

THE GOALS OF ANTITRUST POLICY: ARE WE PROMOTING
COMPETITION?

Luiz Felipe Rosa Ramos

OVERVIEW

Policies favoring enhanced competition among companies, known in the United States as “antitrust” initiatives, often lack clarity with regards to their goals. On the one hand, a great deal of antitrust criteria derives from the predominant goal among scholars: “consumer welfare”. On the other hand, attempts from agencies and courts to promote the more obvious goal of “competition” come up against the absence of a concept that can be applied in antitrust decisions. Such state of affairs tends to make implementation obscure or contradictory.

ANTITRUST INSTUTIONALIZED GOAL AND A POLICY PROBLEM

In the last fifty years, a group of scholars has defended that the sole concern of antitrust should be with “consumer welfare”. Understood as an economic concept, consumer welfare was often equated to (allocative) efficiency or to reduced prices. In practical terms, this path leads antitrust enforcers to have a hard time justifying the prosecution of unilateral actions like predatory pricing or refusal to deal – behaviors that do not involve collusion among two or more firms. Another implication is an increasing difficulty to block mergers that do not indicate significant levels of horizontal concentration (i.e. among firms deemed to provide substitutable products).

While influential, such view has not silenced the centennial debate on antitrust goals. In recent times, one can find, for example, (i) dispute on the concept of consumer welfare: whether it means consumer choice, consumer surplus or total surplus in a relevant market, or otherwise includes impact upon other markets, (ii) attempts to develop the goal of consumer welfare at its margins by putting only a weight on producer surplus, differentiating easy and hard antitrust cases, or including the perspective of suppliers and (iii) alternative goals like market integration, reducing poverty or stimulating development and growth, taken into account differences between the U.S., Europe and developing countries.

Only a minority of scholars defend that (iv) “competition” itself should be a goal. Most antitrust agencies, in turn, quote “competition” or an “effective competitive process” as a goal of their competition policy¹. Brazilian antitrust agency (“CADE”) is a good example: 65 out of 97 cases decided between 2011 and 2013 mentioned competition as a pursued goal. Such view has also found resonance in the broader public discourse².

But what does antitrust’s competition stand for? A possible answer deducts competition from some other goal. One can find in the literature, for example, that competition is the state of affairs in which *consumer welfare* cannot be increased by a judicial decision. Another common strategy is to look at the

¹ For example, International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 9* (2007), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

² See The Economist, *The University of Chicago worries about a lack of competition* (Apr 12th 2017). Before, The Economist, *Too much of a good thing* (Mar 26th 2016).

activity of firms in a real market – one that is not perfectly competitive nor “perfectly” monopolized – and to call it “competition”. The problem with such an inductive approach is that it does not reach an abstract concept that can be generally employed as a policy goal.

If competition is to be taken seriously as a goal and inform antitrust decisions, one can expect a definition that matches the following requirements: (i) it should be *normatively compatible* with antitrust statutes; (ii) *socially sensitive* to what is generally believed as competition in modern society and (iii) *abstractly flexible* so as to apply to multiple cases without losing coherence. Here, not only the relationship between Law and Economics is necessarily bilateral, but also “a combination of various disciplines, including economics”³ will be needed.

TAKING COMPETITION SERIOUSLY

Perhaps the best way to address this serious issue is using a seemingly trivial example. Imagine a town on the coast of Brazil. Such town has only two coconut kiosks by its amazing beach: kiosk A and kiosk B. As both sell coconuts for around five dollars, each tries to do everything to attract consumers. They give one-dollar discounts, they try to serve a colder water, or simply attempt to provide a smiling service. Now imagine that a third kiosk (kiosk C) decides to sell coconuts at the same beach. For a number of reasons – like access to a different technology or ownership of the trees – kiosk C is able to sell coconuts for only three dollars. In a couple of months, kiosks A and B go out of business.

At this point, one could ask: should antitrust do something about it? If the goal of the policy is consumer welfare or efficiency, the answer is probably “no”. Consumer welfare seems to be improved in the new scenario: consumers now obtain their desired coconut water at a lower price. One could easily accept that the assignment of available productive forces and material among the lines of “industry” is also more efficient, preserving the most successful “firm” (kiosk C).

