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HIGH TECH NEEDS ANTITRUST

by Albert A. Foer

Antitrust is a quaint 19th century program that has outlived its time, according to certain critics, many of whom apparently think Bill Gates should be nominated for deity. Without antitrust, however, a monopolist (say, Microsoft) could leverage its market power to take over adjacent markets (such as browsers) occupied by efficient, innovative companies. It could put suppliers and purchasers in positions of subservience, where their economic lives can be dramatically damaged if they cross the monopolist, and could blockade potential competitors (such as the combination of Java and Netscape) so that their innovations cannot challenge the monopoly.

Certain of these critics wrongly believe that the "new economy" is so fundamentally different from the "old economy" that antitrust should only apply (at most) to the old. Columnist Robert J. Samuelson, for example, argues that the only competition needed for a high tech monopolist is the eventual competition represented by a new product that will one day substitute for the monopolized product. But that is exactly what the Microsoft case was about: an unrestrained monopolist may be able to forestall a substitute from gaining traction. Without antitrust keeping the door open for challengers, investors will only make investments in companies and products that are compatible with the interests of the monopolist. Innovation will be channeled to serve the monopolist.

In talking about technology and antitrust, it is misleading to focus too much on the example of Microsoft. In the past three months, for instance, there has been a remarkable explosion of new kinds of joint ventures aimed at creating new on-line marketplaces. It is reported that the Federal Trade Commission is now examining one such business-to-business venture by the three largest auto companies. Let's hope so. Similarly, it is reported that the Justice Department is investigating the five largest domestic airlines, who have announced an agreement to sell air tickets and other travel over the Internet. As part of this venture, known as "T2," the airlines have apparently agreed not to offer any third parties prices lower than those offered through the venture. A few short years ago, even the most reckless of companies would not consider, let alone trumpet, an industry accord to limit price competition. The airlines, thus far, have evaded public antitrust scrutiny of what has every appearance of the very conduct that the antitrust laws condemn.

What these various new ventures have in common is a strategy by established ("legacy") companies to reduce or eliminate the possibility that their industry will be served on-line by independent start-up "dot.com" companies. Should antitrust keep out of the brick versus click battle and simply let the jungle exfoliate?

There are at least four reasons why antitrust should be particularly alert to these high tech ventures, which -if they succeed- stand to radically restructure our economy in industry after industry.

(1) Too much sharing of instantaneously available information by competitors can make it possible for cartels to engage in price fixing through coordination mechanisms that are so subtle that price fixing may never be provable in court to the detriment of consumers everywhere. We need antitrust rules as to what information can or cannot be shared among competitors.

(2) With the largest companies in an industry coming together to start an electronic marketplace or joint sales venture, it may be impossible for a competing marketplace to become established. By being designed to be overly large, the joint venture may make competition with it impossible. We faced this potential with the invention of automated teller machines, when there was a push for a single national network. Antitrust, however, assured that there are multiple electronic fund transfer networks, which compete with each other and assure a continued motivation for generating better products and new services. The participation of the five largest airlines in T2 assures that no competing supplier alternative can emerge, leaving smaller airlines no practical choice but to join the cartel.

(3) A monopoly electronic marketplace dominated by the largest members of the industry can disadvantage or exclude horizontal competitors of the joint venture's owners. For instance, the joint venture could charge high transaction fees to all users, while rebating part of the fees (in the form of profits) to the owners - a strategy known as "raising rivals' costs". We will need antitrust rules to assure fair access and non-discrimination.

(4) To the extent that the leading buyers in an industry can utilize an electronic market place as a kind of buyers' consortium, oligopsony power could be used to unfairly depress prices to suppliers. This can lead to underproduction of supplies and overpricing at the consumer level. As suppliers consolidate or leave the market, competition will be lost and efficient entrepreneurs put out of work. Again, we will need antitrust to stand guard against abuses of buyer power.

As the institutions of e-commerce are being created, it is wise to listen to Lawrence Lessig, whose book Code and Other Laws of Cyberspace spells out the importance of the initial architecture of cybersystems. If government plays no role in the architectural design, he argues, then the rules will be set by commerce alone, and this can lead to a range of abuses. The FTC, in scheduling a two-day workshop (June 29-30) on the topic of electronic marketplaces, is acting swiftly and appropriately to ask the important questions.

Antitrust is needed to assure fairness and efficiency in the new marketplaces and distribution efforts that are emerging. But as the auto industry and airline joint ventures illustrate, there is no clear line between the old economy and the new, and any attack on the applicability of antitrust to high technology is ultimately an attack on the very idea of competition. Without vigilant application of the antitrust laws to such ventures, consumers and ultimately our nation will suffer.

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