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# The New (Or is it Old?) Approach to Antitrust Regulation

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The Department of Justice Section 2 Report,<sup>2</sup> (“Report”) recently dropped like a hot potato by Assistant Attorney General for Antitrust Christine Varney,<sup>3</sup> was an attempt both to define and to extend the U.S. view of market dominance, one based on the application of economic analysis. In the wake of Bork and Posner, and Baxter and the Reagan Revolution, a consensus had emerged that big could be bad, but the harm that dominant firms could do needed to be demonstrated, not simply assumed in consequence of their sheer size. Moreover, the demonstration required harm to competition. The consensus held through the Clinton Administration, buoyed by the talented economists that it attracted. The Section 2 Report is controversial in drawing lines about where harm to competition begins, but it is not hard to imagine all sides of the debate agreeing with this from the report:

Competition is ill-served by insisting that firms pull their competitive punches so as to avoid the degree of marketplace success that gives them monopoly power or by demanding that winning firms, once they achieve such power, ‘lie down and play dead.’<sup>4</sup>

It seemed reasonable to permit successful firms to continue to compete, simply because the benefits of allowing them to do so would keep not only those firms on their toes, but also would keep rivals searching for ways to compete more effectively. This was in contrast with the European view that large firms should hunker down and not attract attention by building on their successes. But the problem was that it was hard to draw the line between success and something more. The problem is illustrated by the remark of Gary Reback, a prominent Microsoft antagonist, who characterized policy

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<sup>2</sup> U.S. DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (SEPT. 2008) (hereinafter “Section 2 Report”).

<sup>3</sup> See Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era*, available at <http://www.usdoj.gov/atr/public/speeches/245711.htm>

<sup>4</sup> *Supra* n. 2, at 8.

toward dominant firms as follows: “We won't punish you for being successful. But if you're a monopolist and you spit on the sidewalk, we'll break up your company.”<sup>5</sup>

It is not trivial to distinguish between succeeding and “spitting on the sidewalk.” The Section 2 guidelines tried to distinguish between exploiting success fully and taking actions to protect one's position by excluding others. In so doing, the Report sought to clear up misunderstandings about the effects of dominant firm actions. As Richard Posner has remarked,

some of the practices deemed exclusionary, mainly price discrimination in its various guises (including most tie-in agreements), are monopolistic but not exclusionary—and not collusive either. They enable the monopolist to extract higher profits without preventing equally or more efficient new entrants from challenging his monopoly.<sup>6</sup>

To draw the line, the Report deployed economic analysis. Both the Report and its critics seemed to agree that the promotion of competition was at least the appropriate intermediate goal for antitrust policy, and that the effectiveness of measures designed to further that goal was best evaluated by means of economics.<sup>7</sup>

This agreement as to objective and method served to limit the ground rules under which the debate would take place. But times have changed. We now worry not just about whether dominant firms abuse their positions. Add the worry that they are too big to fail. Nobody appears concerned about General Motors preying upon its rivals, or even whether its new owners—you, me and the United Auto Workers—might be tempted to run the company in an anticompetitive fashion backed by Federal power. But we might have preferred to see Chevy, Cadillac, Saturn, and the rest fold asynchronously, permitting us to stand on the sidelines as the calamity proceeded slowly enough to allow each succeeding failure to be digested separately. Who could break up the behemoths into little pieces? Calling Senator Sherman.

It's no surprise to observe nostalgia for regulation when markets are shaky. George Stigler likened the tendency to “solve” market failures with regulation to the judge of an opera contest who, when asked to pick the best of two sopranos, awarded his prize to the second immediately upon hearing the first. But the desire is unmistakable. George Akerlof and Robert Shiller hark back to earlier times when

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<sup>5</sup> See Jeff Horwitz, Google: We're Actually Really Small, *available at* <http://www.reuters.com/article/idUS310668181920090604>.

<sup>6</sup> RICHARD A. POSNER, *ANTITRUST LAW*, 2nd ed., at 41-42 (2001).

