Antitrust Overhaul? Let's Get a Better Owner's Manual First

AntitrustConnect Blog
June 2, 2016

Steven J. Cernak (Schiff Hardin LLP)

Please refer to this post as: Steven J. Cernak, 'Antitrust Overhaul? Let's Get a Better Owner's Manual First', AntitrustConnect Blog, June 2 2016, http://antitrustconnect.com/2016/06/02/antitrust-overhaul-lets-get-a-better-owners-manual-first/

The most recent edition of the ABA Antitrust Section's Antitrust Law Journal has yet another thoughtful piece from Dick Steuer. Titled "Antitrust Overhaul" this is not the first time Steuer has covered a big-picture antitrust question in a thought-provoking, readable piece. Here, he suggests that an "overhaul" of the language of the U.S. antitrust laws might soon be necessary. While his goals are laudable and the suggested overhaul would help achieve them, I think a more urgent but achievable goal is for practitioners and businesses alike to better understand all the ramifications of the language we have now.

Steuer correctly points out that the language of the U.S. antitrust laws is both outdated and confusing. Start with the name: Few antitrust practitioners today know what these 19th Century "trusts" were that the laws are "anti" to, which is why other jurisdictions use the more modern and descriptive "competition law." Focusing just on Sherman Act Section 1 (although the article covers the other antitrust laws as well), Steuer highlights the anomaly of its "every contract" language. Those who read only the statutory language would never guess that "every" means "not every, just unreasonable" agreements are prohibited.

Steuer suggests language to fix these problems, including this proposed replacement for Sherman Act Section 1:

> *Agreements that unreasonably impede competition in interstate or foreign commerce are prohibited. Such agreements between or among competitors to fix prices, limit output or divide customers, may, in addition, be prosecuted as a*

> *felony, punishable by a fine up to $100M for a corporation or $1M for any other person, or in an amount otherwise provided by law, and/or by imprisonment up to 10 years.*

The proposed language certainly succinctly captures all the key concepts of Sherman Act Section 1 jurisprudence in language that might seem more familiar to today's audience; however, even if one assumes that any legislative overhaul will result in the proposed language, it is not clear how well the proposal will achieve its goals nor whether those goals outweigh the risks that legislative tinkering might make matters worse.

The main benefit of the "overhaul," according to Steuer, is to nudge the U.S. antitrust laws closer to harmonization with the competition laws of other jurisdictions. Using similar or common language would make it easier to highlight (and even eliminate) any substantive differences, if jurisdictions so choose. Steuer recognizes the many failed attempts to develop a global competition law and acknowledges that a single law might not be possible or desired, given differences in culture and history among the dozens of jurisdictions with competition laws. As business continues to globalize and trade increase, any proposal that clarifies the rules companies must follow around the globe is a step in the right direction. Still, any clarity that might result from more common laws spurred by more common language among many jurisdictions seems a long way off.

Steuer also claims that the proposed language would make it easier to teach prospective antitrust practitioners the intricacies of the law. Professors and partners would not need to start with the usual "despite the statutory language" admonition to students or associates new to the area. As someone who teaches the "the statute says every contract, but *Standard Oil* says rule of reason, but *Trenton Potteries* says price fixing is per se illegal, but *Broadcast Music* says literal price fixing might not be 'price fixing' and so might not be per se illegal" lesson to which the article alludes, I understand the point. That said, the proposed language would seem to only eliminate the first part of those lessons. Students (and associates and judges) would still need to be taught what it means to "unreasonably impede competition," why "agreements between or among competitors to fix prices" are treated more severely, and what it means to "fix prices."

Finally, the article asserts that the "overhauled" language will help business executives better understand the antitrust laws. While I think it is important for businesses to understand the rules they must follow, I fear the proposed language would only marginally advance this goal. It seems hard to imagine that a business executive could read "unreasonably impede competition" and confidently understand, without assistance from someone who has studied the cases, whether her joint venture with a competitor complies.

A better way to meet that important goal more quickly would be for courts, enforcers, and practitioners to clearly articulate the rules generated by applications of the current language. Perhaps we could move beyond mere invocation of "canonical jargon" like "substantial foreclosure" and "sufficient economic power" and explain why the facts of a particular case meet or do not meet those standards. Like Steuer, I am not suggesting any change in those current interpretations or that the rules must be simplistic and rigid. An antitrust rule, for instance, prohibiting all agreements between competitors with a combined market share above 51% would be easy to follow but would not promote competition as antitrust laws should. Still, I think businesses would be helped more and sooner by, say, consensus on the standards to use to judge loyalty discounts or the weight given to certain factors when evaluating exclusive dealing arrangements.

So an overhaul of the "antitrust engine" could prove useful in the long run and Steuer should be thanked for raising the topic and providing useful suggestions. To continue the motor vehicle analogy: What might be even more useful now is a better owner's manual for how to use the engine that we have. (Best would be to avoid those thick manuals that usually sit unused in your glove box and shoot for an accurate summary that drivers might actually read and quickly understand.) Such guidance could help business drive the economy more safely and at greater speeds.