



Challenges to Antitrust in a Changing Economy

Harvard Law School
November 9, 2018

SUMMARY REMARKS

Harvard Law School

November 9, 2018

Summary Remarks*

The Consumer Welfare Standard

Robert Atkinson, President, Information Technology and Innovation Foundation, Washington DC

For roughly 40 years there has been a consensus that its ultimate goal should be the welfare of consumers, broadly defined to usually mean maximizing overall economic growth. A small but growing group of activists and scholars is now arguing that we should abandon the consumer welfare standard, adding in a host of new factors for antitrust policy to address, while also attacking “bigness” per se. They overstate the increase in market concentration and overlook the reasons why in many industries, particularly innovation-based industries, increased concentration can support innovation and consumer welfare. Moreover, they believe focusing on consumers overlooks other values, including vibrant small businesses, innovation, privacy, worker interests, and healthy democratic processes. For them, large companies by their very nature pose a unique danger to the economy and help form a kind of society they reject. The consumer welfare standard stands in the way of using antitrust policy as a kind of social engineering to limit the size of large firms and return to an economy of decades, if not a century past.

A careful review, however, shows the consumer welfare standard is able to handle some of their concerns, including those related to as long-term price increases, monopsony, innovation, and addressing companies with free business models. In the areas where it cannot, other policy tools (e.g., privacy policy, campaign finance reform, etc.) are more appropriate means of addressing their concerns. But in other areas, pursuing their goals— including protecting businesses, especially small firms, against legitimate competition, and avoiding layoffs—would reduce consumer welfare and economic growth. In short, there is no legitimate case for abandoning the consumer welfare standard in favor of a vague and hard-to-enforce alternative that represents

* This is a draft document that includes a summary of the remarks delivered by some of the panelists participating in the inaugural conference on “Challenges to Antitrust in a Changing Economy,” which took place on November 9, 2018 at Harvard Law School. A more detailed report will be released shortly and will be available at <https://www.competitionpolicyinternational.com/HarvardConference/>.

an amalgam of conflicting goals, some of which would work against progress and the national interest.

Lunch Keynote Speech

Richard L. Schmalensee, Emeritus Professor of Management, MIT Sloan School of Management

A surprising amount of debate leading up to the Supreme Court's decision in American Express, and the commentary following this landmark ruling, attempt to trivialize and marginalize the modern economic learning on multisided platforms, even though the underlying literature has grown without major debates. Despite these efforts the 2nd Circuit Court of Appeals and the Supreme Court ultimately embraced the economic literature on these business models. This talk debunks five red herrings that have been floated in the debate. (1) The two sides are just complements, nothing new there, even though the economics of the two situations are obviously different. (2) Everything is two-sided, or who's to know what's two-sided, so we can continue to use the one-sided models that have worked well, even though there is a fairly clear consensus on what makes a business two-sided. (3) As industries mature two-sidedness goes away, an unsupported assertion that may be plausible at the industry level but not at all at the firm level. (4) Because the services provided to the two sides by a two-sided platform are not interchangeable, the two sides cannot be in the same market, even though nobody balks at a market for new cars composed of many parts that are not interchangeable. This red herring, if accepted would require willfully ignoring markets' two sided features in all cases. (5) Because it can be difficult, the need to do two-sided analysis would "devastate" antitrust law, even though doing one-sided analysis of two-sided markets can produce both false positive and false negatives. The Supreme Court's American Express decision has raised a host of interesting issues, and, as in any Supreme Court decision, not every word was chosen as carefully as it might have been. Clarifications will be needed going forward. The large and evolving literature on two-sided platforms will prove helpful to develop them, and I expect the courts increasingly to rely on that literature.

Competition on/via the Internet

Michael Mandel, Chief Economic Strategist, Progressive Policy Institute, Washington DC

Competition and Concentration: How the Tech/Telecom/Ecommerce Sector is Outperforming the Rest of the Private Sector

Recent economic studies show that concentration in many sectors of the U.S. economy has increased over the past 20-30 years. These increases in concentration have been linked to

increased markups, weak productivity growth, stagnant real wages, slower job growth, and falling labor share.

Indeed, there is little doubt that strong and consistent competition policy plays an important role in a market economy. Long-standing incumbents in a wide range of industries can exercise market power to choke off innovation and growth, protecting the status quo and driving up prices rather than benefiting workers and consumers.

Taking these arguments seriously, a forthcoming report from the Progressive Policy Institute uses new data from the Bureau of Economic Analysis to assess the economic performance of the tech/telecom/ecommerce sector—also called ‘the digital economy’—relative to the rest of the U.S. non-health private sector. The report finds that productivity rose by almost 60 percent in the tech/telecom/ecommerce sector between 2007 and 2017, compared to only 5 percent in the rest of the non-health private sector. Because of these gains, the tech/telecom/ecommerce sector accounted for almost half of non-health private sector growth between 2007 and 2017. Over the same period, prices in the tech/telecom/ecommerce sector fell by 15%, compared to a 21% increase in the rest of the non-health private sector.

