The role of antitrust law and regulation in ensuring the public policy objectives of Higher Education: Some thoughts on the UK and US Higher Education Markets

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I. Abstract

European Higher Education Institutions (HEIs) have increasingly been urged to move towards market principles. This development is particularly pronounced in England where there has recently been a major change in the way the undergraduate education is organized and delivered. In fact, after a number of reforms that followed the 2011 White Paper 'Students at the Heart of the System', student choice and competition now play a significant role in the sector, with a greater share of the universities’ funding coming directly from students. Subsequently, higher education institutions depend more than ever on revenue from tuition fees and their ability to attract students. With increasing commodification of HEIs their main activities fall into the ambit of competition law and, inevitably, tensions will arise. Considering these developments, my research plan for this academic year at NYU is to examine how competition law should be applied in the Higher Education sector so that the multiple public policy objectives this sector aims to achieve are considered as a whole. My research will answer this research question by examining the marketization of the Higher Education sector in the UK and in the US and by posing the following core questions: What are the costs and benefits of increased marketization in the Higher Education sector? Does marketization in the Higher Education sector undermine the public policy objectives this sector pursues, such as access? How and to what extent can antitrust law and regulation contribute to the creation of a more equal Higher Education sector?

My postdoctoral proposal is a coherent continuance of my PhD dissertation which focuses on the role of healthcare quality in the application of competition law in the healthcare sector. What is the link between health and education? How will my new research expand my PhD research agenda and my future research? Education, as health, is not just an intrinsic good for the individual but an important instrumental good with positive features. Indeed, education is a basic capability directly affecting people’s well-being. It guarantees access to elite jobs, reduces poverty and gender inequality, and promotes democratic participation. These important goods also determine later life productivity and contribution to the economy. My research will identify these close links between health and education with an eye to answer the wider question: Should the application of antitrust law in the education and healthcare sectors consider the special value our societies attach to these public goods? This paper is divided in four parts. First, I provide an overview of my PhD research agenda. Second, I briefly explain what marketization in Higher Education actually means and how it might affect the public policy objectives a Higher Education system aims to ensure. Additionally, I raise the challenging questions antitrust enforcers may face in applying antitrust law in the Higher Education market with a view to protect access and diversity. Third, I indicate the links
between health and education and I demonstrate how my postdoctoral research will contribute to my future research objectives. Lastly, I describe the work I aim to produce as a result of my postdoctoral fellowship at NYU.

II. My PhD agenda

A number of European Countries, such as the UK and the Netherlands, have moved towards market driven healthcare delivery. In light of this development, the application of competition law in the EU healthcare sectors has gradually increased. Considering that healthcare quality is one of the essential goals of EU healthcare systems, a fundamental question arises: how can the application of competition law in healthcare take into account healthcare quality? My thesis showed that this question, albeit crucial, is far from easy. This is because the goals of antitrust law and the goals of EU health systems do not necessarily align. Indeed, the main goal of antitrust law is efficiency. Nonetheless, a health system aiming to continuously improve its performance should be able to pursue further objectives, such as equity and access. More than that, the antitrust scholarship claims that the pursuit of social policy goals and objectives, such as equity, is not and should not become part of the antitrust agenda. My thesis examines this scholarship with a critical eye and asks: Should the goals of antitrust law be transformed so that its application in healthcare is in line with the multiple objectives of EU healthcare systems? Should equity and access concerns be integrated into an antitrust analysis? And, if yes, how? Second, health policy researchers and antitrust enforcers evaluate and assess quality from different angles. The antitrust community mainly accepts that vigorous antitrust ensures quality. Health policy researchers, however, often tell a different story. Especially when hospital mergers are at issue, they insist that in specific cases hospital consolidation, not competition, brings quality improvements. For example, a merger increases patient volumes for hospital providers. In light of medical research showing a relationship between procedure volumes and patient volumes, the higher volumes a merger brings can enhance the overall quality of the services provided. Antitrust enforcers and medical professionals also view quality through different lenses. Medical professionals believe that quality of care is ensured only to the extent collaboration between different healthcare providers is ensured. Furthermore, in light of their medical expertise, they often perceive themselves as the guardians of healthcare quality. Therefore, they often feel that they are entitled to intervene in the healthcare markets they operate in order to correct the market failures pervading them and to guarantee quality. These interventions may take the form of ethical norms controlling the type of advertising that takes place in a world of imperfect information, or price setting in the market for physicians’ services. Inevitably, these practices and norms catch the attention of antitrust which generally assumes that patients’ interests are better served if competitors’ independence is preserved. My thesis delved into these core conflicts and questions by examining the application of antitrust law in the US and the UK healthcare sectors. By focusing on mergers and article 101 TFEU cases it asks: What are the quality dimensions that the antitrust enforcers actually value? How do they
weigh them against anticompetitive harm? Does their approach allow them to consider the notion of healthcare quality and the objectives their health systems aim to achieve as a whole?

