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The “Protection of the Competitive Process” Standard

Tim Wu
Columbia Law School, twu@law.columbia.edu

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Tim Wu
Julius Silver Professor of Law
Columbia University

The good faith version[1] of the consumer welfare standard in antitrust has been, I believe, an ambitious and even worthy experiment, but ultimately a project that has failed on its own terms. Hoping to impart a scientific-like certainty to the antitrust law, it has not succeeded; and instead run into the limits of a legal system to assess the full range of costs and benefits that would be necessary to the enterprise. Over the last two decades, we have seen that the approach has consistently neglected a range of harms important to the health of the economy — among others dynamic costs, quality effects, and projected prices, let alone potential harms to labor markets and political considerations. Hence the search for an alternative.

Looking back, the consumer welfare standard can be best understood as well-suited for measuring the harms of price collusion; but it migrated too far from its natural home. In particular, it does not perform well as a legal standard when it comes to collusive exclusion, unilateral exclusion and most of all, merger review. In all of these areas, courts, at best, treat harm to consumers as implied by harm to competition,[2] but at worst allow every case to become a quixotic, case-by-case search for price effects or lack thereof — the problem of “price fixation.” The old joke about the economist and the streetlight has become the very soul of the law, which might be funny if it wasn’t so tragic.

There are those, whom I respect, who believe that the consumer welfare standard is essentially correct, but simply has been wrongly applied and can be recovered. I respect that view, but I believe we must deal with what the standard has become, not what it once was or could be. In theory, the standard can incorporate non-price harms, quality effects, innovation harms, and so on. But in our times, it is tainted. It has become indelibly associated, in far too many cases, with the placing of a burden on plaintiff to provide concrete proof of price effects. That has lead to obvious and undeniable distortions in the law’s enforcement. It is time to retire the consumer protection standard, and for the law to re-embrace its original goal, “protection of the competitive process.”

Protection of the Competitive Process

For most conduct cases, I think the antitrust law should return to a standard more realistic and suited to the legal system — the “protection of the competitive process.”[3]

[1] The “good faith” consumer welfare standard, by which I mean the earnest and honest effort to tether the law to a welfare standard. It is safe to say that there is also a “bad faith” version of the standard, whose essential goal is nullification of the law itself.

[2] As in the *Microsoft* case, discussed below.

[3] The standard goes by many names; I regard the differences as semantic.

It posits a basic question for law enforcement and judges. Given complained-of conduct, is that conduct actually part of the competitive process, or is it a sufficient deviation as to be unlawful? In this view, antitrust law aims to create a body of common-law rules that punish and therefore deter such disruptions — hence "protecting the competitive process." What I have said is hardly radical — in fact, this way be why courts so often continue to depend on a process standard, even if supposedly focused on consumer welfare.

At the risk of abusing a metaphor, the question is, in many ways, not unlike that faced by a sports referee in football or soccer. One player tackles another. Is the maneuver actually part of the competition (a legal tackle), or something that threatens the competitive process itself? To put in terms used by the Supreme Court in *Chicago Board of Trade,* we must ask whether it "promotes competition, or whether it is such as may suppress or even destroy competition... The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."[4]

As the Court suggested in that case, that question requires a deeply fact-intensive inquiry, which nowadays means the employment of the most sophisticated economic tools available. For the government or plaintiff still faces the burden of proving that the conduct harmed the competitive process. That requires at a minimum, analyzing the context, the history of the industry, the evident intent of the defendant, and whether what was done falls into a familiar category of anticompetitive conduct, or whether it is something new. It requires analysis of market power, to ascertain whether the conduct really did make a difference, whether it really did pose a threat to the competitive process. And it requires careful analysis of the pro-competitive justifications offered by the defendant. This process, done right, yields a body of rules and standards that, as in our sports metaphor, govern the line between fair and foul, and thereby protect competition.

But unfortunately the "consumer welfare" approach has tended to take antitrust away from this key and central inquiry, and weakened the common law development of rules of standards. For it has evolved into a demand of proof, in every case, not only that the conduct harmed the competitive process, but but also that it had the effect of harming *consumers* as well. That question might matter in some contexts, but to say it always matters, and is indeed the lodestone of the law, is both unsupportable and can sometimes border on the ridiculous. It is not unlike asking our referee not only to assess that an illegal maneuver was used in a football game, but then also prove that it *also* harmed the fans watching the game. That would be an absurd undertaking — how would we ever know? Yet here we are.

The "competitive process" approach is much more realistic about the limits of the legal system. Many areas of the law assumes that courts and judges will struggle to maximize abstract normative values, like "equality," "freedom" or "autonomy."[5] In such cases, the law often turns to doing what it does best — preventing abuse of an underlying process. Hence, to protect equality, we protect employees from racial discrimination in the employment process. Freedom of speech is defended by protecting political debate using the First Amendment, and so on.

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[4] 246 U.S. 231, 238 (1918).

[5] This is discussed at length in Richard Fallon, Implementing the Constitution (2001) (describing the Supreme Court's many practical means of protecting higher-order values).

It is similarly challenging to protect “welfare” or the“health,” or even the “competitiveness” of the economy. In practice, as everyone knows, harm to the welfare of consumers is an abstraction that is usually unmeasurable; indeed, measuring “welfare” suggests the kind of impossible measurement task that Fredrick Hayek took to be the great flaw in centrally planned economies. It does better by a proxy — focusing on protection of the competitive process — assumed to be external to the legal system that can be interfered with and disrupted by powerful parties.

