Why Antitrust Laws Matter?

The True Purpose of Antitrust Law

The antitrust laws are supposed to promote and protect competition. This alone is their proper purpose. They are not intended to punish big companies merely on account of their size, nor to serve as surrogate "consumer protection" laws. Most importantly, they have never been anti-market or anti-business in their underlying conception or in their implementation. On the contrary, the antitrust laws are intended to promote market economics and healthy competition in every market, while checking the abuses that sometimes arise in different markets.

The idea behind these laws is that in every market there should be robust competition: If in each market there are many sellers busily competing against one another to sell a particular kind of product or service to paying customers, no seller will be able to take unfair advantage of the buyers, but rather each seller will be obliged to offer its good or service on attractive terms, and each will be responsive and efficient in its dealings with buyers, who otherwise will simply turn to another, better seller.

In other words, vigorous competition in any given market keeps the sellers honest, forcing them to strive continually both to improve their goods and services and to offer them on favorable terms. Customers benefit from this competition. Poorly run companies are run out of business, as they deserve to be. The better run companies, and the most honest ones too, tend to prosper. Society as a whole benefits.

This is nothing other than marketplace economics working properly and rewarding each of us for our efforts, our talent, and our perseverance. The antitrust laws exist to help marketplace economics to work better.

The Origins of the Antitrust Law

Antitrust law is the law of competition. Why then is it called "antitrust"? The answer is that these laws were originally established to check the abuses threatened or imposed by the immense "trusts" that emerged in the late 19th Century. These trusts controlled or threatened to control entire nationwide markets for rail transport, steel, petroleum, banking, and related lines of commerce. The antitrust laws were established to ensure that these trusts did not permanently undermine competition in these or other markets.

Anti-Business or Pro-Competition?

The antitrust laws serve to promote and protect market economics, doing so on the theory that society flourishes the most when it is founded on vigorous competition: According to this theory, competition brings forth the best in each of us, keeping each of us on our toes, mindful that if we do not perform well, we will be cast aside for someone else who can perform better. It is a harsh

logic, and it works very well because it rightly understands and anticipates actual human nature and human psychology in action.

To paraphrase Adam Smith, the baker does not ask himself whether you might wish to enjoy some of his excellent bread this evening with your meal. No, he wants you to give him money, and thus he strives to make excellent bread so that you will be persuaded to purchase your bread from him and not from some other baker.

Antitrust laws are meant to ensure that these incentives and the resulting excellence and low prices flourish in every market (save those that by their very nature admit the presence of only one seller). We want to have many bakers competing for your business. If you happen to be a baker, we want you to compete against your rivals for our business. We do not want one baker, or a group of bakers, to destroy competition in their local market so that they can then force the customers to submit to higher prices or less responsive service.

The Besetting Flaw of Market Economics

The antitrust laws exist not to punish or dismantle successful, prosperous companies, even the most dominant global monopolies of the era. These laws instead are meant to redress or temper the fundamental flaw that seems inherent to unbridled competition.

Rather than punish successful firms or proscribe free markets, the antitrust laws seek instead to perfect the markets by "correcting" the inherent contradiction of market economies, which is as follows: In many key markets, one firm or a clutch of major firms often come to dominate the entire market. Once this happens, competition in this market ceases altogether or at best becomes a pale shadow of its former self.

More specifically, the antitrust laws serve to check and redress the improper acquisition and abuse of market dominance. The laws above all forbid the following two kinds of conduct: (1) the use of "anti-competitive measures" to acquire, preserve or enlarge monopoly power in a given market; and (2) conduct jointly undertaken by two or more firms that unfairly suppresses "competition on the merits" in a given market, leading to higher prices, worse service, lack of innovation or loss of choice.

Why these proscriptions? Because the antitrust laws presuppose that unrestrained market competition is the best method of promoting lasting prosperity and wealth for the greatest number. But unrestrained competition, put into practice, often leads to the emergence of stultifying monopolies and oligopolies that take unfair advantage of their customers while hindering innovation and commercial excellence. This is the great and eternal contradiction of market economics, and it is this contradiction that the antitrust laws seek to redress.

