

Rawlsian Antitrust

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Agenda

1. A role for inclusive antitrust?
2. Rawlsian Antitrust
3. Operationalising a secondary objective

A role for inclusive antitrust?

- The policy challenge of the age is to find a way to achieve inclusive growth
- The role of competition policy in helping to drive growth through efficiency, productivity and innovation is well understood.
- Its role in driving inclusivity remains the subject of debate. Some perspectives:
 - Antitrust is about efficiency alone, and so has no role to play – it's the wrong tool and stretching it will damage the tool itself.
 - Inclusivity is a core purpose - failing to use the tool to deliver that purpose is a betrayal.
 - Antitrust can rely on structural shortcuts to improve administrability and thereby protect marginalised groups.

A role for inclusive antitrust?

An alternative perspective:

- Shortcuts knowingly sacrifice welfare. An economic basis is needed (presumptions must be rebuttable).
- The welfare of our citizens is the goal, but in a resource constrained world, our values determine which citizens' welfare is prioritised, in which circumstances, and how far we go to explore the impact on such groups.
- Antitrust can and should play a role as part of a coherent policy response to the problem. No policy is an island!
- If not, there will be inevitable political consequences that will damage the tool (as foreseen in Baker, 2013)

= Rawlsian Antitrust?

Rawls: Theory of Justice

- The paper suggests that reconciling competition and equality, can be seen to correspond to Rawls' attempt to reconcile liberalism and equality within his proposed principles of justice.
- To develop those Rawls asked what decisions we would make about the basic structure of society if we had no knowledge of what position we would end up having in that society? the 'Veil of Ignorance'
- He argued we were risk averse and that we would therefore arrive at 3 principles that we would apply lexically:
 - 1: greatest equal liberty
 - 2b: equal opportunity
 - 2a: difference

Principle 1: Greatest equal liberty

- In Rawls' general context this sets out that our priority would be to ensure freedom for all, thereby removing the risk that we'd be denied our liberty.
- I argue that within a market context we can interpret this as requiring that people should have access to the best value possible because that gives them the greatest freedom to achieve their goals and live a fulfilling life.
 - E.g. over-charging eats into an individual's ability to invest in themselves, their community and their experiences and therefore reduces their liberty.
- This might correspond to an '**efficient citizen welfare**' standard (to clarify that workers welfare can be relevant).

Principle 2b: Equal opportunity

- For Rawls this is about there being an equality of opportunity for individuals
- In an antitrust context we think about the equal opportunity to compete on the merits, e.g. both free from being excluded by incumbents, and free from disadvantageous distortions of the playing field.
 - These can be *instrumentally* problematic because they threaten to cause an increase in prices (or lower quality, innovation or wages) and so may already be inconsistent with the greatest equal liberty.
 - But what about as an *intrinsic* offence ?
 - E.g. exclusion from a highly competitive market that had no effect on market outcomes, but which would still offend this principle due to its impact on the equality of opportunity for the entrepreneur?
 - As there's no impact on outcomes, this takes us outside the primary goal of antitrust and suggests the need for a secondary objective.

Principle 2a: difference

- Rawls suggested that if there were a set of ways to structure a society that delivered equal liberty to all, and equality of opportunity, then the set of rules that would be selected by those behind the veil of ignorance would be those that deliver the greatest benefit to the least advantaged members of society.
- Again there's no impact on outcomes, so again this takes us outside the primary goal of antitrust and suggests another element of a secondary objective

Plus: the 'Just Savings' principle - intergenerational transfers

When do 2ndry objectives matter?

- Uncertainty & Prioritisation
 - Before an agency devotes resources to a case the effects and hence the strength of the case under the primary objective is often highly uncertain.
 - A secondary inclusivity objective (SIO) would lead to a focus of resources on markets in which if there is a competitive restriction, it is likely to be one that harms' marginalized citizens
- Uncertainty & Analysis
 - A secondary inclusivity objective might also clarify the need for agencies to dig deeper to identify possible harm to marginalized groups. E.g. to look at preferences, switching behavior and sensitivity to price (or quality) amongst marginalized groups, and to reflect those in the analysis and remedies adopted.

When do 2ndry objectives matter?

- Uncertainty & Rebuttable Presumptions
 - A secondary inclusivity objective might also suggest that a rebuttable presumption of anticompetitive effect, or a lower evidentiary standard, be applied to markets in which any anticompetitive effect is likely to have a high inclusivity cost.
 - Alternatively, the SIO might suggest a more general rebuttable presumption of anticompetitive effect if inclusivity is more likely to be harmed by under-enforcement than by over-enforcement.
- Uncertainty & Private Litigation
 - Opt-out class actions in order to include marginalised citizens
 - Need to guard against courts erecting barriers to litigation for marginalised citizens. E.g. discovery to precede any substantive assessment by the courts in order to identify the degree to which marginalised groups might be harmed by the conduct in question.

Conclusions

- Efficient Citizen welfare standard
 - Economic basis
 - Transparent on values that guide us in the presence of uncertainty
- Secondary inclusivity objective
 - In prioritisation
 - In analysis
 - In rebuttable presumptions and/or evidentiary standards
 - In the legal framework for private litigation

Thanks!

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