

The Goals of Antitrust Policy—Reading

Should the purpose of antitrust law be solely to promote competition leading to superior market performance?

1 Using its powers under the Commerce Clause, Congress passed the Sherman Anti-Trust
2 Act of 1890. The Act prohibited any contract, combination in the form of trust or otherwise, or
3 conspiracy, in restraint of trade or commerce among the several States. It also prohibited
4 monopolization or attempts at monopolizing any aspect of interstate trade or commerce.

5 Congress passed the Sherman Act for important economic reasons. Through monopolies,
6 large companies could absorb their smaller competitors and dominate a market. As Senator John
7 Sherman said,” Senator John Sherman: “If we will not endure a king as a political power, we
8 should not endure a king over the production, transportation, and sale of any of the necessities of
9 life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with
10 power to prevent competition and to fix the price of any commodity.”

11 Congress also had important social and political reasons for passing the Act. The wealth
12 of trusts gave them tremendous political power. Because of their size, wealth, and influence, they
13 could block any legislation they chose. Trusts had the power to shape society and do as they
14 wished. Senator George Hoar called monopolies “a menace to republican institutions
15 themselves.” As Senator Sherman put it, the Act was “a bill of rights [and] a charter of liberty.”

16 After initial resistance, the U.S. Supreme Court accepted that Congress had the power to
17 fight monopolies. Regulators and the courts then faced another problem: How to determine that
18 companies were violating the Act?

19 For many decades, courts followed a general rule that “a market dominated by a very
20 small number of large companies is likely to be less competitive than a market populated with
21 many small- and medium-sized companies” because large companies can use their monopoly

22 powers to fix prices and divide the market or to block new entrants into the market. With the
23 goal of competitive markets, courts stopped horizontal and vertical mergers of companies that
24 might threaten a competitive market.

25 In the 1970s, a new theory arose about how Congress should regulate trusts and
26 monopolies. The essence of this approach, dubbed the Chicago School, was to measure
27 competition based on consumer prices: as long as a merger or monopoly did not affect the price
28 of a product or a service, then it could continue to do business. The Chicago School argued that
29 the only legitimate goal of antitrust is consumer welfare, best promoted through enhancing
30 economic efficiency.

31 A leading advocate of this approach was Robert Bork. He argued that efficiency was the
32 only social goal that antitrust law is well-suited to promote. Adding other goals to antitrust was
33 ineffective and counterproductive. When antitrust addressed these other goals, Bork argued, it
34 often resulted in the paradox of protecting certain competitors rather than protecting competition
35 itself. “The real danger for the law,” wrote Bork, “is less that predation will be missed than that
36 normal competitive behavior will be wrongly classified as predatory and suppressed.” The
37 Chicago School came to oppose antitrust decisions based on anything else except economic
38 goals as measured by market performance. In recent decades, the Supreme Court has accepted
39 this approach, and it remains the dominant antitrust framework today.

40 Under this framework, Google, Facebook, Amazon, and other giants have emerged to
41 dominate the marketplace. In response, many people are asking whether antitrust law should
42 exclusively focus solely on whether the exercise of market power diminishes market
43 competitiveness. Some suggest that it also should focus on fairness, the independence of small
44 business, and other goals. The debate about a competitive marketplace continues.

Goals of Antitrust Policy: Arguments

Superior Market Performance: Supporters

- The current system provides the law with objective measurable outcomes and effects. Market performance keeps courts and regulators focused on what actually matters -- what Bork called consumer welfare. Objective economic analysis enables the law to promote more efficient markets centered on the consumer. The older approach involved making subjective decisions based on unmeasurable social goals. The current approach, they argue, focuses only on actual economic harms to specific economic interests.
- The current system argue that their system keeps the market competitive. When the federal government brought suit against Microsoft in 1998 for monopoly practices, Robert Bork himself sided with the government. At the time, Microsoft software came preinstalled on more than 90% of personal computers: its operating system, Windows, and its browser, Internet Explorer (IE). But Microsoft was worried about another browser created by Netscape and the threat it posed to Microsoft's continued monopoly in the operating system market. Microsoft "bundled" Windows and IE and forced buyers to take both in one package. Microsoft also priced the browser at zero and thus below cost. Based on current antitrust law, Bork argued that Microsoft was engaged in "deliberate predation" designed to drive Netscape from the market. The government successfully proved Microsoft's clear intention to choke off Netscape and forced Microsoft to decouple its browser from its operating system. In short, the system worked.
- Supporters of the current system argue that market performance offers the best framework for maintaining competition. It keeps the courts from picking "winners and losers" by deciding in favor or against certain companies based on non-economic factors. Market performance makes sense because companies in the market act in a rational way: they exist to earn a profit. Any company that fails to act rationally will be punished by the competitive forces of the market. Deciding winners and losers is the job of the marketplace, not the courts.

Goals of Antitrust Policy: Arguments

Superior Market Performance: Opponents

- The current system is not, in fact, effective at protecting consumers. It has allowed concentrations of power that may block true competition. Amazon, for example, was designed to establish scale and dominance in the market first and to generate profits later. The current system fails because it allows companies to gain and store market power until they reach a threshold when it is more difficult to check that power once it is unleashed. As Federal Trade Commission Chair Lina Khan argues, “The fact that Amazon has been willing to forego profits for growth undercuts a central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth. In this way, Amazon’s strategy has enabled it to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws.”
- The current system is neutral only because it relies on a very narrow set of economic measures. By focusing solely on consumer welfare, and over-focusing on the price of goods, the current system fails to promote other important consumer interests. When there is only one distributor or manufacturer, it is hard to assess the loss in product quality, variety, and innovation. Opponents believe that ensuring a competitive market requires attention to more than just the price of a good or service to consumers.
- There is value in what the current system dismisses. Congress passed antitrust laws to promote a host of political economic ends—including the interests of workers, producers, entrepreneurs, and citizens. It was concerned with how markets function and whether power was sufficiently distributed to keep them competitive. By contrast, market performance simply relies on whether consumers are materially better off. Opponents see a competitive market, where no company has outsized economic or political influence, as essential to protecting democratic government: no one entity should be able to write its own laws.

Goals of Antitrust Policy: Sources

Note

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