What Antitrust Laws Try to Accomplish

Antitrust laws, properly understood, are intended to grapple with this market contradiction. In particular they forbid any improper monopoly or any attempt to obtain a monopoly by improper

means -- that is, a monopoly obtained or attempted by a firm that on purpose has destroyed or tried to destroy its competitors, using anti-competitive tactics whose sole purpose has been to undermine competitor businesses. The antitrust laws also forbid dominant firms to act in collusion in order to impose unfair commercial practices that tend to subvert "competition on the merits" in any market that they dominate or aim to dominate by means of the improper practice. These laws also outlaw specific kinds of recognized commercial fraud that by their very nature are calculated to destroy competition in the market in which they are employed (the most notable offenders are bid-rigging, price-fixing, and horizontal market allocation).

The Charter Principles of Antitrust Law

Broadly speaking, the antitrust laws set forth a series of general propositions that serve as the "charter principles" of marketplace economics in the United States. I think these charter principles and their corollaries can be summarized as follows:

1. Monopolization. It is always improper to acquire monopoly power by means of business practices whose only purpose is to undermine or destroy business rivals. If for example your computer software is so good or so inexpensive that eventually all the customers buy this software only from your firm, then you have won in the marketplace and have obtained a proper monopoly. If however you use business methods that lack a legitimate commercial purpose and that are calculated to crush your rivals, and if by such methods you acquire or perpetuate your monopoly, you have committed an antitrust offense.
2. Attempted Monopolization/Conspiracies to Monopolize. It is also improper to attempt to acquire a monopoly by means of such predatory or anti-competitive business practices. If your intent is clear and there exists a dangerous probability that you will succeed, the conduct is forbidden by the antitrust laws. It is likewise illegal under the antitrust laws improper for two or more firms to conspire so that one of them gains a monopoly in a given market.
3. Restraints of Trade. It is also illegal under the antitrust laws for two or more firms to act in concert to employ commercial practices that subvert "competition on the merits" in a market in which they jointly wield significant power or control. The litany of such abuses is as long as the imagination of the wily managers of the bigger firms in each market. Broadly speaking, it is unlawful for two or more firms, acting in concert, to impose severe restrictions on commerce or business conduct in any market that they control, if by so doing they cause the customers in this market to pay higher prices for the good or service in question. The offending practice can be saved only if it can be shown that (1) it is necessary to the accomplishment of a compelling business purpose, and (2) this business purpose cannot be accomplished by less restrictive measures.
4. Per Se Restraints of Trade. It is always improper for two or more firms to collude set or manipulate prices (price-fixing), nor can they pre-arrange bids at competitive auctions or in response to bid-solicitations (bid-rigging), nor can they allocate among themselves parts of a market by customer, territory or product line (horizontal market allocation), nor can they coordinate horizontal group boycotts (a coordinated refusal to deal with a supplier, distributor or seller carried out by competitors at the same level of distribution), nor in certain cases can they provide a commercially indispensable product

or service only on condition that the buyers also purchase another product or service (unlawful tying). These practices, however ingeniously characterized, are antitrust offenses on their face, but note that unlawful tying claims are not always governed by a per se rule.

5. Other Offenses. There are other, more technical wrongs that likewise constitute antitrust offenses: For example, it is an antitrust offense for two firms to agree to an exclusive supplier or exclusive dealer arrangement, if the arrangement unreasonably harms competition or tends to give rise to a monopoly.
6. Anti-competitive Mergers. It is sometimes improper for two competitors, however honest, to merge or otherwise unite, if by so doing they significantly diminish competition in markets in which they have been competitors. A proposed merger or acquisition, if it is large enough, must therefore usually obtain advance clearance from antitrust authorities, such as the Federal Trade Commission (this is another topic, fit for a book or volumes of books all on its own).

