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Maurice E. Stucke*

Teaching Antitrust After the Financial Crisis

The financial crisis raised important issues of market failure, weak regulation, moral hazard, and our lack of understanding about how many markets actually operate. The Organisation for Economic Co-operation and Development (OECD) stated how "the worst financial and economic crisis in our lifetime"[1] provoked policy makers to wonder: "Are our economic theories, our economic models, and our assumptions still appropriate?"[2]

One area where I teach and write is antitrust law, where economic theory has long played an important role.[3] As I noted in a recent co-authored article:

> *Some say that the Chicago School's neoclassical economic theories—with their strong presumption of rational, self-interested profit maximizers with perfect willpower—lost their luster within academic circles over twenty years ago with the rise of post-Chicago School game theories. The post-Chicago School used rational actor models to challenge traditional Chicago predictions. Nonetheless, antitrust's economic theories, whether derived from the Chicago, post-Chicago, or Harvard Schools, continue to assume rational self-interested market participants, who operate in the market with perfect willpower.*
>
> *This rationality assumption is under attack from several interdisciplinary economic fields, most notably behavioral economics. Behavioral economics . . . "is now mainstream."*[4]

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1. Org. for Econ. Co-operation and Dev., OECD Secretary-General's Strategic Orientations for 2011 and Beyond 2 (2011).

2. *Id.*

3. Daniel Rubenfield, *On the Foundations of Antitrust Law and Economics*, *in* How the Chicago School Overshot the Mark 51–58 (Robert Pitofsky ed., 2008); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Ohio St. L.J. 257, 300–09 (1989) (describing judicial reliance on economic theory in early anti-trust cases); *see also generally* Donald Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 Va. L. Rev. 413 (1964) (discussing the role economic theory plays in antitrust law).

I have also commented:

> *The economics literature some time ago moved beyond neoclassical economic theory's assumptions of perfectly rational market participants who pursue with willpower their economic self-interest. Over the past twenty years, the economic literature has increasingly recognized and measured how (i) willpower is imperfect, (ii) people will incur costs to punish unfair behavior, and care about treating others, and being treated fairly, and (iii) the biases and heuristics that affect decision-making.*[5]

As behavioral economics (with its more realistic assumptions of human behavior) goes mainstream in academia and the business world, one expects lawyers and economists to bring the current economic thinking to the competition agencies. Today, organizations, including the OECD,[6] American Bar Association's Section of Antitrust Law,[7] Canada's International Development Research Centre,[8] the British Institute of International and Comparative Law,[9] and the American Antitrust Institute,[10] are considering behavioral economics' implications on

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4. Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1528 (2011); *see also* Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 513–15 (2007); Dan Lovallo & Olivier Sibony, *The Case for Behavioral Strategy*, MCKINSEY Q., March 2010, at 30, 31.

5. MAURICE E. STUCKE, THE IMPLICATIONS OF BEHAVIORAL ANTITRUST 2 (2012), *available at* http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/WD(2012)12&docLanguage=En (prepared for the Organisation for Economic Co-operation and Development's Competition Committee's hearing on Competition and Behavioural Economics); *see also* Reeves & Stucke, *supra* note 4, at 1528–30, 1532–38. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (critiquing the rational model of judgment and decision making); LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD LAWS 238–40 (2011) (discussing how societal norms of fairness and pro-social behavior are both common in, and necessary for, a market economy); MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE (Herbert Gintis et al. eds., 2005) (containing essays from different disciplines presenting arguments that cooperation exists because of "strong reciprocators" in a social group).

6. *See, e.g.*, STUCKE, *supra* note 5.

7. The ABA has recently included behavioral economics as part of two recent antitrust conferences. AMERICAN BAR ASSOCIATION, 60 YEARS OF ANTITRUST: AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPRING MEETING 7 (2012), *available at* http://www.americanbar.org/content/dam/aba/events/antitrust_law/2012/03/spring_meeting/spring_2012_brochure.authcheckdam.pdf (Behavioral Economics in Antitrust and Consumer Protection Law); AMERICAN BAR ASSOCIATION, 59TH ANTITRUST LAW SPRING MEETING 5 (2011), *available at* http://www2.americanbar.org/calendar/59th-annual-antitrust-spring-meeting/Documents/spring_2011_brochure.pdf (Behavioral Economics: Departing from the Rational-Actor Model?).

8. *Fifth IDRC Pre-ICN Forum on Competition and Development*, ICN BLOG (Jan. 20, 2010), http://www.icnblog.org/?p=88.

9. *Competition Law Forum: Forum Meetings 2009*, BRIT. INST. OF INT'L & COMP. L., http://www.biicl.org/clf/clfmeetings2009 (last visited Sept. 24, 2012) (hosting Competition Law Forum on behavioral economics in July 2009).

