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Book Review – E.S. Rockefeller, *The Antitrust Religion*, Washington D.C., Cato Institute, 2007, ix + 123. ISBN 978-1-933995-09-0.

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The *Antitrust Religion* is not the first and probably will not be the last book arguing for abolition of antitrust laws.[1] However, Rockefeller's attack on the legal foundations of antitrust laws is remarkable in its effort to show how antitrust laws are not 'consistent with our aspiration of the rule of law'.[2] According to the author the so-called 'antitrust principles' such as the notions of 'unreasonable restrictions', 'monopolization', 'market power', and 'consumer welfare' are more akin to religious dogmas rather than to legal principles. As religious dogma antitrust principles are accepted as a matter of faith, but cannot be rationally justified or empirically proven.

In Rockefeller's view, antitrust laws fall short of the traditional notion of rule of law on at least two grounds. Firstly, statutes embedding antitrust provisions are vague and drafted in very broad language, thus conferring a lot of discretion on jurors and judges and granting them a power which is not accountable, since it is not reflected in the language of the statute.[3] Secondly, there are no clear rules for enforcement of antitrust statutes which, in turn, enables judges and government officials to make arbitrary decisions.[4] After identifying the aforementioned shortcomings of antitrust laws, the author carries out a thorough review of the evolution and application of American antitrust laws. No stone is left unturned as the three major areas of antitrust

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1 In the last twenty years, some scholars have maintained that antitrust law should be abolished, since they generally do more harm to society than good, see for instance: F. L. Smith Jr., 'Why Not Abolish Antitrust?', (1983) January/February Regulation 23 (reviewing the main arguments against antitrust); T. Armentano, *Antitrust Policy. The Case for Repeal*, Washington, Cato Institute, 1986 (maintaining that the economic case for antitrust is flawed); G. Hull, 'Antitrust Is Immoral' in G. Hull (ed.), *The Abolition of Antitrust*, New Brunswick, Transaction Publishers, 2005, p 143 (arguing that antitrust is immoral since it supports the 'underdog', replacing 'rational egoism' with 'altruism'); R. W. Crandall and C. Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence', (2003) 17 Journal of Economic Perspective 3 (submitting that the empirical evidence concerning the enhancing effects of antitrust on consumer welfare are weak and therefore recommending to antitrust authorities to prosecute only 'egregious anticompetitive violations' such as blatant price fixing and merger-to-monopoly, while 'benign[ly] neglect' all the others).

2 ES Rockefeller, *The Antitrust Religion*, p 1. Rockefeller does not define what the rule of law means for him, although it can be inferred from his writing. For an introduction to the issues underlying the concept of the rule of law see L. Bingham, 'The Rule of Law' (2007) 66 Cambridge Law Journal 67; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467 and M. Radin, 'Reconsidering the Rule of Law' (1989) 69 BU L. Rev. 781. The relationship between antitrust and the rule of law was the subject of a recent roundtable at Loyola University; the papers presented are available at: <http://www.luc.edu/law/academics/special/center/antitrust/events.html#marathon>.

3 Ibid, p 6.

4 Ibid, p 8.

intervention, namely: agreements, mergers, and single firm conduct are examined. For each of these areas, the author illustrates and analyzes their alleged inconsistency with the rule of law in their current application.

In particular, as for the monopolization abuse, the author stresses that monopolization is a concept without any factual reference, i.e. without a reflection in the physical world, unlike for instance the offense of robbery. As a consequence of the vagueness of the statute, 'there is no rule or standard that can be stated in advance to guide and evaluate the conduct',[5] so that 'counseling to avoid prosecution for monopolization is impossible'[6] and therefore successful competitors are turned upon when they win.[7]

Merger control is also fraught with uncertainty and discretion in its application. In the early days of application of s 7 of the Clayton Act, the Supreme Court condemned mergers with no impact on the market for the sake of protecting 'Mom and Pop's shops'.[8] Today, guidelines[9] are supposed to shed light on the agencies' practice in the administration of merger review and supplement the language of the statute. However, in the author's view, they neither guide nor enhance predictability in merger cases.[10] Quite the opposite, guidelines simply give the false impression of a structured analysis, actually masking a process where decisions are secretly taken by 'unidentified, unelected, unaccountable government officials'.[11]

Turning to agreements, as for contractual restrictions, specifically, tying and exclusive dealing, Rockefeller remarks that such practices are never mentioned in antitrust statutes.[12] Furthermore, the author follows the traditional Chicago school critique of the antitrust scrutiny of vertical agreements, relying on the well known single monopoly profit theorem.[13]

One would expect Rockefeller to advocate upholding antitrust enforcement at least when it comes to horizontal price fixing agreements. Indeed, the rule governing this type of conduct seems pretty clear (basically, 'Thou shalt not agree with your rivals on

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5 Ibid, p 53.

6 Ibid, p 54.

7 Citing, as examples, the government cases against Alcoa (*United States v Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945)) and IBM (*In re IBM Corp.*, 687 F.2d 591 (2d Cir. 1982)).

