Competition Enforcement and Stakeholder Remedies

Submission to the FTC "Competition and Consumer Protection in the 21st Century Hearings", Project Number P181201

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Thank you for the opportunity to comment on the FTC's latest hearings. This submission will primarily respond to topic 11 "The agency's investigation, enforcement and remedial processes", whilst engaging more generally with the broader question of whether changes in the economy now warrant adjustments to competition law enforcement.

What Lies Beyond Consumer Welfare?

In this uncertain economic climate the unrelenting burden on competitive markets to deliver broad welfare benefits to all sections of society has never been greater. In the industries vital to our current and future prosperity -- including healthcare, technology and energy -- the dynamic between consumers, business and other stakeholders (workers, local communities, future generations and the planet) is tightly bound-up with market concentration and market power and the concept of "public interest" in antitrust is being stretched to its limits. We can anticipate that this trend will only intensify over the next five to ten years as governments, business and society attempt to navigate the realities of technological innovation, globalisation, climate change, inequality, natural resource scarcity, geopolitical conflict and trade negotiations.

Against this political and economic backdrop, competition authorities and companies find themselves wedged between the narrow technical remit of the law and the overwhelming public and political pressure to prove the societal benefit of the transaction or conduct under investigation. Antitrust agencies are being forced to push past the usual review of efficiencies and the impact on price and output towards an analysis more typical of the realm of corporate governance: the balancing of stakeholder interests.

Competition is about ensuring that the benefits of the market system accrue to consumers. Corporate governance is about ensuring that those benefits accrue to specified stakeholders. Competition authorities now find themselves operating in the gray area between the two.

In some cases it will be possible to address public interest concerns within the well-established boundaries of consumer welfare. Some have argued, where this is not possible, that the consumer welfare standard should be expanded to encompass other stakeholder interests. Even if the guide-post of consumer welfare is preserved, an infringement under that standard can also raise public interest issues that may manifest as a harm to consumers not found in price or output, and there may be material, ancillary harm to other stakeholders. But short of blocking a transaction or banning a particular form of conduct, competition may not have the

tools to address these stakeholder concerns, whether or not the consumer welfare standard is expanded. This gives rise to an opportunity to incorporate governance remedies as part of comprehensive, holistic case resolution that protects consumers, contributes to a vibrant economy and better serves the authority's broader mission statement.

The Benefits of Stakeholder Remedies

The knee-jerk antitrust remedy in response to monopoly, advocated by many commentators if not the authorities themselves, is to break-up the company or otherwise regulate its conduct to foster greater competition. But the biggest scandals that have drawn the public's ire have generally had nothing to do with monopoly power. Industrial-scale data and privacy breaches, for example, are better characterised as failures of company governance not failures of competition. The relevant companies may have been emboldened by their market dominance or made complacent because of it, but it is unclear that more competition would prevent, for example, the commercialisation of private data, which is central to some tech company business models.

The introduction of more competition may not even be possible, to the extent that some of these markets may tend towards a natural monopoly or oligopoly due to network effects, the rising importance of data, or both. In any case, with cycles of innovation becoming ever-shorter, the benefits of any structural remedy may be short-lived. It is a band-aid for a much more fundamental problem with how our market system apportions risks and rewards, and more competition may not always provide a complete solution.

Suggestions that the largest tech companies be treated as utilities acknowledge this tension, and effectively propose the incorporation of stakeholder interests via regulation. Absent this level of industry regulation, elements of stakeholder governance may instead be used in the context of antitrust remedies, including for industries where utilities regulation would not be appropriate.

When looking at issues such as monopsony, in relation to small suppliers of larger corporate entities or negotiations between individual workers and their employers, it may not be possible to structurally create more competition at the local level. But behavioral remedies may be problematic as it may be difficult to predict how commercial conditions and relationships will evolve. Instead of a one-off competition remedy that responds to a particular problem at a point in time, governance remedies can create a process for ongoing stakeholder engagement which is flexible, can adapt as markets change, and can lay the groundwork to protect against future economic risks.

An additional benefit for regulators, who must constantly evaluate how best to allocate public resource, is that stakeholders, once given formal standing in company decision-making, are well-motivated to hold companies to account. They also generally have more information than

the authorities and are not bound by jurisdictional limits. Stakeholders may therefore have more lasting influence than antitrust agencies, once elevated internally within company governance.

Much of the legal and economic expertise needed to pursue stakeholder remedies will already be in-house at the competition authorities, particularly through their extensive experience of formulating and administering behavioral remedies for vertical mergers and monopoly cases. No other regulator would have the in-depth market knowledge and birds-eye view of commercial and stakeholder relationships that the antitrust agencies have as a result of their existing evidence-gathering powers.

Stakeholder Remedies in Practice

The competition authorities may choose to accept governance commitments in the context of a merger investigation to alleviate stakeholder concerns, including the concerns of customers. This may include commitments to increase stakeholder board representation, or at least consultation, or other means of engagement. Such commitments must be open to public review, and the onus should be on the company to prove that the procedures and mechanisms proposed will be robust enough to meet the public concern.

In cases where monopoly power is wielded to compromise aspects of competition other than price or output for consumers, such as with “platform monopolies”, promoting stakeholder voice through formal governance commitments may be a far more effective tool than introducing more competition. Many of these companies already have a symbiotic relationship with their users and suppliers, such as app developers, content producers, marketplace sellers, game designers, and “power users”, and they may propose their own technological solutions to managing community interests and accountability.

Conclusion

The frontier between competition and corporate governance is fertile ground for enforcers to address market conduct that does not serve the public interest. Currently it represents a gap in public enforcement. This set of hearings will no doubt raise many complex issues of competition policy. The goal of this submission has been to highlight the possibility that in some cases the tools of corporate governance, sensitively integrated with the tools of competition enforcement, may result in better outcomes without contorting the bounds of well-established antitrust analysis. Certainly stakeholder remedies may become increasingly necessary should the scope of the consumer welfare standard be adjusted in the future, but in the meantime they may effectively meet public concerns that stray outside the current consumer welfare framework.

I would be glad to participate in the hearings if such a contribution would be useful.

Contributor Bio

I am an independent legal consultant, qualified in the UK and New York. I have experience as an antitrust attorney in private practice (Linklaters LLP, Allen & Overy LLP) and in the public sector (the Federal Trade Commission, the Office of Fair Trading (UK), and the International Finance Corporation). On the corporate governance side, I have policy and advisory experience working for B Corps -- the leading community of certified ethical businesses that commit to serving not just shareholder interests but also workers, communities and the environment.