NETWORK LAW REVIEW

ARTICLE

A Competitive Process Goal Won't Strengthen Antitrust

Jonathan B. Baker

***

Antitrust expert Eleanor Fox has insisted for decades that antitrust law's central norm is to protect the competitive process, not to promote consumer welfare. Antitrust should not be concerned with outcomes alone, Professor Fox maintains, but also with the process of rivalry. Her formulations of this idea tend toward setting out preconditions for robust competition rather than defining the competitive process directly. She emphasizes two preconditions: open markets, in which firms without market power and entrants have the opportunity to compete, and dispersed economic power, shown by the presence of numerous rivals.

Today, in the midst of a robust debate over antitrust's goals, Professor Fox's view no longer seems distinctive. Other antitrust reformers also maintain that antitrust should be understood as pursuing a competitive process goal. But the meaning of the term remains murky, with various proponents defining it in different ways.

Some point to one or the other of Professor Fox's two preconditions. Jonathan Kanter, the current Assistant Attorney General for Antitrust, says that the "heart of the competitive process" is the "freedom to choose"—that is, the opportunity for all market participants, including consumers, farmers, and workers as well as firms, to select freely among alternative offers. Lina Khan, writing before she became F.T.C. Chair, leaned instead toward Professor Fox's precondition involving unconcentrated markets. Her interpretation of the competitive process appears to equate it to market structures that avoid concentrated market power.

Others who endorse a competitive process goal offer still other definitions—definitions that seem, at best, hard to apply. Tim Wu would instruct courts to ask whether the conduct is "merely part of the competitive process, or is it meant to 'suppress or even destroy competition?'" If this definition is not conclusory, it makes

the identification of harmful conduct turn on firm intent rather than on the conduct's observed or likely effects—a subjective approach that would be challenging for judges to implement. Dennis Carlton identifies the objective of antitrust as "to enable firms to compete with each other" and defines that as "a process that produces certain desirable economic outcomes" such as "low prices, innovative products, and high wages." If this definition can be implemented, it would appear to do so by looking at effects, not process.

Because the competitive process is hard to define, the goal of protecting it can mean different things to different people. Lina Khan and Tim Wu view it as rejecting the consumer welfare standard, while Doug Melamed treats it as implementing the consumer welfare standard by interpreting the latter goal to mean protecting the competitive process to promote economic welfare. Perhaps taking a view similar to Melamed's, Carl Shapiro understands the antitrust laws as requiring both disruption of the competitive process and harm to trading partners.

As should be evident, advocacy for a competitive process standard cuts across the usual divisions among antitrust commentators. So too does skepticism. I am not persuaded that courts should be asked to identify antitrust violations based on whether the conduct harms the competitive process. My view is shared by others, including for example, Einer Elhauge, Herb Hovenkamp, and John Newman.

Because the competitive process standard is not well defined, it is hard to know how it would be applied. I fear that its application by judges with a non-interventionist perspective could weaken antitrust when antitrust needs to be strengthened.

Consider merger law. Judges could conclude that a reduction in the number of significant horizontal rivals through a merger from, say, five to four would not harm the competitive process because four firms are enough to preserve that process. Or three firms, or two, without inquiry into whether that change of market structure would allow the firms to exercise market power. Applying this logic, the structural presumption might be undermined to the point where it applies only to mergers to monopolies.

Some may respond that courts can weaken the law governing horizontal mergers today, when judges are thought to be implementing a consumer welfare goal. They may say this can happen even if that goal is understood to be consistent with modern academic economics: to object to harm to all trading partners—including suppliers, and workers along with buyers and consumers—and to encompass short- and long-run effects on quality and innovation as well as price. I disagree because there is a basic difference between the competitive process and consumer welfare approaches. A serious focus on process (as distinct from outcomes) would not consider market

power; it would look for rivalry alone. A court that sees more than one firm making independent offers could plausibly call that rivalry without investigating whether, for example, buyers are led to pay more. And if a court would be expected to avoid that problem by looking at the outcome too, what additional benefit is conferred by also analyzing the competitive process?

A competitive process test could potentially weaken merger law through another route as well. A court might say that any acquisition that generates efficiencies would necessarily allow the merged firm to compete more effectively. Under this line of thinking, any merger with a plausible efficiency rationale could be said to enhance the competitive process regardless of what happens to prices.

A competitive process test could similarly weaken antitrust law's prohibitions against anticompetitive exclusionary conduct. Suppose a dominant firm is able to exercise market power to some extent, but it competes with higher-cost (or otherwise less efficient) rivals that collectively prevent it from charging the monopoly price. Suppose further that the dominant firm engages in exclusionary conduct that harms its rivals in a way that makes them less of a competitive constraint than before, allowing the dominant firm to raise prices further. A court that sees its job as identifying harms to the competitive process could plausibly find no antitrust violation on the ground that the inefficient rivals could not successfully compete in the long run and would exit eventually. By speeding their exit, the court may say, the dominant firm is simply speeding up the competitive process, not harming it—even though that would permit prices to rise more quickly than would otherwise occur.