8 See *United States v Von's Grocery Co*, 384 US 270, 288 (1966); *Brown Shoe, Inc. v United States*, 370 US 294 (1962); *United States v Philadelphia National Bank*, 374 US 321 (1963); *United States v General Dynamics Corp.*, 415 US 486 (1974).

9 See U.S. DOJ/FTC, Horizontal Merger Guidelines, 1992 (revised 1997) as well as the U.S. DOJ/FTC Commentary on Horizontal Merger Guidelines issued in 2006, available on the respective websites <www.ftc.gov> and <www.usdoj.gov/atr>.

10 ES Rockefeller, *The Antirust Religion*, p 67.

11 Ibid, p 72.

12 Ibid, p 77.

13 Ibid, p 82 et seq.

prices, market shares allocation of customers, etc …'),[14] easy to apply, based on a long-standing case law constraining judges, jurors or government's discretion. Nonetheless, the author maintains that cartels are simply temporary mergers. If mergers are normally thought to be pro-competitive, notwithstanding the fact that they eliminate a competitor permanently, *a fortiori*, cartels should be legitimate: after all, participants in a cartel remain independent entities, while coordinating their action in the market.[15] In the author's view, the prosecution of cartels is not worth it, because on the one hand, as cartels are self-destructive, chasing cartels would just waste taxpayers' money;[16] on the other hand, prohibiting cartels would simply turn firms to the government to seek protection under (federal or state) regulations.[17]

In Rockefeller's view, lawyers have attempted to correct the vagueness of antitrust statutes by injecting economics in the analysis of anticompetitive conducts; however, according to Rockefeller, the use of economic tools and concepts such as the notion of market power or consumer welfare, failed the mission. Economic analysis, he concludes, has not streamlined antitrust practice with the concept of rule of law. Much as the language of antitrust statutes, economic concepts are vague and do not have any reflection in the real world. In the author's words they are 'imagined and unverifiable' and are only used 'to provide a façade for subjective decision as to what the decisionmaker feels is fair'.[18]

As a consequence of the criticism above, all antitrust laws should be abolished, since they do more harm than good, according to the author. However, this is not going to happen (at all or any time soon) because of the 'antitrust community' to which

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[14] Indeed, if antitrust is a religion, the prohibition of cartels is its first commandment. The Supreme Court in Trinko labeled price fixing as the 'supreme evil of antitrust' (*Verizon Communications v Law Offices of Curtis v. Trinko*, 540 U.S. 398, 408 (2004)) and Adam Smith, more than two centuries ago, admonished us about the consequences of competitors getting together. Even antitrust minimalists, such as Posner, defend the idea that antitrust laws should prohibit and prosecute collusive pricing practices see R. Posner, *Antitrust Law. An Economic Perspective*, Chicago, The University of Chicago Press, 1976, p 22 and p 212 where he concludes: 'I would like to see the antitrust laws other than section 1 of the Sherman Act repealed' and F. Easterbrook, 'Workable Antitrust Policy' (1986) 84 Mich. L. Rev 1696, 1701 maintaining that antitrust enforcement should be used to prosecute only 'plain vanilla cartels and mergers to monopoly'.

[15] ES Rockefeller, *The Antitrust Religion*, p 87.

[16] Ibid, p 91.

[17] See for instance, the antitrust exemption clauses contained in several federal statues such as the McCarran-Ferguson Act (15 U.S.C. 1011) shielding the 'business of insurance' from antitrust law. As for the scope of the judicially crated state action doctrine, shielding states and business from antitrust liability resulting from state anticompetitive action see *Parker v Brown*, 317 US 341 (1943); *Goldfarb v Virginia State Bar*, 421 US 773 (1975); *California Retail Liquor Dealers Assn. v Midcal Aluminium (Midcal)*, 445 US 97 (1980). For an overview of these statutory and judicially exceptions and proposals for their reform see H. Hovenkamp, *Federalism and Antitrust Reform*, University of Iowa Legal Studies Research Paper, No. 05-24, October 2005. The Antitrust Modernization Commission, in its May 2007 report, pointed out that lower courts have sometimes interpreted too loosely the state action doctrine as laid down by the Supreme Court, therefore it recommends a stricter application in the future case law, while at the same time rejecting any proposal of Congress intervention in the field p 344 et seq (available at: <http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm>).

[18] Ibid, p 44 and 46 respectively; see as well p 83, where the author criticizes the theory of raising rivals' costs.

Rockefeller himself once belonged to as one of its most influential members.[19] The 'antitrust community' is composed of 'professional followers'[20] i.e., lawyers, government officials (more recently economists) who practice antitrust and periodically meet in national and international *fora* and debate antitrust issues. For the author, the 'antitrust community' performs the sole task of spreading the gospel of antitrust and enhancing the feel of self–righteousness regarding the overall mission of antitrust.[21]

