

# Preface

Antitrust laws and policies have developed through high level theories that seek to designate goal(s) and specify procedures for antitrust institutions. Within each theoretical construct and also through fresh insights, the goals and specifications of antitrust undergo constant refinement: new grounds are discovered, old assumptions are replaced and exigencies dictate the activities of relevant institutions. Thus, by its nature, change is a constant in antitrust. This interesting “evolutionary” process is greased through a flowing stream of empirical analysis, argumentations, counter-arguments, assertions, rhetoric, polemics and iconoclasms. However, even as antitrust continues to evolve, one thing remains constant — the single constant is simply the manner of theorising antitrust. Most antitrust theories seek to establish the tasks of antitrust institutions. For instance, they propose the goals that antitrust institutions should champion. They argue on the veracity of a procedure. They debate on the necessity of a measure. They argue top-down.

The postulations within and between these top-down schools of thought come in different shapes, most of which are undeniably relevant to antitrust as they give to the field both content and meaning. Notwithstanding, the problem is that if we isolate the reasoning within a particular theory and forge an antitrust regime on such reasoning, our framework will likely fail to give due consideration to the interests of persons. This is because the chosen theory is likely to eliminate any other form of antitrust analysis. The consequence is that antitrust is diminished as a result of its incompleteness and attendant exclusion of interests.

However, there is yet to be a single acceptable principled approach to antitrust analysis as authorities, courts, practitioners and scholars often fail to reach a convergence on simple terms because they understand those terms through different ideologies.

As a result of the problems associated with the present way in which we analyse antitrust, there is a temptation to propose an account of antitrust that avoids or corrects the present problems. However, before such step is taken, it is important to ascertain why a new paradigm is really needed. This is what brings us to the crux of this thesis. Where a particular antitrust issue is decided based on a mistaken assumption that the theory applied in any instance is complete, a possible

consequence is that the reasoning in such a case might unduly disparage those persons whose interests might very well have been protected if a broader foundation was adopted. Another likely effect is that we might end up protecting interests which, if the chosen theory was not mistaken in some way, would not have been protected. It is thus proposed as an idea of justice that we take a bottom-up, non-normative perspective to antitrust analysis. In an attempt to accomplish this goal, the person-centred approach to antitrust is developed and evaluated. Generally, this approach seeks to introduce a perspective to antitrust analysis whereby issues are conceptually addressed from the position of antitrust subjects. In any given case, antitrust subjects are those: consumers, businesses, individuals and societies that have interests in specific antitrust issues, be it market-related, fairness or on public policy grounds.

The thesis develops the conceptual basis for the pursuit of “justice as inclusiveness”. To achieve this, it recognises the need to deemphasise the normative content of antitrust theories and practices. The thesis recognises that to achieve the inclusiveness sought, antitrust analysis must adhere to the principles of pure procedural justice whilst also remaining intelligible and functional for policy-making, adjudication and enforcement. To achieve this, the person-centred approach identifies the requirement of broadness as an essential condition. However, in order to avoid conceptual absurdities, the scope of the person-centred account of broadness is clearly delineated.

It must be noted that rather than seeking to build a conclusive theory of antitrust (which might fall short as being incomplete and mistaken), the person-centred approach simply states a perspective which gives a broader outlook on antitrust in order to accommodate a variety of interests held or that can be held by different persons.

To reiterate, my motivation for this research stems from the perceived need for justice (as inclusiveness). This germane requirement of justice is unlikely to be noticed if antitrust is addressed strictly through a top-down paradigm.

The main theme and specific arguments in this thesis are generally the result of queries, some of which are stated below:

#### On Substantive Antitrust

- Should antitrust be based on a single/limited value(s) or should it be left open to the vagaries of what antitrust subjects may consider to be of interest in antitrust?
- What are the practical disadvantages of a single/limited value approach and how does a broad scope solve them?
- What form should the broader scope take?
- What are the practical challenges that a plural valued system attract? For example uncertainty, unpredictability, practicality? Are they real concerns and, if so, how can they be remedied?

#### On Antitrust Enforcement

- What is the proper mode of enforcing antitrust?
- On what criteria do we determine if the system is broad enough at the enforcement level?

- Can institutions seek conflicting goals in their enforcement?
- What should be the scope of our enforcement effort and what does this mean to the task of accommodating the interests of different antitrust subjects?
- The thesis makes due reference to seasoned scholarly materials and also draws on established legal and economic theories. To drive my points, I analogue with EU law and US antitrust law. There is, however, a stronger emphasis on the former.

London, UK

Hammeed Abayomi Al-Ameen



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Al-Ameen, H.A.

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