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Antitrust Is Cool Again

Michael L. Weiner, Chair of the NYSBA Antitrust Law Section, writes: As the Trump administration enters its second year, it will bear close watching to see what its antitrust enforcement approach shapes up to be.

By Michael L. Weiner, Chair, NYSBA Antitrust Law Section

The primary aim of antitrust enforcement in the United States since the 1980s has been the maximization of consumer welfare. In practice, the Department of Justice (DOJ) and Federal Trade Commission (FTC) have analyzed mergers, for example, with the goal of answering a relatively narrow question: How will the merger impact product prices and quality? This largely economic question has demanded a largely economic answer, and the DOJ and FTC employ teams of economists who work alongside attorneys to understand the impact of mergers on consumer welfare. Over the last two years, however, some have begun to question whether the government's focus on consumer welfare effects in antitrust enforcement is appropriate.

These questions have been raised by a steady stream of papers and reports concluding that market concentration is increasing in a variety of industries. President Obama's Council of Economic Advisors issued a 2016 report titled "Benefits of Competition and Indicators of Market Power," which reviewed a number of measures of industry concentration, and concluded that "[r]ecent indicators suggest that many industries may be becoming more concentrated, that new firm entry is declining, and that some firms are generating returns that are greatly in excess of historical standards."

The question has also reached Congress, with Sens. Warren, Booker, Klobuchar, and numerous House members advocating for strengthened antitrust enforcement. These members of Congress and other commentators want to broaden the mandate of the antitrust agencies to include considerations beyond consumer welfare, including jobs and wealth disparity. The movement even has a twitter hashtag, #HipsterAntitrust. As Professor Carl Shapiro, former chief economist for the DOJ Antitrust Division, has written, antitrust is "sexy again."

Many of these "new" considerations are in fact quite old, however. From the 1920s through the 1970s, antitrust jurisprudence focused primarily on company size. Mergers were blocked and companies broken up simply because of their size and market share. Indeed, in the 1945 *Alcoa* case, Judge Learned Hand came close to explaining that the mere possession of high market shares can constitute an antitrust violation because "[Congress] did not condone 'good trusts and condemn 'bad' ones; it forbad all." Antitrust was not simply an economic question; Congress may have "prefer[ed] a system of small producers" because "of its indirect social or moral effect."

The "Big is Bad" era perhaps reached its apex with the *Von's Grocery* case, where the Supreme Court blocked a merger between two groceries jointly controlling merely 7.5 percent of Los Angeles area grocery sales. Succinctly summing up the era, Justice Potter Stewart dissented in *Von's Grocery* and explained, "[t]he sole consistency that I can find is that, in litigation under [the Clayton Act], the Government always wins."

Michael L. Weiner

As the Trump administration enters its second year, it will bear close watching to see what its antitrust enforcement approach shapes up to be. Will it adhere to the data- and econometrics-heavy status quo, or will considerations of income inequality, employment, and other political factors become ascendant once again?

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