Or suppose that a dominant firm pays key suppliers or distributors to agree not to deal with its rivals, thereby protecting its market power from erosion. That kind of strategy can be profitable for an excluding firm even if it has to outbid the excluded rivals for exclusivity. Yet a court might say that the competition for the exclusive right is a competitive process, so the resulting exclusive contract should be insulated from antitrust scrutiny even if it keeps prices higher than they would be otherwise.

Because the competitive process standard is not well-defined, it could instead overly-strengthen antitrust. One way is by leading courts to forbid conduct that reduces buyer choice or supplier opportunities on that ground alone, regardless of whether the conduct would be expected to allow firms to obtain, protect, or enhance market power.

Suppose that Walmart chooses to sell toothbrushes from just one manufacturer in its stores. (Perhaps doing so would improve its inventory management, lower costs, or allow Walmart to give more shelf space to other products.) A court could say that by simply denying other toothbrush brands the opportunity to sell, Walmart is harming the competitive process and thus violating antitrust laws, regardless of what

happens to toothbrush prices. A court could potentially take the same position when Walmart offered five toothbrush brands, but denied shelf access to a sixth brand.

To a similar effect, suppose that many automakers outsource windshield wiper production, buying those components from independent suppliers. Suppose further that Ford had once outsourced this component, then chose to vertically integrate by producing its own wipers.

Under some circumstances, vertical integration can lead automobile prices to rise. If Ford were large enough, for example, and if (obviously contrary to fact) windshield wipers accounted for a large enough share of automobile costs, it is possible to imagine that Ford's conduct would force rival wiper producers below efficient scale, raising the price that Ford's automaker rivals must pay for an important input, and thereby dampen automobile competition, raising automobile prices too. But the reverse is also possible. Perhaps Ford reasonably expected that internal products would reduce component shipping costs, increase the reliability of wiper supplies, or improve wiper quality—allowing it to offer consumers a less expensive or better product.

Regardless of the effect of this conduct on Ford's prices or product quality, a court could say that simply by denying independent windshield wiper producers the opportunity to sell to Ford, Ford harmed the competitive process and thus violated antitrust laws. If judges interpreted a competitive process standard this way—that is, to find violations whenever independent suppliers are denied the opportunity to compete without analyzing the consequences for prices, product quality, innovation, or other outcomes—that could sweep too far. That interpretation could prevent Ford from undertaking an investment that potentially allows it to lower costs or improve quality without necessarily leading to higher prices for the component or for automobiles. While there are settings in which it is reasonable for courts to presume competitive harm from vertical integration, this approach to identifying harms to the competitive process is unlikely to identify those settings reliably.

In addition, the competitive process standard could turn business torts into antitrust violations. To illustrate with an extreme example, suppose a pizza parlor torches a hated pizza parlor rival located across the street. That would appear to interfere with the competitive process even if many other pizza sellers also had stores nearby, and as a result, there was no practical reduction in the supply of pizza or increase in pizza prices.

The antitrust laws encourage firms to succeed by providing better or less expensive products and services to their buyers, and more attractive terms and conditions to their suppliers. That is why conduct reasonably understood as

undertaken to accomplish such ends is said to have a procompetitive justification. Sensible antitrust doctrines and successful enforcement would be expected to channel firms toward this kind of conduct, but as with other attempts at definition, that idea does not provide a productive basis for identifying "harms to the competitive process." A plausible procompetitive justification does not insulate a firm from antitrust liability because conduct is not always easily compartmentalized neatly, as either procompetitive or anticompetitive. It could have different effects in the short run and the long run, and it can harm some buyers or suppliers while benefitting others.

If legislators want to strengthen the antitrust laws by addressing the standard for a violation, they can do better than by instructing courts that conduct violates the antitrust laws if it "harms the competitive process." Because that standard is ill-defined and malleable, incorporating it would arguably signal to judges that everything is up for grabs, not that the current approach is insufficiently interventionist. By contrast, instructing courts that conduct violates the antitrust laws if it creates an "appreciable risk" to competition, as in Sen. Klobuchar's comprehensive antitrust reform legislation, tells courts to implement a different error cost balance—one weighted more heavily than today toward deterring harmful conduct (relative to the competing concern to avoid chilling beneficial conduct). That offers a more promising approach to strengthening antitrust than asking courts to employ a competitive process standard.

Jonathan B. Baker
Research Professor of Law at American University Washington College of Law.

The author is indebted to Steve Salop.

***

Citation: Jonathan B. Baker, *A Competitive Process Goal Won't Strengthen Antitrust*, Network Law Rev., Aug. 26, 2022.