



Unintended Consequences: The Real Effects of Populist Antitrust Policies on Competition and Small Enterprises

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ABSTRACT *Recent FTC and DOJ lawsuits have sought to break up large companies and restrict many of their business practices. Their purpose? To protect small companies, strengthen competition, and advance various social and policy goals. But many of these actions weaken competition while harming those very same small firms as well as American consumers. A better way to help small businesses and encourage competition would be to reduce government regulations and block only those mergers and acquisitions that are likely to raise anticompetitive concerns.*

Federal Trade Commission (FTC) Chair Lina Khan has drawn praise from both progressive¹ and populist conservative circles² for aggressively pursuing large companies for perceived wrongs. Under her leadership, the FTC has also promoted social and policy objectives, including labor rights,³ environmentalism,⁴ and the creation of a “level playing field” for small business.⁵

Khan’s Neo-Brandeisian philosophy eschews decades of bipartisan orthodoxy dictating that, when it comes to antitrust law, the FTC should take a neutral stance on a company’s size, instead prioritizing the preservation of the competitive process.⁶ The FTC has historically not seen its job as protecting smaller firms from larger rivals.⁷

Khan and her backers instead believe that, even if large companies like Amazon are popular among consumers for their value and innovative practices, their economic and political power allow them to coerce individuals and businesses who depend on them into accepting terms that they otherwise would not, leaving them worse off.⁸ This, the FTC argues, necessitates government intervention, including the possible breakup of large companies. The FTC would go further, proscribing business practices that disadvantage smaller firms.

Targeted practices include the negotiation of exclusive deals and discounts from suppliers that smaller firms can’t reach,⁹ allegedly restricting competitors’ access to production inputs,¹⁰ and

buying out rivals through mergers.¹¹ Many of these practices and deals stand to benefit consumers through lower prices,¹² more innovation,¹³ quicker deployment of new technologies,¹⁴ and improved services.¹⁵ Because of these drawbacks, Khan's FTC and likeminded allies in the antitrust division at the Department of Justice (DOJ) attract criticism from economists,¹⁶ policy scholars,¹⁷ and judges.¹⁸ These criticisms are well-founded; the populist approach to antitrust causes harm to the small enterprises it purports to help, as the evidence shows.

Exclusive Discounts

In 1937, Congress passed the Robinson-Patman Act (RPA),¹⁹ an anti-price discrimination law aimed to protect small businesses, like independent mom-and-pop grocers, from large retail and supermarket chains. The chains were accused of leveraging their size and dominant market positions to obtain favorable exchange terms, including exclusive discounts, from their suppliers, forcing smaller rivals to pay more for the same inputs.²⁰

Though modern antitrust law is focused on the welfare of consumers, this statute was explicitly intended to protect the interests of competitors by keeping "open the door of opportunity for the small businessman."²¹ Under the RPA, suppliers can only provide exclusive discounts or prices to buyers if the differences in price account for the genuine differences in cost between servicing various buyers, or if they were intended for meeting a competitor supplier's offer.

Since the 1990s, the antitrust agencies have declined to enforce the RPA, because it risks protecting firms from competition at consumers' expense.²² These agencies have acknowledged that the exclusive discounts they police typically benefit Americans,²³ 89 percent of whom shop at large supermarkets,²⁴ through lower prices. Economists find that the price differences faced by different buyers encourage them to adopt more efficient practices, offer promotions or other services, and buy larger quantities to obtain discounts from suppliers.²⁵ These savings can be passed on to consumers.

Despite its original objective, the RPA is also no friend of small business. Suppliers and wholesalers can avoid RPA liability by refusing to service small buyers rather than offer them different prices. The 2007 bipartisan Antitrust Modernization Commission, established by Congress to study and report on issues related to antitrust laws, found that many firms evade liability by selling slightly differentiated products to different buyers at different prices.²⁶ Ironically, during the heyday of RPA lawsuits between 1961 and 1974, just 36 of the 564 companies cited in FTC complaints of RPA injury had annual sales greater than \$100 million, and six in 10 of these firms had sales under \$5 million.²⁷ This indicates that small and medium-sized enterprises were the biggest casualties of the statute in the past and are likely to be so again should enforcement be revived. These firms face greater legal costs relative to their size than larger ones do, making them especially vulnerable to harm from protracted litigation.