10. *9th Annual Conference: The Next Antitrust Agenda*, AMERICAN ANTITRUST INST., http://www.antitrustinstitute.org/content/9th-annual-conference-next-antitrust-agenda (last visited Sept. 24, 2012) (audio recordings of June 18, 2008 conference).

antitrust policy. Competition officials at the Federal Trade Commission,[11] European Commission,[12] Italian Competition Authority,[13] and the United Kingdom's Office of Fair Trading[14] have accepted the limitations in neoclassical economic theory in depicting reality under all, or nearly all, circumstances. So how should the competition agencies and courts respond? How will they respond? Antitrust lawyers, competition authorities and courts can consider the implications of behavioral economics on four levels:

- first *as a gap filler, i.e., to help explain "real world" evidence that neoclassical economic theory cannot explain,*

- second *to assess critically the assumptions of specific antitrust policies, such as merger review and cartel prosecutions,*

11. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Can Consumer Choice Promote Trans-Atlantic Convergence of Competition Law and Policy?, Remarks Before the *Concurrences* Conference on "Consumer Choice": An Emerging Standard for Competition Law 24 (June 8, 2012), *available at* www.ftc.gov/speeches/rosch/120608consumerchoice.pdf (discussing the need for behavioral economics to inform antitrust law); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission, Remarks Before the George Mason Law Review's 14th Annual Symposium on Antitrust Law 1–2 (Feb. 9, 2011), *available at* www.ftc.gov/speeches/rosch/110209georgemasoncartelsmergers.pdf (noting the weaknesses of policy based on assumptions about rational action); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Behavioral Economics: Observations Regarding Issues that Lie Ahead, Remarks at the Vienna Competition Conference 8–9 (June 9, 2010), *available at* http://www.ftc.gov/speeches/rosch/100609viennaremarks.pdf (highlighting tension between behavioral economics and neoclassicism); J. Thomas Rosch, Comm'r, Fed Trade Comm'n, Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency, Remarks at the Conference on the Regulation of Consumer Financial Products 1–3 (Jan. 6, 2010), *available at* http://www.ftc.gov/speeches/rosch/100106financial-products.pdf (detailing evolution of economic theory from the Chicago school to behavioral economics).

12. *See, e.g.*, Emanuele Ciriolo, *Behavioural Economics in the European Commission: Past, Present and Future*, Oxera Agenda 1–2 (Jan. 2011), *available at* http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Behavioural-economics-in-the-EC_1.pdf?ext=.pdf; Eliana Garcés, *The Impact of Behavioral Economics on Consumer and Competition Policies*, 6 Competition Pol'y Int'l 145, 245 (2010) (Ms. Garcés is a member of the Cabinet of the European Commissioner for Competiton); Press Release, European Union Comm'n for Consumers, Why Consumers Behave the Way They Do: Commissioner Kuneva Hosts High Level Conference on Behavioural Economics (Nov. 28, 2008), *available at* http://europa.eu/rapid/press-release_IP-08-1836_en.htm?locale=en.

13. Luca Arnaudo, *The Quest for Behavioral Antitrust: Beyond the Label Battle, Towards a Cognitive Approach* (Nov. 21, 2011), *available at* http://ssrn.com/abstract=1962515.

14. *See* Office of Fair Trading, The Impact of Price Frames on Consumer Decision Making, 2010, OFT1126 14–15 (UK), *available at* http://www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf; Matthew Bennett et al., *What Does Behavioral Economics Mean for Competition Policy?*, 6 Competition Pol'y Int'l 111, 118 (2010) (the authors are all members of the Office of Fair Trading); Amelia Fletcher, Chief Economist, Office of Fair Trading, What Do Policy-Makers Need from Behavioural Economists?, Presentation to the European Commission Consumer Affairs Conference (2008), *available at* http://ec.europa.eu/consumers/conferences/docs/AF_transcript_en.pdf.

- third *to revisit three fundamental antitrust questions, namely what is competition, what are the goals of competition law, and what should be the legal standards to promote those goals, and*

- fourth *to assess how behavioral economics will affect the degree of convergence/divergence of competition law among the over 100 jurisdictions with competition laws today.*[15]

Consequently, one challenge in teaching antitrust law is the tension between the past and future. Antitrust legal doctrine reflects the state of neoclassical economic theory — at times economic theories nearly thirty years old.[16] Future antitrust policy likely will arise from the more recent interdisciplinary economic theories with more realistic, empirically based assumptions.

It is an exciting time to teach and write about antitrust. Basic issues are back on the table, such as what is competition, what are the goals of antitrust, and what should be the legal standards to promote these goals.[17] The challenge, however, is teaching the law today, while assessing where the evolving economic theories may take it next.

15. STUCKE, *supra* note 5, at 2.

16. *See, e.g.*, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (relying on a "consensus among" Chicago School "commentators that predatory pricing schemes are rarely tried, and even more rarely successful").

17. Maurice E. Stucke, *What is Competition?*, *in* THE GOALS OF COMPETITION LAW 27 (Daniel Zimmer ed., Edward Elgar Publishing 2012); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 557 (2012); Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107, 110–11 (2011).