

EXECUTIVE SUMMARY

Principles of Dynamic Antitrust: Competing Through Innovation

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OVERVIEW

It is time for a new approach to antitrust—one that is not grounded in the populist, neo-Brandeisian ideology that seeks to overturn antitrust’s focus on economic welfare and create an economy populated by small firms. It is time to modify the long-standing approach to competition policy that, despite prevailing over the last century, does not give adequate attention to technological innovation and dynamic effects. The increasing importance and breadth of innovation indicate the need for innovation-based antitrust. It is time to expand the principles of “dynamic” or “innovation-based” antitrust in order to reform antitrust.

Innovation, for too long, has been an antitrust paradox. Antitrust scholars and enforcers agree that innovation is vital to antitrust enforcement, yet innovation remains antitrust’s missing principle. Static models have, historically, corseted antitrust enforcement. Both Chicagoans and the emerging Neo-Brandeisians keep textbooks’ ideal of perfect competition as their North Star. Yet, in innovation-driven industries, perfect competition is not only unfeasible but also undesirable. It is a dystopia wherein entrepreneurs cannot invest or innovate. Perfect competition is the enemy of good competition and innovation. Imperfect competition is the source of innovation that thus enhances competition.

To be sure, the Neo-Brandeisians are wrong to seek to overturn the consumer welfare standard, as its associated efficiency analysis constitutes incommensurable improvements to antitrust enforcement. But further improvements to it are required. In particular, antitrust laws and policies require reforms toward innovation-based antitrust wherein market dynamics, including potential competition from innovation, are better integrated into the antitrust analysis.

THE NEED FOR DYNAMIC ANTITRUST

Innovation, and the dynamic changes it brings, is the principal engine of human progress. A principal goal of antitrust should not necessarily be to maximize competition, but rather to maximize innovation. Dynamic competition should be pursued by antitrust enforcement as an evolutionary process inherent to market-based economies. In this evolutionary process, innovation enables competition, and the right level of competition, in turn, provides the basis for further innovation. Antitrust policy has traditionally viewed increased competition, rather than optimal competition, as a critical determinant of innovation. Moreover, it has given less attention to the most fundamental causal relationship of innovation driving competition.

Innovation-based antitrust sets innovation as the paramount objective of antitrust enforcement. It must avoid stifling innovation and ensure that antitrust interventions only occur when innovation incentives are not unduly distorted. The objectives of dynamic antitrust as an innovation-based competition policy must be the short-term absence of consumer harm and long-term preservation of innovation incentives. To attain this dual objective inherent to dynamic antitrust, three sets of principles are necessary. First, enforcement principles put dynamic antitrust into practice. Second, institutional principles ensure that the institutional framework allows for dynamic antitrust. Third and finally, international principles preserve dynamic antitrust domestically, and innovation globally.

IMPLICATIONS OF DYNAMIC ANTITRUST

Enforcement Principles

Dynamic antitrust endorses a Schumpeterian view of competition, revolving around four enforcement principles. First, traditional antitrust enforcement tools exaggerate the role of market structure. Market-definition rules need to be replaced with market studies that reflect the nuances of, and dynamic forces in, a particular market. Antitrust enforcement must better adhere to the rule of law—namely, greater legal certainty and preservation of the role of the courts. The rule of reason needs to be generalized, and evidentiary standards must remain principled. Second, antitrust enforcement should dedicate itself more to its primary and original intent—namely, acting as a tool aimed to preclude cartelization and conspiracies. Third, greater scrutiny of horizontal mergers is called for to prevent undue monopolization at the expense of innovation. Fourth, certain conduct performed unilaterally often generate efficiencies and may lead to innovative responses or constraints from competitors. Exclusionary conduct needs to be assessed in light of the “as-efficient” test—namely, less-efficient rivals cannot seek antitrust protection in order to stifle competition, and thereby innovation.

Institutional Principles

Dynamic antitrust encompasses three institutional principles. First, antitrust enforcement should avoid political meddling—something we see all too often today. The individual desires of elected officials should have no influence on antitrust authorities, nor should politicians interfere with antitrust agendas or investigations. Second, dynamic antitrust should foster the administrative independence of the antitrust authority. Antitrust enforcers must have all the legal power necessary for their functions to be performed in the most effective way without abridging their administrative abilities. Third, dynamic antitrust would minimize antitrust enforcers’ confirmation bias in the organization of the administration. The investigative stage and the adjudicative stage should be thoroughly checked and reviewed by individuals who have no particular interest in confirming earlier decisions. With a solid and clear separation between two teams responsible for each stage of analysis, antitrust enforcement’s confirmation bias may be minimized.

International Principles

Antitrust enforcement has primarily remained both static and domestic. Despite the increasing face of global competition, competition rules have evolved absent substantial international cooperation.

With dynamic antitrust, antitrust authorities need to work more closely together, including sharing more information based on mutual commitments. These commitments can either be soft-

law instruments (e.g., a memorandum of understanding) or legally binding rules included in international conventions.

Domestic antitrust policies are too often weaponized such that they harm the competitive position of a nation's business competitors, with global trade and innovation the victim. Dynamic antitrust means ensuring antitrust is an integral part of global trade enforcement, with fairer and clearer competition rules. The World Trade Organization (WTO) needs to reactivate its Working Group on the Interaction between Trade and Competition Policy (WGTCP). The WGTCP needs to establish legally enforceable principles and rules that minimize distortions to competition for mercantilist purposes and maximize competition on the merits.

Moreover, dynamic antitrust enforcement across American and European markets implies antitrust partnerships must be built on procedural and substantive grounds. The procedural grounds cover enforcement mechanisms, while substantive grounds cover the need to endorse a dynamic view of competition.

CONCLUSION

Antitrust enforcement needs to move beyond static competition and endorse dynamic competition. Antitrust enforcers systematically need to recognize that too much competition can hinder innovation. Innovation can be a key source of competition, not merely the unexpected and underestimated result of competition. Consequently, antitrust enforcement and institutional principles must be revamped based on a more realistic, less formalized model. By adopting a Schumpeterian perspective, principles of dynamic antitrust would improve antitrust enforcement by emphasizing the innovation incentives of antitrust interventions and focusing on innovation as a crucial element through which competition analysis must occur.

Dynamic antitrust is an enforcement path based on creativity, level of innovation, disruption, and evolution. It is the path of creative destruction. Should we want to foster change, progress, and prosperity, it is the only path forward. Should we prefer to apply theoretical frameworks to unsettling facts and draw hasty conclusions at the expense of long-term growth that lead to consumer harm, prevailing static models are suited.

Dynamic antitrust provides a beneficial path for consumers, meritorious companies, and the rate of innovation itself—away from today's antitrust dead end. Dynamic antitrust ensures that capitalist society is better able to preserve its ability to generate shared prosperity and collective progress.

About the Author

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