On the labor side, real annual pay per worker rose by 15.4 percent in the tech/telecom/ecommerce sector between 2007 and 2017, compared to a 7.0 percent gain in the rest of the non-health private sector. Employment also grew faster in the tech/telecom/ecommerce sector, 14.0 percent versus 3.3 percent, as companies such as Amazon and Apple hired at a rapid pace. As a result, the labor share in the tech/telecom/ecommerce sector has stayed flat since 2007. By contrast, the labor share in the rest of the non-health private sector has fallen by 1.3 percentage points.

Thus, it appears that the tech/telecom/ecommerce has consistently outperformed the rest of the non-health private sector across a wide range of economic indicators, generating strong productivity growth and sharing those gains with workers and customers. Conversely, the rest of the non-health private sector has produced extraordinarily weak productivity gains, rising prices, and a falling labor share.

Our analysis suggests that apparently high concentration indicators in individual tech/telecom/ecommerce industries may be misleading guides to competition policy. Of course, industry-wide performance is not the final or even the main indicator of potential antitrust problems, and regulators must always be alert for anticompetitive practices. Nevertheless, to the degree that regulators are concerned with achieving macro-level goals, industry-wide performance on a range of productivity, consumer and labor measures should be an important consideration.

Eliana Garcés, Principal, The Brattle Group, Washington DC

The economics of platforms are interesting because some types of dynamics that are not very relevant in the offline world become very relevant and even determinant online. These are network effects, economies of scale and economies of scope. These characteristics, combined with the lack of friction in accessing different providers, contribute to large and rapid expansion of successful platform businesses. This has generated some discomfort among regulators. Large platforms opening up to competing third party business to become their main distribution channel has added to the concerns of excessive leverage. What are the important issues to keep in mind?

- Successful platforms are successful because they provide real value. Merit is at the origin of all large platforms. Value is a decrease in transaction costs or an efficient delivery of information.
- Economies of scope are real and this creates an inevitable push towards integration of services. Forced unbundling of services may come at a cost to users. Whether the efficiencies at stake require integration becomes a relevant question.
- The effectiveness of data, network effects, and bundling as barriers to entry are empirical questions that cannot be assumed. The factors do not have the same relevance across services. Successful entry relying on further transaction efficiencies or effective interface may be sufficient to overcome these barriers.
- Entry is likely to be by differentiated players, including players outside of the market diversifying into a new service.

Many reasons complicate the analysis of the effect of platforms and platform conduct on markets. Economies of scopes and externalities among users and services lead to a coordinated management and design of platform services. Platforms will examine the impact of every price or platform rule not only on the users of that particular service but also on other types of users that will be impacted because of these interrelations. For example if I decrease the data I collect on one platform activity, I may not be able to improve other platform services impacting these other type of users. Traffic generating practices may be associated with lower prices or lower content quality but may increase the quality and revenue on the advertising side. Antitrust evaluation cannot be done without looking at the platform business model: what value is being created and how is that value creation being monetized. This will involve a web of different activities that cannot be disentangled. Although we have the tools for such analysis we don't have the practice or precedents for their application.

Is Monopoly Power Rising?

Esteban Rossi-Hansberg, Princeton University

The dominance of top firms in specific industries is uncontroversial. Many studies have shown that standard measures of national concentration have increased substantially in the U.S. in the last few decades. A narrative has emerged which describes this increasing national market concentration as responsible for declines in product market competition, as evidenced by higher profits and markups. The problem with this argument is that, in most industries, markets are not national; they are local. The opening of a coffee shop in San Francisco does little to reduce the price of my morning cup in Chicago. The presence of transport costs and the imperfect substitutability between goods imply that markets are (at least to some extent) local and specific to particular products. Hence, if we hope to get clues about the evolution of competition over time, in most industries we need to measure product-market concentration locally, instead of nationally, as is typically done. Our results turn the conventional narrative on its head.

We find that, in contrast to the increasing national trend, local concentration has decreased on average, for all major sectors, and for the large majority of narrowly-defined industries (industries accounting for roughly 70% of U.S. employment and sales). The findings hold for a variety of geographic definitions (CBSA, county, or ZIP code) and industrial aggregations (from 2 to 8-digits). The results also hold for a variety of measures of concentration including the Herfindahl-Hirschman Index, the adjusted Herfindahl Index, and the share of the top firm(s) in a market. Between 1990 and 2014, industries with decreasing local concentration can be found in all major sectors. Perhaps more surprising, 8-digit industries with diverging trends (increasing national and decreasing local concentration) can be found in virtually all 2-digit industry aggregations too. To shed light on the forces behind our finding, we study the role that top firms have played in generating these diverging trends.

