

ANTITRUST TRADE AND PRACTICE

The Antitrust and Antiracism Nexus

In the year 2020, we saw renewed attention in antitrust in the United States. Senator Amy Klobuchar introduced a sweeping bill to strengthen prohibitions against anticompetitive mergers and prevent harmful dominant firm conduct. There was an increase concern regarding the harmful effects of the acquisitions of nascent competitors. The House Judiciary Committee investigated competition in digital markets, which culminated in the first-ever virtual hearing with the CEOs of some of the world's most valuable technology companies.

While the appropriate antitrust regulation of large corporations has been debated since the days of Standard Oil Company, in 2020, Democrats and Republicans aligned in their demand for greater enforcement of the nation's antitrust laws and greater resources to combat antitrust offenses.

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Simultaneously, the nation became focused on racial injustice, highlighted by the murders of George Floyd, Breonna Taylor and Ahmaud Arbery. The deaths of African Americans across the country, at the hand of police officers, ignited a cry for systematic reform. Many antitrust attorneys started asking whether antitrust could be a means for effecting such change.

Antitrust History

Congress enacted the federal antitrust laws to protect consumers by promoting competition. More specifically, the purpose of the antitrust laws—the Sherman Act, FTC Act, and Clayton Act—was to prevent abuse of market power and ensure free and unbri-dled competition.

In the 1970s, Judge Robert Bork offered a sweeping reinterpretation of the antitrust laws. Robert H. Bork, *The Antitrust Paradox* (1980). He argued that Congress enacted the Sherman Act only to protect “consumer welfare” and not to control the broader economic power of corporations. Sandeep Vaheesan, *How Robert Bork Fathered the New Gilded Age*, ProMarket (Sept. 5, 2019). Soon, the Supreme Court, DOJ, and FTC began to incorporate Bork's theories into case law and policy. As a result, antitrust enforcement today prioritizes preventing acquisitions or the exercising of market power that threatens consumer welfare—commonly known as “the consumer welfare standard.”

Recently, activists from the left and right have argued that courts should abandon the consumer welfare standard in favor of a standard that considers a broader public interest. In a report issued last year by the House antitrust subcommittee,

the authors suggested that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to not only protect consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals. Jerrold Nadler and David N. Cicilline, Subcomm. on Antitrust, Com., & Admin Law, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 392 (2020). This article explores the debate on how the antitrust laws may be applied to protect the welfare of black and brown people.

A Nexus

Commentators have observed that America's economic structure is highly racialized and that corporate power has increased wealth inequality, which affects communities of color disproportionately and exacerbates systematic racism. Angela Hanks et al., *Systematic Inequality*, Center for American Progress (Feb. 21, 2018). And although the antitrust laws are facially neutral, regulators are beginning to question whether antitrust laws may in fact be used to reinforce such economic and racial inequality.

As history has shown, the mere fact that laws are facially neutral

does not mean that the laws are actually neutral in application or effect. Earlier this year, Acting FTC Chairwoman Rebecca Kelly Slaughter challenged the view that antitrust policies were neutral, explaining that antitrust laws and enforcement reinforce the structural inequalities in our system. Brendan Kennedy, *Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don't Have to*, NYSBA (Jan. 27, 2021).

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As Commissioner Slaughter noted, in every other area of law enforcement, we are comfortable with law enforcers articulating policy priorities based on values. Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement anti-racist*, CNBC (Sept. 26, 2020). A criminal prosecutor, for instance, might say that he or she is going to prioritize enforcement against white collar criminals or violent criminals. Id. Slaughter stated that whether we agree or disagree

with those priorities, we do not take issue with enforcers setting priorities.

With antitrust, however, there is a sense that we should not and cannot think about the values behind enforcement priorities or set enforcement priorities in a values-based way. Id. Slaughter noted that while the goal to be value-neutral is aspirational, it is "a little bit trying to be race-blind, which is to say it doesn't work. At the end of the day, being neutral or being blind ends up creating and reinforcing existing problems and I think you have to be open-eyed in order to address them." Max Fillion, *US FTC's Slaughter seeks to examine impact of anti-trust enforcement on systemic racism*, mlex (Sept. 15, 2020).

Slaughter has put this issue front and center, questioning whether the desire for values-based neutrality in antitrust enforcement ignores the reality that many antitrust enforcement decisions may disproportionately affect black and brown people by permitting, in many instances, the aggregation of corporate power.

Health Care and Race

One industry in which some have argued that antitrust enforcement priorities might be shifted to ameliorate the racial inequalities in this country is

health care. The high costs of health care unduly burden people of color, making it difficult to access quality care. Black families spend a greater share of their household income on health care and out-of-pocket costs than the average American family. Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, The Century Foundation (Dec. 19, 2019).