But what if competition means something else? Think of the relation that does not exist anymore: the relation between A, B and consumer. Some sociologists have studied this type of relation and called it “competition”. According to those authors, the main features of competition are two: (i) it is a *triadic* structure, with at least two competitors and a third figure (the consumer) and (ii) it is *indirect*, since each competitor tries to overcome the other by favoring a third party, instead of destroying its opponent. In the last decades, the latter quality has become even more drastic. Competition is now *doubly* indirect, as competitors are also largely prevented from directly accessing their third parties (except in trivial businesses like coconut kiosks in small towns). Now they heavily rely on intermediaries such as platforms, market analysts and rankings.

So defined, it is clear that competition addresses not only one economic goal, but many social issues (“multivalued function”). It enhances, for example, a specific type of socialization, enabling strangers to dispute the same scarce good (e.g. consumer’s money) without entering into a direct conflict.

³ Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (2016), Yale University Press, New Haven, 5-6.

Competition might also foster diversity: A looks at B and tries to do better – that is, different – than B. Such combination of diversity and mutual observation arguably enables market robustness in the long term.

It comes without saying that competition does not only address, but also creates, social problems. Among its dysfunctions one could cite the disruption of other important social relations, like cooperation. Under special circumstances, it might lead to homogenization, instead of diversity: A looks at B and merely copies B, with both firms stabilizing such state of affairs at the expense of consumers. To summarize, *competition can be understood as a complex social form (triadic and increasingly indirect) with multivalued function (which includes dysfunctions).*

WHAT SHOULD ANTITRUST ENFORCERS DO?

As antitrust enforcers claim to foster competition, they could be more precise on delineating their efforts. The renewed view here proposed potentially enhances accuracy in different areas of antitrust analysis. This brief will provide only three examples based on real cases decided by CADE. The first one is related to antitrust's most typical violation: cartels. When bakeries come together to discuss the price of 50-gram salt bread⁴, they no longer act as distinct parties indirectly competing for the favors of consumers. The very *form* of competition is in danger. And this is true regardless of the bakeries' actual ability to influence the price of the bread. Even if there are other bakeries or supermarkets willing to provide salt bread at its previous price, competition has been harmed. The focus on the (*triadic*) *social form* of competition provides an elegant reinforcement for the prohibition of cartels regardless of presumed economic effects.

Merger analysis can also be impacted. A chain of health plans and hospitals that is willing to acquire an oncological clinic would think that antitrust risk is low if concentration measured in terms of beds is only 10%⁵. However, antitrust enforcers could see physicians as *intermediates* that reflect and influence consumer (patient) choices. Surgeons working at the hospital can develop professional ties with oncologists working at the clinic. More than market power or restricting output, hospital and clinic might be interested in taking advantage of this *indirect* relation to attract more patients to their own establishments through mutual recommendation. As patients increasingly rely on internet platforms to access medical services (some of which provide rankings of doctors), one can think of newer and more sophisticated types of intermediation.

Finally, exclusionary practices can receive a renovated treatment. A case involving the introduction of a new type of bottle by a major brewery makes us think of the *multivalued function* of competition⁶. By undermining the previous system of shared bottles, the practice certainly disrupts cooperation. On the

⁴ Based on Polícia Civil do Distrito Federal x Several bakeries in Sobradinho/DF (08012.004039/2001-68).

⁵ Based on the merger between Rede D'Or and Acreditar Oncologia (AC 08700.0044151/2012-01).

⁶ Based on ABRABE/Cervejaria Kaiser S.A. vs. Ambev (08012.006439/2009-65).

other hand, the larger bottle contains a proportionally less expensive beer. In order to verify whether the strategy is part of a functional competitive relation, further aspects need to be considered. Does the move towards a new bottle reflect an intention to harm competitors and hinder their capability to compete? Or did it come up as an idea to attract consumers and results in an innovation that can be superseded? In the first case, the strategy resembles rather a fight or a conflict. In the latter, the social form of competition potentially creates objective values and should be preserved.