It is submitted that Rockefeller's critique to the legal foundations of antitrust laws does not carry the day for several reasons which will be examined hereinafter. Firstly, it is true that antitrust statutes are drafted in an open language and contain expressions such as 'monopolization', 'abuse of dominant position', 'restraint of competition', 'substantial lessening of competition', which are objectively broad and undefined. However, it is submitted that this is not enough to affirm that they do not abide with the rule of law. Many other legal concepts and terms are equally or even more open-textured and broader than those enshrined in antitrust statutes. Notions like 'good faith', 'unjust enrichment' as well as the constitutional provisions concerning 'equality' and 'non-discrimination' are also broadly worded and, notwithstanding the fact they have been subject to judicial interpretation for a while, courts still struggle in defining their meaning and their reach in actual cases. Those provisions, as much as antitrust provisions, and unlike the robbery offence (continuing Rockefeller's example), have no reference in the physical world. So, following our author's line of reasoning: do all these legal concepts infringe the traditional concept of the rule of law? It is submitted that they do not and neither do the antitrust statutes.[22]

General clauses and their open texture formulation are necessary in order to provide flexibility within the legal system and allow its adjustment to the multifaceted facts of the real world as well as to keep it in pace with times.[23] Equally, antitrust statutes are drafted to be applicable throughout the economy, across different sectors and to a variety of conducts. The fact that antitrust concepts, as many other legal concepts, do not have an immediate reference in the physical world is therefore insufficient to affirm their incompatibility with the rule of law. Additionally, it is important to point out that such clauses are not a blank check to the government or to any other legal institutions. On the contrary, it should be noted that decisions adopted by antitrust agencies are on

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[19] He served as chairman of the Section of Antitrust Law of the American Bar Association (1976-1977) and, since 1961 as Chairman of the Antitrust Advisory Board of the Bureau of National Affairs' Antitrust and Trade Regulation Reporter.

[20] ES Rockefeller, *The Antitrust Religion,* p 15.

[21] Ibid, p 22 et seq.

[22] For an examination of vagueness within the legal theory see L. Lombardi Vallauri, 'Norme vaghe e teoria generale del diritto' (1998) 3 Ars Interpretandi 155 as well as F. Dallmayr, 'Hermeneutics and the Rule of Law' and K. Kross, 'Legal Indeterminacy and Legitimacy', in G. Leyh (ed.), *Legal Hermeneutics: History, Theory and Practice*, Berkeley/Los Angeles/Oxford, California University Press, 1992, pp 1 and 200, respectively.

[23] See H. Hart, *The Concept of Law*, 2nd ed., Oxford, OUP, 1994, p 128-130.

the one hand subject to judicial review[24] and on the other, Courts have laid down tests for filling in open-textured provisions, thereby constraining their own as well as anyone else's discretion in the adjudication process. So, for instance, in interpreting constitutional provisions like the equal protection clause of the XIV amendment the US Supreme Court has devised different tests, with different levels of scrutiny, in order to assess whether state legislation is in breach of the general principle according to which: 'No state shall […] deny to any person within its jurisdiction the equal protection of the laws'.[25] In the field of antirust concepts like '*per se* rules', 'rules of reason', 'balancing test' have been devised to flesh out the bare bones of the antitrust statutes and provide a framework for the analysis of anticompetitive restrictions and conducts, with the aim of improving the overall application of the antitrust laws. Indeed, if the 'logic' put forward by Rockefeller should be followed and brought to its extreme consequences, then we should do away with many other indeterminate and vague legal concepts as those mentioned above. It is apparent that such a result is neither desirable nor acceptable.

Secondly, most of the cases that Rockefeller uses in his book to argue his view were decided before the so called 'Chicago revolution'. Actually, if the aim of the book is to criticize the excess of the Warren Court (1953-1969), the book comes thirty years too late, since on the one hand, the over-reaching antitrust jurisprudence of the Warren Court has already been the target of the Chicago School's critique in the 70s,[26] which,

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[24] For a review of the EU case law and a thorough discussion on standard of judicial review in merger cases see B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 European Competition Journal 3; in Article 81 EC cases D. Bailey, 'Scope of judicial review under Article 81 EC' (2004) 41 CMLRev 1328; as for Article 82 EC cases, in the recent *Microsoft* case the CFI endorsed for the review of abuse of dominance cases the same standard of review adopted in merger cases see Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, para 89 and P. Larouche, 'The European Microsoft Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evans', (2009) 75 Antitrust L.J. 933 at 937. For a political science approach to the topic see D. Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy', (2008) 28 Journal of Public Policy 139.

[25] For an introduction to American constitutional law and to the methodology of equal protection see E. Chemerinsky, *Constitutional Law. Principles and Policies*, 3rd ed., New York, Aspen Publishers, 2006, p 667 et seq. The freedom of speech granted by the first amendment is another example of a constitutional open-textured provision for which the Court had to devise tests in order to apply the broad language of the amendment, which reads: 'Congress shall make no law […] abridging the freedom of speech […]'.

