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REVIEWS

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Conceptual Foundations of Antitrust, edited by Oliver Black. Cambridge: Cambridge University Press, 2005, viii+222 pages

This book reminds us that there are limitations to economics and law in the sphere of antitrust and, in one important respect, challenges the triumph of economics[1] in competition law. The author's intellectual heritage is analytical philosophy (in which he holds a doctorate) but, as he says himself in his introduction, the career opportunities were better in law and he is a solicitor at one of the "Big Five" law firms in the City of London where he works mainly in the field of antitrust. Thus his practical experience informs his intellectual interests and hence this meditation on a few select issues in competition law through the lens of analytical philosophy. It is refreshing to see competition viewed through a different lens thus challenging received wisdom, providing new lines of argument for practitioners and avenues for further research and reflection on competition. The book, Black hopes, will be of interest to economists, philosophers and political scientists with no special interest in antitrust while being primarily directed at those with such an interest.[2] By marrying competition law with analytical philosophy the monograph is certainly a welcome addition to the canon with the chapters on the concepts of competition and welfare of particular interest.

For lawyers it can be a daunting prospect to face into a book replete with equations even if written in letters rather than numbers. More daunting perhaps is simply the difference in approach and discourse from a law text but the author leads the reader through the process ably. Where examples or particular features of the law are discussed it is very effective

[1] Eisner, M. A. 1991. *Antitrust and the Triumph of Economics: Institutions, Expertise and Policy Change*. North Carolina Press.
[2] At 1.

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e.g., in the analysis of Sugar Cartel in the discussion of concerted practices.[3] The author assumes no knowledge of analytical philosophy – addressed in particular by the fairly thorough overview offered at the start of each chapter to give the non-specialist a map as to the content. In each chapter he proposes models which are intended to represent central cases of central concepts and not to specify necessary and sufficient conditions. They also aspire to fit intuitive judgment. The aim of the author – drawing on Rawls – is that the models should be a reflective equilibrium of intuition and theory.[4]

Black aims to do two things with the book: by exploring concepts at the heart of competition law but found in philosophy to bring an awareness of competition to philosophers. This in itself is a radical step given the limited engagement outside of economics and competition law in a field where even lawyers who are not competition lawyers steer clear. The second aim is to provide a deeper understanding of the discipline for those who do engage with it either academically or through practice. The book is divided into six chapters: what is competition?; competition and welfare; per se rules and rules of reason; agreement; concerted practices; and the spectrum from independent action to collusion. In legal terms, the focus is on restrictive agreements. It is not just a meditation on Article 81EC (that provision of the EC treaty that prohibits arrangements which have as their object or effect the prevention, restriction or distortion of competition within the EC), as it also engages with the rule of reason – a doctrine that lies at the heart of US law but is not directly found in Article 81[5] – and like the term "antitrust" itself is a concept that casts a long shadow over competition law analysis. There is also a discussion of cartel offences under the UK Enterprise Act 2002 and the discussion of collusion necessarily includes co-ordinated effects in mergers. Thus it is more than Article 81EC and in fact draws heavily on American sources and cases law.

Competition law is that field of legal doctrine that seeks to advance consumer (or social) welfare through the promotion of competition.[6] In modern competition law systems, the law gives effect to this policy objective by prohibiting restrictive practices (especially cartels), by prohibiting monopolization (under US law) or abuse of market dominance (under European Community law) and by requiring prior notification of mergers to ensure that they do not substantially reduce competition (or strengthen market dominance in the case of the EC). The term 'antitrust' is

[3] At 161.
[4] At 5.
[5] See Jones, A. and B. Sufrin. 2004. *EC Competition Law: Text, Cases and Materials*, 2nd edn. Oxford University Press, 182–6.
[6] Black at page 33 notes that EC and US antitrust favours consumer welfare while economists favour social welfare.

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often used to refer to those aspects of competition law which are concerned with private market behaviour. Other aspects such as market liberalization of industries that historically were state-protected monopolies, public procurement and state subsidies are primarily concerned with the state and competition and do not fall within the term antitrust. Antitrust is itself is an American term of art. It derives from the legal device – the trust – used at the end of the nineteenth century in the USA to create cartels and secure monopolies.[7] The Sherman Act 1895 was introduced to prohibit such conduct. The pedigree and influence of American law – as the second oldest competition law in the world – in this sphere is such that the historically and doctrinally specific term 'anti-trust' is widely used and recognized in other jurisdictions. Black himself simply defines the term as a body of law and policy designed to promote or protect competition.[8]

Competition law is characterized by its strong dependence on economics with some commentators suggesting it owes its very existence to economics.[9] The law itself lacks the analytical tools needed to define competition. This inter-dependence is recognized in different ways in the law.[10] Substantively for example under current competition regimes, determinations as to whether particular behaviour is prohibited as anti-competitive requires definition of the relevant markets and in order to define the market, regard is had to economic concepts like cross-elasticity of demand or supply in order to determine the scope in terms of products and geography of the market.[11] Institutionally, in some jurisdictions economists sit on competition tribunals.[12] Procedurally, there are specific rules pertaining to economists as expert witnesses in legislation.[13]

It is very rare in law for another discipline and its advocates to have such a prominent role in decision-making. With reforms in the EC over the last 15 years, economic analysis has become the central reference point, reflecting a trend in the USA dating from even before Reagan. The dominance of economics has had the desired effect of excluding other disciplines and discourses – partly because of proper concerns for legal

[7] Peritz, R. J. R. 2000. *Competition Policy in America: History, Rhetoric, Law.* Oxford University Press.

