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Competition and Welfare of Consumers: Critical Analysis of the Sherman Antitrust Act 1890

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Abstract: *This article explores the persistent debates surrounding the Sherman Antitrust Act 1890, underscoring its explicit endorsement of competition as a regulatory cornerstone in commerce. Drawing on pivotal cases like NCAA v. Bd. of Regents of Univ. of Okla. (1958) and City of Lafayette, La. v. La. Power & Light Co. (1978), the Act seeks to protect consumers by fostering competition, presuming that competitive markets result in more affordable prices and superior products. Through an examination of Articles 1 and 2, this article scrutinizes judicial interpretations of the Act's commitment to preserving the competitive process. Investigations into Sections 1 and 2 reveal the Act's emphasis on safeguarding competition rather than prioritizing harm to consumers, challenging arguments that seek to restrict or broaden liability under the banner of "consumer welfare." Lastly, the discussion delves into the historical backdrop and evolution of the Sherman Act, illustrating its ongoing significance in antitrust jurisprudence.*

Keywords: Anti competitive conduct, competition, consumer welfare, judicial interpretation, Sherman Antitrust Act

Introduction

Though debates over the Sherman Act rage on even after more than a century of its implementation, one thing should be clear: the Act explicitly promotes the concept of competition (National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 1984) Congress, via the Sherman Act, sought to establish a framework where competition stands as the fundamental element regulating commerce in the United States (City of Lafayette v. Louisiana Power & Light Company, 1978). The goal of the law is to safeguard consumers by preserving competition. The legislative conclusion that competition will eventually result in cheaper prices as well as higher-quality products and services is embodied in the Sherman Act. Most importantly, the Act forbids determining whether competition is beneficial or harmful in a given situation.

In the forthcoming discourse, we will delve into how the interpretations and applications of Articles 1 and 2 of the Sherman Act serve to safeguard competition itself. We will scrutinize the notion of "consumer welfare," examining how jurists construe this phrase and its correlation with the Sherman Act. Subsequently, our exploration will extend to specific scenarios, debunking arguments that advocate for either constraining or expanding liability under the guise of advancing "consumer welfare." The Sherman Act steadfastly prioritizes the preservation of the competitive process, thus challenging the notion that harm to consumers at the terminus of the supply chain constitutes a necessary or sufficient condition for liability, thereby undermining such arguments.

As we navigate the intricate landscape of antitrust law, it becomes evident that the Sherman Act represents a pivotal cornerstone in the edifice of American commerce. Its enduring relevance underscores the enduring imperative of competition in shaping market dynamics and safeguarding consumer interests. Let us embark on a comprehensive journey through the nuances of the Sherman Act, elucidating its principles, dissecting its applications, and discerning its implications for the contemporary economic landscape.

Central to the Sherman Act is the unequivocal endorsement of competition as the driving force behind a vibrant and dynamic marketplace. Enacted by Congress, the Act serves as a bulwark against monopolistic practices and anti-competitive behavior, thereby fostering an environment conducive to innovation, efficiency, and consumer choice. By prohibiting agreements and practices that restrain trade or monopolize commerce, the Sherman Act endeavors to dismantle barriers to entry, promote fair competition, and prevent the concentration of economic power in the hands of a few.

Articles 1 and 2 of the Sherman Act constitute the bedrock upon which the enforcement and interpretation of antitrust law are predicated. Article 1 prohibits contracts, combinations, and conspiracies in restraint of trade, while Article 2 targets monopolization and attempts to monopolize. These provisions embody the legislative intent to curb anti-competitive conduct and preserve the competitive process as the linchpin of economic vitality. Through vigorous enforcement and judicial interpretation, the Sherman Act seeks to ensure that competition thrives unabated, thereby fostering innovation, efficiency, and consumer welfare.

Background of Sherman Act with Competition and Consumer welfare

A historic piece of American law, the Sherman Antitrust Act was passed in 1890 with the intention of preventing anticompetitive corporate practices and fostering fair competition (Lande, 2017). The legislation has the name of Senator John Sherman of Ohio, who sponsored it and was a well-known proponent of antitrust laws (Newman, 2018).

The Sherman Act's main objective is to encourage competition. The act attempts to maintain fair competition for enterprises, stop the consolidation of economic power, and promote innovation by outlawing monopolistic and anticompetitive behavior. Despite not specifically mentioning "consumer welfare," the Sherman Act's overarching objective is to protect consumers by promoting competition. The theory is that more innovation, better products, and cheaper prices result from a competitive market, which eventually benefits consumers (Paul, 2021).

