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Assuring U.S. competitiveness

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With all the attention given to the confirmation of judges, it is important to keep in mind that other consequential positions are waiting to be filled. One vital position is the assistant attorney general for antitrust. Although not a position to which an economist is traditionally appointed, it is one that is exceedingly important for the economic competitiveness of a variety of American industries.

The antitrust division of the Justice Department has enormous discretion regarding the cases it brings. So, in picking a nominee, the president should carefully consider the extent to which he wants American economic competitiveness to be a factor in antitrust policy. The nature of the American economy has changed drastically since most of the nation's antitrust legislation was passed roughly a century ago. Market power is simply harder to sustain today for three reasons.

First, we live in a global economy in which a record share of our consumption is produced abroad, and the ease of entry of foreign producers into the United States has never been greater. It is ironic that not too long ago a major factor in General Motors' strategic planning was its fear of gaining "too much" market share and being subject to sanctions by the Justice Department.

Second, a much larger share of our economy is idea-based, which makes innovation and new entry easier, and also makes the obsolescence of existing market power happen faster. A major portion of the time and energy of IBM executives in the 1970s and 1980s was taken up with antitrust concerns. Today, that should be a particularly vivid lesson with regard to the fragility of even seemingly very high degrees of market power in high-tech fields.

The fragility of markets for these knowledge-based products means that capital markets must be more demanding before providing the resources needed for innovation. Two of the precipitating events for the NASDAQ bubble collapse in the spring of 2000 were the antitrust division's suit against Microsoft and the declaration by political leaders that human genome research was the common heritage of mankind. The former called into question the sustainability of market power for innovation, and the latter questioned the durability of patent protection for genetic research. History suggests that the great majority of the benefits from innovation accrue to consumers via lower prices and better-quality products. But capital markets will demand some return for the risk involved in innovation if those benefits are to be produced at all.

Third, our global competitors do not have the same faith in leveling the playing field that we have. Certainly, China is unwilling to extend even rudimentary protection of intellectual property to foreign producers. Government funding of risk-taking is a global fact of life.

Our European competitors may even have an advantage in the use of the EU's antitrustpoliciesagainst challenging American firms. We should not stoop to such practices. But neither should we handicap American firms with the fear of antitrust sanctions under novel theories of law or overly narrow definitions of the relevant markets.

The next head of the antitrust division will have to balance the need for American competitiveness with the historic views of market structure. Creative approaches to the law seem to be the hallmark of our current legal system. But at least in this case, a good measure of the contribution of the individual named will be how history will judge his or her decisions 20 years from now.

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