Microsoft and the Problem of a “Price Trump”

As I’ve said, sometimes, judges simply imply that consumers are harmed by harms to the competitive process, which means the two standards have collapsed into one. But price effects, or lack thereof, always threaten to become the trump. That’s the case, even though, in some of the most important cases prosecuted over the last few decades the proof of harm to consumer welfare was never mathematically determinate at the time, yet it was clear, in retrospect, just how much those firms were holding back.

There are, I believe, a great many cases that show the flaws of the today’s consumer welfare standard. Among the most glaring are the recent *American Express* case, the *AT&T - Time Warner* merger, the *American Airlines* predatory pricing case, the approval of the United and American airlines mergers, the approval of Ticketmaster - Live Nation, the approval of Facebook’s acquisition of Instagram and WhatsApp, and Google’s acquisition of Waze. But I would like to look back at the *Microsoft* decision a lesson in the potential dangers of consumer welfare standard, for it is my contention that, under today’s consumer welfare standard, it would have come out the opposite way.

In the most important Section 2 of the last several decades, Microsoft was accused of attacking the competitive process in its targeting of Netscape and Java, which it saw as a threat to its platform monopoly. Yet, in retrospect, there was no clear or decisive evidence of harm to consumers in the case. Microsoft, after all, was giving Explorer away for free, while Netscape was originally charging $20. As Douglas Melamed, then a lead attorney at the Department of Justice, stated in an earlier panel on Microsoft “no one knows what the price effects were of the conduct we’ve been talking about. We’ve talked about innovation, but no one really knows what innovation would have taken place but for the wrongful conduct.…”[6]

There is a real danger that the Microsoft case would today be thrown out based on a failure to demonstrate clear harm to consumer welfare. Robert Samuelson, among others, charged at the time that the case should be dismissed for just this reason, and in our times, there is reason to fear that a court might have done just that.[7] Fortunately it did not. Instead, the D.C. Circuit solved the problem by stating that “to be condemned as exclusionary, a monopolist's act must have an “anticompetitive effect.” That is, it must harm the competitive process….” It then implied that harm to the competitive process was also harm to consumers.[8]

[6] FTC Panel on Microsoft.

[7] Robert Samuelson, ”But Did Microsoft Actually Hurt Consumers?,” Washington Post op-ed, Nov. 17, 1999.

[8] “… and thereby harm consumers.” United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

Some might argue that the D.C. Circuit's opinion in Microsoft proves that the consumer welfare standard is flexible enough to yield the right results. But that was twenty years ago, and I think a charitable interpretation. The standard, today, always presents the risk that a judge will will the standard as demanding proof of price harms to consumers Every case, even as good a case as Microsoft, faces the risk dismissal on that basis, and hence of becoming a battle over whether destruction of competition might provably cost consumers a few bucks down the line.

What is good about a "protection of the competitive process" standard is puts the legal system — enforcers and courts — in a position to do what they do best: oversee a process. It makes it clear that they are making the difficult assessment, based on the breath of the evidence presented, as to whether an illegal and unwarranted attack on the competitive process has taken place. It focuses attention on the right problem, and eliminates the price trump effect that the consumer welfare standard threatens.

Structure & Merger Review

What I suggest takes the antitrust laws as I believe they were intended: as a statement of faith in the virtues of competitive systems, and a quasi-constitutional commitment to preserving a competitive as opposed to a trustified, or monopolized economy, given the experience of the late 19th century, and in reaction to the centralized economies of the fascist and communist world.[9] I want to suggest that the standards for merger review, which have drifted too far from an emphasis on economic structure as a means of protecting the competitive process.

Returning to our sports metaphors, in leagues like the NFL or sports like boxing there has long been structural tools for protecting competition, or"competitive parity." In boxing, for example, the weight classes are intended to ensure that competition is on the merits — the skill of the boxers, as opposed to simply the question of who weighs more. In antitrust, the insight is the same: we assume that there is such a thing as a competitive process, and that that process is strongly influenced by the structure of the industry: most of all, how many firms are really in each industry, how large and capable they are, and how well protected they are against competition as between each other and from outside entrants.

No economist would seriously deny that the number of firms, their market share, and the barriers to entry maintained singly or jointly determines the very nature of competition in an industry. And yet somehow — as well documented by Carl Shapiro and Jonathan Baker[10] — merger review has slid further away from recognizing structure and tended to move to a open-ended analysis of price effects and claimed efficiencies in the consideration of most mergers.

Imagine that a boxing league had a featherweight category for fighters weighing between 118-124 pounds. To a given fight a 200-pound fighter shows up, accompanied by his experts, who testify that they have proof that for this particular fight, for a variety of complex reasons, we cannot prove with certainty that the extra weight will definitively yield an advantage that will cause consumer harm — i.e., harm to the fans. Unfortunately, merger law has grown to

[9] This view is elaborated in Tim Wu, The Curse of Bigness (2018).

[10] See Jonathan B. Baker & Carl Shapiro, Reinvigorating Horizontal Merger Enforcement, *in* How the Chicago School Overshot the Mark 235 (Robert Pitofsky, ed., 2008).

tolerate and accept these kind of arguments, with well known and well-documented consequences.

I reiterate the call that in merger review law need return to strong and real structural presumptions — presumptions that operate, as the Sean Sullivan argues, as a substantive inference of harm to the competitive process.[11] For it cannot be denied that, as Baker and Shapiro put it "market structure matters, in the following specific sense: in the absence of entry and merger efficiencies, a merger that leads to a substantial increase in market concentration will tend to raise price, harm consumers, and reduce economic efficiency. "

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[11] What Structural Presumption?: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis, 42 Journal of Corporation Law 403 (2016)