[26] See R. Bork, *The Antitrust Paradox. A Policy in War with Itself*, New York, Free Press, 1978 which can be considered the summa of the Chicago school of thought as well as R. Posner, "The Chicago School of Antitrust Analysis", (1979) 127 U. Pa. L. Rev. 925. The excesses of the Warren Court were also remarked by other non Chicago scholars, such as T. Kauper, 'The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism' (1968) 67 Mich. L. Rev. 325. For a critique of the Chicago school analysis and a summary of the post Chicago theories see the essays in R. Pitofsky (ed.), *How the Chicago School Overshot the Mark*, Cambridge, CUP, 2008; R. Pardolosi, A. Cucinotta & R. Van den Bergh (eds.), *Post-Chicago Developments in Antitrust Law*, Cheltenham/Northampton, Edward Elgar Publishing, 2003; E. Fox, 'The Modernization of Antitrust - New Equilibrium' (1981) 66 Cornell L. Rev. 1140; H. Hovenkamp, 'Antitrust Policy After Chicago' (1985) 84 Mich. L. Rev. 213. A rich comparison between the Chicago and post-Chicago use of economics in antitrust analysis can be found in M. Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1995) 74 N.C. L. Rev. 219.

however, never argued for the repeal of antitrust laws, but for their reform.[27] On the other hand, many of the judgments quoted by Rockefeller have been reversed or curtailed by later decisions of the Supreme Court itself.[28] Furthermore, Rockefeller's analysis of anticompetitive conducts, especially in the field of merger enforcement and monopolization, lacks legal realism.

As for mergers, it is apparent from the statistics published by both the FTC and the DOJ that the presumption of illegality for mergers is long gone in the US,[29] as nowadays more than 97 per cent of mergers are cleared by the agencies as a result of the introduction of both procedural and substantive reforms in merger control.[30]

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[27] See R. Bork, *The Antitrust Paradox. A Policy in War with Itself*, p 8 'this book attempts to supply the theory necessary to guide antitrust reform' and the *Recommendations* at p. 405-407.

[28] In the last thirty years the Supreme Court have indeed removed every per se rule applying to vertical agreements (see *Continental T.V., Inc. v GTE Sylvania , Inc.*, 433 U. S. 36 (1977); *Business Electronics Corp. v Sharp Electronics Corp.*, 485 US 717 (1988); *State Oil Co. v Kahn*, 522 US 3 (1997); *NYNEX Corp. v Discon, Inc.*, 525 US 128 (1998); *Leegin Creative Leather Products, Inc. v PSKS, Inc.* 551 U.S. 877 (2007); *Illinois Tool Works, Inc. v Independent Ink, Inc.*, 547 US 28 (2006)), restricted the material scope of application of per se rules to horizontal agreements (see *Texaco, Inc. v Dagher*, 547 US 1 (2006); *National Collegiate Athletic Ass'n v Board of Regents*, 468 US 85 (1984); *Broadcast Music Inc. v Columbia Broadcast Sys., Inc.*, 441 US 1 (1979); *Northwest Wholesale Stationers, Inc. v Pacific Stationery & Printing Co.*, 472 US 284 (1985)), basically eliminated predatory pricing claims (see *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574 (1986), *Brook Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 US 209 (1993) and *Weyrhaeuser Co. v Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)) and marginalized monopolization cases (see *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004) and more recently *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 US not yet reported (2009)). The above mentioned case law has shifted the "government always wins" refrain of the 50s and 60s to the modern tune of 'antitrust defendants always win', see E. Elhauge, 'Harvard, Not Chicago: Which Antitrust School Dries Recent Supreme Court Decisions? (2007) 3 Competition Policy International 59, but see D. Crane, 'Rules Versus Standard in Antitrust Adjudication' (2008) 64 Wash. & Lee L. Rev. 65 (arguing that the last decade shift towards a greater use of the rule of reason in deciding antitrust cases leaded to more cases won by plaintiff than in the past). For a prediction of the next possible targets of the Roberts' Court in the field of antitrust see G. Warden, 'Next Steps in the Evolution of Antitrust Law: What to Expect from the Roberts Court', (2009) 5 Journal of Competition Law and Economics 49. For a first assessment of the Roberts Court activity in the antitrust field as well as its possible trends see D. Gifford & E. Sullivan, 'The Roberts antitrust court: A transformative beginning', (2007) 52 Antitrust Bull. 435.

[29] The statistics on merger enforcement activity are available in the annual joint report to the Congress issued by the DOJ and the FTC, at <http://www.ftc.gov/bc/anncompreports.shtm>. Interestingly enough for someone concerned with the role of rule of law in antitrust enforcement, Rockefeller does not discuss in his essay the legitimacy of the DOJ/FTC guidelines with respect to their effect of shifting the paradigm of merger enforcement form a per se illegality to a per se illegality rule, limiting his comment to a comparison between merger review and highway speed limits: 'the antitrust statue on mergers has been interpreted in such a way as to prohibit all mergers, but, like highway speed limits, there is no predictability as to when the law will be enforced', E. Rockefeller, *The Antitrust Religion*, p. 75, see also p 72.

[30] At the procedural level, the introduction of the pre-notification system by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Pub. L 94-435, 90 Stat. 1390, as codified at 15 U.S.C. 18a) gave the DOJ and the FTC the possibility of reviewing mergers before they are consumed and thus it conferred them the tools for streamlining merger enforcement. On the substantive ground, the introduction of a more economic approach to mergers via the guidelines jointly adopted by the DOJ and FTC has increased the predictability of the outcomes in merger review . On the role of guidelines and economic analysis in antitrust enforcement see also *infra*.

