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The Unreasonable Demands of Antitrust Populism
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A panelist brought up an interesting tongue-in-cheek observation about the rising populist antitrust movement at a Heritage antitrust event this week. To the extent that the new populist antitrust movement is broadly concerned about effects on labor and wage depression, then, in principle, it should also be friendly to cartels. Although counterintuitive, employees have long supported and benefited from cartels, because cartels generally afford both job security and higher wages than competitive firms. And, of course, labor itself has long sought the protection of cartels – in the form of unions – to secure the same benefits.

For instance, in the days before widespread foreign competition in domestic auto markets, native unionized workers of the big three producers enjoyed a relatively higher wage for relatively less output. Competition from abroad changed the economic landscape for both producers and workers with the end result being a reduction in union power and relatively lower overall wages for workers. The union model — a labor cartel — can guarantee higher wages to those workers.

The same story can be seen on other industries, as well, from telecommunications to service workers to public sector employees. Generally, market power on the labor demand side (employers) tends to facilitate market power on the labor supply side: firms with market power — with supracompetitive profits — can afford to pay more for labor and often are willing to do so in order to secure political support (and also to make it more expensive for potential competitors to hire skilled employees). Labor is a substantial cost for firms in competitive markets, however, so firms without market power are always looking to economize on labor (that is, have low wages, as few employees as needed, and to substitute capital for labor wherever efficient to do so).

Therefore, if broad labor effects should be a prime concern of antitrust, perhaps enforcers should use antitrust laws to encourage cartel formation when it might increase wages, regardless of the effects on productivity, prices, and other efficiencies that may arise (or perhaps, as a possible trump card to hold against traditional efficiencies justifications).

No one will make a serious case for promoting cartels (although Former FTC Chairman Pertshuk sounded similar notes in the late 70s), but the comment makes a deeper point about ongoing efforts to undermine the consumer welfare standard. Fundamental contradictions exist in antitrust rhetoric that is unmoored from economic analysis. Professor Hovenkamp highlighted this in a recent paper as well:

> The coherence problem [in antitrust populism] shows up in goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically smaller or dedicated to older technologies, who are unable to match them. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it is a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write as if low prices are the evil that antitrust law should be combatting.

To be fair, even with careful economic analysis, it is not always perfectly clear how to resolve the tensions between antitrust and other policy preferences. For instance, Jonathan Adler described the collision between antitrust and environmental protection in cases where collusion might lead to better environmental outcomes. But even in cases like that, he noted it was essentially a free-rider problem and, as with intrabrand price agreements where consumer goodwill was a "commons" that had to be suitably maintained against possible free-riding retailers, what might be an antitrust violation in one context was not necessarily a violation in a second context.

Moreover, when the purpose of apparently "collusive" conduct is to actually ensure long term, sustainable production of a good or service (like fish), the behavior may not actually be anticompetitive. Thus, antitrust remains a plausible means of evaluating economic activity strictly on its own terms (and any alteration to the doctrine itself might actually be to prefer rule of reason analysis over per se analysis when examining these sorts of mitigating circumstances).

And before contorting antitrust into a policy cure-all, it is important to remember that the consumer welfare standard evolved out of sometimes good (price fixing bans) and sometimes questionable (prohibitions on output contracts) doctrines that were subject to legal trial and error. This was an evolution that was triggered by "increasing economic sophistication" and as "the enforcement agencies and courts [began] reaching for new ways in which to weigh competing and conflicting claims."

The vector of that evolution was toward the use of antitrust as a reliable, testable, and clear set of legal principles that are ultimately subject to economic analysis. When the populists ask us, for instance, to return to a time when judges could "prevent the conversion of concentrated economic power into concentrated political power" via antitrust law, they are asking for much more than just adding a new gloss to existing doctrine. They are asking for us to unlearn all of the lessons of the twentieth century that ultimately led toward the

maturation of antitrust law.

It’s perfectly reasonable to care about political corruption, worker welfare, and income inequality. It’s not perfectly reasonable to try to shoehorn goals based on these political concerns into a body of legal doctrine that evolved a set of tools wholly inappropriate for achieving those ends.

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