These then are the charter principles of the antitrust laws. They are principally set forth in two federal statutes -- the Sherman Act and the Clayton Act -- and each state has its own statute that incorporates the federal law and applies it to intrastate activities.

How Some Other Countries Approach the Same Issues

The author of this article would argue that "competition authority" in Europe is too inclined to regulate and lay a restraining hand on marketplace economics, but it seems to be improving over time, and it has certainly played a useful role in penalizing national discrimination by one EU country against firms from other EU countries.

Mexico in contrast suffers from a dearth of competition law: It too much resembles a "corporatist" society in which key industries are utterly controlled by a clutch of inter-connected firms.

The United States seems to do very well in comparison to either Mexico or the European Union, but our antitrust laws rely too much on criminal law enforcement, which should be reserved only to punish outright fraud, such as bid-rigging, extortion, and price-fixing by cartels.

The antitrust laws of Canada are similar to our own laws, but place less emphasis on criminal punishment. The Canadian competition authorities treat competition issues as matters best suited for private litigation and civil decrees, not criminal enforcement, which seems to be sensible. On the other hand, the Canadians have mostly copied our antitrust innovations and then devised clever modifications of them. They have learned from us, and we could stand to learn from them.

Curse or Blessing?

Critics of the antitrust laws plausibly argue that these laws serve in the end merely to punish, restrain and burden the most successful competitors of every market, thereby causing enormous

injury to competition. They thus argue that the antitrust laws are harm the very thing they say they are intended to protect - competition in the marketplace.

For these critics, the antitrust laws are self-contradictory, self-defeating nonsense. Worse than that, they are an expensive nuisance and a crippling burden to our most successful firms, and our economy cannot afford such burdens in this new era of globalization and outsourcing.

The critics have a point. Antitrust laws are uncertain in their application, and compliance with them can be onerous and expensive. If a firm is sued in antitrust case, it will likely be obliged to pay substantial or onerous sums to its attorneys and experts, and some of its key officers will have to devote much of their time to preparing the firm to defend itself in the case. In the meantime, the firm will likely suffer bad press. Even if the firm at length "wins" the case (i.e., is exonerated of any liability for antitrust misconduct), it will find that it has lost money, effort, time and goodwill. This scenario brings to mind the old saw about lawsuits: "I have been twice ruined in my career; once when I went to the courts and lost; and a second time when I went to the courts and won!"

But the alternatives are worse. If there were no antitrust laws, a dominant firm or handful of firms would emerge in many markets, especially the really important ones, such as telecommunications, energy markets and various others in which there are significant "barriers to entry". These firms would not only exclude all other competitors, but would sooner or later impose unfair trading terms on their business partners and ultimate customers, while failing to keep fit and responsive because of the dearth of competition from rivals.

Indeed, this happens all the time in actual practice, and the proper remedy is usually antitrust intervention - a private lawsuit or public prosecution.

Unfettered competition leads to monopolies in many kinds of commerce. Monopolies in turn tend to become unresponsive to customers, less efficient, and above all more likely to impose abusive trading terms in the markets that they control. The antitrust laws do not outlaw monopolies, but they forbid a firm to acquire or maintain a monopoly position by means of commercial practices whose principal purpose and effect are to undermine rival businesses. The antitrust laws also outlaw collusive behavior by which two or more firms seek to impair "competition on the merits" so that they can impose higher prices or other unfavorable trading conditions on captive customers who lack alternatives. Antitrust penalties can be severe: The government can seek criminal convictions, prison terms, and stiff fines. Civil litigants can seek treble damages, attorneys' fees, other costs of suit, and injunctive relief.

We need antitrust laws to redress the fundamental contradiction of marketplace economics: Competition, which yields the best products and greatest prosperity, invites monopolization and trading abuses that can be checked only by stifling regulation or well-conceived antitrust intervention. Yes, the antitrust laws are horrible, ruinous abominations that arise from an inextricable contradiction that they do not resolve, and they involve us all in wasteful litigation and suffering. But as Winston Churchill might have said, the antitrust laws have the benefit of being better than all the alternatives.