ANTITRUST AND INEQUALITY: THE HISTORY OF (IN)EQUALITY IN COMPETITION LAW AND ITS GUIDE TO THE FUTURE

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Abstract. Is equality a value of competition law, and can competition law help to close the growing wealth/income inequality gaps? To help answer these questions, this paper explores the history of equality in the competition laws of four key jurisdictions and uses the studies as a guide to what we can expect competition law to do and not do to reduce inequality. It finds equality values deeply embedded in the antitrust jurisprudence of most (at least representative) jurisdictions, and draws connections that inevitably, albeit indirectly, impact wealth and income. It concludes: Do not overestimate, and do not underestimate, what the equality value can do.

Keywords: equality, inequality, antitrust, competition law, wealth and income inequality gap, monopoly, abuse of dominance, merger control, comparative competition law, sustainability

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Extended abstract

Growing inequality of wealth and income has been flagged as a blight on society all over the world, and polities are brainstorming what to do about it. Competition law (antitrust) has been identified as both a cause and a cure. Antitrust is accused of standing by while corporate power is amassed and while its gains go predominantly to the elite. A critical mass of literature, however, sailing against the populist tide, disputes the statistical connection and argues that equality has no place in antitrust and that its introduction will degrade antitrust and undermine markets.

This article adds to the literature in three ways. First, by historical and comparative analysis, it demonstrates that equality – and consciousness of the distributional consequences of antitrust enforcement choices – have played an important role in antitrust through time. Second, the article documents precisely how equality has been incorporated into antitrust through in-depth studies of four jurisdictions – the United States, the European Union, Germany, and South Africa, with vignettes from several other countries. Third, it finds that most incorporations of equality concerns in antitrust are consistent with an efficiency principle and indeed may be the nudge towards more efficient and responsive markets.

Our examination of US antitrust law shows that an equality principle was embedded in the law up to the late 1970s and early 1980s. The concern was excised from the US law more than 40 years ago, but a movement with strong headwinds currently advocates for reform that would restore an iteration of the principle. EU competition law incorporates principles of openness, contestability, and special responsibility that map on to greater opportunity for the outsider and stronger control of the market power of incumbents. German competition law, from its inception, was deeply influenced by ordoliberalism, which held that a free and fair market order could exist only within an economic constitution that prohibited competitive distortions and ensured the equitable distribution of resources. Post-apartheid South Africa was founded on the principles of equality and dignity, and it uses its competition law to reduce the inequality barriers still facing historically disadvantaged persons – particularly Black South Africans – and small business.

Putting together the history of equality in these representative competition laws, their current applications, and the felt need across so many societies to help reduce the inequality gap, we make these recommendations:

1. Nations and competition policymakers should appreciate the close connection between competition law and an equality value. The two are sympathetic and symbiotic in large measure – not in the sense that people should have equal income and wealth but in the sense that people should not be deprived by corporate power of a fair opportunity to compete or faced with unnecessarily high prices or low wages. Antitrust law sand policy should be recognized as on the side of the people, not on the side of privilege and power.

2. We need to get better control over antitrust prohibitions against the creation, entrenchment, and abuses of market power. This means, in some jurisdictions, that substantive legal standards for mergers and monopolies need to change. It means better policy on remedies; anticompetitive mergers should almost always be enjoined. Also, it means rethinking what is substantial market power and whether, if the law insists on proof of monopoly or dominance, major offenses fall below the radar screen.

3. Certain terminology and conceits should change, for they obscure who are the winners and who are the losers. They entrench a system that protects incumbents and widens the inequality gap while purporting to be neutral. We need to complement or replace the Kaldor Hicks test (when winners win more than losers lose, the conduct is efficient), and disaggregate “consumer welfare” into people, not euros or dollars. If under our antitrust rules poorer people persistently lose, we have to change our rules.

We need to change terminology of redistribution. Most incorporation of equality into antitrust law has nothing to do with redistribution in its “Robin Hood” sense. In any given antitrust case there is a backstory. Dominant firms, cartels, and merger parties have wrongfully appropriated wealth. Antitrust cures the wrongful appropriation.

4. We recommend that antitrust law keep its focus on market goals, except for systems that designedly protect a specific equality value such as rights for historically disadvantaged people or the right not to be exploited by superior bargaining power. We do not recommend “throwing equality” into a balance of factors and see what tips the scale. Keeping the focus on market goals lends more certainty, predictability, and stability to the analysis. Equality-leaning goals that are compatible with a market

system are a natural part of market analysis; for example, ability to contest markets on merits, preventing anticompetitive mergers, depriving monopolists of illegally-won gains, and freeing workers from employer agreements not to compete for them.

5. Priorities. Agencies should prioritize cases that principally help the poorer or middle class and sectors critical to the poorer population such as health care, food, and energy. But most antitrust agencies already do so, so we do not expect that this frequently-made recommendation will result in observable change.

This leads to our final point: expectations. Apart from adopting stronger antitrust principles to make markets work better, can we expect antitrust to become more equality-friendly? The answer is jurisdiction specific. In the United States, equality is likely to be considered a foreign element undermining the efficiency of the market, unless Congress changes the substantive standards. But Congress might do so; the call for legislative change has become strong. South Africa is the leader in equality-conscious antitrust. It already has gone far, and it must feel its way carefully as it goes forward and confronts trade-offs. EU and Germany already have their brands of level-playing field and anti-power-driven antitrust. More injunctions against anticompetitive mergers may be warranted (for all jurisdictions), but it is not easy to see what more room for antitrust enforcement they would find in the name of equality.

This is not a negative view of the future of equality in antitrust. It is, in fact, positive, for the article shows clearly that greater equality is deeply linked to antitrust. But the biggest drivers of the inequality gap – globalization and technological change – are forces much larger than antitrust. One should not overestimate the gains likely to result from more aggressive antitrust in reducing the inequality gap. But also, one should not underestimate what antitrust – and no other discipline – can do.

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