The notion that a market with a competitive framework benefits consumers by encouraging effectiveness, creativity, and choice is the basis for the relationship among the Sherman Anti-Trust Act and the welfare of consumers. Through the prevention of monopolistic and anticompetitive practices, the act aims to maintain fair competition among businesses, resulting in better products and services that are reasonably priced for consumers. The Sherman Act's primary goal of preserving competition and, consequently, consumer welfare does not change, even though how antitrust laws are interpreted and applied may (Lande et al., 1989).

Section 1: Sherman Act and Competition

The fundamental aim of Section 1 is to the protection of competitive process, with the expectation that such protection will generally align with societal objectives. The assessment of conduct, whether under the rule of reason or falling within the per se rule, is inconsequential in this context. The outright prohibition on price fixing under the per se rule began to take shape in the early interpretations of the Sherman Act and gained full clarity in the Socony-Vacuum case. The Supreme Court definitively stated, "Under the Sherman Act, a combination formed with the intent and impact of manipulating, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is inherently unlawful.(NCAA v Board of Regents of University of Oklahoma, 1984) The Court further elaborated in a footnote that, despite variations in the purpose and effect of price-fixing agreements, they are universally prohibited due to their actual or potential threat to the fundamental economic framework. (Northern Pacific Railway Co. v. United States,1958)

The Supreme Court uses the per se rule in its decisions today, which on its face seems to be one that would regularly or almost always tend to restrict competition rather than one that would improve economic efficiency and make markets more, not less, competitive. The Per se rule's enduring rationale stems from the belief which the Sherman Act condemns coordinated behavior that fundamentally eliminates competition, regardless of how it actually affects any given situation.

Cutting-edge the Discon case ,the SC applied an opposite rationale to that of per se rule, asserting that the rule does not extend to manner that is inherently damaging unless the means of causing destruction involves eradicating competition. The Court overturned a previous verdict that suggested the per se rule could be invoked in the case of a regulated utility opting for a specific supplier without a "legitimate business reason for that purchase decision. The Court argued that a plaintiff must not only claim but also demonstrate harm, not merely to an individual competitor but to the competitive process as a whole. Even though the obtaining decision in question was not driven by competitive considerations but was relatively part of a regulatory scam that clearly harmed patrons, the Court apprehended that the Sherman Act was not applicable because "the competitive process itself does not suffer harm." (New York and New England Corporation. v. Discon,1998)

The regulation of reason was instituted through the pivotal American Tobacco case(1998). Shortly thereafter, in Chicago Board of Trade, the SC elucidated that, within the framework of the rule of reason, "the true test for legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." This fundamental formulation, established in Chicago Board of Trade, remains unchanged in subsequent Court decisions (California Dental Association v. Federal Trade Commission,1999).

Modern rulings consistently affirm that the Sherman Act is designed to safeguard the competitive procedure, regardless of the potential implications.

Section 2: Sherman Act and Competition

Section 2 of the Sherman Antitrust Act bars specific behaviors deemed "anticompetitive" or "exclusionary" when undertaken by individual competitors.(National Society of Professional Engineers v. United States,1978). But the meaning and interpretation of detrimental behaviors under the second section of the Sherman Law are still ambiguous, even after an entire century of legal wrangling. Professor Hovenkamp notes that no widely accepted, overarching definition of exclusionary conduct has emerged. Nonetheless, the legal understanding of Section 2 emphasizes that the assessment of single-firm conduct hinges on its effects on the competitive process.

Firstly, Section 2 of the Sherman Antitrust Act does not condemn the existence of a monopoly or the practice of charging monopoly prices. Instead, it focuses on prohibiting exclusionary conduct:

The mere possession of monopoly power and the consequent charging of monopoly prices are not inherently unlawful. In fact, these elements are considered crucial components of the free-market system. The ability to charge monopoly prices, even if for a limited duration, serves as an incentive for "business acumen," encouraging risk-taking that, in turn, fosters innovation and economic growth. To preserve the impetus for innovation, the possession of monopoly power is not deemed unlawful unless accompanied by anticompetitive conduct. (Verizon Communications, Inc. v. Law Offices of Curtis 2004).

Secondly, the second section does not expressly forbid single-firm behavior because it hurts rivals. The main goal of Section 2 as well as antitrust laws generally, according to the Supreme Court, is the "security of competition, not rivals."(Leegin Creative Leather Products, Inc v. Kay's Kloset and Kay's Shoes,2007). The Court makes it clear that the goal of Section 2 is to protect the public from failures in the market, not to shield corporations from the inherent dynamics of the market. The law targets act that unfairly tend to sabotage competition itself, not competitive behavior itself, no matter how fierce (Spectrum Sports, Inc. v. McQuillan,1993).