Despite these findings, Khan’s FTC has vowed to investigate and prosecute firms under the statute again.²⁸ Khan’s backers in this aim include the White House,²⁹ and multiple legislators, including Senators Elizabeth Warren (D-MA) and Bernie Sanders (D-VT) and Representative Alexandria Ocasio-Cortez (D-NY).³⁰ Businesses large and small—as well as consumers—could all be hurt.

Killing M&A

The allure of venture capital and the possibility of future acquisition are two of the greatest motivators for entrepreneurs to strike out on beneficial new projects.³¹ This system delivers immense returns to both investors and founders. This is especially true for innovative, high-value sectors like tech and pharmaceuticals, where big and small firms offer complementary advantages. Often, smaller ones possess unique talent, ideas, and research capabilities, and larger ones possess the economies of scale, resources, and relationships with private sector partners and government agencies that foster new technologies and expedite regulatory approvals.³²

Growing a start-up from its first investors to an initial public offering (IPO) is a long, tenuous, and expensive process,³³ making it unsurprising that 58 to 60 percent of US, British, and Canadian technology and healthcare start-up founders expect to get acquired, and just 17 percent expect to reach an IPO.³⁴ According to data from the National Venture Capital Association, as of 2019, 90 percent of venture capital-backed start-ups “exited” through a private acquisition rather than an IPO.³⁵ Though the prospect of acquisition by a larger firm, motivates entrepreneurs to innovate and take risks, this reality is at odds with the FTC’s and DOJ’s current push to block more mergers.³⁶ In the name of reducing consolidation across the economy, these agencies have frowned on deals that previous administrations would likely have deemed favorable to competition and to consumers’ best interests.

In 2021 the FTC introduced changes to the premerger notification process that increased disclosure requirements and costs while introducing greater uncertainty into the merger process.³⁷ They even began inquiring about proposed transactions’ potential impacts on labor markets; environment, stewardship, and governance goals; and a range of factors extraneous to consumer and competition outcomes.³⁸

In 2023 the FTC, in conjunction with the DOJ, followed up these changes by proposing to amend the premerger notification rule.³⁹ The amendment would further expand the scale and scope of disclosure requirements, adding millions of dollars in merger filing costs. The FTC and DOJ subsequently released new merger guidelines,⁴⁰ which have been widely criticized by multiple experts for failing to provide clarity about the kinds of deals the agencies would permit.⁴¹ The guidelines also fail to adequately recognize the potential of many deals to boost competition by creating entities that better serve consumers and help bring new technologies and products to market quickly.⁴²

Figuring out if a merger is more likely to benefit consumers or reduce competition and innovation is an empirical exercise that necessitates examining the relevant market the firms operate in and the incentives the post-merger firm would face. The 2023 merger guidelines, which inform agency practice and guide business conduct even if they are not legally binding, abandon the likelihood standard, making it clear that the DOJ and FTC plan to pursue deals that *may* theoretically reduce competition.⁴³ Some legal analysts have even argued that the guidelines give the agencies license to block virtually any merger.⁴⁴

Though the agencies have often failed to block deals in court when judges adhere to 40 years of legal precedent and economic insight,⁴⁵ this hasn't stopped the FTC from touting abandoned deals and a chilling of merger activity across the economy as evidence of their success.⁴⁶ However, it is not the FTC and DOJ antitrust division's job to simply block mergers. It's their job to enforce the law, uphold economic competition, and protect consumers from deals that are likely to reduce it. Rather than confirming the agencies' success, abandoned deals may instead indicate that parties scuttled beneficial, legal transactions due to the potential multiyear, multimillion dollar cost of compliance and the potential of a lawsuit.⁴⁷

The FTC and DOJ's approach to policing mergers has already caused immense damage, including the loss of billions of dollars in value for smaller firms seeking to grow or survive through mergers. Consider the following examples:

Air Travel – Spirit and JetBlue

Consider the DOJ's challenge to the proposed merger between airlines JetBlue and Spirit.⁴⁸ Although the deal would have combined the country's sixth- and seventh-biggest airlines, it would have created an entity that would have been only the fifth largest in the country behind United, Delta, American, and Southwest.⁴⁹ It would have accounted for just 8 percent of the US domestic airline market, or a tenth of the market share of those four large airlines combined.⁵⁰

JetBlue and Spirit asserted that the merger would help both lower-cost airlines weather unfavorable conditions following the COVID-19 pandemic, leading to a more effective competitor to the four biggest US airlines.⁵¹ Though the deal did originally raise some anticompetitive concerns, with JetBlue revealing that it planned to increase fares on some of the routes it currently shares with Spirit after the merger,⁵² the airlines also expressed willingness to divest from routes that raised anticompetitive concerns.⁵³

Unfortunately, the DOJ was unwilling to accept this remedy as a condition of allowing the merger to pass. The merger was blocked by William Young, a federal district court judge,⁵⁴ in January 2024. Judge Young had previously noted that, although he believed that the deal raised anticompetitive concerns, it had procompetitive potential if JetBlue and Spirit undertook further route divestitures.⁵⁵ This signaled the possibility that the merger might survive after an appeal.

However, it was too late. Though the plaintiffs could have appealed the federal court ruling, the DOJ's litigation had delayed the deal by 18 months while causing immense economic damage to both airlines at a critical time. JetBlue and Spirit had lost half their premerger stock value.⁵⁶ Losses driven by the costs and delays of the merger litigation forced Spirit to lay off thousands of staff, with both airlines suffering hundreds of millions of dollars in losses.⁵⁷ Since the airlines' recent announcement that the costs and hurdles raised by DOJ litigation and other regulatory barriers had forced them to abandon the deal,⁵⁸ JetBlue has gone on to cut some of its routes to conserve costs.⁵⁹ It's clear that neither consumers nor smaller businesses merging to survive and stay competitive have benefited from such litigation.

Banking and Finance

In 2023, the DOJ's antitrust division announced that it would be carefully scrutinizing mergers in the banking sector, promising to assess them along a range of metrics beyond conventional bank branch and asset overlap, and to favor blocking deals entirely over negotiating remedies for potential anticompetitive harms.⁶⁰ The division has provided little clarity about the changes, though they flag greater uncertainty, higher costs, and longer waiting periods for parties seeking clearance for deals.

Massive growth in costly regulations and declining confidence have hurt smaller banks,⁶¹ forcing many to merge or get acquired just to survive.⁶² These pressures have been recognized by Treasury Secretary Janet Yellen,⁶³ who seemed to strike a contradictory position to her fellow government leaders in the antitrust agencies by flagging the need for *more* mergers in the sector rather than fewer.⁶⁴

Regardless of Secretary Yellen's assertions, the uncertain regulatory environment around bank mergers and risk of antitrust litigation has already chilled bank merger activity,⁶⁵ harming struggling, smaller banks without meaningfully preserving choice for consumers.

Biotechnology – Illumina and GRAIL

Elsewhere, the mounting costs and delays caused by FTC antimerger litigation forced Illumina, a DNA sequencing and medical testing platform, to divest itself of the smaller GRAIL, a pioneer of Multiple Cancer Early Detection (MCED) tests, in late 2023.⁶⁶ The FTC maintained that consumers would be harmed by the vertical merger of the two non-competitors, since Illumina could restrict competitors' access to GRAIL's MCED tests. The Fifth US Circuit Court of Appeals ruled that the deal would lessen competition without an additional remedy from the parties.⁶⁷ In doing so, the judge criticized the FTC for failing to consider contractually binding assurances Illumina was willing to make about making GRAIL's technology available to its competitors, which would have alleviated potential anticompetitive harms.⁶⁸ The judge also remanded the FTC's decision to block the merger back to its own internal administrative process so that remedy could

be considered.⁶⁹ Instead of being a cause for concern, Illumina’s resources and ability to acquire regulatory clearances would have allowed GRAIL’s MCED technology to come to market more expeditiously,⁷⁰ while creating other benefits recognized by economists.⁷¹