[8] At 33.

[9] Audretsch, D. B., W. J. Baumol and A. E. Burke 2001. Competition policy in dynamic markets. *International Journal of Industrial Organization* 19: 613–34.

[10] Maher, I. 2004. Regulating competition. In *Regulating Law,* C. Parker, J. Braithwaite, C. Scott and N. Lacey, eds. Oxford University Press, 197.

[11] See e.g. Commission Notice on Market Definition [1997] Official Journal C 372/5; [1998] 4 Common Market Law Reports 177.

[12] Members of the Australian Competition Tribunal can include an economist, see section 31(2) Trade Practices Act 1974. An economist may sit as a lay member of the High Court in New Zealand when it is considering competition law matters, see section 77 Commerce Act 1986.

[13] See e.g., section 4 of the Irish Competition Act 1996.

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certainty and the view that competition law can only address issues of economic welfare. Other policy considerations such as the role of sport in society and plurality of the media are to be addressed through other legal doctrines. How this balance between economic welfare and other policy concerns is to be achieved is one that shifts over time, industry and jurisdiction. The dependency of law on economics in this sphere and how law mediates that dependency is a complex issue. Competition agencies and courts regularly grapple with the decision as to which economic theory to apply in a particular decision and how to evaluate the quantitative information provided to them. This focus on the bilateral dynamics can obscure the limitations of law and economics and the weaknesses in the conceptual foundations of competition – something which this book seeks to address.

In short, Black brings to the fore the gaps there are in economics and law. The book immediately gets to the heart of one of the conundrums of competition law[14] which is the "scandal"[15] that neither theoretically nor practically is there an agreed definition of competition. Thus economics and law struggle to define competition in a manner that is useful for the application of competition law doctrine. Rising to the challenge, Black proposes a model through which to discuss literature on competition in the philosophical tradition and also highlights the five possible definitions provided by Bork each of which is discussed when developing his model. The discussion brings home the point that economics does not in this sphere have a monopoly on understanding and that it may be necessary to go beyond it to develop an understanding of what is competition. His discussion addresses whether competition and cooperation are mutually exclusive concluding that they are not where the parties' actions and goals in competing are different from those in their acting jointly. This has implications for the notion of a concerted practice under Article 81EC which is prohibited but very difficult to distinguish from parallel conduct which is not prohibited. In his view, concerted practices prevent competition by the same actions in and respect of the same goals and thus fall within Article 81EC irrespective of subject matter. He finishes the chapter having shown via the model that competition is compatible with making an agreement but not with complying with one. He notes that some cases of economic competition fit the model's core but the question as to which forms of competition should be promoted is not a question that can be answered as there is not enough empirical research on the matter. This discussion goes some way towards identifying and clarifying some of the fuzzy edges around the practical legal issues that can arise and he is not shy to point out the tautologous nature of the definition of

[14] The other being that an effective competitor may over time achieve monopoly.
[15] At 6.

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competition as rivalry provided by the UK competition agency responsible for the enforcement of competition law, the Office of Fair Trading.[16]

Having discussed the concept of competition, Black moves onto the most iconoclastic part of the book where he discusses competition and welfare. He calls into question the received wisdom that competition enhances welfare. His thesis is set out as alternatives: either welfare has a meaning in which it is valuable but competition does not maximize it or welfare has a meaning where competition does maximize it but that in itself is no justification for competition, because welfare in this sense is not worth maximizing. In other words: competition is either an ineffective means to a valuable end or an effective means to a worthless end – iconoclastic indeed. He raises three questions: what is it to maximize welfare? Does competition maximize it? And is it a good thing to maximize welfare? If welfare is given a thin sense such as that found in economics, then it is not a good thing to be maximized. If a thick sense of welfare is used, then it is unlikely that competition will maximize it. His conclusion is to suggest that we must consider alternative justifications for competition.

