Antitrust Advocacy

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Numerous consumer groups have used antitrust laws to advocate for greater competition and consumer choice in the marketplace. These advocates have operated under the assumption that competition provides three important benefits to consumers – a competitive price, choice of whom to deal with and under what terms, and an innovative economy. This article describes longstanding antitrust protections, conservative challenges to these protections, and twenty-first century consumer activism based on the traditional protections.

Antitrust Protections

The history of antitrust at the federal level commenced with passage of the Sherman Act in 1980, although several states had enacted antitrust laws earlier. In 1914, two additional federal laws were passed – the Clayton Act and the Federal Trade Commission (FTC) Act. While there have been amendments, the basic framework they established has not changed since 1914. Private causes of action for anti-competitive harms are not only permitted, but are encouraged by the statutory trebling of damages and award of attorneys' fees. As a result, an estimated nine out of ten antitrust cases are private.

The Sherman Act has two key sections. Section 1 proscribes agreements in restraint of trade. The collective activity that is central to this provision can be between two or more competing sellers or buyers (horizontal) or a seller and purchaser (vertical).

In a landmark ruling in 1911, the U.S. Supreme Court held that Section 1 prohibited only restraints of trade that unreasonably restrict competition. Over the years, the concept of reasonableness has been analyzed in two ways: some restraints are per se unreasonable, and others are subject to the so-called Rule of Reason. The former are restraints (such as horizontal price-fixing, bid-rigging, or the division of customers of markets among competitors) that are considered inherently anti-competitive and do not require an elaborate examination of market context or effects.

For restraints that are not per se illegal, a detailed market study is necessary to decide whether the conduct is, on the whole, pro-competitive or anti-competitive. In recent years, the Rule of Reason, which has tended to favor defendants, has been applied to more forms of business conduct. The precise boundary between per se and Rule of Reason cases is often unclear.

Section 2 of the Sherman Act prohibits obtaining or preserving a monopoly by anti-competitive methods (monopolization). It does not consider great size or market share alone to be illegal.

The Sherman Act can be enforced as a civil law or as a criminal law, a judgment left to the Antitrust Division of the Department of Justice (DOJ). Typically, criminal prosecution is directed at the worst per se violations, primarily price fixing, bid rigging, and naked divisions of territories or customers. In recent years, corporations have often been fined large penalties, and individuals have been sent to prison, with increasing frequency.

The early enforcement of the Sherman Act revealed weaknesses that were addressed in legislation in 1914. The Clayton Act outlaws specific types of conduct, such as tying arrangements, exclusive dealing, and anti-competitive mergers. Section 7 of this act is the principal tool for prohibiting anti-competitive concentrations related to mergers, acquisitions, and joint ventures.

Under the 1976 Hart-Scott-Rodino Act, mergers and acquisitions that exceed certain size thresholds must be reported to the DOJ and FTC in advance. The Robinson-Patman Act amended the Clayton Act in 1936 and prohibits price discrimination. Rarely enforced by federal agencies, it is, however, the basis for much private litigation.

In 1914, Congress also passed the Federal Trade Commission Act, which established the FTC as an independent regulatory agency. Section 5 of this act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." Each state has its own antitrust and consumer protection laws, often referred to as "Little FTC" or "Little Sherman" acts. In general, they are similar to federal law.

The FTC and DOJ's Antitrust Division have a similar antitrust jurisdiction. The FTC has no criminal jurisdiction but typically plays a larger role than DOJ in the issuance of reports and development of long-range policy. Whereas DOJ proceeds through the federal district courts, the FTC usually uses an administrative process. However, when it opposes a merger, the FTC also usually seeks an injunction in federal district courts.

As noted above, U.S. antitrust statutes encourage private enforcement. Private plaintiffs, who can recover reasonable attorneys' fees, are able to sue for treble damages and injunctions to remedy federal antitrust violations. They may use judgments or decrees entered against a defendant in a government antitrust suit as "prima facia evidence" against the defendant. Court-imposed restrictions on compensable injuries and limits on standing and recovers by indirect purchases have, to some extent, offset the statutory encouragements.

Attorneys for antitrust plaintiffs often are compensated on contingency, as a percentage of the recovery. Since many harms suffered by individual consumers are not large enough to justify expensive antitrust suits, consumers are usually represented in class actions. Where consumers are indirect purchasers from the violator – e.g., the manufacturers collude to raise prices to the retailers who resell to consumers – they do not have standing in the federal courts under the Supreme Court's Illinois Brick opinion. However, many states have adopted Illinois Brick repealer statutes, which permit indirect purchaser class actions in states in which about half the U.S. population reside.