Though the judge gave that merger a fighting chance, the parties still unwound the recently consummated deal.⁷² Their decision was likely driven in significant part by the delay and costs of FTC litigation. Illumina had previously told investors that it would divest GRAIL if it lost any of the legal challenges to the deal from US or European regulators.⁷³ As a result, GRAIL’s MCED tests will take longer to reach testing platforms that could have accessed it on commercial terms had the merger survived. In other words, the FTC’s placement of theoretical harms above actual competitive and consumer harms achieved the opposite of the agency’s supposed mandate. The litigation reduced competition, hurting a smaller firm that faces considerable regulatory hurdles, and harming consumers, potentially costing the lives of many patients who might otherwise have had timely access to MCED tests.⁷⁴

Tech Platforms and E-Commerce

Today’s small businesses increasingly depend on technology.⁷⁵ These technologies include digital advertising, e-commerce platforms, and business software. According to a Deloitte survey, 90 percent credit technology for helping their businesses run more efficiently, innovate, and overcome challenges,⁷⁶ and 70 percent credit these tools with growing their revenues.⁷⁷

It’s no surprise that 70 percent of small businesses intend to expand their use of digital tools in the coming years.⁷⁸ This means that millions of American businesses will increasingly benefit from the services of major tech platforms, including Google’s digital and search advertising services, Meta’s social media advertising, and Amazon’s e-commerce platform. These tools have become crucial for small firms that want to reach consumers and build brand awareness.

The FTC has made it clear that it cares about these businesses and sees their protection as part of its competition enforcement mandate. In the agency’s 2022 policy statement on Unfair Methods of Competition, it opined that its goal is “to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals,” and that the Federal Trade Commission Act of 1914 (FTC Act) does not require it to show restraint or monopoly, but rather to show that the acts by the larger businesses that attract complaints hinder the business of another.⁷⁹ Though that statement officially applied to its interpretation of Section 5 of the FTC Act, it belies a philosophy that has underpinned the FTC’s and DOJ’s joint campaign against big tech platforms.

Lina Khan has championed this drive to challenge dominant tech platforms since her 2017 law school days, when she gained prominence for a controversial paper that criticized Amazon for gaining and maintaining its market position through allegedly anticompetitive and exclusionary

practices.⁸⁰ However, the current antitrust push began in earnest before her tenure as FTC chairperson, when the Trump administration filed suit against Google for using agreements with smartphone producers to make its search engine the default.⁸¹ Today, both agencies continue to wage major lawsuits against Google's ad services platform,⁸² Amazon's online marketplace platform,⁸³ and most recently, Apple's iPhone operating system,⁸⁴ over business strategies and restrictions on entrepreneurs that use them. However, the practices in question often have countervailing benefits for these businesses, and proscriptions against them risk harming the same firms that these lawsuits purport to safeguard.

DOJ vs. Google Ads

Consider the lawsuit against Google's "ad stack."⁸⁵ Google operates at all three levels of the business chain in open web display advertising: It buys advertising space on websites to serve its advertiser clientele through the Google Ads ad network and demand-side platform, Display & Video 360; sells advertising space on websites through the Google Ad Manager publisher server; and owns an ad exchange, AdX, that links buyers and sellers, integrating AdX into its Google Ad Manager suite.

The DOJ accuses Google of leveraging its control over three stages of the process to harm advertisers.⁸⁶ The agency alleges that Google takes advantage of its market position to raise prices and reduce innovation without the risk of losing market share to rivals who are not similarly situated, thereby excluding them through anticompetitive conduct. For instance, the DOJ argues that the tech giant's web publisher clients are forced to use AdX, not because it is a superior product, but because choosing a rival exchange would mean losing access to Google Ad Services. While Google corners 80 percent of the network for open display advertising, few advertisers can afford to opt out, the agency argues.

Conversely, Google is expected to argue that its integrated web display advertising chain allows it to innovate and deliver greater value and better service to its clients by reducing the cost of using separate services.⁸⁷ Assuming that the court accepts the DOJ's narrow definition of the relevant product market, the agency will still face an uphill battle in showing that Google acquired its alleged monopoly position by requiring customers to use its services, rather than through competition on merits, such as integrating different services to create a single superior product.

