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Transformation of Antitrust Law to All-Purpose Cure for Socio-Economic Woes Would Backfire

by Glenn G. Lammi

So much for a summertime lull in Washington, DC.

A congressional hearing last week reflects that the crusade to weaponize antitrust law takes no vacations. While "tech companies" may be Hipster Antitrust's current target, the policy revolution its acolytes seek would lay waste to a broad set of legal principles that benefit consumers and provide a reliable roadmap for free-enterprise conduct.

For the last several years, a select few legal scholars and special-interest organizations have been complaining that antitrust law predicated on consumer welfare cannot prevent or remedy the many supposed societal harms caused by big businesses. Ideas that were once considered mere curiosities now appear in presidential candidates' platforms, inspire state regulators and private plaintiffs, and offer comfort to competition regulators overseas who have long argued their antitrust approach is superior.

The Hipster Antitrust movement would replace 50 years of antitrust enforcement based on rigorous analysis of price and other static economic factors with an amorphous, pliable public-interest standard. That standard would allow competition regulators to consider and address such social-policy concerns as income inequality, job loss, worker displacement, and financial harm to competitors and suppliers. Under this approach, the appearance of monopoly due merely to a business's size or an industry's concentration—one Cato Institute scholar termed it "psychological monopoly"—would justify severe financial or conduct remedies, or even government-ordered breakups.

As elected officials and other policymakers contemplate this newfangled approach to antitrust, including at a Senate Judiciary Committee oversight hearing on July 24, they must keep two things in mind. First, there is nothing new about Hipster Antitrust. It is merely the resurrection of an old, discredited enforcement method. Second, instead of advancing the public interest, Hipster Antitrust will facilitate anti-consumer rent seeking and political cronyism by a select few entities, individual, and politicians.

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Nothing New

Rather than advance consumer welfare, American antitrust law from the late 19th century and well into the 20th century existed, as the U.S. Supreme Court put it, to protect "small dealers and worthy men." Regulators and judges empowered inefficient competitors by fixating on market leaders' size. Judge Learned Hand wrote in 1945 that "great industrial consolidations are inherently undesirable, regardless of their economic results." Sound familiar?

Examples abound of antitrust enforcement, unmoored from neutral principles and economics, harming consumers. In a 2018 research paper, Former Federal Trade Commission (FTC) Chairman Timothy Muris and Sidley Austin LLP's Jonathan Nuechterlein point to regulators' and legislators' destruction of grocer A&P . Much like the maligned online platforms of today, A&P profoundly disrupted and reshaped the retail sector, lowering prices by, among other strategies, building its own distribution network to bypass middlemen and producing its own food products. A&P was also very adept at using data to increase consumer value.

Unable to keep up or adjust, smaller grocers and wholesalers lobbied Congress, which in 1936 passed the Wholesale Grocers Protection Act, better known as the Robinson-Patman Act. The law prevented A&P and other similar chain retailers from purchasing goods at lower wholesale prices, increasing costs that consumers ultimately bore through higher prices.

In 1944, the Justice Department successfully prosecuted A&P for Sherman Act violations. Trial and appellate courts upheld the jury's decision. Those courts' opinions, "Viewed from the perspective of contemporary antitrust theory," Muris and Nuechterlein wrote, "are a bracing comedy of economic errors." The conviction accelerated A&P's slow decline and sent a chilling message to its retail contemporaries: don't cut costs or get too big.

A June 17, 2019 *Cato Policy Analysis* notes other companies that regulators or competitors once decried as unstoppable monopolists in need of regulation. In addition to A&P, the analysis spotlights Kodak, Microsoft's Internet Explorer, and Myspace. Myspace seemed like such a sure thing that NewsCorp paid $580 million for it in 2005. Calls for antitrust action intensified. By 2009, Facebook had overtaken Myspace.

A June 28, 2019 speech by FTC Commissioner Wilson points to the railroad and airline industries as two additional examples of government intervention gone awry. Ironically, Commissioner Wilson adds, Hipster Antitrust fans frequently mention these industries as government-intervention success stories.

Self Interest, not Public Interest

Not only will Hipster Antitrust fail to improve markets, its preferred approach will increase the authority of the very politicians, individuals, and corporations the movement believes have too much power. In an April 2018 *CPI Antitrust Chronicle* piece, former FTC Commissioner Joshua Wright and attorneys Elyse Dorsey and Jan Rybnicek explain that vague standards increase government actors' discretion. Those actors, public choice theory posits, will use that power in a self-interested way. Regulators will pursue whatever action increases their agency's budget, power, and notoriety. Enforcement action can lead to restrictive, unpredictable rules that regulators, once they leave government for the private sector, are uniquely well equipped to help businesses navigate.

Private actors, such as plaintiffs' lawyers, activists, or competitors, will play to antitrust regulators' self-interest by choosing whichever public-interest antitrust factor elicits the most sympathy. Competitors have much to gain from this rent-seeking. By investing in targeted lobbying, competitors can burden market rivals with years of litigation and compliance costs. Competition in turn suffers when businesses don't compete vigorously, and consumers consequently pay more for fewer choices. Vague standards also empower politicians to lean on antitrust regulators on behalf of constituents or campaign contributors. How are those outcomes in the public interest?

Perilous Path

No body of laws or regulatory standards in the U.S. are above intellectual scrutiny and improvement. A small number of Hipster Antitrust proponents have inspired a great deal of antitrust soul-searching, which perhaps could lead to some productive adjustments. But a wholesale replacement of the consumer welfare standard and its neutral principles with an amorphous public-interest standard is a radical, perilous path that our government should not follow.

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