Thirdly, Section 2 of the Sherman Antitrust Act do not censure single-firm behavior simply due to chance arises to improve consumers benefit. The Supreme Court explicitly dismissed the notion in Trinko, affirming Section 2 "does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition (Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko,2004)

For a violation of Section 2 to be established, it is insufficient for a single firm to merely appear to unreasonably "restrain trade." The Court emphasized that even a robust competitor may create the impression of restraining trade. For instance, a highly efficient competitor may attract dissatisfied customers from an incompetent individual, potentially harming the latter's ability to compete. Such market dynamics are considered the norm, reflecting the competition that aligns with the consumer safeties that the Sherman Act seeks to promote. (Copperweld Corp. v. Independence Tube Corp,1984)

The Sherman Act and Consumer Welfare

In his seminal work "The Antitrust Paradox," Professor Robert Bork claimed that the Antitrust Act was explicitly framed and discussed as a prescription for the welfare of the consumer (ROBERT. H., 1978). By stating that "Consumer welfare is most significant when society's financial assets are allocated so that customers are able to achieve their wants to the fullest extent that technological constraints permit," Bork further clarified his interpretation of the term. In this sense, the nation's wealth is simply referred to as "consumer welfare."(Copperweld Corp. v. Independence Tube Corp,1984) Professor claims that the Sherman Act treats everyone equally, and he used the term "consumer welfare" to refer to the welfare of all economic actors. Notwithstanding the 9th Circuit's acceptance of Bork's definition of "consumer welfare," (Rebel Oil Co. v. Atlantic Richfield Co. 1995). other courts of appeals have not explicitly delineated their interpretation of the term when referencing "consumer welfare."

Prof. Bork's interpretation of "consumer welfare" has sparked muddle and controversy, particularly because academic works on antitrust strategy have not universally adopted his definition. While Bork employed the term to encompass the well-being of all participants in the economy, the academic literature, especially in discussions on merger efficiencies, has typically used "consumer welfare" to specifically denote the welfare of consumers within the applicable market (Katz et al., 2007).

In economic terms, "consumer welfare" in antitrust law aligns with what economists refer to as "consumers' surplus," representing the quantity consumers in a market would have been keen to pay beyond what they essentially paid for the amount used up. This description is rooted in the theory of consumer mandate where consumers are individuals (Brynjolfsson et al., 2018).

The Weyerhaeuser case (2007)[1] has given researchers important background information when examining how the Sherman Antitrust Act interprets consumer welfare. The case made its way to the Supreme Court after the Ninth Circuit upheld a bench ruling that found Weyerhaeuser Co. had violated the second section by overpaying for red alder logs used in its lumbermills. The bench concluded that

[1] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007)

Weyerhaeuser became the primary buyer on alder logs as a result of this behavior, which eliminated competition. The bench did, however, also conclude that the company had not dominated any relevant yield market and dismissed the claim that alder lumber was sold independently of other hardwoods. As a result, the case presents an instance in which a business practices exclusion, acquires monopsony power, but does not pose a risk to end users (Harrison. 2016).

Professor Steven C. Salop and FTC, Commissioner J. Thomas Rosch have argued that Weyerhaeuser's act's legitimacy should be evaluated in light of its "consumer welfare" impacts, which they interpret to mean its effects on end users (Werden,, 2007). On the other hand, these views inappropriately elevate "consumer welfare" from a realm of legal penalties to a functional standard for accountability by adopting an arbitrary narrow definition of it.

Consumer Welfare in Terms of Economics

The term "consumer welfare" has become one of the most misused concepts in modern antitrust analysis. At times, it is employed interchangeably with "economic efficiency,"[2] leading to unnecessary confusion and redundancy. In such instances, the distinction between the two becomes blurred, hindering clear and precise interpretation. Additionally, there are occasions when the term is invoked to denote a specific consumer interest, yet without a clear and defined understanding of what that interest entails. This lack of precision in defining the term contributes to its ambiguity and makes it susceptible to varied and sometimes inconsistent interpretations in the context of antitrust analysis (Wu, T. 2018).