<sup>7</sup> Of course, not everyone agreed or agrees with this formulation. FTC Commissioner Roesch has suggested that analytical rigor can serve in a supporting role contributing to the relevant “story line” in a particular case. “Most economists, however well prepared, will not have the industry experience to serve as the primary ‘storytellers.’ However, they can play an important complementary role and reinforce the testimony of those witnesses by presenting data respecting prices, entry, diversion and/or price erosion.” See <http://ftc.gov/speeches/rosch/080602litigatingmerger.pdf>.

intervention into markets was held in high regard: “We had forgotten the hard-earned lesson of the 1930s: Capitalism can give us real prosperity, but it does so only on a playing field where the government sets the rules and acts as a referee.”<sup>8</sup>

Are you pining for the NIRA? Hoping for a spectral visit from Gardiner Means? Maybe not, but an ambitious antitrust regulator will likely want to pitch in when big firms are in the regulatory crosshairs. Here’s Neelie Kroes (European Commissioner for Competition Policy):

The wider lesson for all policymakers and public authorities is that those who share common goals must work together. For example, competition authorities and central banks cannot afford to operate in their own little worlds—we must work together on issues like bank recapitalisations and restructures.<sup>9</sup>

The problem is that it is hard to pitch in for the regulatory team if your mission is restricted to protecting competition. Some financial firms may have preyed upon unsophisticated consumers, so there could be a role for the FTC’s Bureau of Consumer Protection, but it is pretty hard to make a case that the big banks cooked up the financial calamity to run investment bankers out of business. That hasn’t stopped MIT Professor Simon Johnson from suggesting that:

The Department of Justice’s Antitrust Division should be called in to investigate the increasing market share of major banks (remember that Bear Stearns and Lehman are gone), the anti-competitive practices of some market leaders (there’s more than one predatory way to force your rivals into bankruptcy and to move closer to monopoly power), and the broader increase in economic and political power of the biggest financial services players over the past 20 years and the last 6 months—this is potentially damaging to all consumers and, obviously, to all taxpayers.<sup>10</sup>

If the DOJ and/or FTC want to investigate Bank of America for swallowing Merrill, Lynch, have at it. Anyone for a triple damages action that could sweep in the Fed and the Treasury? Be my guest if you can figure out how. The scary part of this, however, is the suggestion that antitrust should be deployed for broader purposes—containing “economic and political power.” That has a nostalgic ring to it, if you like old-fashioned antitrust.

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<sup>8</sup> George Akerlof & Robert Shiller, *Good Government and Animal Spirits*, available at <http://online.wsj.com/article/SB124052797951850225.html>

<sup>9</sup> Neelie Kroes, *The interface between regulation and competition law*, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/202&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>10</sup> Simon Johnson, *Bring In The Antitrust Division (On Banking)*, available at <http://baselinescenario.com/2009/04/16/bring-in-the-antitrust-division-on-banking/>.

The concern that antitrust enforcers might once again pull the pitchforks from the barn and go after firms for grounds unrelated to competition and efficiency is not far-fetched. My friend Bob Lande, who fits most anyone's definition of antitrust zealot, nonetheless saw fit to gently (too gently) chide the majority in the FTC's N-Data opinion for attacking conduct that was claimed to be "unjust, inequitable or . . . contrary to good morals."<sup>11</sup> Stringent competition doesn't mean being nice. Good morals? Are we going to enforce the Golden Rule for competitors? We wouldn't want somebody cheating on a rival, would we?

It is to be expected that the new administration will move in the direction of more aggressive antitrust enforcement. I'll be happy if the new policy emerges from a process that engages the arguments of the Section 2 Report. But given the current environment, I will not be surprised if we see competitive concerns share the stage with a wide range of other goals and motivations. The Section 2 Report envisions predictable, principled, and coherent enforcement. That's a noble, if tough to achieve vision, but it is one that has little chance of materializing if antitrust embraces a whole set of conflicting concerns.

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<sup>11</sup> Bob Lande, Revitalizing Section 5 of the FTC Using 'Consumer Choice' Analysis, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287218&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287218&download=yes)