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## Book Review

*Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition*

By Bruce Wardhaugh

Hart Publishing 2020; 272 pp.

£70.00; Hardback

Jan Broulík\*

Both in the United States (US) and the European Union (EU), competition law has become dominated by a particular approach. It holds that the goal of competition law is to prevent negative effects of business conduct on welfare, that these effects are best assessed on the basis of neoclassical economics, and that the assessment is to be usually carried out for individual instances of the conduct. Calling this approach 'effects-based', Dr Bruce Wardhaugh is now contributing to academic literature criticising its various aspects.<sup>1</sup> His new book *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* connects several streams of the criticism through the prism of the rule of law, arguing that the latter is threatened by the effects-based approach.

The book proceeds in six chapters, with the first three of them essentially providing background for the later core analysis. In particular, Chapter 1 introduces the rule of law as a yardstick – or more precisely set of yardsticks – against which the effects-based approach to competition law is to be evaluated. Wardhaugh first presents philosophical accounts of the rule of law as an idealised goal to be pursued by legal systems. He explains that the book adopts a thin conception thereof, excluding thus substantive criteria. The particular focus is then supposed to be on the issues of predictability and certainty. Subsequently Wardhaugh shows how the rule of law and its individual elements are incorporated into US and EU positive law as limits on the exercise of law-making and law-applying powers in the respective two jurisdictions.

Chapters 2 and 3 provide historical accounts of how the effects-based approach to competition law has prevailed in the United States and European Union, respectively. On the Atlantic's western shore, the approach manifests itself in a certain interpreta-

tion of the Sherman Act: most types of business conduct are seen to violate this act only if they do not satisfy the fact-intensive rule-of-reason test, whereas only a few are subjected to per se illegality. The current preference for this interpretation can then be traced back to the 1970s. In the European Union, the effects-based approach takes the shape of a 'more economic approach' to the competition law provisions of the Treaty on the Functioning of the European Union. Having been inspired by the US developments, this approach has been around roughly since the turn of the millennium.

The last three chapters evaluate US and EU competition law according to the rule-of-law yardsticks, identifying five points of concern raised by the effects-based approach. The one advanced in Chapter 4 regards inaccuracy of explanations and predictions based on the used economic methodology. Wardhaugh maintains that the effects-based approach is associated mainly with the Chicago school of economics, which is known for its excessive trust in the self-correcting ability of markets and ensuing anti-interventionist positions. He adds that another problem with traditional competition economics is that it assumes market actors to be fully rational despite behavioural research showing that human rationality is bounded. For these reasons, the results of economics-based analyses carried out in the context of competition law may often not correspond with reality. If these erroneous findings are then used to guide official decision-making, what the law aspires to achieve and what it actually brings about may be two largely different things.

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1 See for instance MR Baye and JD Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals' (2011) 54 JLE 1; J Blockx, 'The Limits of the "More Economic" Approach to Antitrust' (2018) 42 WComp 475; J Broulík, 'Preventing Anticompetitive Conduct Directly and Indirectly: Accuracy Versus Predictability' (2019) 64 Antitrust Bull 115; A Tor, 'The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy' (2002) 101 MichLRev 482; ME Stucke, 'Does the Rule of Reason Violate the Rule of Law?' (2009) 42 UC Davis LRev 1375; WPJ Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 WComp 405.

Chapter 5 puts forward two points relating to the institutional framework through which competition law is operating. First, the shift towards the effects-based approach was on neither side of the Atlantic initiated or endorsed by the legislature: the main driver behind the change in the United States was the federal judiciary, led by the Supreme Court, and in the European Union it was the European Commission. The lack of the legislature's involvement raises concerns of democratic legitimacy, especially with regard to welfare becoming treated as competition law's single goal. Democratic choices in competition policy have thus been usurped by judicial and administrative preferences. Second, the effects-based approach places upon adjudicators demands that they are unable to cope with. Adjudicative assessment of business conduct against its effects on welfare necessitates reliance on extensive economic evidence. Properly evaluating this evidence will, however, often be beyond adjudicators' expertise. Even if there is assistance by expert witnesses, adjudicators may still not be able to evaluate the validity of their testimonies. This inability to know what actually transpired in a case to be resolved then leads to arbitrariness and randomness of decisions.

Chapter 6 discusses another two points, this time closely associated with the virtues of predictability and certainty. First, the effects-based approach entails little respect for precedent. In the United States, the Supreme Court views the principle of *stare decisis* as having little force in antitrust cases: the Court will cast precedent aside if economic understanding of the given type of practice has developed in the meantime. In the European Union, while the Court of Justice is unlikely to overrule its previous decisions this easily, these decisions are nevertheless often being disrespected by the European Commission as the first-line enforcer of EU competition law. This disregard for precedent hampers legal stability, which in turn undermines the ability of businesses to plan ahead. Second, legal tests embodying the effects-based approach take the shape of standards mandating extensive case-by-case assessments rather than rules allowing to determine the lawfulness of an instance of conduct with relative ease. Due to a multitude of factors being possibly taken into account in such assessments, standards allow for harmful practices being more accurately separated from benign conduct. For the same reason, however, it is often prohibitively difficult for potential infringers to foresee whether they

would be eventually found liable or not. Against this backdrop, Wardhaugh adds a recommendation that economics – rather than assisting in detailed case-specific inquiries – ought to help designing rules that will optimally balance accuracy and predictability.

Wardhaugh's monograph deserves high praise. It forcefully drives home the salient point that the two most prominent competition law jurisdictions in the world operate under a paradigm fraught with a plethora of problems. Each of the identified problems is moreover analysed comprehensively yet succinctly. What makes the book stand out in particular is the use of the rule of law as an overarching framework allowing to connect issues that otherwise do not necessarily have a substantive bearing on each other. Also, covering the manifestations of the effects-based approach both in the United States and the European Union should be seen as a major feat; the side-by-side evaluations provide a unique comparative perspective. Last but not least, despite its rather complex subject matter, the book reads extremely well thanks to its clear writing style.

There are only a few slight reservations that one can have. For one, the book's title signals neither that the book is largely about US and EU law nor that predictability is just one of several rule-of-law concerns under scrutiny. The latter comment holds also for how the book's scope is framed throughout its body. Further, it might be worth emphasising to the reader that not all rule-of-law deficiencies that the book associates with the effects-based approach are inherent to the approach as such, with some of them clearly being only historically contingent. Think about the lacking democratic legitimacy (Chapter 5, first point) or about the conflict with older case law (Chapter 6, first point): the same concerns could arise also if a jurisdiction was moving away from the effects-based approach, in so far as the move had not been authorised by the legislature, respectively as it conflicted with precedents mandating the approach. Finally, the reader might be left with unanswered questions about apparent tensions and other relationships between the identified concerns. For example, isn't the argued rule of law's preference for behavioural economics over orthodox economics (Chapter 4) somewhat inconsistent with the preference for predictability over accuracy (Chapter 6, second point)? Don't the concerns about erroneous assumptions of orthodox economics (Chapter 4) and the inability of adjudicators to assess economics evidence (Chapter 5, second point) in fact

ultimately both regard inaccuracy of the effects-based approach? And if so, how can this be reconciled with the ability to achieve correct results supposedly being a virtue of the approach (Chapter 6, second point)?

These marginal remarks should nevertheless not obscure the fact that Wardhaugh's new monograph

is an impressive contribution to the debate about the merits and demerits of the effects-based approach. It can be wholeheartedly recommended to anyone interested in how competition law systems ought to be designed, and how the US and EU systems fare under the yardstick of the rule of law.