Drawing on various philosophical theories of welfare ranging from a person's mental state through to participation in various forms of good, he proposes that some version of the latter (which he does not elaborate on) is to be preferred. If a thick sense of welfare is accepted, it is difficult to say that competition can maximize it given problems of proof of such maximization. Instead, Black suggests the weaker test of competition promoting competition. He then makes the radical suggestion that if such a view of objective welfare is taken then competition agencies should prioritize promoting competition in those markets that promote welfare rather than those markets for goods that are trivial or even harmful (e.g., cigarettes). He defends this claim against paternalistic, ethical, and legitimacy based arguments but does note that it is based on the unproven assumption that competition can promote this type of welfare. He also casts doubt on whether it is a good thing to maximize this type of welfare as it may conflict with other goods and notably fairness of distribution. The conclusion is that neither the thin nor thick approach to welfare supports the welfare argument for competition and should be abandoned. Given the richness of analysis in this chapter it would have been interesting to see it developed to determine what objective welfare might look like, and how this idea might tie in with economic theories that draw on psychology and move beyond the narrow economic view found in competition law.

The next chapter explores the disjunction between object or effect of an agreement under Article 81EC and the argument for its abandonment brings a new perspective to a debate that deserves greater attention. The discussion is also grounded for the non-philosopher by the discussion

16 At 26.

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of intention under the cartel offence in the UK Enterprise Act 2002. The chapter on concerted practices[17] argues (using a model) for a concept of concerted practice as a form of joint action thus helping to distinguish such conduct from agreements and individual conduct. Concerted practices are not only well nigh impossible to prove legally but are notoriously difficult conceptually so an analysis of this sort can only help in working out what boundaries, if any, can be drawn in competition law between legal and illegal conduct.

The common theme of the book is the "anarchy of terms"[18] in competition law. Some order is attempted in the last chapter where the author uses materials from the penultimate chapter to model a spectrum showing where different kinds of conduct fall on it and how they are related to each other. The grades on the spectrum are: independent action; mutual belief (which includes expectation); mutual reliance; mutual reliance with a common goal – the issue of when goals are the same is discussed in chapter 1; mutual reliance with a common goal and with knowledge; and finally, joint action. Black concludes that agreements as a concept are not on the spectrum. Drawing on the examples of coordinated effects, especially as seen in the Airtours case,[19] Black attempts to place boundaries on the oligopoly problem i.e., those forms of non-collusive coordination that are not prohibited but are difficult to distinguish from those that are. Thus the book concludes with advice to abandon certain 'co' words found in competition e.g., conspire (same as collude), likewise consensus and concord are to be abandoned as they do little to illuminate the already slippery concerted practice.

The book makes clear that it is not just the intricacies of the relationship between law and economics in competition that can generate legal uncertainty and increase the risk of poor decision making; it is also due to the (sometimes unarticulated) conceptual confusion underlying the doctrine and that this confusion can usefully be addressed through analytical philosophy in a way that can inform our understanding of competition law. The main contribution of the book to the field is that it opens a different window on competition concepts and in doing so points to the gaps in legal and economic analysis. More specifically by challenging concepts of welfare and seeking to clarify notions of competition and agreement, it reminds us of the continual need to clarify while also

[17] "[a] form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition" the European Court of Justice in cases 48/69 etc ICI v. Commission [1972] European Court Reports 619, [1972] Common Market Law Reports 557, paragraph 64.

[18] At 185.

[19] Case T-342/99 Airtours plc c. Commission [2002] European Court Reports II-2585, [2002] 5 Common Market Law Reports 176.

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begging the question: if there is such uncertainty, is legal certainty needed? Perhaps the answer is that competition law works – but the conceptual confusion underlying it adds to the costs of enforcement and hampers the achievement of the policy objectives underlying it. Hence the need for the sort of meditations on the worlds of law and economics found in this book.

Imelda Maher
University College Dublin

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Laws of Fear: Beyond the Precautionary Principle, edited by Cass R. Sunstein. Cambridge University Press, 2005, xii+234 pages

The main objective of Cass Sunstein's book, *Laws of Fear*, is to attack the strong version of the Precautionary Principle as a justification for regulatory action. Specifically, he presents a critique of the concept that regulators should take steps to protect fully against all potential harms. Sunstein argues that this concept is literally incoherent, because regulation in itself introduces its own risks, and therefore the strong version of the Precautionary Principle is paralysing, since it forbids the very steps that it requires.

Sunstein divides his book into sections on problems with and solutions to the strong Precautionary Principle. In summarizing the main arguments in the book, this review follows an identical structure.

1. PROBLEMS

Sunstein states that the weak version of the Precautionary Principle – that a lack of decisive evidence of harm should not offer grounds for refusing to regulate – is a principle to which no reasonable person could object. For example, we may quite legitimately place controls on exposure to low level carcinogens, even if their effect on human health has not been proven. However, he argues that in practice, a stronger version of the principle is often adopted. For instance, he cites cases in European courts that have ruled that activities that potentially harm health or the environment ought to be prevented when there is scientific uncertainty as to the nature of the damage or the likelihood of the risk, *until scientific evidence shows that the damage will not occur*. Since regulation imposes its own risks, we face the contradictory inevitability that some form of "damage" will *always* occur. European courts, according to Sunstein, have yet to resolve the question of whether the Precautionary Principle must be applied in a way that is alert to the fact that the regulation of one risk leads to other risks.

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