

Updates on Antitrust in the USA: Agreement and Single-Firm Conduct Issues

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Today's Agenda

- Modern US Policy Context
- Goals
- Litigation Filters
- Agreement Issues
- Single-Firm Conduct
- Caveat: Personal Views Only

The Great Contemporary Debate About the US Antitrust System

- Four Schools of Thought
 - Leave It Alone (or, at most, minor tweaks)
 - Do Much More with What You Have
 - Do Much More with What You Have and Add New Regulatory Tools
 - “Root and branch” Transformation (Sandeep Vaheesan)

Transformation Proposals

- The “Neo-Brandeisian” Movement
- Critique of Mainstream US Antitrust As It Has Developed Since the Mid-1970s
- Impact to Date
- Prospects for Future Success

Neo-Brandeisians: Two Leading Voices

Barry Lynn, Director, Open Markets Institute



Lina Khan, Columbia Law School and House Antitrust Subcommittee Staff



Critique of US Status Quo: Substance

- “Consumer Welfare” Displaced “Citizen Welfare” as Core Goal of Policy/Doctrine
 - Workers, SMEs, local communities, democracy
- Permissive Rules of Liability Replaced Strict Controls, Especially for Large Firms
- Hopelessly Complex Economics-Based Reasonableness Tests Crowded Out Bright-Line Prohibitions Based on Structural Criteria

Critique of Status Quo: Institutions

- DOJ Antitrust Division and FTC: Said to be Captured by Big Business Interests
 - Revolving door between agencies and private sector imbues agencies with timidity
- Courts Are Controlled by Judges Who Regard Economic Regulation with Severe Skepticism
 - Major source of agency risk aversion: e.g., FTC closing of Google inquiry in January 2013

Critique of the Status Quo: A Professional Racket and Its Main Racketeers

- Law firms: Desire a High Tempo of Agency Activity that Yields Frequent Victories for Defendants
- Economic consultancies which crave activity (hedged with “academic affiliates” who span the philosophical spectrum and enable their firms to serve all clients)
 - Foster acceptance of hopelessly complex (and expensive) analytical techniques for antitrust analysis
- Professional bodies which nurture permissive norms (e.g., “consumer welfare”)
- Journalists and publishers: e.g., *GCR* and its annual ranking of competition agencies (e.g., FTC)
- Academics who take funds from/consult for companies

Neo-Brandeisian Policy Prescriptions

- **Give Primacy to Antitrust's Egalitarian Goals**
- Restore Strict Structural Rules for Abuse of Dominance, Mergers, and Vertical Restraints
- Relax Limits on Cooperation by Small Firms/Gig Workers; cease attacks on occupational licensure
- Reinstate Strong Sectoral Regulation
- Create New Regulatory Tools for Digital Sector
- Clean House at the Enforcement Agencies

Policy Prescriptions: New Agency Leadership

- Absolute Commitment to Egalitarian Vision, Repudiation of Consumer Welfare as Core Aim
- No Contamination
 - Nobody who led DOJ or FTC during Clinton, Bush I, Bush II, Obama, or Trump Administrations – Especially nobody from the Obama era
 - No significant previous engagement as advisor to big business (law firms, economic consultancies) or acceptance of research grants from big tech
 - Naming and shaming of disfavored candidates

Influence to Date

- In General: Substantial and Remarkable
- Specifically
 - Fundamentally changed popular/scholarly discourse on antitrust/competition policy
 - Put defenders of existing mainstream US antitrust doctrine/policy on the back foot
 - Traditionalists still don't know what hit them
 - Catalyzed policy reform moves in Congress

House Judiciary Subcommittee Staff Report (Released Oct. 6, 2020)

- Subcommittee on Antitrust, Commercial, and Administrative Law, House Committee on the Judiciary, MAJORITY STAFF REPORT AND RECOMMENDATIONS: INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020) [449 Pages]

From the Report's Introduction

- “Nearly a century ago, Supreme Court Justice Louis Brandeis wrote, ‘We may have a democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both.’ Those words speak to us with great urgency today.” [Page 7]

From the Report's Recommendations

- “[T]he Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws, by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.” [Page 391]

Report's Proposals

- Exhort Agencies to Do More
- Amend Existing US Antitrust Statutes
 - Expunge disfavored judicial precedents
 - Enhance control of mergers/dominant firms
- Create New Regulatory Mandates/Tools
 - Structural separations
 - New regulatory mechanism (?)

Reasons for Influence: Contentment , Smugness of Mainstream Traditionalists

- Sense of Durable Consensus on Core Values
 - “The end of history”
- Satisfaction with Accomplishments
- Dismissive View of Neo-Brandeisians
 - How could a student law review note ever matter?
 - *Compare* mainstream response to Bork’s *ATP* 1978
- Poor Historical Awareness About Evolution of US System and Its Formative Influences

Reasons for Influence: External Economic Shocks

- Global Financial Crisis: 2008-2010
- COVID-19: 2020-202?
- Consequences
 - Spectacular economic upheaval
 - Distrust of capitalism
 - Rethink of global economic integration
 - Loss of confidence in public administration

Contest in the Biden/Harris Camp

- Who Prevails in Setting Administration Policy and Choosing DOJ/FTC Leadership?
 - Biden as VP and Harris as CA AG and Senator
- Warren/Sanders/Neo-Brandeisians?
- Do More With What You Have (Plus New Tools) Team that Worked in Obama Agencies?
 - Recent Biden/Harris antitrust fundraisers
- Some of Both?

