

Workshop on Venture Capital and Antitrust Law

February 12, 2020

U.S. antitrust law, in one sentence

Private conduct that creates or increases market power, other than by efficiency-based competition on the merits, is illegal.

Note that there are 4 elements:

1. Private conduct (i.e., not government conduct)
2. **Anticompetitive conduct** (i.e., not efficiency-based competition on the merits)
3. Creation or **increase in market power**
4. A causal connection between elements 1 and 2, on the one hand, and element 3, on the other hand

What does increased market power mean?

- An increase in the ability of the firm profitably to take action to the detriment of trading partners (customers or suppliers)
 - Which reflects a reduction in the ability of actual or potential competitors to restrain the firm's conduct
- “Increased” means more than it would have been absent the conduct in question, not more than it was in the past

Mechanisms by which market power can be increased, i.e., by which restraining effect of competitors can be decreased

- **Collusion** – competitors agree not to compete
 - Agreement among actual or potential competitors
 - Joint venture among actual or potential competitors
 - Merger of actual or potential competitors (“**horizontal merger**”)
- **Exclusion** – non-consenting competitors are weakened or driven out
 - **Single-firm conduct**
 - Agreement with a customer or supplier of a competitor (“vertical agreement”)
 - Merger with a customer or supplier of a competitor (“vertical merger”)

What does **anticompetitive conduct** mean?

- Conduct that tends to harm competitors and does not increase economic welfare
- More precisely, conduct that does not
 - Increase product quality,
 - Reduce costs, or
 - Reduce above-cost prices

What is an anticompetitive **horizontal merger**?

- At a high level, it is one that is expected to reduce output of the merged firms in the market in which those firms do or might compete, compared to no merger
- Take Facebook/Instagram, for example:
 - Did the merger improve Facebook and/or Instagram (by, e.g., economies of scope and combining complementary assets) – efficiency based? or
 - Did the merger prevent Instagram from being developed by a firm that did not have a social network franchise to protect and that would have made Instagram more valuable to consumers and/or stimulated more competition or the development of a new, welfare-enhancing social network paradigm – anticompetitive?

What is anticompetitive **exclusionary conduct**?

- There is no settled definition that encompasses all such conduct
- But the following can be said
 - The conduct must exclude, or weaken and thus impair the competitive significance of, actual or potential competitors
 - If the conduct excludes competitors and provides no efficiency benefits, it is anticompetitive
 - **If the conduct both excludes competitors and has some efficiency benefits,**
 - Some courts and enforcers say it is not anticompetitive
 - Others say that the conduct is anticompetitive if
 - The harm from exclusion outweighs the efficiency benefits, or
 - The conduct would not be profitable unless it excludes competitors and causes an increase in the firm's market power
 - Courts rarely find both exclusion and efficiency benefits

Uncertainty – the driver of much antitrust law

- Antitrust cases often involve more uncertainty – about unknowable future events (e.g., innovation) and unobservable facts (e.g., marginal costs) -- than other cases
- Much antitrust doctrine embodies a judgment that false positives are worse than false negatives and thus puts the burden of uncertainty on the antitrust plaintiff
 - E.g., predatory pricing law explicitly permits some kinds of anticompetitive pricing on the ground that a rule that attempted to identify such conduct in specific cases would be too likely to result in false positives
- Whether mergers of start-ups and other nascent competitors, or single-firm conduct that handicaps smaller rivals, will be found to be illegal in the tech space is thus likely to depend in part on **the willingness of enforcers and courts to find violations even with substantial uncertainty**