The term "consumer welfare" is often used rhetorically to imply the moral superiority of one's perspective over competing views. However, for it to be an effective operational principle in antitrust law, it must specifically refer to the direct and explicit economic benefits that consumers receive from a particular product, measured in terms of its price and quality. Using the more precise language of economics, "consumer welfare" can be defined as consumer surplus, representing the portion of total surplus that accrues to consumers. It's essential to note that consumer welfare has both an immediate and a longer-run dimension, aligning with consumers' interests over time.

In the context of antitrust policy with a long-run perspective, the goal of consumer welfare can be best well-defined as the maximization of customer surplus over the long term. Typically, antitrust enforcement policies contribute to both economic efficiency and consumer welfare by eliminating monopolies, preventing cartels, and addressing exclusionary conduct (Cohen, 2022). This approach generally enhances both aggregate social wealth and the share of that wealth allocated to consumers.

There are cases where this may not hold true. First, highly discriminatory pricing systems might increase allocative efficiency but reduce consumer welfare. In other words, while discriminatory pricing can motivate producers to increase output, thereby enhancing allocative efficiency, it may simultaneously reduce consumer welfare by transferring economic wealth from consumers to producers (Hovenkamp. 2019). An example of this scenario is evident in Broadcast Music, Inc. v. CBS, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc (1979), where a highly effective method of price discrimination (the blanket license) expanded output but allowed producers to capture most, if not all, of the consumer surplus, leading to objections voiced in Justice Stevens' dissenting opinion.

The second scenario where increased efficiency may not necessarily translate to increased consumer welfare involves collaboration between competitors that reduces production costs but also enables participants to raise prices. For instance, in the GM-Toyota case (1984), if

[2] ROBERT H. BORK, The Antitrust Paradox: A Policy at War with Itself, Basic Books, New York,1978, p.g. 107-15

the joint venture collusively raised the price of small cars while achieving production efficiencies, total social wealth might increase indicating enhanced economic efficiency. However, the share of wealth accruing to consumers could decrease, resulting in harm to consumer welfare. Despite increased production efficiencies, consumers would not benefit as producers capture the advantages through higher prices. Cases like this raise the question of whether an increase in production efficiency can justify a reduction in consumer welfare (Samson, 2023).

A third situation where efficiency and consumer welfare effects may diverge occurs when courts adopt an antitrust rule that seemingly imposes no injury on consumers but negatively impacts producers' incentives (Goh, W. et.al., 2019). For example, if a firm gains a monopoly through a valuable invention and another firm steals the invention, registers it as a patent, and displaces the original firm from the market, consumers may not necessarily care about paying the monopoly price to the new or old monopolist. A court focusing solely on consumer welfare might see no grounds for antitrust intervention when one monopolist displaces another through predatory tactics. Such a court might consider it "a matter of indifference [which monopolist] exploits a monopoly," and it might not be concerned with "what skullduggery the defendant may have used to get the patent issued.(Brunswick Corp. v. Riegel Textile Corp,1984) However, withholding antitrust remedies in such a situation can adversely impact innovation and production incentives in two unfavorable ways.

The preceding discussion suggests that an effective antitrust policy must find a way to reconcile the broader interest in maximizing social wealth with the specific concerns of consumers (consumer welfare). This reconciliation between efficiency and consumer welfare can take one of three distinct approaches. First, antitrust can choose to disregard consumer interests and concentrate solely on efficiency. In this approach, the law may assert that it is not concerned with the distribution of wealth between consumers and producers. Second, antitrust can explicitly acknowledge the immediate and near-term consumer interest as the singular or primary factor in antitrust analysis. This approach prioritizes the consumer's perspective directly. Third, antitrust can recognize that, while consumer welfare is an essential long-term goal of antitrust policy, the immediate interest of consumers should, under certain conditions, be subordinated to the economic welfare of the entire society (Marty, 2021).

Problems of enforcement of Consumer Welfare and Competition

Enforcing the Sherman Act, with the dual objectives of protecting consumer welfare and fostering competition, poses a nuanced and intricate challenge. The Act, designed to prevent anticompetitive practices, must delicately navigate the fine line between curbing harmful monopolistic behaviors that detrimentally affect consumers and allowing businesses the freedom to engage in robust competition (Orbach, 2011). A central concern arises from potential conflicts between actions that yield short-term benefits for consumers, such as aggressive price cuts or exclusive deals, and the broader aim of cultivating a competitive marketplace (Steinbaum et al., 2020). Determining when specific practices contribute to consumer welfare and when they impede competition demands a nuanced comprehension of market dynamics and consumer behavior.