The results are striking: among industries with diverging trends, top firms have, of course, contributed to the increase in national concentration, but they have also contributed significantly to the declining trend in local concentration. That is, top firms have made the decline in local concentration more pronounced! What is going on? The answer is simple. Top firms are expanding by adding more establishments in new locations. When they do, they increase their national share of sales while also decreasing concentration in the markets where they enter. We find that, in industries with diverging trends, when a top firm opens an establishment, concentration falls and remains down for at least 7 years. Top-firm establishments do not eliminate local competition; they simply become another producer in a less concentrated local market.

Jim Bessen, Executive Director, Technology & Policy Research Initiative, Boston University School of Law

At the national level, US industrial concentration has been rising across sectors since the 1980s. At the same time, evidence shows a rise in profit margins and markups. What is driving this change and what is its significance?

Some commentators attribute the rise in industry concentration to lax antitrust enforcement of mergers and acquisitions. In this case, rising concentration would be a sign of decreasing competition that might lead to higher prices, less innovation, and greater wage inequality. If this view is right, then perhaps antitrust enforcement needs to be strengthened or other policy changes made to increase competition.

However, rising industry concentration does not necessarily imply declining competition. Concentration can also rise when some firms—but not all—grow faster because they are more efficient. In this case, rising concentration would reflect greater innovation and social benefit. The policy implications from rising industry concentration depend very much on what is causing the increase.

My research shows, in fact, that the main factor driving the increase in industry concentration at the national level is firm investments in information technology (IT). US firms spend about \$250 billion a year on proprietary software. This spending provides firms—especially large firms—with substantial advantages that allow them to grow faster. These investments are not in commodity off-the-shelf IT products, but rather in proprietary systems such as Walmart’s logistics systems, which propelled it to industry dominance from a 3% market share in 1982.

Because technology is the main cause, rising industry concentration does not, by itself, imply a need for reinvigorated antitrust enforcement. However, it does raise a major policy challenge. While it is good news that some firms become more productive, most firms are not able to utilize the new technologies. A productivity gap is opening up between the large, leading firms and the rest. It appears that new information technology is diffusing much more slowly than past technologies, and the result may be slower average productivity growth, anemic wage growth, and growing economic disparities. Rising concentration is thus a sign of barriers to the spread of new technology and this poses an important policy challenge. Policy can help overcome these barriers: antitrust authorities have tools to compel licensing in appropriate circumstances; intellectual property policy can foster faster diffusion; employee mobility, which has declined sharply, can be promoted by laws that restrict employee non-compete agreements and other barriers to mobility. Unfortunately, policy often seems to work against technology diffusion today, rather than toward it.

Marc Rysman, Professor of Economics, Department of Economics Boston University

The question of whether monopoly power is rising appears critical in understanding current major economic trends. Factors that might lead to this change are increased globalization and international trade, which allows star firms to expand to a greater degree, increased importance of information technology, which expands scale economies, relatively permissive antitrust enforcement, and the broader geographic scope of advertising and other markets. Even if increased concentration results only from technological market factors, such as the role of information technology, the societal implications might be significant, with some observers pointing to decreased economic dynamism and innovation, increased barriers for entrepreneurialism, and even decreased opportunities for income mobility and increased skewness in wealth distribution. Further concerns might even be the implications for monopoly power on democratic institutions. Indeed, political interest in competition policy appears to be on the rise.

Thus, understanding the extent to which monopoly power is rising and its sources is very important. In my comments, I offer the perspective as someone without specific research in this area, who is a long-time member of Industrial Organization community in Economics. So far, the methods used to establish that market power is rising fall outside of the methods typically employed in modern IO. What are the concerns? IO economists tend to be skeptical of organizing industry by SIC codes, as these government classifications rarely correspond to markets that firms actually compete in. Furthermore, empirical work that relies on industries as the level of observations are viewed with skepticism. Most IO economists subscribe to the view that industries are very heterogeneous, and that it can often be misleading to draw conclusions that look to paint with a broad brush across many industries. For instance, one industry may have a superstar firm because of a technological innovation, one may have a terrific manager, one may be engaging in anticompetitive behavior, and one may have a new foreign entrant. Does saying that all four have increasing concentration provide meaningful information? In addition, a hallmark of modern industrial organization is a skepticism of the value of accounting data, which can often diverge from a meaningful economic description of the state of a firm.

