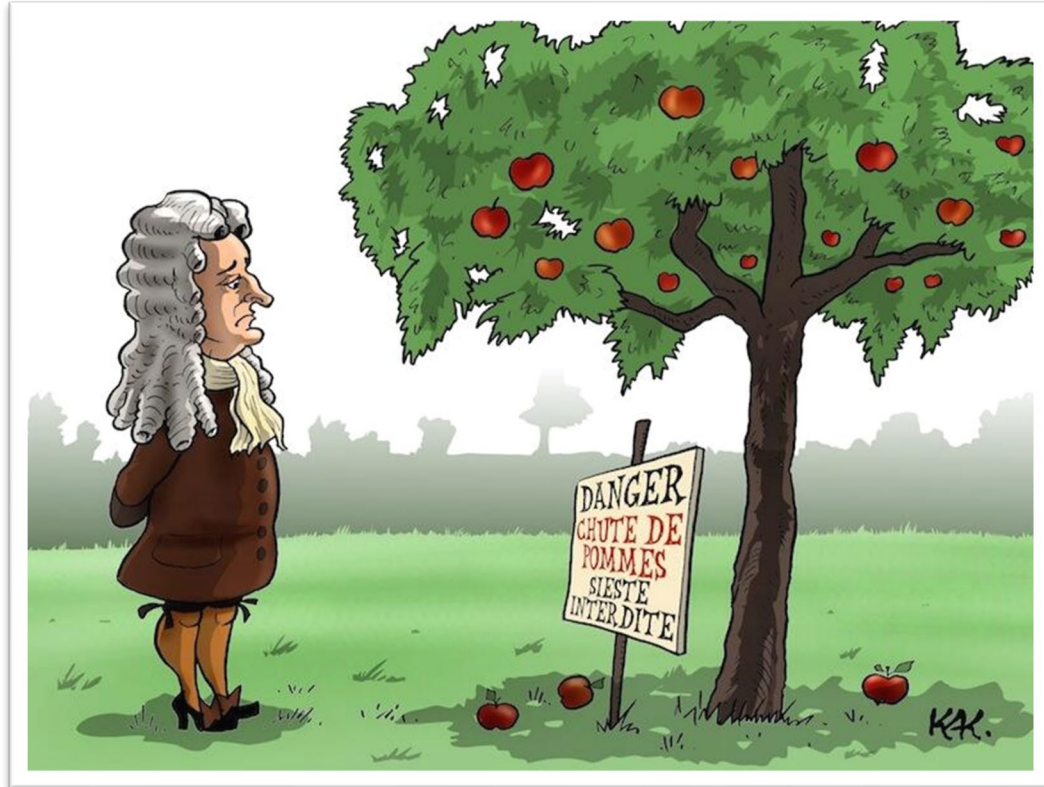
- Only 8.8 percent of employees unaware of having signed a non-compete clause
- Unreasonableness of non-compete clauses prohibited since...1414
(*The Case of John Dyer*)
- If rulemaking means per se illegality, precautionary approach preventing innovation/investment on human capital
- If rulemaking means illegality of unreasonableness, already positive state laws.



2. UMC Rulemaking: Certainly Harmful 'ed

- Exclusionary contracts
 - *Jefferson Parish*, 466, U.S., 45 (1984): “Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.”
 - No serious claim of per se illegality: rule of reason must apply, therefore judicial balancing (not rulemaking) can single out anticompetitive practices from procompetitive practices.
 - Else, risks of false positives : deterrence on contractual agreements fostering innovation and efficiency-enhancing
 - Early per se prohibitions of contractual agreements can prevent innovation, opening new markets, enabling disruptions = lower competition in the name of competition

Conclusion



1. All core elements of the precautionary principle are present in the new antitrust paradigm
2. The precautionary principle better explains antitrust's recent developments than does the error-cost framework

Policy Implications

- Precautionary principle \neq Innovation principle
- Precautionary antitrust \neq Innovation-based (dynamic) antitrust



Thank You!

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