Furthermore, ongoing debates surround the definition and measurement of consumer welfare. While conventional metrics predominantly focus on factors like price and output, this limited viewpoint may not fully capture the diverse ways in which consumers experience benefits. The broader considerations of innovation, product quality, and product variety introduce layers of complexity to decisions regarding enforcement. In industries characterized by swift technological advancements, such as the tech sector, evaluating the impact on consumer welfare requires a comprehensive assessment that extends beyond traditional economic measures. Achieving the right equilibrium in antitrust enforcement under the Sherman Act necessitates a meticulous consideration of these factors to ensure the preservation of competition and genuine long-term benefits for consumers (Crandall et al., 2002).

Enforcing consumer welfare and competition under the Sherman Act faces a myriad of challenges beyond the previously mentioned issues. Resource constraints present a significant hurdle as antitrust enforcement agencies grapple with limited capacities to thoroughly investigate and prosecute alleged violations. The complexities of certain cases, coupled with inadequate resources, can lead to delays and hinder the timely resolution of antitrust matters. Moreover, the technological landscape introduces its own set of challenges, as the rapid advancement of technology, particularly in digital markets, necessitates a deep understanding to effectively assess its impact on consumer welfare (Vaheesan, 2019). The Sherman Act was enacted long before the digital age, and adapting its enforcement to navigate issues related to data-driven strategies, platform dynamics, and online competition is an ongoing challenge.

Globalization further complicates enforcement efforts. While the Sherman Act primarily addresses domestic antitrust concerns, the interconnectedness of markets requires effective coordination with international counterparts. Addressing anticompetitive practices that transcend national boundaries is a complex task, and establishing a cohesive global framework for antitrust enforcement remains an ongoing challenge. Legal uncertainty adds another layer of complexity, as the interpretation of antitrust laws, including the Sherman Act, can evolve through court decisions (Ryu, J. H. 2016). The lack of clear guidance may create uncertainties for businesses, impacting their ability to navigate the boundaries of permissible and impermissible behavior in the competitive landscape.

Changing political priorities also influence antitrust enforcement. Shifts in focus or regulatory approaches with changes in political administrations can impact the consistency and predictability of enforcement actions, contributing to an environment of uncertainty for businesses. Additionally, leniency programs, designed to encourage companies to self-report antitrust violations, may have limitations. Companies may hesitate to come forward due to concerns about potential legal and financial consequences, affecting the overall effectiveness of these programs (Polański, 2022).

Lastly, judicial discretion, afforded by the broad language of the Sherman Act, introduces variability in interpretations and outcomes across different cases, further complicating the landscape of antitrust enforcement. Balancing these multifaceted challenges is crucial to ensuring that antitrust laws effectively protect consumer welfare and foster healthy competition in a dynamic economic environment (Meese, 2016).

Conclusion

The pursuit of economic goals in antitrust necessitates a harmonious integration of efficiency and consumer welfare. While antitrust law aims to achieve various efficiencies, those related to production and innovation, leading to technological progress, contribute the most to enhancing social wealth. Consequently, these efficiencies should be the central objectives of antitrust policy. This perspective implies that, at times, the immediate interest of consumers may need to be subordinated to the attainment of production or innovation advances. However, consumers must ultimately receive a fair share of the wealth generated by such efficiencies, equivalent to what a competitive market would allocate to them. Thus, provisions should be in place for the eventual restoration of competitive market conditions. These economic objectives can be realized by emphasizing the stability and predictability of antitrust rules, preventing exclusionary conduct that jeopardizes production efficiency, and acknowledging a limited efficiencies defense when otherwise restrictive conduct enhances production or innovation efficiency.

Our countrywide economic plan has long been based on the belief that competition is valuable, through the act acting as a tangible manifestation of this assurance. Congress is thought to be using competition as a key tool to support consumer welfare and accomplish larger societal goals. The Sherman Act advances the objective of supporting consumer welfare by taking the lead in the market when rivals subvert the competitive strategy. At the same time, it abstains from getting involved when the market fails to benefit consumers or hurts rival businesses.

Although "consumer welfare" is frequently mentioned in Sherman Act decisions, its exact definition is not always evident, and its use is rarely indicated as a means of furthering statutory goals. According to Prof. Hovenkamp, the "consumer welfare principles" of antitrust law is predicated on the idea that all people are consumers. In essence, antitrust laws designed to maximize consumer welfare are laws that protect everyone's rights, at least as consumers. The Sherman Act protects all victims of misconduct, not just the final operators in the pertinent distribution chain, as the Court of Appeals has repeatedly upheld. In situations where buyers are accused of abusing their power, harm to suppliers has been accepted as a sufficient anti-competitive outcome.

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