

The Fight Over Antitrust's Soul

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The progressive, anti-monopoly, New Brandeis School of antitrust is making the news. Its rise follows mounting evidence indicating greater concentration, greater profits in the hands of fewer firms, and greater wealth inequality world-wide. Driven by concerns as to the competitive dynamic (or lack of it) in many markets, it advocates for more intervention. Signs of this trend are evident across the board. More antitrust enforcers and courts are emphasizing fairness. Liberals and conservatives are increasingly warning that consumers are not benefitting from the (meager) competition in many markets. Their concern is that the current state of competition law (and crony capitalism) benefits the select few at the expense of nearly everyone else. Even the laissez faire “Chicago School” ideology has lost some of its appeal, most notably at the University of Chicago. Furthermore, legislation in the U.S. is being proposed to restore the Clayton Act to its original purpose.

Against this wave, others, in advocating antitrust's purity, warn of an overly inclusive approach to competition law. Ironically, this claim sometimes arises in conferences sponsored by monopolies, and at times by speakers whose work is funded directly or indirectly by these same monopolies. In arguing for a “pure” antitrust, they endorse, outside of cartels, a “light” touch enforcement, if any. They warn about enforcement chilling pro-competitive behavior, and undermining the market's ability to self-correct. They are content with the lack of antitrust enforcement against monopolies in the U.S., critical of enforcement actions in the EU, unconcerned about the trend toward concentration, and reject fairness or distribution concerns as part of competition policy.

The debate has intensified with the rise of virtual competition. On the one hand, non-interventionists state that the threat of disruptive innovation pressures even dominant firms to innovate and compete. This, they argue, justifies the light, if any, touch. Others, on the other hand, warn of the increased concentration and rise of gatekeepers, which benefit from network effects, and access to big data and big analytics. While monopolies of the past might subject us to higher prices and poorer quality products, abuses by today's super-platforms will affect not only our wallets. They can affect the news and entertainment we receive and ultimately, our privacy, well-being, and democracy.

So what is going on here?

One may attribute the increasingly polarizing debate to an ideological divide: between those who believe markets necessarily self-correct and those who believe intervention is necessary to safeguard long-term innovation and prevent the abuse of market power. Increasing the friction are other divisions: Between

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those who believe that the rising economic consolidation is yielding significant efficiencies and those warning about the detrimental effects that economic consolidation has on the person, the family, the community, and society; between those who believe that what is easily measurable, largely counts, and those, like economist F.A. Hayek, who dismiss the notion that only what is countable primarily counts (especially when many goods and services today are ostensibly free, and where our data and privacy are the cost).

Ultimately the divide is over the soul of antitrust: Is antitrust solely about promoting some form of economic efficiency (or as cynics argue, the interests of the powerful who hide behind a narrow utilitarian approach) or the welfare of the powerless (the majority of citizens who feel increasingly disenfranchised by big government and big business)?

Not surprisingly, with so much profit (and power) at stake, corporate interests are fueling the debate. Some who favour a narrow technocratic antitrust policy – including some dominant firms, their investment bankers, and their legal and economic experts - want to keep the M&A pipeline open and minimize the relevance of ex-post intervention. For them competition policy has evolved to its optimal point. Some who favour more intervention do so selectively when it promotes their commercial interest: Encouraging a particular enforcement action which may help improve their (or their client's) market position and profitability, but not society overall.

In an environment so captured, those in search of purity should look elsewhere.

The reality is that 'competition law' has never been, nor will it ever be, pure from normative political, social and economic values. Ultimately it comes down to the values we want to promote and our belief in how competition works.

Granted, antitrust cannot cure every ailment. A consensus exists that competition law cannot be all things to all people. Indeed, other vehicles, such as data protection law, may better remedy some of today's concerns. And yet, competition law cannot be Orwellian -- sanctioning anticompetitive agreements, monopolistic abuses, and greater consolidation in already concentrated markets, all for the sake of promoting a vague "consumer welfare" objective.

Also counselling against antitrust's "purity" is that its objectives and legal standards often reflect trade-offs. For example, a society may sacrifice some efficiency in media markets to promote a vibrant marketplace of ideas. So, antitrust law does not exist as a Platonic ideal out there for us to find. Rather it is for us to design. As we design, we must return to antitrust's core values: what do we, as a society, want to promote?

What South Africa, the EU, the U.S., and other jurisdictions seek to promote may differ at the margins. Calling one country's antitrust goals impure hardly advances the debate. While differences may exist at the margin, ultimately, competition law worldwide can advance several common political, social and economic goals. One would hope that our common optimal goal will be to

promote our welfare in an economy that is inclusive (i.e., benefits many citizens, not just the wealthiest 1 percent), protects the privacy interests of its citizens, promotes overall well-being, and promotes a healthy democracy.