Additionally, black maternal mortality is staggeringly higher than white maternal mortality due in part to black women's lack of access to care and their inability to afford the high costs of that care. Theresa Chalhouh and Kelly Rimar, *The Health Care System and Racial Disparities in Maternal Mortality*, Center for American Progress (May 10, 2018).

Progressive academics and advocates, such as the New Brandeisians, suggest that the consumer welfare standard should perhaps be expanded to evaluate a merger's likely effect on the access of black and brown people to health care resources, in addition to the merger's effect on market prices. Such an expanded consumer welfare standard would seek to ensure that the special struggles to access health care that marginalized black and brown communities experience are not exacerbated by a narrow focus on pricing by the surviving

health care facility. The analysis might require the merging parties to commit that some portion of any efficiencies realized by the proposed merger be directed to providing affordable quality health care in those marginalized communities.

Small Business and Race

The consumer welfare standard's prioritization of lower prices over deconcentrated economic power poses another potential threat to black and brown communities. Merging companies

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often justify their transaction as promising lower consumer prices, which enforcement agencies generally view under the consumer welfare standard as beneficial and pro-competitive. However, lower prices can harm small independent and minority owned businesses, which are unable to compete with the concentrated financial power of the merged company. Following the merger, black-owned businesses flounder and fail.

Commentators have suggested that the consumer welfare standard could certainly be expanded to take into account harms experienced by small business owners, especially small business owners of color, when determining whether a proposed merger is anticompetitive. Hal Singer, *Antitrust Can Address Racial Inequities*, *The American Prospect* (Feb. 10, 2021). Some have suggested, for example, that approval of a proposed merger could be conditioned on assurances by the merging parties that a portion of the efficiencies realized by the merger is used to ensure that competing black and brown entrepreneurs are not driven out of the market.

South Africa

Expanding the policy priorities of antitrust enforcement in this way is not unprecedented. South Africa uses its competition law to redress racial inequity, acknowledging that open, free, and competitive markets require addressing the injustices of the past.

Like the United States, South Africa's economic ownership is highly concentrated due in part to apartheid, a system introduced in the 1920s for the sole purpose to advance the interests of South Africa's white working class. After the fall of apartheid, the Competition Act of 1998 was implemented. The Act had two mandates:

economic and social. For economic purposes, the Act's goal was "to promote the efficiency, adaptability and development of the economy" and "provide consumers competitive prices and product choices." S. Afr. Comp. Com., Competition Act 89 of 1998 §1, 2 (amended 2001).

The Act's social objective was "to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons." *Id.* These goals enabled competition authorities to consider the impact on blacks, who were the historically disadvantaged group. In 2017, then-President Jacob Zuma empowered competition authorities to conduct inquiries as to whether small and medium-sized businesses of the type typically owned by Black South Africans have a fair shot at participating in the marketplace. Eleanor M. Fox, *South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed*, Competition Pol'y Int'l (Dec. 9, 2019).

Under the Competition Act, South African competition authorities must consider equality and inclusion when clearing mergers and taking other enforcement action. Even a competitive merger may be approved only if the merging parties agree to share a slice

of the economic benefits with historically disadvantaged persons. For example, the 2011 merger of Walmart Inc. and Massmart Holdings Ltd threatened the survival of small South African suppliers, who feared displacement by Walmart's global supply chain.

The South African court ordered Walmart to invest 200 million rands (\$13 million) on top of Massmart's 40 million rands (\$2.6 million) so that small suppliers also could enter the market. This program created jobs for Black South Africans and other historically disadvantaged groups. *Id.*

Conclusion

Racial equality and economic efficiency overlap. A racially skewed economy is not sustainable, so the question should not be whether to give regard to racial equality, but how. The antitrust laws may provide one mechanism to promote racial equality. Use of the antitrust laws to promote racial equality does not mean abandoning the consumer welfare standard, which many would likely interpret as an attempt to punish economic success and to return to the days where big was synonymous with bad.

Instead, this debate suggests that the standard could be redefined and expanded to ensure that the consumers whose welfare is

benefited by antitrust enforcement include marginalized communities of black and brown people.

There is a concern that veering away from the neutral approach will open a door for utilizing antitrust to address non-competition issues. Many argue that antitrust should not be politicized. Ensuring fair opportunity for all competitors to the benefit of all consumers does not need to be politicizing antitrust—it can be viewed as doing what antitrust was intended to do, protect the little people. In the words of Commissioner Slaughter, "[a]s long as Black-owned businesses & Black consumers are systematically underrepresented and disadvantaged, we know our markets are not fair." Rebecca Kelly Slaughter (@RKSlaughterFTC), Twitter (Sept. 9, 2020, 2:28 PM).