With regard to monopolization cases, Rockefeller's attack does not take into consideration the fact that in the last 20-25 years, public enforcement of monopolization cases has steadily rolled back.[31] Additionally, he does not acknowledge that as a result of the adoption by the Supreme Court of a very conservative economic analysis in the adjudication of antitrust cases, plaintiffs almost invariably lose monopolization cases.[32] Moreover, the author does not pay any attention to the recent efforts carried out by legal scholarship both in the US and in the EU aimed at refining monopolization standards and looking for unifying criteria for dealing with exclusionary conducts.[33]

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[31] Indeed, it is sufficient to have a glance over the major monopolization cases which reached the Supreme Court's docket in last two decades years and it will be apparent that all were initiated by private parties seeking for damages, rather than by public enforcement agencies (FTC and DOJ). For some data and comments on the public enforcement of Section 2 Sherman Act during the Clinton and Bush administrations see J. Lagenfeld & D. Shulman, 'The Future of US Federal Antitrust Enforcement: Learning From the Past and Current Influences', (2007) 8 The Sedona Conference Journal 1. Data on the public enforcement of Section 2 during the Regan administration can be found in E. Fox & L. Sullivan, 'Retrospective and Perspective: Where Are we Coming From? Where Are We Going?' (1987) 62 N.Y.U. L. Rev. 936. See as well L. Brannon & D. Ginsburg 'Antitrust and the US Supreme Court' (2007) 3 Competition Policy International 1 and E. Sullivan & R. Thomson, 'The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust' (2004) 53 Emory L.J. 1571 (dealing with the antitrust enforcement activity of the Rehnquist Court (1986-2005)); for data on the antitrust cases decided by the Burger Court (1969-86) see E. Sullivan, 'The Economic Jurisprudence of the Burger Court's Antitrust Policy' (1982) 58 Notre Dame L. Rev. 1. But see D. Crane, 'Technocracy and Antitrust' (2008) 86 Tex. L. Rev. 1159 (arguing that although antitrust has lost its political salience, disappearing form presidential speeches and political platforms, its enforcement has not declined significantly in real terms).

[32] T. Kauper, 'The Influence of Conservative Economic Analysis on the Development of the Law of Antitrust', in R. Pitofsky (ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford, OUP, 2008, p 40 et seq.

[33] Legal scholars have recently proposed several tests in order to rationalize and make the application of section 2 of the Sherman Act to exclusionary conducts clearer; however, until now none of these proposals has been formally endorsed by the Supreme Court, see E. Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stan. L. Rev. 253; H. Hovenkamp, 'Exclusion and the Sherman Act', (2005) 72 U. Chi. L. Rev. 155; T. Kauper, 'Section Two of the Sherman Act: The Search for Standards' (2005) 93 Geo. L.J. 1623; D. Melamed, 'Exclusive dealing Agreements and Other Exclusionary Conducts-Are there Unifying Principles?', (2006) 73 Antitrust L.J. 375; G. Werden, 'Identifying Exclusionary Conduct Under Section 2', (2006) 73 Antitrust L.J. 413; M. Popofsky, 'Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules', (2006) 73 Antitrust L.J. 435; M. Lao, 'Defining Exclusionary Conduct Under Section 2: The Case for Non-Universal Standards', in B. Hawk (ed.) *Fordham Competition Law Institute International Antitrust Law & Policy*, Huntington, Juris Publishing, 2006, p. 433 et seqq.; K. Hylton, 'The Law and Economics of Monopolization Standards', (2008) Boston Univ. School of Law Working Paper No. 08-18. In the EU see the contribution of J. Vickers, 'Abuse of Market Power', (2005) 115 Economic Journal F244; R. O'Donughe, 'Verbalizing a General Test for Exclusionary Conduct under Article 82 EC', in C.D. Ehlermann & M. Marquis (eds.), *European Competition Law Annual 2007. A Reformed Approach to Art. 82 EC*, Oxford/Portland, Hart Publishing, 2008, p. 327 et seq. In its report (pp 81-116), the Antirust Modernization Commission pointed out that notwithstanding the broad proscription against anticompetitive conduct contained in Section 2, 'the standards currently employed by U.S. courts […] are generally appropriate'. This in turn leaded the Commission to the following conclusions: i) no amendment of Section 2 is necessary, ii) 'section 2 standards should be designed to minimize over-deterrence and under-deterrence, both of which impair long-run consumer welfare'; iii) leave the development of section 2 law to the courts iv) it is too early for adopting a one catch all test for all exclusionary conducts. Furthermore, after a series of joint hearings with the FTC, in September 2008 the DOJ unilaterally issued its Competition and Monopoly: Single Firm

As for cartels, the idea that they are self-destructive is harder to defend today than a few decades ago.[34] Empirical data and actual examples of cartels show that some cartels are sustainable over a long period of time. For instance, in the EU organic peroxides cartel or the German high-voltage power cable cartel lasted for 29 and 39 years, respectively.[35] Furthermore, theoretical research has demonstrated that, under certain conditions, cartels are profitable and sustainable strategies harmful to consumers, thus requiring incisive antitrust enforcement.[36]