III. My postdoctoral agenda: From market driven healthcare to market driven education

Arguably, my PhD research lies in the intersection between public policy, antitrust law and human development. Inspired by the voices of Debra Satz, Michael Sandel and Elizabeth Anderson, it examines how these different research areas intersect and what they can learn from each other. What can antitrust scholars teach to public policy makers about markets? What can philosophers teach competition policy makers about the limits of markets? Should these limits be considered in antitrust policy and regulation? And, if yes, how? These challenging questions have driven my PhD research in antitrust law in healthcare. They will also form the basis of my postdoctoral research project at NYU.

I consider my postdoctoral proposal a natural continuation of my doctoral research. Education, as health, is not just an intrinsic good for the individual but an important instrumental good with positive features. In Sen’s language education is a basic capability directly affecting people’s well-being and flourishing. It opens up access to professional opportunities, reduces poverty and gender inequality, and enhances business development. Health and education are also interrelated since quality education improves health and nutrition. Above all, health and education are essential dimensions of poverty reduction. My research will identify these close links with an eye to answer the wider question: Should antitrust law and regulation in the education and health care sectors consider the special value our societies attach to these public goods? Should they take into account the key role they play in the reduction of income inequalities?

My postdoctoral research agenda is timely. European Higher Education Institutions (HEIs) have increasingly been urged to move towards market principles. This development is particularly pronounced in England where there has recently been a major change in the way the undergraduate education is organized and delivered. Public funding has become increasingly competitive, private sector needs are considered in policy making and the attraction of additional international funding has become priority. Further, after a number of reforms that followed the 2011 White Paper ‘Students at the Heart of the System’, student choice and competition now play a significant role in the sector, with a greater share of the universities’ funding coming directly from students. Subsequently, Higher Education institutions depend more than ever on revenue from tuition fees and their ability to attract students. With increasing commodification of HEIs their main activities fall into the ambit of competition law and tensions may arise. Aiming to explore these tensions and understand whether choice, competition and regulation work effectively to the benefit of students in England, the Competition & Markets Authority (CMA) embarked a Call for Information in the Higher Education sector in October of 2013. Surprisingly, the CMA did not identify how the emergence of
markets in the Higher Education sector and the subsequent application of antitrust law in these markets may affect the quality of education and the wider public policy objectives this sector pursues. I claim that applying antitrust law in the Higher Education sector without specifically addressing these issues may lead to undesirable outcomes both from antitrust law and educational policy perspectives.

Generally, the introduction of market forms to Higher Education systems is motivated by the desire for economic efficiency and greater innovation. Market instruments in education include government reforms encouraging competitive research grants systems, greater reliance on tuition fees and private fund raising. Do these market reforms achieve their goals? Do they manage to incentivize the main actors in Higher Education to improve the quality of their academic and research output? Research in one of the most competitive Higher Education markets, the US market, reveals that the answer is not always positive. Why?

Education markets are characterized by market failures, such as information asymmetries. This means that the students have less information than academic institutions and scholars as to the level of quality of the education they receive. Although students have high incentives to obtain easy and costless access to objective measures of the value added by differently – priced academic programs, academic faculties and institutions have few, if any, incentives to invest resources in the development of such outcome measures. Research on the activities of academic departments in the US suggests that academic behavior can increasingly be explained in terms of self-interest. Universities and colleges are multi-product firms, producing both education and research. Thus colleges and universities compete in at least two divergent markets for goods and services at the same time. The nature and degree of competition in these two markets varies. In the US for example, a highly competitive market exists for the contracting of university research by the federal government and private corporations, a market which features very sophisticated assessments of the potential benefits of alternative research products. Nonetheless, while students are more interested in the quality of the education output, most faculty members seem to value research over teaching. This should not come as a surprise. Research results can be widely read in the outside world, bringing prizes, fame, consulting opportunities, job offers and many other rewards not available to the successful teacher, whose talents are seldom known beyond the campus. Additionally, hierarchy in Higher Education has become increasingly important since the economic reward for elite educational credentials has jumped sharply in recent decades. The information revolution has made us more aware of product quality differences than ever and puts us in direct contact

