Intelligence MEMOS

From: Aurelien Portuese

To: Canadians Concerned About Competition

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Re: PRINCIPLES OF DYNAMIC ANTITRUST

Innovation remains antitrust's paradox. Everyone agrees that competition policies should not stifle innovation with excessive interventionism and should foster innovation with optimal incentives. And yet, innovation remains insufficiently anchored in antitrust enforcement.

Antitrust enforcement has improved over the years with a more refined economic analysis whereby consumer harm has become the essential condition for regulators to intervene. However, consumer harm primarily measured through the price mechanism obscures instances where increased prices do not result from anticompetitive practices but from innovation efforts.

To shift the antitrust enforcement focus from a price-centric, static analysis toward a more innovation-centric, dynamic analysis not only would better align market realities and entrepreneurs' motives with antitrust analysis, but it would also minimize false positives (i.e., those costly regulatory failures by antitrust enforcers trying to address seemingly identified market failures.)

And yet, such a necessary shift in antitrust enforcement policy often is subject to disparagement due to the increased complexity of dynamic analysis over static analysis since the latter relies on theoretical models with normative power despite unrealistic assumptions. On the contrary, experts and officials may disparage dynamic analysis in antitrust because of the arguably too complex analysis it implies. This means antitrust agencies are too often stuck with incorrect yet administrable models, which presents two pitfalls that should make dynamic antitrust inevitable.

First, to stick to static analysis despite the minor importance of price and the great importance of time suggests that antitrust agencies are fine with costly false positives irrespective of the innocuousness of false negatives. Disparaging dynamic analysis for static analysis ignores the necessary balancing exercise agencies and courts need to embark on between the cost of false positives from static analysis concerning the expected costs of false negatives from dynamic analysis. In other words, the seemingly limited costs related to false positives with short-term antitrust interventions become prohibitively high if the costs of false negatives are null in the long term. For instance, the costs of monitoring a dominant company's prices, albeit perceived limited from static analysis, may become unacceptable if this dominant company is on the verge of being disrupted by an innovator who would monopolize the market through pricier, better quality products.

Second, dynamic analysis is already embedded in competition law for regulators: Merger analysis is a prospective exercise with a speculation on the future development of markets; the notions of potential competition and ease of entry both pare down to the use of time-horizon which cannot be corseted in short-term analysis; and finally, the notion that some behaviours are "likely" to harm consumers or competition inevitably suggest a probabilistic exercise with the uncertain future as a policy compass.

Antitrust is prospective; dynamic antitrust not only acknowledges antitrust principles but most importantly embraces, cherishes, and preserves the evolutionary nature of the competitive process whereby competition and innovation intermingle to drive the competitive rivalry.

Meanwhile Canada's competition framework can prove to be both valuable and pivotal in two ways amid the current global techlash from regulators and lawmakers.

First, it benefits from a rationalized framework, uncluttered regulatory divergences, and overlaps. Unlike the US or the European Union, there are no provincial (i.e., state) antitrust enforcers. The Competition Bureau solely enforces federal antitrust laws without a fragmented regulatory framework (unlike Europeans) and regulatory headaches and detrimental overkill among scattered antitrust enforcers (unlike Americans). Canada's model for antitrust centralization, rationalization, and internal consistency should inspire major competition jurisdictions.

Second, Canada's competition regime is at the crossroads between the two major drivers of the antitrust techlash – again, the US and the EU. Indeed, British-inspired competition laws of Canada have led the Great White North to have provisions such as the prohibition of abuse of dominant positions similar to the one enshrined in European treaties.

More generally, the importance of public enforcement over private enforcement of competition laws and the importance of civil remedies sought by a regulatory agency over criminal remedies imposed by a judge-made law are factors that bring the Canadian and the European views closer.

On the other hand, antitrust doctrines and the significant inspiration of economic analysis developed in the US considerably influence Canadian regulators, given the two nations' economic ties, so that in practice, Canadian competition enforcement appears more aligned with its US counterparts.

Because of its unique position at the crossroads between European influences and US proximity and its coherent regulatory framework on competition matters, Canadian regulators and scholars are well placed to implement the principles of dynamic antitrust.

The preservation of the competitive process as an evolutionary process aimed at fostering competition while protecting innovation incentives for the benefit of consumers constitutes the challenge of today's antitrust authorities. Market power, rather than being a problem in itself, underpins innovation incentives. Canada can and must be part of this important ongoing discussion.

Aurelien Portuese is Director of The Schumpeter Project on Competition Policy at the Information Technology and Innovation Foundation (ITIF), and is Adjunct Professor at the Global Antitrust Institute of George Mason University, and at the Catholic University of Paris.

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