Rockefeller does have a point when he argues that prosecuting cartels under antitrust law is likely to turn undertakings towards governments, in order to obtain statutory antitrust exemptions or anticompetitive state regulation, the latter largely shielded under the state action doctrine. It is submitted, however, that this is not an argument for blessing cartels and waive antitrust enforcement. On the contrary, recognizing that states can restrict competition - through anticompetitive regulation - equally (and more

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Conduct Under Section 2 of the Sherman Act (available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>), reviewing all the above proposed tests, but finally encouraging the development of conduct specific tests and safe harbours. Three out of the four FTC Commissioners (the fifth seat being vacant) publicly distanced themselves from the report, denouncing that it is 'a blueprint for radically weakened enforcement of Section 2' that 'goes beyond the holdings of the Supreme Court cases upon which it relies' and 'seriously overstate the level of legal, economic and academic consensus regarding Section 2' (see the statement of the Commissioners is available at <http://www2.ftc.gov/os/2008/09/080908section2stmt.pdf>, *passim*); FTC Chairman, William Kovacic released its own statement neither endorsing nor opposing the DoJ report, but regretting the lack of coordination between the agencies in issuing a common report (<http://www2.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>). However, the change in the administration following the November 2008 elections is very likely to bring about a more vigorous enforcement of antitrust law and especially of Sec. 2 SA. In particular, one of the first acts of the new Assistant Attorney General in charge of Antitrust was to withdraw the Report issued in September 2008. Moreover, in her first speech in her capacity as DOJ Antitrust division head, Christine Varney emphasized the need for a new enforcement policy of Sec. 2 SA, stressing in particular that the DOJ September Report on the one hand 'raised many hurdles to Government antitrust enforcement', and contrary to what implied in the Report 'antitrust enforcers are able to separate the wheat from the chaff in identifying exclusionary and predatory acts' see 'Vigorous Antitrust Enforcement in this Challenging Era' (May 12, 2009) at <http://www.usdoj.gov/atr/public/speeches/245777.htm>, *passim*. Furthermore, while acknowledging that the Report: 'provided a comprehensive evaluation of the history of single-firm enforcement and careful consideration of the risks and benefits of particular enforcement strategies', the new Assistant Attorney General also remarked how it 'lost sight of an ultimate goal of antitrust laws- the protection of consumer welfare'.

[34] See G. Stigler, 'A Theory of Oligopoly' (1964) 72 Journal of Political Economy 44.

[35] On the peroxide organic cartel see EC Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement, Case COMP/E-2/37.857 - Organic peroxides, OJ 2005, L110/44; for the German power cable cartel see H. Normann and E. Tan, 'The Effects of Cartel Policy: Evidence from the German Power-Cable Industry' (available at <http://www.tilburguniversity.nl/tilec/meetings/wip/normann.pdf>). For a more theoretical study on the duration of cartels see J. Zimmerman and J. Connor, 'Determinants of Cartel Duration: A Cross-Sectional Study of Modern Private International Cartels' (2005), available at <www.ssrn.com>.

[36] For the economic analysis of cartel duration and success see, *ex multis*, the works of M. Levenstein and V. Suslow, 'What Determines Cartel Success?' (2006) 44 Journal of Economic Literature 43; J. Clarke and S. Evenett, 'The Deterrent Effect of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel' (2003) 48 Antitrust Bull. 689. P. Grossman (ed.), *How Cartels Endure and How They Fail: Studies of Industrial Collusion*, Cheltenham/Northampton, Edward Elgar Publishing, 2004.

effectively) than private undertakings is an argument for a stricter control of state action distorting competition and an impulse for reforming the current wording of antitrust exemption statutes, as well as the present application of exemption doctrines.[37]

Contrary to what was submitted by Rockefeller, both the introduction of guidelines and the use of economic analysis have improved the application and the predictability of antitrust rules. Guidelines as well as other soft law instruments adopted by antitrust agencies over the last 30 years have indeed clarified the application of competition law provisions. On the one hand, these instruments provide legal counsellors with a framework of analysis for the assessment of anticompetitive conduct. In particular, guidelines allow to infer the reasoning and to anticipate those elements upon which an agency will decide whether a certain practice is harmful to competition.[38] On the other hand, guidelines straightjacket the discretionary powers enjoyed by the agencies, one of Rockefeller's major concerns, while leaving them enough flexibility to tailor the framework therein -which normally applies irrespective of the industry- to specific market situation. In the EU, for instance, the European Courts have emphasized that although guidelines are not binding instruments towards third parties they can still have some legal effects; notably a self-binding effect on the institution issuing them, under the principles of equality, good governance and legitimate expectation.[39] Therefore the guidelines, issued by the Commission in the competition field, bind the Commission to follow them and oblige the Commission to motivate its departure from the rules stated therein.[40] Moreover, the use of economic analysis in antitrust cases has enhanced the

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[37] It has correctly been remarked that one of the key feature of the Rehnquist Court in the field of antitrust has been the expansion of the state action doctrine, see Roundtable discussion, 'The Legacy of the Rehnquist-O'Connor Court', (2006) 20 Antitrust 8. An equally broad reading of such doctrine, shielding both states and private initiatives from the application of competition law, was also endorsed by the European Court of Justice, see Case C-2/91, *Meng* [1993] ECR I-5751; Case C-245/91 *OHRA Schadeverzekeringen*, [1993] ECR I-5851; Case C-185/91, Reiff, [1993] ECR I-5801; Case C-35/99 *Arduino* [2002] ECR I-1529; Joined Cases C-94 and 202/04, *Cipolla et al.* [2006] ECR I-11421. When it comes to State action it is worthwhile remembering the admonishment addressed by Adam Smith over two centuries ago: '[…] People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. *But though the law cannot hinder people of the same trade form sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less render them necessary.* […]' A. Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations*, London, 1776, Book I, Chapter X, quoting from the version edited by E. Cannan, Chicago, The Chicago University Press, 1976, p 144 (emphasis added).