Conservative Redefinition of Antitrust

There is general agreement that the principal ultimate goal of antitrust laws and enforcement is the advancement of "consumer welfare." But this term has two very different meanings. Most people, and all consumer advocates, would define this welfare in terms of protection from unnecessarily high prices, the commercial peonage that results from the absence of choices, and economic stagnation. Yet, in the 1970s, conservative scholars, associated notably with the University of Chicago, defined consumer welfare in terms of maximizing economic output. These conservatives believed that: large corporate size is probably necessary for efficiency; high levels of concentration are not as important as competitive effects; anti-competitive effects are usually found only when horizontal collusion occurs; markets rarely fail but government interference in markets often has anti-competitive side effects; and government regulation, including antitrust enforcement, is more likely to worsen than improve conditions.

These political and economic views were adopted by the Reagan Administration, which substantially reduced antitrust enforcement budgets and appointed judges skeptical of antitrust. As a result, it became increasingly difficult for either the government or private plaintiffs to win cases. Predatory pricing was less likely to be treated as an illegal practice. The "essential facility" doctrine, that under some conditions required a monopolist to share certain assets with rivals, was undermined. And defendants found it easier to defend against antitrust challenges because of new procedural impediments.

In retrospect, it is evident that some decisions and doctrines in the 1960s and 1970s, which were rejected in the 1980s, promoted inefficiencies to the detriment of consumers. Moreover, the Reagan Administration did bring cases against horizontal collusion, specifically price-fixing and similar anti-consumer practices. The breakup of AT&T, accomplished by Reagan's Antitrust Division, unleashed pro-consumer innovation. However, this deregulation also reduced government oversight without replacing it with aggressive antitrust; markets were allowed to become more concentrated; merger enforcement was reduced; monopolization was rarely challenged; and vertical restraints – such as resale price maintenance – were considered to promote efficiency.

During the 1990s, the Clinton Administration practiced more traditional antitrust enforcement. For example, it brought a landmark case against Microsoft for monopolization of Internet browsers and another case against American Airlines for predatory pricing against budget rivals. The Bush Administration scaled back enforcement against mergers and monopolization and applied a weak remedy in the Microsoft case. The Obama Administration revived merger enforcement, for example, by dismantling a huge international cartel of auto parts. However, today federal enforcers are unwilling to challenge many problematic mergers and dominant firms, many judges hold conservative views of antitrust, and conservatives and business relentlessly attack class actions.

Consumer Advocacy

Until relatively recently, there was no consumer advocacy group focused exclusively on antitrust issues. Most multi-issue and single-issue consumer groups did, from time to time, make an antitrust issue a high priority. But this issue was usually only one of a number of priority issues they addressed. That is evident from a brief review of the recent work of some of the most active national organizations. This work included urging Congress or federal agencies to act, initiating lawsuits, and filing supporting amicus briefs in other lawsuits. For example, in 2012 Public Citizen filed an amicus brief asking for the ability to participate in a lawsuit that expanded antitrust immunity protecting business. In 2013, Consumers Union urged DOJ to require important concessions before approving the merger of American Airlines and US Airways. In 2010, the National Consumers League and other groups urged DOJ to block a merger between Ticketmaster and Live Nation. In 2012, Food & Water Watch protested the merger of Conagra and Ralcorp and, in 2014, objected to the merger of Sysco and US Foods. Especially during the past decade, both the Consumer Federation of America and Public Knowledge worked together against increasing media concentration, actively opposing mergers between Universal Music Group and EMI, and between Comcast and Time Warner.

In 1998, however, Albert Foer created the American Antitrust Institute to promote competition, ensure that this competition serves consumers, and challenge abuses of concentrated economic power. After earning a law degree from the University of Chicago, Foer worked for a large firm before joining the FTC's Bureau of Competition, where he dealt with antitrust issues for six years. Years later, after time helping run the family jewelry business, he was encouraged by Ralph Nader to organize a new consumer group focused on antitrust issues. First with funding from businesses trying to protect themselves from anti-competitive practices, then increasingly with court cy pres awards, Foer built an organization with a budget of just under $1 million, several staff, and more than 100 competition-policy experts around the world.

Led by Foer, these staff and experts submitted amicus briefs in legal cases, published papers and book-length analyses of antitrust issues, and hosted symposiums on many antitrust topics. In the course of a typical year, AAI works on about two dozen separate antitrust issues, often with another consumer group. One of its most successful interventions was helping persuade the Obama Administration to vigorously oppose AT&T's attempt to purchase T-Mobile USA, which the two companies abandoned. The work of AAI has continued until the present. In late 2013, Foer announced that he would retire as president in the coming year. In late 2014, Foer retired as president and was succeeded by Diana Moss, an economist who had worked for AAI since 2000.

-Albert Foer, Stephen Brobeck

Cross References: none

Further Reading

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