In general, IO economists prefer to see studies focused on a single industry, where the researcher can describe important market institutions and collect “real” data on prices and quantities drawn from a well-specified relevant market. To be clear, cross-industry studies that we see are valuable, and I read them with great interest. The “IO approved” kind of study is not conducive to finding results that characterize changing market power across the entire country and all industries, and I worry that my field will be left behind as the most important contributions on market power come from macroeconomists. However, there have been previous examples in which micro-level studies contradicted findings in aggregate studies, and resolving these

differences has been fruitful. I do not believe that the single-industry study approach on this topic is developed yet, and I look forward to this next step in the research process.

Enforcers Roundtable: What's under the Radar?

Joaquín Almunia, Chairman, Centre for European Policy Studies (CEPS); Former Commissioner for Competition, European Commission

Nowadays, antitrust enforcement is challenged by some of the characteristics of the main players in the digital economy. The big champions in this area -Google, Facebook, Apple, Amazon, ...- have acquired in the last decade a dominant position in many of the markets where they are developing their activities.

When the increases in market derive from mergers and acquisitions, the conventional instruments in the hands of the EU Commission to ensure adequate control of the risks to impede or seriously reduce effective competition are working rather well. Nevertheless, a debate is open regarding alternative methods to estimate the impact of M&A's given the experience of previous decisions focused mainly in the size of the companies measured by their turnover. The huge value of data bases owned by those companies should be better taken into account.

When it comes to the interpretation of the rules and criteria to investigate potential abuses of a dominant position in the market, the difficulties are more important. We know that some of the features that define the activities of the big players in the digital economy are challenging the conventional way to enforce competition policy. The extremely fast technological developments and its transmission to the provision of new services, the existence of "snow-ball effects", the relevance of Big data to increase the market power in two-sided and multi-sided markets, require the use of new techniques for the investigation of cases and for the interpretation of the conclusions of such investigations.

This is the reason why some experts and enforcers are in favor of introducing some changes in the legal framework of competition policy, that in the case of the EU are basically the same that were adopted at the beginning of our integration process. Other prefer to look at the way new regulations can provide solutions to the problems found by the enforcers, changing the present division of labor between competition agencies and sectoral regulators. The jury is still out.

The policy challenges raised by the emergence of big digital players go well beyond competition enforcement. The protection of personal data from the privacy perspective, the risks of manipulation of the political debate and its incidence on the opinion of voters, the potential use of mass social networks by criminals, ... cannot be tackled without a better coordination between competition agencies and the public authorities in charge of the other important issues at stake due to the impressive developments taking place in the digital world.

Jon Leibowitz, Partner, Davis Polk; Former Chairman, US FTC

In the United States, for the first time in a long time, there is a lot of discussion about what the antitrust laws mean, and what they should be about. Much of this is attributable to a new populist antitrust movement, which is a response to increased corporate concentration and wealth inequality, as well as the perception of underenforcement since the 1980s rise of the “Chicago School” approach to antitrust law. That school endorsed the “consumer welfare” standard, which balances an activity’s potential harm to consumers against procompetitive benefits such as lower prices, greater choice, or increased innovation. In contrast, the populist proposals would include the consideration of a broader range of factors in antitrust analysis, such as loss of employment, economic inequality, and increased political influence. The Federal Trade Commission recently opened its Hearings on Competition and Consumer Protection in the 21st Century, designed to shed light on a wide range of issues and viewpoints bearing on the mission of the antitrust agencies, and those discussions have already yielded numerous calls for antitrust enforcement with a wider lens. The dominant view among economists, academics, businesspeople, and other stakeholders is that the consumer welfare standard is not only the correct standard, providing predictability to businesses and solid theoretical foundations, but that it offers a sufficiently flexible toolbox to address the new challenges of today’s economy, specifically those raised by developments in technology and the start-up ecosystem. These challenges include, for instance, the treatment of acquisitions by large tech firms of nascent or potential competitors (smaller companies seen as possible future challengers to the market share of larger companies that acquire them). Although there is debate among practitioners about whether focusing on nascent competition is appropriate, there is agreement that the consumer welfare standard can address competition issues in this area. The flexibility of the standard is underscored by the Supreme Court’s recent decision in *Ohio v. American Express Co.*, which has sparked rich but unsettled discussion about the application of the consumer welfare standard in cases involving two or more sets of market participants who influence each other through network effects when interacting via a platform. It is too soon to know whether there will be any significant change in the way antitrust reviews or the antitrust laws themselves will change in the coming years.

The consensus in favor of economically rigorous analysis and the consumer welfare standard is shared by practitioners in the European Union. As for the U.S., thus far, the DOJ Antitrust Division’s approach in the AT&T/Time Warner deal shows that one major agency is willing to take risks and go after big mergers. Because the FTC has five new commissioners, it’s too early to say how it will approach its role in antitrust enforcement and other consumer protection matters. The results of the midterm elections may also have implications for antitrust enforcement, considering multiple existing Democratic legislative proposals that would dramatically change the way deals are reviewed.