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2 Ibid.
with the world best suppliers.\textsuperscript{4} This has resulted in an explosion in the salaries paid to the handful of key players who are most responsible for an organization’s success. Access to elite jobs, however, presupposes and requires access to elite schools. The fact that elite schools are increasingly becoming the gateway to professional positions offering six figure salaries has fueled the explosive growth in demand for elite educational credentials.\textsuperscript{5} In light of the growing importance of rank in the educational marketplace, universities face increasing pressure to bid for the key ingredients that facilitate the quest for high rank, star students and star professors. This market reality has transformed academic life in several ways. Star faculty command ever higher salaries and require ever more elaborate and costly support. Universities and colleges up and down the academic totem pole are spending far more than ever on brochures, videos, mailings, multi-state tours by admissions officials, and other efforts to attract top students.\textsuperscript{6} Schools are also spending more now not just to attract good students but also to keep them happy once they arrive. As the material living standards of affluent students escalate, universities feel increasing pressure to upgrade campus amenities, dining halls, classrooms. Increased competition in turn produces greater pressure for universities to find resources, because almost everything a university is required to do to lift its reputation costs money: recruiting outstanding new professors, financing the merit scholarships to attract better students, and providing the salaries and facilities needed to keep respected faculty members from leaving for more welcoming venues.\textsuperscript{7} Inevitably, these strategies increase universities’ costs and subsequently tuitions. In light of these concerns, a number of core questions arise. Does marketization in education advantage all groups of our society? Who are the winners and losers of increased marketization in Higher Education markets? Surely, markets in Higher Education improve certain aspects of quality in education, such as quality in research and amenities. They also improve star professors’ salaries and research opportunities. Pursuing however quality in education requires much more than improvements in amenities and research outputs.

Indeed, quality in the education sector is partly about outcomes and partly about other public policy objectives, such as access, economic and cultural diversity. Academic institutions are primarily social institutions. They are places where learning, knowledge, skills, and traditions are preserved, reevaluated, and transmitted; where new ideas, scholars, and teachers are born; and where interests and cultural commitments of all kinds meet and inform one another.\textsuperscript{8} In working to address a range of complex scientific, scholarly, professional practice and social issues, universities as institutions benefit greatly from increased accessibility. Exposure to the perspectives of individuals

\textsuperscript{5} Ibid.
\textsuperscript{6} Ibid.
\textsuperscript{7} Bok, supra n. 3, 15.
from diverse backgrounds and circumstances enriches the learning experience. As the world globalizes and shrinks, integrating together students, professors and staff with a wide variety of backgrounds – socio-economic, cultural, and geographic – can be an indispensable part of providing a stimulating and high performing academic environment. Additionally, social interaction between the elites and the disadvantaged limits segregation and the undesirable outcomes it brings to a society. It equips the elites with the awareness necessary to effectively serve the interests of people from all walks of life. It also equips the less advantaged with the social and cultural capital necessary to pursue rewarding careers and access leadership positions. Thus providing access to high quality education to the most disadvantaged groups of our society reduces income inequalities.

Most importantly, an educated electorate is also vital to a successful democratic society. Democracy requires a certain degree of participation, the assumption of responsibilities, respect for different views, tolerance and procedural justice. In that regard, education creates positive externalities. It permits individuals to keep records, file tax returns and evaluate campaign material. It also assists in socializing many diverse immigrant groups and reduces crime and associated social disruption. In this light, a number of antitrust questions come to fore that my postdoctoral research agenda aims to explore: Should universities be allowed to agree on the maximum quality standards of the amenities they offer to students so that they can afford more need-based scholarships? Should they be allowed to agree on the maximum salary they offer to star professors so that they can increase access to minorities? Should they be allowed to agree to provide scholarships not only on the basis of merit but also on the basis of need?

These research questions, albeit fundamental, are highly underexplored in Europe. In contrast, they have been more explored in the US starting as early as 1992, as the seminal case US v. Brown University antitrust case confirms. This case examined the antitrust implications of an agreement between several elite colleges concerning the distribution of student financial aid. Under the agreement, called ‘Overlap,’ the colleges

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11 The seminal work of Neal and Johnson (1996), which used the National Longitudinal Survey of Youth (NLSY 1979), showed that controlling for educational achievement shrinks—or altogether eliminates—the wage gap between blacks and whites and Hispanics and whites. Using a test score measure of basic skills that has been shown to be racially unbiased, the authors demonstrate that educational achievement among 15 – 18 year-olds explains all of the black-white gap in wages for young women and 70% of the gap for young men. The Hispanic-white gap is also eliminated. By looking at the test scores from only the younger end of the cohort, Neal and Johnson are examining pre-market skills acquisition—or, the skills and knowledge we reasonably expect children to receive in K-12 education—rather than any other investments in skills, higher education, or any work experience. See http://edlabs.harvard.edu/link-between-education-inequality.

awarded all financial aid solely on the basis of financial need, thus eliminating merit based scholarships. The colleges also formulated a common methodology for determining financial need and shared financial information on admitted students. By enabling member schools to maintain a steadfast policy of full-need based aid, Overlap promoted the social idea of equality of educational access and opportunity. The Government, however, sued the participating universities for antitrust violations. The District Court, unconvinced by the agreement’s essential justifications, found the challenged conduct anticompetitive. Soon after the trial ended, Congress passed the Higher Education Act of 1992, allowing colleges and universities to engage in certain cooperative conduct aimed at concentrating aid only on needy students. In September 1993, the Appellate Court held that the schools’ non-commercial justifications, such as the pursuit of better communication among a broad spectrum of individuals, should not be ignored and remanded the case to the District Court for retrial. The case was settled under terms permitting the Universities to engage in Overlap-type behavior, including pooling of student information.

