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Antitrust Law Must Remain Focused on Promoting Competition and Enhancing Consumer Welfare

by Maureen K. Ohlhausen

Concerns over a perceived lack of competition in some sectors have led to calls for sweeping new legislation, which would, among other things, focus on size of entities rather than the competitive impacts of transactions or market behavior, introduce restrictions on companies' ability to adjust to market changes, and impose broad obligations to provide access to infrastructure and services to rivals. Other proposals would impose extensive new duties on antitrust enforcement agencies and introduce ongoing uncertainty in previously approved transactions. When considering legislative changes, it is crucial to consider the purpose of antitrust law and that body of law's long record of successfully promoting competition and enhancing consumer welfare.

Competition is a critical driver of economic growth and thus it is important to understand what current antitrust law can achieve. Although we may sometimes think of an antitrust offense in terms of anticompetitive effects, an antitrust offense is better understood in terms of the alleged conduct's impact on the "competitive process" through which a firm makes its decisions on price, quality, and the need to innovate, among other terms. Antitrust law is not designed for, nor intended to, correct a "problem" in the market wholly divorced from its impact on the competitive process. In other words, concerns over fairness, consumer privacy, or the protection of small business should be addressed by regulatory actions or consumer protection laws, not antitrust.[1] Using antitrust law to address non-competition factors, which may diminish competition or conflict with each other, reduces certainty and increases the risk of antitrust being used for industrial policy or political purposes.

This definition of antitrust closely aligns with the core premise of the Sherman Act, which is the belief that a market economy, free of private restraints and unnecessarily burdensome regulations, produces superior outcomes over time. This interpretation comports with the Supreme Court's long-espoused view.[2]

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[1] *See* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 Antitrust L.J. 121, 152-53 (2015), https://www.competitionpolicyinternational.com/competition-consumer-protection-and-the-right-approach-to-privacy/ ("[T]he application of competition law is appropriate only where the potential harm is grounded in the actual or potential diminution of economic efficiency. If there is likely no efficiency loss because of the conduct or transaction, another legal avenue for enforcement is more appropriate and efficient. Second, the scope of the potential harm also should aid in the choice of law. Antitrust laws are focused on broader, macroeconomic harms, mainly the maintenance of efficient price discovery in the markets, whereas the consumer protection laws are preoccupied with ensuring the integrity of each specific contractual bargain. These are complementary, but discrete, enforcement goals. Third, and finally, the available remedies must be able to address effectively the potential harm. Enjoining a merger may do little to prevent a privacy violation if the parties can simply share the same consumer information under a contractual arrangement.").

[2] *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (embracing the "assumption that competition is the best method of allocating resources in a free market").

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Antitrust is intended to protect the market *process*, not ensure a particular market *outcome* at a particular time. Our free market system rests on the conclusion that markets in which firms must endure competitive pressures will produce favorable outcomes in terms of price, output, quality, and innovation in the long run. Enforcers should only intervene when there is evidence that firms are corrupting or are likely to corrupt the competitive process through means other than competition on the merits. We should proceed cautiously and reflect very carefully before asking enforcers to go beyond this well-established mission of antitrust.

The Council of Economic Advisors' recently released annual report largely echoes that sentiment. The Report, which offers a detailed examination of the state of competition and current antitrust law's ability to promote and safeguard it, states that "major policy initiatives to completely rewrite antitrust rules . . . are premature."[3] In reaching this conclusion, the Report finds that such proposals are "likely to impose significant costs" and are based on flawed research.[4]

The Report analyzes several recent studies, including an influential 2016 policy brief issued by the previous administration's Council of Economic Advisers. It concludes that many of these studies rest on the flawed assumption that "if undesirable outcomes—such as higher prices, profits, and markups—are correlated with concentration, then the cause of these outcomes" must be weaker competition.[5] That assumption fails to take into consideration other explanations that may nonetheless be consistent with "procompetitive behavior by firms."[6]

The Report concludes that though competition plays a vital role in economic growth and needs to be safeguarded, the best available evidence simply does not support the current push for antitrust reform. If the antitrust rules are to be rewritten in the future, those efforts "should be based on studies of properly defined markets, together with conceptual and empirical methods and data that are sufficient to distinguish between alternative explanations for rising concentration and markups."[7]

By focusing on the competitive process, current antitrust law can still address many of the concerns raised by today's commentators. As long as there is sufficient factual and economic evidence of a cognizable competitive harm, antitrust law can prevent and remediate price effects, reductions in quality, impacts on innovation, and so-called "killer acquisitions" of nascent competitors.

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[3] Economic Report of the President: Together with The Annual Report of the Council of Economic Advisors, at 202 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf [hereinafter "Report"].

[4] *Id.*

[5] *Id.* at 211. Starting in 2016, some journalists and others observed industry census data; noted that concentration across certain broad industry classifications like retail, transportation, finance, and utilities had risen; and saw that firms' returns on invested capital had increased. From this information, they inferred that monopoly power was rising and called for stricter antitrust enforcement. However, industry classifications identified by the Census Bureau are not antitrust markets and shifting trends in concentration do not necessarily reflect lost competition. Some markets have diminishing long-run average-cost curves, while others produce dominant firms or oligopolies due to superior efficiency or innovation. The arguments about increased concentration overlooked those critical nuances, as well as other key factors. *See* Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition*?, 1 Criterion J. on Innovation 47 (2016). Other scholars also observed these shortcomings. *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714-48 (2018); Gregory Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (2018), SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912##.

[6] Report, *supra* note 3, at 211-12 (alternative procompetitive explanations include fixed costs, scale economies, and globalization).

[7] *Id.* at 215.

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