Example: Policy and the House Antitrust Subcommittee Report

- The House Menu
 - Exhorts agencies to bring big cases
 - Proposes major amendments to existing statutes
 - Creates new regulatory frameworks involving platform structure and conduct
- Will Biden/Harris
 - Order the prix fixe menu?
 - Order ala carte? If so, which items? [And wait to see how forthcoming DOJ, FTC, State cases go?]

Example: Consider Two Appointments Candidates

- Terrill McSweeney
 - Former Biden aide
 - FTC Commissioner during Obama administration
 - Now partner at Covington
- Rohit Chopra
 - Currently FTC Commissioner
 - Vocal advocate for expansive FTC programs
 - Former CFPB official
 - Elizabeth Warren protege

A Speculative Legislative Timetable

- Assume: Democrats Control Presidency and Congress (House and Senate)
- Benchmark: Dodd-Frank Took 18 Months
- Strategies
 - Merger policy first?
 - House Subcommittee full agenda?
 - New legislation: Early 2022 at the soonest
 - Lesson: Litigation is tool of change for next 2 years

Judicial Appointments

- Trump Impact: Nearly 25% of Federal Bench
 - Supreme Court: Judge Barrett's nomination and appointment of Justices Gorsuch and Kavanaugh
 - Court Majority with Judge Barrett:
 - Roberts, Alito, Barrett, Gorsuch, Kavanaugh, Thomas:
All regulation skeptics
- A Biden Presidency
 - Judges with greater taste for economic regulation and intervention

Litigation Filters

- Mandatory Arbitration Clauses
 - Upheld in various cases
 - On the House Subcommittee Hit List
- Antitrust Injury
 - *Brunswick* (S. Ct. 1977): On the House Hit List
- Standing: Direct and Indirect Purchasers
 - *Illinois Brick* (S. Ct. 1977)
 - *Apple v. Pepper* (S. Ct. 2020): Erosion of Ban on Standing for Indirect Purchasers?

Modern Agreement Issues

- *American Express* and Two-Sided Platforms
- *Apple* Ebooks
- *Actavis* and Pay for Delay

Basic Framework for Analyzing Agreements

- Rule of Reason: Actual/Likely Competitive Effects
 - Characterization: *BMI* (S.Ct. 1979)
 - Conclusive presumption of illegality: “Per se”
 - Rebuttable presumption of illegality: “Quick Look”
 - Full Rule of Reason
 - Direct evidence of adverse effects
 - Circumstantial evidence of adverse effects
 - Market power and conduct

Credit Card Payment Systems



US v. American Express (S. Ct. 2018)

- Two-Sided Platform
 - Compare: Newspapers
- Relevant Effects
 - Merchant side only?
 - Net of impact on merchants and cardmembers?
- Applicability of “Quick Look” in Vertical Restraints Cases (Footnote 7)

US v. Apple (2d Cir. 2015)

- Amazon's Leading Role in E-Books
- Publishers' Discontent
- Apple's Entry with Ipad
- Commitments: Higher Price, Switch to Consignment Arrangement, MFN
- Court of Appeals
 - Vertical features
 - Entry argument

“Reverse Payments” [“Pay for Delay”]

- Hatch-Waxman
- Branded Incumbents and Generic Entrants
- *FTC v. Actavis* (S. Ct. 2013)
 - Court of Appeals: “Scope of the patent” test
 - S.Ct.: Rule of Reason
 - No presumption of illegality
 - Relevant factor: Size of payment vs. litigation cost
 - Compare: *FTC v. AbbVie* (3d Cir. 2020) (variety of transfers that constitute “payment”)

Emerging Issues: Employment Contracts

- No-Poaching Agreements
 - DOJ Settlement with tech firms
 - DOJ/FTC policy statement
- Non-Compete Agreements
 - Pending private litigation in federal and state courts

Defining Concerted Action

- *Matshushita* (S.Ct. 1985)
- *Twombly* (S.Ct. 2007)
- Both on House Subcommittee Hit List

Dominant Firm Conduct

- Modern Context
 - Predatory pricing: Brooke Group (S.Ct.)
 - Refusals to Deal: Trinko (S.Ct.)
 - Exclusive Dealing: Microsoft (D.C. Cir. 2001)
 - House Subcommittee Hit List: *Brooke Group* and *Trinko*

FTC v. Qualcomm

- FTC Lawsuit
- District Court Ruling for FTC
- Appeal to Ninth Circuit
- DOJ Support for Defendants on Appeal
- Ninth Circuit Reversal for Defendants
- FTC Petition for Rehearing En Banc
- Possible Further Appeal to Supreme Court

Theories of Liability at Trial and On Appeal

- Qualcomm's Licensing Practices
 - Exclusive Dealing
 - Refusal to Deal
- Competitive Injury
- Nature of and Protection for Intellectual Property Rights

What Is Coming and What Is at Stake?

- Future of US Government Litigation
 - DOJ/Google
 - FTC/Facebook
 - See also State Governments
- Impetus for Legislation