This case reveals that a competition and education policy aiming to ensure the multiple dimensions of quality in education might have to consider whether not vigorous competition but cooperative and collective action is needed in certain cases. Arguably, such an approach might be in contrast with the central mantra of competition law that competitive market forces, besides lowering prices, can increase efficiency, quality or else consumers’ welfare. I claim, though, that such an approach might be necessary if antitrust enforcers and regulatory bodies wish to work together in order to ensure that all parts of our society benefit from the numerous benefits a high quality education system brings.

Critics of my claim would argue that competition law reduces inequalities and contributes to a more equal society by enhancing enforcement against mergers, monopolies and anticompetitive agreements and by ensuring that goods and services are offered to consumers at affordable prices. Therefore they would claim that competition and not collective action guarantees access to Higher Education. However, in my view, cases like *US v. Brown University* prove exactly the opposite. As noted, the attractiveness of a university depends strongly on the intellectual ability of its students. For this reason elite institutions compete strongly for top students. For this reason they are also strongly incentivized to provide merit-based and not need-based scholarships. Viewing Overlap from this perspective would lead to the conclusion that

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13 Recently, in 2015 this exception was extended for additional seven years. See the Need Based Educational Aid Act of 2015.

the famous cartel agreement did nothing more than restricting competition for students with elite credentials so that access to the less advantaged students is not banned.\footnote{For example, suppose that there are two competing colleges and both want to increase racial diversity by attracting more black students who need financial aid. For concreteness, suppose there are four potential black candidates: two are brilliant "superstars" and two are just average. With collusion, the schools would offer a standard aid package to all four candidates and, say, two would attend each college. However, if the schools get into bidding war for the two superstars, and each school attracts one, neither school may be able to afford sufficient aid to attract either of the average black candidates. Thus, competition may reduce diversity: which thereby may reduce the quality of the educational experience for the inframarginal non-aid students, See S. C. Salop; L. J. White, Policy Watch: Antitrust Goes to College, (1991) 5(3) The Journal of Economic Perspectives, 193, 199.}

My proposal is animated by the belief that unlimited competition in the Higher Education market might not always and necessarily lead to the greatest good for all. Surely, the role of antitrust is not and should not be to solve all forms of wealth inequalities or social injustice in our societies. Nonetheless, its application should not also widen them. That is to say, when it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated to help but it can be calibrated not to harm.\footnote{D. Crane, supra n. 14, 1174.} Considering the above, my postdoctoral research will examine how the Higher Education markets work in the US. It will identify the benefits and costs of commercialization in the US Higher education sector and it will ask: How and to what extent does the application of regulation and antitrust law in the US Higher Education sector ensure the public policy objectives this sector wishes to achieve? My project will answer these questions with an eye to identify and propose the lessons the newly formed Higher Education markets in the UK should learn from the US example and experience.

IV. Planned Research Outputs

For my project I will combine scholarly analysis with empirical work. During the first three months of my fellowship in New York I will examine how the Higher Education market works in the US. I will also see to what extent the applicable regulatory framework in the US Higher Education sector and the application of antitrust law in this sector promote access to elite schools, economic and cultural diversity. To this end, during the first three months of my stay in the US I will conduct interviews with Professors from various research institutes and colleges in New York. Integrating their voice in my research is essential. To discuss and disseminate my research findings my goal is to organize a workshop with actors and scholars from both antitrust law and education policy research areas and create a platform where perspectives from different fields will be presented and heard. My research findings will shape the core of an article I aim to publish during the first seven months of my fellowship at NYU. This article will be entitled: ‘The ethical limitations of Higher Education markets: Should these limits transform the antitrust agenda in the US Higher Education sector?’ My research in the US will also lead to a book manuscript on the
application of antitrust law in the US and UK Higher education and healthcare sectors. This work, which will be the result of my doctoral and postdoctoral research both in Europe and in the US, will inform the antitrust authorities on both sides of the Atlantic on how they can apply antitrust law in these sectors so that the wider social objectives these sectors pursue, such as access and equity, are ensured. My goal is to complete this work by the end of December 2018.