[38] Amongst the most relevant guidelines issued by the EC Commission in the last years see the guidelines on Vertical Restraints (OJ 2000, C291/1) on Horizontal Mergers (OJ 2004, C31/5), on Non-Horizontal Mergers (OJ 2008, C265/6). Recently the Commission has adopted guidelines (*rectius*: a guidance on its enforcement priorities) in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009, C45/7).

[39] Case C-313/90, *CIFRS v. Commission* [1993] ECR I-1125; P. Craig, *EU Administrative Law*, Oxford, OUP, 2006, p 641 et seq. and L. Senden, *Soft Law in European Community Law*, Portland/Oxford, Hart Publishing, 2004, p 401 et seq.

[40] Case 148/73, *Louwage v Commission* [1974] ECR 81, in the context of the staff cases; in competition cases Case T-9/89, *Hüls v Commission* [1992] ECR II-499; Case T-214/95, *Vlaamse Gewest v Commission* [1998] ECR II-717.

understanding of markets and of firms' behaviour in the marketplace. It is true, as Rockefeller points out, that economic models are based on simplified assumptions, which are sometimes detached from reality; however, the correctness of an antitrust decision does not depend on whether that decision follows one or another economic theory. The role of economics concepts such as 'market power' or 'market definition' and economics analysis in competition cases is to provide the interpreter with proxies for evaluating the conduct of firms in the market and its effects, not to give him the 'right' solution.[41] Economic analysis has provided tools for understanding and interpreting facts, thereby providing a more structured and accurate analysis of competitive and anticompetitive behaviour.[42] It cannot be denied that economic insights have helped in fine-tuning and fleshing out the bones of broad legal concepts, thus increasing legal predictability with respect to application of antitrust statutes to the activity of undertakings in the market.[43]

At the end of the day, the arguments put forward by Rockefeller for abolishing antitrust laws are not convincing and their apparent force vanishes when they are closely examined. This does not mean that the antitrust building is perfect, indeed as all buildings, it needs to be fixed, maintained and renovated from time to time. As in all fields of law, the enforcement of antitrust laws can lead to over-deterrence or under-deterrence of anti-competitive behaviours, but the solution suggested by Rockefeller to overcome this problem, i.e. getting rid of antitrust laws, seems too extreme. If so, why not abolish criminal law? After all, false convictions and false acquittals happen regularly in criminal law, but nobody would suggest abolishing criminal statutes for this reason. Following Rockefeller's proposal would throw out the baby with the bath water and that is not desirable.[44] The application of antitrust rules, as with all human

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41 As correctly pointed out by J. Breyer in his dissenting opinion in Leegin: 'Economic discussion, [...], can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients.' *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, (2007) 127 S.Ct. 2705, 2729.

42 For an in depth examination of the use and the role of economic analysis in the adjudication of competition cases, see A.-L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, Paris, L.G.D.J, 2008. See as well R. Schmalensee, 'On the use of economic models in antitrust: the *Realmon* case' (1979) 127 U. Pa. L. Rev. 994 and M.P. Schinkel, 'Forensic Economics in Competition Law Enforcement' (2008) 4 Journal of Competition Law and Economics 1.

43 For outstanding examples of how of economic analysis can be successfully incorporated into the legal assessment anticompetitive conducts, thereby enhancing predictability and legal certainty see P. Areeda & D. Turner, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act', (1975) 88 Harv. L. Rev. 697 as well as W. Landes & R. Posner, 'Market Power in Antitrust Cases'(1981) 94 Harv. L. Rev. 937.

44 This is not the place for reviewing the benefits of antitrust enforcement from the legal, economic or political perspective. More or less accurate exposition of the benefits of antitrust control may be found just opening any antirust or competition law book. For its clarity and conciseness, see *ex multi*s, R. Whish, *EC Competition Law*, Oxford, OUP, 6th ed., 2008, p 3 et seq.; for a review of the economic arguments J.B. Baker, 'The Case for Antitrust Enforcement' (2003) 17 Journal of Economics Perspective 27; D. Neven, 'Competition Economics and Antitrust in Europe', (2006) 21 Economic Policy, October, 741; For a political science approach to competition policy see M. Cini & L. McGowan, *Competition Policy in the European Union*, 2nd ed., Basingstoke, Palgrave, 2008; G.B. Doren and S. Wilks (eds.), *Comparative Competition Policy*, Oxford, OUP,

activities, is destined to be imperfect; however, learning from previous achievements and mistakes is fundamental for improving the quality of antitrust enforcement and better distinguishing pro-competitive from anticompetitive conducts.[45]

