Modernizing U.S. Antitrust Law: The Role of Technology and Innovation

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Antitrust law is an important feature of the U.S. business environment, profoundly affecting the strategies and actions of firms of all sizes and in many industries. Furthermore, antitrust litigation can adversely affect the competitive outlook for a publicly-traded company that finds itself in the unenviable role of defendant. From time to time, the U.S. Congress has undertaken major reviews of current legislation to adapt it to emerging challenges in the economy. Thus, in July, 2004, the U.S. Antitrust Modernization Commission (“Commission”) held its first public meeting in Washington, D.C. The Commission, a result of federal legislation passed in November 2002, is statutorily charged with four specific duties (Antitrust Modernization Commission Act, 2002):

• To examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
• To solicit views of all parties concerned with operation of the antitrust laws;
• To evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
• To prepare and to submit to Congress and the President a report containing detailed findings and conclusions, together with recommendations for legislative or administrative action not later than three years after the first meeting of the Commission.

The bipartisan Commission has twelve members, with four appointed by the President, two each by the majority and minority leader of the Senate, and two each by the Speaker and the minority leader of the House of Representatives. The Commission is charged with reporting its findings to Congress by April 2007. This is the sixth time in U.S. history that such a national study commission or committee has been charged with making such a wide-spread review of U.S. antitrust law (Foer, 2003).¹

As can be seen by its statutory charge, this Commission has no specific mandate or focus on any aspect of the federal antitrust laws. However, the Congressman who sponsored the bill creating the Commission, House Judiciary Committee Chairman F. James Sensenbrenner, Jr. (R-Wis.), attended the Commission’s first public meeting (held on July 15, 2004). Addressing the Commissioners, Congressman Sensenbrenner called the need for the Commission to study the following areas of antitrust policy concern: how the antitrust laws operate in the modern, information-driven economy; the intersection between antitrust law and intellectual property law; conflicts between U.S. and foreign antitrust law; the relationship between federal and state antitrust enforcement; the application of antitrust laws in regulated industries; and the length of time taken to conduct reviews of mergers (Antitrust Modernization Commission, 2004).

In this article, I will focus on identifying the major competition-related areas of technology and innovation which have been recommended for study in the public comments received by the Commission and conclude by offering personal recommendations on where the Commission should focus its efforts in these particular areas of study. But first, as a primer for those not as familiar with antitrust policy and law, I will briefly review the economic and social philosophy underlying essential U.S. antitrust statutes.

U.S. Antitrust Policy and Law

Antitrust policy, representing the philosophical foundation of the antitrust statutes, has historically consisted of economic, political, and social goals, all delineated in legislative histories or judicial interpretations.³ Most American scholars of...


³From the perspective of economists of the Chicago School, efficiency should be the only objective of antitrust policy.
Antitrust policy have identified four general objectives of antitrust policy that have emerged over the last century:

- the protection and preservation of a competitive economic environment;
- the protection of consumer welfare by prohibiting deceptive and unfair business practices;
- the protection of small, independent business firms from the economic pressures exerted by competition from big business;
- the preservation of small-town American values and customs.

Depending on one’s disciplinary perspective, antitrust law may be viewed differently. In the case of Robert H. Bork (1978), a legal scholar, it is a form of business regulation. Contrarily, Irving M. Stelzer, an economist, views the antitrust laws as an effective tool for avoiding government regulation, thus leaving resource allocation to competitive markets rather than assigning it to public regulators (Stelzer, 1997). Furthermore, Stelzer makes a convincing case for the proposition that the absence of competition in the marketplace is more likely to result in direct regulation of prices and profits or direct government provision of a good or service. When antitrust policy fails to prevent the creation or maintenance of private monopoly power through unfair business practices, says Stelzer, direct regulation is the usual government response in a society built on democratic capitalism.

Maintaining and promoting a competitive economic environment and protecting consumer welfare are at the heart of the Sherman Act of 1890 and the Clayton Act of 1914, the essential legislation governing U.S. antitrust policy. These are considered the central objectives of antitrust policy as enforced by the U.S. Department of Justice’s (DOJ) Antitrust Section and the Federal Trade Commission (FTC). In general, the Sherman Act proscribes illegal acts of combining or conspiring to restrain trade (i.e., cartels and monopolizing behavior, rather than simply a “monopoly”); the Clayton Act enjoins various practices “that may be substantially to lessen competition, or to tend to create a monopoly.” The economic reasoning behind these statutes argues that consumers will be best served by firms that compete vigorously for their purchases, thereby eliminating collusion and the maintenance of higher-than-normal product or service prices. Under Section 5 of the FTC Act of 1914, the FTC is authorized to investigate business conduct, practices, and the management of companies and to define what methods of competition are unfair and thus unlawful. This expansion in the interpretation of the earlier antitrust statutes was a legislative response to a growing recognition of certain business methods that could be used to exploit or mislead consumers.

In general, the language of the antitrust statutes is intentionally vague, allowing for the federal antitrust agencies to exercise their authority to interpret and enforce the laws according to the economic philosophy of the administration in power. Specific changes in the antitrust statutes pertaining to business conduct or practices statutorily codified are rare and occur only in response to an overwhelming need for business management and public/private enforcement guidance. Not surprisingly, the theories of industrial organization economists are strongly incorporated into the enforcement policies of federal antitrust agencies, as well as the growing body of academic knowledge in the business fields of marketing science and organizational theory/strategy. As economics and management science have evolved, the contours of antitrust doctrine and enforcement policy have followed suit.

The modern interpretation of the antitrust statutes (especially Section 2 of the Sherman Act) emphasizes that modern firms may compete on the basis of “superior products” or “business acumen” and legally maintain a monopoly position (U.S. v. Grinnel Corp., 1966). This public policy emphasis on encouraging managerial and technological innovation is supported by both federal antitrust agencies in their enforcement of enabling statutes and by Congress in enacted legislation which encourages certain competitor collaborations. Supporting an objective of facilitating an innovative market environment falls comfortably into the realm of an “economic” goal (i.e., the enhancement of consumer welfare and market efficiency), certainly in line with the post-1970s emphasis in antitrust enforcement. Simultaneously, encouraging innovation also addresses traditional socie-