We are witnessing a swing in the antitrust pendulum from minimalist to populist poles. This entry briefly highlights the dynamics, potential changes, and, perhaps more importantly from a counseling perspective, what will change and what will remain the same.

At the minimalist antitrust pole, markets are viewed as self-correcting, i.e., no monopolist or manipulator will last for long and, therefore, government intervention should be limited as enforcement is more likely to harm than help markets. At the populist antitrust pole, we find a distrust of concentrated economic power and how it may be wielded.

We can observe a 40-year cycle in the antitrust pendulum’s swing. The late 1970s marks the rise to the “Chicago School” (markets are self-correcting and consumer price is the key factor). Twenty years later, in the 1990s, the pendulum swung toward the center with a more moderate or broader interpretation of consumer welfare. We are now moving toward the populist pole of the antitrust pendulum, which some call the “New Brandeis” or “Neo-Brandeis” movement, which echoes Justice Brandeis’ concern with economic concentration and abuse of market power.

Of course, the pendulum analogy is an oversimplification, but a helpful one in making sense of the changes in antitrust enforcement. As we see the intertwined
evolution of consumer preferences and technology (broadly defined to include transportation, logistics, manufacturing, and services), markets and commercial relationships will change. That, in turn, results in varying degrees of societal disruption and shifting economic power.

Federal Legislation

There are several bills in Congress that propose a variety of changes to the antitrust laws, mainly focused on tech giants, including Amazon, Google, etc. The prospects for Federal legislation range from maybe to unlikely, but there is considerable effort afoot with Hill hearings and Committee reports. Proposed remedies range from forced divestitures (remember AT&T and the Baby Bells?) to limits on future acquisitions by dominant firms, etc.

State Legislation

Proposed state legislation is instructive and more likely to be enacted. For example, New York’s “Twenty-First Century Anti-Trust Act” passed the New York Senate on June 7. The bill does not view big business as neutral or benevolent, but rather reflects a concern with unilateral action. Senate Bill 933 adopts an EU antitrust approach that makes “abuse of a dominant position” illegal. Under that approach, there is no need to demonstrate monopoly power, with dominance having a lower burden of proof.

Litigation

In antitrust litigation, it is mistakenly assumed that market power must be proven through an econometric analysis by antitrust economists defining the product or service market and the defendant’s market power as an essential foundation to any claim of injury to competition. But market power may also be demonstrated through evidence showing that a defendant charged supra-competitive prices. This type of evidence is considered direct proof of market power, that is, the ability to raise prices above competitive levels. See FTC v. Indiana Fed’n of Dentists, 476 U.S.447, 460-61 (1986); Rebel Oil Company Inc. v. Atlantic Richfield Company, 51 F.3d 1421 (9th Cir. 1995). But judges, lawyers, and antitrust economists are so anchored to the economic analysis approach that the ‘mere’ proof of anticompetitive power is often deemed inadequate to establish an antitrust claim. Similarly, while monopsony (monopoly buyer power) has always been actionable, claims of monopsony are greeted with skepticism. Much of the New York bill reflects an effort to correct the gap between existing law and how the law is commonly understood and enforced.

Implications

If legislation is enacted, it may encourage government challenges against mergers, acquisitions, and abuse of a company’s dominant position. This, in turn, may create a litigation environment where disgruntled or disadvantage competitors are more likely to challenge the dominant firm’s business practices.

As astute readers have already deduced, these changes in antitrust analysis address
how competition laws apply to actions by a single company or mergers among companies. The law regarding anticompetitive joint action, such as price fixing and bid-rigging will remain the same, but the environment surrounding the populist pole of antitrust tends to similarly increase scrutiny of joint action as illegal ‘combinations in restraint of trade.’ See the U.S. Dept. of Justice & Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors (April 2000).

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