



Can Antitrust Policy and Antitrust Authorities help to tackle Inequality?

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Inequality causes social resentment and poses a potential risk to economic and social stability, because, among other things, it spreads apart societies. This social rupture can create social malfunctioning and, as some research shows, it can even affect mental health.²

The developing world has long suffered from the maladies of inequality. In Latin America, inequality is particularly traumatic and has been used as a justification for encouraging internal conflicts and has helped ignite violence in urban and rural areas.

Nevertheless, now that inequality is on the agenda of the developed world, developing countries have a golden opportunity to demand a global consensus on how to tackle inequality with the cooperation of developed nations.

Because inequality can lead societies – as it is occurring in many countries – to opt for radicalism, populism, and xenophobia as a wrong and confused response for finding solutions to reduce inequality; individuals, societies, and institutions must address this issue as a main concern, for democracy and economic stability and material progress are in danger.³

As antitrust enforcers, I believe we should seriously analyze how we can help to reduce inequality. In fact, one can pose two main questions to address inequality from an antitrust perspective. Is tackling inequality an objective of antitrust law? If not, can antitrust policy help indirectly to tackle inequality?

As to the first question, I dare to say that inequality is not an explicit antitrust objective in most legal regimes. For example, the Sherman Act, which is the U.S. antitrust law, does not include inequality as an explicit purpose. The Colombian Antitrust Law, which is a younger one, states three objectives, but inequality is not among them. Hence, does this mean that antitrust enforcers should not contribute to reduce inequality? No, I do not think so. Let's elaborate a bit more on this.

To begin with, it is important to mention that some antitrust scholars are debating whether antitrust policy should incorporate inequality as one of its purposes, similar to objectives such as the “consumer welfare” or the “economic efficiency” standard. However, there is still intense debate on this question and a more straightforward answer seems distant.

Thus, if inequality is currently not an explicit antitrust objective stated by law, can antitrust authorities tackle inequality indirectly? For me, the answer is affirmative, for antitrust policy objectives are frequently indirectly linked to inequality. Therefore, we can be in two different scenarios. One refers to cases where antitrust policy is more harmonized with the purpose

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² The Economist, “Does inequality cause suicide, drug abuse and mental illness? ,” (June 14, 2018), <https://www.economist.com/books-and-arts/2018/06/14/does-inequality-cause-suicide-drug-abuse-and-mental-illness>

³ See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY. 571. (2014)

of tackling inequality. The second refers to cases where this antitrust/inequality relation is blurred and consequently, seeking to reduce inequality from an antitrust perspective might be difficult and perhaps counterproductive.

As to the first scenario, antitrust authorities should enforce antitrust laws vigorously, since there is no risk for antitrust policy and tackling inequality would be a desirable indirect outcome. For example, if consumers pay less for products as a consequence of punishing price fixing cartels, antitrust policy is – in principle – compatible with the objective of tackling inequality. In fact, price fixing cartels harm poor consumers that have to spend more to buy more expensive goods as a result of an anticompetitive conduct. In an “easy” case like price fixing, antitrust policy can serve as a complementary tool to tackle inequality.

As to the second scenario, some complications might arise. In fact, what to do when antitrust law objectives are not compatible with tackling inequality? Under these circumstances, traditional approaches to antitrust policy can pose some difficulties.

For example, a purely efficient objective is generally regarded as the cornerstone for many antitrust laws. In a free and competitive market, antitrust authorities believe that the interaction of supply and demand lead to efficient outcomes. However, an efficient outcome might result in an unjust social outcome.

Thus, if an antitrust decision might produce inequality or "some" inequality, should antitrust enforcers take such a result into consideration? Here, two scenarios emerge as well. The first one refers to the *ex post* enforcement and the second one, which I believe is more challenging, has to do with their *ex ante* antitrust role.

For simplicity, I take the price fixing example again. I said that punishing a cartel can support the purpose of tackling inequality, because fining companies that breach antitrust law usually result in gains for poor buyers that in the future – hopefully – will pay lower prices for goods offered in a free and competitive market rather than in a cartelized one. However, what if the offender company goes bankrupt as a consequence of being fined and many workers are fired?

Thus, antitrust authorities should consider not imposing the highest fine if that helps to save the company and some jobs. Some antitrust authorities take into account such considerations, because antitrust enforcement is not meant to eliminate offender companies, but to restore markets.

The second scenario, as I said, arises when antitrust authorities exercise an *ex ante* role. I highlighted that here the task is more challenging but at the same time it can be more powerful.

Many antitrust authorities have the responsibility of reviewing regulation drafts in order to stop sectorial regulators from issuing anticompetitive regulations. Depending of the corresponding jurisdiction, this can be a potent tool in the task of reducing inequality. For example, this form of competition advocacy can prevent huge corporations of “capturing regulators” for their own benefit, and therefore, the risk of erecting barriers to entry in order

to avoid or reduce competition of small and medium sized enterprises, can be diminished. Remember that small and medium sized enterprises are crucial for job creation.⁴

In addition, *ex ante* merger review can be a powerful tool to tackle the monopoly – and the monopsony – problem, which is associated with high inequality levels and other social problems. As professor Tim Wu puts it when referring to the American monopolization trend in his book “The Curse of Bigness”: “We now must face questions that have been ignored for more than a generation. Are extreme levels of industrial concentration actually compatible with the premise of rough equality among citizens, industrial freedom, or democracy itself?”⁵

Here, antitrust authorities can play a very important role in making the economy work for all, for instance, by applying a stringent merger review analysis. Again, according to Professor Wu, America's antitrust authorities have "drifted from what Congress intended,"⁶ for “‘Congress saw the process of concentration in American business as a dynamic force’ and it wanted to give governments and courts ‘the power to brake this force at its outset and before it gathered momentum.’”⁷ Currently, many economists are linking low salaries with less competition, and as a consequence of monopsony power.⁸ These market failures can produce more inequality. Simply put, if the economy works only for huge corporations, many citizens might be excluded from economic prosperity.

Finally, it is important to bear in mind that governments have other means to fight inequality directly and more effectively. As I mentioned, antitrust policy and antitrust authorities are not meant for this aim. Nevertheless, no matter the current occupation or role you have, the truth is that inequality is causing too much harm to social harmony. The most important values of western societies are at risk of failing – or are failing? – the people. These thoughts, framed within antitrust limits, could be part of the solution. We all have an ethical duty to contribute to reducing inequality.

⁴ OCDE, Small and Medium-sized Enterprises: Local Strength, Global Reach (Jan. 4, 2019, 10:45 PM), <http://www.oecd.org/cfe/leed/1918307.pdf>.

⁵ TIM WU, THE CURSE OF BIGNESS, ANTITRUST IN THE NEW GILDED AGE, 16 (COLUMBIA GLOBAL REPORTS, 2018)

⁶ *Id.* at 127.

⁷ *Id.* at 128.

⁸ See The Economist, “Economists think antitrust policy should pay more attention to workers,” (Oct. 25, 2018), <https://www.economist.com/finance-and-economics/2018/10/25/economists-think-antitrust-policy-should-pay-more-attention-to-workers>.