The case's outcome is pending. But, with the DOJ asking the court to force Google to divest its ad stack manager suite, many of Google's small business advertising clients stand to lose. Not only would any cost synergies be lost, but the divestiture would also reduce Google's investment in future ad tool innovations. This could leave advertisers with inferior services rather than a more competitive market. Decreased ad tool innovations would be especially damaging to smaller advertisers, who do not already have a customer base aware of their brand.

FTC vs. Amazon

Potential negative impacts for small businesses are even clearer in the FTC’s 2023 Amazon lawsuit.⁸⁸ It contends that the tech giant and online marketplace engages in tactics that deter sellers from reducing prices, impose charges on sellers, force sellers to deal with its logistics division rather than using their own, and block fair competition from rival sellers within and outside its marketplace platform. The FTC asserts that sellers have no choice but to accept these strictures, because Amazon has aggregated such a large user pool that sellers cannot afford to choose alternatives while remaining competitive. Khan has previously claimed that Amazon’s tactics prevent rival sellers from scaling sufficiently to give sellers more choice and increase competition.⁸⁹ However, many of the practices that the FTC cites have given Amazon the ability to attain its present size and user base. Proscribing these practices when Amazon engages in them would also proscribe them for any potential rival. It’s no surprise, then, that 79 percent of small businesses relying upon Amazon’s services expect that they will be negatively impacted by the FTC’s ongoing lawsuit against the company, according to a survey by the Small Business and Entrepreneurship Council.⁹⁰

For example, Amazon’s price-parity clauses (PPCs) prevent sellers who offer a lower price for the same product elsewhere from having the “buy box” feature in their Amazon listing.⁹¹ Because this feature facilitates more than 80 percent of sales on Amazon,⁹² this prohibition has drawn the ire of some sellers.⁹³ Although it theoretically deters (but does not prevent) sellers from attracting customers to their own websites through lower prices, it also provides immense convenience to customers on Amazon’s platform by guaranteeing that they have found the cheapest possible price for the product in one place. If Amazon’s PPCs were declared illegal, then the user experience that has attracted so many customers would be compromised, and, in turn, the platform’s value to retailers would decline. Also, fragmenting shoppers between Amazon and its competitors to a greater degree than the status quo would make it harder for sellers to reach as many customers in a single place, forcing them to expend more resources to reach potential customers across several platforms. This would be to the comparative advantage of the largest, most prominent retailers, which can more easily attract customers to their own platforms.

Similarly, the FTC and some sellers have criticized Amazon for tying seller eligibility for Amazon Prime, a huge drawcard for customers, to sellers delivering their products through Fulfillment by Amazon (FBA), the company’s in-house shipping and logistics service.⁹⁴ This claim fails to recognize that Amazon Prime’s reputation for expedient delivery attracts customers to the program.⁹⁵ Amazon Prime and FBA function as an integrated product. Uncoupling them would reduce their value to sellers. Moreover, attracting a larger volume of sellers and buyers to the tied Amazon Prime and FBA delivery service allows for large shipping volumes that reduce shipping costs,⁹⁶ benefiting sellers and buyers alike. Regardless, Amazon currently plans to expand Prime eligibility to sellers who want to use their own logistics service, provided that they can guarantee shipping reliability and speed standards comparable to FBA.⁹⁷ The lawsuit is ongoing as of April 2024.⁹⁸

Conclusion

In an era of political polarization and frustration about the perceived wrongs of big companies, Neo-Brandeisian antitrust and its purported concern for the “small businessman” has populist appeal. However, abandoning long-established principles of law and economics to further goals other than upholding economic competition has hurt both consumers and small businesses. And though big tech platforms may employ tactics that sometimes frustrate the small businesses dependent on them, actions that curb platforms’ ability to scale, or that otherwise reduce their utility for those businesses, are not going to help improve services. Reducing burdensome government regulations, curbing inflationary government expenditures, and blocking only those mergers and acquisitions that raise insurmountable anticompetitive concerns would do a lot more to encourage entrepreneurship and competition.

About the Author

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