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Abstract

Barry E. Hawk reviews Giuliano Amato, Antitrust and the Bounds of Power. This Book Review states that Professor Giuliano Amato has successfully written a refreshing and insightful book on antitrust policy after more than a century of US debate and almost half a century of European debate. In his highly enlightening opus on Antitrust and the Bounds of Power, Professor Amato writes from the Olympian heights as the former head of the well respected Italian Antitrust Authority, a former Prime Minister of Italy, and a present professor at the European University Institute in Florence. The book places antitrust law in the broader context of political theory and history. Although the author modestly states that the book is written for young people embarking on an immersion in antitrust law, seasoned antitrust veterans will greatly benefit from Professor Amato's measured wisdom.

GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER

*Reviewed by Barry E. Hawk**

It is a difficult challenge to write a refreshing and insightful book on antitrust policy after more than a century of U.S. debate and almost half a century of European debate. Professor Giuliano Amato successfully has met that challenge in his highly enlightening opus on *Antitrust and the Bounds of Power*.[1] Professor Amato writes from the Olympian heights as the former head of the well respected Italian Antitrust Authority, a former Prime Minister of Italy, and the present professor at the European University Institute in Florence. As might be expected from an author with such broad public experience, *Antitrust and the Bounds of Power* places antitrust law in the broader context of political theory and history. Although the author modestly states that the book is written for young people embarking on an immersion in antitrust law, seasoned antitrust veterans will greatly benefit from Professor Amato's measured wisdom.

Professor Amato begins with the judgment that the desirable introduction of increasingly sophisticated economic analysis into antitrust law has obscured some of the problems and policy goals that antitrust law was born to deal with. He persuasively places the genesis of antitrust both in the United States and in Europe in politics, notably the political values underlying liberal democracy. According to Professor Amato, liberal democracy faces the following dilemma: the fundamental freedom of individuals to trade can lead to the opposite phenomenon of private power that is capable of infringing not just the economic freedom of other individuals but also the balance of public decisions. In a democratic society two boundaries should never be crossed: one beyond which the unlegitimated power of individuals arises, the other beyond which legitimate public power becomes illegitimate. Antitrust law is relevant to understanding both sides of the divide and to deciding where the boundaries should be set. Professor's Amato's book is devoted to this gen-

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1. GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER (1997).

eral theme and his explication of antitrust law is set against the background of this political dilemma in a liberal democracy.

Chapter One sets forth a brief but perceptive analysis of the early history of the Sherman Act case law. Several interesting observations are made. For example, Professor Amato reads the early decisions as points on a continuous line seeking to define a new boundary on market power, marked no longer by the alternative of freedom and coercion, but by respect for, or distortion of, the economic rules laid down for the market itself by the competitive system. He then draws the more general political observation that the defenders of the old common law boundary could see that the boundary had been shifted forward to allow intrusions on freedom of contract that they perceived as opposed to the very foundations of liberal society.

Chapter Two deals with the more recent period in United States antitrust enforcement, notably the influence of the so-called Chicago School. Here, again, Professor's Amato's observations are nuanced and balanced. On the one hand, he expresses doubts whether "consumer welfare" can be restricted to a concept of lower prices and better product quality to the detriment of diversity of consumer choice of more suppliers and products.[2] On the other hand, he praises the Chicago School for having focused antitrust enforcement on market power and efficiency.[3]

Chapter Three explores the history of European antitrust or competition law. Its modern history begins with the German antitrust laws in the 1950s which had their inspiration in the so-called Freiburg School or "Freiburger Ordoliberalen." The Freiburg School was concerned about non-legitimate private power and the necessity to provide a solid institutional framework for the competitive economy to prevent both formation of private power and the creation with it, by linking up with public power, of conglomerates that could engender tragedies such as occurred during the Nazi period.[4] The Freiburg School's mistrust of economic power because it can lead to political power is echoed in the historical roots of U.S. antitrust law. The history

2. *Id.* at 23.

3. *Id.* at 24.

4. *Id.* at 40-41; *see also* David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Comparative Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994).

of EC competition law is strikingly different, however, in its emphasis on market integration as a goal even to the subordination of competition. This heavy emphasis on market integration and the formalism adopted by many antitrust officials and practitioners has resulted in, on the one hand, formalisms and rigidities and, on the other hand, permissive flexibilities that are peculiarly European in origin. As Professor Amato demonstrates, the EC's position towards vertical restraints is perhaps the best example. Indeed, Professor Amato refers to the EC law on vertical restraints as "European duplicity."

