Book Review

The Antitrust Bulletin
1–3

journals.sagepub.com/home/abx
Sage

Richard S. Markovits (2021). *Welfare Economics and Antitrust Policy*. 357 pp. $109,99 (Vol 1), 394pp. $89,99 (Vol 2). Springer.

Reviewed by: Nicolas Petit, *Professor, Competition Law, European University Institute, Florence, Italy; Invited Professor, College of Europe, Brugge, Belgium*

Thibault Schrepel, *Associate Professor, Law, Vrije Universiteit Amsterdam, Amsterdam, The Netherlands; Faculty Affiliate, Stanford University, Stanford, CA, USA*
DOI: 10.1177/0003603X231201430

Richard S. Markovits' contribution to antitrust economics cannot be underplayed. From his analysis of tying in the late 1960s to the present day, Professor Markovits has consistently provided a heterodox voice in a field often dominated by trends and fashions. His latest book, "Welfare Economics and Antitrust Policy" (Springer, 2021), lives up to his reputation and provides an original overview of the economic issues involved in modern antitrust policy. Markovits not only addresses subjects that are absent from the antitrust literature (1), but he also offers a unique take on various topics that are heavily discussed (2).

I. Markovits Outside the Mainstream

"Welfare Economics and Antitrust Policy" offers a unique perspective on antitrust policy. As introduced in Chapter 2, Markovits counters the economic efficiency approach advocated by Chicago scholars as the sole methodology for evaluating practices with a moral rights approach. Markovits explains that one finds different conceptions of the moral good (i.e., a normative concept referring to the set of things that are morally desirable or valuable) in what he calls "liberal-moral-rights-based society" (i.e., societies committed to protecting individual moral rights such as the right to life, liberty, and property). These concepts, he argues, are more helpful in assessing the legality of practices than relying on the concept of economic efficiency, because efficiency has no intrinsic value.

To be clear, Markovits does not separate the legality of practices from their economic effects, but he does make economic theory a variable in, among other things, defining what is morally good and thus permissible in antitrust law. The logic is this: governments (and enforcers) may prefer different normative positions (e.g., liberalism, utilitarianism, various non-utilitarian variants of egalitarianism, and libertarianism). Each of these positions has different economic implications. For example, utilitarianism requires a comprehensive evaluation which, in Markovits view, involves (1) assessing the monetary gains and losses associated with the choice at hand; (2) identifying the individuals or groups who would experience gains or losses, paying particular attention to their characteristics that affect the marginal utility of money within relevant ranges; (3) estimating the average marginal utility for the winners and losers, derived from the equivalent-dollar gains and losses they each experience; (4) multiplying the estimates of relevant equivalent-dollar gains and losses by the corresponding average marginal utility estimates; and (5) comparing the resulting products to determine the overall outcome.

Should a government prefer a utilitarian perspective, its use of economic theory will depend on that perspective and thus follow its analysis of antitrust practices.

On this basis, Markovits devotes several chapters to exploring how the distinction between the economic efficiency and moral rights approaches can lead to different policies. In particular, Markovits devotes an entire chapter to the internal growth of firms, as opposed to growth through mergers, acquisitions, or joint ventures (Chapter 16). Although numerous articles mention the black box of the firm, very few attempt to enter it in a systematic way. Markovits does just that. Returning to his distinction, Markovits discusses the conditions under which internal growth might be prohibited. As he illustrates, what is economically efficient is not always morally acceptable, and vice versa. It may be economically efficient but injurious to "liberal moral rights" to dismantle a firm that has achieved growth through legal means without compensating shareholders, creditors, and potentially affected managers and employees. As a result, policymakers and enforcers may want to clarify their normative position first, and thus use economic analysis if and when this is required to achieve that position. This looks very different from the world we live in.

II. Markovits Inside the Mainstream

Markovits' main criticism of antitrust centers around the idea of vagueness. As he explains, several of the core concepts commonly used in the field are indeed not as workable as they appear.

Markovits begins by debunking the price competition framework. Often presented as an objective measure of competition, Markovits shows that "there is no universally-correct way to measure the intensity of price-competition." Markovits' finding logically opens the way to dynamic measures of competition. As we have argued elsewhere, dynamic competition is driven by uncertainty which is a better predictor of competition than rivalry. A quick analogy illustrates the point.[1] A 100-meter dash between one adult and seven two-year-olds has an obvious outcome: the adult wins. The adult has rivals at the starting line but no competitive pressure. Conversely, a marathon runner typically wants to improve her or his best personal time without hoping to win the race. The runner has no direct rivals but strong competitive pressure. Research is therefore needed to develop workable frameworks for measuring competition dynamically, for example, by measuring the degree of uncertainty caused by innovation rather than focusing systematically on price competition.

In Chapter 7, Markovits follows a theme that he has developed over the years: the concepts of market power or dominance cannot be defined non-arbitrarily. With respect to market power, Markovits first argues that a firm's market power does not determine whether a particular conduct was driven by specific anticompetitive intent or whether it will result in reduced or distorted competition. Second, he contends that a firm's economic power provides limited insight into the economic efficiency of conduct that falls within the purview of antitrust policy. Consequently, Markovits argues that market power should not play a decisive role in assessing the anti-competitive nature of practices.

With respect to market definition, Markovits argues it can only be subjective, and even if it could be objective, agencies cannot infer a firm's ability to set prices above the competitive level, to earn supernormal profits, or to achieve a supernormal rate of return within a given market solely on the basis of its market share. Dominance is therefore irrelevant. These are bold claims that Markovits has consistently defended.

1. Nicolas Petit & Thibault Schrepel, *Complexity-Minded Antitrust*, 33 J Evol Econ, 541–70 (2023).

III. Conclusive Thoughts

Markovits' new book is genuinely thought-provoking. The book refuses to afford much relevance to the usual debates that antitrusters revel in. For Markovits, controversies over consumer welfare and total welfare, strong versus weak enforcement, big tech versus small tech, and European versus American approaches are distractions that prevent careful intellectual analysis. As reviewers, we find it refreshing that it is not possible to situate Markovits's work on a political spectrum, from neo-Brandesian to neo-Chicagoan. Markovits is his own thinker, and "Welfare Economics and Antitrust Policy" shows him at his best.