

Study on Behavioural Approach to Antitrust and Consumer Rights Protection

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This research will begin with a historical review on the interaction between economic theories and anti-trust laws. By illustrating various perspectives from economic theorists on anti-trust laws and legal practice, it is noted that the laws and legal practice of anti-trust laws have been evolved under the influence of economic theoretical framework. Therefore, it is worth attention that emerging behavioral economics theories challenge more and more assumptions of traditional economics and look at economic activities from a more diversified view, it is time to re-think the anti-trust law and legal practice. After examining the theoretical framework of economic theories in the first phase, this research will continue to analyse the relevant case rulings or new rules made by anti-trust authorities in other advanced countries. The ultimate aim of this research is to offer a more diversified perspective on the legal theory and practice of the Fair Trade Law to further advance the discussion regarding consumer rights and the fair competition in market.

As this research categorizes the anti-trust legal issues framing by the economic theoretical structure in different period of time, it is worth attention that compared to traditional economic analysis, behavioral economics is premised on the bounded rationality of individuals which likely to lead to a sub-optimal decision-making. While the conventional antitrust laws focus more on the structure of corporations, behavioral economics provides a new insight into individual consumers' behavior biases. From this perspective, rather than substituting the theoretical framework set by traditional economics, behavioral economics is to shed new light in the analysis of anti-trust laws which might help us to deal with emerging challenges by new business models.

There main contribution of this research includes the following:

- 1 Categorize various types of behavioral biases after a thorough literature review on behavioral economics.
- 2 Mapping the evolution of anti-trust laws under the development of economic theories in different period of time.
- 3 Compare the differences between the application of traditional economic perspective and behavioral economic analysis on anti-trust cases. Analyze the various consideration factors of anti-trust authorities in the case at issue.
- 4 Based on the exploration of theoretical assumptions and case studies, this research

provides a comprehensive guide for the anti-trust authority to rethink the value of behavioral economics and how to apply it to advance the consumer protection and fair market competition within the context of anti-trust laws.

Based on this research, it is a pity that we haven't found any anti-trust case is reasoned bluntly based on the assumptions of behavioral economics. Maurice E. Stuckey stated clearly in the article that this new theory has not been accepted by the anti-trust authority in the US yet. Contrast to that, another article "Behavioral Economics and Abuse of Dominance: A Proposed Alternative Reading of the Article 102 TFEU Case-Law" by The Global Competition Law Center, pointed out the EU competition laws has already integrated with the behavioral economics. Yet, after comparing the cases in EU and the UE, we would suggest that EU is more flexible in the interpretation of anti-trust laws, instead of that EU has already adopted behavioral economics as the foundation of its anti-trust legal practice.

Taking the issue of predatory pricing as an example, traditional economics considers one is aimed at long term profits in exchange of predatory pricing, therefore the courts usually rule that predatory pricing accusation is susceptible to the possibilities of making up for the losses. If there is no possibility of making up for the losses of pricing, the accusation would be groundless. Nonetheless, whether it is possible to make up for the losses under the predatory pricing is not an issue in EU, and behavioral economists would agree with that based on the presumption that predatory pricing is typical behavioral bias entitled to anti-trust remedies.

Bundling with the abuse of market power is another example. Traditional economists thought the most important issue in bundling is to force consumers to buy the bundled products. In the Microsoft case, EU concluded that even Microsoft didn't force consumers to buy or use its products, bundling which took advantage of consumers' habitual behaviors was considered anti-competition. In this context, the habitual behaviors of consumers are a similar concept to the bounded rationality assumed by the behavioral economics.

Refuse to deal is another problem arising from the abuse of market power. Traditional economists mainly considered the negative impact towards the investors' willingness to invest in the market. Contrary to it, in the anti-trust legal context in EU, the negative impact upon the willingness of investors is weighed less and the behavioral bias resulting from forced deal is weighed more. Unlike the US, EU anti-trust authorities are more inclined to fix the unfair pricing and unfair deal issues in the market. In Tetra Pak's II case, EU penalized the huge amount of contractual damages based on the reasons include taking advantage of consumers' cognitive biases and

hiding consumers' costs.

Regarding whether the collection of personal data or the application of algorithms to analyze data shall be regulated under the framework of anti-trust laws is a hot issue, nonetheless, we have not found a single case in the field hence the discussion of this issue is more of journey of theoretical exploration. In the Algorithms and Collusion: Competition Policy in the Digital Age report proposed by OECD in 2017 explored the potential threats of algorithms towards anti-trust laws, nonetheless, there are still legal gaps to be filled to apply the anti-trust regulations on algorithms.

Based on our research, it is concluded that behavioral economics adds new perspective in the conventional framework of anti-trust laws. It may help the anti-trust authorities to pay attention to the consumers' behavioral biases apart from the structure of corporations. It may also provide new perspective while analyzing the anti-trust cases. Some may argue that the behavioral economic approach would not change the decisions made within the framework of traditional economics, it is meaningful to take a diversified path and enrich the anti-trust laws.

Our research suggests keeping an eye on the development of this new behavioral branch of economics and its interaction with anti-trust laws, but no need to rush into applying this approach in field cases at this point. As emphasized by the behavioral economists, this approach is evidence-based, it may not be ready to offer a systematic substitute for the conventional economic framework underpinning the current practice of anti-trust laws, the new perspective would help to build up a more comprehensive perspective and rethink how to achieve the goal of anti-trust laws: to protect consumers by maintaining a fair market competition.