As Professor Amato points out, the market integration goal is not the sole explanation for the differences in results between U.S. antitrust law and European competition law. More fundamentally, there is a difference in "antitrust culture," *i.e.* the persistence of a rooted European culture of regulating and controlling the economy. Amato writes convincingly that EC competition policy rests on two ideas that are in tension: 1) the old idea of supremacy of state power which is above the powers of private individuals and is the most suitable instrument to confront private power; and 2) the new idea of competition in the sense that private power is simply a degeneration of freedom against which the freedom of all must be guaranteed. In other words, in Europe there is still the tendency to prefer that government set the boundary between economic power and freedom of enterprises and not the constitutionally recognized solidity of specific freedoms of each and all.[5] In contrast, the United States is more accepting of private power, continuing to see it as a natural manifestation or expression of private freedoms and thus preferred to the interventions of public power.[6]

This European itch to regulate, or at least reluctance to let markets self-correct, explains many differences between EC and U.S. antitrust law and policy — for example, the EC resort to block exemptions and the inclusion of non-competition policy objectives in antitrust law, such as "industrial policy," or social and regional policies.[7] Another important example concerns abusive or monopolistic behavior by dominant firms where the European itch to regulate also can be seen in the EC's broader

5. *See* AMATO, *supra* note 1, at 54.
6. *Id.* at 76-77.
7. *Id.* at 63-64.

and stricter application of its antitrust laws to dominant firm behavior under Article 86 as compared with Section 2 of the Sherman Act.[8]

The difference in scope between Article 86 and Section 2 rests on the European concern with protecting trading partners that are "dependent" on dominant firms, even where this concern conflicts with consumer welfare considerations. In other words, there is a strong tendency under Article 86 (as well as under the EEC Merger Regulation[9]) to protect competitors and not simply competition.

This tendency to protect competitors, or at least to be unduly sensitive toward effect on competitors as opposed to effect on consumers and consumer welfare, can also be seen in the Commission's occasionally perverse treatment of efficiencies under the EEC Merger Regulation. As Professor Amato points out, the Commission in some cases appears to take the extreme that greater efficiency is not a positive factor in reviewing mergers but a negative one and thus has protected consumers not because of market foreclosure and the associated restriction of output but out of a concern for maintaining pluralism and defending the right to sell to small producers currently on the market.[10]

The recent evolution of EC competition law suggests, however, that there is a greater emphasis on protecting competition and perhaps even the liberation of antitrust law from the multiple purposes it has served in the past.[11] Professor Amato strongly approves of this change and notes that it may result in the weakening of the old regulatory propensity. This would mean rooting antitrust more in the encounter between freedoms and economic rights at stake and less in the tradition of balancing varying public interests; it also would mean making economics the primary yardstick of antitrust analysis.[12] While Professor Amato applauds this narrowing of antitrust policy, he does not advocate an exclusive Chicago School-like reliance on economic efficiency as the sole goal of antitrust. He reasons that

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8. *Id.* at 68-69.

9. Council Regulation No. 4064/89 on the Control of Concentrations Between Undertakings, O.J. L 257/14 (1990).

10. *See* AMATO, *supra* note 1, at 87.

11. *Id.* at 116.

12. *Id.* at 116-17.

although much of European antitrust law has gone too far in looking to industrial, social, and regional considerations in the implementation of antitrust law, the other extreme would be a Chicago School narrowing of antitrust solely to consumer welfare defined as economic efficiency. Professor Amato rejects both extremes and opts for the nuanced but more complex middle ground where antitrust law takes into account not only economic efficiency but also concerns about economic power for political reasons.

After reviewing and comparing the history and present state of U.S. and European antitrust law and policy, Professor Amato returns to the broader political themes. He is particularly instructive in discussing how political history helps explain other differences between U.S. and European law and policy. For example, the Jeffersonian notion of a society of small citizen-farmers that inspired the Sherman Act did not generate liberal democracy in Europe but rather the idea of a communist utopia. This dramatically different outcome is explained by the American mistrust of the state compared with the traditional European belief in the state. This difference in political attitudes toward government is reflected in the fact that the word "state" is not a common term in the U.S. political vocabulary, whereas the concept of "l'etat" plays a strong role not only in European political theory but also in popular European political debate. On the other hand, the early European supporters of antitrust, like Jefferson, also greatly mistrusted economic power but not only because it generated political power. They also mistrusted economic power out of a concern that it reduced social solidarity. Thus European antitrust law, both at the EC and the Member State level, takes a stricter and more interventionist view toward certain business practices and gives less weight to freedom of contract and to freedom of firms to do business. In a sense, the Europeans prefer "soft" competition to "hard" competition, as those terms were used by Judge Learned Hand in his *United States v. Corn Products* decision.[13] It is perhaps inevitable that a preference for soft over hard competition leads to an interventionist antitrust policy which, in the European case, is reinforced by traditional statist preferences.

In sum, *Antitrust And The Bounds of Power* contributes to the

13. *See* United States v. Corn Prod. Ref. Co., 234 F. 964 (S.D.N.Y. 1916).

ongoing debate about antitrust policy goals by providing a refreshingly broad and eminently wise political perspective. Novices, as well as the cognoscenti, will greatly benefit from a close reading.