In this process of learning and changing the enforcement of antitrust laws, the 'antitrust community' plays a key role in shaping and re-thinking legal concepts, despite what is maintained by Rockefeller. The exchange of views amongst members of the community (scholars, practitioners, enforcers) has the potential to, and in practice does, help in understanding current practices and tackling upcoming issues as well as in proposing reforms and circulating legal solutions.[46] The 'antitrust community' is indeed a global epistemic community,[47] considering that nowadays more than 100 countries have enacted antitrust statutes, generally following US or EU competition laws as templates, whose role should be emphasised rather than despised in the quest for better answers to some of the unresolved issues of antitrust enforcement. In this context, contrary to what is argued by Rockefeller,[48] the use of a specific language by antitrust specialists is

1996; see as well J. Monnet, *Mémoires*, Paris, Fayard, 1976, p. 411-412; G. Marenco, 'The Birth of Modern Competition Law in Europe' in A. von Bogdandy (ed.), *European Integration and International Co-operation: Studies in International Economic Law in honour of Claus-Dieter Ehlermann*, Kluwer Law International, The Hague, 2002, p 279 and D. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford, OUP, 1998 on the origin and negotiations of the competition provisions in the Paris and Rome Treaty establishing the European Community of Coal and Steel and the European Economic Community respectively. Recently the Office of Fair Trading (OFT) has carried out an assessment on the benefits of antitrust enforcement for British consumers, finding that the agency enforcement activity has saved consumers five times the operating costs of the agency, see OFT, *Annual Report and Resource Accounts 2007-08*, available at <http://www.oft.gov.uk/shared_oft/annual_report/2007/HC836.pdf>, pp 35-37.

[45] For an overview of the evolution of the American antitrust enforcement see R. Pertiz, *Competition Policy in America: History, Rhetoric, Law*, Oxford, OUP, 2001; H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practices*, 3rd ed., St. Paul Minn., Thomson/West, 2005, pp 48-77. For a review of the evolution of EC Competition law over the decades see P.J. Slot, 'A view from the mountain: 40 years of developments in EC competition law', (2004) 41 CMLRev. 443; A. Weitbrecht, 'From Freiburg to Chicago and Beyond-The First 50 Years of European Competition Law' (2008) 29 ECLR 81; A. Pera, 'Changing views of competition, economic analysis and EC antitrust law' (2008) 4 European Competition Journal 127. For a strong call for a move from a form-based to an effects-based approach fundamental in European legal scholarship has been the work of V. Korah, see for instance, 'EEC Competition Policy: Legal Form or Economic Efficiency', (1986) 39 Current Legal Problems 85.

[46] For instance, the reception in Europe and elsewhere of the leniency programs firstly developed in the US is an example of successful circulation of antitrust enforcement models. A key role at the international level in this regard is played by the ICN (<www.internationalcompetitionnetwork.org>), the UNCTAD (<www.unctad.org>) and the OECD (<www.oecd.org>).

[47] For an overview of the notion and role of epistemic communities in the competition policy setting see F. Van Warrden & M. Drahos, 'Courts and (epistemic) communities in the convergence of competition policies', (2002) 9 Journal of European Public Policy 913; S. Wilks, 'Understanding Competition Policy Networks in Europe: A Political Social Perspective', in C.D. Ehlermann & I. Atanasiu (eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford/Portland, Hart Publishing, 2003, p 65 et seq; H. Kassim & K. Wright, 'Revisiting Modernization: the European Commission, Policy Change and the Reform of EC Competition Policy', CCP Working Paper 07-19, August 2007 (submitting that the modernization of European competition law was driven by the changing views within the competition law epistemic community rather than by the Commission acting as a self-interest agent aiming at maximizing its power through the decentralization of EC competition law).

[48] ES Rockefeller, *The Antitrust Religion*, pp 16 and 24.

an indispensible tool in order to set a common background and foster dialogue among people coming from different legal cultures.[49]

In conclusion, *The Antitrust Religion* will not be *The Antitrust Paradox* of the 21st century: it will not revolutionise the way of thinking about antitrust as much, or bring about an equally strong shift in the application of antitrust statues, nor finally will it lay the foundation for the abolition of antitrust statutes. Nonetheless, its reading may be instructive for two reasons. First, the book presents an articulated attack to the legal foundation of antitrust laws, although, as it has been shown above, the arguments put forward by Rockefeller are not convincing. Second, by questioning the foundations of antitrust the book performs the unintended mission of reminding all those who think that antitrust laws can perform something good (even a little), why antitrust laws are desirable and should be enforced. Such an exercise is worthwhile in order to recast the view of the antitrust forest, which members of the 'antitrust community' sometimes lose sight of when focusing on the trees of specific anticompetitive conducts.

[49] The development and use of a specific vocabulary and a technical register is common to all legal subjects and more generally to all disciplines. In the legal field, think for instance to the notion of 'exhaustion' or to the 'reverse doctrine of equivalents' in patent law. In the medical field, terms like 'bovine spongiform encephalopathy', 'computerized axial tomography' or 'septicemia' are equally examples technical and specialized language.